The Dichotomy Between Tabarru’ and Mu’âwaḍah Contracts: Perspective of Indonesian Law of Obligation

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Abstract: Among many divisions of contract (‘aqd) in mu’âmalah shar’iyyah, the dichotomy between tabarru’ and mu’âwaḍah contracts is the most influential paradigm in getting to know the jungle of classical and contemporary mu’âmalah contracts. Tabarru’ contract (tabarru’ât) means contracts of virtue as if it should be free from material self-interest or any other profane benefit. Meanwhile, mu’âwaḍah contract (mu’âwaḍat) means business contracts as if it is laden with material calculation and other various forms of self-interest. The dichotomic paradigm of these contracts is quite urgent that it is often made the ground to determine whether or not some material benefit obtained from certain contracts is allowed. It is interesting to observe, that the Indonesian law of obligation which is originating from a Dutch colonial legacy actually also acknowledges such a contract. It is however not as strict as its divisions in Islamic fiqh.

Keywords: dichotomy, contract, tabarru’, mu’âwaḍah, law of obligation

Introduction

Of so many divisions of contract with its various points of view, the division of tabarru’ and mu’âwaḍah seems to be more functional in analysis on mu’âmalah law or sharia economic law. For example, regarding legal analysis on sale and purchase by credit at higher price than by cash. Ulama generally allow such excess of price and deem it non-riba, since this occurs to a sales contract and it is mu’âwaḍah (business contract). Differently from overpayment in loan contract (agreed on at
beginning of agreement), it is deemed riba which is prohibited since loan contract (mudâyanah) is a tabarru’ contract.¹

Another example is regarding combined contract, in which one of the regulations is not to combine tabarru’ contract and mu’âwaḍah contract.² As stated by Ibn Taymiyyah in Majmû’ Fatâwâ that the Prophet prohibits combining loan contract with sales contract. When loan contract is combined with lease contract (ijârah), it is then a combination of loan and sales. Any tabarru’ contract in combination with sales contract and lease contract, it is equal to loan contract (qarḍ).³

Besides, in other cases there is a tendency with sharia financial institution, particularly banking and BMT/LKMS to make ‘ijârah’ certain contract which is actually tabarru’ contract, such as wadi’ah contract (to be al-wadi’ah bi al-ujrah),⁴ kafâlah contract (to be al-kafâlah bi al-ujrah), and wakalah contract (to be al-wakâlah bi al-ujrah).⁵ The tendency even reaches to loan contract (qard) like the case of hajj bailout product some time ago,⁶ while some hadiths clearly prohibit loan by taking benefit therefrom.⁷

It is apparent here that the dichotomy between tabarru’ and mu’âwaḍah contracts plays a significant role in determining the law. It is as if categorization of contract into one of the two contracts significantly determines the legal status of a new transaction or contract which is the result of combination. Although this dichotomic concept is the result of ulama’s ijtihad and formulation, but it plays a significant role in determining the legal status of a transaction, while according to the theory of Islamic law determination, whether or not a new transaction or muamalah practice is allowed must be generally based on nas syarak.

It is interesting to study how the dichotomy between tabarru’ and mu’âwaḍah contracts in the perspective of law of obligation (agreement) in civil law is. Meanwhile, the subjects to be answered in this paper are how the concept of tabarru’ and mu’âwaḍah contracts in Islamic law (since its emergence, categorizing method and paradigmatic-dichotomic significance) is; and how the dichotomy between tabarru’ and mu’âwaḍah contracts in Indonesian law of obligation’s perspective is. This research is library research. Data were collected through library materials. Data Sources are divided into two, namely data relating to the tabarru’-mu’awadah dichotomy and data relating to the lawa of obligations in Indonesia. Because this research is library research, the data collection method is the documentation method. The data collected using a document approach from various library sources. The collected data is then analyzed qualitatively with a normative approach from the aspects of Islamic law and Indonesian engagement law.

⁴ In the case of sharia pawnshop where ujrâh is applied in place of interest for custody of collateral which keep increasing per 10 days.
⁵ Yuyun Dwi Astuti, "Tinjauan Hukum Islam Terhadap Ujrah Pada Pembiayaan Dana Talangan Haji (Studi Kasus Pada Bank Syariah Mandiri KCP Purbalingga)," in Skripsi Tidak Diterbitkan (Jurusan Syariah STAIN Purwokerto, 2012), 59-64.
⁶ Astuti, 64.
Discussion and Result

Tabarru’ Contract in Islamic Law of Obligation

Tabarru’ contract is one giving benefit only to one party on the basis of giving or help from one party to the other, such as grant, ‘āriyah, will, sadaqah, waqf contracts and so on. Meanwhile, mu’awadah contract is obligation between two parties containing exchange of reward/achievement between both parties. In Islamic fiqh, tabarru’ contract is basically a counterpart of mu’awadah contract. The main elements of tabarru’ contracts are: affirm commitment ‘without reward’ (for free), which is referred to as material element; and tabarru’ intention of the commitment, which is referred to immaterial element (meaning).

Tabarru’ along with its various types is regulated in Islam in the form of suggestion (sunat) to mandatory level. Many verses and hadiths show this. The following hadiths show how mandatory tabarru’ is.

The hadiths above show that ruler/government is authorized to make tabarru’ an obligation in case of necessary. This is similar to the Prophet’s prohibition from keeping qurbani meat more than three days and prohibition from leasing land.

9 Al-Hasyimi, Ahkam Tasarrufat, 77.
In summary, the typicality of tabarru’ in Islam is as follows:12

1. Its implementation is recommended with religious delegitimation, and even some are mandatory.

2. Tabarru’ is sometime accompanied with the teaching of taqarrub towards Allah and reward in the afterlife, such as the teaching of sadaqah and votive.

3. Tabarru’ tamlik aiming for public benefit is recommended and regulated, such as waqf.

In fiqh, ulama explain that the general principle regarding laws of tabarru’ is laws regarding grant, except those exempted therefrom. Therefore, like grant, there are four principles of tabarru’, namely: mutabarri’, mutabarra’ lahu, mutabarra’ bih, and ijab qabul. Each of the principles must fulfill the requirements as applied to grant. Note needs to be made regarding the voluntary requirement. In tabarru’ contract, the voluntary qualification is higher than that required in general contracts.13

There are some terms in Islamic fiqh and the legislation regarding tabarru’, such as: tanpa ganti (without replacement) (bidûni ‘iwaḍ), tanpa upah (without fee) (bighayr ujr, bidûni ujr), tanpa imbalan (without reward) (bidûni muqabil), and gratis (free) (majjân). Based on the study of early fiqh books, the terms ‘aṭiyyah and ‘aṭâyâ are used more in the time of early Islamic fiqh, while the terms tabarru’ and tabarru’at are used more in the latter time. The term tabarru’ itself has wider meaning than ‘aṭiyyah, since it does not only mean giving but also help (tabarru’ bi al-‘amal) and isqâṭ (tabarru’ by releasing right), even though there are fiqh ulama who equalize ‘aṭiyyah with tabarru’, such as al-Ḥaṭṭâb, fakih of Maliki school, in his book, Tahrîr al-Kalâm fî Masâ’il al-Iltizâm.14

One of so many perspectives in contract classification is division of contracts by objective. One of the four types of contracts is contracts with ownership purpose (‘uqûd al-tamlikât). Of the two types therein is division of tamlik contract to tabarru’, mu’āwaqah, and contracts which is initially tabarru’ to be mu’āwaqah.15

Tabarru’ contract is contracts of which principle is giving and help from one party to the other, such as grant, sadaqah, will, ‘āriyah, kafâlah, wadi’ah, wakâlah, ibrâ’, and qard. Both parties in contract

12 Sammahi, “Al-Nazariyyah Al-‘Ammah...”, 63.
13 Sammahi, “Al-Nazariyyah Al-‘Ammah...”, 72.
will not ask any reward for what they have conducted, the giver will not ask any reward for what is given, similarly, the receiver will not ask any reward for what is received

Some ulama with expertise in fiqh divide tabarru’ contract into tabarru’ maḥḍ-tabarru’ gahyr maḥḍ and tabarru’ haqiqi-tabarru’ iḍāfī. Tabarru’ maḥḍ (pure) consists of three levels:

1. **Tabarru’** of which initial objective is clear, such as grant, sadaqah, waqf, ‘ariyah (lend-use), and will.
2. **Tabarru’** at the start and mu’āwaḍah at the end, such as: qard (loan), kafalah in some forms, according to an opinion, and grant requiring reward, according to an opinion.
3. **Tabarru’** containing mu’āwaḍah contract, such as partiality (muḥābbāh) in loan and supplement to bride price.

The division of tabarru’ contract into tabarru’ haqiqi and tabarru’ iḍāfī may be identified from their definition. Tabarru’ haqiqi is a real tabarru’ contract according to its origin, such as grant and ibrā’ contracts. Meanwhile, tabarru’ iḍāfī is tabarru’ transaction which is based on its original nature, such as wakālah and wadī’ah contracts. Differently from ‘ariyah and grant contracts, which must be tabarru’; wakālah and wadī’ah contracts, which are basically also tabarru’, may become mu’awadah when agreed on by both parties. Therefore, when both parties do not agree on ujrah in the two contracts, they will become tabarru’ contracts. However, when ujrah is agreed on, the two will become mu’awadah contracts.

Some ulama classify tabarru’ contract like general contracts classification, as follows:

1. **Munjaz**, such as: in Allah’s name, I oblige myself to donate this; I endow this land of mine to mosque, and so on.
2. **Mu’allaq**, such as: if Allah cures my illness, I will donate one million Rupiahs to the poor; if you marry me, I will support your father and mother for the rest of their life; and so on.
3. **Mu’abbad**, such as: I endow this land of mine to the poor forever.
4. **Mu’aqqat**, such as: I endow this land of mine to education for 10 years; or only for fulan.
5. **Muṭlaq**, such as: I grant this car of mine to you.
6. **Muqayyad**, such as: I grant this car of mine to you provided that you will not sell it to fulan.
7. **Nafidz**: performed by property owner with perfect skill and that is not prevented by any other matters, such as illness, hajr, and so on.
8. **Mawqûf**: performed by non-property owner or property owner but prevented in certain condition.
9. **Ṣaḥîḥ**: in compliance with principles and requirements.
10. **Bâṭil**: performed by a person who is incompetent by law or whose property cannot be transacted.

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18 Ibid.
19 Ibid, 46-47.
Mu‘awadah Contract in Islamic Law of Obligation

Al-Sanhuri defines mu‘awadah contract as a contract in which there is an exchange of advantage and benefit between two parties.\(^{20}\) Mu‘awadah contract constitutes contracts of which principles are equal ‘obligation’ between two parties in contract, that each party receives from the other equally to what he gives, such as sales contract. In this contract, seller receives the price (money) as reward for the good given; while the buyer receives the good as reward of the price (money) he pays to the seller. The same occurs to the construct of other mu‘awadah contracts, such as ijārah, ṣarf, ṣulḥ, istisna’, musaqāh, muzāra‘ah, and marriage.\(^{21}\)

Mu‘awadah contract in Ibn Taymiyyah’s opinion is an obligation in the world and religion, since human cannot live and fulfill his life needs alone. They will need other human’s help. Should mu‘awadah not be required upon humans, it will be difficult for them to fulfill their needs, leading to corrupted world and religion. Therefore, humans’ life expediency will not be realized except with mu‘awadah contracts.\(^{22}\) Mu‘awadah contracts are, reclassified, divided into four forms, namely: \(^{23}\)

1. Exchange of property and property, such as sales, salam, ṣarf, and ṣulḥ upon property.
2. Exchange between property and benefit, such as: ijārah, istisnā’, musaqāh, muzāra‘ah, mughārasah, and muḍārabah.

The two types of mu‘awadah contracts above are also called mu‘awadat maliyyah, since the objects of exchange are property and benefit, where benefit has the same position as property. Mu‘awadat maliyyah contracts among fukaha are also called mu‘awadât mahdah.

3. Exchange between property and something other than property or benefit, such as: marriage covenant and khul’.\(^{24}\)
4. Exchange between benefit and benefit, such as: part of benefit through muhāya‘ah way.\(^{25}\)

The last two types of mu‘awadat are also called mu‘awadât ghayr maliyyah.

Between Mu‘awadah and Tabarru’: Gray Borderline

Some differences between tabarru’ and mu‘awadah contracts are: \(^{26}\)

1. While tabarru’ contract is basically giving or help from one party to the other, mu‘awadah contract is a feedback contract where both parties give and receive from one another like one in sales, buyer submits money and consequently he receives goods.
2. From the perspective of the parties’ legal competence. Tabarru’ contract requires higher, which is perfect ahlīyyah al-ādā’, in case ‘āqid serves as the actor (first party), such as granting, endowing and pledging himself and his property. Such contracts will be rendered invalid when performed by a child who is still mumayyiz, that he must be of puberty, mindful and rashīd. In regard to mu‘awadah contract, ulama require lower competence and tend to simplify it, that the ahlīyyah al-ādā’ does not necessarily be perfect, it will also be valid.

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21 Justinaih, Aqsam Al-‘Uqud Fi Al-Fiqh Al-Islami,., 369.
22 Al-Hasyimi, Ahkam Tasarrufat..,” 72.
23 Justinaih, Aqsam Al-‘Uqud Fi Al-Fiqh Al-Islami,., 370
24 For those who assume that bride price is reward for sexual intercourse between husband and wife.
26 Al-Hasyimi, Ahkam Tasarrufat.,, 77-80.
when performed by a child who is still mumayyiz, even if permission from his guardian must be obtained in case of a contract which may be advantageous or disadvantageous.

3. In tabarru’ contract, defect, ignorance and obscurity do not influence the validity of contract, while in mu’awadah contract, the three influence it.

4. In tabarru’ contract, compensation law is not applied to damaged goods (damân), but is applied in mu’awadah contract, where goods holder is responsible for any damage to the goods.

According to al-Zarqâ`, the most important differences between tabarru’ and mu’awadah contracts are 27:

1. Volunteer’s (giver) responsibility (in tabarru’ contract) is lower than that of the parties in mu’awadah contract. Custodian’s responsibility, for example, is lower than that of employer (musta’jir). On the contrary, beneficiary’s responsibility in tabarru’ contract, for example, goods borrower, is higher than that of lessee in mu’awadah contract. Therefore, in wadi’ah, ijârah and ‘âriyah contracts, both parties’ responsibilities are not equal, depending on their position and the type of contract.

2. One’s mistake in tabarru’ contract will be remembered forever, but this is not the case in mu’awadah contract, except those involved in such contract are only for formality, such as in shirkah and muzâra’ah contract.

Tabarru’ and mu’awadah contracts may be distinguished by observing:

1. The intention of two parties in contract. Grant which serves as complement to marriage covenant and grant requiring benefit reward for the giver or other party may become tabarru’ contract or mu’awadah contract depending on both parties’ intention.

2. Motive encouraging two parties to perform contract. For example, grant given to repay kindness received by grantor, grant which is convention in an agreement, and so on.

It should be noted here that mu’awadah contract does not require material (property) reward. A contract may become mu’awadah even if it only requires ethical (adabi) reward, advantage speculation (muhtamal), and a future desire (amr mustaqbal). Kafâlah contract, for example, may become tabarru’ or mu’awadah depending on the intention and motive of the two parties in contract.

In this case, fukaha have different opinions whether shirkah contract is included in mu’awadah contract. The first opinion states that shirkah is not mu’awadah contract, but other type which is not mu’awadah. Fukaha with this opinion include Ibn Taymiyyah, Ibn Qayyim al-Jawziyyah and Mustafa Ahmad al-Zarqa’. Ibn Taymiyyah states in Majmû’ al-Fatawa as follows 28:

![Image](image-url)

27 Al-Sanhuri, Nazariyyah Al-’Aqd., 137.
28 Taymiyyah, Majmu’ Al-Fatawa., 99.
According to Ibn Taymiyyah, there are two types of business transaction in this world, namely mu‘āwaḍah and mushârakah. Mu‘āwaḍah includes sales and lease, while mushârakah includes shirkah al-amâlîk and shirkah al-‘uqûd. In line with his teacher, Ibn al-Qayyim states that mushârakah contract is not included in mu‘awadah contract.²⁹

Meanwhile, al-Zarqa’ states that i‘arah, wakalah and shirkah contracts are not covered by the meaning of mu‘āwaḍah. These contracts are deemed trust contract (trust) where muwakkil’s property is at the hand of the wakil, property of member of partnership (shârik) is at the hand of other shârik, property of lender is at the hand of borrower. All of them are pure trust (mahdah) with no replacement guarantee pursuant to agreement (contract), such as in wadi’ah contract.³⁰

The argument of the first opinion is the following rational argument:³¹

1. While mu‘āwaḍah contract contains the meaning of benefit exchange between two parties, shirkah contract is of other type which is not mu‘āwaḍah, since it is built on two underlying elements, namely amânah and wakâlah. Trust, since property at the hand of a shârik is equal to property at the hand of a wakîl and musta’îr of which replacement is not guaranteed like trust contracts in general. Wakâlah, since one of the two give his permission to his partner to transact the property of partnership at his hand.

2. Mu‘āwaḍah is based on exchange between two parties, while shirkah is based on partnership and mixing, such as partnership in benefit, partnership in inheritance property, and so on.

The second opinion states that mushârakah contract may be categorized as mu‘âwaḍah contract. This opinion is proposed by modern reviewers and researchers. The argument of this second opinion is that from the perspective of right exchange, shirkah contract may be deemed as mu‘āwaḍah contract, since the actual meaning of mu‘āwaḍah is that each party takes equally to what he has given. In shirkah contract, each party obtains the outcome equal to what is contributed. The two parties mutually contribute fund and will then obtain outcome in the form of percentage of benefit.³²

Al-Hâshimî tends to be of the first opinion as stated by Ibn Taymiyyah and his student, Ibn al-Qayyim. However, he also emphasizes the importance of distinguishing between shirkah which does not contain mu‘āwaḍah and shirkah which contains mu‘āwaḍah. Shirkah which does not contain mu‘āwaḍah is shirkah which is based on partnership in advantage and disadvantage, such as: shirkah ‘inân, mufâwaḍah, wujûh, and abdân, all of which are called shirkah ‘aqd; or shirkah based on partnership in inheritance property, which is then called shirkah milk. All of these are shirkah which does not contain the meaning of mu‘āwaḍah. Meanwhile, shirkah in other form, such as: musâqâh, muzâra’ah, and muḍârabah, as stated by Ibn Taymiyyah, is pseudo- mu‘āwaḍah contract, even if it is not pure mu‘āwaḍah, since in the contracts there is exchange between benefit and property or between benefit and benefit.³³

Based on the explanation above, we may affirm that muḍârabah, musâqâh and muzâra’ah contracts may be deemed as mu‘āwaḍah contract since the contracts contain the meaning of mu‘āwaḍah. More extensively, we may affirm that sales, šarf, salam, ijârah, ju’âlah, istiṣnâ’ and muḍârabah contracts

²⁹ Al-Hasyimi, Ahkam Tasarrufat... 81.
³¹ Al-Hasyimi, Ahkam Tasarrufat... 82-83.
³² Al-Hasyimi., Ahkam Tasarrufat... 83.
³³ Al-Hasyimi., Ahkam Tasarrufat...
are deemed by *fukaha* as *mu‘awadah* contract. In addition, there are also contracts which leads to *mu‘awadah*, such as *rahn*, *kafâlah*, and *ḥiwâlah*.

**Dichotomy between *Tabarru’* and *Mu‘awadah* Contracts in Indonesian Law of Obligation’s Perspective**

It is interesting to study the dichotomy between *tabarru’* and *mu‘awadah* contracts in the perspective of law of obligation (agreement) in civil law. Law of obligation is a law regulating legal relationship between legal subjects which produces rights on one party and obligation on the other party in such obligation. The rights from the obligation are called material right. According to the theory, the science of law divides civil law into four, namely:

1. Personal law
2. Family law
3. Property law, and
4. Inheritance law.

Meanwhile, the Civil Code (KUHPerdata) (BW), which is the parent civil law in Indonesia, consists of four books:

1. Book I: concerning people and family law;
2. Book II: concerning item, including inheritance law;
3. Book III: concerning obligation; and

From the perspective of obligation of respective party in obligation to make achievement, KUHPerdata in Book III generally divides obligation into two, namely feedback agreement and unilateral agreement (charge-less agreement). In feedback agreement, each party has obligation or achievement towards the other party, such as sales agreement (article 1457 and so on). Each party is obliged to perform its achievement pursuant to the type of agreement. Meanwhile, in unilateral agreement, one party makes achievement or perform obligation without charging the other party to perform contra-achievement or contra-obligation, for example, grant (article 1666 and so on).

From the description above, it is clear that division of contract or agreement into *tabarru’* and *mu‘awadah* in Islamic *fiqh* is actually also recognized in our law of obligation, which is note bene a Dutch colonial product. Therefore, it is reasonable to state that the classification of *mu’amalah* contract into *tabarru’* and *mu‘awadah* is actually recognized in modern law concept. However, the background of such contract classification as well as its significance is certainly different.

**Conclusion**

*Tabarru’* contract is contract which gives benefit only to one party based on giving or helping from one party to another party, such as grant, *‘āriyah*, will, sadaqah, waqf contracts and so on. Meanwhile, *mu‘awadah* contract is obligation between two parties containing exchange of reward/
achievement between two parties, such as: sales, Ḱaḥr, ṣa[r, Ḯiṣnā, musāqāh and muzāra’ah.

Among the differences between tabarru’ and mu’āwaḍah contracts are: while tabarru’ contract is basically giving or help from one party to another party, mu’āwaḍah contract is feedback contract in which two parties give and receive from one another; tabarru’ contract requires higher qualification of legal competence, namely perfect ahliyyah al-ādâ’, while in mu’āwaḍah contract, ulama require lower competence and tend to simplify it, that the ahliyyah al- ādâ’ is not necessarily perfect, it may validly be performed by a child who is still mumayyiz; in tabarru’ contract, defect, ignorance, and obscurity do not influence the validity of contract, while in mu’āwaḍah contract, the three influence it; in tabarru’ contract, compensation law does not apply to damaged goods (ḍamân), but is applied in mu’āwaḍah contract, in which goods holder is responsible for any damage to such goods; tabarru’ contract is contracts of which principle is giving and help from one party to another party. Meanwhile, μ’āwaḍah contract is contract of which principle is equal ‘obligation’ between two parties in contract, in which each party receives from the other party equally to what he gives.

In the Indonesian law of obligation’s perspective, the division of contract or agreement into tabarru’ and mu’āwaḍah in Islamic fiqh is actually also acknowledged even if it is basically a Dutch colonial product. Therefore, it is reasonable to state that the classification of mu’amalâh contracts into tabarru’ and mu’āwaḍah is actually acknowledged in modern law concept. The background of such contract classification as well as its significance is, however, different between Islamic law and the law of obligation.

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