



The Dichotomy Between *Tabarru'* and *Mu'âwadhah* 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'âwadhah* 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'âwadhah* contract (*mu'âwadhât*) 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'âwadhah*, law of obligation

Abstrak: Di antara sekian banyak pembagian akad dalam muamalah syar'iyyah, dikotomi akad *tabarru'* dan *mu'awadah* merupakan paradigma yang paling berpengaruh dalam memahami belantara akad muamalah klasik dan kontemporer. Akad *tabarru'* (*tabarru'at*) merupakan akad-akad kebajikan yang seolah harus kosong dari pamrih materi ataupun keuntungan lainnya yang bersifat profan. Sementara akad *mu'awadah* (*mu'awadat*) merupakan akad-akad bisnis yang seolah serba hitungan materi dan berbagai bentuk pamrih lainnya. Paradigma dikotomik dalam akad ini begitu urgennya hingga tidak jarang dijadikan landasan dalam menentukan boleh dan tidaknya keuntungan materi yang didapat dari akad-akad tertentu. Menarik untuk dicermati, bahwa hukum perikatan Indonesia yang notabene peninggalan penjajah Belanda sesungguhnya juga mengakui pembagian akad semacam ini. Meskipun tentu saja tidak seketat pembedaannya sebagaimana dalam fikih Islam.

Kata Kunci: akad, *tabarru'*, *mu'awadah*, dikotomi

Introduction

Of so many divisions of contract with its various points of view, the division of *tabarru'* and *mu'âwadhah* 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'âwadhah* (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'âwadah* 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 (*qard*).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-wad'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'âwadah* 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'âwadah* 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'âwadah* contracts in Islamic law (since its emergence, categorizing method and paradigmatic-dichotomic significance) is; and how the dichotomy between *tabarru'* and *mu'âwadah* 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 law 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.

¹ Rafiq Yunus Al-Misri, *Al-Jami' Fi Usul Al-Riba* (Damaskus-Beirut: Dar al-Qalam – al-Dar al-Syamiyyah, 1991), 308 dan 310.

² Al-'Imrani, Abd Allah Ibn Muhammad Ibn 'Abd Allah. *Al-'Uqud Al-Murakkabah: Dirasah Fiqhiyyah Ta'siliyyah Wa Tatbiqiyyah* (Riyad: Dar Kunuz Isybiliya, 2010), 187.

³ Ibnu Taymiyyah, *Majmu' Al-Fatawa*, trans. tahqiq: 'Abd al-Rahman ibn Muhammad ibn Qasim. (Madinah: Majma' al-Malik Fahd li Tiba'ah al-Mushaf al-Syarif, 1995), 65.

⁴ In the case of sharia pawnshop where *ujrah* 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.

⁷ Jamal Abdul Aziz, *Akad Gabungan Dalam Perspektif Hukum Perikatan Islam, Laporan Penelitian Tidak Diterbitkan* (Purwokerto: P3M STAIN Purwokerto, 2012), 64-75.

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, *âriyah*, will, sadaqah, waqf contracts and so on.⁸ Meanwhile, *mu'âwadah* contract is obligation between two parties containing exchange of reward/achievement between both parties.⁹ In Islamic fiqh, *tabarru'* contract is basically a counterpart of *mu'âwadah* 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).¹⁰

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

عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ قَالَ بَيْنَمَا نَحْنُ فِي سَفَرٍ مَعَ النَّبِيِّ -صلى الله عليه وسلم- إِذْ جَاءَ رَجُلٌ عَلَى رَاحِلَةٍ لَهُ قَالَ فَجَعَلَ يَضْرِبُ بَصْرَهُ يَمِينًا وَشِمَالًا فَقَالَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- " مَنْ كَانَ مَعَهُ فَضْلٌ ظَهَرَ فَلْيُعِدْ بِهِ عَلَى مَنْ لَا ظَهَرَ لَهُ وَمَنْ كَانَ لَهُ فَضْلٌ مِنْ زَادٍ فَلْيُعِدْ بِهِ عَلَى مَنْ لَا زَادَ لَهُ ". قَالَ فَذَكَرَ مِنْ أَصْنَافِ الْمَالِ مَا ذَكَرَ حَتَّى رَأَيْنَا أَنَّهُ لَا حَقَّ لِأَحَدٍ مِنَّا فِي فَضْلٍ. (صحيح مسلم - ج 5 / ص 138)

عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ قَالَ بَيْنَمَا نَحْنُ مَعَ رَسُولِ اللَّهِ -صلى الله عليه وسلم- فِي سَفَرٍ إِذْ جَاءَ رَجُلٌ عَلَى نَاقَةٍ لَهُ فَجَعَلَ يَضْرِبُهَا يَمِينًا وَشِمَالًا فَقَالَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- " مَنْ كَانَ عِنْدَهُ فَضْلٌ ظَهَرَ فَلْيُعِدْ بِهِ عَلَى مَنْ لَا ظَهَرَ لَهُ وَمَنْ كَانَ عِنْدَهُ فَضْلٌ زَادٍ فَلْيُعِدْ بِهِ عَلَى مَنْ لَا زَادَ لَهُ ". حَتَّى ظَنَنَّا أَنَّهُ لَا حَقَّ لِأَحَدٍ مِنَّا فِي الْفَضْلِ. (سنن أبي داود - ج 5 / ص 220)

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّهُ اغْتَلَّ بَعِيرٌ لِصَفِيَّةَ بِنْتِ حُجَيِّ وَعِنْدَ زَيْنَبَ فَضْلٌ ظَهَرَ فَقَالَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- " لَزَيْنَبَ " أَعْطِيهَا بَعِيرًا ". فَقَالَتْ أَنَا أُعْطِي تِلْكَ الْيَهُودِيَّةَ فَغَضِبَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- فَهَجَرَهَا ذَا الْحِجَّةِ وَالْمُحَرَّمِ وَبَعْضَ صَفَرٍ. (سنن أبي داود - ج 13 / ص 320)

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.¹¹ In the context of *huqûq al-irtifâq* there are also a number of hadiths showing that when a land/goods owner is reluctant to provide his land/goods to those who need, the government may force him with the power it holds. Some of the hadiths are:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ أَنَّ رَسُولَ اللَّهِ -صلى الله عليه وسلم- قَالَ " لَا يَمْنَعُ جَارٌ جَارَهُ أَنْ يَغْرِزَ خَشْبَهُ فِي

⁸ Sultan ibn Ibrahim ibn Sultan Al-Hasyimi, *Ahkam Tasarrufat Al-Wakil Fi 'Uqud Al-Mu'Awadat Al-Maliyyah* (Dubai: Dar al-Buhus li al-Dirasat al-Islamiyyah wa Ihya' al-Turas, 2002), 76.

⁹ Al-Hasyimi, *Ahkam Tasarrufat*, 77.

¹⁰ Khalid Sammahi, "Al-Nazariyyah Al-'Ammah Li 'Uqud Al-Tabarru'at: Dirasah Muqaranah," *dissertation* (Tilimsan: Universitas Abu Bakar Balqayid, 2012), 20-25.

¹¹ Sammahi, "Al-Nazariyyah Al-'Ammah..", 62.

جِدَارِهِ “ . ثُمَّ يَقُولُ أَبُو هُرَيْرَةَ مَا لِي أَرَاكُمْ عَنْهَا مُعْرِضِينَ وَاللَّهِ لَأُرْمِينَ بِهَا بَيْنَ أَيْدِيكُمْ . (صحيح البخارى - ج 9 / ص 135)

عَنْ أَبِي هُرَيْرَةَ أَنَّ رَسُولَ اللَّهِ -صلى الله عليه وسلم- قَالَ “ لَا يَمْنَعُ أَحَدُكُمْ جَارَهُ أَنْ يَغْرِزَ خَشْبَةً فِي جِدَارِهِ . قَالَ ثُمَّ يَقُولُ أَبُو هُرَيْرَةَ مَا لِي أَرَاكُمْ عَنْهَا مُعْرِضِينَ وَاللَّهِ لَأُرْمِينَ بِهَا بَيْنَ أَيْدِيكُمْ . (صحيح مسلم - ج 5 / ص 57)

عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- “ إِذَا اسْتَأْذَنَ أَحَدُكُمْ أَخَاهُ أَنْ يَغْرِزَ خَشْبَةً فِي جِدَارِهِ فَلَا يَمْنَعُهُ . ” فَتَكَسَّوْا فَقَالَ مَا لِي أَرَاكُمْ قَدْ أَعْرَضْتُمْ لِأَلْقِيئِهَا بَيْنَ أَيْدِيكُمْ . قَالَ أَبُو دَاوُدَ وَهَذَا حَدِيثُ ابْنِ أَبِي خَلْفٍ وَهُوَ أَثَمٌ . (سنن أبي داود - ج 11 / ص 25)

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 *isqât* (*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-tamlîkât*). Of the two types therein is division of *tamlîk* contract to *tabarru'*, *mu'âwadah*, and contracts which is initially *tabarru'* to be *mu'âwadah*.¹⁵

Tabarru' contract is contracts of which principle is giving and help from one party to the other, such as grant, *sadaqah*, will, '*âriyah, kafâlah, wadî'ah, wakâlah, ibrâ'*, and *qard*. Both parties in contract

¹² Sammahi, "Al-Nazariyyah Al-'Ammah...", 63.

¹³ Sammahi, "Al-Nazariyyah Al-'Ammah...", 72.

¹⁴ Al-Hasyimi, *Ahkam Tasarrufat*..., 26.

¹⁵ Badran Abu 'Aynayn Badran, *Tarikh Al-Fiqh Al-Islami Wa Nazariyyah Al-Milkiyyah Wa Al-'Uqud* (Beirut: Dar al-Nahdah al-'Arabiyyah, n.d.), 486-489.

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 received¹⁶.

Some ulama with expertise in fiqh divide *tabarru'* contract into *tabarru' maḥḍ-tabarru' gahyr maḥḍ* and *tabarru' haqîqî-tabarru' idâfi*. *Tabarru' maḥḍ* (pure) consists of three levels¹⁷:

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'âwadah* 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'âwadah* contract, such as partiality (*muḥâbbâh*) in loan and supplement to bride price.

The division of *tabarru'* contract into *tabarru' haqîqî* and *tabarru' idâfi* may be identified from their definition. *Tabarru' haqîqî* is a real *tabarru'* contract according to its origin, such as grant and *ibrâ'* contracts. Meanwhile, *tabarru' idâfi* is *tabarru'* transaction which is based on its original nature, such as *wakâlah* and *wadî'ah* contracts. Differently from 'ariyah and grant contracts, which must be *tabarru'*; *wakâlah* and *wadî'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'âwadah* contracts.¹⁸

Some ulama classify *tabarru'* contract like general contracts classification, as follows:¹⁹

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. *Bâtil*: performed by a person who is incompetent by law or whose property cannot be transacted.

¹⁶ Hannan bintu Muhammad Husayn Justinaih, *Aqşam Al-'Uqud Fi Al-Fiqh Al-Islami* (Makkah al-Mukarramah: Universitas Ummul Qura, 1998.), 370.

¹⁷ Sammahi, "Al-Nazariyyah Al-'Ammah Li 'Uqud Al-Tabarru'at: Dirasah Muqaranah.", 46.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 46-47.

Mu'âwadhah Contract in Islamic Law of Obligation

Al-Sanhuri defines *mu'âwadhah* contract as a contract in which there is an exchange of advantage and benefit between two parties²⁰. *Mu'âwadhah* 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'âwadhah* contracts, such as *ijârah*, *şarf*, *şulh*, *istisna'*, *musâqâh*, *muzâra'ah*, and marriage.²¹

Mu'âwadhah 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'âwadhah* 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'âwadhah* contracts.²² *Mu'âwadhah* contracts are, reclassified, divided into four forms, namely:²³

1. Exchange of property and property, such as sales, *salam*, *şarf*, and *şulh* upon property.
2. Exchange between property and benefit, such as: *ijârah*, *istişnâ'*, *musâqâh*, *muzâra'ah*, *mughârasah*, and *muðârabah*.

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'âwadhât maḥḍah*.

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 *muhâya'ah* way²⁵.
- The last two types of *mu'awadat* are also called *mu'âwadhât ghayr mâliyyah*.

Between *Mu'âwadhah* and *Tabarru'*: Gray Borderline

Some differences between *tabarru'* and *mu'âwadhah* contracts are²⁶:

1. While *tabarru'* contract is basically giving or help from one party to the other, *mu'âwadhah* 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 *ahliyyah al-âdâ'*, in case 'âqid 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 *rashîd*. In regard to *mu'âwadhah* contract, ulama require lower competence and tend to simplify it, that the *ahliyyah al-âdâ'* does not necessarily be perfect, it will also be valid

²⁰ Al-Sanhuri, *Nazariyyah Al-'Aqd*, cet. 2, vol. I (Beirut: Mansyurat al-Halabi al-Huquqiyah, 1998), 134.

²¹ Justinaih, *Aqşam Al-'Uqud Fi Al-Fiqh Al-Islami*, 369.

²² Al-Hasyimi, *Ahkam Tasarrufat*, 72.

²³ Justinaih, *Aqşam 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.

²⁵ Justinaih, *Aqşam Al-'Uqud Fi Al-Fiqh Al-Islami*, 370.

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'âwadah* contract, the three influence it.
4. In *tabarru'* contract, compensation law is not applied to damaged goods (*damân*), but is applied in *mu'âwadah* contract, where goods holder is responsible for any damage to the goods.

According to al-Zarqâ', the most important differences between *tabarru'* and *mu'âwadah* contracts are ²⁷:

1. Volunteer's (giver) responsibility (in *tabarru'* contract) is lower than that of the parties in *mu'âwadah* contract. Custodian's responsibility, for example, is lower than that of employer (*mustajir*). On the contrary, beneficiary's responsibility in *tabarru'* contract, for example, goods borrower, is higher than that of lessee in *mu'âwadah* contract. Therefore, in *wadi'ah*, *ijârah* and *'ariyah* 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'âwadah* contract, except those involved in such contract are only for formality, such as in *shirkah* and *muzâra'ah* contract.

Tabarru' and *mu'âwadah* 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'âwadah* 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'âwadah* contract does not require material (property) reward. A contract may become *mu'âwadah* even if it only requires ethical (*adabî*) 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'âwadah* contract. The first opinion states that *shirkah* is not *mu'âwadah* contract, but other type which is not *mu'awadah*. *Fukaha* with this opinion include Ibn Taymiyyah, Ibn Qayyim al-Jawziyyah and Mustafa Ahmad al-Zarqâ'. Ibn Taymiyyah states in *Majmû' al-Fatâwâ* as follows ²⁸:

فَإِنَّ التَّصَرُّفَاتِ الْعَدْلِيَّةَ فِي الْأَرْضِ جِنْسَانِ: مُعَاوَضَاتٌ وَمُشَارَكَاتٌ. فَالْمُعَاوَضَاتُ: كَالْبَيْعِ وَالْإِجَارَةِ. وَالْمُشَارَكَاتُ: شَرِكَةُ الْأَمْلاكِ وَشَرِكَةُ الْعَقْدِ. وَيَدْخُلُ فِي ذَلِكَ اشْتِرَاكُ الْمُسْلِمِينَ فِي مَالٍ بَيْنَ الْمَالِ وَاشْتِرَاكُ النَّاسِ فِي الْمُبَاهَاتِ، كَمَنَافِعِ الْمَسَاجِدِ وَالْأَسْوَاقِ الْمُبَاهَاةِ وَالطَّرِيقَاتِ وَمَا يُجَيِّدُ مِنَ الْمَوَاتِ أَوْ يُوجَدُ مِنَ الْمُبَاهَاتِ وَاشْتِرَاكِ الْوَرَثَةِ فِي الْمِيرَاثِ وَاشْتِرَاكِ الْمُوصَى لَهُمْ وَالْمَوْقُوفِ عَلَيْهِمْ فِي الْوَصِيَّةِ وَالْوَقْفِ وَاشْتِرَاكِ التَّجَارِ وَالصَّنَاعِ شَرِكَةَ عَنَانٍ أَوْ أَبْدَانٍ وَنَحْوِ ذَلِكَ وَهَذَانِ الْجِنْسَانِ هُمَا مَنْشَأُ الظُّلْمِ.

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'âwadah* and *mushâarakah*. *Mu'âwadah* includes sales and lease, while *mushâarakah* includes *shirkah al-amlâk* and *shirkah al-'uqûd*. In line with his teacher, Ibn al-Qayyim states that *mushâarakah* 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'âwadah*. 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 (*maḥḍah*) 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'âwadah* contract contains the meaning of benefit exchange between two parties, *shirkah* contract is of other type which is not *mu'âwadah*, 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'âwadah* 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 *mushâarakah* contract may be categorized as *mu'âwadah* 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'âwadah* contract, since the actual meaning of *mu'âwadah* 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'âwadah* and *shirkah* which contains *mu'âwadah*. *Shirkah* which does not contain *mu'âwadah* is *shirkah* which is based on partnership in advantage and disadvantage, such as: *shirkah 'inân*, *mufâwadah*, *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'âwadah*. Meanwhile, *shirkah* in other form, such as: *musâqâh*, *muzâra'ah*, and *muḍârabah*, as stated by Ibn Taymiyyah, is *pseudo- mu'âwadah* contract, even if it is not pure *mu'âwadah*, 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'âwadah* contract since the contracts contain the meaning of *mu'âwadah*. More extensively, we may affirm that sales, *ṣarf*, *salam*, *ijârah*, *ju'âlah*, *istiṣnâ'* and *muḍârabah* contracts

²⁹ Al-Hasyimi, *Ahkam Tasarrufat...*, 81.

³⁰ Mustafa Ahmad Al-Fiqh al-Islami fi Thawbih al-Jadid Al-Zarqa`, *Al-Fiqh Al-Islami Fi Thawbih Al-Jadid: Al-Madkhal Al-Fiqhi Al-'Amm* (Damaskus: Ali Ba` al-Adib, 1968), I: 583.

³¹ Al-Hasyimi, *Ahkam Tasarrufat...*, 82-83.

³² Al-Hasyimi, *Ahkam Tasarrufat...*

³³ Al-Hasyimi., *Ahkam Tasarrufat...*,83.

are deemed by *fukaha* as *mu'awadah* contract. In addition, there are also contracts which leads to *mu'awadah*, such as *rahn*, *kafalah*, and *hiwâlah*.

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.³⁴ The rights from the obligation are called material right. According to the theory, the science of law divides civil law into four, namely:³⁵

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

Meanwhile, the Civil Code (KUHPerduta) (BW), which is the parent civil law in Indonesia, consists of four books:³⁶

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

From the perspective of obligation of respective party in obligation to make achievement, KUHPerduta 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).³⁷

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, *'ariyah*, will, sadaqah, waqf contracts and so on. Meanwhile, *mu'awadah* contract is obligation between two parties containing exchange of reward/

³⁴ Kartini dan Gunawan Widjaja Muljadi, *Perikatan Pada Umumnya* (Jakarta: P.T. RajaGrafindo Persada, 2003), 10.

³⁵ *Ibid.*

³⁶ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 1992), 17.

³⁷ Muljadi, *Perikatan Pada Umumnya*, 98-99.

achievement between two parties, such as: sales, *ijârah*, *şarf*, *istişnâ'*, *musâqâh* and *muzâra'ah*.

Among the differences between *tabarru'* and *mu'âwadah* contracts are: while *tabarru'* contract is basically giving or help from one party to another party, *mu'âwadah* 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-âdâ'*, while in *mu'âwadah* contract, ulama require lower competence and tend to simplify it, that the *ahliyyah al-âdâ'* 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'âwadah* contract, the three influence it; in *tabarru'* contract, compensation law does not apply to damaged goods (*damân*), but is applied in *mu'âwadah* 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, *mu'âwadah* 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'âwadah* 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'amalah* contracts into *tabarru'* and *mu'âwadah* 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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