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THE ISLAMIC CONTRACT AND ITS BASIS OF *MAŞLAĤA*

Fauzan Muhammadi (a)*

*Corresponding author

(a) Faculty of Law, Universitas Ahmad Dahlan, 42nd Pramuka St, Sidikan, Umbulharjo, Yogyakarta, Indonesia,
fauzan.muhammadi@law.uad.ac.id

Abstract

One of the regulations established by the community is on how people fulfill their needs by having the goods belong to other people through legal means. Islamic laws have regulated the matter in one of the studies called *mu'āmalāt*. Thus, Islamic laws build the concept with philosophical foundation known as *maşlahāh*. Besides, one of five purposes of sharia is to protect the properties. It is related to how human manage their life accordingly, thereby they obtain what they want without offending others. Indeed, they can built mutual relation. Common illegal behavior within financial transaction degrades people's moral and wealth. Later on, strict regulation is required to reduce or remove economic fraud. Thus, the community can reach the prosperity condition. To know the principles of finance from Islamic perspective and to develop it as a living law, the research explains the philosophical foundation of contract. The paper used qualitative method and Uşul Fiqh approach to generate the legal structure of contract in Islam from the valid sources of Islamic Law.

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Keywords: Islamic Legal Structure, Islamic Contract, *Maşlahāh*..



1. Introduction

Human is known to be social being. It means that they are incapable of living alone. Ibn Khaldun (1332-1406) (2001, p.54) said in his book *Muqaddimah* that human togetherness is necessary. Thus, many sages stated that men are naturally social being and they should live together. Other experts, Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694), suggest similar ideas. As cited by Adji Samekto (2012, p.4), they concluded that human are social being. However, Grotius stated that the community of human beings are reality, not an obligation. Conversely, Pufendorf (1632-1694) affirmed that human must be organized (as a group).

Islam, as a religion, help human to create a community as a proper way to live. The term “group” refers to “ummah” in Quran Surah Ali ‘Imran: 104. In this surah, Allah commands to create ummah to build good social system, where human can suggest one another for the benefit of each other. The concept of togetherness also appears in Quran Surah Al Hujurat: 13. Allah calls through this surah to all human that He created male and female and made us peoples and tribes for one purpose, which is to know one another. Muhammad (Peace be Upon Him), as the messenger of Allah, also ordered his follower to create a community. In Islam, we know it as “*jamā’ah*.” He said in his hadith:

يُحِبُّكُمْ بِالْجَمَاعَةِ وَيُحِبُّكُمْ وَطَيْبُكُمْ وَلَقَدْ قَالَ فَإِنَّ الَّذِي تَطَانَ مَعَ الْوُجَدِ وَ مَوْ مِنْ الشَّيْءِ بِالْعَدُوِّ

It means: “you have to remain in *jama’ah* (congregation) and stay away from disunity for satan (*šaiṭān*) are closest to one who separates himself from the crowd and farthest from the two of you (*jama’ah*)” (narrated by Tirmidi, hadith no. 2165) Tirmidzi, 1975 [4], p.465). These two bases showed us that, indeed, human should live in a community and should be organized in a system that frames their act.

One of the regulation established in the community is on how people fulfil their needs legally. We call this kind of practice as buying and selling. The simplest thing in the practice of buying and selling is human willingness to “get this and that to fulfil my basic needs.” The practice expresses what we want specifically by changing the right of ownership through payment. Thereupon, an agreement exist between the seller and buyer. Islamic law, in one of the studies called *mu’amalah*, particularly in the chapter of *al buyū’* (selling) and *al syirā’* (purchasing). *Mu’amalah* does not come with an empty concept. Instead, it deliberately benefits human in achieving their goals in the proper ways. Thus, Islamic law bases the concept with the philosophical foundation known as *Maqāṣid Al Syarī’ah* (Aim of Sharia). This concept, introduced by Syaṭībī in his book magnum opus *Al Muwāfaqāt fī Uṣūl Al Syarī’ah*, has five purposes, those are (1) protection of faith (religion); (2) protection of soul; (3) protection of mind; (4) protection of descendant; and (5) protection of property (Syathibi, 1997 [2], p. 17-20). The last purpose is in line with the way human manage their life accordingly. Thus, they achieved their goals without violating other’s needs. Indeed, they benefit each other.

Buyer and seller should perform the agreement or the transaction according to the applicable laws and regulation. Islamic law covers the agreement that becomes a living law, preventing the people to cheat or deceive others for their own benefit. Islam has provided a guidance for such an agreement in the Quran Surah AL Baqarah verse 282, which is also the longest verse in the Quran. The verse provides a protection in terms of financial activity between two parties or more when it encounters a kind of misconduct in the transaction.

2. Problem Statement

In financial activity, it is common that each party benefits from the transaction. The seller will gain his profit from his trade and the customer gets benefits from what he purchased. However, along with the chain of interest, sometimes negligence appears in the contract. The common one is tricking or deceiving, in the past or present time. This shameful act inflicts the financial loss that decrease the community wealth. It is the reason why most of the prophets in the history of Islam preached their community to be fair and truthful in every economic activity. Further, a strict regulation is necessary to reduce or remove economic frauds, thereby allowing each community to access the wealthy condition. Muhammad (PBUH) thought of justice as social utility. Hossein Askari and his colleagues (2015, p.19-20) describe that fairness is the prominent feature in Islamic law, which is conveyed in Quran and Sunnah. Hence, the prophet inserted the truthfulness proposed in both sources to every aspect of human's activities.

Even though justice becomes the core principle, misunderstanding on the matters often occurs. To understand the financial principles in the perspective of Islam, the philosophical base of a contract need to be elaborated, making it a living law. Again, Hossein Askari explains that the content and the blueprint of Islamic economy derived from three roots. First is the extraction of legal aspect of the Quran and Sunnah to define the ideal Islamic economy and the economic consequences of the two. Second is the review of the sources in modern economy to shape the degree and extent of the gap between institutional framework and Islamic ideal economy. Third is the recommendation on the policies to tie fill the gaps between the two (Askari, Iqbal, and Mirakhor, 2015, p.19). This way, the community will realize the importance of Islamic contract in which it performs to protect the related parties.

3. Research Questions

From the background and the problem statement, the study is questioning two matters, those are :

1. What is the structure of Islamic contract?
2. What is the *maṣlaḥa* of Islamic contract in human societies?

4. Purpose of the Study

The paper aims to:

1. Examine the structure of methodological basis of Islamic contract.
2. Examine the *maṣlaḥa* of Islamic contract in human societies.

5. Research Methods

The paper employs qualitative method. The data were gathered through library research on Islamic law theory, principles, and/or values of sharia, the concept of Islamic contract, and other relevant literatures. This qualitative reading will be from books, journals, papers (published or unpublished), and thesis or dissertation. The study used Uṣūl Fiqh to generate the legal structure of Islamic contract from a valid source of Islamic Law.

6. Findings

6.1. The Legal Structure of Islamic Contract

Contract in general term is the agreement between two parties to deliver the rights of ownership or acts between each other. John Downes describes it as (Downes & Goodman, 1998):

“An agreement by which rights or acts are exchanged for lawful consideration. To be valid, it must be entered into by competent parties, must cover a legal and moral transaction, must possess mutuality, and must represent a meeting of minds. Countless transaction in finance and investment are covered by contracts.”

Thus, a contract is a legal component to make an agreement about what to do later on. Along with the legality, the agreement between two parties must cover morality aspect as a respect upon the matters of agreement. The parties should not arrange an agreement if they do not share similar purposes or perspectives. In addition, a proficient party should administer the contract.

In Islamic literacy, the term contract is called *'aqd*, which is singular form of *'uqūd*. It is the third noun type of the verb *'aqada-ya'qidu-'aqdan*. The meaning of *'aqd* is tightening (*al šaddu*), binding (*al rabṭu*), exactness (*al iḥkām*), strengthening (*al tauṭīq*), combining between two edges (*al jam'u baina aṭrāfi al šai'*). Ibn 'Uqail described *'aqd* etymologically as the binding of two parties. In Islamic Law (*fiqh*) it means tying two promises occur in an agreement (contract) as spoken to connect the purposes of two parties, either it is in marriage, selling and purchasing, company, or leasing. In other way, the common mean of *'aqd* is the binding that occur from two words or something that could replace it like writing or gesturing and has legal consequence (Ahmad, 2008).

The term “contract”, although it could be general kind of agreement, is inclined with financial aspect. Islam has covered the contract in many business activities such as sale (*bai'*), partnership (*mušarakah/muḍārabah*), hire (*ijārah*), or pledge (*rahn*). Islamic jurists then developed the forms of contracts in Islamic history. Hamid argues that sale contract was identified as a main structure of an authentic business contract and from this basis of contract, the traditional jurists and writers improved a body of the other contracts, such as partnership, hire, and pledge (Hamid, 2015, p.14). The development of Islamic contract refers to the daily life of Prophet Muhammad (PBUH) and his companions and his sayings of what he agreed or prohibited. This paper would likely access the root of contract through the Islamic legal sources.

One of the important sciences of law in Islam is *Uṣūl Fiqh*. It serves as an instrument to generate and conclude the law. To access the basic structure of Islamic contract, the need of *Uṣūl Fiqh* as an approach is inevitable, for it would be the legal stands of the contract in daily activities. Briefly explained, Musharraf says that *Uṣūl Fiqh* refers to the body of evidence, principles, methods and approaches that Islamic jurists utilize to provide rulings, fatwas and solutions to problems. In addition, by using *Uṣūl Fiqh*, we will know the analysis process of Islamic legal sources and its conclusion of certain legal act (Musharraf, 2015, p.15). Therefore, by looking thoroughly into *Uṣūl Fiqh* we would manage the legal structure of contract in Islam.

The legal structure of contract in Islam could be structured as follows:

6.1.1. Structure 1. The Contract as it revealed in Quran.

Quran mentions contract in numerous surah and verse. The very substance of contract recorded in Quran is about instruction to keep the agreement between two parties. QS. Al Māidah: 1 describe the matter: وَيٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا اَوْفُوا بِالْعُقُوْبِ which means: “O ye who believe! Fulfil your compacts”. Another different word is in QS. Al-Isrā` : 34-35:

35(وَ اَوْفُوا بِالْعُقُوْبِ اِنَّ الْاَعْدَاءَ لَشَدِيْدُوْنَ) 34(وَ اَوْفُوا بِالْعُقُوْبِ اِذَا قُمْتُمْ وَزِنُوْا بِالْقِيْسِ طٰسِ لَكُمْ فِيْهِمْ

It means: “...and fulfil [every] engagement, for [every] engagement will be enquired into [on the Day of Reckoning] [34] give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination [35]). Alongside with previous verses, QS. Al Nisā` : 29 reveals the forbidden act of getting treasures illegally:

يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا اتَّقُوا اللّٰهَ الَّذِيْ لَكُمْ بِرِجَالِكُمْ لَا تَكُوْنُوْنَ رِجَالًا عَلٰى اَرْجَالِكُمْ ذٰلِكَ هُوَ الْعَدْوٰى عَنِ الَّذِيْ لَكُمْ فَانظُرُوْا فِيْ اٰيٰتِ اللّٰهِ لَعَلَّكُمْ تَتَّقُوْنَ

It means: “O ye who believe! Eat not up your property among yourself in vanities: but let there be amongst you traffic and trade by mutual good-will: nor kill [or destroy] yourself: for verily Allah hath been to you Most Merciful”).

A further aspect of contract in Quran is stated in QS. Al Baqarah: 282, one and only longest verse in Quran. The narration is as follow:

يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا اِذَا تَوَدَعْتُمْ بَيْنَكُمْ مَالًا فَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ فَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ وَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ فَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ وَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ فَاِذَا كُنْتُمْ عَلَى الْوُجُوْهِ فَلْيَكْتُوبُوْهُ

It means: “O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big. It is more just in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm.

If ye do (such harm), it would be wickedness in you. So, fear Allah; for it is good that teaches you. And Allah is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee [faithfully] discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, his heart is tainted with sin. And Allah know all that we do”.

From these verses, Quran illustrated the instruction and prohibition in making agreement between each other. The prohibition as it detailed in QS. Al-Nisā': 29 means that we must not obtain the property by delusive act. It is as explained by Al Zuhailī, that the assets go to either self-possessions or other belongings. The next word *al bāṭil* means *al ḥarām* (illegally). So, getting self-possessions illegally is like giving expenses to the sin way, while achieving other belongings is like every aspect of non-permissible acts like interest (*al ribā*), gambling (*al qimār*) or any broken contract intended by. Gaining the properties is permissible when it is done with consent (allowable consent) of each other (Zuhaili, 2009: 32-33). The other two surah, which are QS. Al Mā'idah: 1 and QS. Al Isrā': 34-35 are the instruction for the holder of contract to honour the agreement. In first verse of QS. Al Mā'idah, the word of *al 'uqūd* is included in all aspect of contract that it should be fulfilled by (Ajjur, 2013: 32). The same instruction also showed in QS. Al Isrā': 34 but with different word that is *al 'ahd*. The word *al 'ahd* has the same meaning with *al 'aqd*, but in Islamic contract term, despite the same meaning, *al 'aqd* (or its plural word *al 'uqūd*) is more prominent use than *al 'ahd* (Priyanti, 2016, p. 5). The next verse (35) come up with another specific word that is *al kail* (measurement) and *wazinū* (from the verb of *wazana*) (weighing). Its instructions are to give a right measure without reduce it and to weigh with balance without cheating (Mardani, 2014, p. 337).

Other specific contract activity is detailed in QS. Al Baqarah: 282. This verse explains a lot about what we should do when making settlement, in this case is debt: a contract that involves future payment. Generally, there are two instructions in this verse; those are contract writing and providing witnesses. Writing the agreement of non-cash contract is not an obligation, but it is desirable (*mustahab*). This command goes to both sides of contract maker, especially the debtor, thus for he not to broke the settlement by deviating his payment responsibility. Other instruction is to witness the transaction which is arranged to affirm the writing as an evidence document (Muzakkir, 2014, pp. 69-74). From this verse also came the three principles of Islamic Accounting, which are: (1) accountability; (2) justice and; (3) truth (Nurlaila, 2016, p.163).

6.1.2. Structure 2. The Contract as it thought by Prophet Muhammad (PBUH)

As a prophet, the teaching of Muhammad (PBUH) about Islam famously known as hadith. The teaching consists of what he said, did, or agreed. The hadith itself serves to explain the Quran clearly. There are at least three functions of hadith toward Quran which are agreed by ulama, explicitly: (1) to confirm what already been said in Quran; (2) to describe the Quran more specific and; (3) to show the law that not mentioned in Quran (Sulidar, 2013, pp. 341-346).

Muhammad (PBUH) has taught us about contract and it was recorded in many hadiths. This paper is not going to reveal all of it, but only some of chosen hadith. We could mention it as below:

Hadith 1.

بَيِّنَاتٌ لِّهُنَّ ثَلَاثٌ إِذَا حَدَّثَ كَذَبَ وَإِذَا وَعَدَ أَخْلَفَ وَإِذَا اتَّعَمَّ خَانَ

It means, “The signs of hypocrite are three: (1) whenever he speaks, he tells a lie; (2) whenever he promises, he always breaks it; (3) if you trust him, he proves to be dishonest (i.e. if you keep something as a trust with him, he will not return it.” This hadith describes, as a philosophical base, the principles of having agreement.

Hadith 2.

لِلْمُؤْمِنِينَ عَلَى شُرُوطِهِمْ

It meansmeans, “Muslims are on (i.e. stick to) their condition”. This hadith affirms the instruction of Quran to fulfil all kind of the agreement. Hence, the dealmaker will uphold the contract until it be accomplished by the two.

Hadith 3.

أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنْ بَيْعِ الْغَرَرِ

It means that Prophet Muhammad (PBUH) forbade the type of sale which involves risk (uncertainty). The meaning of *gharar* is the possibility or the doubt. It is the probability whether someone will get the goods or not (Al-Mashri, 2012, p. 175). In another note, *gharar* is a condition that does not give specific information of the transaction. The famous example is like the sale of birds in the air (Alia, 2015, p.7).

6.1.3. Structure 3. The contract in Islamic scholar consensus

A transaction as an economic event has emerged in daily life: past, present, and future. So, it is agreed upon by all. Islam does not prohibit any kind of *mu'āmalāh* that has benefits to all mankind. If the activities are not violating the principles of Sharia, the acts are permissible. Indeed, there are two opinions whether the contract is allowed legally by Sharia or illegally. First, the school of Zāhiriyyah stated that in fact the transaction is not allowed except it has cleared by Islamic texts (i.e. Quran and Sunnah) or *ijmā'* (consensus). Second, the majority of *Fuqahā* viewed that the fact of contract is permissible act, as long as it does not disrupt the law of sharia (Sahroni, 2016, pp. 13-14).

6.2. The Maṣlaḥa of Islamic Contract in Human Societies

Maṣlaḥa is one of many other sources of Islamic law and it is categorized as one of a debatable source between Islamic scholars. However, the question about *maṣlaḥa* is not the *maṣlaḥa* itself but the kind of *maṣlaḥa* that does not recorded (i.e. instructed or prohibited) in Quran or Sunnah and it is often called as *al Maṣlaḥa al Mursalah*. *Al Maṣlaḥa al Mursalah* is part of the *maṣlaḥa* that consisted from the existence of *maṣlaḥa*, namely: (1) *al maṣlaḥa al mu'tabarāh* (the instructed beneficial); (2) *al maṣlaḥa al malgāh* (the prohibited beneficial) and; (3) *al maṣlaḥa al mursalah* (the non-instructed and non-prohibited beneficial) (Rosyadi, 2012: 20). Etymologically, the *maṣlaḥa* is a beneficial that came from the verb of *ṣalaḥa* and its plural is *maṣāliḥ*. While in terminology, as Būṭi said, is the beneficial kind that aimed by Allah for human and it proposed to protect five objects of sharia: (1) religion; (2) soul; (3) mind; (4) generation and; (5) property (Arfan, 2013, p. 91). This meaning is in line with the ideas of Al Ġazali, who said that *maṣlaḥa* means to protect the aims of Sharia, namely: (1) protecting the *dīn* (religion/Islam); (2) protecting the soul; (3) protecting the mind; (4) protecting the generation and; (5) protecting the property.

Accordingly, if those five are protected, it will be named as *maṣlaḥa*. On the contrary, if it is unprotected, it will be called as *mafsadah*. Abu Bakar explains that *maṣlaḥa* is the way to read Quran and Sunnah based on the beneficial consideration, and it has aims, which are: (1) to conclude the rule/law of the problem and (2) to formulate and or define the legal doings (Abu Bakar, 2012, pp. 34-35).

In daily financial aspect, the prominent note that should be noticed is protecting the property, and surely it has connection of transaction activities. The development of human lives causes the more complex legal problem in society. Thus, it demands the scholars of Islamic law to solve the problems suitably. Holding on to the main sources of Islamic law does not seem enough to jump out of the box. That is why, sharia suggests to not only care of the text sources (i.e. Quran and Sunnah), but also other sources that Quran and Sunnah do not explain scripturally the faced problems. So, using *maṣlaḥa* as a tool to generate the law is important whether to affirm Quran and Sunnah or making progressive solving as long as not break the main principles of Islam.

After outlining the structure of contract in Islam based on the main sources of sharia (i.e. Quran, Sunnah and *Ijmā'*), this study collects the *maṣlaḥa* of contract and uses it as future bases of legal transaction as well as its ethics. There are numerous points of *maṣlaḥa* of contract which have been generated from Quran and Sunnah. This paper briefly mentions those points as follow:

- The realization of contract as commanded by the Quran and Sunnah will satisfy two sides. Consequently, by completing the transaction, there is social connection between people, leading to the development of trust of each other. This will be the attitude of every dealing in the society.
- By gaining the trust, people will realize the need of each other. Thus, everyone will not disturb others through deceptive action. People will get their belongings through the proper means of transaction. Besides, trust will increase the economy of the society, for everyone has no doubt in joining financial transaction with others. Sharia law has regulated the deal. The feeling of needing each other can be called symbiotic mutualism.
- The concept of mutualism also develops the concern to protect others' belongings. It is part of the purposes of sharia law, particularly the protection of property. The carefulness of achieving, having, and spending properties are the forms of self-appreciation on what the people have. As mentioned, Quran recommends the dealmakers to write down the transaction as documented evidence. Along with the writing, they also need the presence of witnesses serving to verify the contract.

7. Conclusion

The contract as it covered by Islamic law is a transaction that we must honour it. However, we could not ignore that sometimes there are problems occurred in contract, like deceiving, cheating, or any other means that could break or harm the justice. Thus, to prevent the negative acts in the future or in the root of Islamic contract philosophy, the structure of Islamic legal contract has been outlined. Additionally, for the sake of values and ethics, we can generate *maslaha* (benefit) of contract from the main Islamic sources.

The structure of Islamic legal contract are as follows:

Quranic Base → QS. Al-Nisā': 29; QS. Al-Mā'idah: 1; QS. Al-Isrā': 34-35; Al-Baqarah: 282

↓

Prophetic Base → the notification of the signs of hypocrite; the instruction to hold firm the contract; the prohibition of uncertainty sale

↓

Consensus Base → the majority agreement of Islamic scholars that mu'āmalāt is principally permissible by sharia with a notice when it does not disrupt the principles of sharia law

In addition, the maslaha of contract is gained by understanding Quranic and Prophetic view of transaction as well as by applying the custom of transaction. Several efforts to generate maslaha of contract include gaining the trust of each other, creating symbiotic mutualism, and building the awareness of property protection. These points of maslaha are not limited to those three. This paper serves as preliminary to the analysis of Islamic contract through Usul Fiqh. Therefore, future research of philosophical base of Islamic legal contract is necessary.

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