

INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v12-i8/14663>

DOI:10.6007/IJARBSS/v12-i8/14663

Received: 10 June 2022, **Revised:** 11 July 2022, **Accepted:** 25 July 2022

Published Online: 09 August 2022

In-Text Citation: (Sharif et al., 2022)

To Cite this Article: Sharif, D., Khir, M. F. A., & Ismail, F. A. (2022). Wadiah and Ujrah Issue in Al-Rahnu Product: A Turning Point to Tawarruq Structure. *International Journal of Academic Research in Business and Social Sciences*, 12(8), 913 – 926.

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Vol. 12, No. 8, 2022, Pg. 913 – 926

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INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



www.hrmars.com

ISSN: 2222-6990

Wadiah And Ujrah Issue In Al-Rahnu Product: A Turning Point To Tawarruq Structure

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Abstract

The issue of *wadi'ah* and *ujrah* has long been discussed by scholars in the past by dividing them into two different types of contracts, namely *mu'awadat* and *tabarru'at*. They agreed that these two contracts have different characteristics, where *mu'awadat* is to generate profit while *tabarru'at* is a purely charitable contract. Thus, this article aimed to review why this combination is a non-*shari'ah* compliant and therefore, a replacement with another *shari'ah* structure becomes an essential. This study uses qualitative approach where interviews and content analysis are conducted and several books of *fiqh* from the four schools of thought are examined. The frequency of words by using some identified terms such as *wadi'ah*, *rahn*, *ujrah*, *mu'awadat* and *tabarru'at* are determined and coded to form the tendency of *fiqh* views whether it support the objective or against it. The study shows that modern scholars have a tendency of shared similar views and they found these two covenants (*wadi'ah* and *ujrah*) have been mixed in the same product namely *ar-rahnu* and this has raised the issue of *shariah*. They argued the safekeeping of collateral is applied based on the principle of *wadi'ah* where they impose a fee for the service that is rendered. This kind of fee is charged under the principle of *ujrah*. However, this connection gives rise to the indirect implications of *bay' wa salaf* and *qard jarra manfa'ah*, that are prohibited in *shari'ah*. Therefore, the *tawarruq* is so much better option to replace the *wadiah-ujrah* principles.

Keywords: Wadiah and Ujrah, Al-Rahnu, Tawarruq

Introduction

The criticisms over this concept have been widely discussed and written. Some scholars are consistently agreed about the unnecessary concept of *ujrah* to be embedded in *al-rahnu* product, as they stated that *al-rahnu* is only served for securing the debt and is not a method for generating the profits. In fact, they analyzed the concept of *ujrah* is a part of sale contract under *bay' manfa'ah* (sale of usufruct) and thus, it is prohibited to be applied with the *qard* (loan) contract. It is understandable due to the reasons why the concept of *ujrah* is wrongly used in *al-rahnu* product, as there is a hadith that prohibits such practice as following: "Do not allow a loan (in combination with) and a sale, do not have prerequisites to sell, do not gain a profit if it is guaranteed, and do not sell what you do not have" In a hadith narrated by Nasa'i also stress the same thing with different words: "Isma'il bin Mas'ud had told us from Khalid

from Hussein al-Mu'allim from 'Amru bin Shu'ayb from his father from his grandfather: Verily Rasulullah forbids combination of salaf (debt) and sale, two conditions within a sale, and profit as long as it not guaranteed (without taking a risk)." In addition, the scholars argued that the safekeeping fee imposed by the institution exceeds the reasonable rate of that safe deposit box, hence it corroborates the presence of riba elements. This higher rate of fee can be seen through the calculation of annual fee against the loan that is given at 13% in banking institutions, and 11.9% as the average charge in a whole al-rahn shop owned by the cooperative societies. Even though the rate seems higher, the product is widely engaged by the small middle-income group and makes it relatively expensive for them. Moreover, the scholars also stressed that the product received an overwhelming response from the public as it has unique and attractive elements such as a quick approval, rollover functionality, and a guarantee of getting back the pawned jewelry. This situation however reveals the real motives of customers who are willing to pay more safekeeping fees than they really should, and that they subscribe to al-rahn product merely for the purpose of obtaining the financing facility.

Literature Review

While the discussion of al-rahn is intensively discovered, the concept of wadi'ah in Islamic law shall be collectively understood in clarifying the issue of compositing al-rahn and wadi'ah. According to the Hanafiyy School, the contract of ida' is defined as authorizing another party to safeguard one's property by either declaration (sarahatan), or indication (dilalatan)(Ibn Nujaym, n.d, Al-Sarakhsi, 2000). The same basic conditions (shurut) are governing a standard contract that applies to wadi'ah (Al-Kasani, 1971). This includes the sanity ('aql) of the contracting parties and their majority (bulugh). However, the Hanafi do not stipulate the adulthood of both parties and accept that a minor who has permission to trade (sabi ma'dhun) is able to deposit his property freely. Another condition is that the object of the contract should be legal (mal mutaqawwim). Accordingly, "only property (mal) can be deposited" applies once it is understood that the mal is not the focus of the condition, but that the legality of the mal is involved (Dien, 2012). Thus, wine is not a legal item as property for an ordinary Muslim, nevertheless, if it is owned by a newly converted Muslim, it is considered legal. The final, standard contractual condition required for ida' is the offer by the depositor (mudi'), and acceptance by the depositary (muda'). The obligations of the depositary dictate that he or she should safeguard the object to the best of his or her ability. When liability is to be assessed by the court, the safekeeping expected would be normally accepted for similar objects. Liability can only be granted to the depositor if negligence or transgression (ta'addi) is proved (Al-Kasani, 1971).

In practice, if a person deposited the thing with a third person, for the depositing is based on the personal confidence which the depositor has placed in a definite individual known to him, Ibn Abi Layla alone allows the depositary to redeposit (Al-Sarakhsi, 2000). The opinions differ regarding further depositing with members of the family. Members of the family are such people who live with the depositary, and belong to his household, wife, children, parents, and servants. The Shafi'iy jurists follow qiyas (analogy) and forbid further depositing, while the Hanafi and Maliki who follow Istihsan allow it. According to all schools, the depositary may deposit again in face of pressure from a higher power to save the thing deposited. In cases of such kind, given examples would be shipwreck, fire, inundation and enemy raids.

The Combination of Wadi'ah and al-Rahn

In an interview with UIM researcher that was conducted in 2019, he consistently rose the issue of using similar jewelry in two different contracts of two different contracts' objectiveness which are wadi'ah and al-rahn (Fairouz, 2019). This structure could lead the contradicted interests and purposes. The diagram below shows the conflict that occurs when these two contracts are combined.

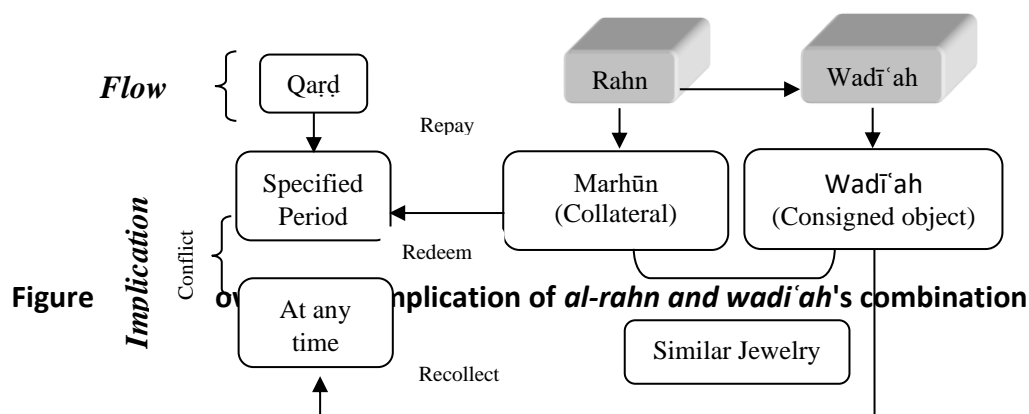


Figure 1 designates the flow and the implication of al-rahn and wadi'ah's composite contract when it is imparted into pawning product. The flow starts with the engagement of qard contract before an institution holds the jewelry as the collateral under al-rahn contract. At the same time, an institution keeps the pawned object under the contract of wadi'ah. Since the collateral and the consigned object are just similar, it creates a conflict in the contract objectiveness (muqtada al-'aqd). The example of such conflict occurs when the contract of wadi'ah allows the depositary to reclaim the goods kept by a trustee at any time, while the contract of al-rahn does not apply it. When the collateral in al-rahn contract only can be redeemed after the completion of debt repayment or purchase installments, the consigned object cannot be recollect before that period even if the safekeeping fee is settled. This is due to the acceptance of a similar object in both contracts; rahn and wadi'ah. The inability of recollecting the consigned object is against the opinion of Ibn Hazm about wadi'ah, as he stated:

"It is compulsory upon the trustee who was entrusted with a wadi'ah to preserve it and to return it to its owner whenever he (saver) asks for it" (Ibn Hazm, n.d). Ibn Qudamah also mentioned about this matter as he said: "It is a non-binding contract that involved by two parties. Whenever the depositary (mudi') wants to take the saved item, it is compulsory for the trustee to return it"(Ibn Qudamah, 1405H).

The above arguments indicate that the current practice of joining rahn and wadi'ah contract on the same item disrupts one of the indispensable structures of wadi'ah. The depositary (mudi') cannot claim a deposited good since it is yet a collateral in the meantime, which grants the creditor the right of confinement. In this case, the owner can only be entitled with the good after reimbursing the debts to the creditor, or the trustee (Fairouz, 2012). Even the later enhancement is suggested by introducing the concept of wadi'ah bi ajr and followed by rahn al-wadi'ah; Mohamed Fairouz Abdul Fairouz a senior researcher of ISRA during the interview conducted in 2019 said, that the structure was rejected by Majlis al-Ulama' Li ISRA (the ISRA Council of Scholars). They justify that the debtor will not keep his/her jewelry under the principle of wadi'ah unless the debtor will receive an offer of loan from the institution.

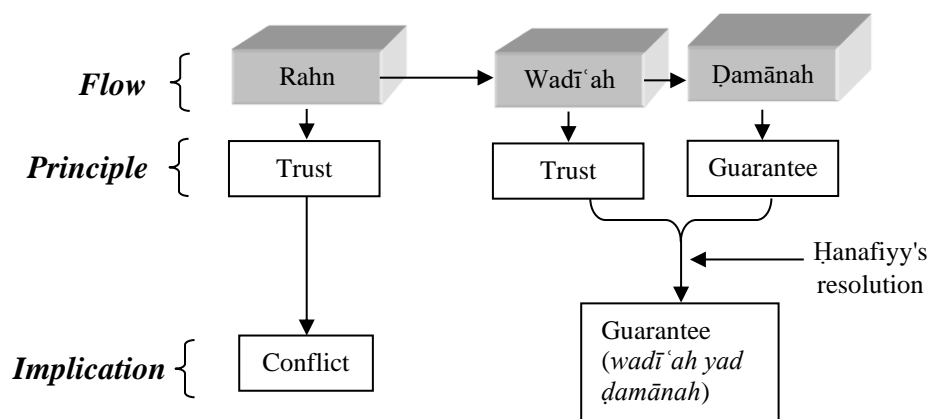


Figure 2: The flow, the principle, and the implication of ar-rahm, wadi'ah and damanah combination

In understanding the position, the diagram above describes how the original principle of *wadi'ah* is conflicting with the principle of *damanah*. The above diagram shows the flow, principle, and the implication of three contracts: *ar-rahm*, *wadi'ah*, and *damanah*. It conflicts when the element of trust, which constitutes the original principle of *wadi'ah* contract is conflicting with the principle of guarantee in *damanah* contract. The principle of *amanah* displays the custodian that he is not liable to guarantee the consigned object under his/her custody, in case of damage or loss, if the negligence (*taqsir*) or the transgression (*ta'addi*) does not occur. In this regard, changing original feature of *wadi'ah* from being a trust-based contract to a guarantee-based contract is being concerned. According to the Shari'ah Board of AOOIFI, the stipulation of guarantees in trust (fiduciary) contracts - agency contract or contracts of deposits - is not permitted as it goes against the nature of trust, unless such stipulation is intended to cover cases of misconduct, negligence, or breach of contract (AOOIFI, Guarantees, 2010). The current practice of *al-rahm* at the institutions reveals the changes of the element of trust (*amanah*) in a *wadi'ah* contract, to the element of guarantee (*damanah*). This occurs since the service charge is being imposed for safekeeping customers' goods.

Nevertheless, this ruling is based on Hanafi's view, that an imposed fee for safekeeping a *wadi'ah* object will change the original status of *wadi'ah* as a trust-based contract (*amanah*) to a guarantee-based contract (*damanah*). This change marks the term that is known as *wadi'ah yad damanah*. Eventhough, the issue of *wadi'ah yad damanah* is resolved through Hanafiyy ruling, other issues arise when a further conflict occurs between the contract objectiveness (*muqtada al-'aqd*) of *wadi'ah yad damanah* and *rahm*. The contract objectiveness of *rahm* is primarily based on trust (*amanah*), which does not admit any form of guarantee (*daman*), while *wadi'ah yad damanah* requires a custodian to guarantee a deposited item kept under his/her custody as a counter-value for the fee paid by the customer for safekeeping's service that are to be rendered.

The position of *al-rahm* as a charity-based contract must not be literally concluded, as the earlier scholars had discussed this in an extensive and comprehensive version. For instance, Qadi Zadah argues with Hanafi's justification about *al-rahm* as a charitable contract; he claims that the inconsistency of the charitable action is occurred along the process of contract. He claims that *al-rahm* contract inclines more towards a form of *mu'awadat* (exchange) rather than *tabarru'at* (charity), as the creditor or the value of the collateral may become a guarantor or a guaranteeing object to a damaged or lost collateral. It the case of object's damage or

loss, it can be considered as the settlement of the debtor's debt. As such, the offer of submitting jewelry as a collateral by the debtor must be clearly accepted by the creditor, so that the debtor can be attached by the responsibility for any risk of damage or loss (Ibn Hammam, d.681h:0:137). This view has also been shared by al-Kasani as he says that one who has reached puberty, a free man, a child and a slave who has his guardian's consent, are allowed to execute *al-rahm* contract since they are all already eligible to own a business, including pawning activities (Al-Kasani, 1971).

As for Al-Buhuti, he views *al-rahm* as not being compulsory to secure a debt and the parties in the contract are merely based on the principle of charity (Al-Buhuti, 1947). However, others regard it as *mu'awadat*, which is an exchange-based ownership contract in which the benefits of the contract are obtained by both contracting parties (Kuwait, n.d.). Nonetheless, al-Kasani explains that there is an evidence which shows that *al-rahm* is neither fully *mu'awadat* nor *tabarru'at*. He claims that the action of giving and receiving the collateral is not an exchange for something. At the same time, the purpose of securing a debt is also not an option. The jurists of Hanafiyy said that the creditor has a right to demand his right by selling the pawned object that he is holding if the collateral is not perished. If the collateral perishes, the function of *al-rahm* as a debt's security will end (Al-Kasani, 1971). Al-Rafi'i of Shafi'i said that *al-rahm* remains *tabarru'* even though it is stipulated by the conditions in the contract or any other contract (Al-Rafi'i, 1997).

In conclusion, there are two rulings regarding *ar-rahm's* status. Firstly, that *al-rahm* is a charitable (*tabarru'*) contract and secondly, that *al-rahm* can be changed to *mu'awadat* (exchangeable) contract such as a sale or a lease, if it is stipulated by a required condition. These rulings are in turn associated to further effects, as well as the agreed and disputed condition. The agreed condition refers to the unanimous agreement of its ruling, while the disputed condition is the undecided or individual agreement of its ruling.

The three conditions that result in the agreed rules of *al-rahm*- as discussed by the jurists - are the condition required by the contract, the condition that is contrary to the contract objectiveness and the condition neither required nor contrary to the contract's objective. The first condition requires the debtor to place a collateral to the possession of the creditor and he may sell it after the expired period of redemption. In this case, the creditor can stipulate a condition in the contract by giving him primacy over other creditors, through the possession of collateral on which he has the first right to extract what is owed to him.

The second type is that the debtor requires the creditor not to hold the collateral; not to sell it after the expired period of redemption; or in the event of a default. Else, the debtor may not give primacy over other creditors in settling the latter's debt. In this situation, all scholars from Hanafi, Maliki, Shafi'i and Hanbali unanimously agreed that such condition is unlawful. However, they differed in opinion about the whole contract's effect, whether it is defective (*fasid*) or terminated (*batil*).

The third type is the condition that is based on *maslahah*¹ (Khadduri n.d.), which merely aims at strengthening the existing requirement. For example, a testimony of *ar-rahm*, *al-rahm* in a sale contract and *al-rahm* with compensation. These additional elements are neither necessary nor unnecessary to *al-rahm* contract. All scholars of Hanafi, Maliki, Shafi'i and Hanbali agreed that this condition is lawful and the contracting parties should fulfill it or otherwise one of the parties involved can terminate the contract.

¹ the public interest or welfare

Methodology

This study uses qualitative approach where content analysis is conducted. Several books of *fiqh* from the four schools of thought are examined. This study uses several books of *fiqh* from the four schools of thought are examined. The books are Al-Mabsut of Sarakhsi, Hasyiah Rad al-Mukhtar Li Ibn 'Abidin 'Ala al-Dur al-Mukhtar li al-Haskafi (Hanafi School), Bidayah al - Mujtahid wa Nihayah al-Muqtasid of Ibn Rushd in Maliki School, Hashiah al-Dasuqi 'Ala Sharh al-Kabir (Maliki School), Al-Majmu' of Nawawi (Shafi'i School) and Al-Mughni of Ibn Qudamah (Hanbali School). The frequency of use of some identified terms such as wadi'ah, rahn, ujah, mu'awadat and tabarru'at are determined and coded to form the tendency of fiqh direction. The study mentioned the views of the four main schools of jurisprudence, starting with the initial order of existence. Thus, the Hanafi legal school will be reflected first, followed by the Maliki, Shafi'i and Hanbali, without considering the strengths of each view. It also referred to the other schools of thought if they are consistent with the Islamic general principles and the view of *ahl sunnah wa al-jama'ah*. However, the use of schools other than the main four schools is extremely rare. The study also presented genuine evidence and discussions by highlighting the solutions and conclusions for each evidence presented. However, the study would not make conclusions in the absence of any guidance in resolving a problem. The study limits the strongest view for each school of thoughts and sometimes, the view of a particular one would be mentioned more than once, if there is a need for it. In discussing the issues of *al-rahnu*, it is important to divide the subject into further classifications, so that it shall be comprehensible. If the discussions about *al-rahnu* are dragging and not focusing, this would complicate the path of understanding to real problems.

The study also conducted semi-structured interviews that based on (Wilson, 2014). A semi-structured interview combines the open-ended exploration of an unstructured interview with predetermined questions like those used in structured interviews. Interviewers that use the semi-structured interview method usually follow a document called an interview guide. The semi-structured interview's overall purpose is to collect systematic information about a handful of major subjects while also allowing for open-ended questions as new issues or themes arise, some investigation. The interviews conducted with some scholars who have knowledge regarding related topics and related industries such as ISRA and INCEIF Researchers, Shariah Committee and Operators for IFI Conducting ar-Rahnu product.

Table 1

The cumulative result of responses of interviews

No	Questions	Shariah Principle Risk		Principle Acceptance	
		Wadiah-Ujrah	Tawarruq	Wadiah-Ujrah	Tawarruq
1	When the time a product is said to be facing the shariah risk? Describe the situation	√	x	X	√
2	Does such a product would be terminated if it is faced the violation of the Shariah principles? Why and describe the situation	√	x	X	√
3	Are there situations where; the consideration of shariah risk over the other or vice versa? Why and describe the situation	√	x	X	√
4	What are the risks faced by the bank when the product of Ar-Rahnu will be changed its structure to the exchange contract (<i>mu`awadat</i>) such as <i>tawarruq</i> ? Describe the situation.	√	x	X	√
5	Is there any possibility of <i>tawarruq</i> structure (if applicable to the product ar - Rahnu) are excluded from the credit assessment?	NR	√	NR	√
6	Of many issues involved, which are the one of concern to al-rahn product?	√	x	NR	NR
7	What are the negative factors possibly happened in al-rahn product that could make it unattractive? Describe the situation	√	x		

The outcomes of the interviews are then described in the diagram below.

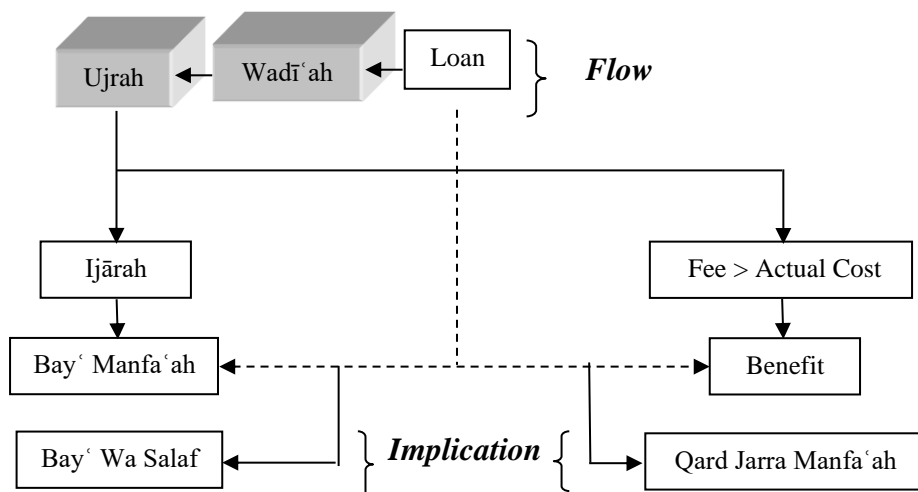
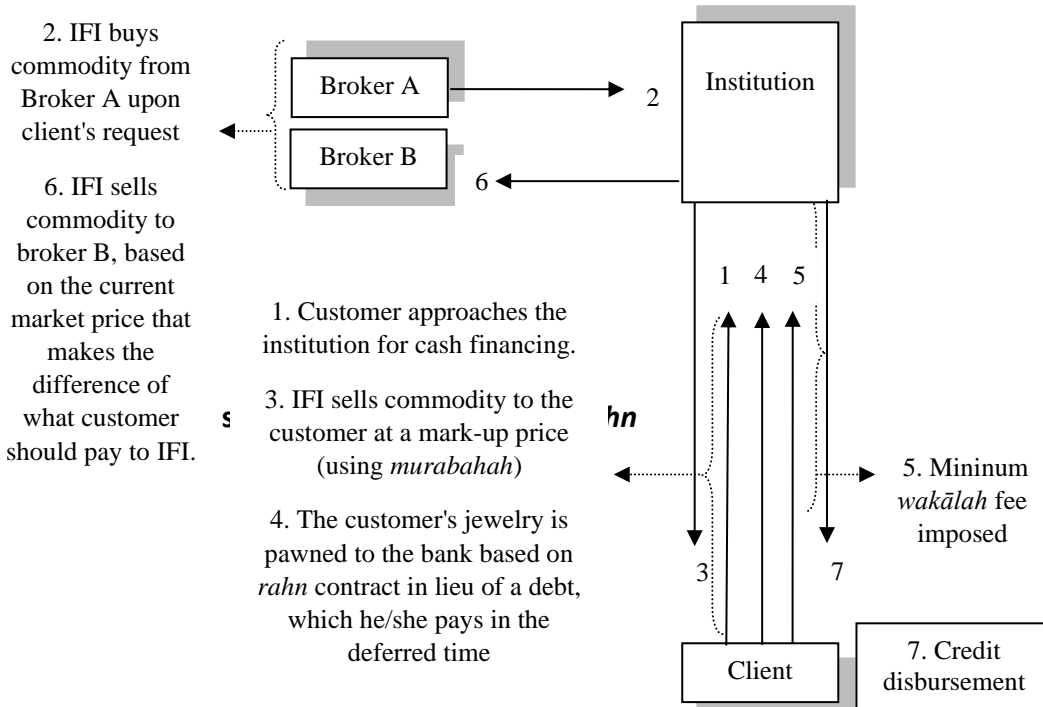


Figure 3: The framework of *Ujrah -Wadi'ah's* framework

The figure 3 describes the flow and the implication of *Ujrah -Wadi'ah's* connection when it is applied through *al-rah*n product. The flow starts with the engagement of loan contract before an institution keeps the collateral under their custody. The safekeeping of collateral is applied based on the principle of *wadi'ah* where they impose a fee for the service that is rendered. This kind of fee is charged under the principle of *ujrah*. However, this connection gives rise to the indirect implications of *bay' wa salaf* and *qard jarra manfa'ah*, that are prohibited in *shari'ah*. In this regard, a deeper debate involving these two principles (*ujrah* and *wadi'ah*) is therefore explained and analyzed.

Finding



At the first stage, the customer approaches the institution for cash financing. The institution then assesses customer's ability of engaging in such contract. However, this stage is practically critical, because most *al-rah*n institutions are not assessing customer's credit ability in

repaying the debt. The absence of customer's credit assessment is a great turning point for the success of this suggested structure. Thus, the exemption or very minimal assessment, which takes very short time is a must condition. (1)

The institution buys a commodity from Broker A upon client's request; normally, this process of buying a commodity is done through *Suq al-Sila'* or Commodity *Murabahah* House. This trading platform that uses crude palm oil as the underlying commodity is introduced by Bursa Malaysia in 2009 to facilitate Islamic financial transactions, particularly the application of commodity *murabahah* which is based on the principle of *tawarruq*. Usually, this process will include buying and selling transactions in ten minutes, since it is applied through the system in computer (2). The institution sells the commodity to the customer at a mark-up price, and the customer pays the price in deferred payment basis, based on six months or above according to the agreed terms and conditions of the contract. (3) The customer's jewelry is pawned to the bank based on rahn contract in lieu of a debt, which he/she pays in the deferred time. (4)

The customer appoints the institution as his/her agent to sell the commodity to a third party for getting the cash. This process is also conducted through mechanism of *Suq al-Sila'*, or Commodity *Murabahah* House. Once again, at this stage the institution must find a way for the exemption of wakalah fee that is resulted from the appointment of bank as the customer's agent. This fee may discourage the customers as the institution is already making a profit from the mark-up price. (5) As an agent, the institution sells the commodity to the third party, who is known as broker B. But this time, the selling price is based on the current market price that makes the difference of what customer should pay to the institution. (6). The difference that creates the cash will then be given straight away to the customers or credited into customer's account depending on how the institution wills to disburse it. (7)

This structure suggestively allows the institution to generate a legitimate profit, as it does not involve *qard* as the underlying contract for profit generating. In fact, the profit is purely generated from a mark-up sale via *tawarruq* arrangement that the parties entered. However, this structure associates the issue of organized *tawarruq* (*tawarruq munazzam*), which is controversial in terms of its legitimacy. In principle, the majority of Sharicah scholars approve the permissibility of the classical *tawarruq* contract. However, they are far from unanimously agreeing with the legality of organized *tawarruq* (*tawarruq munazzam*) as practiced in contemporary Islamic finance. Those who allow it stipulate specific conditions to avoid prohibited elements such as the three-way *'inah*. The modern scholars who reject the current practice of organized *tawarruq* argue that it is a legal trick to circumvent the prohibition of *riba*. In counting back those arguments, this selected structure shall depend on the following justifications.

Discussion

This structure suggestively allows the institution to generate a legitimate profit, as it does not involve *qard* as the underlying contract for profit generating. In fact, the profit is purely generated from a mark-up sale via *tawarruq* arrangement that the parties entered into. However, this structure associates the issue of organized *tawarruq* (*tawarruq munazzam*), which is controversial in terms of its legitimacy. In principle, the majority of Sharicah scholars approve the permissibility of the classical *tawarruq* contract. However, they are far from unanimously agreeing with the legality of organised *tawarruq* (*tawarruq munazzam*) as practiced in contemporary Islamic finance. Those who allow it to stipulate specific conditions to avoid prohibited elements such as the three-way *'inah*. The modern scholars who reject

the current practice of organised tawarruq argue that it is a legal trick to circumvent the prohibition of riba. In counting back those arguments, this selected structure shall depend on the following justifications:

1. An absence of ownership transfer

Many institutions are reluctant to own the jewelry that has been transferred to their ownership due to the cost, and operational risk's factors. On the other hand, the composite contract of tawarruq and rahn as what is suggested in this work, does not involve the transfer of the jewelry's ownership to the institution and this can reduce their risk of market's deficiency for resale. The reselling of the jewelry can be harder market for the institution to deal with, since it has now become a used item and the buyer will perceive it as a cheaper item. This situation occurs when the original seller fails to repurchase the sold jewelry in the first contract of bay' sarf, which has taken place earlier. It also reduces the risk of the institution against losses resulting from the gold price fluctuations in the market. Thus, this structure make the jewelry to be functioned as a security to the commodity's trading activities executed at bursa suq al-sila' in a tawarruq contract, instead of just being an object of matter.

2. The rahn based product should carry the real concept of ar-rahn

Although, there are a variety of products sharing the same principles of shari'ah, or products that have shared the same name by using different shari'ah principles, yet it is hard to compare with the product of al-rahn itself. The customers always perceive the rahn based product as their source of instant cash. Thus, their jewelry held by the institution cannot be considered as a transfer of an ownership, as it would alienate the customers and discourage the policy makers of the institutions (as what structured in bay sarf). Either the clients or the institutions do not perceive pawning as the main contract, but rather a derivative mechanism to the contract of debt; this perspective is in line with the original ruling of shari'ah about ar-rahn. If the pawned jewelry is not deemed as collateral in lieu of a loan given, but a contracted matter in a sale contract as what has proposed in bay al-sarf, then al-rahn product is pointless as the product's label carries the element of pawning. People will get jumbled if the term 'pawning' only appears as the product's label, and afterwards the item's ownership goes through the legal impact that is affected by the product structure.

Therefore, the structure of the product must reflect the actual concept that is supposedly meant for, or else it should be ready for the product rebranding; it will cause transformation on a massive scale for hundreds of the existing al-rahn institutions. Alternatively, the jewelry is remained as a security item for the main contract, either the debt or through sale agreement if the structure of tawarruq - that is backed by rahn - is executed.

3. The stronger connection of qard and sale

The Islamic scholars acknowledge that the structure used today has a link with the prohibition of bay' wa salaf as mentioned in the hadith. Even though the connection between the concept of ujah and qard indirectly links to the product, yet it has a significant dependency upon each other. This happens since the object is served for two different contracts, which vary in nature and its contract objectiveness.

Moreover, some institutions have distinguished the rate of ujah fee for the pawned jewelry; with or without the offer of loan. For example, Ar-Rahnu KPMNJ charges RM0.15 as ujah fee for each of RM100 of marhun value without a need to borrow cash, while imposing a higher rate of RM0.70-0.75 if a customer needs cash. This clearly shows a significant relationship between the existence of ujah and the existence of loan.

Furthermore, a study done by Fairouz shows, that there is an unnecessary inclusion of principles in the product which are ujah and wadi'ah. He held that the unnecessary inclusion

of a contract in a deal is an indicator of the presence of a hilah element (Fairouz, 2010), and for this particular case, the structures including the principles of *ujrah* and *wadi'ah* are unnecessary. This occurs since the original concept of *rahn* has already covered the function of *ujrah* and *wadi'ah*.

4. An instrument of *tawarruq* is not prohibited

One may argue that *tawarruq* structure has a problem from the viewpoint of some contemporary fiqh scholars. However, the scholars who disagree about the current practice of an organized *tawarruq* claimed that it is a legal trick to escape from the prohibition of *riba*. They took the resolution of *Majma' Fiqh* as a basis of their claim (The International Council of the Islamic Fiqh Academy, 2009). In response, Laldin (2014) insisted that the resolution of *Majma' Fiqh* - which refers to the prohibition of the use of *tawarruq* instrument - is not binding. Furthermore, the contemporary scholars such as Shaykh 'Abd al-Sattar Abu Ghuddah, Shaykh Nizam Ya'qubiy and Dr. Mohamed A. Elgari disagreed with the ruling. This resolution is then being refuted by the Shariah Standard 2010 that permitted such practice. There are many scholars who allow such practice, as they claim that the current structure of *tawarruq* which is implemented in the institution is excluded from what the resolution has concluded. They define that *tawarruq munazzam* is an arrangement in which the contracting parties have no choice, but to follow only the specified transaction flow from head to toe; for instance, just as the delivery or the sale of goods to the other parties is not allowed (Hashim, 2014). Based on an interview with Ashraf bin Md. Hashim, a Profesor and Senior Researcher at ISRA on the 14th of January 2014 about *tawarruq* executed in Malaysia's financial institution, it was discussed that if the buyer at any level has a complete freedom in *tasarruf* - either to take delivery, or sell goods to any party - then it is not included in the "*tawarruq munazzam*". The Bursa Suq al-Sila' in Malaysia is given this liberty; thus, his viewpoint of such practice is not included in *tawarruq munazzam*. Moreover, they also viewed that these instruments are included in the category of *makharij*, which is supposed to be temporary (Hashim, 2014).

5. A permitted *tawarruq* structure is guided by the specific condition as resolved by AOIFI Shariah Standard

AOIFI Shariah Standard had permitted such practice; general evidence can be traced in the texts of the Quran and the Sunnah that permit sale transaction (AOOIFI, 2010). It has also been confirmed by two resolutions issued by; the Islamic Fiqh Academy of the Muslim World League; the Standing Committee of the Supreme Board of Sharia Scholars of the Kingdom of Saudi Arabia (Fatwa No. 19297); as well as the fatwas of several shari'ah supervisory board. Therefore, *tawarruq* is an exit for avoiding *riba* rather than a trick for performing it, since it is usually practiced by those who do not want to be involved in interest-based borrowing. It has been reported by 'Abd Allah Ibn Mubarak that Sayyidah 'A'ishah (God bless her) practiced it. However, its permissibility depends on the specific condition that must be fulfilled by the transacting parties. Among others are:

i. The prohibition of composite contract between purchasing the commodity and reselling them, which is justified by the fact that joining them together would impose a commitment on the client to sell the commodity right away. Hence, such immediate transfer of the ownership of the commodity may not enable the client to receive it. This is again the same reason for prohibition of proxy-related commitment.

- ii. The permissibility of resorting to the proxy of the institution when the client, by virtue of law, is unable to sell the commodity directly is meant to safeguard the deal from being nullified by the law.
- iii. The ruling that institution should provide detailed information about the commodity to the client, aims at preventing the fictitious transactions and helping the client to obtain the liquidity. Such requirement holds true; whether the subject matters are in the form of a commodity, car, and shares of a company, international goods, or local goods. The latter are more suitable for monetization due to the easiness of ensuring their existence and the chance available to the client to actually hold them, if he so desires.
- iv. The ruling that the institution should provide the client with full description or a sample of the commodity is actual, rather fictitious.
- v. Monetization should be subjected to strict controls and restrictions, so that institutions fulfill the main objectives underlying their presence and the interest of customers to make dealings with them.

The institutions have to show strict commitments towards using modes of investment and financing such as; the various form of *musharakah* and exchange of goods; usufruct and services that conform the very nature; and basic activities of Islamic banking. Hence, imposition of controls and restrictions on monetization would curb any tendency for expanding the monetization, except in the limited scope defined in the AAOIFI Sharia Standard 2010.

Conclusion

In conclusion, this structure has manifest gains over other structures that have been earlier debated. The use of *rahn* in this structure consistently meets the purpose for which the *rahn* contract was constituted by the Shari'ah, i.e. as an assurance contract. In this structure, profit generation is placed in the right position, which is a trading contract, while al-*rahn* remains a trust-based security contract. Thus, this structure does not try to employ *rahn* for a purpose that contravenes the very nature of the *rahn* contract, and its objectiveness. As a result, this structure is ultimately safe from the prohibited elements of *bay' wa salaf* or *qard jarra manfa'ah*, which regularly arise from the structures such as that of *ijarah* (additional exchange contracts), and al-*rahn* contract. In addition, there is no conflict of *muqtada al-'aqd* between *wadi'ah* and *rahn*. This structure significantly enables the bank to generate a legitimate profit, since it does not involve *qard* as the underlying contract for profit generating. In fact, the profit is purely generated from a mark-up sale via *tawarruq* arrangement that the parties enter into.

Acknowledgement

This paper is funded by MOHE under Fundamental Research Grant Scheme/Reference number: 600-IRMI/FRGS 5/3 (078/2019)

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