

SHARIA INSURANCE CONTROVERSY: FATWA REVIEW AND ITS DEVELOPMENT

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ABSTRAK

Asuransi syariah hadir sebagai solusi atas dilema hukum asuransi konvensional yang dinilai mengandung unsur gharar dan riba. Penelitian ini mengkaji konsep, landasan hukum, serta kritik terhadap asuransi syariah dengan metode penelitian kepustakaan (library research). Asuransi syariah berlandaskan prinsip tolong-menolong (ta'awun) dan mengacu pada fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia (DSN-MUI). Beberapa fatwa yang relevan mencakup ketentuan akad dalam asuransi syariah, seperti mudharabah musytarakah, wakalah bil ujah, dan tabarru'. Kendati demikian, asuransi syariah masih menuai kritik, terutama terkait penggunaan multi-akad yang dipandang bermasalah oleh sebagian ulama. Selain itu, terdapat perbedaan antara konsep teoritis dan praktik di lapangan, yang terkadang menyimpang dari ketentuan syariah. Meskipun demikian, asuransi syariah tetap berkembang sebagai alternatif perlindungan finansial yang dianggap sesuai dengan nilai-nilai Islam. Studi ini menyimpulkan bahwa asuransi syariah dapat diterima selama tetap berpegang pada prinsip syariah dan fatwa DSN-MUI.

Sharia insurance is a solution to the legal dilemma of conventional insurance which is considered to contain elements of gharar and usury. This study examines the concept, legal basis, and criticism of sharia insurance using library research methods. Sharia insurance is based on the principle of mutual assistance (ta'awun) and refers to the fatwa of the National Sharia Council-Indonesian Ulema Council (DSN-MUI). Several relevant fatwas include the provisions of contracts in sharia insurance, such as mudharabah musytarakah, wakalah bil ujah, and tabarru'. However, sharia insurance still attracts criticism, especially regarding the use of multi-contracts which is considered problematic by some scholars. In addition, there are differences between theoretical concepts and practices in the field, which sometimes deviate from sharia provisions. Nevertheless, sharia insurance continues to develop as an alternative financial protection that is considered in accordance with Islamic values. This study concludes that sharia insurance is acceptable as long as it adheres to sharia principles and DSN-MUI fatwas.

KEYWORD	ARTICLE INFO
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INTRODUCTION

Life in the world is full of uncertainty and risk, starting from the risk of illness, accidents, even ending in death because risks such as death cannot be avoided, therefore, to overcome these life problems, humans are required to plan for the future comprehensively.

The development of the era is increasingly advanced, various ways that can be done to invest, one of which is in the field of insurance. In this advanced era, risks can occur in all possibilities. This makes human needs increasingly complex so that they want all their needs to be met, people are required to have a guarantee to guarantee the lives of their children. Insurance companies are one place where people get this guarantee. Insurance companies in Indonesia have offered various products that can attract public interest. Public interest in insurance is quite large, but it becomes a problem when conventional insurance is considered as insurance that contains gharar and is certainly haram.

To provide a way out of the existing legal problems, of course there must be insurance based on sharia, which can accommodate the community's need for insurance. In this paper, the author will describe insurance law, both conventional and sharia, although the author will focus more on the study of sharia insurance law.

RESEARCH METHODS

This study uses a library research method with the type of book analysis research and analysis of the thoughts of figures in the field of Islamic insurance. The data collection technique uses documentation techniques or collection of written sources which are then analyzed using content analysis techniques so that the research results can be presented in more detail and the results are described into a comprehensive research result.

RESULTS AND DISCUSSION

The existence of sharia insurance businesses cannot be separated from the existence of conventional insurance businesses, which has been around for a long time. Before the realization of sharia insurance business, there were already various conventional insurance companies that had long been developing. Based on the beliefs of the world's Muslims and the benefits obtained through the concept of sharia insurance, various insurance companies were born that run insurance businesses based on sharia principles. These companies are not only owned by Muslims, but also various companies owned by non-Muslims. In addition, there are also parent companies with conventional concepts that also provide sharia insurance services by opening a branch office or sharia business unit (UUS).

To provide a legal basis for Insurance Sharia, a legal legitimacy is required by an authorized institution for that. In addition to the rules in the form of conventional insurance law, also special rules

regarding sharia insurance, the Indonesian people, the majority of whom are Muslim, want a fatwa specifically about this sharia insurance. In general, sharia insurance has been fatwaed as permissible with several conditions in the general provisions of the DSN-MUI fatwa. There are at least 6 fatwas that directly relate to this sharia insurance. 1. Fatwa No. 21/DSN-MUI/X/2001 concerning General Guidelines for Sharia Insurance. 2. Fatwa 39/DSN MUI/X/2002 Concerning Hajj Insurance; 3. Fatwa No 51/DSN-MUI/III/2006 concerning Mudharabah Musytarakah Agreement on Sharia Insurance. 4. Fatwa No. 52/DSN-MUI/III/2006 concerning the Wakalah Contract Bill of Value in Sharia Insurance and Sharia Reinsurance. 5. Fatwa No. 53/DSN-MUI/III/2006 concerning the Tabarru Contract in Sharia Insurance. 6. Fatwa 81/DSN MUI/II/2011 Concerning Return of Contributions Tabarru' for Insurance Participants Who Resign Before the End of the Agreement Period, 7. Fatwa Number 106/DSN-MUI/X/2016 Concerning Waqf Benefits of Insurance and Investment Benefits in Sharia Life Insurance.

In this paper, the author only emphasizes the arguments used by DSN-MUI in giving fatwa about this sharia insurance.

The evidence for the fatwa DSN-MUI About Insurance Sharia

1. God's word regarding the command to prepare for the future is represented by the verse Al-Hasyr verse 18¹ verses quoted in the fatwa DSN-MUI. This is Bayani's postulate. In this verse, fiil mudhari is used which is preceded by lam amr, (lam which indicates command), so the meaning indicates obligatory, because there is no karinah that recommends it to be sunnah or permissible.
2. God's word about the principles of muamalah, represented by Surah al-Maidah verse 1², An-Nisa verse 58³, Al-Maidah 90⁴, Al-Baqarah 275⁵, Al-Baqarah 278⁶, Al-Baqarah 279⁷, Al-

¹QS Al-Hashr: 18

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَلْتَنْظُرْ نَفْسٌ مَّا قَدَّمَتْ لِغَدٍ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

Meaning: 18. O you who believe, fear Allah and let everyone pay attention to what he has done for tomorrow (the afterlife); and fear Allah, surely Allah is All-Knowing of what you do.

²QS Al-Maidah: 1

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُم بَيْعَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ غَيْرَ مُحِلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

Meaning: 1. O you who believe, fulfill the aqads. Livestock is permitted to you, except for those which are read to you. (such as that) by not making hunting permissible while you are performing Hajj. Indeed, Allah establishes laws according to what He wills.

Aqad (agreement) includes: a servant's promise of loyalty to Allah and an agreement made by humans in their interactions with each other.

³QS An-Nisa: 58

﴿ إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَى أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۚ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا ﴾

Meaning: 58. Indeed, Allah commands you to convey the message to those who are entitled to receive it, and (orders you) when you determine a law between people, so that you determine it fairly. Indeed, Allah will give you the best teaching. Indeed, Allah is All-Hearing, All-Seeing.

⁴QS Al-Maidah: 90

Baqarah 280⁸, An-Nisa 29.⁹In several of the verses that the author mentioned above are also the basis of the Bayani argument, these verses command the carrying out of muamalah in accordance with the Sharia.

3. God's word about the command to help each other is represented by surah Al-Maidah verse 2¹⁰

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

Meaning: 90. O you who believe, indeed (drinking) wine, gambling, (sacrificing to) idols, drawing lots of fortunes with arrows, are among the actions of the devil. So stay away from those actions so that you will get good luck.

Al-Azlaam means: an arrow without feathers. The Jahiliyah Arabs used arrows that had no feathers to determine whether they would do something or not. The method is: they take three arrows that don't have feathers. after each one was written, namely: do it, don't do it, while the third one was not written down, it was put in a place and kept in the Kaaba. If they wanted to do something, they asked the caretaker of the Kaaba to take an arrow. It's up to them whether they will do or not do something, according to the writing on the arrow they took. If an arrow is drawn that has no writing on it, then the draw is repeated once again.

⁵QS Al-Baqarah: 175

أُولَٰئِكَ الَّذِينَ اشْتَرَوُا الضَّلَالَةَ بِالْهَدَىٰ وَالْعَذَابَ بِالْمَغِيرَةِ ۖ فَمَا أَصْبَرَهُمْ عَلَى النَّارِ

Meaning: ...Even though Allah has permitted buying and selling and prohibited usury. ...

There are two types of usury: nasiah and fadhl. Riba nasiah is an excess payment required by the person who lends. Usury fadhl is the exchange of an item for a similar item, but in greater quantity because the person exchanging requires it, such as exchanging gold for gold, rice for rice, and so on. The usury referred to in this verse is the multiple forms of usury that were common in Arab society during the jahiliyah era.

What this means is: people who take Riba are not at peace in their souls, like people who are possessed by the devil. Riba that has been taken (collected) before this verse was revealed, may not be returned.

⁶QS Al-Baqarah: 178

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأَنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۚ ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۖ فَمَنْ اغْتَدَىٰ بِذَٰلِكَ فَلَهُ عَذَابٌ أَلِيمٌ

Meaning: 278. O you who believe, fear Allah and forsake the remainder of Riba (which has not been collected) if you are believers.

⁷QS Al-Baqarah: 179

وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

Meaning: 279. So if you do not do it (leaving the rest of usury), then know that Allah and His Messenger will fight you. And if you repent (from taking usury), then for you is your principal; you do not wrong nor will you be wronged.

⁸QS Al-Baqarah: 280

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ ۚ وَأَنْ تَصَدَّقُوا خَيْرٌ لَّكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ

Meaning: 280. And if (the person who owes it) is in trouble, then give him respite until he has room. and giving in charity (some or all of the debt), it is better for you, if you only knew.

⁹QS an-Nisa: 29

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ بَيْعَةً عَنْ تَرَاضٍ مِّنْكُمْ ۚ وَلَا تَقْتُلُوا أَنْفُسَكُمْ ۚ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

Meaning: 29. O you who believe, do not consume each other's wealth in a false way, except by means of commerce which is valid between you. and do not kill yourselves; Indeed, Allah is Most Merciful to you.

The prohibition on killing oneself also includes the prohibition on killing others, because killing others means killing oneself, because the people are a unity.

¹⁰ QS Al-Maidah verse 2:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَحِلُّوا شَعَائِرَ اللَّهِ وَلَا الشَّهْرَ الْحَرَامَ وَلَا الْهَدْيَ وَلَا الْقَلَائِدَ وَلَا آمِينَ الْبَيْتِ الْحَرَامَ يَبْتَغُونَ فَضْلًا مِّن رَّبِّهِمْ وَرِضْوَانًا وَإِذَا حَلَلْتُمْ فَاصْطَادُوا وَلَا يَجْرِمَنَّكُمْ شَنَا نَقَوْمٍ أَنْ صَدَّقْتُم عَنِ الْمَسْجِدِ الْحَرَامِ أَنْ تَعْتَدُوا وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ يَوْمَئِذٍ اللَّهُ إِتَّاهُ شَدِيدُ الْعِقَابِ

Meaning: ... and help you in (doing) virtue and piety, and do not help in committing sins and transgressions. and fear Allah, surely Allah is Severe in punishment.

4. Hadiths

عَنْ أَبِي هُرَيْرَةَ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ فَرَّجَ عَنْ مُسْلِمٍ كُرْبَةً مِنْ كُرْبِ الدُّنْيَا فَرَّجَ اللَّهُ عَنْهُ كُرْبَةً مِنْ كُرْبِ الْآخِرَةِ، وَمَنْ سَتَرَ أَخَاهُ الْمُؤْمِنَ فِي الدُّنْيَا سَتَرَهُ اللَّهُ فِي الْآخِرَةِ وَاللَّهُ فِي عَوْنِ الْعَبْدِ، مَا كَانَ الْعَبْدُ فِي عَوْنِ أَخِيهِ»¹¹

عَنِ الثُّعْمَانِ بْنِ بَشِيرٍ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: " مَثَلُ الْمُؤْمِنِينَ فِي تَوَادُّهِمْ، وَتَرَاحُمِهِمْ، وَتَعَاطُفِهِمْ مَثَلُ الْجَسَدِ إِذَا اشْتَكَى مِنْهُ عُضْوٌ تَدَاعَى لَهُ سَائِرُ الْجَسَدِ بِالسَّهَرِ وَالْحُمَّى"¹²

عَنْ أَبِي مُوسَى، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «إِنَّ الْمُؤْمِنَ لِلْمُؤْمِنِ كَالْبُنْيَانِ يَشُدُّ بَعْضُهُ بَعْضًا»¹³
عَنْ كَثِيرِ بْنِ عَبْدِ اللَّهِ بْنِ عَمْرٍو بْنِ عَوْفٍ الْمُرَبِّيِّ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «الْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَمَ حَلَالًا، وَأَحَلَّ حَرَامًا»¹⁴

حَدَّثَنَا الْحُمَيْدِيُّ عَبْدُ اللَّهِ بْنُ الزُّبَيْرِ، قَالَ: حَدَّثَنَا سُفْيَانُ، قَالَ: حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ الْأَنْصَارِيُّ، قَالَ: أَخْبَرَنِي مُحَمَّدُ بْنُ إِبْرَاهِيمَ التَّيْمِيُّ، أَنَّهُ سَمِعَ عَلْقَمَةَ بْنَ وَقَّاصٍ اللَّيْثِيَّ، يَقُولُ: سَمِعْتُ عُمرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ عَلَى الْمِنْبَرِ قَالَ: سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: «إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ، وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى، فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا، أَوْ إِلَى امْرَأَةٍ يَنْكِحُهَا، فَهِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ»¹⁵

عَنْ أَبِي هُرَيْرَةَ، قَالَ: «كَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْخَصَاةِ، وَعَنْ بَيْعِ الْغُرَرِ»¹⁶

¹¹ Abu Abdurrahman Ahmad bin Syu'aib bin Ali bin Ali al-Khurasani an-Nasai, *Al-Mujtabâ Mi as-Sunan=Sunan Ash-Sughra Li an-Nasâ'i* (Halb: Maktab al-Mathbu'ah al-Islâmiah: 1986). Lihat juga Sulaiman bin Ahmad bin Ayyub bin Mathîr al-Lakhmi asy-Syâmî Abu al-Qâsim ath-Thabrânî, *Al-Mu'jam Al-Kabîr* (Kairo: Maktabah Ibn Taimiah: 1994), Jilid 12, h. 257.

¹² Muslim bin al-Hajjaj Abu al-Hasan al-Qusyairi an-Naisyaburi, *Al-Musnad as-Shahih Al-Mukhtâsar Bi Naql Al-Adl 'an Al-Adl Ilâ Rasulillah Saw* (Beirut: Dâr al-Ihya at-Turats al-Arabi: tth), Jilid 4, h. 1999.

¹³ Ibid., Jilid 1, h. 103.

¹⁴ Ahmad bin al-Husain bin Ali bin Musa al-Kurasani Abu Bakar al-Baihaqi, *Sunan Al-Kubra* (Beirut: Dâr al-Kutub al-Ilmiyah: 2003), Jilid 17, h. 22.

¹⁵ Abu Abdillah Muhammad bin Ismail al-Bukhari, *Al-Jamiu as-Shohih Al-Musnad Bin Hadis Rasulallah Sollallahu 'Alaihi Wa Sallam Wa Sunanuhu Wa Ayyaamuhu*, vol. 4 (Mesir: al-Mathbi'ah as-Salafiah wa Maktabuha, 1400 H), Jilid 1, h. 6.

¹⁶ an-Naisyaburi, Jilid 3, h. 1153. Kata gharar berarti hayalan atau penipuan, tetapi juga berarti risiko. Dalam keuangan biasanya diterjemahkan tidak menentu, spekulasi atau risiko. Keuntungan yang terjadi disebabkan kesempatan dengan penyebab tak dapat ditentukan, adalah dilarang. Karena mengandung risiko yang terlampaui besar dan tidak pasti. Gharar dilarang dalam Islam bukan untuk menjauhi risiko. Tentu saja risiko yang sifatnya komersil disetujui dan didukung dalam Islam. Setiap jenis kontrak yang bersifat open-ended mengandung unsur gharar. Menurut Imam Ibnu Taimiyah, gharar adalah Gharar adalah konsekuensi yang tidak diketahui (*the unknown consequences*), lihat Taqiu ad-Diin Abu al-Abbas Ahmad bin Abd al-Halim bin Taimiah al-Harani, *Maj'mu Al-Fatawa* (Madinah: Maj'ma al-Maliki al-Fahd, 1995), Jilid 29, h. 22. (versi maktabah syamilah). Sedangkan menurut al-Jurjani gharar diartikannya sebagai:

ما يكون مجهول العاقبة لا يدري أ يكون أم لا

Artinya: Gharar adalah sesuatu yang tidak diketahui hasilnya, apakah dapat terealisasi atau tidak?" Lihat as-Syarif 'Ali bin Muhammad al-Jurjâni, *Kitâb Al-Ta'rifât* (Jakarta: Dâr al-Kutub al-Islâmiyyah: 2012), h. 144. Demikian sedikit nukilan penulis dari banyak definisi gharar yang diungkapkan oleh para ahli fikih. Menurut penulis dua pendapat ini telah mewakili banyak pendapat yang dikemukakan oleh para ahli fikih tersebut.

¹⁶ Muslim bin al-Hajjaj Abu al-Hasan al-Qusyairi an-Naisyaburi, *al-Musnad al-Shohih bi naqli al-Adl an al-Adl ila Rasulillah saw.*, tahqiq Muhammad Fuad Abd al-Baqi, (Beirut: Dar al-Ihya al-Turats al-Arabi, tth), Jilid 3, h. 1153. Hadis Nomor 1513 (versi Makatabah as-Syamilah Isdar 3, mungkin saja berbeda dengan versi cetakan maupun penerbit yang lain). Menurut versi Islamweb.net hadis ini memiliki nomor 2791.

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ: أَنَّ رَجُلًا أَتَى النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَتَقَضَّاهُ، فَأَعْلَطَ فَهَمَّ بِهِ أَصْحَابُهُ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «دَعُوهُ، فَإِنَّ لِصَاحِبِ الْحَقِّ مَقَالًا»، ثُمَّ قَالَ: «أَعْطُوهُ سِنًا مِثْلَ سِنِّهِ»، قَالُوا: يَا رَسُولَ اللَّهِ، إِلَّا أَمْتَلَّ مِنْ سِنِّهِ، فَقَالَ: «أَعْطُوهُ، فَإِنَّ مِنْ خَيْرِكُمْ أَحْسَنَكُمْ قَضَاءً»¹⁷
حَدَّثَنِي يَحْيَى، عَنْ مَالِكٍ، عَنْ عَمْرِو بْنِ يَحْيَى الْمَازِنِيِّ، عَنْ أَبِيهِ، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «لَا ضَرَرَ وَلَا ضِرَارَ»¹⁸

Hadiths quoted by DSN-MUI Even though there is nothing that clearly and specifically mentions sharia insurance transactions, there is an expression that uses the phrase *khabar* meaning God willing. There is also a hadith that explicitly uses the expression *insyai*, so that it is understood that there is an obligation to carry out transactions correctly.

5. Principles of Islamic Jurisprudence

الأصل في المعاملات الإباحة حتى يدل الدليل على التحريم

الضرر يدفع بقدر الإمكان²⁰

الضرر يُزال²¹

¹⁷ Muhammad bin Ismail Abu Abdullah al-Bukhari, *Al-Jami'u Al-Shahih Al-Mukhtashar Min Umûri Rasulallah Saw., Wa Sunanihi Wa Ayyamihi = Shahih Al-Bukhari* (Beirut: Dâr Thuqu an-Najâh: 1422), Jilid 3, h. 99. Lihat juga Abu Abdillah Ahmad bin Muhammad bin Hanbal bin Hilal bin 'Asad asy-Syaibânî, *Musnad Al-Imam Ahmad Bin Hanbal* (Halb: Muasasah ar-Risâlah: 2001), Jilid 15, h. 52.

¹⁸ Ibnu Majah Abu Abdullah Muhammad bin Yazid al-Qazwaini, *Sunan Ibnu Majah* (Beirut: Dâr al-Ihya al-Kutub al-Arabiah: tth), Jilid 2, h. 784. Lihat juga Malik bin Anas bin Malik bin Amir al-Ashabi al-Madani, *Muwatha' Al-Imam Al-Malik* (Beirut: Dar Ihya at-Turats al-Arabi, 1985), Jilid 2, h. 745.

¹⁹ Menurut DSN-MUI, kaidah ini terdapat dalam kitab al-Asybah li as-Suyuthi, namun penulis tidak menemukannya, yang penulis temukan adalah kaidah yang berbunyi: *الأصل في الأشياء الإباحة حتى يدل الدليل على التحريم*. Muhammad Hasan Abd al-Ghafar, *Al-Qawaid Al-Fiqhiyah Baina Al-Asholati Wa at-Taujih* (Mekkah: ttp, tth), jilid 6, h. 6. Penulis belum menemukan kaidah ini pada kitab-kitab ushul fikih maupun qawaid fikih, namun ada beberapa yang mirip. Seperti:

الأصل في المعاملات الحل والإباحة

Lihat Abu Abdillah Ahmad bin Umar bin Masaid al-Hazimi, *Syarh Nizham Al-Waraqat* (ttp: tp, tth), Jilid 12, h. 12. Selanjutnya bahwa penulis berasumsi bahwa tambahan dari kaidah ini, adalah adanya hadis Nabi yang berbunyi:

عَنْ أَبِي ثَعْلَبَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ: " إِنَّ اللَّهَ فَرَضَ فَرَائِضَ، فَلَا تُضَيِّعُوهَا , وَحَدَّ حُدُودًا، فَلَا تَعْتَدُوهَا، وَنَهَى عَنْ أَشْيَاءَ، فَلَا تَنْتَهِكُوهَا، وَسَكَتَ عَنْ أَشْيَاءَ رُخْصَةً لَكُمْ , لَيْسَ بِسَيِّئَانِ، فَلَا تَبْخَثُوا عَنْهَا

Lihat al-Baihaqi, Jilid 10, h. 21. Lihat juga Sulaiman bin Ahmad bin Ayyub bin Mathiir al-Lakhmi asy-Syami Abu al-Qasim ath-Thabrani, *Al-Mu'jam Al-Ausath* (Mesir: Dâr al-Haramain: tth), Jilid 7, h. 265.

عَنْ أَبِي عُلْمَانَ، عَنْ سَلْمَانَ قَالَ: سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنِ السَّمَنِ وَالْجُبْنِ وَالْفِرَاءِ، فَقَالَ: «الْحَلَالُ مَا أَحَلَّ اللَّهُ فِي كِتَابِهِ، وَالْحَرَامُ مَا حَرَّمَ اللَّهُ فِي كِتَابِهِ، وَمَا سَكَتَ عَنْهُ فَهُوَ مِمَّا عَفَا عَنْهُ»

Muhammad bin Isa bin Surah bin Musa ad-Dhahak at-Tirmidzi, *Al-Jami'al-Shahih Wa Huwa Sunan Tirmidzi* (Kairo: Darul Hadits, 2005), Jilid 4, h. 220. Lihat juga Sulaiman bin Ahmad bin Ayyub bin Mathiir al-Lakhmi asy-Syâmî Abu al-Qasim ath-Thabrani, *Musnad Asy-Syamiyyiin* (Beirut: Muasasah ar-Risâlah: 1984), Jilid 3, h. 203.

²⁰ Muhammad Shidqi al-Burnu, *Al-Wajiz Li Idhah Al-Qawâid Al-Fiqhiyyat Al-Kuliyyât* (Riyadh: Muassasah al-Risalah: 1983), Jilid 1, h. 256. Lihat juga Musthafa Ahmad al-Zarqa, *Syarh Al-Qawaid Al-Fiqiyah* (Damaskus: Dar al-Qalam: 1989), Jilid 1, h. 207.

²¹ Al-Imâm al-Jalalu ad-Diin Abd a-Rahman as-Suyuthi, *Al-Asybah Wa Al-Nazhâ'ir Fî Qawâ'id Wa Furû' Fiqh Al-Syar'iyah* (Beirut: Dâr al-Kutub al-Ilmiyyah: 1998), Jilid 1, h. 7.

6. Opinions of scholars. In addition to citing verses of the Qur'an, the Sunnah, the rules of Islamic jurisprudence, DSN-MUI also took the opinions of contemporary scholars in his fatwa.²²

The principle in financing and financial investment activities in sharia insurance is the various business ventures carried out by capital owners to entrepreneurs (issuers).) aims to empower business owners to the maximum in carrying out their business activities where investors hope to get certain benefits/advantages. The principles and foundations of sharia investment that need to be considered by sharia insurance business actors are to have the principle that the company as the trustee (mudharib) which is entrusted by the fund owner (shahibul maal)) must carry out investment activities after obtaining sharia approval from the sharia supervisory board against funds that have been successfully collected from participant premiums.

When conventional insurance has been declared haram by ulama, of course as an effective, intelligent and sharia-compliant alternative and solution, we should follow an official insurance program using the sharia system. Because sharia insurance has been studied in depth by scholars, both at the national and international level, and has been issued a fatwa on its halal status.

Although the halal rules on sharia insurance certainly do not rule out the possibility of criticism from other scholars or sharia observers in general. So we as lay people are sometimes surprised when we see this phenomenon of different views. In fact, we should understand that in the world of sharia science, differences of opinion are something that is common and certain to happen.

So if there are certain parties, such as the National Sharia Council (DSN) MUI, that halalize a product, of course the product is halal, at least according to the halal one. However, it must also be understood that what has been halal by the DSN above, but there are still gaps that are open to debate. Among those gaps are:

1. Difference of Views Due to Khilafiyah

We must know that every law that is issued in the present era, especially concerning contemporary muamalat chapters, is almost certain to always have an area of khilafiyah. Since the beginning, scholars have had different views on the two contracts which are different in

²²View fatwa-DSN-MUI fatwa related to insurance. As in the Insurance article Hajj, on p. 4-5, which takes the opinion of Wahbah az-Zuhaili, see on Wahbah az-Zuhaili, *Al-Fiqh Al-Islâmi Wa Adillatuh* (Beirut: Dâr al-Fikr: 1989), Volume 4, p. 3416. Also Husain Hamid Hasan's opinion, see Husain Hamid Hasan, *Hukm as-Syarii'ah Al-Islamiyah Fi 'Uqud Al-Ta'miin* (Beirut: Dar al-I'tisham, 1976). Abu Muhammad 'Abd al-Malik Ibn Hisham, *Al-Sirah Al-Nabawiyah* (Qahirah: Dar al-Hadis, 2004), Volume 1, p. 141. Muhammad Abd al-Mun'im Abu Zaid, *Nahwa Tathwir Al-Mudharabah* (al-Qahirah: Maktabah al-Ma'had al-'Alami li al-Fikr al-Islami, 2000), p. 411. Ibn Qudamah, *Al-Mughni* (Cairo: Dar al-Hadis, 2004), Volume 6, p. 348. Wahbah az-Zuhaili, *Al-Muamalat Al-Maliyyah Al-Muashirah* (Dimasyq: Dar al-Fikr, 2002), p. 107. Muhammad bin Ali bin Muhammad bin Abdullah ash-Syaukani al-Yamani, *Nail Al-Authar* (Egypt: Dar al-Hadis, 1993), Volume 4, p. 527.

one transaction, some allow and some forbid. In this case, the DSN school of thought seems to be inclined towards the one that allows. And almost all modern contract products according to the DSN version are based on the permissibility of multiple contracts in one transaction.

However, it should be noted that on the other side, there are still scholars who forbid two contracts or more in one transaction. And not a few national or international fuqaha still have different views on what is permitted by the DSN.

Even within the DSN itself before the final decision was made, there was still a possibility of differences of opinion among its members. What was decided by the DSN was not suddenly a unanimous decision made in five minutes. Before getting there, there was a heated and long debate, where if examined one by one, there were still many figures in it who had some objections.

But because there must be one face in the fatwa, finally the gavel was struck, although there were still extreme internal differences of opinion. Only we as lay people and outsiders, of course were not given any leaks of DSN's internal khilafiyah.

So if there is an opinion that still forbids it, we can understand and accept it. It is a common and normal thing, there is no need to be surprised by the difference in legal istimbath.

More or less the case is similar to the status of contemporary zakat written by today's scholars. In the past, the fuqaha never talked about professional zakat, corporate zakat, zakat on buying and selling transactions and the like. Currently, these zakats suddenly seem like an obligation that has come down from the sky like the revelation. In fact, it is only a product of the ijtiḥad of a handful of people, where not all parties necessarily agree with its existence.

Even though Al-Imam Asy-Shafi'i had the status of a mujatahid mutlaq mustaqil, above him there was no longer a higher hierarchy of mujtahids. Because he is already the tallest. Even so, he did not force his opinion and still opened his mouth wide to anyone to disagree with him.

2. Mismatch of Theory with Practice²³

On the other hand, the case that occurred was not due to a difference of opinion in fiqh, but rather a 'deviation' between the fatwas.DSN-MUI with direct practice in the field. For example, DSN-MUI promulgates a halal fatwa on the condition that it is like this and like this.

²³The theory of the asynchronous relationship between theory and practice can be studied through Joseph Schacht, *An Introduction to Islamic Law Translated from an Introduction to Islamic Law*, trans. Joko Supomo (Yogyakarta: Imperium, 2012). See also Schacht, *An Introduction...* Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009). Wael B. Hallaq, *Sharia Theory Practice Transformation*, 3 ed. (New York: Cambridge University Press, 2012). Wael B. Hallaq, *History of Islamic Legal Theory* From the book *a History of Islamic Legal Theory* trans. Abdul Haris bin Wahid E. Kusnadiningrat (Jakarta: PT RajaGrafindo Persada, 2001).

It turns out that in the field only halal fatwas are used, while the conditions are not fulfilled. So there was a fatal case of twisting the fatwa.

And unfortunately, there is no professional and independent monitoring device for sharia practices, and one that knows in detail the forms of violations in practice.

Although every form of product is required to have a Sharia Supervisory Board (DPS), unfortunately it is still not optimal in its implementation. Because often the professionalism and independence of the DPS itself are still questionable. So do not be surprised if many people still doubt the halalness of various sharia financial products. Even in the case of BPJS itself, scholars have different opinions²⁴

Criticism of Insurance Sharia

Some of the criticisms that can be used for comparison are those conveyed by KH. M. Shiddiq Al-Jawi entitled *The Non-Shariah of Insurance Sharia*.²⁵ According to him, there are at least 3 (three) contracts in Sharia Insurance: First, the grant agreement (*tabarru'*) among fellow policyholders (insurance participants) where participants provide grants that will be used to help other participants who are affected by disaster. Second, the *mudharabah / musyarakah* contract, where participants act as *shahibul mal* (policy holders), while the company acts as *mudharib* (manager). The contract is in the form of *mudharabah*, if the insurance company does not share capital. If the insurance company shares capital, the contract is *musyarakah*. Third, the *ijarah* contract (*wakalah bil ujah*), which is a *wakalah* contract (granting power of attorney) from the participant to the insurance company to manage the participant's funds by obtaining compensation (*ujrah/fee*).²⁶

Wakalah Agreement bil ujah is found in insurance which contains an element of savings) and *tabarru* elements' or which does not contain savings elements (non-saving).²⁷

²⁴The existence of BPJS initially did not give rise to differences of opinion and confusion regarding its permissibility until a fatwa was issued from the Indonesian Ulema Council (MUI) dated June 9, 2015 M. (21 Sya'ban 1436 H.) which questions the validity and conformity of BPJS Kesehatan practices with Islamic law. At least, there are three formulations of the problem that underlie the issuance of the fatwa: starting from the conformity of the concept and practice of BPJS Kesehatan with laws and regulations and sharia principles; what alternative solutions can replace the existence of BPJS Kesehatan if it is proven not to meet the qualifications of sharia compliant; and the motive for determining a 2% fine for late payment of participant contributions, doesn't that conflict with sharia? See the Decision of the *Masail Fiqhiyyah Mu'ashirah* (Contemporary Fiqh Problems) of the Indonesian Fatwa Commission *Ijtima' Ulama V Year 2015* concerning the Guidelines for National Health Insurance and BPJS Kesehatan, 56-61. In the fatwa itself, the word "haram" mentioned by the MUI is not found at all, as was then strongly blown by the media (including social media) about the prohibition of BPJS in the MUI fatwa, so that it more or less threatens the understanding, harmony, and harmony of religious communities which in turn has implications for the emergence of social rifts in society. The MUI fatwa on BPJS Health focuses more on health insurance which is still managed using a conventional insurance scheme..

²⁵See the discussion in KH. M. Shiddiq Al-Jawi, "The Non-Shariah of Sharia Insurance," <https://anaksholeh.net>, accessed March 21, 2018.

²⁶Compare with Tarmidhi, *Haram Treasure*...., p. 250.

²⁷ Andri Soemitra, *Islamic Banks & Financial Institutions* (Prenada Media, 2017), pp. 250-51.

1. General Practices In Insurance Sharia Non Saving (Without Savings)

In non-saving sharia insuranceHere, all premiums paid by insurance participants become tabarru funds.' (grant). It is claimed that there are no funds for investment in the contractThis. Management of the tabarru' funds and takaful activities(mutual liability among participants) is then run by the insurance company. The insurance company gets a fee from the management of the tabarru' fund based on the wakalah bil ujah contract. Meanwhile, participants will receive insurance funds from the tabarru' fund according to existing provisions.

So in non-saving insuranceThere are 2 (two) contracts, namely: First, the grant agreement (tabarru') between fellow participants under the management of the company. Second, the ijarah agreement (wakalah bil ujah) between all participants and the company.

2. General Insurance Practice Sharia With Savings (With Savings)

As for sharia insurance with saving, the premiums paid by insurance participants to the insurance company are divided into two: (1) funds for tabarru', and (2) funds for investment (usually larger than tabarru' funds). These tabarru' funds are then managed by the insurance company with a contractijarah (wakalah bil ujah). The insurance company gets a fee from the wakalah bil ujah contract. Participants will receive insurance funds from the tabarru' funds according to existing provisions. Meanwhile, investment funds are managed by the insurance company with a mudharabah/musyarakah contract, and then the insurance company gets a share of the profits from the investment contract.

So, in insurance with savingsthere are 3 (three) contracts, namely: First, the grant agreement (tabarru') between fellow participants under the management of the company. Second, the ijarah contract (wakalah bil ujah) between all participants and the company. Third, the mudharabah / musyarakah contract between all participants and the company. It should be noted here that in the mudharabah / musyarakah contract, the insurance participant acts as shahibul mal; the company as mudharib, or at the same time shahibul mal. Why is it said so? Because the company does not directly manage the invested funds by doing real business (producing goods or services), but rather re-insurance, or investing funds in banks. The profits obtained from this mudharabah/musyarakah are then divided according to the agreement, between the insurance participants and the insurance company. Part of this profit is set aside for tabarru' funds.

InsuranceSharia as explained in fact above, in our opinion is a contractwhich is invalid (batil) and haram, because there are at least 6 (six) deviations from sharia (mukhalafat syar'iyah) as follows: First, because the evidence used is not appropriate, especially the hadith of Ash'ariyin and the hadith

of Abu Ubaidah bin Jarrah RA above. In both hadiths, the dangerous event occurs first, then the process of ta'awun (mutual assistance) occurs. Meanwhile, in sharia insurance, the ta'awun contract has been made first, even though the dangerous event has not occurred at all. According to Shaykh 'Atha' Abu Rasyta, using the hadith of Ash'ariyin as the basis for sharia insurance is a wrong istidlal. Second, because there is a combination of two contracts into one contract (multi-contract). Whereas multi-contracts have been prohibited in sharia.²⁸

Third, because it does not comply with the agreement dhaman (guarantee/insurance) in Islam. There are discrepancies in the following 3 aspects: (1) In terms of the character of the contract. The character of the dhaman contract is a tabarru contract.' (aimed at charity/mutual assistance), not a tijarah contract (aimed at commercial). While Sharia insurance is essentially not a tabarru' contract, but a tijarah contract, because participants expect to receive claims (insurance funds) and profits in mudharabah. So the statement that Insurance Sharia is a ta'awun contract and not a mu'awadhah / tabaduli (exchange) contract, which is not appropriate and does not correspond to the facts. (2) The discrepancy with the dhaman contract can also be seen in terms of the discrepancy in the number of parties in the contract.²⁹

Meanwhile in Insurance Sharia, there are only two parties, not three parties. The two parties are: (1), the party that guarantees/insurers (dhamin), namely all participants; (2) the party that receives the guarantee/insurance (madhmun lahu), namely all participants. So in sharia insurance there is no third party, namely the guaranteed/insured party (madhmun anhu).

Third the third discrepancy with the contract dhaman, can be seen from the perspective of dhammu dzimatin ila dzimmatin, namely the merging of one party's responsibilities with the responsibilities of another party.³⁰

²⁸It was narrated by Ibn Mas'ud RA that the Prophet SAW had prohibited two agreements in one agreement." (HR Ahmad, authentic hadith). What is meant by "two agreements in one agreement (shafqataini fi shafqah wahidah)" is the existence of two contracts in one contract (wujudu 'aqdaini fi aqdin wahidin). Facts show that in sharia insurance without saving, there is a merger of the grant agreement with the ijarah agreement. While in sharia insurance with saving, there is a merger of the grant agreement, the ijarah agreement, and the mudharabah agreement.

²⁹On the contract dhaman (guarantee/insurance), there are 3 parties, namely: (1) the guarantor/guarantor (dhamin), (2) the guaranteed/insured (madhmun anhu), and (3) the one who receives the guarantee/insurance (madhmun lahu). The existence of these three parties is based on the hadith of Abu Qatadah RA., that a corpse was brought to the Prophet SAW. so that he could pray for it. Then he asked, "Did he have any debt?" The Companions said, "Yes, two dinars." He said, "Pray for your friend!" Then Abu Qatadah said, "Both (the two dinars) are my obligation, O Messenger of Allah." The Prophet SAW then prayed for him. (HR Ahmad, Abu Dawud, an-Nasa'i and al-Hakim).

In this hadith there are three parties; First, the party who guarantees/guaranteed (dhamin) is Abu Qatadah RA. Second, the guaranteed/insured party (madhmun anhu) is the corpse. Third, the party who gets the guarantee/dependant (madhmun lahu) is the person who gives the debt to the corpse.

³⁰In the contract dhaman has occurred dhammu dzimatin ila dzimmatin, as seen in the hadith of Abu Qatadah RA., above, that Abu Watadah has combined the dzimmah (liability) of the corpse, to the liability of Abu Qatadah RA., himself. So the liability that must be fulfilled by the corpse, is transferred to the liability of Abu Qatadah RA. As for sharia insurance, dhammu dzimatin (combination of liabilities) does not occur and does

Fourth, because of the contract grant (tabarru') in Insurance Sharia is not in accordance with the understanding of the grant itself. Because a grant in the understanding of sharia is the granting of ownership without compensation/replacement (tamliik bilaa 'iwadh).³¹

While in Insurance Sharia, insurance participants provide grant funds, but expect to receive compensation ('iwadh/ta'widh), not that they do not expect. So actually, Sharia Insurance is not rightsaid to be a contract grants, but must be honestly referred to as investment contracts that expect profits.

Fifth, because of the grant (tabarru') given to participants in insurance Sharia, will return to the participant (if there is a risk of an event covered, for example fire) plus grants from other participants. In our opinion, this is haram, because withdrawing a grant that has been given is haram.

The words of the Prophet SAW:

عَنْ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْعَائِدُ فِي هَبْتِهِ كَالْكَلْبِ يَلْعَقُ بِلُغْمِهِ فِي فَيْئِهِ»³²

Meaning: "A person who takes back his gift is like a dog who licks back his vomit." (HR Bukhari, Muslim, Tirmidhi, Nasa'i, Ibn Majah, and Ahmad).

Sixth, because there has been gharar (uncertainty) in insurance Sharia. Because participants do not know clearly whether the insurance company is really acting as a manager, or as a manager and also as a financier when the company reinvests premium funds to third parties, and so on. Participants also do not know clearly where the insurance company will invest the existing funds, whether to a bank, a conventional bank or a sharia bank, or to re-insure to the next insurance company, and so on. The existence of this gharar means confirming the prohibition of Sharia Insurance that exist today.

The author concludes that the basis for Muhammad Siddiq al-Jawi's criticism and prohibition of sharia insurance practices is because sharia insurance carries out multiple contracts in its transactions. Here the undeniable khilafiyah, that scholars have long discussed about multi-akad and they have different opinions in responding to it. Some judge it permissible and some judge it haram.³³

In determining the fatwa, DSN-MUI cannot be separated from the opinions of the imams of the School or opinions that have been discussed by their followers. Including in the determination of several fatwas related to this sharia insurance. The issue of hybrid contracts which are considered

not exist. Because when an insurance participant pays a premium, he does not have any liability to anyone, which he must fulfill. So, sharia insurance is not in accordance with the dhaman contract in Islam.

³¹ al-Yamani, p. 1169.

³² al-Bukhari, Sohih al-Bukhari,....Volume 3, p. 158. See also an-Naisyaburi, Sohih Muslim..., Volume 3, p. 1241.

³³ Please study further Abdullâh bin Muhammad bin Abdullâh al-'Imrâni, Al-'Uqûd Al-Mâliyah Al-Murakkabah: Dirâsah Fiqhiyyah Ta'shîliyah Wa Tathbîqiyyah (Riyadh: Dâr Kunûz Eshbelia li al-Nasyr wa al-Tauzî': 2006). Also Yosi Aryanti, "Multi Contracts (Al-Uqud Al-Murakkabah) in Islamic Banking from the Perspective of Fiqh Muamalah," JURIS (Islamic Scientific Journal) 15, no. 2 (2017). Nazîh Hammâd, Al-'Uqûd Al-Murakkabah Fî Al-Fiqh Al-Islâmî (Damascus: Dâr al-Qalam: 2005). Atep Setiadi, "Implementation of the Concept of Al-'Uqûd Al-Murakkabah on Sharia Financial Institutions," Journal of Economic Studies 1, no. 1 (2017). See also Muhammad Nafi, Hybrid Contract in Islamic Banking from the Perspective of Maqashid Syariah (Yogyakarta: Diandra Kreatif, 2017).

haram by some Islamic thinkers certainly does not deny the opinion that allows it. However, in this case the author follows the opinion that allows hybrid contracts, so in his conclusion that the law of sharia insurance, as long as it implements the provisions of sharia as regulated by the DSN-MUI fatwa and other regulations relating to sharia insurance, then the law is permissible and halal. Until now, sharia insurance companies continue to grow.³⁴

CONCLUSION

Insurance Sharia is a form of solution to conventional insurance. Sharia insurance, in addition to being obliged to comply with state legal regulations regarding conventional insurance, is also obliged to comply with sharia regulations that have been regulated in the fatwa.DSN. There is criticism from parties who state that sharia insurance is haram because it involves multiple contracts.in the transaction, it must also be addressed as a difference in understanding of jurisprudence. Multiple contracts have been discussed by previous scholars, and their jurisprudential opinions are divided into two, opinions which are forbid and opinions which are permissible. If you adhere to the opinion that allows multiple contracts, sharia insurance that carries out multiple contracts is also halal.

³⁴<http://www.ojk.go.id/Files/statistik/26102015daftarperusahaanasuransisyariah.pdf>

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