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Product Motive in Insurance WAQF Transaction: Is it Allowed?

Fauzia Ulirrahmi, Universitas Islam Negeri Surakarta, Indonesia

Haq Muhammad Hamka Habibie, Universitas Islam Negeri Surakarta, Indonesia

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ABSTRACT

One of the innovations on waqf is insurance waqf. This paper studies on the fully product motive (the type of insurance waqf with full financing when waqf is used as the main purpose and intention in conducting transactions). Due to the requirement that waqf property must remain perpetual, the insurance waqf contract in relation to the fully product can be considered as vague. Fully product is when the waqif makes waqf the core goal in carrying out insurance. These consequences arise if one day the insurance waqf participant cannot fulfill his obligation to pay the premium so that the dependent status becomes lapsed. In addition, there are several shariah provisions that need to be studied related to the fully product motive. This research will examine the fully product motive in insurance waqf in Indonesia and its conformity with shariah principles. The findings show that the motive for the fully product is not in accordance with several sharia provisions because there is the potentials for waqf assets to be lost if the waqif cannot fulfil the obligation to pay the premium properly and in insurance waqf, the waqif does not have the authority to freely determine the contents of the contract agreement because the insurance agreement is attached to the insurer's requirements (adhesion. Moreover, the investment benefits that are distributed must not violate wills in Islamic inheritance law i.e distribution of not more than 1/3 except with the approval of the heirs. It is recommended that if an insurance participant wants to participate in an insurance waqf activity, his or her intention to have insurance must be placed at the beginning to fulfill the principle of insurable interest which must always be prioritized for all types of insurance. In addition, any endowment of insurance or investment benefits must be Shariah compliant.



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Corresponding author's email address: fauzia.ulirrahmi@iain-surakarta.ac.id

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Introduction

As a country with a Muslim majority in the world, Indonesian interest in shariah insurance is very large. This is in accordance with data from the Financial Services Authority (OJK) which states

that Sharia Life Insurance in 2021 has reached 7 companies with a full shariah system and 23 conventional insurance companies that have shariah units. Meanwhile, Sharia General Insurance now has 5 units with a full shariah system and 24 shariah units. Furthermore, in December 2020, the growth rate of shariah insurance in Indonesia increased by 5% with gross premiums reaching 15.37 trillion. Whereas in the previous year, November 2019, the gross premium achievement of sharia insurance only reached 14.45 trillion. This means that the gross premium has increased by 5%.

The development of sharia insurance in Indonesia is very reasonable, given the level of awareness of the Muslim community about risk management and their better financial literacy. Moreover, the risk in Islamic insurance is lower than conventional insurance. In addition, state legitimacy towards the halal status of shariah products through the DSN-MUI Fatwa is very important in the growth of this industry.

Islamic insurance companies have gone through many challenges to reach that point of growth. Eliminating the paradigm of society that still equates sharia insurance with conventional is not easy. Several innovations were carried out in order to expand the market share of Islamic insurance. One of them is the emergence of the insurance waqf movement as a stimulant for some Muslim communities which have been difficult to 'touch'. Insurance waqf is a new innovation in the world of insurance and waqf in Indonesia. The potential for this waqf is predicted to be large and it can even become a trend in the Muslim community. The trend of waqf insurance can be seen from the number of sharia insurance companies that open waqf features. This proves that waqf can be an accelerator for other sharia economic activities. And on the other hand, the existence of insurance waqf is also very effective in optimizing the potential of waqf and increasing waqf fund. The insurance waqf movement requires a clear legal basis because it will combine two products in one contract, which each has a different and opposite character and concept. In a very basic concept, waqf and insurance seem to have no common ground. Insurance is a form of risk mitigation against uncertainty about something that will happen in the future. That is, there is the principle of insurable interest as the basis for contracting interests in insurance agreements where this principle is an absolute requirement as the basis for insurance contracts and its absence will cause the insurance contract to be illegal or null and void. Waqf is a voluntary activity that does not base its activities on risk. Whereas in insurance there is a contract of adhesion provision which positions the insurance participant not to bid on the contents of the contract. This is very contrary to the principle of philanthropy.

The disharmony between waqf and insurance can also be seen from the fully product motive (when waqif makes waqf the core goal in carrying out insurance). In addition to the inconsistent principle of insurable interest and contract of adhesion, problems will also arise in the event of a default, when the insurance participant can no longer fulfill his obligations in paying the policy so that the agreement can be canceled by law and the policy will change status to lapsed.

As a result, the protection will be stopped and the premium paid is non-refundable. In this case, insurance participants whose main purpose is waqf will lose their capital because the premiums and benefits of the funds issued have been lost. This study examines the suitability of the fully product motive in insurance waqf in terms of the DSN-MUI fatwa as the basis for this activities in Indonesia to explore the limitations in it contracts so that they remain within the appropriate legal corridor.

Based on this background, this study will also examine the fully product motive in insurance waqf in Indonesia and its conformity with shariah principles through a literature study on insurance waqf in Indonesia and explore the previous research related to the same theme.

Part I – Basic Principles of Sharia Insurance in Indonesia

Insurance is a form of protection that is closely related to profit and loss. Khairandy said that insurance can bring the possible profit but can also cause losses. According to Article 246 of the Commercial Code (KUHD) insurance or coverage is an agreement where an insurer can enjoy a premium that binds himself to the insured to free him from losses. From this explanation, it can be concluded that insurance is related to the insurer and the insured, uncertainty, risk transfer, premiums, and compensation.

In Islamic law, uncertainty and risk speculation are included in *gharar* and *maysir*. *Gharar* is a contract that contains elements of profit and loss (speculation). If one party gains, the other party suffers a loss. While *maysir* is a form of transfer of property or goods without going through the contract path that has been determined by sharia. Tarmizi said that *maysir* is forbidden because it contains elements of gambling. This concept is corrected in the shariah insurance system by including the concept of *ta'awun* (mutual assistance) and *tabarru'* (voluntary contribution). Insurance in Islam is called *at-ta-min* or *takaful* which means mutual guarantee or mutual responsibility. *Takaful* based on this understanding is based on three principles, there are the principle of mutual responsibility, the principle of mutual assistance and cooperation, and the principle of mutual protection.

Furthermore, Ahmad Azhar Basir argues that *takaful* is based on two main concepts. The first is *takaful* which bears the risk of each other among its participants, in which the principle of mutual responsibility, cooperation, or assistance are enforced in the form of *tabarru'* and the second is adhering to the concept of *mudharabah* which is the concept of profit sharing from the profits obtained from the development of insurance funds from participant. The insurance company acts as the recipient of the trust from the participants to carry out mutual agreements for the risks suffered by the participants. With this principle, the elements of *gharar*, *maysir* and *usury/riba* (interest at unreasonable high rates) will disappear by themselves.

Although conventional insurance activities have been internalized with Islamic values into the concept of *takaful*, there are some basic principles and characteristics in insurance that cannot be abandoned or must be fulfilled by both conventional and sharia insurance companies. The basic principles in insurance include:

- a. Good Faith Principle or the existence of good faith or Utmost Good Faith or the principle of perfect honesty. The element of mutual trust between the insured and the insurer becomes the most important capital so that both will provide each other with correct and honest information. If one day there is a deviation from the actual reality, the insurer has the right to cancel the insurance.
- b. Insurable Interest or interests that can be insured. Each party entering into an insurance agreement must have an insurable interest. The point is that the insured must have involvement with the consequences of an event that is not certain to occur and the person concerned can suffer losses as a result of the event. This interest becomes very essential because its absence can invalidate the obligations of the insurer. This is stated in Article 250 of the KUHD: "If a person who insures for himself, or someone, for whose dependents is held by another person, at the time the insurance is held does not have an interest in the object being insured, then the insurer is not obliged to compensate for the loss." So, the interest in insurance is absolute.
- c. Indemnity principal or the principle of balance. Through the insurance agreement the insurer provides a protection for possible economic losses that will be suffered by the

insured. The insurer provides protection in the form of the ability to provide compensation for the insured who suffers a loss due to an event or an uncertain event. Khairandy further explained that the compensation for losses should not result in the insured's financial position being higher than before the loss occurred.

- d. Subrogation principle or the principle of subrogation for the insurer. This principle involves a third party in terms of compensation when the third party commits an act that harms the insured. With regard to the principle of subrogation, Article 284 of the KUHD explains "The insurer who has paid for the loss of an insured object gets all the rights that the insured has against a third person regarding the loss and the insured is responsible for any actions that may harm the rights of the insurer against those three people."
- e. Contribution principle or the principal of contribution is if an insured covers insurance for the same object and for the same risk to more than one insurer in different policies, it can cause double insurance. If this happens, each insurer according to the amount for which they signed the policy, bears only the actual price of the loss suffered by the insured.

While some of the inherent characteristics of the insurance agreement include:

- a. That the insurance agreement is aleatory in which the performance of the insurer still has to depend on an uncertain event, while the achievement of the insured is certain.
- b. The insurance agreement is a conditional agreement in which the insurer's performance will only be carried out if the conditions specified in the agreement have been fulfilled
- c. The insurance agreement is unilateral or one-sided in which only the insurer makes a promise while the insured does not make any promises
- d. An insurance agreement is an agreement attached to the terms of the insurer (adhesion) in which almost all the terms and contents of the agreement as outlined in the policy have been determined unilaterally by the insurer.
- e. Agreement with perfect good faith or free from bad intentions

Having the same basis and nature of the agreement, Islamic insurance provides an explanatory boundary as the difference between the two. The difference lies in risk management (sharing of risk), more transparent fund management, a system of agreements with *tabarru'* (voluntary contribution) contracts, joint ownership of funds and profit-sharing mechanisms.

Regulations regarding Shariah Insurance are still based on the Insurance Law in general, namely Law No. 40 of 2014. In its implementation, Muslims usually refer to the DSN-MUI Fatwa No. 21 of 2001 concerning Sharia Insurance. In the fatwa, the types of sharia insurance are divided into two. The first is life insurance and the second is loss insurance. While the contracts used for both are *mudharabah* (profit sharing contract in which one party provides funds and the other management expertise) and *hibah* (transfer of a determinate property (*mal*) without any material consideration).

Part II – Insurance – WAQF in Indonesia

Waqf, like other *muamalah* (transaction according to shariah) activities, has pillars and conditions that must be met in its implementation. The pillars of waqf are *waqif* (the party who waqf their property), *mauquf 'alaih* (the beneficiaries or parties who benefits from the waqf), *mauquf bih* (waqf object), and *shighat* (statement of the will of the waqf). Jaih Mubarak and Hasanudin mentioned that among the pillars that need to be considered are those relating to *mauquf* (waqf objects):

- a. The assets that are donated must be valuable assets according to sharia
- b. The assets that are donated must be clear and measurable

- c. Assets that are donated are assets that have become the property of the waqif perfectly
- d. The assets that are donated are clear assets, not assets that must be divided because there are other parties' property rights.

In Indonesia, the emergence of Law Number 41 of 2004 concerning Waqf which was followed by Government Regulation Number 42 of 2006 concerning the implementation of Law Number 41 of 2004 is part of the movement to develop, expand, and renew waqf objects or their management to be more productive and can be used proportionally.

The expansion of waqf object stimulates the existence of insurance waqf which cannot be separated from the widespread development of cash waqf which has led to the proliferation of new trends in the world of waqf. At the first glance, there is no common ground between waqf and insurance but if examined further, it will be seen that the similarities between the two are related to preparation and self-planning to welcome death. In death planning insurance, the plan is more intended for the heirs, while in waqf the preparation is made for personal preparation for welcoming death because of the waqif's full awareness of the existence of life after death. Therefore, the existence of insurance waqf is a win-win solution for both the individual and the heirs.

Seeing these benefits, the Indonesian Ulema Council (MUI) compiled a fatwa regarding insurance waqf No. 106 of 2016 concerning Insurance Benefit Waqf and Investment Benefits in Sharia Life Insurance. This means that this fatwa is only intended for sharia insurance and not conventional. The fatwa was then followed up by several sharia insurance companies by compiling the concept of waqf and applied through several models. The models are

- a. Waqf fund is a waqf as an insurance model where the sharia insurance company at the beginning of its formation will provide funds intended for waqf and the funds are placed in a fund.
- b. Insurance policy waqf is when the policy holder makes waqf to the waqf body or institution at the discretion of the policy holder himself.
- c. Waqf as a feature of sharia insurance products is when a general product made by a sharia insurance company provides an opportunity for insurance participants to provide insurance benefits as waqf.
- d. Waqf as one of the product names in sharia insurance companies

From the explanation above, it can be concluded that waqf in insurance can be used in its entirety where the initial formation of an insurance company was intended for waqf activities but can also be one of the features in a series of insurance activities.

Part III – Fully Product Motive in Insurance WAQF

Loundon and Della Betta say that motive is a state that moves energy and physical energy in a human being that leads to a goal. This means that the motive greatly influences a person in carrying out an action. Motives in Islam are called intentions. Intention is the first rule in fiqhiiyah rules because it becomes a very important basis in the implementation of worship. This intention will explain the worship that will be carried out and will determine whether an action is an act of worship or not.

In waqf, the motive/intention will be closely related to waqif and mauquf because it will determine the waqf contract. For example, does the waqif intend to waqf his property temporarily (mu'qqat) or forever (muabbad), or does the waqif want to waqf his mauquf into khairi waqf or family waqf. Regarding insurance waqf, Habibaty and Latif explained that there are two motives that underlie a person to take insurance waqf products, namely fully product and product features. Fully product

is when the waqif makes waqf the core goal in carrying out insurance. While the product feature is when waqif makes waqf only as an additional product taken apart from the core products. Because the waqf property must remain and last forever, the waqf insurance contract in relation to the fully product motive can be a problem. This is because insurance waqf activities may bring consequences that cause the property to be lost. These consequences arise if one day the insurance waqf participant cannot fulfill his obligation to pay the premium so that the dependent status becomes lapsed. It means that nothing can be channeled at all for waqf. Whereas the initial intention of the waqif to carry out the transaction was to repay the waqf payment and hand over the entire property for waqf at a later date.

In addition, the principle of aletary insurance also cannot be fulfilled in the full motive. There should still be another interest in the agreement relating to insurance with regard to events that are not certain to occur in the future. This 'aletary' can fulfill the principle of insurable interest where its absence can cancel the obligation of the insurer. The act of waqf is not based on any interest except to return ownership of property to Allah SWT. In addition, in the insurance waqf, the waqif does not have the free authority to determine the contents of the contract agreement because the insurance agreement is attached to the insurer's requirements (adhesion) because almost all the terms and contents of the agreement set forth in the policy have been determined unilaterally by the insurer. This is in stark contrast to waqf which is voluntary in nature.

Furthermore, with regard to the fully product, ownership of property is crucial. Waqf of insurance benefits and investment benefits can only be implemented after the policyholder dies so that the ownership of the policy becomes the property of the beneficiary. The policy holder only makes a binding promise that he will donate his property when he dies. This is absolutely necessary in order to fulfill the 'milku tam' element in the waqf when the property has become the full property of the waqif.

In the context of insurance, the new policyholder will receive his insurance benefits when he has died. Therefore, the waqf pledge is not made by the policy holder but by the policy beneficiary. Furthermore, the benefits obtained by the beneficiary after the policy holder dies are included in the 'tirkah' (heritage) property so that laws relating to inheritance are also subject to insurance waqf. The policy holder's promise to endow his wealth later if he dies is included in the will. In the will, the maximum amount is 1/3, so it is not allowed to donate all policies received except with the permission of all heirs.

In Indonesia, some of these problems have been responded to by the Indonesian Ulama Council (MUI) by enacting several special provisions contained in fatwa No. 106 of 2016 so that insurance companies pay attention to the important aspects in the implementation of insurance waqf, For example, the provisions in the waqf of insurance benefits. The party appointed to receive insurance benefits must declare a binding promise to waqf insurance benefits at most 45% of the total insurance benefits. This is to protect the insurance principle related to the fulfillment of the insurable interest aspect so that there is still an interest owned by the policyholder in the form of events that will occur and be borne by the insurance company. Furthermore, it is related to the provisions of the investment benefit waqf. Investment benefits may be waqf and the maximum amount of investment benefits is 1/3 of the total wealth unless agreed by all heirs. This is related to the application of will law in inheritance which allows only 1/3 of the total assets of the deceased.

Conclusion

After conducting various analysis regarding insurance policy waqf and insurance benefit waqf, the motive for the fully product is not in accordance with several sharia provisions. In addition, there

are several principles in insurance that are violated. First, there is the potential for waqf assets to be lost if waqif cannot fulfill the obligation to pay the premium properly. Second, in the insurance waqf, waqif does not have the authority to freely determine the contents of the contract agreement because the insurance agreement is attached to the insurer's requirements (adhesion), that is, almost all the terms and contents of the agreement as outlined in the policy have been determined unilaterally by the insurer. Whereas waqf is a voluntary activity. Third, the investment benefits that are distributed must not violate wills in Islamic inheritance law, which is a maximum of 1/3 except with the approval of the heirs. Therefore, if an insurance participant wants to participate in an insurance waqf activity, his or her niyyah or intention to have insurance must be placed at the beginning, as the basis for carrying out the transaction. This is necessary in order to fulfill the principle of insurable interest which must always be prioritized for all types of insurance. As for if he later wants to endow the insurance or investment benefits, then he must still pay attention to some of the provisions of the Shariah regarding inheritance and wills.

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