

HAJJ BAILOUT: IT'S PROBLEMS AND LEGALIZATION

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Abstract: Fundamental issues on the hajj today is the problem of funding, in which hajj applicant must pay hajj journey fee (BPIH) first to get seat number. Many pilgrims want to perform hajj but they haven't enough funds to pay the BPIH. This is an opportunity for the Bank to launch Islamic financing hajj bailout products. This financing aims to help hajj applicant who can not pay BPIH as an initial deposit to get a seat/ queue number.

Based on above, this study generally aims to analyze the legal status and position of hajj bailouts according to Islamic law. This research includes a legal research with descriptive analysis, which describes the facts of law in society by using secondary data: the primary legal materials, secondary legal materials and tertiary legal materials. This study used the normative method with qualitative data analysis.

Results of the study concluded that the hajj bailout allowed by the DSN based on the allowance of *ija'rah* and *qardh* contract component. Whereas, the legalization of *ija'rah* and *qardh* contract combination in this product are particularly vulnerable to the usury practice or at least still a doubtful case. If we see "*ist'ah*" for the mandatory requirement of hajj, actually, the people who use the services of hajj bailouts can not be considered to meet these requirements, so he is not obliged to perform hajj. Precisely when he forced himself to owe to the LKS, then there is a possibility he would trouble himself.

Keynote : Hajj, Financing, Bailout, BPIH, *Ija'rah*, *Qardh*, Usury

A. Introduction

Hajj is a spiritual journey towards Allah's mercy, it is one of the five pillars of Islam establishment on earth that is prescribed by Allah to his servants. We as Muslims should certainly keep that hajj as pillar that reinforce the foundations of Islam, not the other way around. That is by practicing in accordance with harmony, terms, and conditions that exist. Hajj is a complement of Islamic Pillars. Even as-Sayyid as-Sabiq said should there be those who deny its obligations then indeed he has been polytheist.¹

Allah has said in al-Baqarah (02:196):

وَأَتَمُّوا الْحَجَّ وَالْعُمْرَةَ لِلَّهِ

*And complete the Hajj and 'Umrah for Allah.*²

For this reason the Muslims are trying to perform hajj to complete the fifth pillar of Islam. Hajj requires relatively high costs, at least for Indonesian Muslims. Approximately to the current property valued at least thirty million must be prepared for this pilgrimage. That fee certainly is not a small amount, so not everyone can do it, just certain people who are capable to pay. Ironically, for most people in Indonesia still there is the assumption that pilgrimage will raise one's social status. These factors lead to increase public interest to try to perform hajj in any state and condition without seeing some of the considerations that a mandatory requirement and legitimate in hajj.

In the meantime, the times are spread throughout areas of life, not least in the world of shari'ah banking, bringing very significant progress. So that shari'ah economists insist on innovative and creative thinking in responding to the needs of complex society. One of recently Islamic banking innovation is giving the bailouts of hajj fee, which for most people is a positive breakthrough that offers convenience to help the Muslim community to realize its noble ideals to uphold one of the pillars of Islam, the hajj. During its development, the community has been enthusiastic about the arrival of this product, even nationally this product has significantly increased.

Hajj bailout financing as a result of human thought and civilization would need to be studied carefully so we as Muslims can determine the status of the hajj bailout financing

¹ Sâbiq, As-Sayyid, *Fiqh As-Sunnah*, (Kairo: Dâr al-Fath li 'Ilâm al-'Arabiy, 2001), 460

² QS. Al Baqarah (2:196)

existence. To be able to respond and make choices about these issues, we will explain briefly about hajj bailout funds, both theoretically and practically.

B. Definition and Obligations of Hajj

Al-hajj etymologically means purpose, intent, and intentional. While in the *syara'* term, hajj is intentionally pilgrimage to Mecca at a specific time to carry out a series of worship included in the section of hajj to fulfill the call and the pleasure of Allah SWT.³ More detailed Sayyid as-Sabiq defines hajj is heading to Mecca to perform *thawa>f, sa'i*, stay at Arafah and all the rituals of hajj in order to expect the pleasure of Allah SWT.⁴ Hajj is the fifth pillar of Islam which must be implemented by Muslims who are able to do that (*ist{it{fo>'ah*).⁵ Validity of the hajj has been enshrined in the Qur'an, Sunnah, and *Ijma> 'of ulama>* with the following proposition:

1) al-Qur'an

إن أول بيت وضع للناس للذي ببكة مباركاً وهدى للعالمين (٩٦) فيه آيات بينات مقام إبراهيم ومن دخله كان آمناً والله على الناس حج البيت من استطاع إليه سبيلاً ومن كفر فإن الله غني عن العالمين

"96. Indeed the first house built for the (place of worship) man, Baitullah is Bakkah that in (Mecca) blessed and a guidance for all mankind. 97. him there are real signs, (in which) Station of Abraham; whoever entered it (Baitullah) became the she was safe; pilgrimage is a duty men owe to Allah, are (for) people who can travel to the House Hold. Whoever denies (hajj obligation), then surely Allah is Rich (not requiring anything) of the Worlds. "

According to *jumhu<r ulama<*, this verse indicates obligatory Hajj.⁶

2) as-Sunnah

بني الإسلام على خمس: شهادة أن لا إله إلا الله وأن محمداً رسول الله وإقام الصلاة وإيتاء الزكاة وصوم رمضان وحج البيت (متفق عليه)

"Islam is built upon five matters: Testifying that there is no god but Allah and Muhammad is the messenger of Allah, establish regular prayers, practice regular charity, fasting Ramadan, and pilgrimage to the House". (Muttafaq 'Alaih).

³ Zuhaily, Wahbah, *Fiqh Islam wa adillatuhu*, (Damaskus: Darul Fikr, 2006), 2064

⁴ Sâbiq, As-Sayyid, 2001, *Fiqh As-Sunnah*, 460

⁵ Ash-Shan'âniy, *Subul as-Salâm*, (Lebanon: Dâr al-Kutub al-'Ilmiyyah, 2006), 189

⁶ Katsir, Ibnu., *Tafsîr Ibnu Katsîr*, (Beirut: Dâr al-Kutub al-'Ilmiyyah, 2008), 348

Actually, the hajj obligation is truly the case that has been known in Islam as (المعلوم من الدين بالضرورة) and it certainly has been a deal by Muslims. If there are among Muslims who denies the hajj obligatory, then he judged an apostate from Islam.⁷ Based on the arguments above, *ulama*> agreed that hajj is obligatory for every Muslims who has the ability. Ability here means: the ability of the hajj cost and income for families and dependents left behind, the ability in terms of health, and the ability in terms of opportunity.

Regarding to hajj period, *jumhu>r ulama*> (*ulama*> *madzhab* Hanafi, Maliki, and Hanbali) argues that people who have been able to pilgrimage should be immediately perform hajj after the capability and should not be delayed. If in the delaying period the money was gone or reduced, then he should pursue or borrow for the cost of hajj realization. This is because the obligation of the hajj has tied himself, then it should be accomplished.⁸ While *madzhab* Shafi'i found hajj obligation after the ability is obligation that can be postponed (*'ala> al-tara>khi*), not an obligation that must be carried out (*'ala> al-Faur*). Although *ulama*> Syafi'iyah don't blame people who delay the implementation of hajj after he hasn't abilities, but they set the requisites for that allowance delay. *First*, there is no fear of failing or the inability to perform hajj in the future. *Second*, one's who postpone pilgrimage has strong determination in his heart to perform hajj.

و عن أبي هريرة قال: خطبنا رسول الله صلى الله عليه وسلم. فقال: يا أيها الناس إن الله قد فرض عليكم الحج فحجوا فقال رجل أكل عام يارسول الله؟ فسكت حتى قالها ثلاثا. فقال رسول الله صلى الله عليه وسلم: لو قلت نعم لوجبت ولما استطعتم. ثم قال ذروني ما تركتم (رواه أحمد ومسلم والنسائي)

From Abu Hurairah, he said: "The Messenger of Allah preaching to us, and then he said": "O mankind, indeed Allah has made obligatory hajj to you, then perform hajj". Then there was a man who asks: "Is every year, O Messenger of Allah?" he is silent (not answered) until the man repeated his question three times. After the Prophet replied: "if I had said 'yes' then it will be required (every year) and you definitely can not (execute)". Then the Messenger of Allah said: "Take what I leave it to you". (Narrated by Ahmad, Muslim, and an-Nasai)

⁷ Sâbiq, As-Sayyid, *Fiqh As-Sunnah*, 460

⁸ Halim, Abdul., *Ensiklopedi Haji dan Umrah*, (Jakarta: PT. RajaGrafindo Persada, 2002), 148.

Hajj is only required once in a lifetime. This is the opinion of *jumhu>r ulama>*. They reasoned that in these verses (QS. al-Imra>n (03:97) there is no *qari>nah* that shows command to perform hajj many times (*tikra>r*).⁹ Moreover, explicitly, the second *hadi>th* above shows hajj is only required once. Usul fiqh rules says:

... لأن الأصل في الأمر للوجوب, فإن أريد به الندب أو الإباحة فلا بد من قرينة تدل على ذلك

... Because the law of the fundamental command is mandatory. If the question of the injunction is recommended (*an-nadb*) or permissibility (*al-iba>hah*), then there must be a showing *qari>nah* on it.¹⁰

C. Hajj Bailout

Financing hajj bailouts is a loan (*qardh*) from Islamic banks to the applicant to cover the shortage of funds in order to gain seats at BPIH settlement (Pilgrimage Travel Expenses).¹¹ This bailout is guaranteed by a deposit owned by the applicant. Applicant then must return the amount of money borrowed within a certain period. For the bailout loan services, Islamic banks obtain compensation (*fee / ujah*) which amount is not based on the amount lent.

The bankers basing this product to the DSN (National Islamic Council) MUI fatwa No.29/DSN-MUI/VI/2002 about the financing of hajj maintenance by LKS (Islamic Financial Institutions). Which the DSN MUI Fatwa is said that the contract used in hajj bailouts are *ija>rah wa al-qardh* that include the following steps:

1. In the management of pilgrimage for applicant, LKS can obtain fee (*ujrah*) by using the principle of *al-ija>rah* corresponding to DSN-MUI Fatwa No.9/DSN-MUI/IV/2000.
2. If necessary, LKS can help to cover the BPIH payment using the principle of *al-qardh* corresponding to DSN-MUI Fatwa No.19/DSN-MUI/IV/2001.
3. Hajj maintenance services from LKS should not be required by granting hajj bailouts.
4. The amount of *ija>rah* fee should not be based on the amount of *al-qardh* bailouts given by LKS to applicant (DNS Fatwa No.29/DSN-MUI/VI/2002 about Financing Hajj Bailouts Shari'ah Financial Institutions)

⁹ Ash-Shâbuniy, Muhammad 'Ali., *Rawâ'î al-Bayân Tafsîr âyât al-Ahkâm*, (Kairo: Dâr Ash-Shâbuniy, 2007), 296

¹⁰ Ibnu Najâr, *Syarh al-Kaukab al-Munîr*, (Tt: Al-Maktabah Asy-Syâmilah, 1997), 19

¹¹ www.syariahmandiri.co.id being accessed on September 14th 2013

D. *Al-Qardh*

Al-Qardh etymologically is a masdar form of *فرض يقرضه الشيء*, which means break. Thus *qardh* is something given by the owner to get paid. Sayyid al-Sabiq defines *qardh* as follows:

القرض هو المال الذي يعطيه المقرض للمقترض ليرد مثله إليه عند قدرته إليه

"Treasure given to the creditor a person who *dihutangi* to then he gave the like / worth after afford".¹²

Ulama> Hanafi explain that *qardh* is *al-misliya>t*¹³ treasures loaned and then returned with a similar item. Thus, in the *qardh* required *misliya>t* property, that the property has no difference in terms of value.¹⁴ Imam Shafi'i gives the criteria, that *qardh* here is a good loan, as same as the *as-salf*,¹⁵ that the ownership of an object as a loan and then returned the property such as customary in those days.¹⁶ While Imam Ahmad ibn Hanbal explained that *qardh* is a type of loan to help people who borrow to take advantage of the goods which he borrowed.¹⁷

From the definition above, it is clear that *qardh* contract is a *mu'a>malah* form based on *ta'a>wun* (helping one another), the purpose is to fulfill the needs of others in need. So there is no particular benefit required.

The *qardh* argument is QS. al-Baqarah (2: 244)¹⁸ and the *hadi>th* of Ibn Majah.¹⁹ There are two things to note regarding *qardh* law in context of bailout funds, hajj tempo and addition in *qardh*. For tempo terms, *jumhu>r ulama>* argue that tempo is unauthorized requires in *qardh*. This is because *qardh* is a conditional debt. But the authentic opinion is tempo allowed in *qardh*. This is the opinion of Malik, Ibn Taymiyya, Ibn Qayyim, Muhammad al-'Uthaymeen and Salih fauzan.²⁰

¹² Sābiq, As-Sayyid, *Fiqh As-Sunnah*, 166

¹³ Property that have similarities or equivalent with not considering the differences between each other in the unity of its kind. it is usually in the form of property that can be weighed, dosed, measured or calculated quantity.

¹⁴ Fikri. Ali, *Al-Muāmalah al-Madiyah al- adabiyah*, (Mesir: Al-Mathbah al-Musthafa al-Bany, Tt), 344

¹⁵ No-interest loans

¹⁶ If at the present time, then the person can pay an object by using the interest-free finance. (Ali Fikri: tt: 345)

¹⁷ Ibid., 346

¹⁸ *Who will lend to Allah a good loan (spend their wealth in the way of Allah), then Allah will double the payment to him with a lot of double fold* (QS. Al-Baqarah (2: 244)

¹⁹ *Do not lend to a Muslim to another Muslim man twice but the loan (resident) as alms one time.* " (HR. Ibn Majah)

²⁰ An-Nawawi, Abi Zakariya yahya bin Syaraf. *Raudlah Ath-Thalibin fi Umdah aL-Muftin*, , vol. VII, (Beirut: aL-Maktabah aL-Islamiyyah, Tt), 34.

Additional concerns in *qardh*, it depends whether the addition is required or not. If the addition is required, then it is prohibited by *ijma> ulama>*.²¹ The practice of giving loans to get benefit is forbidden. This prohibition is based on the word of the Prophet:

حدثنا حفص بن حمزة, أنبأنا سوار بن مصعب, عن عمارة الهمداني, قال: سمعت عليا يقول: قال رسول الله صلى الله عليه وسلم: كل قرض جر منفعة فهو ربا

"It has been told us Hafz bin Hamzah, has told us Shawar bin Mus'ab al-Hamdaniy of the Emirate, he said: I heard Ali ra said, the Messenger of Allah said: every qard with benefit was usurious." (al-Bayhaqi, Thabrani)²²

The second addition is given when paying the *qardh* and it is not required. This kind of addition is allowed, and even included the good deeds as what Prophet said narrated by Muslim.²³

E. *Al-Ija>rah*

Al-Ija>rah etymologically means wages, rents, services or benefits.²⁴ Terminologically means contract of getting benefit by changing²⁵.

Ulama> Hanafiyah explain that *ija>rah* is contract that result in ownership transfer of object benefits for getting more rewards (lease). While *ulama>* Malikiyah only equate with *al-kira>*.²⁶ *Ulama>* Syafi'iyah were also gives a similar definition, with the allowance for the additional which has been agreed in contract, so for *ulama>* Syafi'iyah *ijab* and *qabul* is essential and must be pronounced.²⁷ While *ulama>* Hambali, provide a more detailed definition by stating the agreement in contract time, and the additional of rent is also something that agreed.²⁸

The legal basis of *ija>rah* transaction is QS. al-Zukhruf (43:32),²⁹ QS. al-Thalaq (65:6),³⁰ and *hadi>th* of Ibn Majah.³¹ *Ija>rah* scope contract in the books of fiqh includes three categories: *First, ija>rah* against people (*ija>ratu as-syakhs*), as contracted maid; *Second, ija>rah* towards

²¹ Khairi, Miftakhul., *Ensiklopedi Fikih Mu'malah dalam Pandangan 4 Madzhab*, (Yogyakarta: Maktabah al-Hanif, 2009), 169.

²² Ibn Muhammad, Muhammad al-Syaukani ibn 'Ali., *Nailu al-Authar*, Juz V, (Kairo: Dar al-Hadits, t.t.), 332

²³ Khairi, Miftakhul., *Ensiklopedi Fikih Mu'malah*, 169

²⁴ Dahlan, Abdul Aziz., *Ensiklopedi Hukum Islam*, (Jakarta: PT. Ichtiar Baru Van Hoeve, 1996), 660

²⁵ as-Sabiq, *Fiqh As-Sunnah*, 144

²⁶ Rent. Fikri. Ali., *Al-Mu'malah al-Madiyah al- adabiyah*, 85.

²⁷ Ibid., 87

²⁸ Ibid., 89

²⁹ *Are those who divide the mercy of your Lord? We have determined among them their livelihood in the life of the world, and we have raised them partly over others a few degrees, so most of them can use some of the others. And the mercy of thy Lord is better than what they collect.* (QS. al-Zukhruf (43: 32)

³⁰ *If they have nursed your child, then give them wages.* (HR. Ibn Majah)

³¹ the Prophet said: "*give workers wages before his sweat dried on*" (HR. Ibn Majah)

work (*ija>ratu al-'amal*), contracted services such as doctors and engineers; *Third, ija>rah* against goods (*ija>ratu al-'ain*), such as renting a car, house and so on.³²

Based on the explanation above, *al-qardh* and *al-ija>rah* contracts are contracts that permitted by Islamic law, but the problem is if that two contracts were combined into one contract, *al-qardh wa al-ija>rah* used by Financial Shari'ah Institutions (LKS) as the legal basis of hajj bailouts which is one of their products.

F. *Istithā'ah* Levels

Istithā'ah in His word "*man istithā'ah ilaihi sabi>la>*", the followers of the four *madzhab* also argues:

Hanafiyah excerpt that *istithā'ah* includes three points: having health body, having supply and travel expenses, and a guarantee of security.³³ Malikiyah found *istithā'ah* is allowing pilgrimage, either by walking or by car. Followers of Imam Malik (Malikiyah) also requires the fulfillment of three things in *istithā'ah*, which has a strong body, capability of supply, and passable roads to go to Mecca, whether by land, sea or air.³⁴ Regarding this *istithā'ah*, Syafi'iyah agree with Malikiyah, who has health body, wealth, both travel and travel expenses, and a vehicle to travel.³⁵ Hanabilah (followers of Imam Ahmad ibn Hanbal) argues that *istithā'ah* is only required to have supply and travel expenses.³⁶

Of all the above opinion, then we can take summarize about *istithā'ah* into 3 scope of meaning:

First, physical health, based on the *hadi>th* of Abdullah Ibn Abbas ra:

أن امرأة من خثعم قالت: يا رسول الله إن أبي أدركته فريضة الحج شيخا كبيرا لا يستطيع أن يستوى على الرحلة أفأحج عنه؟ قال: حجى عنه

"Behold, a woman of Khats'am said: 'O Messenger of Allah, my father actually been required to perform the pilgrimage when he was old and weak, he was unable to stay afloat above the vehicle, if I perform hajj to represent it? He said: "hajj for him"³⁷

Secondly, It has enough supply to go and back, to fulfill his needs and people needs, who become their responsibility in livelihood. It is based on the *hadi>th* of the Prophet:

³² an-Nabhani, *as-Syakhshiyah al-Islamiyyah*, Juz II

³³ Zuhaily, Wahbah, *Fiqh Islam*, 2082

³⁴ Ibid., 2050

³⁵ Ibid., 2087

³⁶ Ibid., 2089

³⁷ al-Baihaqy, 14

عن عبد الله بن عمرو، أن النبي صلى الله عليه وسلم قال: "كفى بالمرء إثماً أن يضيع من يقوت"

*"From Abdullah ibn Umar, the Prophet said: It is enough sin for a person (when) he wasted those responsibility"*³⁸

Third, security in the journey, this was due to the hajj which is not guarantee by security during the trip is dangerous (*dharar*), whereas according to the Shari'ah provisions الضرر يزال (something harmful should be avoided). If the above three conditions are met then it has been mandatory for a person to perform hajj for both men and women.

For those who want to uphold the pillars of Islam with Hajj, then it is obligatory for him to initiative by being able in materials, health and safety, one of which is to save (formerly Syariah Bank has Hajj Savings Products). Then another problem came from Muslims who are not materially capable but already eager for pilgrimage, then, this is where the bailouts products are considered very helpful.

G. Analysis

It is undeniable that a product would have positive and negative sides. The *first* benefit, provide assistance to the community to carry out one of the pillars of Islam, hajj. So that it is could be considered as part of *fath al-dzari'ah*. *Second*, the length portion queue of existing pilgrimage, has reached the year 2027,³⁹ although many of the pilgrims who have earned a portion (seat) has not met the standard of *istithqah*, so for those who can obtain hajj bailout funds, can get a number of servings. *Third*, this product has a considerable interest in potentially advancing Shari'ah Financial Institutions as an instrument of Muslims economic.

However, there is a lot of harm arising from the practice of hajj bailout funds. In syari'ah terms, the legalization of the contract too risky and resembles as the hidden usury, as is this case, there was a merger agreement between the contract of *qardh* and *ijarah* by requiring the additional benefits as a service, moreover, the additional amount has been determined at the beginning of the contract period.

Hajj bailouts given by LKS actually even make the ambiguous meaning of *"istithqah / capable"* as a compulsory of hajj. Someone who, actually, materially has not been able to hajj, by the hajj bailouts funds, these people can "be lent" to get the seat number in the next few years. This makes these people into debt and had to pay off the debt to the LKS according to the

³⁸ al-Munziriy, Hafidz. *Mukhtashar Sunan Abi Dawud*, (Beirut: Daar al-Fikr, 1989), 59

³⁹ Corresponding of the estimated portion number of hajj, the Ministry of Religious Affairs of East Java.

predetermined deadline. That's look easy for people who have a fixed salary and can be used to repay the debt. However, new problems will arise for those who had unfixed income. Must he pay his debt to LKS by owing to another person / institution? Surely this is a very burdensome and not in line with Shari'ah rule.

Other than that, *ija>rah* contract in case the bailouts violated Islamic rules, because of the three existing *ija>rah* contract, LKS activity by lending funds to hajj applicant must not belong to one of them. It is true that the LKS has been credited with "lend" the hajj applicant, but this can not be equated with teaching services, treating, and others. More appropriate contract shall in is *qardh* (debt receivable) which is categorized as *tabarru'* (social orientation) nor a business (commercial) so it can not be combined with *ija>rah* contract (wages / services). So this is the way which makes it is close to the covered usury.

Thus, since we already know the benefits and disadvantages of the use of hajj bailout funds, it is proper that we avoid what misleading to return to a more *maslahah*. We know in usul fiqh rule that *درأالمفاسد مقدم على جلب المصالح*.

H. CONCLUSION

1. Hajj bailouts funds allowed by the DSN on the basic of *ija>rah* and *qardh* contract components.
2. *Ija>rah* and *qardh* contract merger has led to the usury.
3. *Ist}it{a<'ah* as a mandatory requirement for a pilgrimage covering the material itself and the ability of the bereaved family, health and safety.
4. Benefits of hajj bailouts funds: 1) lighten the hajj applicants who are unable in material to do hajj. 2) Makes Muslims easier to get the seat number. 3) Potentially advancing Islamic financial institutions.
5. *Mudha>rot* hajj bailout funds: 1) Makes the hajj bailouts funds receiver, owe to LKS. 2) Merger of two contracts susceptible to usury practice. 3) Extend the hajj queue portion.

I. Suggestion

1. For the implementer of Shari'ah Financial Institutions: for more selecting hajj bailout funds recipients, in order to reserved for who truly capable to pay the borrowed funds from LKS.

2. For the Government: hajj bailouts program is supposed to be the cause of the long queue of hajj seat (portion) number. It would be better if there is a replacement program that

makes those who have physically and financially prepared, to be able to perform hajj without having to queue for too long.

3. For MUI National Shari'ah Council: to examine more about the fatwa No. No. 29/DSN-MUI/VI/2002 about Financing Hajj Bailouts Shari'ah Financial Institutions

4. For pilgrims: in fact if there is less ability in material term, saving the money and paying money that has been enough to pay the registration is more *maslahah* than using hajj bailout funds. In *al-Asyba>h wa Nazha>ir*, al-Suyuti mentions a fiqh rule:⁴⁰

إذا اجتمع الحلال و الحرام غلب الحرام

⁴⁰ Sayuthi al, 1983, *al-asybah wa al-nadhoir*, dar al-kutub al-ilmiyyah, Lebanon. 209

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