

# COMPARISON OF THE HAWALAH SYSTEM FROM THE PERSPECTIVES OF FIQH MUAMALAH, TURKEY'S MAJALLAH AL-AHKAM, AND INDONESIAN CIVIL LAW

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## Abstract

This paper discusses differences in the debt transfer system (*hawalah*) contained in the Muamalah fiqh, *hawalah* in Majallah Al-Ahkam Al-Adliyah and Indonesian Civil Law. This paper is carried out through library research with a qualitative approach. The results of this study, if the *hawalah* system in the Fiqh Muamalah compared with the *hawalah* system contained in Majallah Al-Ahkam Al-Adliyah, the authors found little change in the *hawalah* agreement part. However, when compared with Indonesian Civil Law, there are many differences found in the form of agreements, and the parties involved in the *Hawalah* system.

**Keywords:** *Hawalah System, Majallah al-Ahkam al-Adliya, Indonesian Civil Law.*

## INTRODUCTION

The transfer of debt in the study of Islamic Economics is referred to as *hawalah* or *hiwalah*. Etymologically, that *hawalah* means *al-Intiqal* (moved) and pronounced “*hāla anil ahdi*” means that move or turn away from the promise. Meanwhile, in terminology of Hanafiyyahs scholars, *hawalah* is to move the prosecution or the collection of liabilities owed by the debtor (*al-Madin*) to the liabilities of *al-Multazim* (creditor, in this case is *Muhal alaihi*). Thus, the debtor party (in this case the intention is *Muhil*) is not charged anything. (Az-Zuhaili, 2011).

Meanwhile, in addition to the scholars Hanafiyyah (*Shaf’iyyah, Malikiyah and Hanabilah*) defines that *hawalah* is a contract that wishes the transfer of a debt from dependents to other dependents. Anshori argued that it is a contract to transfer a party’s debt/receivables to another party. Thus, in practice, in *hawalah* there are three parties involve, namely the debtor (*Muhil* or *Madin*), the creditor (*Muhal* or *Da’in*), and the party that receives the transfer (*Muhal alaihi*). (Anshori, 2009).

Receiving a transfer of debt according to some scholars is mandatory, but the

majority of scholars argue that the ruling is *sunnat*. In fact, al-Bassam argued that the agreement is contrary to logic of Islamic law, because it is equal to buy debt to debt, while debt buying and selling debts against debt is forbidden. This opinion was disputed by Ibnul Qayyim, he explained that it is not contrary to *qiyas*, because it includes the type of fulfillment of rights, and does not include about the type of buying and selling. Ibn Qayyim said: “*If it is debt to buy debt, but it does not prohibit even the rules of Sharia willed to do hawalah*”. (al-Bassam, 2004)

Although the *hawalah* only as a doctrine of the law in the formal legal level. The author suspects that the system contained in *hawalah* theory to the *Fiqh* is an important reference either for designing the type or model of formal law to be legalized. However, the authors found the system of debt transfer in the *Fiqh Muamalah* is different than in the *Majallat al-Ahkam wa Adiya* and in the Civil Law of Indonesia. Therefore, the author assumes that it is important to review the debt transfer system controversy in *Fiqh Muamalah* compared to Turkey’s *Majallat al-Ahkam* and Indonesian Civil Law.

## LITERATURE REVIEW

This section describes some of the differences in the debt transfer system in legal sources that are considered to be guidelines for Muslims, which are for Muslims in Indonesia. The legal sources intended in this journal are *Fiqh Muamalah*, *Majallah al-Ahkam al-Adliyah* and Indonesian Civil Law. According to the author that the difference is influenced by the position of the respective legal sources (referred to as *Fiqh Muamalah*, *Majallah al-Ahkam al-Adliyah* and Indonesian Civil Law) in the development of the system of law enforcement.

*Fiqh Muamalah*, etymologically that *Fiqh Muamalah* is derived from the Arabic language, namely *Fiqh* and *Muamalah*. *Fiqh* is etymologically understanding. (Munawwir, 1997). Whereas *Muamalah* etymologically is to act, to do, and to practise each other. (Syafei, 2001). Meanwhile, the understanding of *Muamalah* terminology initially has a wide scope, which is the rules of God that must be followed and said in the life of society to safeguard human interests. But lately, the sense of *Muamalah* is understood as the rules of God that govern human relationships with people in obtaining and developing property or rather can be said as an Islamic rule about economic activity. (Mas’adi, 2002). Therefore, the *Fiqh Muamalah* can be defined as a knowledge of the activities or transactions based on the sharia laws that are sourced from the Islamic evidence in detail. The scope of *Fiqh Muamalah* is all activities of human beings based on Islamic laws that form the rules that contain orders or prohibitions such as *Wajib*, *Sunnah*, *Haram*, *Makruh* and *Mubah*. (Suhendi, 2007).

*Fiqh Muamalah* has principles to be used as references and guidelines for regulating muamalah activities. The principles are as follows: a) *Fiqh Muamalah* may be done by humans as long as it does not conflict with the provisions of *Syara'* (God), b) *Fiqh Muamalah* must be based on the agreement and willingness of both parties, c) Customary custom is used as a legal basis if custom and custom are not contrary to *Syara'*, d) in the *Fiqh Muamalah* must not harm others and yourself, because the principle in *Fiqh Muamalah* must be mutually beneficial to both parties involved. (Muslich, 2010).

*Majallah al-Ahkam al-Adliyah*, etymologically derived from the Arabic language, namely *Majallah*, *Ahkam* and *Adliyah*. The word "*Majallah*" etymologically means the journal. And the word "*al-Ahkam*" is the plural of the law, which etymologically is (*al-Man'u*) that prevents. As for the word "*al-Adliyah*" etymologically means justice and law. (Ash-Shidieqy, 1975). Meanwhile, in terminology, *Majallah al-Ahkam al-Adliyah* is the civil law of Islamic laws which was legalized during the reign of Turkey Usmani.

The existence of *Majallat al-Ahkam al-Adliyah* is a new thing in the history of Islamic law, because it is the beginning of the formulation of fiqh into modern law that is officially enforced for the society, as mentioned in clause 1801 that must follow the Sultan's command (Djatnika, 1994). The draft law was later passed into law and was declared in force in 1934. The law consists of 1,107 chapters and adopts many Western civil laws such as France, Switzerland and Germany, in addition to *Islamic Law*. With the enforcement of this law, the provisions of *Majallat al-Ahkam al-Adliyah* are not used anymore as a book of civil law in Islamic countries. (Ali, 1994).

Civil law in Indonesia basically originates from Napoleon Law and then based on Staatsblaad number 23 of 1847 concerning burgerlijk wetboek voor Indonesie (abbreviated BW) or referred to as the Civil Code. BW is actually a rule of law made by the Dutch East Indies government aimed at non-native citizens, namely from Europe, China, and foreign east. However, based on article 2 of the transitional rules of the 1945 Constitution, all regulations made by the Dutch East Indies government apply to Indonesian citizens (the principle of concordation). Some of the provisions contained in BW at this time have been regulated separately or separately by various laws and regulations. For example relating to land, mortgage, and fiduciary rights.

According to Volmar that Civil Law is the rules or norms that provide restrictions, and therefore provide protection for the interests of individuals in the right comparison between the interests of one with another of the people in a certain societies, especially those concerning family relations and traffic relations. Civil Law is also called Civil Law or Private Law. (Volmar, 1983). According to Kansil, in 1848 became a very important year in the history of Indonesian law. This year private law that

applies to European legal groups is codified, i.e. it is collected and included in several books of law based on a particular system. (Kansil:1993).

## RESEARCH METHODS

This study uses library research because researchers examine the manuscripts and literature of hawalah in the Books of *Fiqh Muamalah*, *Majallah al-Ahkam al-Adliyah* and Indonesian Civil Law. According to Zeid “Library research is research that uses library data used as a source to get data”. (Zeid, 2004). On the other hand, library research uses the library as a source for collecting and analyzing data. The researcher also draws and integrates his ideas to make synthesized conclusions. In this study, the researchers used several books as sources of data and references.

Library research data is not limited by time and space. As according to Glasser and Strauss “Another benefit of library research data is the breadth of comparative material available, in terms of time, space and other properties”. (Glasser and Strauss, 1967). From this statement, researchers can reach data easily without limited space and time. In accordance with the expression of Glasser and Strauss, this research explains about hawalah by understanding the different systems used in the *Fiqh Muamalah*, *Majallah al-Ahkam al-Adliyah* and Indonesian Civil Law which has been applied for a long time. So the purpose of this study is to find differences in the application of the hawalah system in the *Fiqh Muamalah*, *Majallah al-Ahkan al-Adliyah* and Indonesian Civil Law.

This researcher uses a qualitative approach to analyze documents and literature relating to hawalah in the *Fiqh Muamalah*, *Majallah al-Ahkam al-Adliyah* and Indonesian Civil Law because according to Marshall that qualitative approaches are allowed to depend on document analysis and material culture. (Marshall, 2006).

## DISCUSSION

### Characteristics of the Hawalah in the Fiqh

The author of *al-Inayah* defines that *hawalah* is to divert (*tahwil*) debt from the liabilities of the *Ashil* (in this case is *Muhil*) to the liabilities of *Muhal alaih* as the form of *at-tawatstsuq* (reinforcement, guarantee) (az-Zuhaili, 2011). The discussion of the law in the Qur'an is in Sura al-Baqarah:282, “O Those who believe, when you are not in cash for the appointed time, you shall write it and shall be a writer among you Write it properly”. In this verse describes in general the principles of the rulings is advocating to trust each other and to maintain the trust of all parties. For the relief of doubt, a written or collateral agreement should be held.

In the hadith narrated by Bukhari and Muslim from Abu Hurayrah that Prophet Muhammadsaid: “Postponing payments for people can be a misfaith. And if one of you is included (delegated) to a capable/wealthy person, accept it”.(Bukhari, 1999, number: 2287 and Muslim, 2000, number: 4002). In this hadith, it appears that the prophet told the person who said, if the person who owes to the rich or able person, let him accept it and let him charge the person who is granted (*Muhal alai*h). Therefore, the right to be fulfilled.

According to the Imam Maliki, Shafi’i and Hambali sect that the pillars of the *hawalah* there are 6 (six): 1) *Mu*hil (a person who owes to the party whose right is transferred), 2) *Mu*hal (the person who receives the transfer of rights, the lender, the owner of the receivables that must be paid by the transferee), 3) *Mu*hal *alai*h (the recipient of the debt Transfer contract), 4) The receivables of the *Mu*hal shall be settled by *Mu*hil (the object of debt transfer contract), 5) the receivables of *Mu*hil which must be settled by *Mu*hal *alai*h, and 6) *Shighat*(Submission and acceptance).Meanwhile, according to Imam Hanafi sect that the pillars of the latter are only *ijab* (statements that do *hiwalah*) of the *Mu*hil (first party) and in (statement received *hawalah*) from *Mu*hal (second party) to *Mu*hal *alai*h (third party).

Furthermore, az-Zuhaili (az-Zuhaili, 2011) stated that the requirements for *hawalah* according to the Imam Hanafiyyah sect are as follows:

1. The requirements of the *Shighah*: the *akad hawalah* is formed with the fulfillment of *ijab* and *qobul* or something resembling the *ijab* and *qobul*, such as a statement with a signature on the note *hiwalah*, written and gesture. *Ijab* was *Mu*hil said: “I redirect you to the *Fulan*.” *Qobul* is like *Mu*hal said: “I accept or I agree.” The *ijab* and *qobul* are in charge of having to be done at the event and the agreement that is required must be final. Therefore, it is not valid for the *khiyar majlis* or the *khiyar syarat*.
2. Requirements of *Mu*hil: 1. Should the person who has the qualifications and competence to hold the contract, namely a person who is resourceful and *baligh*. Therefore, *baligh* is a requirement for *al-nafadz* (validity of the contract agreement), not the condition of *al-in’iqad* (requirements for the formation of *akad*), 2. *Mu*hil’s willingness and approval means that his own will is not in a state of forced. So, if *Mu*hil is in the condition of being forced to hold the contract, then the contract is not valid. Because the *hawalah* is a form of *al-ibra’* (liberation) which contains the meaning of *at-tamlik* (possession). Therefore, it is not valid if it is done by an element of compulsion such as the form of an agreement that contains the meaning of other *at-tamlik*. The scholars of the Malikiyah, Syafi’iyah, Hanabilah agree with the Hanafiyyah scholars in this condition. Meanwhile, Ibn Kamal in Al-

Lidhah said that *ridho Muhil* is as a requirement that later *Muhal alaih* may ask him for change.

3. Terms of *Muhal*: 1. Must have the eligibility and competence to conduct a contract, similar to the requirements of *Muhil* is to be resourceful because the in of the *Muhal* is included pillars of *hawalah*. It should also be puberty as the requirements of the existing *akad hawalah* can be effective. If *Muhal* not puberty then need to approval and confirmation from his guardian, 2. The willingness and approval of *Muhal*. Therefore, it is not legitimate if *Muhal* is forced on the basis of the reason it has been discussed. In this case the scholars of the Malikiyah and Shafi'i agree with the Hanafiyah scholars. 3. And *qobul* by *Muhal* must be done in the place of *akad*. This is the requirement of the establishment of the priest according to Imam Abu Hanifah and Muhammad. If an *Muhal* is not present in the place of the contract. Then, spread the news about the holding of the contract and then he received it. Thus, according to Imam Abu Hanifah and Muhammad that the contract is still unenforceable and invalid. Meanwhile, according to Abu Yusuf, this third requirement is only a condition of *al-nafs*. Al-Kasani said that the truth is the opinion of Imam Abu Hanifah and Muhammad, because *qobul* by *Muhal* is one of the pillars of *hawalah*.
4. The terms *Muhal alaih*: Terms of *Muhal alaih* equals the terms of *Muhal*.
5. The requirements of *Muhal bih*: 1. *Muhal bih* must be *ad-damain* (property in the form of debt), meaning that *Muhil* has debt liabilities to *Muhal*. If not, then the contract is *akad al-wakalah* (representative). Thus, it automatically applies the laws and regulations of the *akad al-wakalah*, not the *akad hawalah*. Based on these terms, it is not valid to hold an agreement with *Muhal bih* in the form of the property of *ain* which still exists or has not been damaged. Because the *ain* is not something that is in dependents; 2. The liabilities of the debt are already positive and binding, such as debt in debt loan contract (*al-qardh*). Therefore, the contract with *Muhal bih* is not valid if the price is *al-mukhatabah* (some money that is redeemed by slaves to his employer as a requirement for its independence), because the slave is as *Muhal alaih*.

Meanwhile, Malikiyyah scholars require three things to *Muhal bih*: 1. The liabilities owed by the debt are due to the payout; 2. Liabilities of debt made *Muhal bih* (debt transferred, meaning that the debt of *Muhil* is transferred to *Muhal*) as its specifications with the debt liabilities of the party to *Muhil*. Therefore, it is not valid if one is more or less or if one of them is better quality or worse. And if it is not the same, then it means that it has been out of the *hawalah* system and belongs to the category

of *bai'* (buying and selling) meaning to buy debt with debt; 3. Both liabilities of the debt (liabilities owed by *Muhil* to *Muhal* and the liabilities of the debt of *Muhal alaih* to *Muhil*) or one of them are not in the form of ordered meals (*salam*). Because if in the form of a meal ordered, then it includes selling such food before the ordering party receives it, and it is not valid. If one of the debts arising from the contract of sale and the other debt arising from the contract *qardh*, then it can be if the debt transferred is due.

Broadly, it can be said that any liabilities of unauthorized debt are made as *mak-fuul bih*, then also not valid as *Muhal bih*. Because it must be a true debt, has been real, definite, not speculative and still contains the possibility between there and no. That is the debt that usually *Fuqaha'* call it with a saheeh debt. The stated debt should be positive and binding is the most popular opinion of the Hanabilah scholars. Meanwhile, the scholars of Hanabilah permit the debt of the price of the *mukhatabah* contract and the debt in the form of purchase price during the period. Syafi'iyah scholars allow the debt to be not positive and binding on its own, such as the debt of purchase price coupled with a *khiyar* in the contract.

### The Hawalah System in The Turkey's Majallah Al-Ahkam Al-Adliya

*Majallah al-Ahkam al-Adliya* is an Islamic Civil Law Act which was legalized during the reign of Usmani in Turkey. Az-Zarqa mentions that the background that lubricated the Turkish government thought of Usmani to compile the *Majallah al-Ahkam al-Adliyyah* based on the Hanafi sect (official government) is there are several opinions in the Hanafi sect, So that law enforcement difficulties to choose the law to be applied in the case they are facing. On this basis, the Turkish Government of Usmani asked the clergy to codify the *fiqh* in the Hanafi sect and chose the opinion that best suited the development of the time. (Hayreddin, 2012). However this is the impact of the existence of the *tanzimat* (change movement) in the Turkish Government of Usmani itself, (Az-Zarqa, 1965).

*Majallah al-Ahkam al-Adliya* was completed in 1869, resolved in 1885, during the time of Sultan Abdul Hamid II, the last Sultan who sought to re-establish Islam. *Majalla* has been translated into English (The Mejele and A Complete Code of Islamic Civil Law) and Malay language in the state of Johor, Malaysia, which has been the legal reference, since 1913 (the Ahkam Johor Magazine). In Turkey itself, although the secular civil legal system increasingly gripped, *Mejelle* continued to apply until 1926, two years since the official end of the Usmani Sultanate.

The codification of *Mejelle* consists of sixteen (16) chapters. Twelve chapters govern commercial affairs, and the last four chapters govern the last question of



dispute resolution and litigated procedures (*Sulh* and *Ibra'*). Chapter I, about Trading (*Buyu'*). Chapter II, *Ijarah*, which regulates some issues about tenancy. Chapter III: *Kafalah*, about trust. Chapter IV: *Hawalah*, about the transfer of debt. Chapter V: *Rahn*, about pawnshop. Some of the books further govern the problems of care (in chapters VI: *Amanah*), the issue of grants (in Chapters VII: *Grants*), of fraudulent acts and destruction (in chapters VIII: *Ghasab* and *Itlaf*), then the question of prohibition, compulsion, and warning (in Chapter IX). Then one book regulates the work of co-operation consisting of two forms of Union and Trading Investments (in Chapters X: *Syirkat* and *Mudarabah*), continued on the agency's problem (in Chapter XI: *Wakalah*). The last four books include a compromise (in Chapter XII), of Confession (in chapter XIII), a lawsuit or indictment (in chapter XIV), of evidence and vows (in chapter XV), and the last is about the task and authority of the judge (in Chapter XVI), (Hanafi, 1995). In the period of Ottoman Turkey all judges were obliged to apply the codified legal material, (Black, 2001).

At the end of the Majallah also discusses and establishes rules on the judiciary. Such as Peace (*Sulh*), Liberation (*Ibra*), Oath (*Ikrrar*), Proof (*al-Bayyinah*), and the Judiciary (*Qadha'*) are arranged orderly in the Majallah. Therefore, it can be said that Majallah not only the civil law that regulates the provisions of transactions based on Islamic law, but as well as the law of civil proceedings in the field that occurs throughout the jurisdiction of Ottoman Empire. (Ozturk, 1973).

In the IV chapter on *hawalah*, there are 2 (two) subsections: In the subsection I: About the *aqad hawalah* explanation, consisting of 2 (two) articles, in the first article of the *hawalah* explanation and the second article on the terms of the *hawalah* explanation. In the subsection II: The explanation of the law of *hawalah*. Altogether, there are 27 (twenty-seven) *maddah* (verses), from verse 673 up to paragraph 700, as follows:

*(Verse 673) Hawalah is a transfer of debt from one party to another.*

*(Verse 674) Muhil is a person who diverts, meaning a person who is indebted (second party).*

*(Verse 675) Muhal lahu is the payee, the creditor (first party)*

*(Verse 676) Muhal alaih is the person who receives the transfer of debt (should pay the debt to the second party changed to the first party) is also known as Muhtal alaih.*

*(Verse 677) Muhal bih is the asset (money) of the debt transferred.*

*(Verse 678) Hiwalah Muqayyadah is a transfer of debts attributed to the settlement of money by a person who is owed (first) with a guarantee by the person who receives the transfer of debt. This happens if the person who is indebted (Muhil) moves the burden of the debt to Muhal alaih by relating*



*it to the Muhal alaih debt. This is what is permissible under the Scholars' agreement. (Mansuri, 2006).*

*(Verse 679) Hiwalah Muthlaqah is a transfer of debt that is not associated with the settlement of money by the person who owed it. Then, paid by the person receiving the transfer of debt.*

This happens if a person moves his debts to be borne by the Muhal alaih, while he does not associate them with their receivable debts. Then, Muhal alaih received the hawalah. Scholars other than the Hanafi sect do not justify this kind of hawalah. Some scholars argue that muthlaq's debt transfer included the kafaah madhdah (assurance). Thus, it must be based on the three parties: the person who has receivables, the person who owes and the person who bears the debt. (Carya, 2006)

*(Verse 680) If Muhil (the second party) said to Muhal lahu (first party): "That my debts I have been switching to someone and accepted (first party)". Thus, debt transfer has been legitimately moved to third parties.*

*(Verse 681) Aqad Hawalah is also valid if it is done by agreement between Muhal (first party) with Muhal alaih (third party). Like the statement to Muhal alaih, «take the debts of the Fulan of the many cents to your debts in a hawalah, then be accepted by the Muhal alaih.» Or like the statement, «I took the debts of the Fulan for payment to you (Muhil), then accepted by the Muhal». Thus, the aqad is also valid, and will not even be void if then the Muhal alaih regretted it.*

*(Verse 682) When it is told to Muhal alaih (third party) that this agreement has occurred between the Muhil (second party) with Muhal lahu (first party), it is legitimate aqad hawalah. As if a person transfers his debts to another person who is in another country, then accepted by the Muhal lahu if it has been notified to Muhal alaih, then it is legitimate.*

*(Verse 683) Whereas hawalah which is only agreed by the Muhil and Muhal alaih. Thus, the validity of the hawalah is delayed until it is agreed by Muhal lahu. As if someone told People «take for you the same debts as the Fulan», then accepted by the person. Therefore, the aqad is delayed until the approval of the Muhal lahu.*

*(Verse 684) Resourceful (not insane) is a requirement for the Muhil and Muhal lahu in the aqad hawalah. As for the Muhal alaih, other than reasonable also should puberty (adult). As a child who is not yet discernment (can distinguish both good and bad), if he moves his debts to another person in order to become a debt of another person, then the other person accepts hawalah for himself. Then the hawalah is not valid. Likewise, if a child who is either discernment is still in the care or not, it is not legitimate to receive hawalah from others.*

*(Verse 685) Baligh is a requirement in the application of hawalah to the Muhil and Muhal alaih. On the basis that the aqad hawalah small child who discernment must be suspended until the permission of Guardians. And if the child has received the hawalah for him, then it is required Muhal alaih richer than the Muhil accompanied also by the permission of Guardian.*

*(Verse 686) It is not required that the debt of the Muhal alaih on Muhil to be legitimate. So it is legitimate to be transferred debt to Muhal alaih without indebtedness to Muhil.*

*(Verses 687) Any debt that cannot be guaranteed, can not be a hawalah.*

*(Verse 688) Any debt that can be given a guarantee is legitimate to be made hawalah, but should be known the rate of debt. Therefore, it is not valid if the amount of the debt is unknown. As if someone says «I receive your debts that you will take from Fulan», then the hawalah is not valid.*

*(Verse 689) As debt transfer (hawalah) which in the form of collateral is valid, so is it legitimate to transfer the debt (hawalah) that is guaranteed based on the assurance system.*

*(Verse 690) Hawalah is aimed to make Muhil free from debt because there is someone who guarantees to provide it. So the Muhal alaih is given as the one who is required to pay for the Muhal lahu, or if Murtahin (the one who receives the pawn) redirects to someone to be a Rahin (a mortgaged person). So, Murtahin still has no right to confiscate the pawn goods.*

*(Verse 691) If Muhil do aqad hawalah in the form of muthlaq, while Muhal alaih has no debts on Muhil, then Muhal alaih will bill to Muhil after making payment to Muhal. And if Muhil has debts, the debt of Muhal alaih on Muhil will be reduced after making payment to Muhal.*

*(Verse 692) Lost the right of debt claims by Muhil in the hawalah muqayyadah to Muhil bih. And Muhal alaih is not obliged to pay the debt. However, if paid by Muhal alaih, the payment becomes a guarantee, which is then returned to the Muhil. And if Muhil dies before payment, while the debt is greater than the inheritance, then people who have many debts are not entitled to the debt transferred,*

*(Verse 693) If the transfer of debt (hawalah) is done in muqayyad through given the price of goods requested by the seller to be the dependents of the buyer, then it is legitimate to refer to the Verse (252) in the Majalla. And if the transferred goods are damaged before being accepted and dropped in price or are inflated based on the khiyar syarat, khiyar ru'yah or khiyar aib, then can not cancel the Hawalah. So Muhal alaih return it after settling on Muhil and taken what is given by Muhil. But if it appears to meet the requirements and the goods are appropriate and explained that Muhal alaih exempt from*

*the debt, then the hawalah is not valid.*

*(Verse 694) If it meets the requirements of hawalah muqayyadah by way given the number of available on the Muhil in a trustful to the Muhil alaih and the property is accordingly it becomes invalid hawalah, then this debt will be refunded to Muhil.*

*(Verse 695) In the hawalah muqayyadah that if given (to Muhal) a number of debt of goods that are in the Muhil through Muhal alaih while the goods are damaged then it is not valid. And if he (Muhal alaih) does not bear it, then the debt will return to the Muhil. But if the Muhal alaih endure it is not void hawalah with damage to the goods. As if a person diverts the debt to another person with the obligation to pay a trustful amount of the dirham, then breaks down before being taken (by Muhal) then cancel hawalah and the debt returns to the Muhil. As for if the dirham is lost or provided in a trustworthy, then (Muhal alaih) must bear the loss, whereas hawalah not void.*

*(Verse 696) If a person transfers a certain purchase right to another person (for sale to the person who transferred the purchase right) at their price. Then accepted by the person, it is legitimate even Muhil alaih can be forced to sell it at the purchase price because it becomes a debt.*

*(Verse 697) On the hawalah mubhamah means that the hawalah is not mentioned the time of its repayment, if the tempo of the repayment is not long (soon), then Muhil should pay for it. But if the time is old, then the hawalah is also long, it means that it must be settled when until the tempo.*

*(Verse 698) Muhal alaih can not return (debt) to the Muhil before making payment. And if returned (to Muhil) the debt, it must be refunded the type of debt of the specified dirham. Like the debt of silver dirham to Muhal alaih, then given the gold dirham to Muhil, it must be taken silver, meaning it should not ask for paid with gold dirham. Likewise, if paid with a certain item while a diverted one is a debt of the dirham.*

*(Verse 699) As that Muhal alaih free from debt after giving the Muhal bih or there is someone who takes (obligation of debt payment) for him in a hawalah or Muhal lahu free the Muhal alaih of debt payments. And if Muhal lahu to give or alms Muhal bih to Muhal alaih, then received by Muhal alaih, then Muhal alaih will be free from the debt.*

*(Verse 700) If Muhal lahu died, then Muhal alaih gave it to the heir (Muhal lahu). Finished.*

## **The Hawalah System In Indonesian Civil Law**

In article 18 paragraph (1) of Law No. 4 of 1996 on the rights of liability, it shall be governed that the right of liability shall be erased due to the following events: a)

the deletion of the debt secured by the right of liability; b) Waive rights by the rights holder; c) Cleaning of rights on the basis of the designation by the Chairman of the District Court; d) The deletion of land borne by the rights of liability.

In the concept of civil law, the right to be referred to as *Hawalah* in Islamic civil law is known as the transfer of debt in Indonesian Civil Law. The transfer of individual debts is similar to the Debt Acquisition Agency (*schuldooverneming*), Debt relief agency or debt sale, or creditor replacement agency or replacement of debtor. In civil law, the institution is known as a subrogation, novation and cessie, which is a legal institution that allows the replacement of creditors or debtor. (Sjahdeini, 2007).

Pursuant to the provisions of article 1381 of the Civil Law, it has been affirmed that one of the events that caused the alliance to remove is due to the occurrence of debt renewal. In general, to transfer a debt from an old debtor to a new debtor in the civil law, as follows:

### **1. Transfer by way of Delegation**

The delegation is the transfer of debt from the old debtor to the new debtor affirmed in a delegation deed, but the old debtor is still bound to guarantee the repayment of the debt transferred to the new debtor. While the creditor party does not explicitly declare the release of the old debtor from the obligation of the transferred debt payment. In article 1417 of the Civil Law mentions that «delegation or transfer, which a person owes to one who is given to a new indebted to bind himself to the receivable, but does not publish a debt renewal, and which is receivables does not expressly state that it intends to liberate the debtor who performs the transfer from the alliance.»

### **2. Subrogation**

The subrogation is governed in article 1400 to 1403 of the Civil Law. Subrogation is a replacement of the rights (receivables) of old creditors by a new third party/ creditor paying, where the subrogation occurs because of the payment made by the third party. This subrogation occurs either with approval or by legal acknowledgment to the creditor either directly or indirectly (the new lender lends money to the debtor to pay the receivables to the old creditor). Thus, in the case of subrogation occurs on the initiative of the creditor (article 1401 sub 1 of the Civil Law), does not require the approval of the debtor. (Satrio, 1991).

### **3. Novation**

Novation is governed in article 1413 to 1424 of the Civil Law. Novasi is an update of receivables conducted by the parties agreement through: a) there is a replace-

ment of the old alliance with a new alliance for the benefit of creditors (objective novation); b) A new debtor is appointed to replace the old debtor (passive subjective novation); or c) based on an agreement between the old creditor, the debtor and the new creditor (new agreement), the new creditor was appointed to replace the old creditor (the active subjective novation). Thus, in Novation the old alliance was erased and replaced by a new debt alliance. (Satrio,1991). The transfer by means of passive subjective novation (debt renewal) is the transfer of debts from the old debtor to the new debtor accompanied by the transferred statement of debt exemption from the creditor to the old debtor.

Pursuant to article 1413 of the Civil Law, it was confirmed about the implementation of the novation of debt that there are three kinds of roads to carry out debt renewal: 1) When a person who owes a new debt, to the person who Owed to him could replace his old debt, so it was erased; 2) When a person owes a newly appointed to replace the old indebted person, who by the receivable is exempt from his account; 3) If as a result of a new covenant, a person who is newly owed is appointed to replace the person who owes the old, then the old indebted from the alliance of his debts.

Regarding the agreement that follows the principal agreement on the debt, it has been governed by article 1422 of the Civil Law as follows: *«If debt renewal is held with the appointment of a new debtor replacing the old debtor, the privileges and mortgage-mortgages are and originally attached to receivables, not transferred to new debtor goods «*

#### 4. Cessie

Cessie has been governed by article 613 of the Civil Law. Cessie is the way to transfer receivables on behalf by creating an authentic deed under hand to another party, but the old alliance is not erased, only switching to a third party as a new creditor. Cessie does not have any consequences for those who owe before the cessie is notified to him or agreed in writing or admitted. (Satrio,1991).

The contract of *hawalah* in banking is usually applied to the following: a) Factoring, where the customers who have receivables to the third party, then transfer the receivables to the bank, the bank then pays the receivables and the bank Third party. b) Post-dated check, where the bank acts as a bill, without paying the receivables first. c) Bill discounting, in principle that the bill discounting is similar to *hawalah*. Only, in the bill discounting the customer must pay the fee, while the fee is not found in contract *hawalah*. One example of a modern application or take over in banking is the existence of a self-service teller system/Anjungan Tunai Mandiri (ATM) and other systems. (Antonio, 2001).

*Hawalah* as one of the sharia banking products in the field of services has obtained the legal basis in the law No. 10 of 1998 through the change of Law No. 7 of 1992 on Banking. Thus, in Law No. 21 of 2008 on Sharia Banking, *hawalah* obtained a more robust legal basis. In article 19 of the Sharia Banking Act, it is said that the business activities of Sharia Bank include conducting a debt takeover based on its contract or other contract that is not contrary to the sharia principle.

Sharia banking services products based on the *akad hawalah*, technically based on Bank Indonesia Regulation/Peraturan Bank Indonesia (PBI) No. 9/19/PBI/2007 on the implementation of sharia principles in gathering fund activities and distribution of funds and services of Sharia Bank, as amended by PBI No. 10/16/PBI/2008. Article 3 PBI referred to the fulfillment of sharia principles as intended is done through service activities with the use of *akad kafalah*, *hawalah* and *sharf*. (Anshori, 2009).

The National Sharia Council/Dewan Syariah Nasional (DSN) establishes a fatwa on the transfer of debts. The general provisions of the fatwa, referred to as the transfer of debt, are the transfer of debts from conventional banks/financial institutions to the Bank/Sharia financial institution. Akad can be done through the following four alternatives:

### 1. The First Alternative

Fatwa of DSN No. 19/DSN-MUI/IV/2001 on *al-Qardh* and Fatwa of DSN No. 04/DSN-MUI/IV/2000 on *Murabahah* is valid in the implementation of debt transfer financing. In this case, Sharia Financial Institutions/Lembaga Keuangan Syariah (LKS) provide *qard* to the customer. Through the *Qard*, the customer pays off his credit (debts). Furthermore, assets purchased by way of credit belong to the customer in full. Because the customer sells assets to the LKS, and the sales proceeds the customer pays off his *qardh* to the LKS. Then, the LKS sell a *murabahah* asset that has become his own to the customer, by means of payment in installments.

### 2. The Second Alternative

LKS buys some customer assets through the Conventional Financial Institution/Lembaga Keuangan Konvensional (LKK) license. Thus, *syirkah al-milk* came between LKS and customers against the asset. The part of the asset purchased by the LKS is a part of the asset worth the debt (remaining instalment) of the customer to the LKK. Then, LKS sell a *murabahah* part of the asset that belongs to the customer, with payment in installments. On this second alternative, it still refers to the Fatwa of DSN No. 19/DSN-MUI/IV/2001 on *al-Qardh* and Fatwa of DSN No. 04/DSN-MUI/IV/2000 on *Murabahah*.

### 3. The Third Alternative

Management to acquire full ownership of the asset. The customer can do *akad ijarah* against the LKS, according to the *Fatwa* of DSN-MUI No. 09/DSN-MUI/IV/2002. The *akad ijarah* as intended, shall not be required with (should be separated from) the granting of funds provided by the Bank. Thus, the amount of rewards of such services shall not be based on the sum of funds provided by the LKS to the customer. But if necessary, the LKS can help lend money to pay the customer's obligations using the principle of *al-Qardh* pursuant to the *Fatwa* of DSN-MUI No. 19/DSN-MUI/IV/2001.

### 4. The Fourth Alternative

*Fatwa* of DSN No. 19/DSN-MUI/IV/2001 on *al-Qardh* and *Fatwa* of DSN No. 27/DSN-MUI/III/2002 on *Ijarah al-Muntahiyah bi al-Tamlik* also applied in the implementation of debt transfer financing. Through, the LKS gives *al-qard* to customers. Through the *al-qard*, the customers pay off the credit (debts). Thus, the purchased asset is fully owned by the customers. Then, customers sell assets to the LKS. Next, by getting the sales result, customers can pay the *qard* system to the Sharia Financial Institutions/ Lembaga Keuangan Syariah (LKS).

## CONCLUSION

The *hawalah* system (debt transfer) in the *fiqh* has been ratified by the verses of the Qur'an, and has been explained generally by the Prophet Mohammad hadith. Later, in more detail, there have been several opinions of the scholars of *fiqh*, especially the opinion of the scholars of the Imam Hanafi sect (Hanafiyah) and other sect opinions. However, the Imam Hanafi sect has more serious determination of the provisions of the practice of *hawalah* (debt transfer), such as: conditions, pillars, forms, the factors that cancel and parables in the system of the *hawalah*. In the legal level, the *hawalah* system in the *fiqh* is seen as a doctrine because it does not bind its perpetration formally. In the sense that violating *hawalah* in the context of *fiqh* can not be sanctioned by the State Law Institute. Thus, the controversy on the system of debt transfer (*hawalah*) contained in the *Fiqh* to *Majallah al-Ahkam al-Adliya* and the Civil Law of Indonesia became undeniable.

The *hawalah* system in *fiqh* has been a serious consideration in the process of Legislation as a dispute resolution solution in the transfer of debt. As in the civil law during the Ottoman dynasty called *Majallah Ahkam al-Adliya*, especially in chapter-IV of the transfer of debts (*hawalah*) that almost overall adopted the system of debt transfer contained in the priests sect Hanafi. Because the system of debt transfer in the *Majallah* is still similar to the *hawalah* system in *fiqh*. But the system is in a *Ma-jallah*, mentioning three other types of *hawalah*: 1. *Hawalah Muqayyadah* 2. *Hawalah-*



*Muthlaqah*, and 3. *Hawalah Mubhamah* (which is not the tempo of the payout). In addition, it is also discussed about the pillars and terms and conditions of *hawalah*. All these provisions, become a binding legal basis This statement is strengthened by the background of the preparation of *Majallah Ahkam al-Adliya*, namely the command of the Government for the preparation of Islamic civil law based on the Imam Hanafi sect.

In Indonesian Civil Law, a debt transfer system that has a binding legal basis refers to Law No. 4 of 1996 on the rights of liabilities, the system is herein referred to as the right of liability not a transfer of debt. So that the debt transfer system in Indonesia is different from the *majallah* and the *fiqh* because the system of rights of debt or transfer of debts similar to the institution of debt acquisition (*schuldoverneming*), debt relief agencies or debt sale ), or any creditor replacement agency or replacement of debtor. As for, directly related to the system of debt transfer through the *hawalah* system is governed by a fatwa assembly DSN MUI. Meanwhile, the Fatwa DSN MUI in the legal level in Indonesia is not binding.

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