

## The Obligation of The State to Realize Sharia-Compliant Certainty in Islamic Banking Financing

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### Abstract

**Introduction:** Islamic banking is growing significantly and rapidly. The state needs its presence not only related to providing the right to freedom of religion but also ensuring that its implementation is following the provisions of sharia. Islamic banks have received a lot of criticism due to the existence of prohibited elements specifically in financing. Therefore, a supervision system for sharia compliance is needed.

**Purposes of the Research:** This paper analyzes the basis and form of state obligations and their manifestation in ensuring compliance with Sharia principles in Islamic banking financing contracts in Indonesia. Because the State Financial Services Authority as the party with the authority in supervision has not reached the conformity of Sharia principles in the agreement as a private aspect.

**Methods of the Research:** The problem analysis methodology involves legal research with a philosophical approach. The Statute Approach is conducted by reviewing applicable legal regulations, while the Analytical Approach involves analyzing legal principles and understanding through the examination of legal materials using techniques such as grammatical, teleological, and systematic interpretation.

**Results of the Research:** The state is responsible for ensuring Sharia compliance in Islamic banking financing stems from the basic principles of Pancasila and the Constitution, as reflected in various laws, regulations, and fatwas of the National Sharia Council. These regulations serve as guidelines for sharia-compliant financing. However, legal certainty is needed in supervision and sanctions in implementing Sharia compliance.

**Keywords:** Islamic Banking; State obligation; Sharia Compliance.


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## INTRODUCTION

The evolution of the global Islamic economy has left a profound impact on people's lives, Indonesia included, shaping various facets, including legal frameworks, as a response to the growing need for a juridical basis for its practical implementation. Despite not all Indonesians being Muslims fully endorsing endeavors to establish Islamic economic laws, its formal consideration has been consistent across different developmental stages associated with Islamic Law. Following independence, Islamic leaders harbored aspirations for the incorporation of Islamic law within the new state. Over the past decade, Indonesian society has been immersed in legal and religious debates, with the foremost issue revolving around the integration of Islamic law or Sharia into national legislation.<sup>1</sup>

<sup>1</sup> Nelly Van Doorn (Harder, Wake Forest University) reviewed R. Michael Feener's book, *Muslim Legal Thought in Modern Indonesia*, (Cambridge: Cambridge University Press, 2007) in the *Journal of American Oriental Society* 13, no. 1 (2010): 132-135.

Indonesia, despite not being an Islamic state, operates as a constitutional state with the acknowledgment of the One and Only God. This underscores the country's commitment to safeguarding the rights of religious adherents to practice their faith freely. Indonesia functions as a nation governed by laws, with all policies grounded in legal frameworks, often referred to as a religious nation-state. Religion serves as the moral and ethical foundation of laws and regulations governing the state. However, it's undeniable that with a predominantly Muslim population, Islamic law exerts influence on the positive laws of the land. The social fabric shaped by the majority Muslim populace significantly impacts the formulation of laws and regulations, contributing to the development of positive law, including constitutional law.<sup>2</sup> In Indonesia, the constitution reigns supreme as the highest legal authority, serving as the bedrock of the legal system. Islamic law, within the framework of the 1945 Constitution, holds a significant position, as evidenced by the Jakarta Charter. Although certain aspects of the Jakarta Charter have been amended via presidential decree, it is recognized that its influence has left an indelible mark on the 1945 Constitution, becoming an integral part of its essence.<sup>3</sup>

Azhary with Concentric Circle Theory explains 2 (two) concepts of thought. *The first is* Western thought, which separates the relationship between state and religion. The law and state are free and independent of religion. *The two* Islamic ideas, in which religion, law, and state are one unit and have a close relationship are inseparable. Azhary illustrates a conceptual framework with concentric circles, assigning each component a specific position. The state is situated in the outermost circle, followed by law in the middle circle, and religion at the core. Placing the state in the outermost circle signifies that it does not impose limitations on laws and religions. Azhary further argues that religious conflicts in Indonesia should not disrupt the state's order or interfere with existing laws.<sup>4</sup>

The Indonesian Constitution can flexibly accept and give place to Islamic economic values so that Islamic economics has a place and a strong foothold in Indonesia. Mochtar Kusumaatmadja, one of the functions of law is to provide pathways for the development (political, economic, legal, and socio-cultural) of society<sup>5</sup>. The 1945 Constitution outlines the state's comprehensive obligations to its citizens, encompassing various domains such as politics, governance, social welfare, religion, education, economy, and defense. The relationship between the state and its citizens is guided by constitutional norms. These obligations are implicitly articulated in the preamble of the 1945 Constitution, particularly in the fourth paragraph, emphasizing the government's duty to safeguard the entire Indonesian nation and its people. The state is responsible for ensuring a just legal system, safeguarding human rights, fostering a national education system, offering social security, and guaranteeing freedom of worship for its citizens.

In the realm of economics, especially within the banking financial institutions in Indonesia, Islamic banking has shown significant growth. Starting with Bank Muamalat Indonesia, it has expanded into numerous Sharia Commercial Banks and over 164 Sharia

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<sup>2</sup>Muhammad Alim, *Asas-asas Hukum Modern dan Pengujian Peraturan Dalam Islam*, Public lecture, Faculty of Law, University of Muhammadiyah Yogyakarta, 2002.

<sup>3</sup>Rifyal Ka'bah, *Penegakan Syariah Islam di Indonesia*, Jakarta: Khairul Bayan, 2004, p. 7

<sup>4</sup>Syahirul Alim, "Sejarah dan Konsep Pembaruan Hukum Islam Masa Kini di Indonesia. Web Directorate General of Religious Justice Board of the Supreme Court of the Republic of Indonesia, p. 8.

<sup>5</sup>CFG Sunaryati Hartono, *Upaya Menyusun Hukum Ekonomi Indonesia Pasca 2003*, National Development Seminar VIII with the theme "Law Enforcement in the Era of Sustainable Development," organized by the National Law Development Agency of the Ministry of Justice and Human Rights, Denpasar, 14-18 Juli 2003.

Rural Banks by 2021. Law Number 21 of 2008 on Sharia Banking serves as the legal foundation for Sharia banking operations, aiming to safeguard citizens' rights within Sharia-compliant banking activities. Alongside the Sharia Banking Law, the Financial Services Authority (OJK) oversees regulatory and supervisory functions. Particularly concerning Sharia principles, The Financial Services Authority (OJK) collaborates with the National Sharia Council (DSN), which plays a pivotal role in ensuring the adherence to Sharia principles within Islamic banking operations.

However, when it comes to ensuring adherence to Sharia principles, there is a lack of evidence demonstrating the state's ability to guarantee compliance. The Financial Services Authority (OJK), tasked with overseeing financial institutions in Indonesia, including Islamic banks, has not directly engaged in monitoring the implementation of Sharia principles. Several studies indicate that the financing contracts of Islamic banks do not consistently align with Sharia principles and concepts. Consequently, the Sharia Supervisory Board (DPS), an independent institution, primarily assumes the supervisory role. Although the Sharia Supervisory Board (DPS) operates independently and is not an extension of the state, it falls under the umbrella of the National Sharia Council of the Indonesian Ulama Council (DSN-MUI). The supervision of Islamic banking by The Financial Services Authority (OJK), the National Sharia Council of the Indonesian Ulama Council (DSN-MUI), and the Sharia Supervisory Board (DPS) primarily rely on the independent oversight provided by the Sharia Supervisory Board (DPS).<sup>6</sup>

Islamic banking includes its function as a distribution of funds to the public in the form of financing and has various types of agreements, including profit sharing, buying and selling, and rent, as well as various derivative contracts. With activities that are no different between Islamic and conventional banking, it is undeniable that the implementation of activities in Islamic banking is strongly colored and influenced by the concept of conventional banking activities, especially related to the existence of credit interest as an element in the distribution of public funds in conventional banks.

Based on the law of agreement, contracts in Islamic banking applicable in Indonesia in addition to being subject to sharia provisions must also follow the principles in the Civil Code. The principle of contract freedom stipulated in Article 1338 of the Civil Code provides space for Islamic banking to realize Sharia principles but also opens up opportunities for the entry of elements that may be contrary to sharia, so more in-depth supervision is needed to prevent things that violate sharia provisions. Especially because various empirical facts in various studies show the above, including the object of goods, determining profit margins, late fees on *murabahah*, and the position of Islamic banks in *mudharabah* contracts.<sup>7</sup> Based on this, this study analyzes its basis and manifestation in ensuring compliance with Sharia principles in Islamic banking contracts in Indonesia.

This paper explores the state's responsibility in upholding Sharia compliance, which extends beyond merely having laws and regulations in place to ensure adherence to Sharia principles. The presence of Islamic financial institutions fulfills citizens' needs related to both religion and economics. In Islam, conducting economic activities guided by Sharia principles is considered a form of worship. Thus, the state should not only guarantee

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<sup>6</sup> Muhammad Adam HR, *Tanggungjawab Negara dalam Menjamin Penerapan Prinsip-prinsip Syariah pada Perbankan Syariah di Indonesia*, Dissertation, Doctoral Program in Law, Postgraduate in Law, Sebelas Maret University, Surakarta, 2022, p. 9.

<sup>7</sup> *Ibid.*

freedom but also ensure that economic transactions adhere to Sharia provisions, maintaining compliance with Sharia principles throughout their implementation.

## METHODS OF THE RESEARCH

The method used in problem analysis is through legal research with a philosophical *approach*, reflection on the legal rules to be analyzed, and reflection on the foundation of reality as the function of legal philosophy, namely studying and studying law. The *Statute Approach* is carried out through a legal review of applicable positive legal regulations, in the form of laws and decisions of authorized institutions.<sup>8</sup> The *Analytical Approach* is also carried out to analyze the understanding of legal principles, legal understanding, etc. then an analysis of legal materials is carried out with grammatical interpretation techniques to find the meaning of words contained in the Law by emphasizing meaning in the context of identifying the elements that make it up, teleological interpretation to interpret a rule based on the goals to be achieved and the basis of thought and a rational explanation of the Act is made, and a systematic interpretation through relating one rule to another based on the principle underlying it.

## RESULTS AND DISCUSSION

### A. The Foundational Principles of Pancasila and Their Implications for the Economic Rights of the Indonesian Muslim Community in Practicing Sharia-compliant Economic Activities

The interaction between the state and religion can be categorized into two distinct paradigms: antagonistic and accommodating. Indonesia neither adheres strictly to religion-based governance nor adopts a purely secular stance. Instead, it embraces an integrated approach to the relationship between religion and the state. Here, the state functions as both a political and religious entity. In line with the symbiotic paradigm, the relationship between religion and the state is viewed as mutually dependent and reciprocal. Religion relies on the state as a tool for safeguarding and advancing its principles, while the state depends on religion for guidance in shaping morality, ethics, and spirituality, and as a source of motivation.

There are polemics about the relationship between the state and religion. The *first* issue sets limits on how the state can interfere in religious affairs; *second*, the emergence of symptoms in a society rooted in the secularization of Western thought; *third*, related to the problem of contextualization of the *state type*, where in the history of the formation of the *nation-state*, Indonesia is the most plural country in the world.<sup>9</sup> Mahfud MD argues that constitutionally Indonesia is not a state based on religion, but a state of Pancasila. The Pancasila state is characterized as a "religious nation-state," meaning it neither adheres strictly to one religion nor adopts a secular stance. Some refer to it as a Theo-democratic country. Throughout Indonesian history, despite the absence of the original seven words in the Jakarta Charter, the implementation of Islamic law has been pursued within a legal and political framework. This allows Islamic principles to permeate and influence various aspects of society. Consequently, Muslims actively engage in national legislative programs

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<sup>8</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo Persada, 2003, p. 73.

<sup>9</sup> Armadiy Armawi, *Pemikiran Filosofis Hubungan Negara dan Agama di Indonesia*, Dissertation summary, Doctoral Program in Philosophy, Postgraduate Faculty of Philosophy, Yogyakarta: Gadjah Mada University, 2009, p. 1-2.

and processes, as well as cultural movements, advocating for substantive values rather than mere symbols.<sup>10</sup>

Drawing from the essence of the first and second principles of Pancasila, the state is founded upon the belief in the Almighty and a commitment to just and civilized humanity. This principle is explicitly articulated in the Explanation of the Preamble of the 1945 Constitution, particularly in the fourth Point of Thought. Unlike a secular state that separates religion from governance, Pancasila affirms the state's foundation on the divinity of the Almighty, as expressly stated in Article 29, paragraph (1) of the Constitution. Consequently, the logical implication of realizing an Islamic economy by the constitution is viable. Every Indonesian citizen enjoys the freedom to practice their religion and engage in economic activities following their beliefs, which are protected by the state.

The Supreme God is a profound principle of the Indonesian state and is the ultimate goal. Because the ultimate goal is not just prosperity or welfare sought by the state, but by God Almighty Himself.<sup>11</sup> The third precept, namely the unity of Indonesia, means that there is no place for religious conflict, religious groups, inter-religious believers, and between religious believers. In economic activities such as private activities in Indonesia, since Dutch colonialism has known the existence of legal pluralism, it is very possible to have special regulations for Muslims in the economic field per the needs and desires of their adherents.

Legal pluralism already exists in Indonesia with the division of population and the law that applies to each group based on Article 163 Indische Staatsregeling (IS). Until now, legal pluralism still prevails, especially in the field of private law. Similarly in the field of economic law. This includes the law of treaties. The existence of globalization from the West has a strong influence on the law of the economic field. On the contrary, the needs and desires of the Muslim community to carry out their lives based on Islamic law should also receive attention from the state. The implementation of two different economic laws is possible within a country, as Tie stated that laws are within cultural diversity. Multicultural law emerges from dimensions replacing the emphasis on the law of codification and justification of power, through the exploration of alternative concepts based on social, democracy, and legal empowerment.<sup>12</sup>

The diversity within treaty law in Indonesia, including the Dutch (Western) legal legacy, undoubtedly exhibits significant distinctions. From a Western perspective, culture tends to evolve in response to social changes, whereas, in Islam, civilization is perceived as established. Western views often consider Islam as a cultural component, whereas Islam defines culture within the framework of religion. Islam governs human conduct, ethical codes, and moral principles, including directives and prohibitions regarding permissible actions. The freedom of individuals to enjoy Allah's mercy should not contravene Islamic Sharia law. Every aspect of achieving happiness encompasses a spiritual dimension that cannot be quantified solely by wealth and material possessions.<sup>13</sup>

Globalization introduces a Western-centric culture that seeks to propagate uniform products under the control of a select few, serving the interests of these entities. This materialistic cultural imposition has the potential to stir unrest and social discord within

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<sup>10</sup> Mahfud, Moh. MD. *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta: RajaGrafindo Persada, 2011, p. 281-282.

<sup>11</sup> Armaidly Armawi, *Op. Cit.*, p. 12.

<sup>12</sup> Tie, Warwick. *Legal Pluralism: Toward a Multicultural Conception of Law*. Brookfield, VT: Ashgate Publishing Company, 1999.

<sup>13</sup> Amrullah Ahmad, *Op. Cit.*, p. 21.

non-Western societies, which uphold distinct cultural and religious values. Consequently, the constitution should ensure ample room and safeguards for preserving the unique identity of each nation, thereby mitigating conflicts arising from the impact of globalization.

Rajagukguk argued, that due to historical factors, pluralism of society, and Indonesia's position as part of the global community, it is impossible to create a uniform law in Indonesia. The history of Indonesia is inseparable from the development of economic globalization and legal globalization, starting from the spice trade period that brought new laws to this country. Currently, economic globalization that leads to legal globalization takes place peacefully, among others through agreements. Therefore, at least four legal systems coexist peacefully in Indonesia today: Customary Law, Islamic Law, "Civil Law" and "Common Law." As the motto of Bhineka Tunggal Ika: "Different but Still One," the legal system in Indonesia also contains pluralism along with the development of the Indonesian nation and society. Legal pluralism can encourage the creation of national unity, economic development, and people's welfare. These three are major problems faced by the Indonesian nation.<sup>14</sup> When analyzed based on Griffiths' *Legal Pluralism* theory, legal pluralism in Indonesia is strong *legal pluralism*,<sup>15</sup> because of the equal position between each existing legal system, customary law, Islamic law, civil law, and common law.

The word "agreement" shows the importance of harmonization between legal systems in Indonesia. Various efforts to harmonize law between legal systems can apply by finding common ground between the two. In the field of treaty law as an economic implementation of Islam, in addition to being subject to Islamic law is also subject to the Civil Code. Departing from article 29 of the 1945 Constitution paragraph (1) "that the state is based on the One and Only God", and in paragraph (2) "the state guarantees the freedom of its population to practice their religion", then for Muslims, there is room to embrace their religion and carry out worship in the sense that it includes economic activities following Islamic teachings.

Business activities as part of muamalah according to Islamic law are based on mubah or "permissibility", meaning "every Muslim is free to do whatever he wants, as long as there are no prohibitive provisions in the Qur'an and Sunnah". Juxtaposed with the principle of agreement in the Civil Code, this principle has several similarities with the principle of freedom of contract in Article 1338 of the Civil Code. Freedom of contract provides freedom for people to make agreements as long as they do not violate the provisions. Similarly, in muamalah freedom is given as long as it does not violate what is forbidden. The existence of this harmony provides a basis for Islamic financial institutions to be able to implement agreements based on Islamic Law in Indonesia while still being subject to 2 (two) different legal systems, either promising material or substance, how to implement, until its resolution in case of disputes.

However, what is described above does not mean that there are no problems with legal pluralism in Indonesia. There are three main issues: national unity, economic growth, and social welfare. Some secessionist territories must be resolved without violence through economic equality and prosperity. In addition, tribal and religious conflicts can also arise at any time and place. Economic growth becomes the second problem, where the state must

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<sup>14</sup> Rajagukguk, Erman. *Ilmu Hukum Indonesia: Pluralisme*. Delivered at a Panel Discussion in the framework of the 37th Anniversary of IAIN Sunan Gunung Djati, Bandung, April 2, 2005, p. 2-7.

<sup>15</sup> Griffiths, John. "What is Legal Pluralism?" *Journal of Legal Pluralism*, 24 (1986): 1-55.

employ reviving the real sector. And the third problem is to improve the welfare of the people. In a pluralistic society and legal pluralism, the law should be able to answer it. Because law is part of the political, economic, social, and philosophical development of the nation. Initiating Indonesian Law we need to remember the pluralism and diversity of religions, customs, communities, and living legal systems.<sup>16</sup>

## **B. Fundamental Responsibilities of the State in Enforcing Islamic Economic Principles According to the 1945 Constitution**

The Constitution has a broad meaning. Some terms that are synonymous with constitution include *Loi Cinstitutionnel*, *Droit constitutionnel*, Basic Law, *Qanun Asasi*, *Grondwet*, and *staatregeeling*. Even in unwritten practice, there are also notions of *unwritten constitution* and *constitutional convention*. It's just that in everyday practice it is known as a narrow sense, as Brian Thompson writes, "A constitution is a document which contains the rules for the operation of an organization". The state as an organization will have a text referred to as a constitution or constitution.<sup>17</sup>

Since the constitution is the law that is considered the highest level, the purpose of the constitution as the highest law is to achieve and realize the highest goal. The objectives that are considered to be heightened are (1). Justice, (2). Order, and (3). The realization of ideal values such as freedom *prosperity and welfare*. As formulated as the purpose of statehood by *the founding leaders or the formers of the constitution*.<sup>18</sup>

In the formulation of the 1945 Constitution there are explicitly or implicitly fundamental views and values, the 1945 Constitution in addition to being a *political constitution*, is also an *economic constitution*, even a *social constitution*). The purpose of statehood is contained in paragraph 4 of the preamble of the 1945 Constitution, namely, "protecting the entire Indonesian nation and all Indonesian bloodshed, promoting the general welfare, educating the life of the nation, and participating in implementing world order based on independence, lasting peace, and social justice".

The 1945 Constitution serves as more than just a framework for state institutions and governmental organization; it also encompasses economic and social welfare considerations, notably articulated in Article 33. This provision is regarded as the economic cornerstone of Pancasila. Therefore, when exploring the constitutional basis for Islamic economics in Indonesia, it is essential to recognize not only the significance of Article 29, which guarantees freedom of religion and worship, but also the importance of Article 33.

Article 33 of the 1945 Constitution was the foundation for the Pancasila economic system. The economic constitution is seen in the material of Article 33: 1). The economy is structured as a joint effort based on the principle of kinship; 2). Those branches of production which are important to the state and which control the livelihoods of the people are controlled by the state; 3). Earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people; 4). The Indonesian economy is organized based on economic democracy with the principles of togetherness, equitable efficiency, sustainability, environmental insight, and independence, and by maintaining a balance of

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<sup>16</sup> Rajagukguk, Erman. *Ibid.*, p. 8-9.

<sup>17</sup> Jimly Asshiddiqie. *Konstitusi Ekonomi*. Jakarta: Kompas Media Nusantara, 2010, p. 3-5.

<sup>18</sup> *Ibid.*, p. 9.

progress and national economic unity; 5). Further provisions regarding the implementation of this article are provided for in the law.

From Article 33, several key principles emerge, including familial ties, state regulation, public welfare, economic inclusivity, cooperation, judicial efficacy, sustainability, environmental consciousness, self-reliance, balanced progress, and the preservation of national economic unity. Article 33 and Article 34 are both housed within the chapter titled "National Economy and Social Welfare," illustrating their interconnectedness. Article 34 addresses issues such as poverty, vulnerable individuals, deficient social security systems, community empowerment, and state obligations regarding healthcare provision. This economic constitution serves as a foundational framework for guiding policymaking in economic development endeavors. Hence, all economic policies, particularly within the Indonesian context, should align with and uphold the principles outlined in the economic constitution, as enshrined in the 1945 Constitution.

Indonesia's economic constitution, in addition to being characterized by the cultural character of the Indonesian people, is also strongly influenced by religion, although editorially it is not very visible, but its influence is strong on material, especially in Article 33 paragraphs (2) and (3) that "(2) The branches of production that are important to the state and that control the livelihoods of many people are controlled by the State. (3) The earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". Article 33 paragraphs (2) and (3) are by Islamic teachings, the fundamental principle in the production process is economic welfare. The system of production in the Islamic state is controlled by objective and subjective criteria. Objective criteria are reflected in the form of welfare measured by money, and subjective criteria in the form of economic ethics according to the Qur'an and Sunnah.<sup>19</sup>

How important justice is in wealth according to Islamic economics. The Prophet pointed out the consequences of inequality in the distribution of wealth in society "*On the one hand excess wealth can harm faith and morals, and on the other hand, poverty can drag them into kufr*". Therefore the Prophet emphasized the attitude of not exaggeration, and balance in viewing wealth not only for the benefit of the world but also the Hereafter, as the Prophet Muhammad said: "The best among you are those who do not leave the world for the Hereafter, and leave the Hereafter for the world, and should not be a burden to others".<sup>20</sup> The last phrase refers to the self-reliance, prosperity, and general well-being that begins with each individual. This is following the preamble of the 1945 Constitution.

Article 34 of the Constitution of 1945 provides the foundation for social welfare. The principle of benevolence and protection for the poor is universally recognized in Islam, as an integral part of the distribution of wealth which the state is obliged to regulate and supervise its implementation. Islam regulates in detail how to obtain objectivity in the fair and equitable distribution of property in society, both legal and elective measures, in the form of recommendations and prohibitions.<sup>21</sup>

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<sup>19</sup>Muhammad Abdul Mannan, *Teori dan Praktek Ekonomi Islam (Dasar-dasar Ekonomi Islam*, translated by M. Nastangin From The Original Title: *Islamic Economic: Theory and Practice*, Yogyakarta: Dana Bhakti wakaf, 1993, p. 54-55

<sup>20</sup>Ibid., 35-37.

<sup>21</sup>Rahman, Afzalur. *Doktrin Ekonomi Islam Jilid 1*, Islamic Economics Series No. 3. License Edition. Yogyakarta: Dana Bhakti Wakaf, 2005, p. 98.



The concept of financing in Islamic banking strongly prioritizes justice and equal position between the parties, for example in *mudharabah* and *musharakah* financing based on the concept of profit sharing. Thus, it can be concluded that the concept of financing in Islamic banking as part of the Islamic economy in the constitution of Indonesia is very possible to exist and develop, and is protected in its implementation. Departing from the first precept of Pancasila and Article 29 of the 1945 Constitution, this is the right for Muslims in Indonesia to embrace their religion and carry out their worship including worship in economic activities, and the state is obliged to guarantee it. The existence of legal pluralism in Indonesia is also not a problem, because pluralism is one of the characteristics of this nation that is a challenge for its management.

### **C. The State's Responsibility in Ensuring Sharia Compliance in Sharia Banking Financing as an Integral Element of Implementing Islamic Economics**

To carry out the activities of the distribution of funds to society, several legal regulations are established:

#### **Sharia Banking Law Number 21 of 2018**

The Sharia Banking Law affirms the obligation to comply with sharia provisions, especially in terms of financing in several articles. Specifically related to financing products, addressed to Commercial Banks, Sharia Business Units (UUS), and Sharia Rural Banks (BPRS) are listed in 2 Articles. Article 19 paragraph (1) letter c to f for Sharia Commercial banks, Article 19 paragraph (2) letter c to f for Sharia Business Units (UUS), and Article 21 letter b for Sharia Rural Bank (BPRS). It is stated that the activity of distributing financing to the community with *mudharabah*, *musharakah*, *murabahah*, *salam*, *isthisna'*, *qardh*, *ijarah muntahiya bittamlik*, etc., does not contradict Sharia principles.

In addition to provisions not contrary to Sharia principles as 2 articles above, Articles 24 and 25 also mention several prohibitions for Sharia banks, Sharia Business Units, and Sharia Rural Banks, one of which is carrying out activities that are contrary to Sharia principles.

Sharia principles themselves have been defined in the general provisions of Article 1 number 13 of the Sharia Banking Law, that what is meant by Sharia principles is, "Islamic legal principles in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia". In the explanation of article 2 of this Law, it is detailed that what is meant by business activities based on Sharia principles is those that do not contain elements: *usury*, *maisir*, *gharar*, *haram*, and tyranny.

To clarify who is the authority in determining fatwas in the field of sharia, Article 26 clarifies Article 1 number 13 by stating that sharia principles must be fatwakan by the Indonesian Ulama Council (MUI), and stated in Indonesian Central Bank's Regulations. Furthermore, this article mentions the establishment of the Sharia Banking Committee which will be regulated in the regulations. "With the establishment of the Financial Services Authority's Law and the transfer of banking supervision authority, the fatwa was codified within the Financial Services Authority Regulation."

In terms of supervision related to Sharia compliance, Article 32 relates to the Sharia Supervisory Board (DPS) established in each Islamic bank, with one of the duties being to supervise the implementation of National Sharia Council of the Indonesian Ulama Council (DSN-MUI) decisions on bank activities. Thus, supervision of Sharia provisions is handed

over to each Islamic bank through the establishment of the Sharia Supervisory Board (DPS) which is structurally not under the government.

### **Financial Services Authority Law Number 21 of 2011**

Through this law, the Financial Services Authority (OJK) is given the authority to supervise micro-prudential Islamic banking (and other financial institutions), with two approaches, namely *compliance-based supervision* and *risk-based supervision*. Thus, the supervision carried out by the Financial Services Authority (OJK) is not supervision related to Sharia compliance. the Financial Services Authority (OJK) carries out supervision of Islamic banking no different from supervision carried out on other financial institutions under its responsibility and authority, as stipulated in Articles 6 - 9 of the Financial Services Authority (OJK) Law.

However, in the implementation rules, the regulation of the Financial Services Authority (POJK) also regulates matters related to Sharia principles. However, the pouring of Sharia principles in POJK cannot be separated from the fatwas of authorized institutions, so the regulation of the Financial Services Authority (POJK) related to Sharia principles will always be harmonious and in harmony with the fatwas of the National Sharia Council of the Indonesian Ulama Council (DSN-MUI). This is also as stipulated in the Sharia Banking Law related to the pouring of fatwas in PBI.

### **The Fatwa of the National Sharia Council**

Since the birth of the National Sharia Council until September 2023, the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) has issued 156 fatwas. When grouped, fatwas in the banking sector dominate compared to other Islamic economic fields such as capital markets or insurance. Almost 2/3 of the fatwas issued by the National Sharia Council of the Indonesian Ulama Council (DSN MUI) are in the field of Islamic banking.

Here are some fatwas of the National Sharia Council of the Indonesian Ulama Council (DSN MUI), especially those that regulate financing products. There are 3 concepts derived into various financing in Islamic banking, namely the concepts of buying and selling, profit sharing, and rent. In the concept of buying and selling, fatwas on *murabahah*, fatwas on buying and selling greetings, and *istishna* have been issued. Several fatwas were also issued in support of *murabahah* activities, for example regarding *murabahah* contracts, advances, discounts, repayment deductions, bill deductions, deductions for receivables from customers who are unable to pay, rescheduling, and conversion of *murabahah* contracts. Similarly, for buying and selling *istishna*, several other fatwas were issued to facilitate the operation of this type of buying and selling, including parallel *isthisna*.

Fatwa for financing with akad for revenue issued by the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) among others are fatwas on the financing of *mudharabah (qiradh)*, *musyarakah* financing, akad *mudharabah musytarakah*, *musyarakah mustanaqisah*, akad *mudharabah*, etc. Funding based on the concept of rent among others is found in fatwas on the financing of *ijarah*, *al ijarah al mutambiya al bittamlik*, *akad ijarah al mawshufah fi adz dzimmah*, akad *ijarah*, etc.

In addition to the 3 main concepts above, several fatwas are also related to financing, for example, fatwas on the distribution system of business result in Islamic financial institutions, the principle of distribution of business results in Islamic financial institutions,

sanctions on capable customers who delay payments, *al qard*, multi-service financing, sharia refinancing, sharia syndicated financing, sharia microfinancing, etc.

From several articles and fatwas of the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) which are further outlined in the Regulation of the Central Bank of Indonesia (PBI) or The Regulation of the Financial Services Authority (POJK) above, it can be analyzed based on the theory of legal certainty. The principle of legal certainty is a form of protection for justice seekers so that it does not occur against arbitrariness. In the context of Sharia compliance, legal protection can be interpreted for Muslims who want to carry out muamalah (economic) activities following Sharia. Legal certainty is also part of the purpose of law, as an effort to achieve justice. Legal certainty has a tangible form, namely the enforcement and implementation of the law against an action. Through legal certainty, things that might happen can be predicted, especially in written legal provisions. With the various rules outlined earlier, Islamic banking actors already know exactly what is required and prohibited in carrying out banking functions, especially in financing.

According to Jan Michael Otto's theory of legal certainty, the rules regarding Sharia compliance in material contexts can be summarized as follows: 1) Clarity, consistency, and accessibility of legal regulations issued by the state and recognized by competent authorities are essential. While existing regulations may be incomplete, the issuance of new fatwas in response to economic developments and community needs helps to address this; 2) Government agencies should consistently implement and adhere to the rule of law. In Sharia compliance, the National Sharia Council (DPS) is tasked with supervision. However, the lack of external oversight, particularly from government agencies, may weaken the assurance of legal certainty; 3) Society should align its behavior with these rules. In the context of Islamic banking, this pertains to both the banking community and individuals receiving financing from Islamic banks. However, complexities in financing contracts, especially those involving dominant parties, may lead to errors in understanding and prioritization of agreements over Sharia compliance; 4) Judges in the judicial system must possess independence, impartiality, and consistency in applying the rule of law when resolving disputes; 5) Court decisions should be effectively enforced. While aspects 4 and 5 are relevant in resolving disputes in court, violations of Sharia compliance may be overlooked unless they lead to legal disputes during the financing process.

The state's obligation to ensure Sharia compliance in Islamic banking financing has been realized through various regulations. The National Sharia Council of the Indonesian Ulama Council (DSN-MUI) fatwa which is further outlined in the Regulation of the Central Bank of Indonesia (PBI) or The Regulation of the Financial Services Authority (POJK) is a detail of procedures that must be complied with in carrying out financing based on sharia principles.

## CONCLUSION

The basis of the state's obligation to guarantee Sharia compliance in Islamic banking financing is contained in the first and second precepts of Pancasila, Article 29 of the 1945 Constitution, and is embodied in various laws and regulations, especially the Sharia Banking Law, the Financial Services Authority Law, and the Fatwa of the National Sharia Council of the Indonesian Ulema Council, which are further outlined in various Bank Indonesia Regulations and Financial Services Authority Regulations as guidelines for the

banking community, especially in providing Financing based on sharia principles. However, there are still weaknesses in the regulation in supervising the implementation of Sharia compliance, namely that it has not provided legal certainty. Sharia compliance supervision has been given to the Sharia Supervisory Board (DPS), where the structure is within the internal of each Islamic bank. Therefore, sanctions for Sharia non-compliance are difficult to implement. In particular, Sharia compliance has not been regulated as part of the bank's health level, especially the management aspect.

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