

## Penetration of *Muamalah* Jurisprudence into Indonesian Law

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### Abstract

This research aims to elaborate the penetration of *fiqh muamalah* into the Indonesian legal system, especially in laws and regulations related to Islamic financial institutions. One fact is that the nomenclature of *muamalah* and/or *fiqh muamalah* is not found at all in legislation and legal system. However, in other reality, substantively, *fiqh muamalah* has become an integral part of the Indonesian legal system, at least as evidenced by the positivization of fourteen laws and regulations related to Islamic financial institutions. The study uses a descriptive qualitative method that focuses on the analysis of legal documents. The analysis method used is a normative descriptive technique involving a historical approach to Islamic law in the context of Indonesia. The findings of this study reveal that the penetration of *fiqh muamalah* into the Indonesian legal system does not only occur at the theoretical level, but has also had a real impact on the legal culture, legal structure, and legal substance of Indonesian law. At the level of legal culture, *muamalah* has become an attitude and legal awareness in the form of beliefs, values, ideas, and expectations of the community. As a legal structure, *muamalah* already has state institutions and their enforcement organizations. In addition to the House of Representatives, which carry out the role of legislation with the government, the legal norms of *muamalah* have been implemented by Islamic banking institutions, Islamic capital markets, Islamic insurance, Islamic pawnshops, and other Islamic microfinance institutions. Meanwhile, in terms of legal substance, the legal norms

of *muamalah* have manifested into various laws and regulations related to economic and social activities, which are basically related to the determination of sharia principles as the main reference for the activities of financial institutions, the use of *muamalah* contracts in sharia economic activities, and the criminalization of violations of sharia principles.

**Keywords:** Indonesian law; *muamalah* jurisprudence; penetration

## Introduction

Islamic law has an important role and meaning for the life of the Indonesian nation.<sup>1</sup> As part of Islamic law, the latest understanding of *fiqh muamalah*, one of which is represented by 'Alî Fakrî, is "the science of the procedure for the exchange of property and services between fellow human beings through the mediation of transactions or promises".<sup>2</sup> This kind of meaning makes *fiqh muamalah* close to the contemporary meaning of civil law.

It is an undeniable fact that none of the national laws and regulations clearly states the word *muamalah*. On the contrary, almost all fatwas of the National Sharia Council (DSN) of the Indonesian Ulema Council (MUI) were adopted as rules of Indonesia's sharia financial institutions.<sup>3</sup> As is known, the most important function of DSN MUI is to provide fatwas, recommendations and supervise issues related to the activities of Islamic financial institutions.<sup>4</sup> This clearly raises the question of the existence and method of entry of *muamalah* jurisprudence into the Indonesian legal system.

This problem is important to be answered in order to understand the influence and interaction of *fiqh muamalah* in the Indonesian legal system, as well as how its synergy can provide a frame of reference in public policy and open a space for discussion related to religious, legal, and national life relations. There are several studies that provide different perspectives, such as Oyo Sunaryo Mukhlis who highlights the flexibility of Islamic law in *muamalah* so that it can

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<sup>1</sup> Juhaya S. Praja, *Hukum Islam Di Indonesia, Pemikiran Dan Praktik* (Bandung: Rosda Karya, 1991).

<sup>2</sup> 'Alî Fakrî, in: Muḥammad 'Utsmân Syabîr, *Al-Mu'âmalât Al-Mâlîyah Al-Mu'âshirah Fî Al-Fiqh Al-Islâmî*, 6th ed. (Amman: Dâr al-Nafâ'is, 2007).

<sup>3</sup> Ipuk Widayanti, Silvia Waning, and Hiyun Puspita, "The Role of DSN-MUI Fatwa in Indonesian Sharia Banking Development Flows in the Industrial Revolution 4.0," *Elqish: Journal Islamic of Economics* 3(1) 2023, 29-44; *Journal Islamic of Economics* 3(1) 2023, 29-44 3, no. 1 (2023): 29-44, <https://doi.org/10.33830/elqish.v3i1.6519.2023>.

<sup>4</sup> Nur Sillaturohmah Handayani, Muhamad Subhi Apriantoro, and Malika Al-Husnayani, "The Strategic Role of DSN-MUI in Developing Islamic Economic Law," *Al-Iktisab: Journal of Islamic Economic Law* 7, no. 1 (2023): 1-25, <https://doi.org/10.21111/aliktisab.v7i1.9297>.

blend in with local traditions.<sup>5</sup> Alfitri's article in the *Journal of Law and Religion* emphasizes the inclusion of Islamic jurisprudence in the framework of national law through the Religious Court.<sup>6</sup> Muhamad Hasan Sebyar explores the integration of Islamic law with customary law, highlighting the success of harmonization that emphasizes the flexibility of *fiqh* in providing legal certainty, justice, and benefits for society.<sup>7</sup> Meanwhile, this research aims to elaborate the penetration of *fiqh muamalah* into the Indonesian legal system, especially related to Islamic financial institutions.

As a descriptive qualitative research, this research uses several approaches. First, the "literature" approach to obtain primary legal materials, such as laws, fatwas, and other regulations related to *fiqh muamalah* and Indonesian law.<sup>8</sup> Second, the analysis of legal documents to examine the norms of *fiqh muamalah* and how these norms are integrated into Indonesian positive law.<sup>9</sup> Third, normative descriptive analysis is carried out to describe the applicable legal norms related to *fiqh muamalah*, including the basic principles taken from Alquran, Hadith, and Ijtihad ulama.<sup>10</sup> Fourth, a historical approach is important to describe the development of laws and regulations that adopt *fiqh muamalah* in Indonesia.<sup>11</sup>

## Discussion

### 1. Philological intersection

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<sup>5</sup> Oyo Sunaryo Mukhlas, "Harmonization of Islamic Legal Institutions Into The Indonesian Legal System," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 16, no. 1 (2022): 89–106, <https://journal.uinsgd.ac.id/index.php/adliya/article/view/22726/pdf>.

<sup>6</sup> Alfitri, "Expanding a Formal Role for Islamic Law in the Indonesian Legal System: The Case of Mu'amalat," *Journal of Law and Religion* 23, no. 1 (2007): 249–70, <https://doi.org/https://doi.org/10.1017/S0748081400002666>.

<sup>7</sup> Muhamad Hasan Sebyar, "Harmonization of Islamic Legal Institutions and Customary Law in Marriage Dispensation Cases at the Panyabungan Religious Court," *MILRev: Metro Islamic Law Review* 2, no. 2 (2023): 155–74, <https://doi.org/https://doi.org/10.32332/milrev.v2i2.7809>.

<sup>8</sup> Moh. Hoirul Mufid Rois Choirur Nur Jannani, "Islamic Law Paradigm Responding Conflicts of Interest of Economic Development and Ecological Conservation Hifdz Al-Bi'ah Perspective," *Al-Istinbath: Jurnal Hukum Islam* 9, no. 1 (May 30, 2024): 193, <https://doi.org/10.29240/jhi.v9i1.8660>.

<sup>9</sup> Eko Rial Nugroho, Bagya Agung Prabowo, and Rohidin Rohidin, "Granting of Property During Marriage as an Inherited Property in Indonesia," *El-Ushrah: Jurnal Hukum Keluarga* 7, no. 1 (2024): 310–27, <https://doi.org/http://dx.doi.org/10.22373/ujhk.v7i1.22875>.

<sup>10</sup> Amirullah, Athoillah Islamy, and Hamzah, "Moderasi Fikih Muamalah Di Indonesia: Analisis Terhadap Paradigma Fatwa Dewan Syariah Nasional," *Al-Bayyinah* 6, no. 1 (2022): 95–108, <https://doi.org/https://doi.org/10.35673/al-bayyinah.v6i1.2634>.

<sup>11</sup> S. Sarkowi and Agus Susilo, "Akar Historis Formalisasi Hukum Islam Di Nusantara," *Jurnal Sejarah Citra Lekha* 5, no. 1 (2020): 14–27, <https://doi.org/https://doi.org/10.14710/jscl.v5i1.21697>.

The word *muamalah* in Indonesian, adopted from Arabic, means matters that include public affairs (association, civil, etc.).<sup>12</sup> The meaning that takes precedence Indonesian (public affairs) clearly does not represent the "breadth" of the linguistic meaning of *muamalah* in Arabic which includes "association" with anyone and anything, including with Allah. But the breadth of the meaning of *muamalah* in Arabic can be "reached" by the word association (without *qayyid*), which is an alternative in the dictionary.

In terms of law, there is no legislation that uses the word *muamalah*. Referring to the linguistic meaning above, the word *muamalah* is represented by the word civil which is interpreted as civil law, as opposed to criminal.<sup>13</sup> While civil law regulates rights, property, and relationships between people and people within one country.<sup>14</sup> Law in this sense is also called private law and civil law or civil code.

In terms of formal law (*al-murâfa'ât*), there is usually no division in jurisprudence; the discussion of buying and selling, for example, is always accompanied by *khiyâr*, consequences and how to resolve them. Meanwhile, in terms of material content, civil law does not accommodate the broadest meaning of *muamalah* (only leaving aside worship).<sup>15</sup> But civil law in its broadest sense can be said to be commensurate with the definitive meaning of the broad *muamalah* (rules on lawfulness and the haram of property and genitals)<sup>17</sup> and, of course, broader than *muamalah* in the narrow sense (rules on matters of property in order to maintain survival),<sup>18</sup> which some scholars and one of them Tâj al-Dîn called *makâsib*.<sup>19</sup> This intersection can be described as follows:

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<sup>12</sup> Kemendikbud, "KBBI Daring," n.d., <https://kbbi.kemdikbud.go.id/>, Entry: muamalah, Accessed: 14 October 2015

<sup>13</sup> Kemendikbud. Entry: perdata, Accessed: 14 October 2015

<sup>14</sup> Kemendikbud. Entry: hukum, Accessed: 14 October 2015. See also: Kemendikbud, *Kamus Bahasa Indonesia*, 4th ed. (Jakarta: Pusat Bahasa, 2008), p. 560

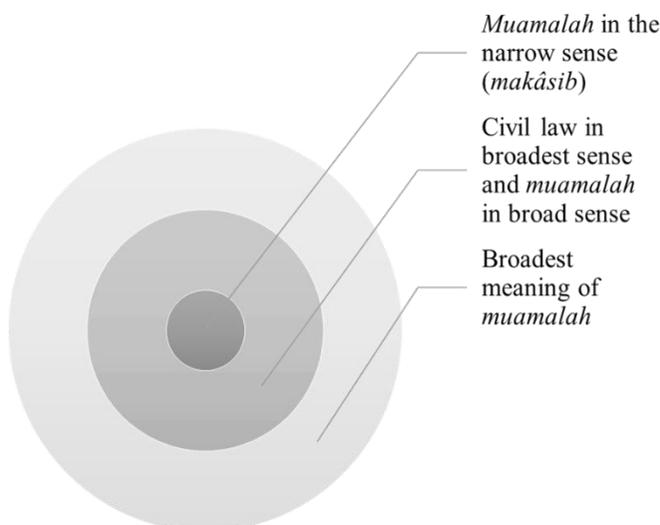
<sup>15</sup> Sayyid Quthb Ibrâhîm Ḥusayn al-Syârîbî, *Khasbâ'ish Al-Tashawwur Al-Islâmî Wa Muqanwimâtub*, 15th ed. (Kairo: Dâr al-Syurûq, 2002), p. 114-115

<sup>16</sup> Abû Ḥâmid Muḥammad bin Muḥammad al-Ghazâlî, *Ashnâf Al-Maghrûrin*, ed. 'Abd al-Lathîf 'Âsyûr (Kairo: Maktabah al-Qur`ân, n.d.), p. 41

<sup>17</sup> Abû Ḥâmid Muḥammad bin Muḥammad al-Ghazâlî, *Al-Mustashfâ Min 'Ilm Al-Ushûl*, ed. Hamdzaḥ bin Zuhayr Ḥâfîz (Madinah: t.p., n.d.), Part 1, p. 313

<sup>18</sup> Abû Ḥâmid Muḥammad bin Muḥammad al-Ghazâlî, *Jawâbir Al-Qur`ân*, ed. Muḥammad Rasyîd Ridhâ, 2nd ed. (Beirut: Dâr Iḥyâ` al-'Ulûm, 1990), p. 39

<sup>19</sup> Tâj al-Dîn 'Abd al-Wahab bin 'Alî bin 'Abd al-Kâfî al-Subkî, *Thabaqât Al-Syâfi'iyah Al-Kubrâ*, ed. Maḥmûd M. Thanahî (Kairo: 'Îsâ al-Bâbî al-Ḥalabî, 1964), Part 3, p. 297



**Figure 1: Intersection Of Civil Law With *Muamalah***

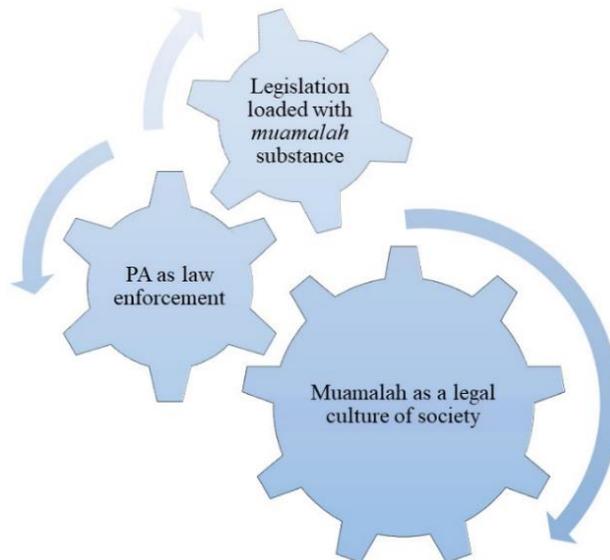
Guided by BW, which consists of four books, civil law material that is relatively commensurate with *muamalah* in the narrow sense (hereinafter referred to as *muamalah* only) is the rule in Book II and Book III. Broadly speaking, Book II regulates the rights of *bezit* (position of power), *eigendom* (property rights), *erfpacht* (business rights), *hypothec* (mortgages), and liens. While Book III regulates buying and selling, exchange, lease, labor agreements, business entities, unlawful acts and *borgtoegh* (individual dependents agreement).

It is certain that the two "areas" governed by the legal system are not exactly same. But it can be seen that *bezit*, *eigendom* and *erfpacht* are covered by the meaning of *al-milk* in *muamalah* jurisprudence, and mortgages and pawns are covered by the concept of *rahn*. While buying and selling and exchanging are equivalent to *bay'* (and derivatives), leases and labor agreements are equivalent to *ijârah*, business entities are equivalent to *shirkah*, and *borgtoegh* to *kafâlâh*.

Besides BW, civil law is also regulated separately, will be mentioned in the next section, related to financial institutions and the Judiciary, can be said that directly adopt the substance of *fiqh muamalah*. This is proof that the substance of *muamalah* has become part of the Indonesian legal system. According to Friedman, the legal system is built by three components, namely legal structure, legal substance, and legal culture.<sup>20</sup> *Muamalah* is no longer at the level of legal culture, but has become part of the structure and substance of law. As a legal culture, *muamalah* has become people's legal attitudes and awareness (beliefs, values, ideas, and expectations). As a legal structure, *muamalah* already has state institutions and enforcement organizations. While *substantively*, it has

<sup>20</sup> Lawrence M Friedman, *Hukum Amerika: Sebuah Pengantar*, ed. Wishnu Basuki, Translate (Jakarta: PT. Tatanusa, 2001), p. 7

become a principle, norm and reference for society and government; it has been stated in official legislation. These three things are complementary and functionally related to the realization of national legal objectives. The following is an overview of the relationship between these three components:



**Figure 2: The Relationship Between The Components Of The *Muamalah* Legal System (Legal Structure, Legal Substance, And Legal Culture)**

## 2. *Muamalah* as a legal culture

Legal culture is very close in meaning to legal awareness. There are three indicators of legal awareness: First, legal knowledge. It means that a person knows that certain behaviors are regulated by law; prohibited or allowed. Second, legal understanding. This means that a society has a tendency to make certain judgments about the law. Third, legal behavior in which a person behaves in accordance with legal norms that he knows and understands.<sup>21</sup>

For the Indonesian context, it is not difficult to prove that *islâmi* values strongly influence their legal culture. A simple example, the saying "Paradise under the soles of the mother's feet" can be found in reference in the treasures of Islamic teachings, namely the hadith of the Prophet (peace be upon him) with a meaningful expression. Popular pronunciation is "*al-jannah tahta aqdâm al-ummahât*", as mentioned by al-Qadhâ'i,<sup>22</sup> Ibn al-Jawzî<sup>23</sup> and al-Dzahabî.<sup>24</sup> But al-

<sup>21</sup> Soerjono and Mustafa Abdullah Soekanto, *Sosiologi Hukum Dalam Masyarakat* (Jakarta: Rajawali, 1982), p. 229

<sup>22</sup> Abû 'Abdillâh Muḥammad bin Salâmah bin Ja'far al-Qadhâ'i, *Musnad Al-Syabâb*, ed. Ḥamdî 'Abd al-Majîd Al-Salafî (Beirut: Mu'assasah al-Risâlah, 1986), p. 102-103

<sup>23</sup> 'Abd al-Rahman bin 'Alî bin Muḥammad Ibn al-Jawzî, *Al-Birr Wa Al-Shilah*, ed. 'Âdil 'Abd al-Mawjûd (Beirut: Mu'assasah al-Kutub al-Tsaqâfah, 1993), p. 66

Albânî stated that this pronunciation was *dha'îf*.<sup>25</sup> Other pronunciation: "*al-jannah 'ind rijlibâ'*", as mentioned by 'Abd al-Razzâq,<sup>26</sup> Aḥmad,<sup>27</sup> al-Ḥâkim<sup>28</sup> and al-Bayhâqî.<sup>29</sup> In *muamalah* practice it can also be found easily, such as the "sticking" in the minds of the majority of people that something that is "valuable" haram should be shunned, such as haram food and illegitimate children.<sup>30</sup>

For the civil sector, there are a lot of *muamalah* principles that are already known, realized and become a reference for the community. Here we will mention just a few: **First**, everything that is good is halal and everything that is bad is haram.<sup>31</sup> **Second**, maintain trust.<sup>32</sup> **Third**, it is forbidden to persecute and be persecuted (*lâ dharar wa lâ dhirâr*). There are many hadith narrators who mention this story, among them are Mâlik,<sup>33</sup> al-Syâfi',<sup>34</sup> Aḥmad,<sup>35</sup> Ibn Mâjah,<sup>36</sup> al-Thabrânî,<sup>37</sup> al-Dâruquthnî,<sup>38</sup> al-Ḥâkim<sup>39</sup> dan al-Bayhâqî.<sup>40</sup> **Fourth**, gambling and

<sup>24</sup> Muḥammad bin Aḥmad bin 'Utsman bin Qâymâz al-Dzahabî, *Al-Kabâ'ir Wa Yalib Manzûmah Fî Al-Kabâ'ir*, 2nd ed. ('Ujmân: Maktabah al-Furqân, 2003), p. 135

<sup>25</sup> Muḥammad Nâshir al-Dîn al-Albânî, *Dha'îf Al-Jâmi' Al-Shaghîr Wa Ziyâdatub (Al-Faḥ Al-Kabîr) No Title*, 3th ed. (Beirut: al-Maktab al-Islâmî, 1988), p. 394.

<sup>26</sup> 'Abd al-Razzâq bin Hammâm bin Nafî' al-Ḥumayrî, *Al-Mushannaḥ*, ed. Ḥabîb al-Raḥman Al-A'zhamî (India: al-Majlis al-'Ilmî, 1983), Part 5, p. 176.

<sup>27</sup> Aḥmad bin Muḥammad bin Ḥanbal al-Syaybânî, *Musnad Al-Imâm Aḥmad Bin Ḥanbal*, ed. Syu'ayb Al-Arna'uth (Beirut: Mu'assasaḥ al-Risâlah, 1997), Part 24, p. 299

<sup>28</sup> Abi 'Abdillâh Muḥammad bin 'Abdillâh al-Ḥâkim, *Al-Mustadrak 'Ala Al-Shahîḥayn*, ed. Ḥabîb al-Raḥman Al-A'zhamî (India: al-Majlis al-'Ilmî, 1990), Part 2, p. 114

<sup>29</sup> Aḥmad bin al-Ḥusayn 'Alî bin Mûsâ al-Bayhâqî, *Al-Sunan Al-Kubrâ*, ed. Mushthafa 'Abd al-Qadir 'Atha (Beirut: Dâr al-Kutub al-'Ilmiyah, 2003), Part 9, p. 45

<sup>30</sup> For Minangkabau people, the term "*Makan masak mata*" reflects behavior that does not consider halal or haram, violates modesty, customs, applicable laws, and disturbs the peace of others.

<sup>31</sup> One of the verses in line is Sura al-A'râf [7] verse 157; "... legalize for them all that is good and forbid for them all that is bad..."

<sup>32</sup> This is declared by Allah as a "commandment" in Sura al-Nisâ' [4] verse 58; "... Verily God commands you to deliver the commission to those who deserve it..."

<sup>33</sup> Mâlik bin Anas bin Mâlik bin 'Âmir al-Madanî, *Al-Muwaththa' Li Imâm Dâr Al-Hijrah Mâlik Bin Anas; Riwayah Abi Mush'ab Al-Zubri*, ed. Basisyâr 'Awwâd Ma'rûf (Beirut: Mu'assasaḥ al-Risâlah, 1998), Part 2, p. 452.

<sup>34</sup> Muḥammad bin Idrîs bin al-'Abbâs bin 'Utsman al-Syâfi'î, *Musnad Al-Imâm Al-Syâfi'î Bi Tartîb Al-Sindî*, ed. Muḥammad Zâhid bin al-Ḥasan Al-Kawtsarî (Beirut: Dâr al-Kutub al-'Ilmiyah, 2005), Part 3, p. 2494.

<sup>35</sup> al-Syaybânî, *Musnad Al-Imâm Aḥmad Bin Ḥanbal*, Part 5, p. 55.

<sup>36</sup> Muḥammad bin Yazîd al-Qazwaynî Ibn Mâjah, *Sunan Ibn Mâjah*, ed. Syu'ayb Al-Arna'uth (Beirut: Dâr al-Risâlah al-'Âlimiyah, 2009), Part 2, p. 784.

<sup>37</sup> Sulaymân bin Aḥmad bin Ayyûb bin Muthîr al-Thabrânî, *Al-Mu'jam Al-Kabîr Li Al-Thabrânî*, ed. Ḥamdî bin 'Abd al-Majîd Al-Salafî (Kairo: Maktabah Ibn Taymiyah, 1994), Part 2, p. 86.

<sup>38</sup> 'Alî bin 'Umar bin Aḥmad bin Mahdî bin Mas'ûd al-Dâruquthnî, *Sunan Al-Dâruquthnî*, ed. Syu'ayb Al-Arna'uth (Beirut: Mu'assasaḥ al-Risâlah, 2004), Part 4, p. 51.

voting illicit fate.<sup>41</sup> **Fifth**, *muamalah* must obey the law.<sup>42</sup> **Sixth**, fraud (*gharar*) is forbidden; based on hadith as mentioned by Muslim,<sup>43</sup> Aḥmad,<sup>44</sup> Ibn Mâjaḥ,<sup>45</sup> al-Tirmidzî,<sup>46</sup> al-Nasâ'î,<sup>47</sup> al-Dârimî,<sup>48</sup> al-Dâruquthnî<sup>49</sup> dan al-Bayhâqî.<sup>50</sup> **Seventh**, monopoly (*ihtikâr*) is a violation of the law; hadiths: "No one does ihtikar, except the wrong person", as mentioned by al-Thayalâsî,<sup>51</sup> 'Abd al-Razzâq,<sup>52</sup> Ibn Abî Syaybah,<sup>53</sup> Aḥmad,<sup>54</sup> al-Dârimî,<sup>55</sup> Muslim,<sup>56</sup> Ibn Mâjaḥ,<sup>57</sup> Abû Dâwud,<sup>58</sup> al-Tirmidzî,<sup>59</sup> al-Thabrânî,<sup>60</sup> al-Ḥâkim<sup>61</sup> dan al-Bayhâqî.<sup>62</sup> **Eighth**, intervening against natural price fluctuations is tyrannical; based on the hadith as mentioned by 'Abd al-Razzâq,<sup>63</sup> Aḥmad,<sup>64</sup> al-Dârimî,<sup>65</sup> Ibn Mâjaḥ,<sup>66</sup> Abû Dâwud,<sup>67</sup> al-

<sup>39</sup> al-Ḥâkim, *Al-Mustadrak 'Ala Al-Shābiḥayn*, Part 2, p. 66.

<sup>40</sup> al-Bayhâqî, *Al-Sunan Al-Kubrâ*, Part 6, p. 114.

<sup>41</sup> This is of serious concern to the Qur'an, which "culminates" in the prohibition by sura al-Mâ'idah [5] verse 90; "O believers, verily (drinking) *ḵhamr*, gambling, (sacrificing for) idols, drawing lots with arrows, are among the deeds of Satan. So stay away from these deeds so that you may have good luck".

<sup>42</sup> One of them is by proof by deed, as instructed by sura al-Baqarah [2] verse 282; O believers, if you do not give money for a fixed time, you should write it down...".

<sup>43</sup> Abû al-Ḥusayn bin al-Ḥajjâj Muslim, *Shabîḥ Muslim*, ed. Muḥammad Fu'ad 'Abd al-Baqî (Beirut: Dâr al-Kutub al-'Ilmiyah, 1991), Part 3, p. 1153.

<sup>44</sup> al-Syaybânî, *Musnad Al-Imâm Aḥmad Bin Hanbal*, Part 12, p. 373.

<sup>45</sup> Ibn Mâjaḥ, *Sunan Ibn Mâjaḥ*, Part 2, p. 739.

<sup>46</sup> Muḥammad bin 'Isa bin Sawrah bin Mûsâ bin al-Dhahhak al-Tirmidzî, *Al-Jâmi' Al-Shabîḥ (Sunan Al-Tirmidzî)*, ed. Aḥmad Muḥammad Syâkir, 2nd ed. (Mesir: Mushthafâ al-Bâbî al-Ḥalabî, 1975), Part 2, p. 523.

<sup>47</sup> Aḥmad bin Syu'ayb Abu 'Abd al-Raḥman al-Nasâ'î, *Sunan Al-Nasâ'î; Bi Syarḥ Al-Ḥâfiẓ Jalâl Al-Dîn Al-Suyûṭhî Wa Ḥâsiyah Al-Imâm Al-Sindî* (Kairo: Maktabah al-Tijârîyah al-Kubrâ, 1930), Part 7, p. 262.

<sup>48</sup> 'Abdullâh bin 'Abd al-Raḥman al-Dârimî, *Musnad Al-Dârimî (Sunan Al-Dârimî)*, ed. Ḥusayn Salîm Asad Al-Dârânî (Saudi Arabia: Dâr al-Mughnî, 2000), Part 3, p. 1669.

<sup>49</sup> al-Dâruquthnî, *Sunan Al-Dâruquthnî*, Part 3, p. 403.

<sup>50</sup> al-Bayhâqî, *Al-Sunan Al-Kubrâ*, Part 5, p. 437.

<sup>51</sup> Sulaymân bin Dâwud al-Jârûd al-Thayalâsî, *Musnad Abî Dâwud Al-Thayalâsî*, ed. Muḥammad bin 'Abd al-Muḥsin Al-Turkî (Mesir: Dâr Ḥajar, 1999), Part 2, p. 506.

<sup>52</sup> al-Ḥumayrî, *Al-Mushannaḥ*, Part 8, p. 203.

<sup>53</sup> 'Abdillâh bin Muḥammad Ibn Abî Syaybah, *Al-Mushannaḥ*, ed. Sa'îd bin Nâshir bin 'Abd al-'Azîz Al-Syasyrî (Riyadh: Dâr Kunûz Isybîliyâ, 2015), Part 4, p. 301.

<sup>54</sup> al-Syaybânî, *Musnad Al-Imâm Aḥmad Bin Hanbal*, Part 25, p. 37.

<sup>55</sup> al-Dârimî, *Musnad Al-Dârimî (Sunan Al-Dârimî)*, Part 3, p. 1656.

<sup>56</sup> Muslim, *Shabîḥ Muslim*, Part 3, p. 1228.

<sup>57</sup> Ibn Mâjaḥ, *Sunan Ibn Mâjaḥ*, Part 2, p. 728.

<sup>58</sup> Sulaymân bin al-Asy'âts al-Sajastânî Abû Dâwud, *Sunan Abî Dâwud* (Beirut: Maktabah al-'Ashrîyah, n.d.), Part 3, p. 271.

<sup>59</sup> al-Tirmidzî, *Al-Jâmi' Al-Shabîḥ (Sunan Al-Tirmidzî)*, Part 2, p. 558.

<sup>60</sup> al-Thabrânî, *Al-Mu'jam Al-Kabîr Li Al-Thabrânî*, Part 20, p. 445.

<sup>61</sup> al-Ḥâkim, *Al-Mustadrak 'Ala Al-Shābiḥayn*, Part 2, p. 14.

<sup>62</sup> al-Bayhâqî, *Al-Sunan Al-Kubrâ*, Part 6, p. 49.

<sup>63</sup> al-Ḥumayrî, *Al-Mushannaḥ*, Part 8, p. 205.

Tirmidzî,<sup>68</sup> al-Thabrâni<sup>69</sup> and al-Bayhâqî.<sup>70</sup> **Ninth**, give rewards directly after the work is completed; based on the hadith as mentioned by al-Thabrâni<sup>71</sup> and al-Bayhâqî.<sup>72</sup>

This shows that the Indonesian Muslim community has known the *muamalah* which is legally charged; allowed and prohibited. With that knowledge, they understand (assess) the *muamalah* practices carried out by individuals, both in their own society and other societies. Next, consciously or not, they will be "encouraged" to act according to that knowledge and understanding.

In practice, in many places different types of transactions are carried out referring to the value of *muamalah*. Among those that have become part of the economic behavior, such as agreements for sale and purchase of goods (*istishbâ*), profit sharing (*mudbârabah*), bankruptcy (*taflîs*), guardianship (*hajr*), transfer of debt (*hivâlah*), wages, rent (*ijârah*), borrowing property (*'arjâh*), entrustment (*wad'âh*), promises of gifts (*ju'âlâh*), guarantees (*dbamân*), owner's cooperation with agricultural cultivators (*muẓâra'âh*), pawns (*rahn*) and so on.

All of these are valid bases for strengthening aspirations for Islamization of civil law, especially economics. For legal culture determines the validity of written positive law;<sup>73</sup> Positive law is only effective if it has a legal cultural foundation.<sup>74</sup> Conversely, a law is ineffective if it conflicts with the legal culture and value system of society.<sup>75</sup> In addition to the legal culture in society (external legal culture), the effectiveness of law is also influenced by the legal culture that exists in the legal structure (internal legal culture) itself.<sup>76</sup>

<sup>64</sup> al-Syaybânî, *Musnad Al-Imâm Aḥmad Bin Hanbal.*, Part 18, p. 328.

<sup>65</sup> al-Dârimî, *Musnad Al-Dârimî (Sunan Al-Dârimî).*, Part 3, p. 1658.

<sup>66</sup> Ibn Mâjah, *Sunan Ibn Mâjah.*, Part 2, p. 741.

<sup>67</sup> Abû Dâwud, *Sunan Abi Dâwud.*, Part 3, p. 272.

<sup>68</sup> al-Tirmidzî, *Al-Jâmi' Al-Shahîḥ (Sunan Al-Tirmidzî).*, Part 2, p. 536.

<sup>69</sup> Sulaymân bin Aḥmad bin Ayyûb bin Muthîr al-Thabrâni, *Al-Rawdh Al-Dâni (Al-Mu'jam Al-Shaghîr)*, ed. Muḥammad Shakûr Maḥmûd al-Ḥaj Amuwayr (Beirut: al-Maktab al-Islâmî, 1985), Part 2, p. 59.

<sup>70</sup> al-Bayhâqî, *Al-Sunan Al-Kubrâ.*, Part 6, p. 48

<sup>71</sup> al-Thabrâni, *Al-Rawdh Al-Dâni (Al-Mu'jam Al-Shaghîr).*, Part 1, p. 43.

<sup>72</sup> Aḥmad bin al-Ḥusayn 'Alî bin Mûsâ al-Bayhâqî, *Ma'rifaḥ Al-Sunan Wa Al-Atsar*, ed. 'Abd al-Mu'thî Amin Qal'ajî (Beirut: Dâr Qutaybah, n.d.), Part 8, p. 335

<sup>73</sup> A legal system without legal culture is like a fish in a basket. Erman Radjagukguk, "Pembaharuan Hukum Memasuki PJPT Kedua Dalam Era Globalisasi," *Jurnal Hukum & Pembangunan* 23, no. 6 (2017): 505, <https://doi.org/10.21143/jhp.vol23.no6.1038>.

<sup>74</sup> Satjipto Rahardjo, *Hukum Dan Masyarakat* (Bandung: Angkasa, 1980), p. 85

<sup>75</sup> There are at least five things that make public policy ineffective: First, it conflicts with the value system of society. Second, there is selective non-compliance with the law. Third, one's membership in an association or group. Fourth, the desire to make a profit quickly. Fifth, there is legal uncertainty. Irfan Islamy, *Prinsip-Prinsip Perumusan Kebijakan Negara* (Jakarta: Bumi Aksara, 2000), p. 110

<sup>76</sup> Regarding this internal legal culture, in 2014 the National Development Planning Agency (BAPPENAS) gave a "concerning" picture that became a challenge to the development

### 3. *Muamalah* as a legal structure

Legal structure includes legal structure (internal structure of legal system) and structural law in a legal system (external structure of legal system). The internal structure of the legal system includes the understanding of the institutional aspects of the legal system, which is related to the process of institutionalization of legal functions and the mechanism of relations between institutions and between legal functions, which in a broad sense includes starting from the function of law making (law and rule making), the application of law (the administration of law), to law enforcement and justice (law enforcement). All aspects related to the form and formation, as well as the mechanism of relations between legal institutions with each other, as well as their relationship with justice seekers, can be referred to as structural aspects that are nothing but the internal structure of a legal system. While the external structure of the legal system is the contextual reality in which the value system and legal norms work. That is, it is the context of social structure in social life.<sup>77</sup>

Legal structure basically means legal institutions that work to create, implement and enforce laws. In this case, the institution that makes (positive) laws is the DPR (legislative) with the government.<sup>78</sup> Legal (positive) implementing institutions are state institutions, such as legislative, executive, judicial, and Bank Indonesia.<sup>79</sup> In a broader sense, *muamalah* legal norms are also carried out by<sup>80</sup> Islamic banking institutions, sharia capital markets, sharia insurance, sharia pawnshops, and sharia microfinance institutions (BPRS, BMT, and sharia cooperatives). While law enforcement institutions that are strongly

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of the national legal system. See: Kementerian Perencanaan Pembangunan Nasional / Badan Perencanaan Pembangunan Nasional BAPPENAS, "Rencana Kerja Pemerintah Tahun 2014; Buku II: Prioritas Pembangunan Bidang Hukum Dan Aparatur (Chapter 8)" (Jakarta, 2014), <http://www.bappenas.go.id/books/rkp2014/buku2/files/res/-downloads/book.pdf>. Saturday, June 14, 2014

<sup>77</sup> Jimly Asshiddiqie, "Struktur Hukum Dan Hukum Struktural Indonesia," in *Dialektika Pembaruan Sistem Hukum Indonesia*, ed. Dinal Fedrian (Jakarta: Komisi Yudisial Republik Indonesia, 2012), pp. 17-22

<sup>78</sup> This law-making function can be carried out by: First, a legislative or quasi-legislative institution, such as a village head with the approval of the village representative body. Second, executive institutions through delegation and sub-delegation regulations, such as the government (through PP) and Bank Indonesia (through Bank Indonesia Regulations). Third, executive institutions authorized to establish independent regulations, such as presidents, governors, regents, mayors, and village heads. Asshiddiqie., pp. 30-32

<sup>79</sup> Implementing institutions include all types of positions, state institutions and executive, central or regional government bodies (legislative, executive, and judicial). The responsibility to obey and enforce all the rules of law rests with the 'commander' or supreme leadership in each of these institutions. Asshiddiqie., pp. 32-34

<sup>80</sup> In Indonesian, the word institution (synonym of institution and pranata) means something that is institutionalized by law, custom or custom (such as associations, associations, and social organizations). In addition, institution also means a building where the activities of associations or organizations are held. See: Kemendikbud, "KBBI Daring." Entry: institusi, Accessed: 14 October 2015

related to *muamalah*, among others, are the Religious and Arbitration Courts (National Sharia Arbitration Board; Basyarnas).<sup>81</sup>

4. *Muamalah* as a legal substance

From the perspective of legal formation, the substance of law related to *muamalah* is a concretization of social values that exist in the legal culture of *muamalah* society. In this case, the majority of Indonesia's Muslim population plays a decisive role. Not only limited to the number, but there is awareness to carry out Islamic sharia in the field of *muamalah* in everyday life. This awareness is then supported by the political will of the legislative institution, the House of Representatives and the President. That series is what prompted the birth of various current legislations. From the legislative process that has been running, there are at least fourteen laws that have adopted *muamalah* values as part of the seal.

**Table 1**  
***Muamalah* In The National Legal System (Chronologically year of publication)**

N o	Rules	Number	About	Information
1.	Law	7 year 1992	Banking	Especially, those regulating the Profit-sharing Principle, Articles 6 and 13
2.	Government Regulation	72 year 1992	Bank Implementation Based on Profit Sharing Principle	
3.	Law	10 year 1998	Amendments to Law Number 7 of 1992 concerning Banking	Especially those regulating Sharia Principles, Articles 6, 7, 8, 11, 13, 29, 37
4.	Law	23 year 1999	Bank Indonesia	Especially those regulating Sharia Principles, Articles 10 and 11
5.	Law	3 year 2004	Amendments to Act No. 23 of 1999 concerning Bank Indonesia	Especially regulating Sharia Principles, Articles 10 and 11

<sup>81</sup> Among the institutions related to law enforcement are investigators (examiners; auditors), investigators (in the police, prosecutor's office, KPK, and Civil Servant Investigating Officers (PPNS), prosecutors (prosecutors and KPK), judicial and semi-judicial bodies (quasi-judiciary) and arbitration, mediators, defense (advocates), and corrections by prisons (LP). Asshiddiqie, "Struktur Hukum Dan Hukum Struktural Indonesia.", pp. 34-35

6.	Law	3 year 2006	Amendments to Law Number 7 of 1989 concerning Religious Courts		
7.	Law	40 year 2007	Limited Company	Liability	Specifically regulating Sharia Principles, Article 109
8.	Law	19 year 2008	National Precious Letter	Shariah	
9.	Law	20 year 2008	Micro, Small, and Secondary Efforts		Specifically, the rules of non-bank financial institutions with a sharia system, Articles 8 and 22
10.	Law	21 year 2008	Shariah Banking		
11.	Supreme Court Rules	02 year 2008	Compilation of Shari'ah Economic Law (KHES)		Except for part of Book III which regulates Zakat
12.	Law	6 year 2009	Perpu Designation		
13.	Law	Number 2 of 2008 concerning the Second Amendment to the Law			
14.	Law	Number 23 of 1999 concerning Bank Indonesia became Law	Specifically regulating Sharia Principles, Article 11		

Data Source: Processed from various sources

If classified, the fourteen regulations found in Table 1 above consist of 11 regulations on financial institutions (banking, cooperatives, letters, and futures markets), 1 form of business entity (PT), 1 (KHES) in the form of rules for all financial institutions and 1 law affirming the Religious Court as an institution authorized to resolve sharia economic disputes. If explored more deeply, the *muamalah* values that become legislation can be divided into three

main points, namely the determination of sharia principles as the main reference for financial institution activities, the use of *muamalah* contracts in sharia economic activities, and criminalization of violations of sharia principles.

a. The principle of sharia as the main reference

The term sharia principle is a change from the "profit sharing principle based on Sharia". Definitively, sharia principles are stated in Article 1 number 12 of Law No. 21/2008, that "Sharia principles are Islamic legal principles in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia".<sup>82</sup>

The legalization of the profit-sharing principle was initiated by Law No. 7/1992 and affirmed by PP No. 72/1992.<sup>83</sup> While Article 2 paragraph (1) of PP No. 72 of 1992, expressly states that the principle of profit sharing is based on Sharia. Officially the term sharia principle (Bank based on Sharia Principles) is used Law No. 10/1998. The term also appears in Article 109 of the Limited Liability Company Law, No. 40/2007, Law No. 6/2009, and Supreme Court Regulation (PERMA) No. 02/2008, KHES.<sup>84</sup>

The existence of sharia principles became stronger with the enactment of Law No. 10/1998.<sup>85</sup> Sharia Banking Law, No. 21/2008, as a special law (*lex specialis*), reinforces sharia principles as the principle and identity of Indonesian Islamic banking.<sup>86</sup> The term "Islamic bank" itself means a bank based on sharia principles.<sup>87</sup> That is, the specificity of Islamic banking lies in the placement of

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<sup>82</sup> Sharia principles are based on the values of justice, expediency, balance, and universality (*rahmatan lil 'alamin*). Second Paragraph General Explanation of Law No. 21/2008

<sup>83</sup> The most important legal material related to muamalah in Law No. 7/1992 is the definition of credit which mentions profit sharing as one of the rewards for providing capital, and the recognition of profit sharing as a financing principle. See: Article 1 number 12 and Article 6 letter m.

<sup>84</sup> In Law No. 17/2012, concerning Cooperatives, the term "Islamic economic principles" emerged. The use of the term is completely without specific explanation, and the derivative government regulations have not come out until now. Most likely what is meant is the same, namely sharia principles. Article 87 of Law No. 17/2012 states: (1) Cooperatives carry out business activities that are directly related and in accordance with the types of Cooperatives listed in the Articles of Association. (2) Cooperatives can partner with other business actors in running their business. (3) Cooperatives can conduct business on the basis of **Islamic economic principles**. (4) Provisions regarding cooperatives based on sharia economic principles as referred to in paragraph (3) shall be regulated by Government Regulation.

<sup>85</sup> Among them: First, expanding the area of sharia principle banking activities; Not only providing financing but also being able to carry out other activities. Second, make consistency in the application of sharia principles the basis for providing financing. Third, make sharia principles part of the way of monetary control.

<sup>86</sup> Article 2 of Act No. 21/2008 states: Shariah banking in its business activities based on Shariah Principles, economic democracy, and principles of caution.

<sup>87</sup> Article 1 number 7 of Law No. 21/2008 states "Sharia Bank is a Bank that carries out its business activities based on Sharia Principles and by type consists of Sharia Commercial Banks and Sharia People's Financing Banks".

sharia principles as its operational basis sourced from the Qur'an, hadith and *ijmā'*.<sup>88</sup>

b. *Muamalah* transaction in sharia economic activities

As a profit organization, financial institutions have the opportunity to profit from each of their activities and products. Therefore, the contracts are identified based on the presence or absence of compensation. From this comes the classification of *tabarru'* contract (*gratuitos* contract) and *tijārah* or *mu'āwadhah* (compensational contract).<sup>89</sup> *Tabarru'* 'aqd is a not-for-profit transaction; doing good for help, such as *qard* or *qard al-ḥasan*, *wadi'ah*, so on. However, the party who does good may ask for reimbursement of costs incurred by his counterpart. While *tijārah* contract is an agreement for profit (*for profit transaction*), such as buying and selling, *ijarah* and others.<sup>90</sup>

In Government Regulation No. 72/1992, the contract on banks and LKS is only three, profit sharing, giving rewards and buying and selling.<sup>91</sup> Meanwhile, Law No. 10/1998, in addition to replacing the profit-sharing principle with sharia principles, mentions several *muamalah* contracts, but does not use the word contract, which can be used in LKS to save funds and / or finance business activities. Among those offered are *mudhārahah*, *musyarakah*, *murābahah*, *ijārah*, and *ijārah wa iqtinā'* (spellings in Law *mudharabah*, *musbarakah*, *murabahab*, *ijarah*,<sup>92</sup> and *ijarah wa iqtina*).<sup>93</sup>

Law No. 21/2008, partly contained in Article 1 number 25, mentions more *muamalah* contracts, and "officially" uses the word contract which is

<sup>88</sup> Third Paragraph General Explanation of Law No. 21/2008

<sup>89</sup> Such a classification is not prevalent in jurisprudence. Because jurisprudence scholars do not discuss *muamalah* contracts apart from other contracts, marriage and *jinayah* for example. A close classification is put forward by al-Tuwayjiri, that *Sbar'it* contracts are divided into five: First, the contract of exchange, which contains the element of surrender (reward) to something else, such as buying and selling, *ijarah* and so on. Second, the *tabarru* contract, which contains elements of "goodness" without remuneration, such as grants, alms, endowments and wills. The third contract is *irfāq* (compassion), which aims to benefit without reward, such as *qardh*, *'ariyah* and so on. Fourth, the contract of *tawtsiq* (affirmation of trust), which aims to strengthen beliefs, such as *nahn*, guarantee (*dhamān*), *kafālah*, and marriage. Fifth, the contract of trust, which is based on trust, such as *wadiah*. Muḥammad ibn Ibrāhīm bin 'Abdillāh al-Tuwayjiri, *Mawsū'ah Al-Fiqh Al-Islāmī* (Saudi Arabia: Bayt al-Afkār al-Dawliyah, 2009)., Part 3, p. 362

<sup>90</sup> Nafis Irkhami, "A Study on the Implementation of Dual Contracts of *Tabarru* and *Tijarah* on Shari'ah Insurance Industries in Indonesia," *Journal of Islamic Finance* 6, no. 2 (2017): 045–057.

<sup>91</sup> See Article 2 of PP No 72/1992

<sup>92</sup> This is mentioned in Article 1 number 13 of Law No. 10/1998.

<sup>93</sup> In the interest of consistency, various foreign terms (especially Arabic) are written according to transliteration guidelines, except in direct quotations or for textual affirmation and other interests deemed necessary.

sometimes interchangeable with transaction words<sup>94</sup>, such as *wadi'ah*, *mudharabah*, *musarakabah*, *ijarah muntabiyah bittamluk*, *murabahah*, *salam*, *istishna'*, *qardh*, *wakalah*, *hawalah*, and *Kafalah*. The laws and regulations that can be said to reproduce almost all contracts in *muamalah* jurisprudence are KHES, issued September 10, 2008, PBI and fatwa DSN. In KHES, the transaction rules are not only limited, but predominantly contained in Book II which is expressly given the head "*Tentang Akad*".<sup>95</sup>

Overall, it can be seen that there has been a positivization (formalization) of *muamalah* into the national legal system. The process begins with the fact that various *muamalah* norms are indeed "alive" in a society adhering to Islamic values. Then, motivated by the desire to apply these values in socio-economic life, financial institutions were formed that made these values as their main reference. In light of that fact, it is the constitutional obligation of the state to provide and establish legal norms, in order to anticipate disputes that may arise, by accommodating living values and being a reference for the institution.

However, in the process of positivization, there are certain things that become important notes, including: First, consistency with the basic principles of *muamalah* in Islam. For example, the naming of a contract should correspond to the popular substance among scholars and users of the contract. Because, one of the important references in the contract is that changes in the composition of the contract (objects and rewards) will change the classification and rules. Conversely, the use of different names indicates a difference in substance.<sup>96</sup>

Second, formalistic positivization distorts the meaning of contracts. From one side, positivization-formalism has a positive value, namely "familiarizing" Muslims with financial institutions, which previously had the image of "infidels" and "haram", until some Muslims (potential customers) stay away from it. But formalization, inevitably, gave rise to new "confusion".

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<sup>94</sup>Prior to the Sharia Banking Law, SBSN Law No. 19/2008 had also used the term contract, but with a slightly different definition, as seen in Article 1 number 5 of Law No. 19/2008. However, according to its requirement for sharia securities, this law only mentions four contracts, in the fifth paragraph of the General Explanation, namely *Ijarah*, *Mudarabah*, *Musarakabah*, *Istishna'*.

<sup>95</sup> KHES as reference is: Penyusun, *Kompilasi Hukum Ekonomi Syariah; Peraturan Mahkamah Agung RI No. 2 Tahun 2008 (Arab-Indonesia)* (Jakarta: Badilag Mahkamah Agung RI, 2013).

<sup>96</sup> In this context, there is a rule that states: Basically, differences in names are an indication of differences in substance. See: Abû al-Ḥasan ‘Alî bin Muḥammad bin Muḥammad bin Ḥabîb al-Mâwardî, *Al-Ḥâwî Al-Kabîr Fî Fiqh Madzhab Al-Imâm Al-Syâfi’î* (*Syarḥ Mukhtashar Khalîl*), ed. ‘Alî Muḥammad Mu’awwadh (Beirut: Dâr al-Kutub al-‘Ilmiyah, 1994), Part 5, p. 127, Part 6, p. 369 and p. 371. Abû Bakr bin Mas’ûd bin Aḥmad al-Kasânî, *Badâ’i’ Al-Shanâ’i’ Fî Tartîb Al-Syarâ’i’*, 2nd ed. (Beirut: Dâr al-Kutub al-‘Ilmiyah, 1989), Part 5, p. 233 dan Part 7 p. 34. Yaḥyâ bin Syaraf bin Murâ al-Nawawî, *Al-Majmû’ Syarḥ Al-Mubadẓah* (Beirut: Dâr al-Fîkr, n.d.), Part 20, p. 22.

Because the explanation of the terms used is not in line with the concepts they previously found from jurisprudence.

For example, it is not difficult to understand when DSN's fatwa states "*Akad tijarah* is all forms of contract made for commercial purposes". But it is not that easy when DSN states "*Akad tabarru'* is all forms of contract carried out for the purpose of benevolence and help, not merely for commercial purposes".<sup>97</sup> Because, the addition of the phrase "not only for commercial purposes" gives the meaning that the *tabarru* contract is also for commercial purposes.

Third, LKS's commitment in complying with sharia *compliance* which, one of them (but not all), is represented by DSN's fatwa. Because, *sharia compliance* means the application of Islamic principles, sharia and its traditions in financial transactions, banking and other businesses.<sup>98</sup> Operationally, sharia compliance is manifested in the form of compliance with DSN's fatwa, because it is a manifestation of sharia principles and rules that must be obeyed by LKS.<sup>99</sup>

#### c. Criminalization of violations of sharia principles.

Basically, the Law stipulates that the objective element of criminal behavior in Islamic banking, as expressly sounded by Article 64 of the Sharia Banking Law, is any behavior that is contrary to the regulations applicable to Islamic banks.<sup>100</sup> The limitation in Article 64 is expanded by Article 66 paragraph (1) point d which mentions "this Law and/or applicable provisions".<sup>101</sup> Likewise, although the provisions in Article 66 paragraph (1) point d refer to members of the board of directors and employees of BUS or BU who have a UUS, it can certainly be extended to members of the board of commissioners, as long as the other provisions apply to banks and do not conflict with the Sharia Banking Law.<sup>102</sup>

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<sup>97</sup> General Provisions number 3 and 4 of Fatwa DSN No. 21/DSN-MUI/X/2001, concerning General Guidelines for Sharia Insurance

<sup>98</sup> Fadia Fitriyanti et al., "Application of Sharia Principles in Sharia Financial Institutions," *Fiat Justisia: Jurnal Ilmu Hukum* 17, no. 2 (2023): 157–66, <https://doi.org/10.25041/fiatjustisia.v17no2.2849>.

<sup>99</sup> Mohammad Ghozali, Devid Frastiawan Amir Sup, Ika Prastyaningsih and Hasanuddin Yusuf Adan, *The Law Concept of Sharia Banking Compliance on Murabaha Financing in Indonesia*, Samarah: Jurnal Hukum Keluarga dan Hukum Islam, Vol. 8, No. 3, 2024, DOI: <http://dx.doi.org/10.22373/sjhk.v8i3.11313>

<sup>100</sup> Although article 64 only mentions the provisions in the Sharia Banking Law, it certainly does not exclude derivative regulations, such as PP, PBI and regulations from institutions authorized to regulate banking institutions.

<sup>101</sup> The addition of "and/or applicable provisions", because they are not specifically specified, has the consequence that members of the board of commissioners, directors, or employees of the bank are "bound" by other regulations, both existing and future (not yet existing).

<sup>102</sup> In comparison, Article 49 paragraph (2) point b of Law No. 10 of 1998, concerning Amendments to Law No. 07/1992 concerning Banking, also stipulates that banking crimes also

Table 2. Sharia Banking Crime

No	Perpetrators	Deeds	Rule	Punishment	
				Prison	Fine
1.	Unaffiliated parties	Conducting sharia banking business activities without BI permission	Article 59	5-15 years	10-200 billion
2.		Bring a written order or permission from BI to force BUS, UUS, or affiliated parties to provide information	Article 60 paragraph (1)	2-4 years	10-200 billion
3.	Affiliated parties	Not carrying out the necessary steps to ensure compliance of BUS or BU that has UUS with the provisions in the Sharia Banking Law	Article 63 paragraph (2) point b dan Article 64	3-8 years	5-100 billion
4.		Deliberately provide information that must be kept confidential	Article 60 paragraph (2)	2-4 years	4-8 billion
5.	Commissioners, directors or	Deliberately not providing information that must be fulfilled	Article 61	2-7 years	4-15 billion
6.	their proxies, officers,	Deliberately not submitting financial statements	Pasal 62 paragraph (1)	2-10 years	5-100 billion
7.	employees of BUS or BU who	Deliberately not giving clarity or not carrying out orders that must be fulfilled	Article 62 paragraph (1)	2-10 years	5-100 billion
8.	have UUS	Negligence that makes non-submission of financial statements	Article 62 paragraph (2)	1-2 years	1-2 billion
9.		Negligence that makes not provide information or does	Article 62 paragraph	1-2 years	1-2 billion

violate other regulations applicable to banks. The regulation reads: Members of the Board of Commissioners, Board of Directors, or employees of the bank who: b. do not carry out the necessary steps to ensure the bank's compliance with the provisions of this Law and other laws and regulations applicable to the bank, shall be punished with imprisonment of at least 3 (three) years and a maximum of 8 (eight) years and a fine of at least Rp5,000,000,000.00 (five billion rupiah) and at most a lot of Rp100,000,000,000.00 (one hundred billion rupiah)."

		not carry out orders that must be fulfilled	(2)		
10.		Ask for or accept rewards or commissions (bribes) for personal or family benefits in providing services to customers.	Article 63 paragraph (2) point a figures 1, 2, and 3	3-8 years	5-100 billion
11.	Shareholder	Instructing (influencing) commissioners, directors, or employees of BS or BU who have UUS to act and result in BUS or UUS not implementing measures that ensure compliance with the provisions of the Sharia Banking Law	Article 65	7-17 years	10-200 billion
12.	Members of the board of directors, and	Deliberately not taking steps to ensure compliance with BUS or UUS to the provisions of the maximum limit of fund distribution	Article 66 paragraph (1) point d	1-5 years	1-2 billion
13.	employees of BUS or BU who have UUS	Make or cause false records in books or reports, documents or reports of business activities, and/or transactions or accounts of BUS or UUS	Article 63 paragraph (1)	5-15 years	10-200 billion
14.		Eliminate or not include or cause non-recording in the books or in reports, documents or reports of business activities, and / or transaction reports or accounts of a BUS or UUS	Article 63 paragraph (1)	5-15 years	10-200 billion
15.		Alter, obscure, conceal, or eliminate records in books, documents or reports of business activities, transactions or accounts of a BUS or UUS	Article 63 paragraph (1)	5-15 years	10-200 billion
16.		Commit acts contrary to the Syariah Banking Act which result in the loss or indecency of BUS or UUS	Article 66 paragraph (1) point a	1-5 years	1-2 billion
17.		Obstructing the inspection or	Article 66	1-5	1-2

	not assisting the inspection conducted or assigned by the board of commissioners	paragraph (1) point b	years	billion
18.	Channeling funds or guarantee facilities by violating applicable provisions required by BUS or UUS, resulting in losses to endanger the business of BUS or UUS	Article 66 paragraph (1) point c	1-5 years	1-2 billion
19.	Intentionally misuse of Customer, BUS or UUS funds	Article 66 paragraph (2)	2-8 years	2-4 billion

Data Source: Law No. 10 of 1998

The main criterion for Islamic banking crimes in the eight articles is "disobedience to the provisions of the Sharia Banking Law". Since sharia principles are the main characteristic of Islamic banking, it can be concluded that the criteria are primarily, technically certainly not limited to "disobedience to sharia principles". If translated more technically, following the explanation of Article 2 of the Sharia Banking Law, the form of disobedience can take the form of doing business that contains elements of usury, *maysir*, *gharar*, *haram* and tyranny.<sup>103</sup> Fatwa DSN No. 80/DSN-MUI/III/2011, in addition to mentioning usury, *maysir*, *gharar*, and *haram* transactions, as violations of sharia principles also adds *taghrîr*, *bay' al-ma'dûm*, *bay' al-makasyûf*, *jahâlah*, *ihtikâr*, *ghabn*, *ghabn fâhisy*, *talaqqî al-rukban*, *tadlîs*, *tanâjush/najsy*, *ghisyisy*, and *dharar*.

Therefore, it can be affirmed that all affiliated parties who allow, encourage or participate in BUS or UUS businesses that contain elements of usury, *maysir*, *gharar*, *haram* and tyranny, whether gambling, conventional financial transactions, or the production and distribution of haram goods, are criminal offenses. As stipulated by law, they are sanctioned according to their position and participation in the activity.

In relation to the determination of interest on money as a criminal offense (criminalization of interest), on the basis that it violates sharia principles, it can also be referred to Article 26 paragraph (1) that "Business activities as referred to in Article 19, Article 20, and Article 21 and/or sharia products and services, shall comply with Sharia Principles". In paragraph (2) it is stated "Sharia principles as referred to in paragraph (1) are fatwa by the Indonesian Ulema Council".

The "demands" contained in paragraph (2) have actually been fulfilled with the issuance of MUI Fatwa No. 1/2004, concerning Interest (Intersat /

<sup>103</sup> It is also mentioned in Article 25 letter a, that "Businesses that are contrary to Sharia Principles include businesses that are considered usury, *maysir*, *gharar*, *haram*, and *tyranny*".

Fa'idah), January 24, 2004, in which the fatwa expressly states that the practice of legal interest on money is haram, whether carried out by banks, insurance, capital markets, court, cooperatives, and other financial institutions or carried out by individuals. However, there are "demands" of the Sharia Banking Law that are not fulfilled by BI in this regard, namely in Article 26 paragraph (3) that "Fatwas as referred to in paragraph (2) are set forth in Bank Indonesia Regulations".

Until now, the MUI fatwa has not been adopted or there has been no PBI POJK that "ratified" it. In this case, it can be considered that BI and OJK "allow" the fatwa as an unwritten law.<sup>104</sup> But the existence of strict rules in KHES has raised the substance of the fatwa into written law and applies positively to legal subjects who violate it.

## Conclusion

The previous discussion confirmed that there has been penetration of *muamalah* jurisprudence and it has become an integral part of the Indonesian legal system, especially those related to Islamic financial institutions. The penetration of *fiqh muamalah* into the Indonesian legal system does not only occur at the theoretical level, but has also had a real impact on the legal culture, legal structure, and legal substance of Indonesian law. At the level of legal culture, *muamalah* has become an attitude and legal awareness in the form of beliefs, values, ideas, and expectations of the community. As a legal structure, *muamalah* already has state institutions and their enforcement organizations. In addition to the House of Representatives (DPR), which carries out the role of legislation with the government, the legal norms of *muamalah* have been implemented by Islamic banking institutions, Islamic capital markets, Islamic insurance, Islamic pawnshops, and other Islamic microfinance institutions. Meanwhile, in terms of legal substance, the legal norms of *muamalah* have manifested into various laws and regulations related to economic and social activities, which are basically related to the determination of sharia principles as the main reference for the activities of financial institutions, the use of muamalah contracts in sharia economic activities, and the criminalization of violations of sharia principles.

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<sup>104</sup> Even in these circumstances, a judge still has room to choose, *ijtihad* and determine it as a criminal offense. This is because unwritten law is recognized as the basis for determining criminal acts and is contained in several legal products. Among them are Emergency Law No. 1 of 1951 Article 5 paragraph (3), Law No. 48 of 2009 concerning Judicial Power Article 10 paragraph (1), Article 5 paragraph (1), and Article 50 paragraph (1).

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