

THEORY AND LEGALITY OF MUDHARABAH FINANCING IN INDONESIAN ISLAMIC FINANCIAL INSTITUTIONS

Fadhil Muhammad

Ar-Raniry State Islamic University Banda Aceh, Indonesia

Email: 180102184@student.ar-raniry.ac.id

Abstract

Islamic financial institutions continue to experience very rapid development, one of the contracts that is often carried out is the mudharabah contract and as a form of state law, legality and regulation are important things to create in order to have a strong foundation. The purpose of this article, to see the extent of legality and regulation in mudharabah contracts. the author uses library research methods (library research), this research is quantitative research and this research uses two types of legal materials, consisting of primary legal materials and secondary legal materials. The results found in this article, namely the legality and regulation under the protection of the state can be said to be very strong because this regulation is already contained in the legislation, the Fatwa of the National Sharia Council - Indonesian Ulema Council (DSN-MUI), and regulations from the Financial Services Authority (OJK) and in accordance with maqashid sharia, especially in protecting assets (Hifdzu Al-Maal) by avoiding things that are prohibited in muamalah which makes customers feel comfortable and not worried.

Keywords: Banking System, Mudharabah Agreement, Regulation, and Maqashid Syariah

Abstrak

Lembaga keuangan syariah terus mengalami perkembangan yang sangat pesat, salah satu akad yang sering dilakukan adalah akad mudharabah dan sebagai salah satu bentuk negara hukum, legalitas dan regulasi menjadi hal yang penting untuk diciptakan agar memiliki landasan yang kuat. Tujuan dari artikel ini, untuk melihat sejauh mana legalitas dan regulasi dalam akad mudharabah. penulis menggunakan metode penelitian kepustakaan (library research), penelitian ini merupakan penelitian kuantitatif dan penelitian ini menggunakan dua jenis bahan hukum, yang terdiri dari bahan hukum primer dan bahan hukum sekunder. Hasil yang ditemukan dalam artikel ini, yaitu legalitas dan regulasi di bawah perlindungan negara dapat dikatakan sangat kuat karena regulasi ini sudah tertuang dalam peraturan perundang-undangan, Fatwa Dewan Syariah Nasional - Majelis Ulama Indonesia (DSN-

MUI), dan peraturan dari Otoritas Jasa Keuangan (OJK) serta sesuai dengan maqashid syariah terutama dalam menjaga harta (Hifdzu Al-Maal) dengan cara menghindari hal-hal yang dilarang dalam muamalah yang membuat nasabah merasa nyaman dan tidak khawatir.

Kata kunci: Sistem Perbankan, Akad Mudharabah, Regulasi, dan Maqashid Syariah

INTRODUCTION

Islamic financial institutions in Indonesia continue to experience significant changes.¹ The beginning of the development of Islamic financial institutions began with the establishment of the Muamalat Bank, which underwent a very critical process at that time so that Indonesia agreed to the birth of Islamic banks and was different from other countries that used the word Islam such as Islamic economics, Islamic banking, and others.² Until now, Indonesia already has various Islamic financial institutions, such as Islamic banking, Islamic securities, and Islamic financial technology (fintech). This proves that Indonesia's Islamic financial institutions continue to undergo significant changes.³

Bank interest is currently still problematic so that the scholars are still questioning the position of bank interest, there are at least three opinions of scholars regarding bank interest. First, scholars argue that bank interest is usury. Second, this opinion is the opposite of the first opinion, namely interest is not included as a prohibited thing, meaning it is allowed. Third, an opinion that is very cautious so that it argues that interest is a mustayabihat whose position is better to avoid.⁴ The presence of Islamic financial institutions using mudharabah contracts is an alternative to avoid usury and provide a sense of security and comfort for Muslims in particular.

¹ Chairul Fahmi and Syarifah Riyani, 'ISLAMIC ECONOMIC ANALYSIS OF THE ACEH SPECIAL AUTONOMY FUND MANAGEMENT', *Wahana Akademika: Jurnal Studi Islam Dan Sosial* 11, no. 1 (2024): 89-104, <https://doi.org/10.21580/wa.v11i1.20007>.

² Nabilah Anika -, Nabila Indah Chairunnisa -, and Aditya Wahyu Saputro, 'Potensi Praktik Monopoli dalam Merger Bank Syariah Indonesia: Tinjauan Hukum Ekonomi Islam dan Hukum Larangan Monopoli', *Jurnal Hukum Lex Generalis* 2, no. 2 (22 February 2021): 174-94, <https://doi.org/10.56370/jhlg.v2i2.22>.

³ Chairul Fahmi, 'The Impact of Regulation on Islamic Financial Institutions Toward the Monopolistic Practices in the Banking Industrial in Aceh, Indonesia', *Jurnal Ilmiah Peuradeun* 11, no. 2 (30 May 2023): 667-86, <https://doi.org/10.26811/peuradeun.v11i2.923>.

⁴ Heru Maruta, 'Akad Mudharabah, Musyarakah, Dan Murabahah Serta Aplikasinya Dalam Masyarakat', *Iqtishaduna: Jurnal Ilmiah Ekonomi Kita* 5, no. 2 (2016): 80-106.

One of the Islamic financial institutions is banking which is identified with mudharabah or profit sharing.⁵ In the Indonesian context, there are two banking systems, namely conventional and sharia. Of the two systems, the only difference is the contract. The contract referred to here is a mudharabah contract. So that the banking system is known as a mudharabah or profit sharing system. From the description above, mudharabah is an important part of every financial line of Islamic institutions, because every form of transaction carried out will return to the concept of profit sharing. Like musyarakah, although the contract is a cooperation contract, but at the time of sharing the results will use a profit-sharing system, namely mudharabah.

Mudharabah agreement is an important agreement in Islamic financial institutions. This is because this mudharabah contract is the dominating contract in financing or funding that occurs in every financial institution. Due to the importance of this mudharabah contract, it is necessary to pay attention to the regulations relating to mudharabah contracts. So far, there are several institutions that have the authority to issue regulations or formulate regulations regarding mudharabah contracts. Such as the DSN-MUI fatwa, Supreme Court number 2 of 2008, Sharia banking law, Bank Indonesia Regulation (PBI), and Financial Services Authority Regulation (POJK).⁶

Marcus Tullius Cicero, a Roman philosopher, stated that *Ubi Societas Ubi Ius*, which means that where there is law there is society. This means that law and society cannot be separated.⁷ Law and society are components that are always attached to everyday life which makes a mirror of order in society. This is also in line with what Gustav Radbruch said, namely the purpose of the law is to create justice, certainty, and usefulness which is called the principle of priority.⁸

Nowadays, research on the legality and regulation of mudharabah financing has never been studied. There are several studies that discuss mudharabah such as research with the title *Analysis of Mudharabah Financing Procedures and Requirements at Bank Syariah Indonesia KCP*

⁵M.Ag. Drs. H. Syaokani, 'Mudharabah Dalam Sistem Ekonomi Islam', *Jurnal Manajemen Dan Bisnis* 6, no. 2 (2018): 48-58.

⁶Muhamad Izazi Nurjaman et al., 'Akad Mudharabah Perspektif Regulasi Dan Praktik Di Perbankan Syariah', *Jurnal Hukum Ekonomi Syariah* 7, no. 1 (2024): 75-92.

⁷Fatma Afifah and Sri Warjiyati, 'Tujuan, Fungsi Dan Kedudukan Hukum', 2024, 142-52.

⁸Frans Limahelu, *Eksistensi, Fungsi, Dan Tujuan Hukum* (Jakarta: Kencana, 2020). 174

Ujung Berung 1.⁹ Tends to discuss procedural in BSI banking in an area. The next research , discusses related to mudharabah with the title Analysis of the Application of Mudharabah Financing in Improving Micro, Small and Medium Enterprises (Study at Bmt Fajar Metro Pusat).¹⁰ this research has concluded that the application of this financing has not been successful, because it can harm one of the parties. Then the research entitled Policy Analysis: Sharia Economic Regulation.¹¹ This research discusses the regulation of Islamic economics which has a very broad aspect, while this research is more specific to mudharabah. From the description above, it shows that no one has discussed conferentially about the legality analysis and regulation of mudharabah financing.¹²

In Islamic law, a policy issued must have a purpose rather than a law in sharia science this is called maqashid sharia. According to Imam Al-Ghazali in maqashid sharia there are five things that need to be considered, namely Hifdzu Ad-Din (protecting religion), Hifdzu An-Nafs (protecting the soul), Hifdzu Aql (protecting the mind), Hifdzu An-Nasl (protecting offspring), Hifdzu Al-Maal (protecting property).¹³

From the background and phenomena above, the author is interested in writing an Analysis of the Legality and Regulation of Mudharabah Financing. The reason the author took this title is to see the importance of mudharabah contracts in Islamic financial institutions. So it is necessary to study the legality and regulation of the mudharabah contract by comparing the maqashid sharia perspective.

RESEARCH METHODS

⁹Tasya Tiwana, Rofikotul Husnah, and Dian Rosinawati, 'Analisis Prosedur Dan Persyaratan Pembiayaan Mudharabah Di Bank Syariah Indonesia KCP Ujung Berung1' (2023).

¹⁰Indra Nur Alim, 'Analisis Penerapan Pembiayaan Mudharabah Dalam Meningkatkan Usaha Mikro Kecil Menengah (Studi Pada BMT Fajar Metro Pusat)' (Universitas Islam Negeri Raden Intan Lampung, 2020).

¹¹Handi Risza, 'Penelitian Mandiri Analisis Kebijakan : Regulasi Ekonomi Syariah Universitas Paramadina', 2020, 1-73.

¹² Chairul Fahmi, 'TRANSFORMASI FILSAFAT DALAM PENERAPAN SYARIAT ISLAM (Analisis Kritis Terhadap Penerapan Syari'at Islam Di Aceh)', *Al-Manahij: Jurnal Kajian Hukum Islam* 6, no. 2 (2012): 167-76.

¹³Eranda Wulan Agustina, 'Pengukuran Kinerja Bank Syariah Menggunakan Maqashid Syariah Index Dan Islamicity Performance Index' (Universitas Islam Negeri Raden Mas Said Surakarta, 2022).

This research uses normative research, which is legal research that examines positive legal norm as the object of study.¹⁴ approach used in this research uses a qualitative approach. Which aims to understand the phenomenon in depth by focusing on the meaning, value, and interpretation of the data collected. In this context, a qualitative approach is applied to examine the concepts of regulation, muamalah fiqh, legal theory, and maqashid sharia that are relevant to the legality and regulation of mudharabah financing. Qualitative methods are considered appropriate to analyse normative issues related to the legality and regulation of mudharabah financing.

The type of research used in this research is descriptive-analytical. This research uses two types of legal materials, consisting of primary legal materials and secondary legal materials.¹⁵ Primary legal materials are legal materials consisting of laws and regulations, fatwas of the National Sharia Council-Majelis Ulama Indonesia (DSN-MUI), OJK regulations, and other regulations. Meanwhile, secondary legal materials consist of law books, journals related to regulations and mudharabah contracts, and opinions of experts (doctrines) such as Marcus Tullius Cicero, Gustav Radbruch, and Abdul Hamid Al-Ghazali, and other figures.

In the process of collecting this data, the author uses the library research method. A good research design requires the author to include the results of a literature search study. The research is based on literature review by reading and studying related to the legality and regulation of mudharabah financing.

RESULTS AND DISCUSSION

A. Mudharabah

1. Definition

Mudharabah in terms of understanding is divided into two, namely etymologically and terminologically. Etymologically, mudharabah comes from Arabic ad-dharb which means hitting, walking, commensurate, and balanced. The word hit here, if expanded into the determination of the parties in the process of running their business.¹⁶ While in terminology, mudharabah

¹⁴Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).

¹⁵Muhaimin.

¹⁶Zaenal Arifin, *Akad Mudharabah (Penyaluran Dana Dengan Prinsip Bagi Hasil)* (Indramayu: Penerbit Adab, 2021).

is an agreement made by several parties which at least consists of the owner of the capital (shahibul mal) and the party running the business (mudharib).¹⁷

The madzhab scholars also provide an understanding of mudharabah. For example, the Hanafi school of thought defines mudharabah as a two-party contract between the owner of the capital and the person doing business to generate profit. Imam Maliki argues that mudharabah is a representative contract, in which there are two parties between the owner of the capital and the person who runs the business with predetermined financing, either in gold or silver. In the present context, the gold and silver intended by Imam Maliki can be in the form of money. Meanwhile, according to Imam Hambal, stated that mudharabah is a cooperation based on trust in the assets issued by the owner of the capital to the person running the business with the provisions of the capital spent and the division of the results of the business. And finally, mudharabah expressed by Imam Syafi'i is a contract made by the parties to run a business consisting of the owner of the capital and the person running the business.¹⁸ The opinions above, it can be concluded that mudharabah is a cooperation agreement carried out by parties consisting of the owner of the capital (shahibul mal) and the person who runs the business (mudharib) for profit.

2. The principle of mudharabah

Satjipto Rahardjo argues that principle is the heart.¹⁹ From Satjipto Rahardjo's opinion, it can be interpreted that principles are an important part of the law, in this case the same as agreements. If the principle is likened to the heart, then if there is no heart in humans, humans can die. This proves that the principle needs to be realised. In general, in the agreement there are several principles that need to be considered, namely as follows.

a. The principle of permissibility (Mabda al-Ibadah)

The principle of permissibility or the principle of mabda 'al-ibadah is that there is no form of prohibition in entering into a form of cooperation

¹⁷Mahmudatus Sa'diyah and Meuthiya Athifa Arifin, 'Mudharabah Dalam Fiqih Dan Perbankan Syari' Ah', *Equilibrium : Jurnal Ekonomi Syariah* 1, no. Desember (2013): 302–23.

¹⁸Sanawiah and Ariyadi, *Fiqh Muamalah; Menggagas Pemahaman Fiqh Kontemporer* (Yogyakarta: K-Media, 2021).

¹⁹Eudea Adeli Arsy, Hanif Nur Widhiyanti, and Patricia Audrey Ruslijanto, 'Tanggung Jawab Notaris Terhadap Akta Yang Cacat Hukum Dan Tidak Sesuai Dengan Ketentuan Pembuatan Akta Dalam Undang-Undang Jabatan Notaris', *Jurnal Bina Mulia Hukum* 6, no. 1 (2021): 130–40, <https://doi.org/10.23920/jbmh.v6i1.324>.

agreement.²⁰ This principle of permissibility takes the argument from the general argument used by Islamic economic law, namely everything is allowed until there is evidence that forbids it. This argument is also the basis for the practices carried out in the scope of the economy can be done as long as it does not conflict with sharia. At least there are some things that are prohibited in the economy that make the economy invalid in sharia, such as economic activities carried out containing elements of maysir, gharar, usury.

The above argument is a counterpoint to the argument recommending worship. In worship, every practice of worship must have an argument to do it, if there is no argument then the worship cannot be done. So in this context, the mudharabah agreement uses this proposition of worship. Instead, it uses the first proposition, which is about the permissibility of carrying out muamalah activities as long as there is no prohibition on doing so.

b. The Principle of Justice (Al 'Adalah)

Agreements or contracts in co-operating with other parties are required to be fair. Agreements that are based on justice are in line with the guidelines of the Koran stated in Surah Al-A'raf: 29 and Al-Hadid: 25.²¹ So that the existence of guidelines in the Al-Quran makes the parties to be able to follow the guidelines in the Al-Quran as a form of belief in the Al-Quran.

Fairness in cooperation is also stated in the civil code article 1244. With this positive law, it demands that the parties make agreements fairly.²² So from the description above, it shows complete guidelines to be fair in making agreements, because it is already contained in the A-Quran and positive law.

c. Principles of Equality and Equity

The principles of equality and equity require the parties to complement each other.²³ As a form of social human being, of course, requires other people to fulfil their interests. In mudharabah there are at least two things that

²⁰Neni S R I Imaniyati, 'Asas Dan Jenis Akad Dalam Hukum Ekonomi Syariah : Implementasinya Pada Usaha Bank Syariah' XXVII, no. 2 (2011).

²¹Rahmani and Timorita Yulianti, 'Asas-Asas Perjanjian (Akad) Dalam Hukum Kontrak Syari ' Ah' II, no. 1 (2008): 91-107.

²²Sekolah Tinggi et al., 'Asas Keadilan Dalam Pasal 1244 KUHPerdata', n.d.

²³Chairul Fahmi and Wira Afrina, 'ANALYSIS OF LEGAL ASPECTS ON DEBT TRANSFER FROM CONVENTIONAL BANK TO SHARIA BANK POST THE APPLICATION OF QANUN ACEH NO. 11 OF 2018', *Al-Mudharabah: Jurnal Ekonomi Dan Keuangan Syariah* 4, no. 1 (23 July 2023): 28-39, <https://www.journal.ar-raniry.ac.id/index.php/mudharabah/article/view/3047>.

complement each other, namely people who have capital and who have the ability to run the agreed business. Equality and equality have a foundation in the Al-Quran letter Al-Hujurat: 13.

d. The Principle of Honesty and Truth (Ash Shidiq)

Surah Al-Ahzab: 70 commands that humans must speak the truth. Telling the truth is the same as honesty. This principle is an effort to make those who make agreements to create a sense of trust. The goal is to keep the agreement to completion without mutual suspicion.

e. Principle of Good Faith (Principle of Trust)

Article 1338 paragraph (3) of the Civil Code requires good faith in entering into an agreement. Good faith must be carried out until the agreement is completed as a form of fulfilling achievements in cooperation.

f. The principle of expediency and benefit

Every activity in making a profit, in this case a mudharabah contract. Of course, one of the goals is to generate profits, so that these profits will produce benefits and benefits as initiated by Imam Al-Ghazali and Imam Ash-Syatibi regarding benefits.

g. The Principle of Consensualism or the Principle of Willingness (mabda' ar-rada'iyyah)

Agreements made between one party and another must be based on willingness. This principle of willingness needs to be maintained before the agreement is implemented. Because it is difficult for an agreement to be agreed upon if at first it is detrimental to one of the parties. Therefore, to realise cooperation must be based on willingness from before the agreement until the end of the agreement.²⁴

h. Principles of Freedom of Contract (mabda' hurriyah at-ta'aqud)

²⁴ Abd Kadir Arno and A. Ziaul Assad, 'PERAN OTORITAS JASA KEUANGAN DALAM MENGAWASI RESIKO PEMBIAYAAN DALAM INVESTASI "BODONG"', *Al-Amwal : Journal of Islamic Economic Law* 2, no. 1 (19 March 2017): 85-95, <https://doi.org/10.24256/alw.v2i1.602>.

The principle of freedom of contract is a form of flexibility in making agreements. Freedom of contract has no limits as long as what is done is in accordance with Islamic law.

i. The Principle that the Agreement is Binding

Islam discusses that every Muslim must fulfil the promises they have agreed upon. With this proposition, it instructs Muslims not to cheat or get out of the agreements that have been agreed upon. Therefore, Muslims have an obligation to fulfil every promise.

j. Principle of Legal Certainty (Pacta Sunt Servanda Principle)

The agreement that has been made by the parties has become the law itself. In court, judges who act as third parties, need to pay attention that there is an agreement they have made that must be implemented. Because the agreements they make will produce compelling legal certainty.²⁵

These principles show that in every agreement it is necessary to pay attention to the principles mentioned above. Especially in mudharabah contracts, the most important thing is the principle of justice regarding profit sharing and the principle of trust regarding the agreed agreement.

3. Terms and conditions of mudharabah

Conditions and pillars are things that must be fulfilled by every worship performed by Muslims. The difference between conditions and pillars is that the conditions are carried out or fulfilled before the worship is carried out, while the pillars are things that must be done during the activity.

Sayyid Sabiq stated that the pillars of the mudharabah ijab qabul contract are expressed by people who have the ability to perform these pillars. And the valid conditions include:²⁶

1. It must be in the form of cash, otherwise the agreement is void.
2. The parties to the contract must be tasharruf in the sense that the parties fulfil the conditions for making a contract. The contract will be invalidated if the parties to the contract are insane people, children, and people under guardianship.

²⁵Rahmani and Yulianti, 'Asas-Asas Perjanjian (Akad) Dalam Hukum Kontrak Syari ' Ah'.

²⁶Zaenal Abidin, Rosnawati, and Siti Rahma, *Fiqih Muamalah* (Zabags Qu Publish, 2022).

3. The capital spent by shahibul mal must be certain. The capital spent must be in accordance with the agreed upon agreement. This is to get clarity on the profit sharing.
4. Profit sharing is carried out in accordance with the agreement
5. Both parties perform the shigat of ijab and qabul contracts.
6. Profit sharing is determined based on the profit that has been run. The owner of the capital cannot seek compensation from the mudharib in the event of a loss. If this happens, the mudharabah contract is cancelled.

B. Types of mudharabah

Mudharabah is generally a profit-sharing agreement between the parties to the agreement. In its development, mudharabah is divided into two types, namely:

1. Mudharabah Muthlaqah

The purpose of this type of mudharabah muthlaqah is an agreement between shahibul mal and mudharib whose scope has no restrictions from all aspects.²⁷ Mudharabah muthlaqah has the principle that the capital is given to the mudharib to be fully managed in order to make a profit provided that it is in accordance with sharia principles.²⁸

2. Mudharabah Muqayyadah

Mudharabah muqayyadah has another term, restricted mudharabah or specified mudharabah whose application is the opposite of mudharabah muthlaqah. Mudharabah muqayyadah is a cooperation agreement made by the parties whose profits are agreed upon in advance and the losses are borne by shahibul mal. Mudharabah muqayyadah is bound by certain restrictions.²⁹ For example, shahibul mal wants to invest in certain business sectors. Then the business that must be run is a predetermined sector and cannot be switched to another sector.

Mudharabah muqayyadah in practice is divided into two types: first, off balance sheet where the application is channelled directly to

²⁷Muhammad Syafi'i Antonio, *Bank Syariah: Dari Teori Ke Praktik* (Jakarta: Gema Insani Press, 2001).

²⁸Rahman Ambo Masse, 'Konsep Mudharabah Antara Kajian Fiqh Dan Penerapan Perbankan', *Jurnal Hukum Diktum* 8, no. 1 (2010).

²⁹Yurida Zakky Umami and Anto Kustanto, 'Akibat Hukum Wanprestasi Dalam Perjanjian Gadai', *Qistie* 14, no. 2 (2022), <https://doi.org/10.31942/jqi.v14i2.5597>.

business actors, such as banks acting as managers to earn fees. Second, on balance sheet which is the owner of capital, banks, and fund managers who require in accordance with the agreed business sector agreement.³⁰

C. Mudharabah Financing Regulation

Indonesia, which is a state of law, will make the basis for running something must have legality and applicable regulations. Mudharabah contracts are also inseparable from the regulations that bind them, so that mudharabah contracts can be enforced and valid according to state law. From this description, it shows that legality and regulations are important to be examined further, because they will become guidelines in carrying out mudharabah contract transactions.³¹

A good and effective state always follows its goals and principles. In this case, the basic law can be a reference so that the government can run in accordance with the initial formation of the state. Based on the 1945 Constitution in the fourth paragraph, it states that "Then to form an Indonesian State Government that protects the entire Indonesian nation and the entire Indonesian homeland and to advance the general welfare, educate the nation's life, and participate in carrying out world order based on independence, lasting peace and social justice". The mandate of the law states that the purpose of the state is to protect, safeguard and prosper the people.³²

The state exists to realise its purpose, which is to protect, safeguard and prosper the people. One form of realising this goal is by issuing and ratifying regulations that have benefits and benefits for citizens. Therefore, the presence of rules or regulations regarding mudharabah contracts is important for Indonesian citizens, especially for Muslims who consider that interest is usury. The following will explain the legality and regulations relating to mudharabah contracts:

1. Legislation

³⁰Wahyu Syarvina, 'Penerapan Akad Mudharabah Muqayyadah Pada Bank Syariah Di Indonesia', *Studia Economica: Jurnal Ekonomi Islam* 7, no. 1 (2021), <https://doi.org/10.30821/se.v7i1.9806>.

³¹Sri Wahyuni et al., 'THE ROLE OF COURTS IN RESOLVING CASES OF BANKRUPTCY OF ISLAMIC BANK CUSTOMERS', *JURISTA: Jurnal Hukum Dan Keadilan* 7, no. 1 (10 June 2023): 1-23, <https://doi.org/10.1234/jurista.v7i1.42>.

³²Wilma Silalahi, 'Penataan Regulasi Berkualitas Dalam Rangka Terjaminnya Supremasi Hukum', *Jurnal Hukum Progresif* 8, no. 1 (2020), <https://doi.org/10.14710/hp.8.1.56-66>.

Statutory regulations are written norms that are binding and regulate in general, which are formed and determined by state institutions through statutory procedures.³³ The laws and regulations relating to mudharabah contracts, namely:

a. Syariah Banking Law

The Islamic banking law or Law No. 21 of 2008 on Islamic Banking is a regulation governing Islamic banking. This regulation is a regulation that amends Law Number 7 of 1992 concerning Banking. With the presence of Law Number 21 of 2008 concerning Islamic Banking, Islamic banking has been separated from conventional banking regulations.

Specifically regarding mudharabah contracts, it is explained in Law Number 21 of 2008 in Article 19 paragraph (1) in this article explains that banks can carry out various contracts in accordance with sharia principles, one of the contracts mentioned is a mudharabah contract in the sense that Islamic commercial banks can run a profit-sharing system. Furthermore, Article 19 paragraph 2 also states that profit-sharing contracts can include mudharabah and musyarakah contracts.

From the description above, it states that the mudharabah contract or profit-sharing contract is valid to be carried out in accordance with sharia principles because it has received legality that this mudharabah contract can be carried out.

b. Fatwa DSN-MUI

Fatwa is a consensus agreed upon by scholars in a certain area regarding a matter that comes to obtain a law based on thought and ijtihad. For Indonesia, the fatwa institution that partners with the state is the National Sharia Council of the Indonesian Ulema Council (DSN-MUI).³⁴

DSN-MUI has the authority to issue regulations related to Islam. Judging from its position, the DSN-MUI fatwa is an element of constitutional infrastructure. However, this fatwa is not binding on individuals so that it cannot become state law. However, this fatwa can

³³Muhammad Raihan Nugraha, 'Perbedaan Undang-Undang Dengan Peraturan Perundang-Undangan', in *Hukum Online*, n.d.

³⁴Nafiatul Munawaroh, 'Kedudukan Fatwa MUI Dalam Sistem Hukum Indonesia' (Hukum Online, n.d.).

be a guideline for Islamic institutions, such as Islamic banking, BMT, and other Islamic institutions that need guidelines in running their business.

1. Fatwa No. 07/DSN-MUI/IV/2000 on Mudharabah Financing, principles of financing based on mudharabah contracts in Islamic financial institutions.
2. Fatwa Nomr 15/DSN-MUI/IX/2000 on the Principles of Distribution of Business Results of Islamic Financial Institutions, which regulates the principle of distribution of business results based on mudharabah contracts.
3. Fatwa No. 75/DSN-MUI/VII/2009 on the Distribution of Zakat Funds in the Form of Working Capital, regulates the use of zakat funds for financing small businesses with mudharabah contracts.
4. Fatwa No. 84/DSN-MUI/XII/2012 on Operational Guidelines for the Collection and Distribution of Social Funds by Islamic Financial Institutions, regulates the collection and distribution of social funds, including the use of mudharabah contracts in the management of social funds.
5. Fatwa Number 105/DSN-MUI/X/2016 concerning Wakalah bil Ujah Agreement in Savings Fund Raising, although it does not directly regulate mudharabah, this fatwa explains the relationship between the wakalah agreement and the mudharabah agreement in savings fund raising.
6. DSN-MUI Fatwa 115/DSN-MUI/IX/2017, this fatwa is about general provisions on mudharabah contracts consisting of ten things. First, general provisions, second, legal provisions on the form of mudharabah, third, provisions on the shigat of the contract, fourth, provisions on the parties, fifth, provisions on ra's al-mal, sixth, provisions on profit sharing ratio, seventh, provisions on business activities, eighth, provisions related to profits and losses, ninth, provisions on activities and products of LKS, tenth, closing provisions.
7. Fatwa Number 116/DSN-MUI/IX/2017 on Customer Investment Management Based on Sharia Principles in the Capital Market, regulates the management of customer investment funds, including mudharabah contracts in the Islamic capital market.

The above fatwas are regulations that are shown to financial institutions to obtain legality in conducting transactions using mudharabah contracts. With these fatwas, mudharabah already has a legal basis for implementation. Banking Islamic financial institutions and non-banking financial institutions can use mudharabah contracts.

c. FSA Regulation

The Financial Services Authority (OJK) in Indonesia regulates mudharabah contracts as one of the Islamic financial products used in Islamic banking, Islamic microfinance institutions, and other institutions that operate based on sharia principles. The following are some OJK regulations relevant to mudharabah contracts:

1. POJK No. 31/POJK.05/2014 on the Business Implementation of Microfinance Institutions
2. POJK No. 10/POJK.03/2022 concerning Islamic Commercial Banks
3. POJK No. 75/POJK.04/2017 on the Issuance and Requirements of Sukuk
4. SEOJK No. 36/SEOJK.03/2015 concerning Products and Activities of Sharia Commercial Banks and Sharia Business Units

D. Legal Theory

Legal theory is an opinion expressed by a scholar who has the capacity to speak about law. Figures who find theories about law are numerous with different streams according to their circumstances. One of the leading figures in legal science is Gustav Radburch who argues about the purpose of law. Gustav Radburch argues that the purpose of law is the key to the achievement of a law, so Gustav Radburch states that the purpose of law is three things, namely justice, legal certainty, and legal benefits. In this case regarding justice and legal certainty, what must be prioritised is justice, because if justice has been upheld, then legal certainty will follow.³⁵

E. Maqashid sharia

³⁵Saifullah et al., *Hukum Fintech Lending Upaya Mitigasi Pinjaman Online Ilegal* (Bandung: PT Refika Aditama, 2023).

Maqashid sharia is important in determining Islamic law. In general, maqashid sharia is the purpose of a law to provide that the law has a good purpose. So that maqashid sharia becomes a very fundamental thing in determining a law.³⁶

According to Imam Al-Ghazali, maqashid sharia is rejecting all forms of things that are not good so as to produce benefits and avoid harm. Imam Al-Ghazali divided maqashid sharia into five things, namely:

- a. Hifdzu Ad-Din (protecting religion), protecting religion has many meanings and examples. Examples of protecting religion are praying five times, tolerance towards other religions to maintain religious harmony.
- b. Hifdzu An-Nafs (protecting the soul), the purpose of the implementation of a law is to be able to protect oneself as a form of respect for the soul and all efforts to defend life. For example, eating forbidden food in times of emergency is allowed to survive
- c. Hifdzu Aql (protecting the mind), various efforts can be made to protect the mind such as not consuming something that can damage the mind. In the present context, learning and education is also an effort to protect the mind.
- d. Hifdzu An-Nasl (protecting offspring), it is forbidden to commit adultery.
- e. Hifdzu Al-Maal (safeguarding wealth), not putting something into the body with wealth that is not rightfully his.

Maqashid sharia proposed by imam al-ghazali has a very strong value to determine a law. Because a law that is determined needs to pay attention to these five points. In the context of mudharabah contracts, the presence of legality and regulations regulated by the state has fulfilled the elements of maqashid sharia, especially in terms of safeguarding property. This regulation also involves scholars who have competence in religious knowledge. So that the public will be convinced by the presence of regulations that allow banking and non-banking Islamic financial institutions to carry out transactions with profit sharing.

³⁶Paryadi, 'Maqashid Syariah: Definisi Dan Pendapat Ulama' 4, no. 2 (2021).

CONCLUSION

Mudharabah agreement is a cooperation agreement involving several parties, namely between the owner of the capital and the person who runs the business. Which aims to get profit with a profit-sharing system. The legality and regulation under the protection of the state can be said to be very strong because this regulation is already contained in the legislation, Fatwa of the National Sharia Council - Indonesian Ulema Council (DSN-MUI), and regulations from the Financial Services Authority (OJK).

The presence of regulations regarding mudharabah contracts also provides comfort and security for Muslims in Indonesia to avoid elements of usury so that this is very much in accordance with maqashid sharia in safeguarding property (Hifdzu Al-Maal).

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