

THE CONCEPT OF *MUDHARABAH* CONTRACT AND ITS APPLICATION TO SHARIA SECURITIES CROWDFUNDING IN INDONESIA

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Abstract

This article discusses the concept of the *Mudharabah* contract and its application to Sharia securities crowdfunding in Indonesia. The article has a discussion focus related to issues regarding *Mudharabah* which have developed both from the implementation and the provisions in it. The method used in this study is a descriptive method with a qualitative approach. The data sources used come from books, books, journals, the internet, and so on that are relevant to the subject matter. The results of the research in the article are: First, the majority of scholars define *mudharabah* based on their own understanding which when the common thread is drawn that *mudharabah* is a cooperation contract between two parties in which one party gives his property to another party to be traded. Scholars agree on the permissibility of the *mudharabah mutlaqah* contract but differ in opinion regarding the *mudharabah muqayyadah* which the Shafi'iyah scholars and Maliki scholars consider invalid. The majority of scholars agree that the pillars of the *mudharabah* contract consist of 'aqidain, ma'qud and shighat akad. Second, securities crowdfunding is a method of raising funds with a joint venture scheme carried out by business owners to start or develop their business and Sharia securities crowdfunding is crowdfunding of securities based on the principle of -Shariah principles. Third, the implementation of the *mudharabah* contract on Sharia securities crowdfunding in Indonesia has been carried out by several platforms, one of which is Shafiq which issues sukuk based on the *mudharabah* contract whose implementation is in harmony with the opinions of scholars, and the DSN-MUI fatwa.

Keywords: *Mudharabah*; Securities Crowdfunding; Sharia

Abstrak

Artikel ini membahas Konsep akad *Mudharabah* serta penerapannya pada *securities crowdfunding* Syariah di Indonesia. Artikel memiliki fokus pembahasan berkaitan dengan persoalan-persoalan tentang *Mudharabah* yang mengalami perkembangan baik dari penerapan dan ketentuan di dalamnya. Metode yang digunakan dalam penelitian ini adalah metode deskriptif dengan pendekatan kualitatif. Sumber data yang digunakan berasal dari buku-buku, kitab, jurnal, internet, dan lain sebagainya yang relevan dengan pokok pembahasan. Hasil penelitian dalam artikel adalah: Pertama, jumbuh ulama mendefinisikan *mudharabah* berdasarkan pemahamannya tersendiri yang apabila ditarik benang merahnya bahwa *mudharabah* ialah akad Kerjasama antara duabelah pihak yang mana salah satu pihak memberikan hartanya kepada pihak lain untuk diperdagangkan. Ulama

sepakat mengenai kebolehan akad *mudharabah mutlaqoh* tetapi berbeda pendapat mengenai *mudharabah muqayyadah* yang mana ulama syafi'iyah dan ulama Malikiyah menganggapnya tidak sah. Juhur ulama sepakat bahwa rukun akad *mudharabah* terdiri dari 'aqidain, ma'qud dan shighat akad. Kedua, *securities crowdfunding* adalah metode pengumpulan dana dengan skema patungan yang dilakukan oleh pemilik usaha untuk memulai atau mengembangkan bisnisnya dan *securities crowdfunding* Syariah adalah urun dana efek yang berlandaskan kepada prinsip-prinsip Syariah. Ketiga, penerapan akad *mudharabah* pada *securities crowdfunding* Syariah di Indonesia telah dilakukan oleh beberapa platform salahsatunya adalah Shafiq yang mengeluarkan sukuk berdasarkan akad *mudharabah* yang mana penerapannya memiliki keselarasan dengan pendapat ulama, dan fatwa DSN-MUI

Kata Kunci: *Mudharabah; Securities Crowdfunding; Syariah*

A. Introduction

Mudharabah is a partnership contract in business between two parties, where one party acts as the owner of business capital (*shahib al-mal*) who provides all the capital, on the other hand there is a party who manages the funds or capital or is known as *mudharib*. Technically, *mudharabah* is a partnership for profit, where the *shahib al-mal* provides capital and the *mudharib* provides labor or as a party who works directly. Fiqh scholars, such as Hanafi and Hanbali scholars, refer to this contract term as *mudharabah*, while Maliki and Shafi'i scholars refer to it as *qiradh*.¹

The stipulation of *mudharabah* in Islam aims to facilitate human activities, this is because some of them have property but are unable to manage it, on the other hand there are people who do not have property but have the capability to manage and develop property. So Islamic law allows this cooperation so that they can benefit from each other. The owner of the capital utilizes the expertise of the *Mudharib* (manager) and the *Mudarib* takes advantage of the assets and thus the realization of the cooperation of wealth and charity. The stipulation of the contract in Islam aims to realize a benefit and avoid damage and harm.²

¹ Chasanah Novambar Andiyansari, "Akad Mudharabah Dalam Perspektif Fikih Dan Perbankan Syariah | SALIHA: Jurnal Pendidikan & Agama Islam," September 7, 2020, 43, <http://www.staitbiasjogja.ac.id/jurnal/index.php/saliha/article/view/80>.

² Sulayman Fifi, *Ringkasan Fikih Sunnah Sayyid Sabiq*, 2013, 221.

Along with the development of information technology, the *mudharabah* contract does not only act as a contract of agreement and cooperation in the Islamic financial institution sector, but develops and begins to enter the fintech sector, one of which is Sharia crowdfunding services (Sharia Securities Crowdfunding). For this reason, it is interesting to discuss the concept of the *mudharabah* contract and its application to Sharia securities crowdfunding activities in Indonesia.

B. Research Method

The method used in this study is a descriptive method with a qualitative approach. Descriptive studies are carried out by describing, describing and describing research objects objectively and factually based on the data sources obtained.³ In this study, a theoretical approach is used, namely the pure legal theory initiated by Hans Kelsen to analyze the implementation of regulations and rules on securities crowdfunding in Indonesia. This type of research is a literature research in which the author collects written data from relevant previous studies regarding the *mudharabah agreement* and its implementation in securities crowdfunding in Indonesia.

C. Result and Discussion

1. Definition of *Mudharabah*

The origin of the word '*mudharabah*' is '*dharaba*' which has various meanings. Some of the literal meanings are to go in search of sustenance (*dharaba al-thair*); mixing (*dharaba al-syai' bi al-syai'*); trade or trade (*dharaba fi al-mal bi al-mal*). Wahbah Zuhaili explained that one of the meanings of *mudharabah* literally is to travel on earth (*al-sir fi al-ardh*) some derivations of the word '*al-sir*' are '*istar*' or '*istiyar*' which means shopping for necessities on the way.⁴

In the fiqh muamalah literature, there are two terms used to indicate a profit-sharing business whose capital is fully provided by one of

³ Suryana, *Metodologi Penelitian (Model Praktis Penelitian Kuantitatif Dan Kualitatif)* (Bandung: Universitas Pendidikan Indonesia, 2010), 20.

⁴ Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5 (Damaskus: Daar Al-Fikri, 2006), 476.

the partners (*shahib al-mal*), namely '*mudharabah*' and '*qiradh*' or '*muqaradhah*'. The two terms have the same meaning; it's just used by different scholars. During the Tabi'in era, there were two centers for the development of jurisprudence, namely Medina and Baghdad. For Baghdad scholars, cooperation between investors and business actors is called *mudharabah*, while Medina scholars call it *qiradh* or *muqaradhah* which literally means al-qath' (disconnected). The right of the owner of the capital to do business with the capital has been abolished because it was handed over to the *mudharib*.⁵

In addition to the above definition, four madhhab imams define *mudharabah* as follows;

Madzhab Hanafiyah

Mudharabah according to Imam Hanafi, *mudharabah* is;

عقد سيركاه في الربح أحد الطرفين مالك رأس المال والآخر مالك الخدمة

"Shirkah contract is in profit, one party is the owner of the capital and the other is the owner of the service."

Madzhab Malikiyah

Mudharabah according to Imam Maliki, *mudharabah* is;⁶

عقد تمثيلي ، يفرج بموجبه مالك العقار عن بعض أصوله لاستخدامها كرأس مال لأشخاص آخرين بحيث يتم تداول رأس المال بدفع محدد مسبقاً

"Representative contract, where the owner of the property takes out part of his wealth to be used as capital to other people so that the capital is traded with a predetermined payment (gold and silver).

Madzhab Syafi'iyah

Mudharabah according to Imam Syafi'i, *mudharabah* is;⁷

عقد يقرر تسليم الشخص ممتلكاته إلى شخص آخر ليتم تداولها

"A contract that determines a person to hand over his property to another person to be traded."

⁵ Jaih Mubarak and Hasanudin, *Fikih Mu'amalah Maliyah (Akad Syirkah Dan Mudharabah)* (Bandung: Simbiosis Rekatama Media, 2017), 158.

⁶ Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 476.

⁷ Heru Maruta, "Akad Mudharabah, Musyarakah, Dan Murabahah Serta Aplikasinya Dalam Masyarakat," *IQTISHADUNA: Jurnal Ilmiah Ekonomi Kita* 5, no. 2 (December 30, 2016): 84.

Madzhab Hanabilah

Mudharabah according to Imam Ibn Hanbal, *mudharabah* is;

يقوم مالك العقار بإصدار جزء من ممتلكاته بحجم معين لأشخاص آخرين ليتم تداوله
بحصة من الأرباح المعروفة

"The owner of the property issued a portion of his property with a certain size to other people to be traded with a share of the profits that have been known."

***Mudharabah* Evidence and Ulama's Opinions**

The *mudharabah* contract is based on the verses of the Quran and the hadith of the Prophet Muhammad

SAW, including:

in QS. al-Muzzamil (73): 20 Allah Said:

... واخرون يضربون في الأرض يبتغون من فضل الله وآخرون

"...(Among you are) those who walk the earth seeking some of Allah's bounty..."⁸

The interpretation of the sentence *yadhribun fi al-ardh* is that they travel to do business (*yusafirun li al-tijarah*).

Hadith in the form of *taqrir* for the actions of *sahabah*, namely:

كان سيدنا العباس بن عبد المطلب إذا دفع المال مضاربة إشتراط على صاحبه أن لا يسلك
به بخرا، ولا ينزل به واديا، ولا يشتري به دابة ذات كبد رطبة، فإن فعل ذلك ضمن، فبلغ
شرطة رسول الله صلى الله عليه وآله وسلم فأجازه

"Abbas Ibn Abd al-Muthallib when giving up property as a *mudharabah*, he requires his *mudharib* not to wade through the ocean and not to descend from the grandparents, and not to buy livestock. If these conditions are violated, he (*mudharib*) must bear the risk. When the conditions set by Abbas were heard by the Messenger of Allah, he confirmed it."⁹

Mudharabah contracts are divided into two, namely; *mudharabah muthlaqah* (unbound *mudharabah*) and *mudharabah muqayyadah* (bound *mudharabah*) contracts. Because *mudharabah* is the

⁸ Lajnah Pentashih Qur'an Depertemen Agama, *Al-Qur'an Dan Terjemahnya*, Penerbit Diponegoro (Bandung, 2013), 574.

⁹ Fifi, *Ringkasan Fikih Sunnah Sayyid Sabiq*, 225.

same as qiradh, there are other terms that are almost the same as the variety of *mudharabah*. *Mudharabah muthlaqah* is the same as *qiradh'am*, while *mudharabah muqayyadah* is the same as *qiradh khash*. The difference between the two is explained by Wahbah Zuhaili as follows:¹⁰

1. Unbound *mudharabah* is the transfer of capital from *shahib al-mal* to mudharib to conduct business (business) without being determined by the type of business, the place, the time, the nature of the business, and/or the party conducting the business.
2. Bound *mudharabah* is a *mudharabah* contract in the form of transfer of capital from *shahib al-mal* to mudharib to conduct a business (business) which is determined by the type of business, the place, the time, the nature of the business, and/or the party conducting the business.

Ulama agree on the validity of the *mudharabah-muthlaqah* contract. However, ulama differ on the legal status/legitimacy of the *mudharabah muqayyadah*. There are differences of opinion among scholars regarding the *mudharabah muqayyadah* law, including:¹¹

1. Maliki and Shafi'iah scholars are of the opinion that *mudharabah-muqayyadah* is invalid. Therefore, the Maliki and Shafi'i scholars forbade it.
2. Hanafi scholars are of the opinion that the *mudharabah-muqayyadah* contract is valid under several conditions, including:
 - a. Imam Abu Hanifah and Imam Ahmad Ibn Hanbal allow *mudharabah-muqayyadah* related to the time of business, the party doing the business, and the future (*idhafatuha ila al mustaqbal*), while Imam Malik and Imam al-Shafi'i forbid it.
 - b. *Mudharabah-muqayyadah* contract which is associated with uncertain terms (for example someone says; if someone comes to

¹⁰ Az-Zuhaili, *Fiqih Islam Wa Adillatuhu*, 479.

¹¹ Mubarak and Hasanudin, *Fikih Mu'amalah Maliyah (Akad Syirkah Dan Mudharabah)*,

you by paying me a debt to me through you, the payment of the debt that you have received can be used as business capital with a *mudharabah* contract).

Hanabilah and Zaidiah scholars allow *mudharabah* muqayyadah contracts.

2. Pillars and Conditions of *Mudharabah*

Rukun is something that stands for something else. Therefore, scholars emphasize that the pillars are part of what must exist (if the pillars of the contract are not present, the contract is not formed (not exist or do not exist)).¹²

The terms of the *mudharabah* contract are related to its pillars. However, scholars differ regarding the pillars of the *mudharabah* contract. In general, these differences can be grouped into three, namely:¹³

1. The pillars of *mudharabah* according to the majority of scholars are: 1) the parties who make the contract, namely shahib al-mal and mudharib; 2) ma'qud, namely capital (ra'slal-mal), business (al-'amal/al-a'mal), and profit (al-rihb); 1 and 3) *mudharabah*/shighat lakad statements, namely statements in the form of consent/offer and qabul/acceptance.
2. Abu Zaid explained that there are five pillars of *mudharabah*: 1) two parties to the contract; 2) contract shighat, namely consent and qabul; 3) lal-mal, namely capital for doing business; 4) al-rihb, namely the increase in capital; and 5) al-'amal, which is an effort made by mudharib to earn a profit.
3. Umar Mushthafa Jabar Isma'il explained that in the view of the Hanafi scholars, there is only one pillar of *mudharabah*, namely the shighat contract consisting of consent and acceptance.

The conditions regarding the *mudharabah* contract are explained in more detail, including:

¹² Az-Zuhaili, *Fiqih Islam Wa Adillatuhu*, 480.

¹³ Az-Zuhaili, 481.

1. The parties who enter into the *mudharabah* contract are required to have the legal ability or experts at *al-wujub wa al-ada* to represent or give power to the *shahib al-mal* and receive representation or power of attorney for the *mudharib* because the *mudharabah* contract contains *lakad Iwakalah* or power of attorney, namely the *mudharib* doing business (business) on the basis of the power of the *shahib al-mal*. *Mudharabah* may be performed between Muslims and non-Muslims (dhimmi and musta'min) in Muslim countries. In business, the main requirement for *mudharib* (business actors) is to have the ability, expertise, or business skills so that they are able to develop business capital.
2. *Ra's al-mal* (business capital) in a *mudharabah* contract must meet the following requirements:
 - a. Capital must be in the form of a medium of exchange (nuqud/money), not in the form of goods.
 - b. Capital must be known and measurable.
 - c. Capital must be in cash (not in the form of receivables).
 - d. Capital must be transferred from the *shahib al-mal* to the *mudharib*.
3. ***Mudharabah Profit Sharing Mechanism***

Tandidh is a concept used in the *mudharabah* contract in dividing profits between *shahib al-mal* (owner of capital) and *mudharib* (manager). Muhammad abd al-Mun'im Abu Zaid explained that *tandhidh* is the principle of profit sharing (*tandhidh principle li qismat al-ribhi*).¹⁴

Tandhidh is a profit-sharing rule which states that profits in the *mudharabah* business cannot be *divided* between *shahib* and *mudharib* before *tahwil* (estimation) of goods at a certain price/value (*tahwiluhu min urudh ila nuqud*) is carried out. Although the *tandhidh* principle was originally introduced to make it easier to share business profits, this

¹⁴ Mubarak and Hasanudin, *Fikih Mu'amalah Maliyah (Akad Syirkah Dan Mudharabah)*, 167.

principle can also be applied in determining business capital in the form of goods, including merchandise. The condition contained in the business is that the efforts carried out by the *mudharib* must be in line with the Qur'an and the sunnah of the Prophet. and scholarly ijihad. Therefore, *mudharib* are not justified in doing business in fields or sectors that are forbidden, both in terms of the object being transacted and in terms of the method.

Profit sharing must be determined in the form of profit-sharing ratio (eg 50% profit for *mudharib* and 50% for *shahib al-mal*; 70% profit for *mudharib* or 30% for *shahib al-mal*) Because the purpose of the *mudharabah* contract is to get profit, the ratio is unclear profit sharing will result in the facade of the *mudharabah* contract. However, there are also scholars who allow the existence of a *mudharabah* contract without determining the profit ratio in the contract.¹⁵

4. End of the *Mudharabah* Agreement

Mudharabah contracts, in the view of the majority of scholars, are common *ghair* contracts, namely contracts that can be canceled by the *mudharib* or *shahib al-mal* at any time. Malikiyah scholars are of the opinion that the *mudharabah* contract is a common contract, namely a contract that cannot be canceled unilaterally by the *mudharib* or *shahib al-mal*. Cancellation can only be done on the basis of an agreement. Wahbah Zuhaili explained the reasons that led to the end of the *mudharabah* contract, including:¹⁶

1. Cancellation (*al-faskh*) or dismissal (*al-'azl*). The *mudharabah* contract ends when one of the parties (*shahib al-mal* or *mudharib*) unilaterally declares the end of the *mudharabah*. The *mudharabah* contract ends when the *mudharib* resigns or the *shahib al-mal* dismisses the *mudharib* as capital manager. Cancellation or termination of the *mudharabah* contract, including impeachment or

¹⁵ Mubarok and Hasanudin, 168.

¹⁶ Az-Zuhaili, *Fiqih Islam Wa Adillatuhu*, 482.

resignation, is effective after the termination is known to the parties concerned.

2. The death of one of the parties to the contract, both the *sahib al-mal* and the *mudharib*. Because in a *mudharabah* contract, in terms of its nature, it is the same as a *wakalah* contract which ends due to the death of the representative or the party who represents (*muwakkil*).
3. Loss of legal competence, the *mudharabah* contract ends if the *sahib al-mal* or *mudharib* loses legal competence, either because of madness (*al-junun*) or because of an idiot or is declared under guardianship.
4. *Shahib al-mal* (owner of capital) changed religion (*al-riddah*). Apostasy or changing religion is a legal death as the contract ends due to the death of one of the parties to the contract. However, the *mudharabah* contract does not end because the *mudharib* apostates immediately, but there must be a process of terminating the *mudharabah* contract by distributing the profits that have been obtained and returning the capital to the owner.

5. Sharia Securities Crowdfunding Overview

In simple terms, securities crowdfunding is a method of raising funds with a joint venture scheme carried out by business owners to start or expand their business. In other words, securities crowdfunding is a form of alternative financing scheme for raising funds through the capital market. This scheme is considered to make it easier for businesses or individuals to obtain funding from the capital market. In the securities crowdfunding scheme, the funds raised are also hedged for a certain period of time. Securities crowdfunding is a new version of equity crowdfunding, to facilitate MSMEs who are still having difficulty entering the capital market because their business entities do not meet the funding criteria. There are three parties involved in securities crowdfunding, namely businesses or business actors (MSMEs) that require funding (publishers), online platform providers,

and capital owners (investors). Through securities crowdfunding, investors can buy and obtain ownership through shares, sharia shares, proof of ownership of debt (bonds), or joint ownership certificates (sukuk). The shares of the business are acquired in accordance with the percentage of the value of the contribution.

Through securities crowdfunding, investors and parties who need funds can be easily met through an online platform (information technology-based application system). Investors will get profits in the form of dividends or profit sharing from the business profits which are distributed periodically. Basically, securities crowdfunding is almost the same as investing in the capital market, namely there are issuers (companies that offer company shares), crowdfunding service providers, and investors (investors). The difference lies in the mechanism for offering shares, bonds, and sukuk with the SCF system, which is carried out by the issuer to sell shares directly to investors through an electronic system (online). Then those who are given the disbursement of funds or hereinafter referred to as publishers are start-up companies and MSMEs with a total capital of not more than Rp. 30 billion and are not public companies.

Securities crowdfunding itself already has a legal umbrella from the Financial Services Authority (OJK) which is regulated in OJK Regulations, namely POJK Number 57/POJK.04/2020 concerning Securities Offerings Through Information Technology-Based Crowdfunding Services (Securities Crowdfunding).¹⁷

In Sharia crowdfunding securities, the securities offered are generally in the form of shares and sukuk, provided that both the issuer and its business activities do not conflict with Sharia principles, namely avoiding elements of gharar, maysir, usury, dzulm. As has been

¹⁷ Kompas Cyber Media, "Daftar Fintech Securities Crowdfunding Syariah yang Dapat Izin OJK Halaman all," KOMPAS.com, March 27, 2022, <https://money.kompas.com/read/2022/03/27/174902126/daftar-fintech-securities-crowdfunding-syariah-yang-dapat-izin-ojk>.

stipulated in the DSN-MUI fatwa DSN Fatwa Number 137 of 2020 concerning Sukuk, DSN Fatwa Number 140 of 2021 concerning Sharia Securities Offerings through Information Technology-Based Crowdfunding Services Based on Sharia Principles, DSN Fatwa Number 115 of 2017 concerning *Mudharabah* Contracts, DSN Fatwa Number 07 of 2000 concerning *Mudharabah* Financing

6. *Mudharabah* Agreement on Sharia Securities Crowdfunding in Indonesia

Before entering into the discussion of implementing *mudharabah* contracts on the Sharia securities crowdfunding platform, it should be noted that not many securities crowdfunding service providers have received licenses and direct supervision from the DSN-MUI, until April 2022 only two Sharia securities crowdfunding service providers were licensed by the OJK at the same time obtaining licenses. and supervision from DSN-MUI, namely Shafiq and Lbs Crowdfunding. For Shafiq himself, he has offered several sukuk with musyarakah and *mudharabah* contracts, while the crowdfunding lbs is still in the pre-bidding stage and has not been traded to the public in the form of shares or sukuk. Therefore, here the author will take the application of the *mudharabah* contract which is carried out on Sharia securities crowdfunding which is applied on the Shafiq platform.

Sukuk *Mudharabah* Scheme on the Shafiq platform:

1. Issuers through sharia SCF operators issue *mudharabah* sukuk.
2. The SCF operator makes an offer of sukuk *mudharabah* to potential investors.
3. After getting an investor, the investor gives wakalah (power) to the SCF organizer to be his representative in signing the *mudharabah* agreement with the issuer and submitting the capital.
4. The organizer as the investor's representative enters into a *mudharabah* contract and hands over the capital from the investor to the party acting as business manager (mudharib) in the project that is the object of the *mudharabah*.

5. Mudharib or business manager performs the work for which he is responsible.
6. When the project is completed, the issuer as mudharib performs reporting, calculation and realization of profit sharing to investors or investors, as well as returning the capital.
7. The SCF operator will forward the profit sharing and return on capital reports to investors.

Before offering sukuk or shares, the service provider in this case Shafiq will conduct a business feasibility review from the prospective issuer / sukuk issuer which in this case must meet predetermined criteria, namely the business that has been carried out has been running for at least one year, and carried out does not conflict with Sharia principles. This is also related to the Sharia compliance of service providers in bridging the sale of sukuk

Then the issuer and organizer will issue a prospectus and at the same time offer sukuk within a predetermined period of time. In the *mudharabah* sukuk issued by Shafiq himself, all the terms of the contract have been listed in the prospectus, both from the company profile, business activities to be funded in the sukuk, profit sharing schemes, profit projections, risk profile and mitigation, as well as dispute handling and resolution. when it happens

In the *mudharabah* sukuk contract which is on the Shafiq platform, all business or project capital is borne by the investor (shahib al-mal) and the sukuk issuer as the mudharib will manage the funds collected in predetermined business activities. Then the mudharib is also obliged to return the capital within the agreed time or tenor, along with the profit-sharing ratio which is usually realized in the last month of the return on capital. This means that in this case the realization of profits is based on real profits after the project or business activity is actually running. And if there is a loss in the business activity, then the entire loss will be borne by the investor, except if the mudharib is in default which results in a loss in his business activities, then the investor can get compensation for the loss.

The profit sharing ratio in the *mudharabah* sukuk contract on the Shafiq platform is determined and determined in the form of a percentage agreed at the beginning, but is determined and offered by one of the parties, in this case the party offering, namely the sukuk issuer itself.

7. Pure Legal Theory (Natural Law) in the Implementation of *Mudharabah* Contracts in Sharia Securities Crowdfunding in Indonesia

According to Kelsen, pure legal theory is a positive legal theory. He tried to question and answer to the question what is the law? and not how the law should be? Because of such a starting point, Kelsen argues that justice, as is usually questioned, results from the science of law. law. The main basis of Kelsen's theory is as follows:

1. The aim of the theory of law, is to reduce chaos and improve unity.
2. Legal theory is a science, not a will, and or desire. It is knowledge of the law that is present, not of the law that should be present.
3. Legal science is normative, not natural science.
4. As a theory of norms, legal theory does not deal with the issue of the effectiveness of legal norms.
5. Legal theory is formal, a theory about how its contents change according to a certain path or pattern.
6. The relationship between legal theory and a certain positive legal system such as between possible laws and existing laws.

Hans Kelsen introduced the concept of “Grundnorm” which is the basis and goal of all legal pathways.¹⁸ Grundnorm as the core that produces legal regulations in a legal order which was further developed by Adolf Merkl known as *Stufenbau Des Recht* who prioritizes the existence of a hierarchy rather than legislation. Hans Kelsen sees law as a system of norms that emphasizes the supposed aspect or *das sollen* by predicting in advance that it cannot be derived from reality, legal norms are always created through an act of will, an act can only create law, law must be created. according to the norm.

¹⁸ Khudzaifah Dimiyati, *Teorisasi Hukum* (Surakarta: Muhammadiyah Press, 2004), 61.

higher law. Thus, the higher a norm, the more abstract it is, and conversely, the lower the level of a norm, the more concrete it is.¹⁹

In terms of implementing regulations that are the legal basis for economic activities in Sharia securities crowdfunding, the authors can divide the regulations and hierarchical levels as follows:

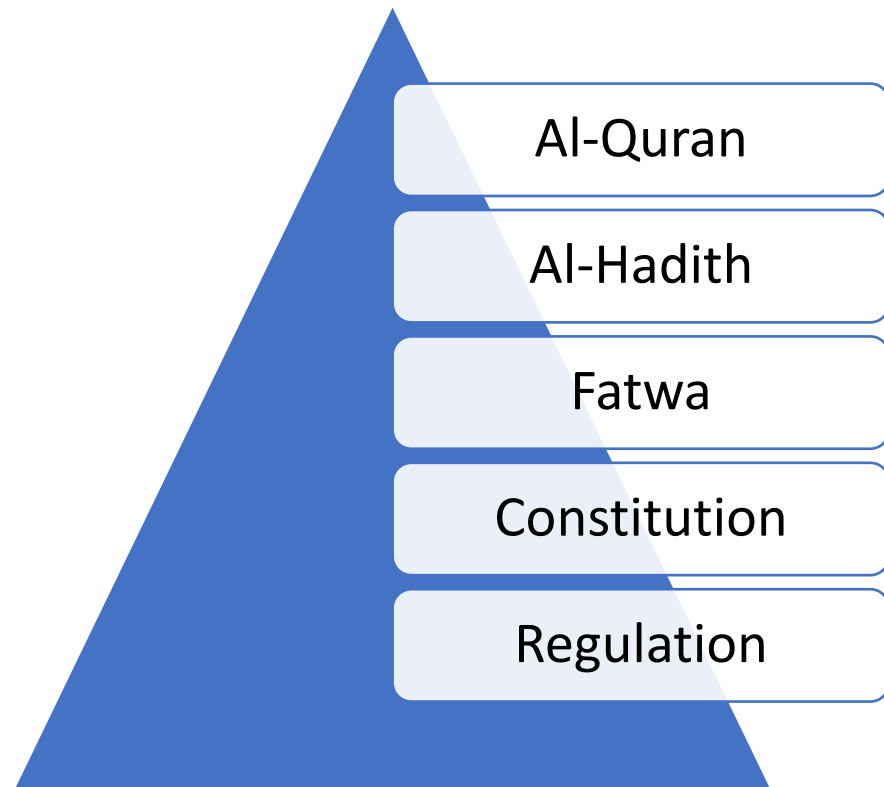


Table 1.

In the hierarchical table above, it can be seen that the Qur'an occupies the first position which acts as the basic norm in the regulation of securities crowdfunding. Then in the second place there is al hadith which acts as a complementary source of the Koran in its role as a valid argument for Islamic jurists to determine law and Sharia compliance and establish a Sharia transaction in accordance with detailed arguments or not.

In the next order is occupied by a fatwa in this case it ranks above the law because there are several laws and even laws which in their formation are

¹⁹ Satjipto Rahardjo, *Ilmu Hukum*, 6th ed. (Bandung: Citra Aditya Abadi, 2006), 280.

a transformation of a fatwa.²⁰ for example is Law No. 21 of 2008 concerning Islamic Banking in which there is a sentence on the application of Sharia principles based on a fatwa issued by an institution authorized to issue a fatwa in this case DSN-MUI.²¹ Then DSN has issued DSN Fatwa Number 140 of 2021 concerning Sharia Securities Offering Through Information Technology-Based Crowdfunding Services Based on Sharia Principles, which is the basis for Sharia fatwa on economic activities on Sharia securities crowdfunding.²²

Then the law in terms of referring to the form of the state of Indonesia which is a republican legal state and the law is one of the highest sources of law, it is necessary to positivize Sharia law to laws and regulations in terms of economic activities in Sharia securities crowdfunding Law no. 21 of 2008 which is the legal basis for Sharia economic activities in Indonesia, both in the banking and non-banking sectors.²³

Regulations become rules and at the same time occupy the lowest position because in regulations all derivative rules, both those mandated by law and what are contained in the DSN fatwa regarding the operational basis of securities crowdfunding are regulated and carried out and in this case the ojk has issued rules relating to securities crowdfunding activities Sharia, namely POJK Number 57/POJK.04/2020 concerning Securities Offerings Through Information Technology-Based Crowdfunding Services (Securities Crowdfunding).

D. Conclusion

Based on the discussion above, several conclusions can be drawn, namely;

First, the majority of scholars define mudhrabah based on their own understanding which, if the common thread is drawn, is that *mudharabah* is a

²⁰ Ma'ruf Amin, *Fatwa Dalam Sistem Hukum Islam*, 3rd ed. (Jakarta: eLSAS, 2011), 18.

²¹ Yeni Salma Barlinti, *Kedudukan Fatwa Dewan Syariah Nasional Dalam Sistem Hukum Nasional Di Indonesia* (Jakarta: Badan Litbang dan Diklad Kemenag RI, 2010).

²² Dewan Syariah Nasional, *Kumpulan Fatwa DSN-MUI*, n.d.

²³ Sofyan Al-Hakim, "Perkembangan regulasi perbankan syariah di Indonesia," *Ijtihad : Jurnal Wacana Hukum Islam dan Kemanusiaan* 13, no. 1 (June 1, 2013): 15, <https://doi.org/10.18326/ijtihad.v13i1.15-31>.

contract of cooperation between two parties in which one of the parties gives their assets to the other party to be traded. Scholars agree on the permissibility of the *mudharabah* mutlaqoh contract but differ in opinion regarding the *mudharabah* muqayyadah which the Shafi'iyah scholars and Maliki scholars consider invalid. Most scholars agree that the pillars of the *mudharabah* contract consist of 'aqidain, ma'qud and shighat contract.

Second, securities crowdfunding is a method of raising funds with a joint venture scheme carried out by business owners to start or develop their business and Sharia securities crowdfunding is a crowdfunding of securities based on Sharia principles.

Third, the implementation of the *mudharabah* contract on Sharia securities crowdfunding in Indonesia has been carried out by several platforms, one of which is Shafiq which issues sukuk based on the *mudharabah* contract whose implementation is in harmony with the opinions of scholars, and the DSN-MUI fatwa.

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