



**A CONCEPT OF ISLAMIC NOTARY AS REGISTRAR ON SHARIA
CONTRACT: *AL-MUWATHTHIQ* PERSPECTIVE**

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Abstract: Public notary officials are authorized to make authentic deeds. The notary's deeds are very significant for business activities, including sharia contracts in Sharia banking. The notary paradigm derived from conventional concepts is undoubtedly different from the concept of sharia banking based on sharia principles. Thus notaries often do not know these principles unless they only concern the contract's validity, which is still conventional. This research aimed to answer the void of sharia notary law. Islam has the concept of *al-Muwaththiq*, similar to a notary mainly requiring personality and expertise, especially related to Islamic law. On the other hand, Law Number 2 of 2014 concerning Notary Official Changes also becomes a notary basis in every operation, including contracts in Sharia banking. This research employed library study approaches to explore the notaries' competence in the concept of *al-Muwaththiq*. The results and discussions showed that notaries making authentic deeds in Sharia banking must have sharia competence as excavated from the concept of *al-Muwaththiq* since their incompetence will impact the Islamic law validity. Moreover, Notaries must also follow the applied positive rule of law because Sharia banking as a sub-system of national banking is also subject to state-regulated regulations.

Notaris memiliki otoritas independen untuk membuat dokumen otentik. Kerja-kerja notaris sangat penting dan diperlukan untuk aktivitas bisnis, terutama kontrak syariah pada perbankan syariah. Paradigma notaris yang lahir dari konsep konvensional tentu berbeda dengan konsep perbankan syariah yang berlandaskan pada prinsip syariah. Problem yang muncul ialah notaris seringkali tidak mengetahui prinsip-prinsip tersebut kecuali hanya menyangkut validitas kontrak yang sesungguhnya masih konvensional. Penelitian ini bertujuan untuk menjawab kekosongan hukum kenotariatan syariah. Di mana Islam sebenarnya memiliki konsep *al-Muwaththiq* yang berperan sebagaimana notaris, yang menempatkan kepribadian dan keahlian sebagai syarat utama yang harus dimiliki, khususnya terkait hukum Islam. Di sisi lain, Undang-Undang Nomor 2 Tahun 2014 tentang Jabatan Notaris (Perubahan) menjelaskan bahwa notaris bekerja untuk

semua kontrak, termasuk kontrak syariah. Metode dan pendekatan yang digunakan pada penelitian ini adalah pendekatan studi pustaka guna menggali kompetensi notaris dalam konsep *al-Muwaththiq*. Hasil dan pembahasan pada penelitian ini menunjukkan bahwa dalam konsep *al-Muwaththiq* seorang notaris mesti memiliki kompetensi kesyariahan karena ketiadaan kompetensi syariah dan hukum Islam akan berimplikasi pada validitasnya. Selain itu, seorang notaris juga harus menguasai hukum positif karena kontrak syariah saat ini sudah menjadi bagian dari regulasi nasional hampir di negara-negara dunia.

Keywords: *Al-Muwaththiq; Islamic Notary; Sharia Contract; Sharia Banking.*

INTRODUCTION

Notary, based on Law Number 2 of 2014 concerning Notary Official Changes Article 1 number 1, a public official is authorized to make authentic deeds,¹ i.e., a deed that holds the power of convincing proof and can provide legal certainty.² This act also has a substantial effect on sharia agreements to provide legal certainty on each transaction³. As in sharia banking, such as *murâbahah*, *mushârahah*, *mudârahah*, *ijârah*, sharia guarantees, and others.⁴ Today, the developing notary is a legal instrument based on the conventional paradigm,⁵ of which practice refers to the common law and civil law concept schools.⁶ Besides, the competence in the conventional paradigm is different from that in the paradigm of the Islamic law becoming the principle of sharia contract transactions. Although there have been recommendations related to sharia certification for notaries, those suggestions have not been followed by precise rules.⁷ Therefore, there are still notaries inaugurating (authentication) sharia contracts without understanding and mastering the sharia principles and the terms of sharia contract pillars, including non-Muslim notaries⁸ and notaries practicing on *ribawi* contracts as well as sharia contracts.

Several studies related to sharia notaries were conducted by several researchers and academicians, namely *first*, research entitled "*Urgensi Notaris*

¹ Edwar, Faisal A. Rani, and Dahlan Ali, "Kedudukan Notaris sebagai Pejabat Umum Ditinjau dari Konsep Equality Before The Law," *Jurnal Magister Hukum Udayana* 8, no. 2 (2019): 208.

² Ida Fitriyana, "Kepastian Hukum Akad Syariah yang Dibuat dalam Bentuk Akta Notaris (Ditinjau dari Undang-Undang Nomor 02 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris)," *Supremasi Hukum* 7, no. 1 (2018): 72.

³ Deni K. Yusup, "Peran Notaris dalam Praktik Perjanjian Bisnis di Perbankan Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah)," *Al-'Adalah* 12, no. 4 (2015): 703.

⁴ Windi Audya Harahap, Agus Nurdin, and Budi Santoso, "Kompetensi Notaris dalam Pembuatan Perjanjian Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah)," *Notarius* 13, no. 1 (2020): 174.

⁵ Harahap, Nurdin, and Santoso, 171.

⁶ Dudi Badruzaman, "Isu Kontemporer Notaris dalam Akad Murabahah di Lembaga Keuangan Syariah," *Jurnal Muslim Heritage* 4, no. 1 (2019): 144.

⁷ Alifia Annisaa and Aad Rusyad Nurdin, "Beberapa Aspek Hukum Berkaitan dengan Sertifikasi Syariah terhadap Notaris," *Indonesian Notary* 01, no. 003 (2019): 2-3.

⁸ Pandam Nurwulan, "Akad Perbankan Syariah dan Penerapannya dalam Akta Notaris Menurut Undang-Undang Jabatan Notaris," *Jurnal Hukum IUS QUIA IUSTUM* 3, no. 25 (2018): 626-27.

Syariah dalam Bisnis Syariah di Indonesia" (The Urgency of Shariah Notary in Indonesian Shariah Business),⁹ second, "Peran Notaris dalam Pemenuhan Prinsip Syariah pada Akad Pembiayaan Murabahah bil Wakalah di Bank Syariah" (The Role of Notary in Fulfilling Shariah Principles in Financing Agreement of Murabahah bil Wakalah in Shariah Bank),¹⁰ third, "Kompetensi Notaris dalam Pembuatan Perjanjian Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah)" (Notary's Competence in Making Shariah Agreement: A Review from Shariah Economic Law Perspective),¹¹ and fourth, "Pengawasan Dewan Pengawas Syariah pada Akta Pembiayaan Notaris dalam Rangka Kepatuhan Prinsip Syariah (Sharia Compliance) (Shariah Supervisory Board Supervision on the Notary Financing Deed in the Context of Shariah Compliance)".¹² These four studies showed the urgency of Sharia Notaries for the development of Sharia business in Indonesia, the significance of Public Notaries having Sharia competence when making deeds of commitment in Islamic banking, the role and authority of Notaries in making deeds of commitment in Islamic banking, and the validity of sharia contract deed in sharia banking made by Public Notaries ignoring sharia principles. The difference of this study from previous research mentioned before is this study used the point of view of the need to formulate sharia competences necessary for notaries making sharia contracts. Hence, in this study, researchers explored the concept of sharia notaries and the required competences derived from the thought literature of previous Muslim scholars.

Related to a notary in Islamic concept, Shamsuddîn Muḥammad al-Suyûṭî in the book *Jawâhir al-'Uqûd wa Mu'aiyyin al-Qudâh wa al-Muwaqî'in wa al-Shuhûd* uses the term *al-Muwaththiq* to describe a person recording official documents in an agreement. *Al-Muwaththiq* has to fear Allah, write according to the provisions of God's law, provide advice (legal counseling) to the party utilizing his services, and avoid using vague and ambiguous words. *Al-Muwaththiq* prefers to have the ability in science and religion, integrity, knowing legal issues, based on virtue, moving rationally, knowing divisions in inheritance science, and mathematical calculations including arithmetic, rank numbers, and square roots. *Al-Muwaththiq* must also be honest in his speech, be, avoid small or great sins, avoid a relationship with vile people (unless forced) because his profession is honorable and noble,

⁹ Laurensius Arliman S., "Urgensi Notaris Syariah dalam Bisnis Syariah di Indonesia," *Walisongo: Jurnal Penelitian Sosial Keagamaan* 24, no. 1 (2016).

¹⁰ Ayasha Salsabil Sosiawan, Gemala Dewi, and Aad Rusyad Nurdin, "Peran Notaris dalam Pemenuhan Prinsip Syariah pada Akad Pembiayaan Murabahah Bil Wakalah di Bank Syariah," *Indonesian Notary* 2, no. 3 (2020).

¹¹ Harahap, Nurdin, and Santoso, "Kompetensi Notaris dalam Pembuatan Perjanjian Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah)."

¹² Arista Nurul Shofanisa, "Pengawasan Dewan Pengawas Syariah pada Akta Pembiayaan Notaris dalam Rangka Kepatuhan Prinsip Syariah (Sharia Compliance)," *Yuridika* 32, no. 2 (2017).

take care of private matters, king's secrets, people's affairs, and protect people's life and property with words and deeds based on him.¹³

Regarding a public notary making authentic deeds on sharia contract, *al-Muwaththiq*, based on the concept of notoriety in Islam, is not only enough to have general knowledge but also must have competence in the knowledge of Islamic law, including principles, terms, and pillars of commitment. *Al-Muwaththiq* must have such competencies since he also serves as a legal counselor for his clients. Similarly, with the status of faith, notaries have to believe in Allah. It means that the notary recording the sharia contract must be Muslim¹⁴ because sharia contracts are products using the principles of Islamic law and also regulating the affairs of Muslims. In the case of notaries standing on "two legs," namely in sharia contracts while carrying out usury-laden (*ribawi*) contract practices, this is not following the provisions of *al-muwaththiq*, preventing small or large sins and realizing fairness.¹⁵ Affirmation related to the notary with competence in understanding and mastery of Sharia is essential, especially for Sharia banking.

Referring to the above problems, it is interesting to examine how the competence must be possessed by notaries making authentic deed/sharia contracts in Sharia banking. Similarly, the validity status of deeds in Sharia banking made by non-Muslim notaries and notaries who do not have sharia competence is worth investigating. To examine these issues, this study used the literature review method focusing on the study and analysis of primary materials from literature (books, reports of research results, reports of devotion results, manuscript records, and so on).¹⁶ With a phenomenological approach to notary practice in Sharia banking, the data were then processed based on literature sources from journal articles and books of *turrets* deductively to explain the reality being studied to produce the concept of sharia notary competence.

This study employed a qualitative research method designed to explore the concept of the notary as a registrar on the Islamic perspective on the text of *al-Muwaththiq* as a given topic, where a specific method was used to examine how it works to the notary in Indonesia in relation with the Islamic bank. This research was a library study to explore the competence of notaries in the concept of *al-Muwaththiq*. The data analyzed were those mainly written by al-Suyûti, *Jawâhir al-'Uqûd wa Mu'ayyin al-Qudâh wa al-Muwaqqi'în wa al-Shuhûd*, and supported by other documents, such as books, journals articles, and monographs. All data collected were coded into categories related to the topics of this study, namely

¹³ Shamsuddin Muḥammad al-Suyûti, *Jawâhir al-'Uqûd Wa Mu'ayyin al-Qudâh wa al-Muwaqqi'în wa al-Shuhûd*, 1st ed. (Beirut: Dâr al-Kutub al-'Ilmiyah, 1996), 11.

¹⁴ Al-Suyûti, 11.

¹⁵ Al-Suyûti, 11.

¹⁶ Ibrahim, *Metodologi Penelitian Kualitatif*, 1st ed. (Bandung: Alfabeta, 2015), 37.

al-Muwaththiq and its relation with the notary on a registrar of shariah contract on Islamic bank, and then analyzed to attain the research findings.

NOTARY IN INDONESIA

The mention of a Public Notary as a Public Official is a translation of *openbare amtbtenaren* as noted in Article 1 of the *Peraturan Jabatan Notaris (PjN)* and Article 1868 of the *Kitab Undang-undang Hukum Perdata (KUHPdt)*.¹⁷ Public Notary official means that a public Notary is appointed, authorized, and obliged by the State under the Law that gives official authority to the public notary with the principle to carry out the profession of legal services to the public to provide protection and legal guarantees.¹⁸ The implementation and obligation of the state in performing services to the community are realized in the creation of authentic evidence tools recognized by the state.¹⁹ However, the state must take care of the current living law in the social community on Islamic collectivities.

In general, there are two traditions adopted in carrying out the practice of notary. *First*, a Latin Notary of the concept of civil law is a state official and serves as an authentic deed maker who has the power of proof. *Second*, the anglo Saxon notary of the concept of common law with the function of deed maker private deeds and has no evidentiary power in the Court.²⁰ At the same time, the practice of notary in Indonesia is more inclined to Latin Notaries. Notaries in Indonesia are assembled in an organizational forum called the *Ikatan Notaris Indonesia (INI)* and overshadow the practice activities of notaries in Indonesia.²¹ Furthermore, to become a Public Notary, some requirements must be qualified. In Article 3, *UUJNP* mentions the conditions that a person can be appointed a Public Notary:

1. Indonesian citizen
2. Fear The One True God;
3. At least 27 years old;
4. Healthy physically and spiritually;
5. Graduated with a law degree and a graduate of the second degree of notoriety
6. Have undergone an internship or have manifestly worked as a Notary; employee for 12 consecutive months at the Notary office on its initiative or the recommendation of the Notary Organization after passing the second degree of a notary; and

¹⁷ M. Syahrul Borman, "Kedudukan Notaris Sebagai Pejabat Umum dalam Perspektif Undang-Undang Jabatan Notaris," *Jurnal Hukum dan Kenotariatan* 3, no. 1 (2019): 76.

¹⁸ Borman, 78.

¹⁹ Teresia Din, "Pertanggungjawaban Notaris terhadap Akta Otentik Terindikasi Tindak Pidana," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 172.

²⁰ Borman, "Kedudukan Notaris Sebagai Pejabat Umum dalam Perspektif Undang-Undang Jabatan Notaris," 81.

²¹ Borman, 81.

7. Not being a civil servant, state official, advocate, or not holding another position that by law is prohibited from being concurrent with the notary public.

The above requirements indicate that the notary public has a unique cauldron with qualified quality in science and leadership. Moreover, Notary performs the duties of esoteric positions, which must be studied and explicitly understood.²² In carrying out its duties, the public notary should pay attention to professional behavior that includes the following elements: 1. Have stable moral integrity; 2. Must be honest with the client (intellectual honesty); 3. Be aware of its limits and authority; and 4. Not solely based on monetary considerations.²³ Notary provisions in carrying out their duties are also stipulated in Article 6 of the *UUJN*, which states that notaries must act honestly, carefully, impartially, and safeguard the interests of the parties concerned in legal acts.²⁴ Notary's duty in making authentic deeds is limited only at the request of the interested parties, not at its initiative. However, public Notaries must also provide education and actively ensure legal protection to all interested parties.²⁵

In Article 1, number 1, *UUJNP* mentioned that Notary public officials are authorized to make authentic deeds and have other authority as intended in this law or under other laws. Based on the provision, there are three authorities owned by Notary Public. *First*, the authority to make authentic deeds is stipulated in Article 15 paragraph (1) *UUJNP*. *Second*, the authority stipulated in Article 15 paragraph (2) of *UUJNP* in the form of legalization, *waarmeking*, legalization, copy *collation*, providing legal counseling related to a deed, making a deed of auction minutes, and making deed related to land. *Third*, the authority that exists outside the *UUJNP*, as mentioned in Article 15 paragraph (3), that the Notary has authority other than those mentioned in paragraphs (1) and (2) governed by the laws and regulations.²⁶ However, the concept and regulation of notary law that is developing today have not strictly regulated the competence of sharia that must be owned by notaries who make authentic deeds on sharia contracts. Whereas in the Notary code of ethics, it has been mentioned that Notaries must also develop knowledge not only limited to the field of law (it is also possible in the field of Islamic law as well).

²² Roosalina Kartini and Rusdianto Sesung, "Kedudukan Notaris yang Memiliki Jabatan Struktural di Perguruan Tinggi," *Al'Adl* 10, no. 1 (2019): 43-44.

²³ Din, "Pertanggungjawaban Notaris terhadap Akta Otentik Terindikasi Tindak Pidana," 173.

²⁴ Benny Krestian Heriawanto, "Kewajiban Menyimpan Protokol Notaris dan Akibat Hukumnya Menurut Hukum Positif Indonesia," *Arena Hukum* 11, no. 1 (2018): 102.

²⁵ Deviana Yuanitasari, "The Role of Public Notary in Providing Legal Protection on Standard Contracts for Indonesian Consumers," *Sriwijaya Law Review* 1, no. 2 (2017): 188.

²⁶ Muhammad Farid Alwajdi, "Urgensi Pengaturan Cyber Notary dalam Mendukung Kemudahan Berusaha di Indonesia," *Jurnal RechtsVinding* 9, no. 2 (2020): 262.

CONCEPT OF *AL-MUWATHTHIQ*

The rules related to the recording of the contract are contained in *al-Baqarah* verse 282 by mentioning the word *al-Kâtib* as the registrar of the contract. *Kâtib* or *al-kâtibu* means scribe, writer, author,²⁷ also has a sense of security with *al-sikrâtîr* (secretary), *al-nasâkh* (copyist), and *al-muwaththiq* (notulis).²⁸ Based on some similarities from the word *al-kâtibu*, it seems that *al-Muwaththiq* has something to do with the concept referred to in *al-Baqarah* verse 282, namely as a registrar of contracts intended to have the power of proof. *Al-Muwaththiq* itself is an *isim fâ'il* from the word *waththaqa-yuwaththiqu*, which means *ahkâmahu* (making it following the law), *waththaqa al-aqdâ* means *sajjalahu bi al-tarîq al-rasmî* (making it an official document).²⁹

Al-Muwaththiq as the registrar of contracts has several explanations, namely as a registrar of marriage contracts,³⁰ registrar of the trade agreement,³¹ testament registrar,³² registrar in inheritance affairs,³³ testimony recorder³⁴, and registrars of official documents that have the power of proof.³⁵ The concept of *al-Muwaththiq* as the registrar of contracts or official documents is comprehensively explained in the book of *Jawâhir al-'Uqûd wa Mua'iyin al-Qudâh wa al-Muwaqqi'in wa al-Shuhûd* by Muḥammad bin Aḥmad bin 'Alî bin 'Abd al-Khâliq Shamsuddîn al-Suyûtî, an Egyptian-born Shâfi'iyah cleric in *Jumâdil Akhîr* year 813 H.³⁶ This book may become the first book that explains the concept of a notary from an Islamic perspective by using many classic references. It denotes that the author completed his work from the classic theory to show us the fundamental concept of Islamic terms.

Concerning the recording of contracts in the broader scope, as-Suyuthi mentions three parties that have a role. Namely *al-Mushahid* (witness), *al-Muwaththiq* (registrar), and *al-Muwaqqi'* (signatories).³⁷ More clearly, *al-Mushâhid* acted as a witness who witnessed the making of the contract, then *al-Muwaththiq* with his role as the author of the contract, as well as *al-Muwaqqi'* as a signatory who gave the legality of the contract. However, among the three parties, it is *al-Muwaththiq* who has the role of *al-Katib* as mentioned in *al-Baqarah* verse 282,

²⁷ Mahmud Yunus, *Kamus Arab Indonesia* (Jakarta: PT. Mahmud Yunus Wa Dzurriyyah, 2010), 367.

²⁸ Ahmad Warson Munawwir, *Kamus Al-Munawwir* (Surabaya: Pustaka Progresif, n.d.), 1187-88.

²⁹ Ibrâhîm Anis et al., *al-Mu'jam al-Wasîf* (TK: Majma' al-Lughah al-'Arabiyyah, 2004), 1011.

³⁰ Abû Zakariya al-Nawâwî, *al-Majmû' Sharḥ al-Muhadhdhab*, Juz 17 (TK: Dâr al-Fikr, n.d.), 88.

³¹ Shamsuddîn al-Maghribî, *Mawâhib al-Jalîl fî Sharḥ Mukhtasar Khalîl*, Juz 3, 3rd ed. (TK: Dâr al-Fikr, 1992), 499.

³² Al-Maghribî, 368.

³³ Mansûr ibn Yûnus al-Bâhûtî, *Kashf al-Qanâ' 'an Matn al-Iqnâ'*, Juz 6 (TK: Dâr al-Kutub, n.d.), 438.

³⁴ Al-Bâhûtî, 366.

³⁵ Ibn 'Âbidîn al-Dimasqî, *Râdd Al-Mukhtâr 'Alâ al-Durr al-Mukhtâr*, Juz 5 (Beirut: Dâr al-Fikr, 1992), 400.

³⁶ Al-Suyûtî, *Jawâhir al-'Uqûd wa Mu'ayyin al-Qudâh wa al-Muwaqqi'in wa al-Shuhûd*, 5.

³⁷ Al-Suyûtî, 7-13.

which notes or writings can also occupy positions as well as testimony as well as *fiqhiyyah* rules, *al-kitâb ka al-khitâb*, which means writing occupies a position as a speech in testimony, or written evidence is the same as evidence of testimony.³⁸

Al-Muwatththiq as the contract registrar, has to qualify the requirements in consulting Allah, writing under the provisions of God's law, giving advice (legal counseling) to those who use his services, avoiding the use of words that are unclear and ambiguous. *Al-Muwatththiq* prefers to have the ability in science and religion, integrity, knowing legal issues, based on virtue, acting rationally, knowing divisions in inheritance science, and mathematical calculations including arithmetic, rank numbers, and square roots. *Al-Muwatththiq* must also guard his speech against lies, be, avoid small or great sins, avoid association with vile people (unless forced) because his profession is honorable and noble, take care of private matters, king's secrets, the affairs of the people, and protect the souls and property of the people with words and deeds based on him.³⁹ As mentioned above, the provisions related to *al-Muwatththiq* boil down to two general competencies that must be possessed: competencies related to personality in the form of faith and morals. As well as competent expertise in the form of knowledge insights in law and other knowledge that supports its performance.

NOTARY POSITION AS REGISTRAR OF SHARIA CONTRACTS IN SHARIA BANKING

Notary as a profession can be traced in ancient Rome with *scribae*, *tabellius*, or *notaries*. The notary's main job is to record speeches that then develop to record and make deed that is not in the executive, legislative or judicial power.⁴⁰ Notary institutions applicable in Indonesia is a concept that develops in the civil law system. Its characteristics are appointed by the ruler and aim to serve the interests of the general public and obtain honorarium from the general public.⁴¹ Regulation related to the public notary is regulated in *UUJNP*, which in Article 1 number 1 mentions the definition of a public notary with the sentence: "*Public Notary official is authorized to make authentic deed and has other authority as referred to in this Law or other Law.*" This regulation becomes the main point of jurist reference when talking about notary and its problems in Indonesia.

Notary authority in making authentic deeds makes it a public official domiciled before the law by having the power of proof on the deed he made.⁴²

³⁸ Abû al-Hârith al-Ghâzî, *Al-Wajîz fî Idâhi Qawâ'id al-Fiqhiyyah al-Kulliyah*, 4th ed. (Lebanon: Muassasah al-Risâlah, 1996), 301.

³⁹ Al-Suyûtî, *Jawâhir al-'Uqûd wa Mu'ayyin al-Qudâh wa al-Muwqqi'în wa al-Shuhûd*, 11.

⁴⁰ Yulies Tiena Masriani, "Kedudukan Akta-Akta Notaris dalam Ekonomi Islam," *Serat Acitya* 4, no. 1 (2015): 32.

⁴¹ Arliman S., "Urgensi Notaris Syariah dalam Bisnis Syariah di Indonesia," 90-91.

⁴² Edwar, Rani, and Ali, "Kedudukan Notaris Sebagai Pejabat Umum Ditinjau dari Konsep Equality Before The Law," 208.

Notary as a legal officer in civil affairs has a critical position and role, namely representing the state carrying out the duties and functions of its position in making authentic deed as a vital evidence tool.⁴³ In the operation of banking transactions, a notary becomes an essential element with its authority in creating credit/financing needs, debt recognition letters, *Grosse* deed, legalization, and *watermarking*. In addition, notaries can also act as legal advice concerning the widespread use of civil law⁴⁴. Thus the notary can provide legal counseling or opinion to his client, which is then poured into the deed.⁴⁵

Theoretically, an authentic deed made by a public notary is a letter or deed that, from the beginning, is deliberately and officially made as a means of proof.⁴⁶ Article 1, number 7 of the *UUJNP* stated that “*Notarial deed from now on referred to as deed is an authentic deed made by or before a notary public according to the form and procedure stipulated in this Law.*” It shows that authentic deed has mechanisms stipulated in *UUJNP* and deed of authentic domicile when made by or before authorized officials.⁴⁷ The completion of the authentic deed is because of two things: first, it is ordered by law and is in the public interest. *Secondly*, it is necessary to be a means of proof of the events that have passed.⁴⁸ According to this law, the notary’s position is central to being the real keeper of every contracting need to this deed.

Legal instruments also influence the development of Sharia banking in the notary field because every agreement must be recorded before a public notary to have legal force.⁴⁹ Notary has a mutual relationship with Sharia banking as a sub-system of national banking is affirmed by-law No. 2 of 2008 on Sharia Banking, which also uses notary legal services in every business activity, such as fiduciary guarantees and dependent rights and others.⁵⁰ This shows that authentic deed has a significant effect on sharia business agreements. Notary has a strong position as an essential element in providing legal certainty to transactions in Sharia banking.⁵¹ As a conventional bank, Islamic banks also need a notary to make confidence

⁴³ Holly Muridi Zham-Zham and Thea Yori Mataheru, “Kewenangan Notaris dalam Penerapan dan Pengembangan Hukum Ekonomi Islam di Indonesia,” *Bonum Commune* 3, no. 2 (2020): 142-43.

⁴⁴ Sentiya Dwi Ningsih, “Peran Notaris dalam Pelaksanaan Pembuatan Akta Akad Pembiayaan di Bank Syariah Menurut Undang-Undang Nomor 2 Tahun 2014 tentang Jabatan Notaris,” *Jurnal Akta* 4, no. 1 (2017): 80.

⁴⁵ Harahap, Nurdin, and Santoso, “Kompetensi Notaris dalam Pembuatan Perjanjian Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah),” 177.

⁴⁶ Fitriyana, “Kepastian Hukum Akad Syariah yang Dibuat dalam Bentuk Akta Notaris (Ditinjau dari Undang-Undang Nomor 02 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris),” 72.

⁴⁷ Indah Parmitasari, “Autentikasi Akad Pembiayaan pada Perbankan Syariah dalam Penggunaan Lafadz Basmallah,” *Undang: Jurnal Hukum*, 2020, 92-93, <https://doi.org/10.22437/ujh.3.1.85-105>.

⁴⁸ Badruzaman, “Isu Kontemporer Notaris dalam Akad Murabahah di Lembaga Keuangan Syariah,” 143.

⁴⁹ Nurwulan, “Akad Perbankan Syariah dan Penerapannya dalam Akta Notaris Menurut Undang-Undang Jabatan Notaris,” 625.

⁵⁰ Badruzaman, “Isu Kontemporer Notaris dalam Akad Murabahah di Lembaga Keuangan Syariah,” 143.

⁵¹ Yusup, “Peran Notaris dalam Praktik Perjanjian Bisnis di Perbankan Syariah (Tinjauan dari Perspektif Hukum Ekonomi Syariah),” 703.

proof to minimize every problem that comes after the contract's deed not to be brought to the judge because of conflict.

Sharia banking in its operations must be based on law compliance and sharia compliance simultaneously⁵² which has implications on the competence that a notary must have as an authentic deed/ sharia contract maker in Sharia banking. Notary public who become partners of Sharia banking instead of only mastering the positive legal aspects generally must qualify the requirements in the form of sharia certification. Although it does not affect the validity and strength of notarial deed, sharia certification is required to ensure that notaries who become sharia banking partners have sharia competencies.⁵³ In other words, a notary who wants to make a deed of sharia contract must understand the sharia agreements principles.⁵⁴ The existence of notaries who have sharia competence will guarantee the validity of sharia business following the principles of Sharia economic law, especially notaries who are also responsible if there are errors and violations in the deed made.⁵⁵

RELEVANCE OF *AL-MUWATHTHIQ* TO THE ROLE OF NOTARY PUBLIC AS REGISTRAR OF SHARIA CONTRACTS IN SHARIA BANKING

Recording authentic deeds in Sharia banking is necessary to ensure legal certainty related to business activities carried out.⁵⁶ This situation indicates that the official recording of the contract should be done as a form of anticipation of a dispute in the future. Related to this, *al-Muwaththiq*, as a notary concept in Islam, has an essential role in recording official contracts to become an agreement with the power of proof. It functions as a registrar of marriage contracts, registrar of the trade agreement, testament registrar, registrar in inheritance affairs, testimony recorder, and registrars of official documents that have the power of proof. Especially in sharia contract, of course, notary like *al-Muwaththiq* is needed to be one other system that supports the development of Islamic values that grows in the world of Islamic economic progress in several eras.

Sharia banking as a banking system based on sharia principles certainly requires a notary with sharia competence, namely the competence of notaries who understand and master sharia principles. This is under the competence that must be possessed by *al-Muwaththiq* in the form of laughter to Allah, writing following

⁵² Shofanisa, "Pengawasan Dewan Pengawas Syariah pada Akta Pembiayaan Notaris dalam Rangka Kepatuhan Prinsip Syariah (Sharia Compliance)," 192.

⁵³ Sosiawan, Dewi, and Nurdin, "Peran Notaris dalam Pemenuhan Prinsip Syariah pada Akad Pembiayaan Murabahah Bil Wakalah di Bank Syariah," 845.

⁵⁴ Annisaa and Nurdin, "Beberapa Aspek Hukum Berkaitan dengan Sertifikasi Syariah terhadap Notaris," 2.

⁵⁵ Zham-Zham and Mataheru, "Kewenangan Notaris dalam Penerapan dan Pengembangan Hukum Ekonomi Islam di Indonesia," 149.

⁵⁶ Badruzaman, "Isu Kontemporer Notaris dalam Akad Murabahah di Lembaga Keuangan Syariah," 142.

the provisions of God's law, giving advice (legal counseling) to those who use his services, and avoiding the use of words that are unclear and ambiguous. He must also have skills in science and religion, integrity, know legal issues, be based on virtue, move rationally, know divisions in inheritance science, and mathematical calculations including arithmetic, rank numbers, and square roots. In addition, *al-Muwaththiq* must also guard his speech against lies, be, avoid small sin or big sin, avoid association with vile people (unless forced) because his profession is honorable and noble, take care of private matters, king's secrets, the affairs of the people, and protect the souls and property of people with words and deeds based on him.⁵⁷ Those became the basis of the character of the notary in Islam that must be used for all notaries in Indonesia, especially those who work in Islamic economic and business institutions.

The word of *al-Muwaththiq* has a more special meaning in the development of Islamic notary nomenclature. Compared to the word of *katib* mentioned in the Al-Qur'an,⁵⁸ the word of *al-Muwaththiq* shows more of a new civilization in the history of Islamic notary than the word of *al-Nassâkh* and *al-Sikrîâtîr*. Although all those words can indicate the historical development of Islamic notaries, the word of *al-Muwaththiq* is closer to the meaning and performance of today's notaries.⁵⁹ It is sorted, the early history is called by *al-Kâtib*, then to *al-Nassâkh*, and then to *al-Muwaththiq* and *al-Sikrîâtîr* with the same initial meaning and purpose. However, it has a different meaning today because its function and role are more emphasized than the words used. *Al-Kâtib* is meant for typists, and *al-Nassâkh* is meant for photocopying or rewriting of manuscripts. *Al-Sikrîâtîr* is intended for a secretary who does not work as a typist only but can even become a typist manager or a person (woman) who handles all the plans or agendas of his principal activities.

Al-Muwaththiq is a notary in today's context that its term has been used by classical fiqh in various sources. Meanwhile, the word notary is the only one who makes notes and notes, even though its work is called *al-Muwaththiq* as a maker of legal documents.⁶⁰ Therefore, the word *al-Muwaththiq* has more meaning and performance orientation shown by a notary, even though the naming minimizes its role. *Al-Muwaththiq* completely covers all notarial identities and their performance. It is a perfect description of Islamic notary history, both in terms of naming and function. Unlike a notary whose name is only a note maker, *al-Muwaththiq* covers his name and duties. There is no such thing in notarial history except in Islam. At this stage, Islam has offered a notary concept that is not kidding, and it provides

⁵⁷ Al-Suyûtî, *Jawâhir al-'Uqûd wa Mu'ayyin al-Qudâh wa al-Muwqqi'în wa al-Shuhûd*, 11.

⁵⁸ *Al-Baqarah* (2):282.

⁵⁹ Ibrâhîm Anis et al., *al-Mu'jam al-Wasît* (TK: Majma' al-Lughah al-'Arabiyyah, 2004), 1011.

⁶⁰ Borman, "Kedudukan Notaris Sebagai Pejabat Umum dalam Perspektif Undang-Undang Jabatan Notaris," 81.

concepts, names, and all its principles to be referred to in various contracts in the name of sharia.

The word of *al-Muwaththiq* has the same roots as *al-Wathîqah*, which means legal document. Therefore, *al-Muwaththiq* is a person who makes documents for legal purposes as a piece of authentic evidence needed by others or jurists. In the practice of agreements, engagements, and contracts, documents are necessary to maintain future certainty regarding what was agreed in any transaction. When the legal document is needed, it can be the evidence in court because of some dispute between one party and another that arises after carrying out the transaction. So that, legal documents are so principle and necessary. al-Qur'an provides the principle of legal documents by ordering al-Kitabah every depth contract and giving collateral when there are no written documents. This principle developed with the term *al-Wathîqah* with an emphasis on *al-Muwaththiq* as the stricter of legal aspects. The purpose of this discussion is that the era of contract law is more meaningful than in the era of agreement and engagement law.

In the era of *al-Muwaththiq*, the contract has increased to the contract law involving the state through the existence of a notary as *al-Muwaththiq*. Therefore, all transactions at the level of a notary presence contract become mandatory to guarantee the legal aspects of the contract and legal documents. Almost all transactions in banks, including Islamic banks with a certain level of financing, must use a notary to execute them. Of course, the notary principle in sharia should look at the *al-Muwaththiq* principle. Any contract in Islamic banks is required to use the services of a notary. This is because the bank only acts as an intermediary. All bank funds are customer deposits. Therefore, the use of funds by banks requires extra caution by using the services of a notary so that documents can be used as a piece of evidence before the law if needed. The comfort of Islamic banks should be if all of their performance refers to sharia principles and systems. Today, especially in the notary field, it seems inappropriate if the notary used does not understand the principles of sharia contracts and their long consequences for the benefit of the hereafter.

Al-Muwaththiq as a contract registrar, can act as legal advice and become one of the parties that guarantee the application of sharia compliance in sharia contract practices in Islamic banks. This is in line with the competence possessed by *al-Muwaththiq* related to understanding and mastery of Islamic principles and law. In addition, the mistakes made by notaries in legalizing sharia contracts – due to understanding and mastery of Islamic principles and laws lacking – can result in the breakdown of the contract and lead to the prohibition of a transaction because it does not meet the provisions of sharia. Moreover, there are still Sharia

contracts in Islamic banks that – although legalized by Notaries – are still not fully following sharia principles. Such as sharia contracts made by notaries declared invalid and null and void by the National Sharia Arbitration Board, as outlined in decree No. 01/P/Basy.PJT/VII/2010.⁶¹

The relevance of *al-Muwaththiq* as a registrar of Islamic contracts in Islamic Banks is also based on his expertise and knowledge that supports his duties as a contract registrar – such as expertise in writing, reasoning (understanding logic) as well as knowledge in the field of mathematics. This is because writing a contract is not only copying but also related to the anatomical structure of the contract, clauses of the contents of the contract, the use of excellent and correct legal language, and transactions related to mathematical calculations. Likewise, *al-Muwaththiq*'s competence with personalities, such as piety, faith, morality, and integrity. This is in line with the professional ethics held by a registrar of Sharia contracts in Sharia Bank. Because of his influential position and trust by clients, he must be independent, honest, and maintain self-respect.

As explained, the character of the notary in the law and the concept of *al-Muwaththiq* are equally strong and become principles that must be adhered to by those who work as notaries, mainly when the notary profession is being applied in Islamic financial institutions. It is a shame if the word “sharia” is not stuck as a value that must be referred to by notaries. Moreover, their character's position has been regulated by law and the concept of *al-Muwaththiq*.⁶² Sometimes, the character of a notary in conventional and sharia tends to run without any difference. For example, the bank activity transaction is always done without dealing with a notary, even in both institutions, conventional or sharia. What usually applies in conventional, then so does is sharia also. Sharia has its formulation that complies with sharia compliance. The pattern of notary working is equated with conventional ones certainly cannot be justified. Therefore, to confirm how a sharia notary is, the study of *al-Muwaththiq* clearly must be encouraged even though it is pretty behind in terms of the development of sharia economic institutions itself.

There is a view that using a public notary in Islamic banks or other institutions needs to be evaluated. This is due to the inaccuracy of a public notary to handle sharia contracts that require particular expertise in the field of sharia which is not as simple as imagined. Therefore, the offer of the concept of *al-Muwaththiq* has become a necessity to encourage evaluation of the Islamic achievements of the contracts made by a public notary. Of course, the method is not abolishing existing laws but simply strengthening them by adding unique points and requirements for recruitment – for example, prospective notaries who have the capacity and

⁶¹ Ro'fah Setyowati, “Notaris dalam Sengketa Perbankan Syariah,” in *Masalah-Masalah Hukum*, 2016, 132.

⁶² Al-Suyûti, *Jawâhir al-'Uqûd wa Mu'ayyin al-Qudâh wa al-Muwâqqi'in wa al-Shuhûd*, 11.

capability related to sharia issues and principles. Of course, candidates for sharia notaries must master the positive legal aspects and the most deepening aspects of sharia law. So it appears that the figure of a notary who is pious in the field of Ulama and pious in the field of scholars is illustrated in the study of the personality of *al-Muwaththiq* itself.

In fact, from the conventional banks, we learn how to manage a sound contract system and maintain trust in the future, especially on administrative issues. Perfection will be found if Islamic banking learns by imitating the conventional ones and living up to the concept of *al-Muwaththiq*.⁶³ However, things are still not right in conventional terms applied in Islamic banks, for example, a contract without a notary and being assured that a notary will process everything. Reading this way, of course, needs improvement for all activities of the bank. Islamic banks should not only leave the issue of usury in interest, but also leave the contract method without the presence of this notary, also need to strengthen the realization of administration and legal drafting on paperwork, for example, in the content and language of letters, placing signatures, initials, and fiat, affixing stamps that sometimes do not follow the way. The concept of *al-Muwaththiq* and its various derivatives has given this signal that can be applied at this time.⁶⁴

Based on the requirements related to competencies that must be owned by *al-Muwaththiq* as the registrar of contracts, it can have implications for *al-Muwaththiq* to work well and professionally. Concerning the recording of sharia contracts in Sharia banking, with the competence of *al-Muwaththiq*, he can also act as legal advice (extension or legal advisor)⁶⁵ who gives legal opinions, which are then poured into the deed. Thus, *al-Muwaththiq* as a notary as a law enforcement officer in the notary field,⁶⁶ can ensure sharia compliance in business activities in Sharia banking. Of course, in the future, according to the legal system in Indonesia, the principles of sharia compliance in Islamic banks are not only present in internal banking institutions, but also external bank system that supports the existence of Islamic banks must meet the principle of sharia compliance, for example, this notary system.

CONCLUSION

Al-Muwaththiq as a notary concept in Islam meets the competency criteria that must be possessed by the registrar of sharia contracts in Sharia banking. This is because the registrar of sharia contracts in Sharia banking and understanding

⁶³ Ibrâhîm Anîs et al., *al-Mu'jam al-Wasîf* (TK: Majma' al-Lughah al-'Arabiyyah, 2004), 1011.

⁶⁴ Al-Suyûfî, 7-13.

⁶⁵ Arliman S., "Urgensi Notaris Syariah dalam Bisnis Syariah di Indonesia," 83.

⁶⁶ Zham-Zham and Mataheru, "Kewenangan Notaris Dalam Penerapan Dan Pengembangan Hukum Ekonomi Islam Di Indonesia," 143.

favorable laws must also master Islamic law principles. Because the role is not just to record the contract to be an official or authentic contract, but more than that, namely as legal advice and law enforcement in the notary field that ensures sharia compliance in every business activity in Sharia banking.

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