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Harmonization of Sharia Principles and Modern Guarantee Laws in Strengthening the National Islamic Banking Industry

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Abstract: The global expansion of the Islamic financial sector has positioned Indonesia as one of the important centers of Islamic banking. However, the development of this industry continues to face profound legal and epistemological tensions between the principles of fiqh muamalah and the positive legal framework inherited from the Dutch colonial system governing security interests and their enforcement. The main problem lies in the lack of harmonization between Sharia principles and the modern law of security interests, which affects legal certainty and creates the risk of Sharia non-compliance (Sharia Non-Compliance Risk). This study focuses on a doctrinal, conceptual, and comparative analysis of these incompatibilities, particularly the reliance on fiduciary security and mortgage rights, and aims to formulate a model for harmonizing Islamic security law in Indonesia. The research employs doctrinal, conceptual, and comparative legal approaches through an examination of legislation, DSN-MUI fatwas, Islamic legal scholarship, and literature on security law, as well as legal practices in Malaysia and the United Arab Emirates. The findings reveal normative gaps and fragmentation resulting from the reliance on conventional security instruments and Indonesia's decentralized regulatory paradigm operating through dual legal tracks. This condition also gives rise to what may be termed "regulatory theology," namely, the use of religious norms as references without adequate methodological transformation into clear, consistent, and enforceable legal standards. As a theoretical and practical contribution, this study proposes the Maqashid-Integrated Sharia Guarantee Framework, which integrates maqashid al-shariah into the formulation and implementation of Islamic security law through the establishment of a lex specialis, the strengthening of DSN-MUI fatwas as binding positive law, the alignment of enforcement mechanisms with Sharia objectives, and the balancing of procedural efficiency with substantive justice. This framework may serve as a strategic blueprint for strengthening legal certainty, mitigating Sharia non-compliance and systemic risks, and supporting the sustainable development of Indonesia's Islamic financial industry.

Keywords: Islamic Banking, Fiqh Muamalah, Maqashid al-Shariah, Legal Certainty

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Abstrak: *Ekspansi sektor keuangan syariah global menempatkan Indonesia sebagai salah satu pusat penting perbankan syariah. Namun, perkembangan industri ini masih menghadapi ketegangan hukum dan epistemologis antara prinsip fikih muamalah dan hukum positif warisan Belanda yang mengatur jaminan serta eksekusi. Permasalahan utama terletak pada ketidakharmonisan prinsip syariah dengan hukum jaminan modern yang berdampak pada kepastian hukum dan risiko ketidakpatuhan syariah (Sharia Non-Compliance Risk). Penelitian ini berfokus pada analisis doktrinal, konseptual, dan komparatif mengenai ketidakharmonisan tersebut, khususnya terkait ketergantungan pada jaminan fidusia dan hak tanggungan, serta bertujuan merumuskan model harmonisasi hukum jaminan syariah di Indonesia. Metode penelitian menggunakan pendekatan yuridis-doktrinal, konseptual, dan perbandingan hukum melalui kajian peraturan perundang-undangan, fatwa DSN-MUI, literatur hukum Islam dan hukum jaminan, serta praktik Malaysia dan Uni Emirat Arab. Hasil kajian menunjukkan adanya kekosongan dan fragmentasi normatif akibat ketergantungan pada instrumen jaminan konvensional dan paradigma regulasi Indonesia yang terdesentralisasi serta berjalan dalam dua jalur. Kondisi tersebut juga memunculkan "teologi regulasi", yakni penggunaan norma keagamaan sebagai rujukan tanpa transformasi metodologis yang memadai menjadi standar hukum yang jelas, konsisten, dan dapat ditegakkan. Sebagai kontribusi teoretis dan praktis, penelitian ini mengusulkan Maqashid-Integrated Sharia Guarantee Framework, yang mengintegrasikan maqashid al-shariah dalam pembentukan dan pelaksanaan hukum jaminan syariah melalui pembentukan lex specialis, penguatan fatwa DSN-MUI sebagai hukum positif yang mengikat, penyelarasan mekanisme eksekusi dengan tujuan syariah, serta keseimbangan antara efisiensi prosedural dan keadilan substantif. Kerangka ini dapat menjadi cetak biru strategis untuk memperkuat kepastian hukum, mengurangi risiko ketidakpatuhan syariah dan risiko sistemik, serta mendukung keberlanjutan industri keuangan syariah Indonesia.*
Kata Kunci: *Perbankan Syariah; Fiqh Muamalah; Maqashid al-Syariah; Kepastian Hukum*

Introduction

The emergence and subsequent development of Islamic banking in Indonesia are driven by a socio-economic mandate to align financial intermediation with the ethico-religious requirements of the world's largest Muslim population.[1] Since its formal inception, the Sharia-compliant sector has expanded systematically, offering a structural alternative to conventional banking by strictly adhering to the prohibitions of *riba* (usury), *gharar* (uncertainty), and

[1]Ezzedine Ghlamallah et al., "The Topics of Islamic Economics and Finance Research," *International Review of Economics and Finance* 75 (2021), p. 145–60.

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maysir (speculation).[2] Constitutionally, the legitimacy of these practices is anchored in Article 29 of the 1945 Constitution, which guarantees religious freedom and serves as the legal bedrock for Sharia-based economic frameworks. The evolution of this sector culminated in the enactment of Law No. 21 of 2008; by providing a comprehensive statutory basis, this legislation formalized the industry's operational legitimacy and solidified its integration into the national macroeconomic architecture.[3]

Despite these legislative advancements, the Indonesian Islamic banking sector operates within a fundamentally bifurcated legal environment.[4] While core financing instruments such as *Murabahah* (cost-plus), *Mudharabah* (profit-sharing), and *Ijarah Muntahiyah Bittamlik* (lease-to-purchase) are rigorously structured to comply with Sharia jurisprudence, the ancillary mechanisms for risk mitigation and collateralization remain tethered to conventional secular statutes.[5] This stems from a national juridical architecture that synthesizes *Adat* (customary), Islamic, and Western civil law, the latter primarily inherited from the Dutch colonial *Burgerlijk Wetboek*.[6] Consequently, this structural hybridity generates significant doctrinal friction when Sharia-compliant institutions attempt to secure credit through conventional security instruments, such as Fiduciary Guarantees (Law No. 42 of 1999) and Mortgage Rights (Law No. 4 of 1996).

Central to this juridical impasse is an ontological crisis of substantive legal certainty that extends beyond mere regulatory compliance.[7] Current institutional practices necessitate the use of legal artifices, wherein Sharia-compliant financing is reconfigured to fit within conventional security paradigms.[8] This synthesis inadvertently compromises the ethical integrity of the transaction, particularly during collateral enforcement following a credit default. Furthermore, the absence of a dedicated Sharia Guarantee Law (*Undang-Undang Jaminan Syariah*) compels the Religious Courts (*Pengadilan Agama*) to

[2]Sri Rahayu Hijrah Hati, et al., "Sharia vs Non-Sharia Compliant: Which Gives Much Higher Financial-Based Brand Equity to the Companies Listed in the Indonesian Stock Market?," *Journal of Islamic Marketing* 14, no. 9 (2023), p. 2167–2187.

[3]Mohammad Ghozali et al., "The Law Concept of Sharia Banking Compliance on Murabaha Financing in Indonesia," *Samarah* 8, no. 3 (2024).

[4]Beng Soon Chong and Ming Hua Liu, "Islamic Banking: Interest-Free or Interest-Based?," *Pacific Basin Finance Journal* 17, no. 1 (2009), p. 125–144.

[5]Irwan Trinugroho et al., "Is Spin-off Policy an Effective Way to Improve Performance of Islamic Banks? Evidence from Indonesia," *Research in International Business and Finance* 56 (2021).

[6]Syed Aun R. Rizvi et al., "Role of Islamic Banks in Indonesian Banking Industry: An Empirical Exploration," *Pacific Basin Finance Journal* 62 (2020), p. 101–17.

[7]Fahmi Ali Hudaefi and Abdul Malik Badeges, "Maqāṣid Al-Sharī'ah on Islamic Banking Performance in Indonesia: A Knowledge Discovery via Text Mining," *Journal of Islamic Marketing* 13, no. 10 (2022), p. 2069–2089.

[8]Prasojo Prasojo et al., "Conformity of Indonesian Islamic Bank CSR Practices with Maqashid Shariah Rules," *Journal of Islamic Marketing* 16, no. 9 (2025), p. 2596–2616.

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adjudicate claims via conventional procedural statutes, despite their exclusive jurisdiction over Sharia economic disputes under Law No. 3 of 2006. Consequently, these judicial processes often lack the Sharia-specific nuances required to uphold the foundational principles of Islamic equity.

This structural incongruity transcends mere academic discourse, functioning as a formidable impediment to national macroeconomic stability.[9] The absence of specialized Sharia-compliant collateral enforcement mechanisms necessitates the inclusion of a "juridical risk premium" within the pricing of Islamic financial instruments; this premium erodes market competitiveness and inflates costs for the public.[10] To actualize its strategic objective of becoming a preeminent global nexus for the Halal economy, Indonesia must develop a legal framework that ensures institutional predictability commensurate with conventional markets while meticulously preserving its Sharia-compliant ontological integrity.

The institutional misalignment between the Financial Services Authority (OJK), Bank Indonesia (BI), and the National Sharia Board (DSN-MUI) signifies a critical gap in contemporary legal scholarship.[11] While existing literature often bifurcates the theological dimensions of Islamic finance from the secular mechanisms of Indonesian civil law, there remains a scarcity of transdisciplinary inquiries capable of reconciling these disparate domains. [12] Current regulatory frameworks emphasize a technocratic paradigm prioritizing administrative compliance and macro-financial stability at the expense of the substantive teleological objectives of *Maqashid al-Shariah*. Central to this discourse is the principle of *Hifz al-Mal* (protection of property), which necessitates a legal system that integrates ethically grounded contracting with robust, non-usurious mechanisms for asset recovery.[13] Consequently, a framework that employs conventional secular instruments for creditor protection while maintaining Sharia-compliant inception engenders a profound ethical-juridical dissonance, ultimately undermining the distributive justice central to Islamic jurisprudence.

The imperative for this synthesis is underscored by the rapid maturation of Islamic financial hubs within Malaysia and the Gulf Cooperation Council

[9]Idah Zuhroh, et al., "Cost Efficiency of Islamic Banks in Indonesia – A Stochastic Frontier Analysis," *Procedia - Social and Behavioral Sciences* 211 (2015), p. 1122–1131.

[10]Agus Widarjono et al., "Islamic Bank Margins in Indonesia: The Role of Market Power and Bank-Specific Variables," *Cogent Business and Management* 10, no. 2 (2023).

[11]Ridwan Ridwan and Arung Gihna Mayapada, "Does Sharia Governance Influence Corporate Social Responsibility Disclosure in Indonesia Islamic Banks?," *Journal of Sustainable Finance and Investment*, (2022), p. 299–318.

[12]Idah Zuhroh, "Mapping Islamic Bank Governance Studies: A Systematic Literature Review," *Cogent Business and Management*, 2022.

[13]Ahmad Ali Jan, et al., "Developing an Islamic Corporate Governance Framework to Examine Sustainability Performance in Islamic Banks and Financial Institutions," *Journal of Cleaner Production* 315 (2021).

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(GCC) jurisdictions.[14] In these regions, the formal codification of specialized Sharia-compliant securities and the institutionalization of dedicated judicial protocols have effectively reconciled the dichotomy between normative religious principles and civil enforcement mechanisms.[15] Conversely, the Indonesian sector suffers from a persistent "regulatory inertia," wherein the normative sanctity of Sharia instruments often dissipates during the stage of judicial execution.[16] Consequently, Indonesia remains institutionally subordinate to its regional counterparts, particularly regarding the sophistication and maturity of its juridical infrastructure.

To address this substantive gap, this study investigates two primary research inquiries. First, it examines how a normative harmonization model—synthesizing Sharia principles (*fiqh muamalah* and *maqashid al-shariah*) with contemporary guarantee law can be structured to establish a coherent and compatible juridical framework within the national legal system. Second, it analyzes the functional implications of the current legal disharmony, specifically assessing its impact on legal certainty, operational efficacy, and the institutional robustness of the national Islamic banking industry.

This study investigates the systemic misalignment between Sharia principles and contemporary collateralization regimes, assessing its impact on juridical certainty and the operational efficacy of the Indonesian Islamic banking sector. Drawing upon a comparative analysis of regulatory frameworks in Malaysia and the GCC, the research develops a novel conceptual paradigm: the Maqashid-Integrated Sharia Guarantee Framework. By synthesizing statutory law with Islamic jurisprudence, this framework ensures that Sharia-compliant financial operations achieve substantive equity, heightened predictability, and robust legal security. The primary scholarly contribution lies in this transdisciplinary integration, which offers a pragmatic, policy-oriented blueprint specifically calibrated to enhance the institutional resilience of the Indonesian Islamic financial industry.

The Anatomy Of Disharmony: Sharia Principles Versus Modern Guarantee Practices

The fundamental tension between contemporary positivist guarantee statutes and Sharia financial tenets stems from a profound epistemological

[14]Adnan Trakic, "Shari'ah Compliance in Islamic Finance Contracts: The Malaysian Constitutional Dilemma," *Oxford University Commonwealth Law Journal* 20, no. 2 (2020), p. 289–309.

[15]Mohamed Ghezal, et al., "Legal and Regulatory Requirements to Implement Sukuk in Algeria: Learning from Malaysian Experience," *Journal of Islamic Finance* 10 (2021).

[16]Harjum Muharam, et al., "Islamic Stock Market and Sukuk Market Development, Economic Growth, and Trade Openness (The Case of Indonesia and Malaysia)," *Business: Theory and Practice* 20 (2019).

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divergence.[17] Within the conventional civil law tradition—embodied in Articles 1131 and 1132 of the Indonesian Civil Code (*Burgerlijk Wetboek*)—a debtor's entire asset portfolio constitutes a universal pledge for all liabilities. This framework facilitates a legal relationship predicated upon the temporal valuation of capital, interest-bearing mechanisms, and the absolute prioritization of creditor interests.[18] Consequently, under this positivist paradigm, collateral functions strictly as an instrument for loss mitigation, often operating independently of the debtor's socio-economic exigencies and the ethical imperatives inherent in Islamic jurisprudence.

Conversely, Islamic jurisprudence (*Fiqh al-Muamalat*) conceptualizes collateral specifically *Rahn* (material security) and *Kafalah* (personal or corporate guarantees) as an accessory agreement (*accessoire*) rather than a primary vehicle for wealth extraction.[19] These mechanisms are designed to mitigate moral hazard and reinforce contractual trust (*amanah*) within risk-sharing or trade-based frameworks. While the Indonesian Islamic Banking Law characterizes collateral as an "additional guarantee," implying its non-obligatory status in equity-based contracts such as *Mudharabah* and *Musharakah*, contemporary institutional practices diverge from this statutory ideal. Macroprudential regulatory imperatives frequently compel Sharia financial institutions to mandate material collateral across nearly all facilities. This institutional isomorphism effectively mirrors conventional credit behaviors, thereby diluting the authentic risk-sharing essence of Islamic finance.[20]

A primary locus of juridical antinomy lies in the regulation of movable assets under the Fiduciary Guarantee Law (Law No. 42 of 1999).[21] This framework is predicated on the principle of *constitutum possessorium* (constructive delivery), wherein legal ownership is transferred to the creditor *in fiducia* while the debtor retains physical possession.[22] In practice, however, fiduciary arrangements often gravitate toward elements of *lex commissoria* (*pactum commissorium*)—the automatic appropriation of collateral by the

[17]Wardiah Hamid et al., "The Transformation of Gala and Mawah: Towards the Sharia Gala Bank Microfinance Model in Aceh," *Samarah* 9, no. 3 (2025).

[18]Markus K. Brunnermeier and Lasse Heje Pedersen, "Market Liquidity and Funding Liquidity," *Review of Financial Studies* 22, no. 6 (2009).

[19]Jocelyn Grira and Chiraz Labidi, "Banks, Funds, and Risks in Islamic Finance: Literature & Future Research Avenues," *Finance Research Letters* 41 (2021).

[20]Jocelyn Grira and Chiraz Labidi, "Banks, Funds, and Risks in Islamic Finance: Literature & Future Research Avenues,".

[21]T. Muhammad Ali Bahar et al., "Contractual Obligations in Financing with Fiduciary Security in Indonesia in the Context of Justice," *Lex Scientia Law Review* 7, no. 1 (2023), p. 215–248.

[22]Iza Rumesten RS et al., "Protection of Human Rights Against the Environment in the Indonesian Legal System," *Journal of Law and Sustainable Development* 11, no. 10 (2023).

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creditor upon default.[23] Despite being formally prohibited under both civil and Sharia legal systems, the prevalence of summary repossession maneuvers creates a significant ethical-juridical vacuum that fundamentally undermines the distributive justice central to Sharia economic philosophy.[24]

Islamic jurisprudence strictly proscribes the automatic alienation of ownership rights from a debtor to a creditor based solely on the existence of a pledge.[25] To reconcile this doctrinal imperative with contemporary financial requirements, the National Sharia Board (DSN-MUI) promulgated Fatwa No. 68/DSN-MUI/III/2008 concerning *Rahn Tasjily*. This mechanism permits the debtor (*rahin*) to retain physical possession and the productive utility of the asset, while the creditor (*murtahin*) holds only the legal title or possessory documentation. [26] Although *Rahn Tasjily* mirrors the conventional fiduciary guarantee in its reliance o constructive possession, the two frameworks remain fundamentally divergent in their underlying legal philosophies and procedural execution protocols.[27]

The structural and ethical divergence between conventional fiduciary guarantees (Law No. 42/1999) and *Rahn Tasjily* (Fatwa No. 68/2008) manifests through distinct ontological and procedural dimensions.[28] While the conventional model is predicated on debt-based obligations facilitated by *constitutum possessorium* (constructive delivery), *Rahn Tasjily* is anchored in the principle of *Amanah* (trust), ensuring that legal ownership remains vested in the debtor. Furthermore, the allocation of maintenance costs in *Rahn Tasjily* utilizes a transparent *Ijarah* fee for document safekeeping, contrasting with the often opaque cost assignments found in conventional contracts. Execution protocols also diverge significantly: where conventional repossession is contingent upon judicial intervention, Sharia-compliant execution prioritizes *As-Shulh* (amicable settlement) and distributive transparency to preserve the ethical integrity of the transaction.[29]

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[23]Iza Rumesten RS et al., "Protection of Human Rights Against the Environment in the Indonesian Legal System,".

[24]Rinitami Njatrijani et al., "Business Development of Copyright and Fiduciary Guarantee in Indonesia," *International Journal of Economics and Business Administration* 8, no. 1 (2020).

[25]Rinitami Njatrijani et al., "Business Development of Copyright and Fiduciary Guarantee in Indonesia,"

[26]Riska Nabila et al., "Wadiah Agreement From the Perspective of Fiqih Muamalah," *Proceeding International Seminar on Islamic Studies* 6, no. 1 (2025).

[27]N.H.D. Foster, "The Islamic Law of Guarantees," *Arab Law Quarterly* 16, no. 2 (2002).

[28]Nurjihad, "Legal Conformity Between Rahn Tasjily And Fiduciary Guarantee And Obstacles To Implement Ation In Indonesia," *Prophetic Law Review* 5, no. 2 (2023), p. 224 – 247.

[29]Muhammad Ali Bahar, "Study On Engagement Of Financing With Fiduciary Guarantee," *Journal of Legal, Ethical and Regulatory Issues* 25, no. 5 (2022).

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Although the *Rahn Tasjily* fatwa offers normative clarity, the Indonesian legal framework lacks a dedicated *lex specialis* statute to govern Sharia-compliant guarantees. This legislative vacuum compels Sharia financial institutions to register *Rahn Tasjily* instruments through the National Fiduciary Registration Office, a process that imposes a state of "jurisprudential subjection" by subordinating Sharia contracts to conventional execution laws.[30] Such legal hybridization inadvertently introduces elements of *riba* (usury), *gharar* (uncertainty), and *zalim* (injustice), as the secular civil framework is structurally ill-equipped to accommodate the principle of *ta'awun* (mutual assistance) fundamental to Islamic finance. Ultimately, the absence of autonomous executory power within the *Rahn Tasjily* framework necessitates a reliance on secular instruments, thereby undermining the very legal certainty essential for the industry's stability.[31]

For immovable assets, Sharia financial institutions rely on the Mortgage Law (Law No. 4 of 1996 or *Hak Tanggungan*), which offers robust juridical certainty and grants creditors *droit de préférence*.[32] However, applying this framework to trade-based Sharia instruments, such as *Murabahah* (cost-plus financing) or *Ijarah Muntahiyah Bittamlik* (lease-to-purchase), engenders a profound ontological dissonance. While conventional mortgages are structurally designed to secure interest-bearing debt obligations, *Murabahah* functions as a sales-based transaction characterized by a deferred profit margin. Consequently, this conceptual misalignment creates a legal paradox wherein a sales-based contract is artificially secured by a debt-based instrument, potentially compromising the contractual integrity of the Sharia transaction.[33]

A critical systemic vulnerability emerges when land collateral is not institutionalized under a formal mortgage title (*tanah non-hak tanggungan*). In instances of default, Sharia financial institutions must seek recourse through the Religious Courts, which operate under Supreme Court Regulation (PERMA) No. 14 of 2016 concerning simplified claims.[34] Although the judiciary endeavors to uphold the mandates of expeditious and cost-effective litigation, the absence of the *fiat executio* (executory power) typically afforded by mortgage registration

[30]Muhammad Ali Bahar, "Study On Engagement Of Financing With Fiduciary Guarantee,".

[31]Muhammad Ali Bahar, "Study On Engagement Of Financing With Fiduciary Guarantee,".

[32]Mohammad Dulal Miah and Yasushi Suzuki, "Murabaha Syndrome of Islamic Banks: A Paradox or Product of the System?," *Journal of Islamic Accounting and Business Research* 11, no. 7 (2020), p. 1363–1378.

[33]Bagya Agung Prabowo and Jasri Bin Jamal, "Concept And Application Of Akad Wakalah In Murabaha Financing In Islamic Banking (A Comparative Study Between Indonesia And Malaysia)," *Diponegoro Law Review* 2, no. 1 (2017).

[34]Triamita Rahmawati, "Hak Tanggungan Sebagai Jaminan Perlindungan Hukum Bagi Para Pihak Dalam Pembiayaan Di Perbankan Syariah," *Jurnal Officium Notarium* 1, no. 2 (2021).

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complicates enforcement. Consequently, judges are often compelled to rely on pragmatic legal reasoning, applying the general provisions of the Civil Code (Article 1320) to validate the underlying contract; however, this effectively strips the institution of its status as a secured, preferential creditor, relegating it to that of a concurrent creditor,[35]

This judicial construction highlights a significant regulatory vacuum, precipitating a structural tension between procedural efficiency for the debtor and the erosion of executory certainty for the creditor. In the absence of a standardized Sharia procedural code for the enforcement of non-mortgage collateral, the existing legal framework inadvertently weakens creditor protections.[36] This instability incentivizes opportunistic debtor behavior characterized as moral hazard—and necessitates higher risk premiums within Islamic financial products, ultimately impeding the industry's competitive parity with conventional banking counterparts. [37]

Subsumed within these contractual frictions is a profound structural deficiency in Indonesia's normative hierarchy concerning *Sharia* compliance.[38] Indonesia adopts a decentralized, collaborative governance model, wherein the state delegates theological adjudication to the National Sharia Board (DSN-MUI). However, as the DSN-MUI remains an independent, non-governmental entity, its *fatwas* lack inherent *ex officio* binding force within the state's positive legal hierarchy. The juridical legitimacy of these *fatwas* is strictly contingent upon their formal absorption into administrative regulations (*lex positiva*) by the Financial Services Authority (OJK) or Bank Indonesia (BI).[39]

This institutional arrangement precipitates a systemic bottleneck, a phenomenon characterized as "regulatory theology", wherein theological interpretations are subject to a significant bureaucratic hiatus.[40] During this period of regulatory gestation, *Sharia* financial institutions operate within a juridical lacuna, compelled to utilize conventional civil frameworks (such as the Fiduciary Law) while simultaneously asserting *Sharia* compliance based on non-binding

[35]Rahmawati.

[36]Wetria Fauzi and Ratih Agustin Wulandari, "Collateral Binding Principles in Sharia Banking Financing Agreements," *Media Syari'ah : Wahana Kajian Hukum Islam Dan Pranata Sosial* 25, no. 1 (2023), p. 32–50.

[37]Fauzi and Wulandari, "Collateral Binding Principles in Sharia Banking Financing Agreements."

[38]Suaidi et al., "Harmonisation Between DSN-MUI Fatwas and OJK Regulations: Towards an Innovative and Inclusive Sharia-Compliant Fintech Ecosystem in Indonesia," *Mazahib Jurnal Pemikiran Hukum Islam* 24, no. 1 (2025).

[39]Suaidi et al.

[40]Jacob Chengwei Feng, "Deificational Hermeneutics as Theological Interpretation: A Theological Exegesis on 2 Peter 1:1–11," *Religions* 15, no. 12 (2024).

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normative guidelines.[41] This disconnect between positive legal validity and *Sharia* ethical ideals underscores the exigency for a structural paradigm shift.

The prevailing disharmony between these disparate legal norms necessitates a comprehensive executive and judicial review to fulfill the foundational requirement of substantive legal certainty. To resolve this "theological-legal" friction, the Indonesian state must reconsider the constitutional position of *Sharia* economic norms, ensuring that the transition from religious *fatwa* to enforceable statute is characterized by institutional continuity rather than bureaucratic fragmentation.

Impact of disharmony on effectiveness, legal certainty, and industry strengthening

Within the paradigm of Islamic finance, ensuring *Sharia* compliance transcends mere ethical preference; it serves as the ultimate determinant of ontological legitimacy.[42] The primary differentiator of an Islamic financial institution is its rigorous adherence to *Sharia* principles.[43] When a bank is compelled to execute collateral via conventional fiduciary statutes that permit oppressive or inequitable collection practices (*zalim*), the resulting revenue may be classified as Sharia Non-Compliance Income (SNCI).[44] The escalation of SNCI risk significantly erodes the institution's moral legitimacy and public trust, thereby negating the foundational rationale for the industry's existence.[45] Empirical evidence suggests that Muslim consumer preferences are predominantly anchored in religious norms and a profound aversion to *riba* (usury).[46] When regulatory incongruity obscures the distinction between conventional repossession and *Sharia*-compliant execution, market penetration stagnates as devout consumers perceive the sector as a form of "disguised conventionalism."[47]

The absence of a coherent, *lex specialis* legal framework directly thwarts product innovation. Macroprudential mandates that prioritize material collateralization through conventional instruments create a structural disincentive

[41]Feng.
[42]Feng.
[43]Md Kausar Alam et al., "The Influences of Shariah Governance Mechanisms on Islamic Banks Performance and Shariah Compliance Quality," *Asian Journal of Accounting Research* 7, no. 1 (2022).
[44]Zuhair Khalid Afifi, "Financial Sukuk: Concept, Legal Principles, and Types," *Asian Journal of Economics, Business and Accounting* 24, no. 2 (2024).
[45]Afifi.
[46]Mahamudul Hasan, "An Empirical Analysis on Perceived Compliance of Islamic Marketing Principles in Bangladesh," *International Journal of Asian Business and Information Management* 13, no. 1 (2022).
[47]Burhanudin Harahap, et al., "Islamic Law, Islamic Finance, and Sustainable Development Goals: A Systematic Literature Review," *Sustainability (Switzerland)*, (2023).

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for the adoption of genuine equity-based, risk-sharing instruments, such as *Mudharabah* and *Musharakah*.[48] Because contemporary guarantee statutes are designed around rigid, debt-based architectures, Islamic banks exhibit a pronounced institutional isomorphism, defaulting to debt-like contracts (e.g., *Murabahah*) where collateral enforcement is more predictable under the Civil Code.[49] This regulatory gravity prevents the industry from evolving beyond a mere "mirroring" of conventional banking models.[50]

This phenomenon effectively subverts the transformative potential of Islamic finance.[51] The Maqashid al-Shariah framework envisions a financial ecosystem that facilitates distributive justice and equitable wealth circulation through risk-sharing mechanisms. However, the prevailing regulatory environment necessitates a heavy reliance on tangible collateral, thereby marginalizing micro-entrepreneurs who lack physical assets but possess viable, productive potential. Consequently, the current legal infrastructure reduces Islamic finance to a mimicry of conventional banking, rather than serving as a genuine catalyst for inclusive and equitable socio-economic development.[52]

The ambiguity inherent in current dispute resolution mechanisms serves to escalate systemic operational costs across the sector. Following the landmark Constitutional Court Decision No. 18/PUU-XVII/2019, which effectively proscribed the unilateral execution of fiduciary guarantees in instances of debtor resistance, *Sharia* financial institutions have been subjected to protracted and fiscally burdensome litigation within the Religious Courts.[53] In the absence of specialized *Sharia*-compliant procedural guidelines for asset recovery, the deceleration in the resolution of Non-Performing Financing (NPF) leads to significant liquidity entrapment.[54]

This judicial friction precipitates a degradation in key Financial Soundness Indicators (FSIs), specifically impairing asset quality ratios, capital adequacy, and Return on Assets (ROA).[55] While empirical comparative analyses indicate that Indonesian Sharia banks maintain profitability through high profit

[48]Nilam Sari et al., "Managing Financing Risk of Islamic Banking Products in Indonesia: A Value At Risk Approach," *Jurnal Ilmiah Islam Futura* 24, no. 1 (2024), p. 213–240.

[49]Ah Azharuddin Lathif, "The Concept and Application of Murâbahah Contracts in Syariah Banking in Indonesia," *Ahkam: Jurnal Ilmu Syariah* 12, no. 2 (2012).

[50]Lathif.

[51]Necmeddin Güney, "Maqāsid Al-Sharī'a in Islamic Finance: A Critical Analysis of Modern Discourses," *Religions* 15, no. 1 (2024).

[52]Güney.

[53]AlFath Anggara and Fitria Esfandiari, "Harmonization of Legal Decision Number 18/PUU-XVII/2019 by The Constitutional Court Concerning Fiduciary Guarantee," *2nd International Conference on Law Reform (INCLAR 2021)* 590, no. 109–112 (2021).

[54]Anggara and Esfandiari.

[55]M. Shabri Abd. Majid, et al., "A Comparative Analysis of the Quality of Islamic and Conventional Banks' Asset Management in Indonesia," *Gadjah Mada International Journal of Business* 16, no. 2 (2014), p. 185–200.

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margins in specialized niche markets, they simultaneously exhibit high degrees of institutional heterogeneity and face significantly higher litigation friction compared to their regional counterparts in Malaysia.[56]

The establishment of substantive legal certainty is a fundamental prerequisite for safeguarding industry stakeholders. In its absence, the "legal risk premium" inevitably inflates the cost of financial intermediation, thereby compromising the competitive parity and strategic resilience of the national Islamic banking industry within the global financial architecture.

Comparative Analysis: Sharia Guarantee Ecosystems In Malaysia And The Gulf Cooperation Council

Malaysia operates within a monolithic and institutionalized dual-tier Sharia governance architecture, underpinned by the Islamic Financial Services Act (IFSA) 2013 and the Central Bank of Malaysia Act 2009 (CBA 2009).[57] At the apex of this hierarchy is the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM).[58] In a definitive departure from the Indonesian model, where the DSN-MUI functions as an independent non-governmental entity, the SAC is a sovereign statutory organ integrated directly into the central banking authority.[59]

The primary distinction lies in the binding legal force of *Sharia* adjudications. In the Malaysian jurisdiction, SAC resolutions inherently constitute binding positive law.[60] Civil courts and arbitral tribunals are subject to a statutory obligation of judicial referentiality, requiring them to consult the SAC for definitive interpretations on any financial dispute.[61] This mechanism ensures absolute jurisprudential consistency and mitigates the risk of conflicting adjudicatory outcomes. Regarding collateral, BNM proactively issues granular policy documents, such as the *Policy Document on Rahn and Islamic Collateralised Funding*, which delineate the precise parameters for management,

[56]Mehboob Ul Hassan et al., "Measuring the Performance of Islamic Banks in Saudi Arabia," *International Journal of Economics and Management* 12, no. 1 (2018). Mehboob-ul A Hassan et al., "IJEM International Journal of Economics and Management Measuring the Performance of Islamic Banks in Saudi Arabia," *Journal of Economics and Management*, vol. 12, 2018.

[57]Muhd Issyam Itam@Ismail and Rusni Hassan, "Shari'ah Committee Composition in Malaysian Islamic Financial Institutions: Post Implementation of SGF 2010 and IFSA 2013," *Journal of Islamic Finance* 5, no. 2 (2016), p. 28–36.

[58]Muhammad Iqmal Hisham Kamaruddin et al., "Exploring Shariah Governance Practices in Islamic Co-Operatives in Malaysia," *International Journal of Economics and Financial Issues* 14, no. 3 (2024).

[59]Norhashimah Mohd Yasin, "Legal Issues Related To The Shariah Advisory Council in Malaysia," *Jurnal Media Hukum* 20, no. 1 (2013).

[60]Kamaruddin et al., "Exploring Shariah Governance Practices in Islamic Co-Operatives in Malaysia."

[61]Kamaruddin et al.

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liquidation, and accounting.[62] By embedding *Sharia* standards directly into the state's positive legal fabric, Malaysia achieves a level of regulatory cohesion and contractual certainty that currently eludes the Indonesian framework.[63]

Conversely, the Gulf Cooperation Council (GCC) states present an alternative trajectory for harmonization, centered on the comprehensive modernization of civil codes and a stringent adherence to global *Sharia* accounting standards (AAOIFI).[64] Historically characterized by a reliance on self-regulation or fragmented commercial statutes, these jurisdictions have recently undergone significant legislative overhauls.[65] These reforms reflect an urgent strategic imperative to align traditional commercial law with the complex exigencies of contemporary *Sharia* finance, transitioning from a reactive to a proactive regulatory posture.[66]

The United Arab Emirates (UAE) recently promulgated Federal Decree Law No. 25 of 2023 (the New Civil Code), representing a comprehensive statutory overhaul of civil transactions.[67] Critically, the New Civil Code establishes a definitive normative hierarchy: in instances of legislative lacunae, UAE courts are explicitly mandated to apply *Sharia* principles as a primary subsidiary source, followed by local custom, provided such applications align with public order.[68] This framework affords significant predictability for *Sharia* financial instruments, positioning Islamic jurisprudence as an immediate, recognized legal fallback rather than an external concept requiring "legal fiction" for validity.[69] Furthermore, the codification of good faith obligations and pre-contractual liability within the code aligns the UAE's secular statutes with the ethical imperatives of *Sharia* transparency.

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[62]Engku Rabiah Adawiah Engku Ali and Umar A. Oseni, "Towards an Effective Legal and Regulatory Framework for Islamic Financial Transactions: Major Initiatives of the Central Bank of Malaysia," *International Journal of Law and Management* 59, no. 5 (2017), p. 652–672.

[63]Engku Ali and Oseni, "Towards an Effective Legal and Regulatory Framework for Islamic Financial Transactions: Major Initiatives of the Central Bank of Malaysia."

[64]Sherif Elhalaby et al., "The Adoption of AAOIFI Standards by Islamic Banks: Understanding the Microeconomic Consequences," *Economies* 11, no. 2 (2023), p. 39.

[65]Hakeemat Ijaiya, "A Review of Literature on the Challenges of Shariah Governance in Islamic Banking in Nigeria," *Journal of Shariah Law Research*, (2021).

[66]Maryam Safdar, "The Role of AAOIFI in Standardizing Shariah Governance Practices Globally," *SSRN Electronic Journal*, 2025.

[67]Bambang Iswanto and Miftah Faried Hadinatha, "Sharia Constitutionalism: Negotiating State Interests and Islamic Aspirations in Legislating Sharia Economic Law," *AHKAM : Jurnal Ilmu Syariah* 23, no. 1 (2023).

[68]Liaquat Ali Bhand, Tauseef Iqbal, and Nazakat Ali, "Comparison of Sharia Court's of Pakistan, United Arab Emirates (UAE), Indonesia and Malaysia," *Russian Law Journal* 11, no. 2 (2023).

[69]Ali Raza, Ain Bemisal Alavi, and Laiba Asif, "Sustainability and Financial Performance in the Banking Industry of the United Arab Emirates," *Discover Sustainability* 5, no. 1 (2024).

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Within the broader GCC region, jurisdictions such as Bahrain, Qatar, and the UAE increasingly mandate or institutionalize the standards promulgated by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI).[70] Specifically, AAOIFI Shari'ah Standard No. 5 on Guarantees (Rahn) provides granular, globally vetted benchmarks concerning the collateralization of future assets, the rights of third-party guarantors, and the strict prohibition of asset utilization for creditor profit.[71] By integrating these transnational standards into their domestic legal frameworks, GCC financial institutions facilitate cross-border harmonization, mitigate systemic compliance risks, and fortify international investor confidence.[72]

The governance of Islamic banking exhibits significant structural variance across Indonesia, Malaysia, and the UAE.[73] In Indonesia, *Sharia* authority is vested in the DSN-MUI, an independent non-governmental entity whose decrees necessitate administrative absorption by the OJK or Bank Indonesia to achieve legal validity.[74] In contrast, Malaysia utilizes the SAC BNM, a sovereign statutory body whose resolutions are *ex officio* binding on both financial institutions and the judiciary.[75] The UAE model presents a hybrid approach, employing a Higher Sharia Authority within the Central Bank, supported by a modernized civil code that recognizes *Sharia* as a foundational legal source. Regarding security instruments, while Indonesia remains tethered to conventional fiduciary and mortgage statutes, Malaysia has institutionalized granular *Rahn* policy documents, and the UAE has integrated AAOIFI standards into its civil architecture.

Development of the Maqashid-Integrated Sharia Guarantee Framework

To rectify the systemic incongruities currently impeding the Indonesian Islamic banking sector, incremental or piecemeal regulatory adjustments to Financial Services Authority (OJK) mandates are inherently inadequate. Addressing these deep-seated challenges necessitates a foundational structural and philosophical reconfiguration of the existing legal architecture. Consequently, this study posits the formulation and institutionalization of a "Maqashid-Integrated Sharia Guarantee Framework." This original paradigm triangulates three critical dimensions: the rigorous codification of *Sharia* norms

[70] Sherif Elhalaby, et al, (2023).

[71] Aida Lias, "Importance of Standards of Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)," *International Journal of Economic Perspectives* 18, no. July (2024), p. 310–346.

[72] Sherif Elhalaby et al, (2023).

[73] Noer Purnama et al, (2025).

[74] Abdul Azis Ali Ramdlani, (2025).

[75] Jaenal Arifin et al., "A Comparative Study On Sharia Governance And Supervisory Authority In Islamic Banking Of Indonesia And Malaysia," *Malaysian Journal of Syariah and Law* 13, no. 3 (2025).

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within statutory law, the cultivation of institutional synergy among regulatory stakeholders, and the establishment of teleological performance metrics rooted in the substantive objectives of Islamic jurisprudence (*Maqashid al-Shariah*).

1. Statutory Codification: The Enactment of a Lex Specialis Sharia Guarantee Law

The primary structural intervention recommended to resolve the current impasse is the promulgation of a dedicated Sharia Guarantee Law (*Undang-Undang Jaminan Syariah*). This statute would function as a *lex specialis*, purposefully superseding the jurisprudential incongruities inherent in the conventional Fiduciary Guarantee and Mortgage laws when applied to Islamic financial instruments. By establishing a separate statutory track, the state can ensure that the ethical and legal foundations of *Sharia* contracts are not compromised by the legacy positivism of secular security regimes.

This proposed legislation must institutionalize *Rahn* (pledge), *Rahn Tasjily* (registered movable security), and *Kafalah* (suretyship) as distinct, enforceable security interests ***sui generis*** within the Indonesian positive legal order. Such a framework would endow *Sharia* financial institutions with native *fiat executio* (executory power) derived directly from *Sharia* principles. Crucially, this would decouple *Sharia* asset recovery from the conventional administrative subjection of the National Fiduciary Registration Office, thereby streamlining enforcement without sacrificing doctrinal integrity.

Furthermore, the statute must explicitly proscribe *lex commissoria* (*pactum commissorium*), the automatic forfeiture of assets, while codifying optimized, *Sharia*-adherent enforcement protocols. This includes the implementation of supervised public auctions characterized by radical transparency, ensuring that any surplus value is strictly restituted to the debtor (*rahin*). Such a mechanism would eliminate the risk of unjust enrichment through opaque administrative surcharges, fulfilling the *Maqashid* objective of protecting property (*hifz al-mal*) for both creditor and debtor alike.

2. Institutional Synergy: Elevating DSN-MUI and Judicial Harmonization

To mitigate the institutional inertia characteristic of "regulatory theology," the Indonesian legal framework should pivot toward a governance architecture commensurate with the operational efficiency of Malaysia's Shariah Advisory Council (SAC), while simultaneously preserving the autonomous scholarly integrity of the Indonesian Council of Ulama (MUI). The advocated framework necessitates the statutory elevation of the DSN-MUI's jurisdictional authority. Rather than the current reactive approach, whereby the Financial Services Authority (OJK) selectively incorporates *fatwas* into administrative mandates, legislative amendments should confer immediate, subsidiary legal

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force upon DSN-MUI resolutions concerning banking operations, thereby establishing a prerequisite for mandatory institutional compliance.

Moreover, to alleviate the adjudicatory congestion within the Religious Courts (*Pengadilan Agama*), the Supreme Court (*Mahkamah Agung*) ought to institutionalize a formal consultative nexus with the DSN-MUI. In alignment with established international precedents, judicial officers presiding over novel collateralization disputes should be legally mandated to seek binding interpretive guidance from the *Sharia* authority. This procedural requirement would preempt recourse to the reductive pragmatism of secular civil statutes, ensuring that judicial outcomes remain doctrinally sound.

The formulation of standardized, national technical protocols for the verification and enforcement of *Sharia*-compliant security is an essential prerequisite for nationwide judicial consistency. Such a reform would facilitate the emergence of a coherent jurisprudential framework (*yurisprudensi*) capable of equitably safeguarding creditor interests while upholding the inherent dignity of the debtor. By bridging the gap between theological theory and judicial practice, Indonesia can establish a legal environment characterized by both ethical integrity and institutional predictability.

3. Maqashid-Based Risk Management and Supervisory Metrics

Ultimately, the harmonization of guarantee statutes must transcend mere procedural formalism and embrace the substantive, ethical outcomes mandated by *Maqashid al-Shariah* (the objectives of Islamic law). The proposed framework is conceptually anchored in the classical *Maqashid* paradigms developed by Imam al-Ghazali and Abu Zahrah, which prioritize *Hifz al-Mal* (Protection of Wealth), *Adl* (Distributive Justice), and *Maslahah* (Public Utility). By situating guarantee laws within this teleological context, the legal system moves from a reactive, secular-positivist stance to a proactive, ethics-driven governance model.

Within the context of collateral enforcement, *Hifz al-Mal* functions as a bilateral protective mechanism. For the *Sharia* financial institution, it necessitates the preservation of depositor funds through statutorily fortified security interests designed to mitigate credit and systemic liquidity risks. Conversely, for the debtor, it guarantees protection against inequitable repossession maneuvers (*zalim*) and punitive exactions, ensuring that collateral liquidation is characterized by transparency, proportionality, and ethical integrity. This reciprocal obligation ensures that the law protects the capital of the creditor without compromising the fundamental human dignity of the debtor.

By integrating *Maqashid* performance indicators into the Financial Services Authority's (OJK) supervisory oversight framework, regulators can evaluate *Sharia* banks beyond traditional prudential metrics such as Capital Adequacy (CAR) or Non-Performing Financing (NPF) ratios. A more nuanced assessment should include a quantitative analysis of the institution's structural

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composition, specifically the ratio of authentic risk-sharing instruments (*Mudharabah/Musharakah*) versus debt-based financing (*Murabahah*).

The OJK should proactively incentivize financial institutions to utilize *Kafalah* (suretyship) and genuine equity partnerships, reducing the systemic over-reliance on material collateral. This could be achieved through fiscal incentives, such as preferential Risk-Weighted Asset (RWA) weightings for portfolios demonstrating high *Maqashid* compliance. Transitioning toward a *Maqashid*-centric risk management paradigm aligns macroeconomic stability with socio-economic justice, thereby resolving the contemporary paradox wherein *Sharia* banking remains formally compliant yet substantively indistinguishable from conventional capitalist entities.

Conclusion

The realization of juridical certainty and operational coherence within the Indonesian Sharia banking sector is fundamentally impeded by a systemic dependency on conventional, civil-law-oriented security institutions. The profound ontological divergence between the ethical, trust-centric imperatives of Islamic jurisprudence, exemplified by *Rahn Tasjily* and *Kafalah*, and the debt-oriented, secular constructs of the Fiduciary Guarantee and Mortgage Laws exposes financial institutions to acute legal, operational, and Sharia Non-Compliance (SNC) risks. This "regulatory theology," characterized by the institutional inertia of *fatwa* absorption into positive statutes, compels practitioners and the judiciary toward a paradigm of reductive pragmatism, often sacrificing substantive equity for procedural efficiency. Consequently, this regulatory lacuna stifles product diversification, incentivizing a regression toward debt-based *Murabahah* instruments and obstructing the authentic risk-sharing potential inherent in Islamic finance. Cross-jurisdictional benchmarks, specifically the statutory empowerment of Malaysia's Shariah Advisory Council and the dynamic codification of *Sharia* within the UAE's modernized civil codes, provide robust templates for institutional reform. These jurisdictions have successfully mitigated legal ambiguity by centralizing *Sharia* interpretation and integrating transnational standards, such as those promulgated by AAOIFI, into their binding legal orders. To fortify the industry's structural resilience, this inquiry advocates for the implementation of a "Maqashid-Integrated Sharia Guarantee Framework." The cornerstone of this paradigm is the enactment of a *lex specialis* Sharia Guarantee Law (*Undang-Undang Jaminan Syariah*), effectively decoupling the sector from incompatible conventional security regimes. By elevating *fatwas* to statutory prominence, institutionalizing consultative nexuses within the judiciary, and embedding *Maqashid al-Shariah* indicators within the regulatory oversight matrix, Indonesia can ensure that collateral enforcement achieves the bilateral protection of wealth (*Hifz al-Mal*). Ultimately, this integrated approach transforms legal certainty from a formalistic

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compliance exercise into a catalyst for substantive socio-economic justice within the global financial architecture.

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