

Comparative Study of Islamic Legal Systems in the Application of the Istishna' Agreement in Indonesia and Malaysia

Khansa Tazkiya^{*1}, Burhanudin Harahap², Hari Purwadi³

^{1,2,3}(Universitas Sebelas Maret, Jl. Ir. Sutami No.36, Surakarta, Central Java, Indonesia)

*khansatazkiya@student.uns.ac.id

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ABSTRACT: *The provisions in the Qur'an and al-Hadith bind Islamic Contract Law. From the Islamic perspective, contracts are better known by the word Akad. The most significant factor in the increase in profit power in Islamic contract law is obtained from financing agreements. Indonesia and Malaysia, as Muslim-majority countries, provide different arrangements regarding istishna's financing agreement'. Therefore, this legal research aims to compare Islamic legal systems in applying the istishna' agreement in Indonesia and Malaysia based on the DSN MUI Fatwa and the SAC BNM Fatwa. The research method is a doctrinal legal research method with a comparative approach. The results showed that in the application of the istishna' contract in Indonesia and Malaysia, there was no significant difference. The development of istishna' agreements between the two countries from year to year has fluctuated. The number of istishna' financing agreements in Indonesia is higher than in Malaysia.*

Hukum Kontrak Islam terikat dengan ketentuan-ketentuan yang ada dalam al-Qur'an dan al-Hadis. Dalam perspektif Islam, kontrak lebih dikenal dengan kata Akad. Faktor terbesar meningkatnya daya laba pada hukum kontrak islam didapat dari akad pembiayaan. Indonesia dan Malaysia sebagai negara dengan mayoritas muslim memberikan pengaturan yang berbeda mengenai akad pembiayaan istishna'. Oleh karena itu, penelitian hukum ini bertujuan untuk membahas perbandingan sistem hukum islam dalam penerapan akad *istishna'* di negara Indonesia dan Malaysia berdasarkan Fatwa DSN MUI dan Fatwa SAC BNM. Metode penelitian yang digunakan adalah metode penelitian hukum doktrinal dengan pendekatan perbandingan. Hasil penelitian menunjukkan bahwa dalam penerapan akad *istishna'* di Indonesia dan Malaysia tidak terdapat perbedaan yang signifikan. Perkembangan

akad *istishna'* antar kedua negara tersebut dari tahun ke tahun mengalami fluktuatif. Jumlah akad pembiayaan *istishna'* di Indonesia jauh lebih tinggi dari pada di Malaysia.

Keywords: *Comparative Study, Islamic Law, Istishna' Akad, Comparison System.*

I. INTRODUCTION

Islamic contract law is a written form of the provisions of Islamic law in the field of engagement. These provisions are regulated in the Islamic binding law which regulates human behavior in carrying out contracts (Ardi, 2016). Islamic Contract Law is bound by the provisions of the Qur'an and al-Hadith. Contracts in Islamic Contract Law must avoid interest (usury) and contracts that contain uncertainty (*gharar* and *maysir*), emphasize the principle of profit sharing and risk, prioritize halal contracts and must be based on honest contracts (Rama, 2013).

An agreement is an event that occurs when the parties promise each other to carry out a mutual agreement. According to Subekti, a contract is when someone or more promises to carry out an agreement or promises each other to do something. According to the Islamic view, the primary sources are *aqidah* and *sharia* to obtain the ultimate truth. By making *aqidah* and *sharia* the source of truth on the foundation of the contract, it is hoped that the contract formed will be accounted for before Allah Almighty. To bring fundamental values into concrete legal regulations, knowledge of the rules of *fiqh* (*al-qawa'id al-fiqhiyyah*) found in the science of *ushul fiqh* is needed.

The contract is carried out by applying the agreement, where the agreement must be based on Islamic contract law. Akad or contract comes from Arabic, meaning bond or conclusion of visible (*hissyy*) and invisible (*ma'nawy*) ties. Al-Mawrid Dictionary, translating *al-'Aqd* as a contract and a treaty. Meanwhile, according to the term, a contract or contract is an agreement or joint commitment, whether oral, gesture, or written, between two or more parties that has binding legal implications for carrying it out. The most significant factor in the increase in profit power in Islamic contract law is obtained from financing agreements.

Islamic financial institutions are one of the choices for some people to carry out a financing agreement by Islamic law. Islamic financial institutions are rapidly growing in almost all countries in the world, especially countries with a Muslim majority population, such as countries in Southeast Asia, namely Indonesia and Malaysia. Supported by its Muslim-majority population, it is hoped that the development of Islamic contract law can also progress.

Speaking of Islamic financial institutions, Sharia transactions do not only include commercial transactions such as buying and selling. There are also broad muamalahs such as *istishna'* contract transactions that do not conflict with Islamic law (Muslimin, Hasriani, Zainab, Ruslang, & Karno, 2021). In general, financing agreements in Sharia transactions have a variety of options. With various choices of contracts in sharia transactions, people are more helped by adjusting their needs, but this study will focus on *istishna'* arrangements. Operationally, *istishna'* is a sharia treaty contract between *al-*

Mustashni (booker) and *as-Shani* (maker). In this contract, *as-Shani* received an order from *al-Mustashni* to make the goods (*al-Mashni*) according to the specifications agreed upon in the agreement and sold them to *al-Mustashni*. Both parties agreed on the price and payment system (Junaidi & Yusriadi, 2022).

Research on the Islamic legal system in the application of the *istishna'* contract has previously been studied by previous researchers, but the study results still have differences. As research conducted by Enny Puji Lestari, it shows that there is a risk to *istishna'* contracts in Islamic commercial banks in Indonesia (Lestari, 2014). Based on the phenomena and differences in the results of previous studies, the author is interested in conducting this study to see comparisons to the Islamic legal system in applying the *istishna'* contract in Indonesia and Malaysia.

II. METHOD

This research uses doctrinal legal research methods with a comparative approach by reviewing existing legal materials. Jhonny Ibrahim argues that the comparison approach is one way that can be used for normative research to compare one of the legal institutions of one legal system with another legal institution (which is more or less the same as the legal system) (J. Ibrahim, 2010). The type of research used in this study is literature research, which seeks to obtain data using library sources. The data central to this research is collected through variable data based on the writings, thoughts, and opinions of figures and experts who talk about the main themes of the investigation. The source of this research data is secondary legal material, namely journals related to this research. In this study, the document study technique was used as data collection, then associated with data analysis techniques using qualitative descriptive analysis to see aspects of Islamic Contract Law, especially in the *istishna'* contract and its relation to its current application.

III. RESULT AND DISCUSSION

Islamic law is sharia which means the rules held by Allah for His people brought by a Prophet Saw, both laws related to belief (aqidah) and laws related to *amaliyah* (deeds) carried out by all Muslims (Iryani, 2017). Islamic contract law exists as a written form of Islamic law clauses in the field of contracts. This clause complies with the Islamic Law of Engagement, which regulates human behaviour when conducting economic, commercial and banking relations. Islamic contract law is known as a *non-ribawi* contract, and it carries out financing contracts with its Islamic principles. In a broad sense, financing is defined as funding spent to support investments planned either by themselves or run by others. Meanwhile, in a narrow sense, financing defines as funding by financing institutions (Sundari & Zuana, 2018).

In the financing contract, the borrower gets the lender's trust, so the recipient must return the financing he has received by the period agreed in the financing contract. In theory, three things are characteristic of Islamic-based funding: interest-free, principled profit sharing and risk and profit sharing calculations are not carried out in advance

(Widiana & Annisa, 2017). Islamic financial institutions are one of the choices for some people to carry out financing agreements following Islamic law. An Islamic financial institution is a business entity whose activities are in the field of Islamic finance and whose assets are in the form of financial and non-financial based on Islamic sharia principles.

Islamic financial institutions are alternative financial institutions for people who want financial services to sharia principles (Ascarya, 2016). However, some still need to use transactions at Islamic financial institutions. People have not used Islamic financial institutions because of educational and communication strategies that have not been effective in reaching the public. Therefore, it is essential to implement new and effective educational plans for the people, both from the government and Islamic banks, to increase public interest in Islamic financial institutions (Waluyo, Rozza, & Sujarwo, 2018).

Islamic financial institutions are experiencing relatively rapid growth and development and provide positive value. Countries with Muslim-majority populations, such as countries in Southeast Asia, namely Indonesia and Malaysia, have also used Islamic financial institutions. Indonesia and Malaysia are both countries with the most Muslim populations. However, both regulate the position of religion as an official religion, or a recognized religion is regulated differently. In Article 29 of the 1945 Constitution, Indonesia stipulates that "the State is based on the One True Godhead." This means that Indonesia does not regulate based on a specific religion but recognizes six religions: Islam, Catholicism, Christianity, Hinduism, Buddhism, and Confucianism. Malaysia is stipulated in Number 3 (1)Part 1 of The States, Religion, and Law of The Federations The Federal Constitution that "Islam is the religion of the Federation."

The most frequently used financing pattern in Islamic financial institutions is the profit-sharing principle and the buying and selling principle. For the direction of buying and selling, there is an *istishna'* financing agreement'. Compared to buying and selling in the time of the Prophet, buying and selling today is very different. Sellers today no longer pay attention to the honest nature of the buying and selling system but only prioritize profits. Therefore, the Qur'an and Hadith are the source or basis for our daily lives, whether in harmony with Allah or in association with fellow human beings (Karim, 2014). The development of the number of *istishna'* financing agreements in Indonesia and Malaysia is shown in Table 1:

Table 1. Comparison of the Development of the *Istishna'* Agreement (In Miliyar)

Year	Indonesia	Malaysia
2018	15	1,325
2019	11	1,589
2020	21	1,225

Sumber : Islamic Banking IFSB 2020 per Quarter (Q4)

Based on table 1 above, it can be seen that the development of *istishna's* financing agreements between the two countries from year to year has fluctuated. The number of *istishna'* financing agreements between the two countries has differences. Indonesia experienced a considerable increase in 2020 of 21 billion, while in Malaysia in 2020, it

was 1,225 billion. Thus, the community can accept financing with sharia principles, and the increasing funding shows that the level of public trust in Islamic financing products is increasing.

When Islamic financial institutions can improve their operating efficiency system, they will be more resilient in facing changes in the business economic environment (Maulidiyah & Laila, 2016). Each method has some guiding principles involved in its formation. The system functions as a whole, and its components are structured together in functional relationships, arguably independent of the underlying principles. When we talk about law as an institution, this means an orderly arrangement or system of life rules (Diana, 2001).

Istishna's Agreement in Indonesia

Indonesia is the country with the highest number of Muslims in the world by population. Almost 87% of Indonesia's total population is Muslim. By population, Indonesia is also the country with the largest Muslim population. With such a large population, it is okay for the Indonesian people to pay more attention to and consider their business contracts by adhering to sharia principles. Every business contract is based on the principle of willingness between the two parties and is not good. Neither party is tyrannical and dizalimi, so if you want to get results, it is necessary to incur costs, and if you want to make a profit, you are willing to bear the risk (Amni & Faujiah, 2020). In Islamic contract law, the term interest is unknown, but it uses a profit-sharing system because interest is considered usury (Hidayah, Nawawi, & Arif, 2018). Islam is required to be more apparent in providing a legal basis. Therefore Islam attaches a legal basis linked to the Qur'an, al-Hadith or ijma (Darmawansyah & Polindi, 2020).

Financing is the activity of Islamic banks in distributing funds to other parties based on sharia principles. The distribution of funds in the form of financing is based on the trust given by the fund's owner to the user. The owner of the fund believes in the recipient of the funds that the funds in the form of financing provided will pay off. The beneficiary gains the lender's trust so that the borrower is obliged to return the financing he has received by the period agreed in the financing agreement. One form of financing carried out by Islamic banks is the *istishna'* contract (Ismail, 2011).

In Indonesia, *istishna's* financing agreement is an agreement where the customer needs an item, equipment, or development project to be built, produced, made or assembled. In this case, it is customary to ask the bank for financing. The bank offers to have ordered items to build, manufacture or produce. Then the buyer can pay the price for the ordered item in the future, either in one lump sum or in instalments. In the Fatwa of the National Sharia Council No. 06/DSN-MUI/IV/2000 on buying and selling *istishna'* it is stated that *istishna'* is a buying and selling contract in the form of ordering the manufacture of certain goods with specific criteria and requirements agreed between the booker (buyer, *mustashni*) and the seller (maker, *shani*).

The *istishna'* contract is used to sell and purchase goods between two other parties. The ordered goods will be produced according to the agreed specifications and sold at the agreed price and payment at the beginning of the agreement. *Istishna'* is a sales

agreement between *al-Mustashni* (buyer) and *as-Shani* (producer who also acts as seller). Under the *istishna'* agreement, the president makes or holds *al-Mashni* (ordered goods) according to the specifications required by the buyer on the deal and sells them at the agreed price (Lestari, 2014). In this contract, the means of payment must be known in quantity and form, whether in money, goods, or benefits. In addition, payments are made by the agreement and should not be in the form of debt relief. At the time of submission (which will be carried out in the future), the time and place must be established by agreement. If there is a defect or the goods are not by the agreement, the booker has the right of *khiyar* (right to choose) to continue or cancel the contract.

According to Ibrahim & Kamarudin, in Islamic banking *istishna'* contracts are advised to concentrate on industrial development. *Istishna'* agreements provide financing facilities in certain transactions, especially in the housing finance and manufacturing sectors. The manufacturing business sector is the segment in which *istishna'* plays the most prominent role – *istishna'* financing from Islamic banks can generate significant profits. Thus, this study recommends *istishna'* as an alternative contract by sharia law that needs to be used (M. F. Ibrahim & Kamarudin, 2014).

Istishna's contracts are usually practised on Islamic contract law financing in construction projects and manufacturing fields such as financing aircraft factories, installing factory equipment and so on. This is very suitable for the customer needs to build a construction (Hidayah et al., 2018). *Istishna'* is an agreement in which one of the parties pays for the goods to be produced or for something to be made. *Istishna'* is a mechanism for insuring receivables by Islamic banks to customers who have debt dependents for financing physical projects. In this case, Islamic banks will benefit based on profit sharing from projects carried out by customers (T. Abrar, 2016).

This order contract is a sale and purchase contract in which the buyer makes an order to the seller to make something desirable and is made at a particular time at a price and payment method set during the contract. Such a sale and purchase contract is also equated with a wage contract because it involves labour and raw materials (Hulwati, 2006). Sunarto Zulkifli defines that *istishna'* as one of the developments of the *as-salam* principle, in which the delivery time of goods is carried out at a later date. At the same time, payments can be made through instalments or suspension. Thus, the terms of the *istishna'* contract follow the terms and rules of the *as-salam* contract

Supervision during the production/development process is essential in financing with *istishna'* contracts. The dishonesty of customers and developers in reporting the development progress makes the bank always cautious and continuously monitors the development progress carried out by the developer. In terms of bookkeeping, *istishna'* is quite complex. The Financial Services Authority considers implementing the *istishna'* contract by the PSAK to be complicated. Islamic banks that have *istishna'* financing products have different mechanisms. Reviewing the application of *istishna'* financing, which was previously less than optimal, is one of the efforts of Islamic banks to increase the use of *istishna'* financing. By reviewing it, this *istishna'* contract can be renewed again so that the mechanisms implemented by all Islamic banks are uniform and can make new provisions according to sharia principles to minimize previous risks so that in the future,

the istishna' contract can help develop the Islamic economy in Indonesia (Wijayanti, Waluyo, & Fatah, 2021).

An example of applying the *istishna'* contract in Indonesia is used in financing Public Housing Loans (KPR). In practice, the istishna' contract used in mortgages is *istishna'* parallel. The financing uses consumers who want to build a house to come to the bank and order a home with certain specifications. Then consumers and banks make deals on the handover of houses, selling prices, and payment mechanisms. In this case, the bank does not act as a development company, but the bank orders the developer to make the same house ordered by the consumer. With this contract, buying and selling can begin to be carried out even though the object of buying and selling has yet to be created.

***Istishna's* contract in Malaysia**

Malaysia is a relative of the Indonesian family, which has a plural and heterogeneous cultural diversity. Malaysia also has a variety of cultures, ethnicities and religions. The number of religious groups in Malaysia is very diverse, including Islam, Buddhism, Christianity, Hinduism, Confucianism, Taoism, and Chinese traditional beliefs. However, the most widely professed faith is Islam. Malaysia is a leading country in the development of Islamic finance. Malaysia leads the financing market in terms of volume and innovative and competitive sukuk structure variations to attract a broader range of investors (Melis, 2017).

Malaysia has a strategy that focuses on developing the Islamic financial system comprehensively. To become a global financing transaction hub, Malaysia focuses its strategy on creating a conducive environment, namely:

1. Facilitative regulation
2. Provision of a comprehensive infrastructure
3. Incentives in investment activity
4. Innovative structure and provision of human resources
5. Competitive pricing
6. Clear sharia framework

In Malaysia, *istishna's* financing contracts need to be more utilized than another financing. Only 1,225 billion use *istishna'* contracts. For Islamic banking, this contract is recommended to be concentrated on industrial development (M. F. Ibrahim & Kamarudin, 2014). Islamic banking as a financial institution has become obligated to follow the rules that SAC BNM has made in its banking activities. Islamic banks of Malaysia use *bai' bithaman ajil* agreements in their application which have been regulated in the *Fatwa Shariah* Resolutions In Islamic Finance of Shariah Advisory Council of Central Bank of Malaysia. Islamic financial institutions must market Istishna's contract to be better known to the public. It can be used to finance certain transactions, especially housing financing. Since in istishna', the price does not have to be paid in advance, nor does it need to be paid at the time of delivery (it can be postponed at any time according to the agreement of the parties). Therefore the time of payment can be determined in any way they wish. The price is also in instalments (Usmani, 2012).

Istishna' is one of the contemporary innovation products in Malaysia. Kuwait Finance House Malaysia Berhad was the first bank to initiate *istishna'* in Malaysia. Scholars agree on the ability of sharia to contract *istishna'*. The first contract is an agreement between the buyer and the bank, the second contract is an agreement between the bank and the seller. *Istishna'* is a special buying and selling contract. There are three main buying and selling agreements in traditional Islamic fiqh, from a financing perspective. *First*, is the general contract of sale, where the goods and the price of the money are exchanged simultaneously. *Secondly*, there are no loans involved for either the seller or the buyer. *Thirdly*, if sold at a suspended price, the seller finances the buyer, since he gives his goods now, at a price that will have to be paid later.

Speaking of *istishna'*, this contract can be used to provide financing facilities for certain transactions, especially in the Islamic home financing sector. *Istishna'* is a buying and selling agreement that involves the manufacture, production or construction of certain assets with the specifics of the conditions agreed between the seller, developer and customer. Currently, in Malaysia, parallel *istishna'* (better known as *al-istishna' muwazi*) is used in the manufacturing and construction sectors (Rahman, 2009). *Istishna's* contracts place a moral obligation on producers to produce goods. Either party may cancel the contract before any work begins after giving sufficient notice. However, the contract cannot be unilaterally cancelled if work has already started (Rahman, 2008).

IV. CONCLUSION

Based on the research, there is no significant difference between the two in the application of the *istishna'* contract in Indonesia and Malaysia. This is because the use of contracts is equally used by manufacturing. The development of the *istishna'* contract in Malaysia in terms of emission value and the benefit amount is relatively slow. Meanwhile, in Indonesia, *istishna's* contract has reached 21 billion users. There are many challenges in developing *istishna'* contracts, ranging from sharia aspects, legal frameworks, regulations, and markets, to product complexity. This is reasonableness because *istishna's* contracts can be categorized as new products integrated into established conventional financial institutions.

Based on these research and conclusions, the author suggests that Islamic financial institutions also need to review the application of the previous *istishna'* agreement because the mechanisms between Islamic banks are different, which needs to be uniform. In addition, it is hoped that Islamic banks will increase the quality and quantity of competent human resources in their fields to carry out more intensive socialization to the public to increase financing with *istishna'* agreements.

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