

# TAFRIQ AL-HALAL 'AN AL-HARAM THEORY IN THE SELECTION OF SHARIA STOCKS: The Comparative Study in The Sharia Capital Market in Indonesia and Malaysia

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## ***Abstract***

*Sharia stock is the Islamic capital market's instrument used as a proof of a company's shareholder ownership. It must be in line with the Quran, Sunnah, and Ulama's ijtehad. To include a company's shares in the sharia category, there are several criteria and screening processes taken by the issuer. This study examines and analyzes tafriq halal wal haram theory in the screening process of the Indonesian Islamic capital market and compares it to Malaysia. Comparative approach and content analysis were used here. Qualitative method investigates whether the company involves in riba activities, gharar, producing non-halal products, gambling, and so forth. This is a normative study to review Indonesia Financial Services Authority regulations and stock exchange regulations. The results indicate that the Indonesian Sharia Capital Market uses an interest-based debt ratio limit compared to a maximum total asset of 45% while Malaysia uses a 20% limit, and the ratio of non-halal income to total income should not be more than 10%. This study can be the reference for Muslim countries to apply the theory of tafriq halal 'an haram in the selection of sharia stocks in sharia capital market.*

*Sabam syariah adalah instrumen pasar modal syariah yang digunakan sebagai bukti kepemilikan*

*pemegang saham suatu perusahaan. Hal tersebut harus sejalan dengan Al-Qur'an, Sunnah, dan ijtihad Ulama. Untuk memasukkan saham perusahaan dalam kategori syariah, ada beberapa kriteria dan proses penyaringan yang dilakukan emiten. Penelitian ini mengkaji dan menganalisis teori tafriq halal wal haram dalam proses penyaringan pasar modal syariah Indonesia dan membandingkannya dengan Malaysia. Kedua negara menggunakan metode kualitatif dan kuantitatif dalam proses penyaringan stok. Metode kualitatif menyelidiki apakah perusahaan terlibat dalam kegiatan riba, gharar, memproduksi produk yang tidak halal, perjudian, dan sebagainya. Kajian ini merupakan kajian normatif untuk mengkaji fatwa dan peraturan OJK dan peraturan Bursa. Pendekatan komparatif dan analisis isi digunakan di sini. Hasil penelitian menunjukkan bahwa Pasar Modal Syariah Indonesia menggunakan batas rasio utang berbasis bunga dibandingkan dengan total aset maksimum 45% sedangkan Malaysia menggunakan batas 20%, dan rasio pendapatan non-halal terhadap total pendapatan tidak boleh lebih 10%. Artikel ini dapat dijadikan sebagai rujukan negara muslim untuk membuat tafriq halal 'an haram dalam melakukan seleksi saham syariah pada pasar modal syariah.*

**Keywords:** *capital market, sharia stocks, tafriq al-halal 'an al-haram*

## Introduction

Capital Market transactions are permitted as long as they are in line with sharia principles and do not involve in various prohibited practices such as *riba* (usury), gambling (*maysir*), *gharar*, hoarding (*ihthakar*), and others. The existence of a Sharia Capital Market that is in accordance with sharia principles has an important role in economic growth and in realizing the objectives of sharia (*maqashid shari'ah*). Stocks in Islam are part of investment activities. As long as it is not against the sharia principles, every legal transaction is "permissible". Screening is an effort to maintain sharia principles on stock in the sharia capital market. It has two stages, namely, screening *li zatibi* and screening *li ghairibi haram*.

The two methods mentioned above are commonly used in Indonesia. Each country has a different approach in carrying out this screening process, yet, they are similar in employing qualitative and quantitative methods in the stock screening process in the capital market. In Indonesia, for example, DSN-MUI (National Sharia Board-Indonesian Ulama Council) stipulates and regulates the screening pattern using the *tafriq halal 'an haram* written in the so-called fatwa.

The pattern of *tafriq halal 'an haram* in the implementation of stock screening in the capital market is quite interesting, considering the different businesses of issuers, which consist of various elements of substances, both in the form of liquids that are easily mixed or dissolved and others. In addition, the issuer as a legal entity owning the capital, is also connected to conventional interest-based financial institutions, because access to capital in Indonesia is still

dominated by conventional financial institutions. This current study examines and analyzes the use of the *tafriq halal 'an haram* in screening sharia shares and the approaches, as well as the *halal* quality it produces.

The fatwa issued by the DSN-MUI related to sharia capital market activities has a significant role in shaping the Islamic capital market based on the Indonesian business climate characteristic. In addition, DSN-MUI also conducts strategic cooperation with The Indonesia Financial Services Authority (known as Otoritas Jasa Keuangan/OJK) so the fatwas regarding the Islamic capital market are converted into the Indonesia Financial Services Authority regulations. This will provide legal certainty for market players in carrying out Sharia securities transactions in the Indonesian Islamic capital market. The existence of this fatwa institution is similar in both countries, Indonesia and Malaysia.

There have been many studies on the sharia stocks done by previous researchers, both in Indonesia and Malaysia. Deri Siswara writes that there is a relevance among dominant economic, geographical, and trade relations in influencing the integration of the Islamic stock market.<sup>1</sup> Nita Nurafati states that based on the regression test results, it is known that sharia stock variables contribute positively and insignificantly to economic growth in Indonesia. Meanwhile, *sukuk* variables contribute positively and significantly to economic growth in Indonesia. Furthermore, Islamic mutual fund variables contribute negatively and insignificantly to economic growth in Indonesia. When tested with sharia stock variables, sharia *sukuk* and mutual funds contribute positively and significantly to the Indonesian economic growth.<sup>2</sup> In another study, M. Kabir Hassan and team show that Islamic stocks are less prone to the leverage effect since there is the upper limit of debt financing imposed by sharia (quantitative) screening.<sup>3</sup> These previous research studies are different from the object of this study since they did not discuss the *tafriq halal 'an haram* theory as a method to answer issues in the sharia capital market. Thus, this study will cover the gap and compare the implementation of the mentioned theory in the Malaysian and Indonesian sharia capital markets.

1 Deri Siswara, The Integration of Islamic Stock Markets of OIC Countries in China Stock Market Crisis and US-China Trade War. *Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah* Volume 13 Number 1 (2021).

2 Nita Nurafati, Perkembangan Pasar Modal Syariah Dan Kontribusinya Terhadap Pertumbuhan Ekonomi Di Indonesia, Perkembangan Pasar Modal Syariah Dan Kontribusinya Terhadap Pertumbuhan Ekonomi Di Indonesia, *Jurnal Inklusif: Jurnal Pengkajian Penelitian Ekonomi dan Hukum Islam*, Vol. 4 Number 1 (2019).

3 M. Kabir Hassan, Sirajo Aliyu, Buerhan Saiti, Zairihan Abdul Halim, A review of Islamic stock market, growth and real-estate finance literature, *International Journal of Emerging Markets* Vol. 16 Issue 7 (2021).

## Research Methods

This study uses normative legal research examining literature sources as legal materials that become media for analyzing problems. This study also applies comparative and conceptual approaches. The data for the study are (a) primary legal materials i.e. laws, the Indonesia Financial Services Authority regulations, Bapepam-LK (The Capital Market Supervisory Agency and Financial Institution) regulations, and fatwa of DSN-MUI; (b) secondary legal materials i.e., the Regulations of the Minister of Finance; and (c) tertiary legal materials i.e., the exchange regulations.<sup>4</sup> The analytical technique used in this research is content analysis. This technique is used to analyze the collected materials to answer the problems using indicators. The indicators are several theories and concepts chosen as analytical tools in reviewing this paper. The analysis approach is carried out by aligning the problems with the literature used as a reference through narrative arguments.

## Discussion

According to the Indonesia Financial Services Authority (Financial Services Authority) regulation Number 35/POJK.04/2017 concerning The Criteria and The Issuance of Sharia Securities List, sharia shares must accord with Islamic principles.<sup>5</sup> In fact, the concept of shares is similar with *syirkah* or *musyarakah*. *Syirkah* is a concept of cooperation done by two parties involving the rights to business production sharing. Due to the concept, the applied method is called *al-ghurmu bil ghurmi*. It means that along with the benefits, there is a risk that must be borne by both parties involved in *syirkah* agreement, depending on the portion of the ratio set at the beginning.

Ibn Nujaim states that one must avoid dangers in the field of property (also included in *mu'amalah*). Based on this, the scholars formulated a method called *ad-dhararu yuzal*. This method requires that all human's activities should be harm-free, where usually some harms are caused by the human himself. This is in line with the statement of Qal'ahaji that the purpose of *mu'amalah* activities is to give benefits for human life.<sup>6</sup>

4 Salim dan Nurbaini, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta: Rajagrafindo, 2013), 30.

5 POJK No. 35/POJK.34/2017 concerning The Criteria and The Issuance of Sharia Securities List.

6 Muhammad Rawwas Qal'ahaji, *al-Mu'amalat al-Maliyah al-Mu'ashirah fi Dhawi al-Fiqh wa al-Syari'ah* (Jordan: Dar al-Nafais, 1999), 1<sup>st</sup> published, 11.

The object of the shares transaction is the company's ownership. Therefore, shares can only be issued by companies or corporations, not the state. The relationship between investors and companies issuing stock (issuers) is an ownership relationship so that investors are the owners or the shareholders of a company, which then investors will get dividends.<sup>7</sup> Based on Prasetyo<sup>8</sup> and Abdalloh,<sup>9</sup> Indonesian Islamic capital market acknowledges two types of sharia shares, first, shares that pass the selection of shariah shares (also called as active shares), and second, issuers' shares. Those claiming to be companies which comply with sharia principles are called sharia issuers, which are called passive sharia shares. According to Abdalloh<sup>10</sup> the category of active sharia shares is still very limited in Indonesia.

Neneng Hartati concludes that the concept of shares is in accordance with sharia principles, which is similar with *syirkah* or *musyarakah* concept, in the form of *bai' musahamah* (stocks trading).<sup>11</sup> Investment is in accordance with sharia principles and state laws because the development of assets is one of the realizations of *maqasid sharia (hifdz al maal)*. However, Zamir Iqbal claims that the element of *gharar* is actually still found in stock transactions in the capital market.<sup>12</sup> This is understandable because the transaction is based on a fundamental analysis of economic variables and it is subject to an acceptable level of uncertainty. For that, to conduct the stock screening that violates Islamic law is important.

However, not all shares can be categorized as sharia shares. They can be included in the category if they are issued by<sup>13</sup> (a) companies which in the articles of association state that their business are based on sharia principles, for example shares of PT. Bank Muamalat Indonesia Tbk., PT. Bank Panin Dubai Syariah Tbk., and PT. Sofyan Hotel; or (b) companies that do not declare they do sharia-based business but meet the criteria of sharia shares determined by Indonesia Financial Services Authority. The criteria for selecting or screening

7 Abdalloh Abdullah, *Pasar Modal Syari'ah* (Kompas Gramedia, 2018), 81.

8 Yoyok Prasetyo, Rasio Keuangan Sebagai Kriteria Saham Syariah, *Jurnal EKUBIS (Ekonomi, Keuangan dan Bisnis)* Vol. 1 No.2 (2017), 20.

9 Abdalloh Abdullah, *Pasar Modal Syari'ah*, 90.

10 Abdalloh Abdullah, *Pasar Modal Syari'ah*, 90.

11 Neneng Hartati, Investasi Saham Syariah di Bursa Efek Indonesia dalam Perspektif Hukum Ekonomi Syariah, *J-HES Jurnal Hukum Ekonomi Syariah* Vol. 05 Nnumber 01 (2021), 45.

12 Zamir Iqbal, *An Introduction to Islamic Finance: Theory and Practice* (Jhon Wiley & Sons, Singapore, 2007), 68 and 173.

13 Neneng Hartati, Investasi Saham Syariah di Bursa Efek Indonesia dalam Perspektif Hukum Ekonomi Syariah, 49.

sharia shares are ruled in the Indonesia Financial Services Authority Regulation No. 35/POJK.04/2017 concerning The Criteria and The Issuance of Sharia Securities List. The criteria are also in line with the Fatwa of DSN-MUI No. 40/DSN-MUI/X/2003 concerning The Capital Market and The General Guidelines for the Implementation of Sharia Principles in the Capital Market Sector.

### **Selection Criteria for Sharia Stocks in Indonesia and Malaysia**

Ramadhani and Aziz state that there are many differences in the screening process. It is due to legal differences in various countries, different regulators, and capital market authorities, thus, providing different indicators for determining sharia principles.<sup>14</sup> In general, the criteria for sharia shares in Indonesia and other countries consist of two selection components, those based on business activities and financial ratios. For the selection of business activities, there is relatively no significant difference from the criteria of sharia shares. The criteria is that the shares must be issued by a company that is not engaged in *riba* finance, risk trading, gambling, and production of non-halal food and beverages. Meanwhile, from the selection of financial ratios, there are different criteria for sharia shares in several countries or sharia index providers. This is understandable because the financial ratios are the result of *ijtihad* of each country's experts or the provider of the sharia index. One of the *ijtihad* considerations is the general condition of the company in each country.<sup>15</sup> Therefore, the components of the financial ratio are flexible and changeable according to circumstances.

Currently, the criteria for sharia shares in Indonesia is regulated in the Financial Services Authority No. 35/POJK.04/2017. The regulation states that the Indonesian Capital Market uses three stages of sharia stock selection. The first stage is the selection of *halal* or *haram* type of issuer's business. Meanwhile, the second and third stages are related to the amount of *riba* by the company in managing its business. The criteria currently used by Indonesia Financial Services Authority to select sharia shares are, (a) issuers or public companies do not carry out business activities or produce goods/services that are not in accordance with sharia principles, such as *maysir* (gambling), *riba*, *riswah* (bribes), and cigarette companies; (b) the ratio of *riba*-based debt to the company's total

14 Ahmad Ramadani, Ahmad Amir Aziz, Telaah Perbandingan Model Business Screening dan Financial Screening indeks Saham Syariah Global lalu, *Iqtishaduna*, Vol. 9 No1. (2018), 33.

15 Ahmad Ramadani, Ahmad Amir Aziz, Telaah Perbandingan Model Business Screening dan Financial Screening indeks Saham Syariah Global lalu, 34.

assets is not more than 45%. What is meant by *riba*-based debt is corporate debt originating from conventional banking, bond issuance, or other debts that have interest calculations. The company's source of funds originating from sharia-based financing is excluded from the calculation, because it is not *riba*-based debt e.g. when companies issue *sukuk* or take loans from Islamic banks. This ratio measures how big the ratio of *riba* to the company funds source used for business activities; and (c) the ratio of total interest income and other non-halal income compared to total operating income (*revenue*) and other incomes is not more than 10%. This ratio measures how much the ratio of *riba* to the company's sources of income is.<sup>16</sup>

There are various methodologies used in selecting Islamic stocks in various countries. However, in general, the methods have similarities, namely using business activity criteria (*business screening*) and company financial ratios (*financial screening*). The selection is done by, first, regulators such as the government of Indonesia and Malaysia. Second, the selection is conducted by index providers such as Morgan Stanley Capital International (MSCI), Dow Jones Islamic Market (DJIM), and the Financial Times Stock Exchange (FTSE).

The Shariah Advisory Council (SAC) of The Securities Commission Malaysia adopted two main approaches, namely quantitative and qualitative, in determining the sharia status of securities list. When determining the sharia status of securities listed on the *Bursa Malaysia*, the contribution of sharia non-compliant activities to the company's profit before tax will be calculated and compared with the relevant benchmarks of business activities so it does not exceed 5%. The 5% benchmark business activities are, (a) conventional banking and loans; (b) conventional insurance; (c) gambling; (d) liquor-related business; (e) pork-related business; (f) non-*halal* food and beverage; (g) non-compliant daily entertainment; (h) tobacco-related business; (i) interest from conventional accounts and instruments; (j) the awarded interest from a court judgement or arbitrator; (k) dividends from sharia non-compliant investments; and (l) other sharia non-compliant business activities determined by the SAC. Furthermore, there is the 20% benchmark which is applicable for, (a) share trading; (b) stockbroking business; (c) rental received from non-sharia activities; and (d) other activities categorized as non-sharia decided by the SAC.<sup>17</sup>

16 Abdalloh Abdullah, *Pasar Modal Syari'ab*, 92.

17 Securities Commission Malaysia, *Resolutions of The Sharia Advisory Council of The Securities Commission Malaysia*, 2021. 171-172.

### Classification of Islamic Law

Ibn Qoyyim classifies Islamic law into two parts; first, Islamic law which is static-permanent (*tsabitat*) and second, Islamic law which is dynamic (*mutaghayyirat*). Permanent Islamic law is a law that does not change from its original position. This type of law cannot be renewed despite the changes in social aspect, cultural aspect, economic aspect, etc., for example, related to faith, worship of *mahdhab* (in the forms of speech and behavior), and so on. The door of *ijtihad* is closed against permanent law. Meanwhile, dynamic law is defined as a law that changes following the changes in socio-cultural aspect, economic aspect, and so on. For this type of law, sharia has provided an opportunity to make changes in accordance with the benefits.<sup>18</sup>

It is a sign of change in society. This statement is interesting to note because the Prophet Muhammad PBUH once said that every one hundred years (one century), some people make a renewal for the understanding of religious teachings. This means that every hundred years, some religious experts will correct previous legal fatwas which are considered no longer relevant due to social, cultural, and economic aspects as well as other changes. Surely, not all Islamic law can change due to changes in socio-economic, culture, economy, etc. In this case, as previously mentioned, Ibn Qoyyim classifies Islamic law into *tsabitat* and *mutaghayyirat*, so it will change when the *'illah* does too.

Therefore, the law in sharia economics is a large area for conducting *ijtihad* since its development is very rapid. It has not been discussed by previous scholars and there are still few contemporary Fiqh experts' opinions on this issue. For reforming Islamic law (Fiqh), the scholars have actually provided a solid *manhaj*. Understanding Fiqh that is limited to a collection of Islamic law is not in accordance with religious teachings. Thus, the renewal of Islamic law is a necessity, especially in this rapidly changing era. The extraordinary movement of change, as a result of advances in industry, trade, service, contractual agreement, technology, communication, and others, requires constant development and renewal in Islamic law.

In sharia capital market activities, particularly, a pattern is needed to identify stocks that are in accordance with sharia principles, requiring a screening method by separating *halal* and *haram* funds. Puspita<sup>19</sup> and Anand revealed that

18 Ma'ruf Amin, *Solusi Hukum Islam (Makharij Fiqhiyyah) sebagai Pendorong Arus Baru Ekonomi Syariah di Indonesia (The contribution of fatwa of National Sharia Board-Indonesian Ulama Council in Laws and Regulation of the Republic of Indonesia)* 2017.

19 Indria Puspitasari Lenap, Pengungkapan Pendapatan Non-Halal: Psak 109 Vs Praktik, *Jurnal Aplikasi Akuntansi* Vol. 3 No. 2 (2019), 20.



Islamic financial institutions have been disclosed non-*halal* funds since 2015 as in accordance with PSAK 109, but they were not able to trace the origin of these non-halal funds.

### The Theory of *Tafriq Al-Halal 'An Al-Haram* in the Selection of Sharia Stocks

Anand, et al.<sup>20</sup> reveal the theory of *tafriq al-halal 'an al-haram*, which was developed with the consideration that Islamic economic activities, in the Indonesian context, cannot be completely separated from the conventional economic system which is usurious. At least, they are related in terms of capital, product development, and profits. The separation of *halal* and *haram* can be performed if one focuses on what is forbidden, and it is not considered *haram* because of its substance (*haram lidzatibi*). This theory can be formulated into a statement saying that property or money is not *haram* because of its substance in the perspective of Fiqh, but it is *haram* because the method used to obtain it is not in accordance with sharia (*ligairih*).

The rules regarding *halal* and *haram* that have been stated above are the rules used by scholars in determining something that is not legally determined in the Quran and Sunnah. The problem which was later developed by the ulama was about the mix of what was lawful and what was not. In order to explain the law regarding the mix of *halal* and *haram*, the ulama revealed the rule stating that, “*idza ihtama' al-halal wa al-haram ghuliba al-haram* (if it is a mixture of *halal* and *haram*, then it is considered *haram*)”. The rule is derived from a hadith quoted in al-Qaradhawi's book, “*There is nothing mixed between what is lawful and what is unlawful, except that what is forbidden overpowers what is lawful.*”

However, the quality of the hadith does not reach the degree of *sabeeh* (valid). Abu al-Fadhl al-Iraqi argues that the source of the hadith is not clear (*la ashl lah*). Al-Subki, quoted the aforementioned hadith from Imam al-Baihaqi as narrated by Jabir al-Ju'fi, whereas in fact, al-Ju'fi's track record is weak (*dha'if*). Al-Subki explained Nevertheless, al-Subki argues that the rule of “*idza ihtama' al-halal wa al-haram ghuliba al-haram*” is substantively authentic although the hadith used as a reference is weak, in terms of the narration line.<sup>21</sup> The rule is also

20 Ghansam Anand, Kukuh Leksono S. Adity, Bagus Oktafian Abrian, Problematika Aplikasi Ekonomi Syariah Dalam Rezim Hukum Kepailitan Di Indonesia, *Jurnal Bina Mulia Hukum* Vol. 2, Number 1, 67-79. DOI: 10.23920/Jbmh.V2n1.6 website: [Http://jurnal.fh.unpad.ac.id/I](http://jurnal.fh.unpad.ac.id/I)

21 Yusuf al-Qaradhawi, *al-Halal wa al-Haram fi al-Islam*, p. 38-39.40 Jalal al-Din Abd al-Rahman Ibn Abi bakr al-Suyuthi, *al-Asybah wa al-Nazha'ir fi Qawa'id wa Furu' Fiqh al-Syafi'iyah* (Beirut:

related to *ushul*, which is a contrary proposition (*ta'arudh al-adillah*). In the rule of *ushul*, it is stipulated that if there are two contradictory propositions—where one stipulates something as *haram* (forbidden) and the other proposition allows it—then, the proposition forbidding it will be used.<sup>22</sup>

The discussions about mixing lawful things with unlawful things or mixing unclean things with holy things, as a part of discussions about the rule of “*idza jytama ‘al-halal wa al-haram ghuliba al-haram*”, continue to roll among experts in Islamic law. Shaykh al-Islam Taqiy al-Din Ahmad Ibn Taimiah al-Harani (d. 728 H), better known as Ibn Taimiah in Indonesia, is strongly believed to enrich the mentioned rule by creating a new rule as an “extension”. Jaih Mubarak states that this rule is considered applicable for liquid and soluble objects. Therefore, the mix of *halal* and *haram* objects or the mix of sacred and unclean objects, if it is liquid object, it will be dissolved and hard to separate.<sup>23</sup> Meanwhile, the mixing of *halal* and *haram* objects that is not liquid can be carried out using another approach or rule.

Ibn Taimiyah has shared his opinion regarding transactions which is allegedly contained *riba*. It is considered *halal* if the dominant object is *halal*, unless the dominant is *makruh*. If someone sells 1,000 for 1,200, then what is *haram* is only the margin. If one’s income consists of mixed *halal* and *haram* funds, then the *haram* part does not affect the *halal* one. He/she can take the *haram* part as if the funds belong to two *syariks* (the parties involving in an agreement)—the *syirkah* funds are divided into two *syariks*. In short, if *halal* funds are mixed with *haram* ones, the *haram* part can be removed so the rest becomes *halal*.

Ibn Taimiyah<sup>24</sup> was asked about two things. The first one is the legal status of the property of an entrepreneur whose majority of his wealth comes from the proceeds of the business sectors that are unlawful, including entertainment

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Dar al-Kitab al-‘ Arabi. 1987), p. 209. Ibn Nujaim explains the same thing, see Zain al-Abidin Ibn Ibrahim Ibn Nujaim, *al-Ayyabah wa al-Nazha’ir ‘ala Madzhab Abi Hanifah al-Nu’man* (Cairo: Mu’assasah al-Halabi wa al- Syirkah, tt),

22 Ma’ruf Amin, *Solusi Hukum Islam (Makbarji Fiqhiyyah) sebagai Pendorong Arus Baru Ekonomi Syariah di Indonesia (Contribution of Fatwa DSN-MUI in the Legislation of the Republic of Indonesia)* 2017, 43.

23 Proceedings of Sharia Economics Thematic Training for Religious Court Judges, Bureau of Recruitment, Advocacy and Capacity Enhancement of Judges of the Judicial Commission of the Republic of Indonesia © 2013, 47.

24 Judicial Commission, Proceedings Sharia Economics Thematic Training for Judges of Religious Courts, Bureau of Recruitment, Advocacy and Capacity Building for Judges of the Judicial Commission of the Republic of Indonesia © 2013, 45.

businesses involving *striptease* or gambling. The second one is the legal status of the assets of leaders who obtain assets illegally (through corruption or gratuities). In answering these questions, Ibnu Taimiyah explained that if the property of the entrepreneur or leader is mixed between lawful and unlawful assets because of the business sector, it is considered as *syubhat*. Then, it should not be condemned as *haram* unless the prohibition is known for sure. Also, it should not be considered *halal* unless the *halal*-ness is known for certain. If the majority of their assets include lawful assets, then it should not be considered unlawful; whereas, if the majority of their assets include unlawful assets, then they may be considered unlawful. If their assets consist of unlawful and lawful elements, and everything has been mixed (*ikhtilath*), then the unlawful property is legally forbidden and the lawful property is legally accepted. What may be used is the lawful property through sorting (separating) and/or taking the property based on the analysis. Factual property, including assets obtained in a lawful way may be used. The explanation is then framed in the rule, “*man ikhtalatha bi malibi al-halal wa al-haram ukhrijja qadr al-haram wa al-baqi halal lah* (anyone whose wealth is mixed of lawful and unlawful assets, removes the rate of unlawful assets, then the remaining [after the rate of unlawful assets is separated and/or removed] is legal for him)”.<sup>25</sup>

Ibn Arabi al-Maliki, in the book of *Ahkam al-Qur'an*, gives a statement that is in line with the rules of Ibn Taymiyyah and he even criticized the opinion, “if *halal* property is mixed with the *haram* one and it is inseparable, the *haram* substance should be taken/separated. Afterwards, the remaining non-*halal* property cannot be considered *thayyib* because the part taken maybe *halal* and the rest is *haram* property”. He asserted that this opinion is an excessive attitude in implementing a deviation from the teachings of Islam (*ghubww fi al-din*).

Athiyah Adlan Athiyah Ramadhan, in the book entitled *Mausu'at al-Qawa'id al-Fiqhiyyah*, also shares his thought on Ibn Taymiyyah's opinion. He states that if such condition happens, then there are two things that can be considered. First, if the substances can be separated, then the *haram* substance must be removed. Second, if the mixed substances are indivisible (e.g. money), then it must be calculated carefully. Afterward, the content of the unlawful portion must be separated, and the rest is considered lawful. The unlawful part of the property obtained in a way that is not allowed by Islamic law, must be returned to its rightful owner. If the owner is nowhere to find, the property will be donated in the name of the owner.

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25 Nur Chamid, *Jejak Langkah Sejarah Pemikiran Ekonomi Islam* (Yogyakarta: Pustaka Pelajar, 2010), 230

Ramadhan<sup>26</sup> explains the accuracy of the use of two rules that seem somewhat *ta'arudh* (contradict). The first one is the statement “*idzā ijṭama ‘al-baḥāl wa al-haram ghuliba al-haram*” and the second one is “*man iḥṭalatha bi malibi al-baḥāl wa al-haram uḥbrija qadr al-haram wa al-baḥāl ḥalal lab*”. The principle of the former statement is used against the mixing of property that can no longer be distinguished or separated from one another, either essentially or legally. Meanwhile, the latter is used against the mixing of property that allows differentiation or separation between one and another. He considered this method fair and moderate (*al-‘adl wa al-wasath*) as well as in line with the characteristics of Islamic law which is full of convenience (*yusr al-syari‘ah al-Islamiyah*). The companies listed in Sharia shares in Indonesia still use corporate debt with an interest mechanism. In Islamic economics, the interest system is prohibited. However, since its use is still difficult to avoid, DSN-MUI agreed to limit the amount of debt with the interest system. The limit on the amount of debt that still uses the interest mechanism is different in the sharia index.<sup>27</sup>

The interest tolerance limit on debt in the US and Malaysia is 33%. This indicates that the tolerance limit of the two countries is smaller than Indonesia which is 45% or the equivalent of 0.82. Hence, the level of corporate debt needs in Indonesia is relatively higher; so, companies provide funds for operations with loan funds that are still dominant with the interest system. The high tolerance limit in Indonesia indicates that the number of companies listed on the stock exchange is still small. Such flexibility can provide a greater opportunity for companies to be listed as sharia shares. Such considerations are better understood as a form of benefit in investing based on sharia.

Interest-based debt of 45% is attributed to the opinion of Imam Al Ghazali who said that a venture capital must be greater than debt. DSN-MUI explains that the concept used to determine the percentage is *tafriq al ḥalal wa al-haram*, which means to separate the *ḥalal* from the *haram*, and the *ḥalal* portion must be greater than the *haram* portion.

The tolerance of non-*ḥalal* income in companies incorporated in the Sharia capital market in Indonesia refers to the opinion of scholars. Ibn Taymiyyah argued that if there is a mix of *ḥalal* and *haram* property, then the *haram* property does not change the *ḥalal* property into *haram*. Illegal property should be removed so that it becomes *ḥalal*.<sup>28</sup>

26 Athiyah Adlan Athiyah Ramadhan, *Mausu‘ah al-Qawa‘id al-Fiqhiyyah alMunazḥamah li al-Mu‘amalat al-Maliyah al-Islamiyyah wa Dauruha fi Tawjib al-Naḥm alMu‘ashirah* (Iskandariyah: Dar al-Aiman. 2007), 279.

27 Syafiq M. Hanafi, Comparison of Shari‘ah Criteria on Shari‘ah Stock Indices of Indonesia, Malaysia and Dow Jones, *Ay-syariah: Journal of Shariah and Law* Vol. 45 No. II, 2011.

28 Rusihd Siddiqui, Husain Shihattah. Rushdi Siddiqui, *Islamic Index: The Djim Frimework In*

## Conclusion

The selection of Sharia Stocks (stock screening) in the Indonesian Islamic capital market uses two selection methods so that they can be categorized as Sharia; those are qualitative and quantitative screening. Qualitative selection, according to the company's business activities, consists of *Riba* and *Gharar*, producing non-*halal* products, gambling and games, and other prohibited immoral activities. Whereas, the quantitative method is assessed from the structure or financial ratios set by regulators or institutions.

Related to the financial ratio, it is regulated in POJK No. 35/POJK.34/2017 concerning The Criteria and The Issuance of Sharia Securities List, and the fatwa of DSN-MUI 40/DSN-MUI/X/2003. Indonesian Islamic Capital Market uses an interest-based debt ratio limit, which is compared to a maximum total asset of 45%. Meanwhile, Malaysia uses a limit of 20%, and the ratio of non-halal income to total income should not be more than 10%. Malaysia uses a limit of not more than 5%. This condition is quite logical knowing that the corporate financing ecosystem in Indonesia is still dominated by the conventional system. On one hand, Malaysia puts a lower ratio than the Indonesian capital market since the sharia shares listed on the Malaysian stock exchange have reached 70%.

The selection of Sharia Shares in the Indonesian Islamic Capital Market uses the method of *tafriq halal 'an haram, man ikhtalatha bi malibi al-halal wa al-haram ukbrija qadr al-haram wa al-baqi halal lab*. It is understood that halal and haram properties that are mixed are still possible to be separated.

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