CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 65/PUU-XIX/2021

Concerning

Authority of the Indonesian Ulema Council (*Majelis Ulama Indonesia* or MUI) in Establishing Sharia Principles *Fatwa* (Decision) on Sharia Banking Activities

Petitioner	:	**Rega Felix**
Type of Case	:	Judicial review of Law Number 21 of 2008 concerning Sharia Banking (Law 21/2008) against the 1945 Constitution of the Republic of Indonesia
Subject Matter	:	Judicial review of Article 4 paragraph (2) and paragraph (3), Article 1 number 12 and Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 against Article 1 paragraph (3), Article 28D paragraph (1), Article 28H paragraph (2), Article 28H paragraph (4) of the 1945 Constitution
Verdict	:	To dismiss the Petitioner's petition entirely.
Date of Decision	:	Wednesday, August 31, 2022
Overview of Decision	:	

Whereas the Petitioner in the *a quo* petition explains his qualifications as an individual Indonesian citizen who works as an advocate and is a customer of an Islamic bank and applies for a financing facility to an Islamic bank based on a *Murabahah* contract. The Petitioner argues that he has constitutional rights as stipulated in Article 1 paragraph (3), Article 28D paragraph (1), Article 28H paragraph (2), Article 28H paragraph (4), and Article 28I paragraph (5) of the 1945 Constitution. The constitutional loss of the Petitioner was caused by the rigidity of Law Number 5 of 1960 concerning Regulations of Basic Agrarian Principles (Agrarian Principles Law) which was inconsistent with land transactions that occurred in society. This situation is exacerbated by the unclear regulation in Law 21/2008, especially the provisions in Article 1 point 12 and Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 which gives a "form delegation" to the Indonesian Ulema Council (*Majelis Ulama Indonesia* or MUI), Bank Indonesia (BI), and the Financial Services Authority (*Otoritas Jasa Keuangan* or OJK) that has been causing legal uncertainty;

In relation to the authority of the Court, because the Petitioner's petition is a petition to review the constitutionality of the norms of the Law, *in casu* Law 21/2008 against the 1945 Constitution, the Court has the authority to adjudicate the *a quo* petition*;*

In relation to the Petitioner's legal standing, according to the Petitioner, Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 is multi-interpretable because it delegates the authority to two different institutions, namely MUI as a non-state institution and BI/ OJK as a state institution. The law which establishes such authority is also different, MUI is an institution that establishes sharia principles while BI/OJK is an institution that sets out sharia principles as mandated by MUI. Due to the ambiguity of the delegation rules in Law 21/2008 it has led to disharmony of legislations which has caused the Petitioners to question

the legal certainty in carrying out sharia banking transactions, whether such action will provide fairness to the Petitioner;

Therefore, without intending to judge the concrete cases as experienced by the Petitioner, the Court is of the opinion that the presumption that the constitutional loss as described by the Petitioner has a causal relationship with the enactment of the norms of the law being petitioned for review. Therefore, regardless of whether or not there is an issue of constitutionality of norms as argued by the Petitioner, the Court is of the opinion that the Petitioner has the legal standing to act as the Petitioner in the *a quo* Petition*;*

Whereas because of this, the Court has the authority to adjudicate the *a quo* petition and the Petitioner has the legal standing to file the *a quo* petition, furthermore the Court shall consider the subject matter of the petition;

Whereas in the argument of the Petitioner's petition, the Petitioner's constitutional rights were harmed because Law 21/2008 did not regulate ownership rights, however in the implementation of Islamic banking transactions, transfers of ownership rights often occur. The dualism of authority with the use of the words "stipulated" and "set out" to two different institutions makes Article 26 paragraph (1), paragraph (2), and paragraph (3) multi-interpretable/ambiguous. As a result of this multi-interpretation nature, in practice OJK often chooses not to stipulate fatwas (decisions) into legislations, but instead uses OJK Circular Letters or Sharia Banking Product Standard Books to stipulate in detail regarding sharia principles which then often used as references by sharia banks in making Standard Operating Procedure (SOP) for sharia bank products;

Whereas before the Court considers the issue of the constitutionality of the norms of Article 1 number 12 and Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008, several things must first be considered, first*,* regarding the existence of Islamic banking which is regulated in Law 21/2008. In this case, the adoption of Islamic banking arrangements in the legal system, *in casu* in the Indonesian banking system, cannot be separated from the empirical fact of the high demand of some Indonesian people for sharia banking services. As a banking entity that is designed differently from other conventional banking, the existence of Islamic banking has a number of differences or specificities compared to conventional banking. One of the specificity of Islamic banking is the obligation of the banking process to comply with the Islamic sharia system. As for the determination of sharia standards in the banking business, it is not under the authority of the bank, but under the authority of religious institution. The placement of the matter of determining sharia principles as a religious institution is inseparable from the constitutional provisions, in this case the norms of Article 29 of the 1945 Constitution. In relation to Islamic banking, for Muslims, carrying out banking activities in accordance with the religious law is certainly part of the way of life in the economic field in accordance with the religion they believe in. In this regard, when legislators facilitate such needs by providing sharia banks, any matters relating to the determination of sharia principles in banking operations surely must be maintained to be under the authority of Islamic religious institution, and not being taken over by the state through another body which was authorized to administer banking. This is because the intended sharia principles are related to the principles of Islamic law, the stipulation of which can only be carried out by scholars who have capacity to do so, and not by bank managers who have authority, "capacity", and limited knowledge in the field of sharia;

Whereas second, the construction of the norms of Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 contains two main content materials, namely: determination of the substance of sharia principles, and with regard to the legal basis in incorporating such sharia principles in the legislations. With regard to these two matters, the determination of the substance of sharia principles is placed under the authority of the MUI, while the embodiment of sharia principles into legislations is placed under the authority of BI/OJK. Doctrinally, the substance of legislations, which is referred to as a source of law in a material sense, can come from various sources such as religious laws, customary law and others. Even though it can come from various material sources, when it is poured into the form of legislations, the material can only be set out by an institution that is explicitly ordered by legislations or established based on authority. The problem is, when the legislators *in casu* the

legislators of Law 21/2008 handed over the authority to determine sharia principles in sharia banking business activities to the MUI, whether such action constitutes a form of mistake that may lead to legal uncertainty so that it must be declared as in contrary to the 1945 Constitution;

Whereas in relation to this issue, in principal it has been answered with the principles and position of Islamic banking which has specificities that are different to conventional banking. These specificities are related to the application of sharia principles in the administration of banking, in which the Islamic religious institution, namely the MUI, is involved. If sharia principles in sharia banking are placed as specificities, then the MUI's involvement does not contain any legal issues as long as it is only limited to issuing fatwas (decisions) related to the sharia principles, which indeed falls under its authority as one of the religious institutions in Indonesian Islamic society. Furthermore, the intended fatwas (decision) related to sharia principles will only be stipulated as regulations if BI/OJK has established it into a BI Regulation/OJK Regulation. If this is to be seen from the perspective of the Indonesian legal system, then it can also be justified. Because, in the establishment of legislations, one of the sources is Islamic law. When Islamic law as outlined in the MUI fatwa (decision) is used as a material source for BI regulations/OJK regulations, then this cannot be considered as a constitutional problem;

Whereas with regard to the existence of the MUI fatwa (decision) in determining sharia principles in the implementation of sharia banking business, various supporting facilities shall be needed, one of which is the role of fatwas shall be issued by trusted institutions and it shall also maintain the credibility among Muslims for the sake of upholding sharia principles in all sharia banking activities that provide legal certainty for the stakeholders. The MUI, which is given the authority to issue fatwas in Islamic banking, is a forum for Muslim religious leaders, *zu'ama* and scholars, and it is an institution that is competent to answer and respond to requests for any fatwas, questions from the government, institutions or social organizations regarding religious and social issues;

Whereas based on Law Number 23 of 1999 concerning Bank Indonesia and Article 8 of Law Number 21 of 2011 concerning the Financial Services Authority (OJK), neither BI nor OJK have the function or authority which can be interpreted as the authority to stipulate the sharia principles, especially in sharia banking as petitioned by the Petitioner. In the absence of authority to stipulate sharia principles as the fundamental basis for sharia banking activities, BI and OJK do not have the competence or resources to assess and provide explanations related to Islamic law as the competencies possessed by the Islamic law experts (*fuqaha).* If the stipulation of sharia principles is submitted to BI/OJK in the PBI (BI regulations) or POJK (OJK regulations) by following the procedures for establishing the legislations in general, BI/OJK will have difficulty in formulating the substance of the PBI/POJK because they have limited knowledge related to sharia substances or principles. That means, by handing over the stipulation of sharia principles in sharia banking to BI/OJK, such thing can be seen as an arbitrary act by the legislators which may lead to chaos in determining the substance of regulations containing sharia principles. In turn, this can also harm the beliefs and the way Muslims practice their religion*;*

Whereas if a fatwa relating to sharia principles is not regulated to be issued by an Islamic religious institution which represents the majority of Indonesian Muslims, *in casu* MUI, it is very likely that it will cause chaos and legal uncertainty. *First,* the specificity of the implementation of sharia banking will disappear. This is because the specific aspect of Islamic banking regulation lies in the aspect of the existence of other organs involved in determining sharia principles. *Second,* the stipulation of sharia principles shall be issued directly by the state, not by any religious institutions that protect the interests of the majority of Muslims. As is well known, Indonesia is not an Islamic state, but a state based on Pancasila which makes religious teachings and values of the One and Only God as a source of law. Because it is not an Islamic state, then how is it possible for the state authorities to determine sharia principles which in fact it is part of the determination of Islamic law. Even though the state has full authority in establishing the laws, when it comes to establishing religious law, *in casu* Islamic banking, the state needs to limit itself by submitting the determination of such legal material to

the religious institutions. In this case, the state shall take on the role of adopting the religious laws that have been stipulated by the religious institutions to become the positive laws that are enforced in the administration of state affairs in the management of Islamic banking;

Whereas based on all of the above legal considerations, the Court concluded that the norms of Article 1 point 12 and Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 did not cause legal uncertainty as argued by the Petitioner. Moreover, the existence of the *a quo* norms has been properly and proportionally placed regarding the determination of sharia principles and their inclusion in legislations. The stipulation of sharia principles through a fatwa by the DSN MUI which is then set out in the PBI or POJK is a manifestation that the state recognizes, respects, protects and facilitates Muslims in carrying out their worships in accordance with their beliefs as contained in Article 29 of the 1945 Constitution;

Whereas regarding the *petitum* of the Petitioner which petitioned for the Court to order the legislators to amend Law 21/2008 regarding material rights in sharia banking transactions or to establish a law that regulates material rights in sharia banking transactions. With regard to such *petitum*, it can be said that the Petitioner has misinterpreted the authority of the Court in reviewing the laws against the 1945 Constitution. Moreover, the arguments leading to the *petitum* have no clear relevance to the norms of Article 1 point 12, Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 which were submitted for review of their constitutionality by the Petitioner. Therefore, the *petitum* and such arguments and any other related matters are irrelevant for consideration by the Court;

Based on the entire aforementioned description of the legal considerations, the Court is of the opinion that the provisions of the norms of Article 1 number 12 and Article 26 paragraph (1), paragraph (2), and paragraph (3) of Law 21/2008 evidently did not create legal uncertainty, injustice, non-usefulness, and obstacles for the Petitioner in accessing sharia banking services as guaranteed by the 1945 Constitution as argued by the Petitioner. Thus, the Petitioner's petition is entirely legally unreasonable, meanwhile any other remaining matters shall not be considered because they are deemed to be irrelevant;

Accordingly, the Court passed a decision which verdict is to dismiss the Petitioner's petition entirely.