

SOVEREIGN *ṢUKŪK* IN INDONESIA:
AN ANALYSIS OF THE ISSUES FROM LEGAL AND
SHARĪ'AH PERSPECTIVES

BY

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ABSTRACT

This study raises issues of *Ṣukūk Negara* (Indonesian sovereign *ṣukūk*) issued in Indonesia which are captured from both legal and *Sharī'ah* perspectives. This is based on perceptions of legal and *Sharī'ah* scholars in Indonesia. By employing a qualitative research approach, this study collects relevant data through library study as well as interviews. The interviews in particular are conducted with selected legal and *Sharī'ah* scholars in Indonesia, in addition to officers of Ministry of Finance of Indonesia which is the main stakeholder for *Ṣukūk Negara* issuance. Three lists of questions are designed for the interviews. One list is set to collect relevant information from the Ministry of Finance which takes the main role in the issuance of Indonesian sovereign *ṣukūk*. The second list deals with opinions and ideas of *Sharī'ah* scholars, and the third list deals with those come from legal expertise background. The interviews are conducted separately with participants, namely: three government officials of the Ministry of Finance, two legal experts, two prominent *Sharī'ah* scholars of *Dewan Syariah Nasional - Majelis Ulama Indonesia* (DSN-MUI), and one representative of *Badan Wakaf Indonesia* (BWI) in connection to *waqf* investment in *Ṣukūk Negara*. The findings are composed into three parts. The first part deals with the concept of Indonesian sovereign *ṣukūk* in terms of definition, main elements in issuance, as well as structures designed and developed by the Government of Indonesia as issuer. The second part deals with legal framework of *Ṣukūk Negara* and legal issues that focus on four main issues, namely: (i) legal conundrum in embracing of the Beneficial Right concept, (ii) legal issues on SPV & Trustee of *Ṣukūk Negara*, (iii) legal arrangement for *Sharī'ah* governance of *Ṣukūk Negara*, and (iv) legal protection for investment in *Ṣukūk Negara* Instrument. The study acknowledges that the adoption of Beneficial Right concept as well as SPV and Trustee authorized by *Ṣukūk Negara* Law 2008 needs to be further perfected. Also, the study finds that the mechanism of legal resolve for the default case of *Ṣukūk Negara* needs to be ruled in *Ṣukūk Negara* Law 2008. The third part especially deals with *Sharī'ah* framework of *Ṣukūk Negara* and *Sharī'ah* issues that are condensed into three main issues, namely: (i) discussion on Beneficial Right from *Sharī'ah* perspective, (ii) *Sharī'ah* debate on *Ṣukūk Negara* structure, and (iii) prospect for developing the *Ṣukūk Negara* structure. The study concludes that the structure of *Ṣukūk Negara* contains a problem in term of similarity with doubtful contract models in Islamic jurisprudence such as *Bay' al-Wafā'*, *Bay' al-Istiglāl*, *al-'Aqd al-Ṣuriy*, that involve *al-Heyal* (legal ruses) debated by *Sharī'ah* scholars. In addition, the study also suggests the stakeholders to explore and design other new structures for *Ṣukūk Negara*.

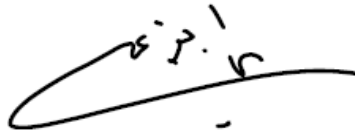
خلاصة البحث

(الصكوك الحكومية في إندونيسيا: تحليل القضايا من منظوري القانون والشريعة)

تثير هذه الدراسة قضايا الصكوك الحكومية المصدرة في إندونيسيا التي تم تحليلها من منظوري القانون الوضعي الإندونيسي والشريعة. التحليلات تعتمد على تصورات علماء القانون وعلماء الشريعة في إندونيسيا. من خلال استخدام منهج البحث النوعي التحليلي (Qualitative Research Method)، تقوم هذه الدراسة بجمع المعلومات المعنية من خلال الدراسة المكتبية والمقابلات مع المختارين من علماء الشريعة والباحثين القانونيين في إندونيسيا بالإضافة إلى مسؤولي وزارة المالية الإندونيسية التي تعد الجهة صاحبة المصلحة الرئيسية في إصدار هذه الصكوك السيادية. لقد تم تصميم ثلاث قوائم من الأسئلة للمقابلات. تصمم القائمة الأولى لجمع المعلومات ذات الصلة من وزارة المالية التي تقوم بالدور الرئيسي في إصدار هذه الصكوك. فالقائمة الثانية تصمم لتناول آراء أولئك الذين جاؤوا من الخلفية القانونية، والقائمة الثالثة تتناول آراء وأفكار علماء الشريعة في إندونيسيا. تتألف نتائج الدراسة من ثلاثة أجزاء. يتناول الجزء الأول مفهوم الصكوك الحكومية الإندونيسية من حيث التعريف، والعناصر الرئيسية في الإصدار، بالإضافة إلى الهياكل التي صممتها وطورتها الحكومة الإندونيسية كالمصدر. فالجزء الثاني يتناول الإطار القانوني للصكوك الحكومية الإندونيسية والقضايا القانونية التي تركز على أربعة قضايا رئيسية، وهي: (1) اللغز القانوني في تبني مفهوم حق المنفعة، (2) القضايا القانونية المتعلقة بالشركة المصدرة الخاصة (SPV) وولي الأمانة (Trustee) في إصدار الصكوك الحكومية الإندونيسية، (3) قضية التنظيم القانوني للحكومة الشرعية، و (4) الحماية القانونية للاستثمار في الصكوك الحكومية الإندونيسية. أما المسائل القانونية، فتؤكد الدراسة بأن تبني مفهوم حق المنفعة وكذلك الشركة المصدرة الخاصة وولي الأمانة المرخصة بموجب قانون الصكوك الحكومية الإندونيسية 2008 يحتاج إلى مزيد من التكميلية. بالإضافة إلى ذلك، توصلت نتائج البحث أيضًا إلى أن آلية العزم القانوني للحالة الافتراضية للصكوك الحكومية الإندونيسية يجب أن تُحكم بوضوح في قانون الصكوك الحكومية. أما الجزء الثالث فيتناول بشكل خاص الإطار الشرعي للصكوك الحكومية الإندونيسية والقضايا الفقهية التي تركز على ثلاثة القضايا الرئيسية، وهي: (1) مناقشة حق المنفعة من المنظور الفقهي الإسلامي، (2) مناقشة هيكل الصكوك المثيرة للجدل الفقهي، (3) قضية تنمية هيكل الصكوك الجديد. فيما يتعلق بالقضايا الفقهية، خلصت نتائج البحث إلى أن هناك تشابهاً بين هيكل الصكوك الحكومية الإندونيسية مع نماذج العقود المشكوك في الفقه الإسلامي كمثل بيع الوفاء، وبيع الاستغلال، والعقد الصوري، والحيل التي جادلها علماء الشريعة. تقترح الدراسة استكشاف وتصميم هياكل جديدة أخرى للصكوك الحكومية الإندونيسية.

APPROVAL PAGE

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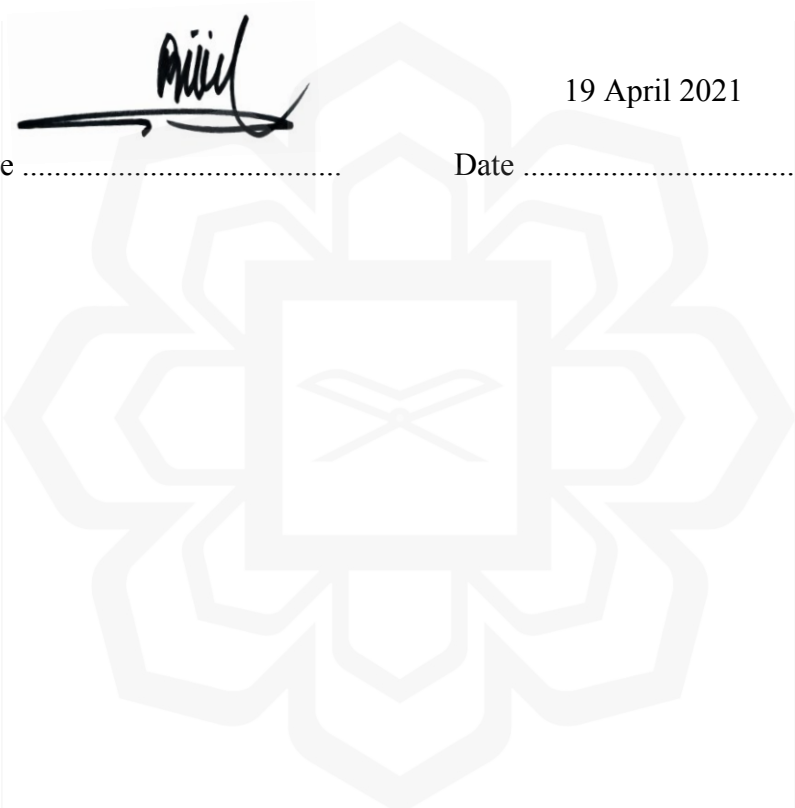
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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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LIST OF ABBREVIATIONS

AAOIFI	Accounting & Auditing Organization for Islamic Financial Institutions
ADB	Asian Development Bank
AH	After Hijri (Islamic Calendar)
ANP	Analytic Network Process
APBN	<i>Anggaran Pendapatan dan Belanja Negara</i>
BMN	<i>Barang Milik Negara</i> (State-Owned Assets)
BPK	<i>Badan Pemeriksa Keuangan</i> (Audit Board of Indonesia)
BWI	<i>Badan Wakaf Indonesia</i>
DPR	<i>Dewan Perwakilan Rakyat</i>
DSN-MUI	<i>Dewan Syariah Nasional Majelis Ulama Indonesia</i>
GDP	Gross Domestic Product
IDB	Islamic Development Bank
IDR	Indonesian Rupiah
IFR	Islamic Fixed Rate
IMF	International Monetary Fund
IFSB	International Financial Services Board
IPO	Initial Public Offering
ISRA	International <i>Sharī'ah</i> Research Academy for Islamic Finance
KUHPer	<i>Kitab Undang-undang Hukum Perdata</i>
MFI	Ministry of Finance of Indonesia
MYR	Malaysian Ringgit
NRGI	Natural Resource Governance Institute
ORI	<i>Obligasi Ritel Indonesia</i> (Indonesian retail bonds)
OJK	<i>Otoritas Jasa Keuangan</i> (Financial Service Authority)
PBS	Project Based <i>Ṣukūk</i>
PBUH	Peace Be Upon Him
PPSN	<i>Perusahaan Penerbit Ṣukūk Negara</i>
SUN	<i>Surat Utang Negara</i> (Indonesian sovereign bonds)
SBSN	<i>Surat Berharga Syariah Negara</i> (Indonesian sovereign <i>ṣukūk</i>)
SPN	<i>Surat Perbendaharan Negara</i> (Indonesian treasury bills)
SDHI	<i>Ṣukūk Dana Haji Indonesia</i>
SPV	Special Purpose Vehicle
SCM	Securities Commission Malaysia
SAC	<i>Sharī'ah</i> Advisory Council
SSB	<i>Sharī'ah</i> Supervisory Board
USD	United States Dollar
UUD	<i>Undang-Undang Dasar</i> (Constitution)

LIST OF STATUTES

Constitution of Indonesia (*Undang-Undang Dasar* or UUD 1945)
Law No. 19 of 2008 on *Surat Berharga Syariah Negara*
Law No. 1 of 2004 on *Perbendaharaan Negara*
Law No. 20 of 2007 on *Perseroan Terbatas*
Law No. 5 of 1960 on *Peraturan Dasar Pokok-Pokok Agraria*
Law No. 8 of 1995 on *Pasar Modal*
Regulation of Government of Indonesia No. 40 of 1996 on *Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah*
Regulation of OJK No. 18 of 2015 on *Penerbitan dan Persyaratan Sukuk*
Regulation of OJK No. 16 of 2015 on *Ahli Syariah Pasar Modal*
Fatwā of DSN-MUI No. 69 of 2008 on *Şukūk Negara*
Fatwā of DSN-MUI No. 70 of 2008 on *Metode Penerbitan Şukūk Negara*
Fatwā of DSN-MUI No. 72 of 2008 on *Şukūk Negara Ijārah Sale and Lease Back*
Fatwā of DSN-MUI No. 76 of 2010 on *Şukūk Negara Ijārah Asset to be Leased*
Fatwā of DSN-MUI No. 95 of 2014 on *Şukūk Negara Wakālah*
Fatwā of DSN-MUI No. 32 of 2002 on *Obligasi Syariah*
Fatwā of DSN-MUI No. 33 of 2002 on *Obligasi Syariah Mudharabah*
Fatwā of DSN-MUI No. 40 of 2003 on *Pasar Modal dan Pedoman Umum Penerapan Prinsip Syariah di Bidang Pasar Modal*
Fatwā of DSN-MUI No. 59 of 2007 on *Obligasi Syariah Mudharabah Konversi*

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

1.1.1 State Budget Deficit in Indonesia

The Government of Indonesia is forced to employ the budget deficits in the last few years to finance the huge countrys' spendings. The budget deficits could be seen in the annual Indonesian State Budget (hereinafter referred to *Anggaran Pendapatan dan Belanja Negara* or APBN) since 2001 (Faculty of Economic and Business, Gadjah Mada University, 2014). The reports on the state budget by the Ministry of Finance of Indonesia (hereinafter abbreviated as MFI) shows the upward trend for the nominal value of budget deficit in Indonesia every year untill now. The deficit reached IDR40.5 trillion (approximately US\$3.1 billion) or around 2.46% of Indonesian GDP in 2001, and further increased to IDR269.4 trillion (approximately US\$20.7 billion)¹ or 1.81% of GDP in 2018 (MFI, 2019).

The deficit is driven by the situation where the government had failed to boost the revenues to match the planned state expenditures due to the economic crises, among others. The economic crisis that hit Asian countries in 1997, and followed by the global economic recession in 2008, had disrupted the economic growth in Indonesia (Sawitri, 2006). The deficit is aggravated by economic crisis in 1997 (also followed by political instability in 1998-1999²) and global recession in 2008.

¹ Using the exchange rate of US\$ 1,- equal to IDR 13.000,-.

² Economic crisis which hit Asian countries in 1997 contributed to trigger political unrest in Indonesia and caused the resignation of President Soeharto who ruled Indonesia for over than 30 years.

According to Kunarjo (2001), several reasons cause the budget deficit in Indonesia, namely: (i) the high cost of infrastructure development; (ii) low per capita income; (iii) low exchange rate of Indonesian Rupiah denomination to foreign currencies, especially US Dollar; (iv) the rising expenditures due to economic crisis; (v) tax collection as primary state revenues does not reach the target that was planned; and (vi) the increases of state expenditures due to inflation. Apart from the reasons mentioned by Kunarjo above, the state budget deficit in Indonesia is also caused by corrupt behaviour and inefficiency in the budget management (Fajar Online, 2016). According to a research by Economic Laboratory of Gadjah Mada University (2016), the state loss due to corruption crimes in the period of 2001-2015 reached IDR 203.9 trillion (Beritagar, 2016).

The annually budget deficit definitely will imply the increase of government debt as it is the main instrument in financing the state budget deficit in Indonesia. In this regard, the total of Indonesian government debts increase year by year. In 2014, the total debts are IDR2,608.78 trillion, and the figure continues rising to reach IDR3,165.13 trillion in 2015, IDR3,466.96 trillion in 2016, IDR3,938.45 trillion in 2017, and IDR4,418.30 trillion in 2018 (MFI, 2019).

Nevertheless, a question arises on how Islamic perspective deals with the budget deficit discourse. At least, there are two points related to how the budget deficit is perceived from the Islamic perspective. Firstly, it should be understood that there is no substantial difference to understanding the state budget deficit from either the *Shari'ah* perspective or conventional economic, especially in term of definition. The term refers to the weakness in the balance of public finance indicating the deficit of revenues to finance the expenditures spent (Aljazeera, 2016). This supposition is also empathized by Chen (1984) and Kettl (1992) as quoted by Luo and

Golembiewski (1996) whose state that there are no significant differences in the way the oriental and western scholars generally define budget deficits. Nevertheless, Islam prefers the concept of balanced state budget, or even surplus state budget as a reserve for expenditures in the next budget year (Ibrahim, 1980). The opinion stresses that a balanced state budget will not cause the state to use exceptional ways to finance the budget deficits, such as by incurring debt or other means.

Secondly, although giving emphasis to balance or surplus state budget, it does not mean that public borrowing indicating the problem of budget deficit had never been encountered in the history of Islamic government. A research conducted by Siddiqi (1992) finds a number of public borrowings during the rule of the Prophet (PBUH) and Islamic governments afterwards. Siddiqi finds six cases of public borrowing by the Prophet (PBUH) in his capacity as a leader and a head of Islamic government in Medina. One of them is to meet the requirements of jihād as mentioned by Ibn Hisham (demised 218 A.H) in his *Kitāb al-Sīrah al-Nabawiyah*. This occurred on the eve of the battle of Hunayn in the 8th year after Hijrah. In this case, the Prophet (PBUH) borrowed from a non-Muslim without any kind of compensation nor coercion.

The other case is that of borrowing a substantial sum of money from a Muslim individual also for financing the Hunayn battle, as narrated by Ibn Majah (demised 273 AH) in his *Kitāb al-Sunan*. There is also a case of borrowing a camel of a particular age as reported in a *hadīth*. Repayment was made from the camels collected in *zakāh*, which rules out the possibility of the loan being in the Prophet's personal capacity since he was barred from *zakāh*. Siddiqi (1992) highlights a comment by Ibn Hajar al-Asqalani on a version of the same hadith in *Kitāb Ṣaḥīḥ al-Bukhari*, that the debt was most probably incurred for helping somebody to meet his basic needs. In this

regard, the Prophet (PBUH) borrowed to fulfill a public need that he intended to repay from *zakāh* asset to be received in the future (Siddiqi, 1992).

The cases of public borrowing in Islam accentuate that the budget deficit problem might be faced by the Islamic government that might be caused by certain circumstances such as economic crisis, wars, natural disasters, etc. In this situation, the government should find the solution to overcome critical problems, including the budget deficit. According to al-Burnū (1983), the government should find ways to provide the basic needs of the people such as food and energy. If the state revenues are not sufficient to finance them, the government should seek additional funds which are in accordance with the principles of *Shari'ah*. Some of Islamic legal maxims (القواعد الفقهية) govern the emergency situation like: 'harm should be removed' (الضرر يزال). It also should be noted that the borrowings from the public as recorded in the cases above were done without usury (*ribā*). It was clear that the sum repaid equaled the sum borrowed and no extra payment was involved. Even if there was an excess or addition in the repayment as mentioned in the practice of the Prophet (P.B.U.H.) above (pay back the young camel with an older camel), it was done voluntarily by the borrower without any precondition by the creditor. Last but not least, the circumstance of budget deficit could be faced by any state, irrespective of the ideology adopted.

Thus, Islam essentially does not keep away the probability of difficult circumstances encountered by the government of any country that cause the state budget deficit situation. This justification is evidenced by historical facts during the Islamic ruling as deliberated early. When the situation occurs, the government is responsible to find out the solution protecting and providing the basic needs of the citizen. Related to this, the government should give the priority to protect the five elements of *Shari'ah* objectives, i.e. protection of religion, life, intellectual,

dignity/descendant, and property, at the first stage. Secondly, Islam does not prohibit to take loan in case the deficit occurs as experienced by the Prophet Muhammad (P.B.U.H). However, the loan taken does not violate the principle of *Sharī'ah* such usury (*ribā*) as also done by the Prophet (P.B.U.H). Considering this guideline, it is becoming a challenge for the Government of Indonesia to create and develop a *Sharī'ah*-compliance financial instrument, and use it as the main instrument to finance the budget deficit.

1.1.2 Financing the State Budget Deficit in Indonesia

State budget deficit generally can be financed through two state institutions, i.e. the central bank by using its monetary policy, and the government (ministry of finance) by using its fiscal policy (Remolona, 1985). The central bank can take action in two ways, namely: (a) printing money, when it holds part of the newly issued debt, thereby monetizing it, and it ends up in the hands of the public as freshly printed money (notes) or in bank vaults as excess reserves; (b) raising reserve requirements, i.e. when banks are made to hold additional required reserves in the form of cash balances with the central bank, or eligible government securities. Whereas the government (represented by ministry of finance) can also respond in two ways, namely: (a) domestic open-market borrowing, i.e when the government debt is voluntarily held by the banks or the public for the interest it pays; and (b) foreign borrowing, i.e. when the national government borrows abroad (Remolona, 1985).

In the context of Indonesia, the Government has several options to finance the budget deficit, among others by raising taxes, reducing spendings, selling assets, and loans from the public. The Government of Indonesia made loan agreements with the

other parties before using conventional bonds, such as private sector, other governments, or international financial aid institution such as International Monetary Fund (IMF) and the World Bank to finance the budget deficit. Specifically, a report of Indonesian Ministry of Finance (2014) mentions that there are several instruments used by the Government of Indonesia to finance the budget deficit that are classified into two categories: (a) domestic financing instruments, which seem to be playing a significant role in financing the budget deficit, and (b) external financing instruments. Specifically, the portrait of financing state budget deficit by the Government of Indonesia is demonstrated by Table 1.1.

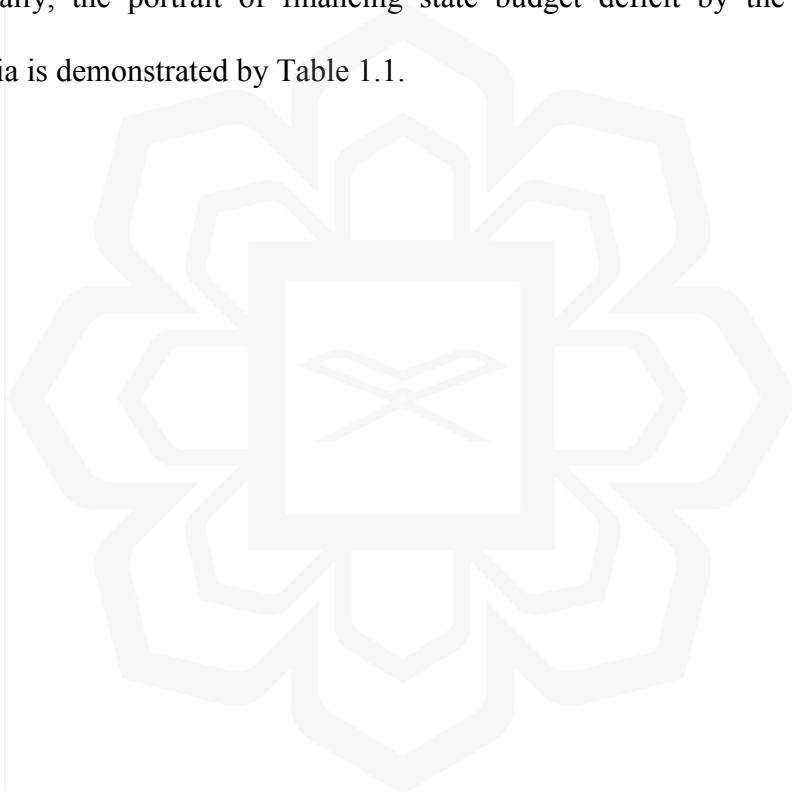


Table 1.1 Overview on the Financing Instruments for Budget Deficit³

APBN's Deficit Financing	2016	2017	2018
I. Deficit (A)	-308.34	-340.90	-269.44
II. Financing (B), consists of:	334.50	366.62	305.70
1. Domestic Financing (Net)	344.92	386.89	302.52
Government Account	19.01	0.00	0.00
Payments of Government Lending	6.78	4.81	4.83
Assets Privatization	0.55	0.36	0.16
Government Securities (Net):	407.26	441.83	358.40
-Government Securities Issuances	660.80	726.27	782.31
-Government Securities Payments	-253.54	-284.44	-423.91
Domestic Borrowings (Net):	1.05	0.65	1.35
-Domestic Borrowing	1.33	1.31	2.43
-Domestic Borrowing Payments	-0.28	-0.66	-1.08
Government Investments Funds	-84.07	-49.25	-46.11
Guarantee Liabilities	-0.65	-1.00	-1.12
National Education Development	-5.00	-10.50	-15.00
Other Financing Sources	0.00	0.00	0.01
2. Foreign Financing (Net)	-10.41	-20.27	3.17
Foreign Borrowing	63.42	51.73	88.59
Instalment of Foreign Borrowing	-73.83	-71.99	-85.42
III. Balance (II-I)	26.16	25.65	36.25

(Source: Compiled from official reports of MFI, 2016-2018)

The data of the table above are collected from the official financial reports of the Government of Indonesia during three last year, i.e. 2016, 2017, & 2018, which have been audited by the State Agency for Government Financial Auditing (called as *Badan Pemeriksa Keuangan* or BPK). Table 1.1 shows that the Government of Indonesia needs the additional funds from domestic and foreign sources that coming not from tax or other revenues instruments of state budget. The funds are used to: (a) cover the budget deficit, (b) pay the maturity debts, and (c) funds others than the deficit and the maturity debts. The table shows that the instruments linked to domestic financing play the significance role in financing the budget deficit compare to foreign

³ Denomination in IDR Trillions

financing instruments. Specifically, the government securities as one of domestic financial instruments perform the dominant role in financing the state budget deficit. In 2016, the issue of IDR407.26 trillion was used to finance IDR308.34 trillion deficit. The amount IDR441.83 trillion of issuance covered the deficit of IDR340.90 trillion in 2017, and the amount of IDR358.40 trillion to cover IDR269.44 trillion of deficit in 2018 respectively.

1.1.2.1 Financing the Budget Deficit Using Government Securities

Table 1.1 above shows that the government securities seize the first place as the main financial instrument used to finance the budget deficit in Indonesia (both conventional and Islamic). Government Securities Law 2002 (*Undang-undang Surat Utang Negara No. 24*) defines the government securities (which are called as *Surat Berharga Negara*) as securities in the form of promissory notes denominated in Indonesian rupiah or a foreign currency where the payment of interest and principal are guaranteed by the government. The objectives of the issuance of these government securities are: (a) to finance the budget deficit, (b) to cover the cash-mismatch in the state budget, and (c) to manage the portfolio of state debts⁴.

In short, the Indonesian government securities are divided into two types: (a) government bonds which are called as *Surat Utang Negara* (SUN) or *Obligasi Negara*, and (b) government *sharī'ah* securities or sovereign *ṣukūk* which is called as *Surat Berharga Syariah Negara* (SBSN) or *Ṣukūk Negara*. This far, the government bonds (*Surat Utang Negara* or SUN) are issued in 4 kinds, namely:

⁴ Cash-mismatch in the Indonesian state budget dictionary is an imbalance between expenditures and revenues, where the expenditures exceed the revenues (or conversely) in a period of state budget (Ministry of Finance of Indonesia, 2015).

- (1) the fixed interest rate which consist of two forms, (a) the Fixed Rate Series (FR), and (b) Retail Bonds which are called *Obligasi Ritel Indonesia* (ORI);
- (2) the floating interest rate, i.e. the Variable Rate Series (VR);
- (3) without interest, namely Treasury Bills (T-Bills) which are called *Surat Perbendaharaan Negara* (SPN), and *Zero Coupon Bond* (ZC); and
- (4) government bonds in foreign currency denomination which are called *Obligasi Negara Valas*.

On the other hand, the sovereign *ṣukūk* or *Ṣukūk Negara* are issued in 6 kinds, namely: (1) *Ijārah Fixed Rate* (IFR), (2) Retail *Ṣukūk*, (3) Indonesian *Hajj Funds Ṣukūk* (called *Ṣukūk Dana Haji Indonesia* or SDHI), (4) *Sharī'ah* Treasury Bills (which are called *Surat Perbendaharaan Negara Syariah* or SPN-S), (5) Project Based *Ṣukūk* (PBS), and (6) *Ṣukūk Valas* (denominated in foreign currencies). The Government of Indonesia prioritizes the issuance of government/sovereign securities in the domestic financial market. The Ministry of Finance of Indonesia (2014) states that the purposes of this prioritizing are: (a) to minimize the debts risk, especially exchange rate fluctuation; (b) to develop the domestic financial market; and (c) to have a benchmark for the issuance of domestic corporate bonds.

1.1.2.2 Financing the Indonesian Budget Deficit Using *Ṣukūk*: Current Issues

The main financial instrument used by the Government of Indonesia to finance the state budget deficit is the government securities (as demonstrated by Table 1.1). The government securities can be divided into two: sovereign bonds (called as *Surat Utang Negara*) and sovereign *ṣukūk* (called as *Surat Berharga Syariah Negara* or *Ṣukūk*