

Should National Sharia Board be Restructured to Sustain the Development of Economic Sharia in Indonesia?*

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The economy of Islamic finance has an important role in improving a nation's economy and has developed rapidly throughout the world including in Southeast Asia. This paper discusses the role of Board of fatwa (and the fatwa itself) within Indonesia governmental structure in order to enhance the economic activities of sharia. The involvement of sharia scholars are needed in the process of regulating economic policies since only few of Indonesian legislators have good understanding in the law of Islamic finance. At the moment, fatwa issued by sharia scholars in economic activities is not legally binding due to its organization structure in Indonesia governmental system. As a result, it creates legal uncertainty not only to business players but more importantly to the society at large on the issue of whether or not the fatwa is mandatory. Therefore restructuring the board of fatwa is a way to provide legal certainty in order to sustain the development of economic sharia in Indonesia as well as in Southeast Asia.

Keywords: *Islamic finance, Sharia National Board, Islamic Economics*

I. Introduction

Dating back to 1992, the presence of economy of sharia in Indonesia has been strong and continues progressing until today. Started with the implementation of Islamic banking by the establishment of Bank Muamalat Indonesia as the first Islamic commercial bank (Bank Umum Syariah), the sharia economic activities is expanded to other economic sectors, in particular insurance, capital market, mutual fund, leasing, pawn, and other business modes. Relatively new to Indonesian economy, those who perform economic sharia usually puts someone to act as sharia supervisor in their companies, this method is aimed at performing supervisory duty regarding the company's operational activity, particularly, to find out whether or not it has been conducted in

* This paper is presented on The 2nd CILS (Center for International Law Studies) International Conference 2011: "The ASEAN's Role in Sustainable Development" at Faculty of Law Universitas Gadjah Mada, Yogyakarta, Indonesia, on 21-22 November 2011.

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compliance with the sharia. The existence of such supervisor is based on a regulation in PP No. 72 Th. 1992¹ and SEBI No. 25/4/BPPP. The legal status of sharia supervisor was subsequently solidified by Majelis Ulama Indonesia (MUI)² in 1999. Through this event, Sharia National Board (Dewan Syariah Nasional, DSN) is formed as part of MUI. DSN is tasked to perform several functions such as; to deliver fatwa on economic sharia and to give recommendation from members of Sharia Supervisory Board (Dewan Pengawas Syariah, DPS) which representatives will be placed in companies which operates in the field of sharia economic. The formation of DSN inside the structure of MUI has raised a question to various parties, particularly on whether or not the fatwa produced by DSN is a legally binding instrument. In Islamic tradition, fatwa is a form of advice or answer from the ulama (religious leader) upon questions forwarded by Muslims. Questions that are forwarded concern the application of Islamic Laws in several circumstances, whereby in such circumstances Islamic Laws cannot offer a proper solution due to an absence of regulation. As such, mustafti (the one raising the question) is in need of explanation from mufti (the expert in Islamic Laws). A delivered fatwa is essentially not binding. However, in absence of other regulation in Islamic Laws and in emergency situation fatwa has to be obeyed for it has been assessed pursuant to sharia. From a legal-formal standpoint, fatwa of DSN is binding for as long as it is so regulated by law. In Article 56 Law No. 21 of 2008 on Islamic Banking, it is stipulated that "Bank of Indonesia determines administrative sanction on Islamic Bank or Islamic Business Unit of a Conventional Bank, commissioners, members of the Sharia Supervisory

¹ Article 5 Government Regulation No. 72 of 1992 stipulates that:

- (1) Bank which operates based on profit sharing concept is obligated to have Sharia Supervisory Board (*Dewan Pengawas Syari'at*) which duty is to perform a supervisory task over banking products in the effort of gathering fund from society and to distribute them to society so that it is conducted in compliance with the sharia principles.
- (2) The formation of Sharia Supervisory Board is conducted by the relevant Bank based on consultation with the organization of Indonesian *ulama*.
- (3) In performing its duty Sharia Supervisory Board shall consult the organization as previously mentioned in paragraph (2).

² Majelis Ulama Indonesia is organization of society based on Islam, as an organization of Islamic scholars (*ulama*) throughout Indonesia since 1975. This organization provides guidance of Islamic Law for Indonesian muslims.

Board, directors, and/or employees of Islamic Bank or Islamic Business Unit of a Conventional Bank, which inhibit and/or implement Sharia Principles in running the business or duties or does not fulfill its obligations as provided in this Act”.³ On Article 1 number 12 of the Law is stated definition of Sharia Principles, “Sharia Principles are principles of Islamic law in banking activities based on fatwa which produced by authoritative institution”.⁴ Accordingly based on these articles Islamic Financial Institution (Lembaga Keuangan Syariah, LKS) is indeed bound by fatwa of DSN. However, this organization (DSN) is not a correct institution to deliver a legal product that binds its actors. This is due to the fact that DSN is neither a state entity nor a government entity.

In Article 8 of Law No. 12 of 2011 on the Formation of Regulation, it is regulated that:⁵

a. Types of regulations other than the ones regulated in Article 7 paragraph (1) encompasses regulations that are issued by the People’s Consultative Assembly, House of People’s Representative, House of Regional Representative, Supreme Court, Constitutional Court, State Financial Investigation Board, Judicial Commission, Bank of Indone-

³ Article 56 Law No. 21 of 2008: “Bank Indonesia menetapkan sanksi administratif kepada Bank Syariah atau UUS, anggota dewan komisaris, anggota Dewan Pengawas Syariah, direksi, dan/atau pegawai Bank Syariah atau Bank Umum Konvensional yang memiliki UUS, yang menghalangi dan/atau tidak melaksanakan Prinsip Syariah dalam menjalankan usaha atau tugasnya atau tidak memenuhi kewajibannya sebagaimana ditentukan dalam Undang-Undang ini”.

⁴ Article 1 number 12 Law No. 21 of 2008: “Prinsip Syariah adalah prinsip hukum Islam dalam kegiatan perbankan berdasarkan fatwa yang dikeluarkan oleh lembaga yang memiliki kewenangan dalam penetapan fatwa di bidang syariah”.

⁵ Article 8 Law No. 12 of 2011:

- (1) Jenis Peraturan Perundang-undangan selain sebagaimana dimaksud dalam Pasal 7 ayat (1) mencakup peraturan yang ditetapkan oleh Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Mahkamah Agung, Mahkamah Konstitusi, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Menteri, badan, lembaga, atau komisi yang setingkat yang dibentuk dengan Undang-Undang atau Pemerintah atas perintah Undang-Undang, Dewan Perwakilan Rakyat Daerah Provinsi, Gubernur, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota, Bupati/Walikota, Kepala Desa atau yang setingkat.
- (2) Peraturan Perundang-undangan sebagaimana dimaksud pada ayat (1) diakui keberadaannya dan mempunyai kekuatan hukum mengikat sepanjang diperintahkan oleh Peraturan Perundang-undangan yang lebih tinggi atau dibentuk berdasarkan kewenangan.

sia, The ministers, entity, institution, or commission at the same level which was formed by regulation or Government as ordered by the regulation, Provincial House of People's Representative, Governor, House of People's Representative of Regency or City, Regent/Mayor, Head of Village or the like.

b. The types of regulation as mentioned in paragraph (1) shall be recognized and have legal and binding force for as long as demanded by the higher regulation or formed by way of authority.

Those recognized as regulation includes a regulation which produced by an entity or an institution of a similar level, which was formed by regulation (UU) or government based on the regulation (authority). DSN is part of MUI. Meanwhile, MUI is a societal organization which was founded under Islamic teachings and it is not an entity which was established by a regulation (UU) or government as ordered by the regulation (by way of authority). It should then followed that fatwa delivered by DSN has no legal effect.

The organizational status of DSN at the present moment is not suitable for it to perform its role and function as fatwa institution (creator of legal product) which legally binds the Islamic economic actors. For that purpose, this research is dedicated to analyze the organizational aspect of DSN, particularly in its effect upon the development of Islamic economy through the force of its legal products and to find a more appropriate organizational position for DSN. This research is vital to help increasing the legal force of DSN's legal products.

II. Relationship between National Sharia Board and Development of Islamic Economics

Islamic economics is an economic system, founded by the principles of the Qur'an and hadits of the Prophet Muhammad SAW. One of the most important factors in the implementation of Islamic economics is law, regulation or policy. To ensure the implementation and compliance from all actors of Islamic economics, the law or regulation has to be consistent with Islamic teachings. Further, in ensuring the legal force of a regulation, it has to made and legalized by the government. Article 7 paragraph (1) of Law No. 12 of 2011 on the Formation of Regulation mentions several types of regulations based on their hierarchy in the

national legal system. Those are, The 1945 Constitution, People's Consultative Assembly Decree, Act or Government Regulation in lieu of Regulation, Government Regulation, Presidential Decree, Provincial Regulation, and Regency Regulation. Other regulations that are considered as regulation are regulation passed by People's Consultative Assembly, House of Representative, Regional State of Representative, Supreme Court, Constitutional Court, State Financial Investigation Board, Judicial Commission, Bank of Indonesia, Minister, body, institution, or commission at the same level, and is established pursuant to regulation or by government by the order of regulation, Provincial House of People's Representative, Governor, House of People's Representative of Regency or City, Regent/Mayor, Head of Village or the like. As such, all types of regulations, as far as it governs Islamic economic, have to be consistent with Islamic laws.

Presently, Islamic economics has emerged as an alternative economic system in Indonesia, apart from conventional economics system. Although newly developed, Islamic economics has been able to demonstrate its upper hand in creating prosperity to all its actors, be it LKS or customer. The problem lies in the non-existence of laws and regulations that are specific to ensuring the implementation of Islamic economics, in the early stage of its development. For that very purpose, Islamic economics actors significantly need the role of Ulama -Majelis Ulama Indonesia-, particularly to deliver advice or decision that could later serve as guidance in performing Islamic economics. At this stage, Islamic economics actors cannot count on government to form a regulation that corresponds perfectly with sharia, this is due to an absence or limitation of knowledge and human resources at government's disposal in crafting a suitable policy according to sharia. Since Ulama is the one who produce such advice and decision, consequently the legal product of their contemplation is called fatwa. In MUI, the body entrusted with the task of studying the formation of fatwa concerning Islamic economics as well as fatwa which will subsequently legalized by MUI Fatwa Commission, is DSN.

Therefore, the existence of DSN as an institution - which creates fatwa - will ensure Islamic economics to run in track of sharia based on the Qur'an and hadits. If this fatwa ceases to exist, it is very likely that Islamic economics would remain an economic system with Islam only

as a label, for its implementation is a far from Islamic teaching.

III. National Sharia Board in Malaysia

The development of economic sharia in Malaysia is apparent through the history of Islamic banking in that country. Banking has known to be one of the front-runner financial institutions in developing sharia principle in business activity at this contemporary age. It started from the inception of ideas to establish sharia banks in countries like Qatar, Egypt, Pakistan, Iran, and others. Malaysia, as a country with heavy Islamic influence in terms of the method by which the country is administered, was also in the interest to propagate Islamic economic system. The first step toward realizing this conception was by allowing banks and other financial institutions with sharia principles to grow in Malaysia. This effort was then followed by the establishment of National Steering Committee on 30 July of 1981 which duty was to supervise the establishment of Islamic financial institutions.⁶ This committee formed a draft of regulation which governs the basic of operational activity of Islamic banking and a supervisory system in 1982. On 7 July 1983, the draft of this regulation was legalized into becoming positive law in Malaysia. This regulation is popular as Islamic Banking Act 1983. Also in the same year, Bank Islam Malaysia Berhad was established as the first bank with sharia principle in Malaysia.⁷ In capital market, Malaysia is registered as the first country to every issue sharia bond in 1983 according to Report of The Islamic Capital Market Task Force of The International Organization of Securities Commissions (IOSCO).

Rules concerning the conduct of sharia banking and insurance are governed under a specific regulation. The regulations governing the conduct of Islamic banking are Banking Act 1973, the Islamic Banking Act 1983, the Banking and Financial Institutions Act 1989.⁸ In 1984, Malaysian government issued the Takaful (Islamic Insurance) Act which essentially offers takaful as a form of alternative insurance from

⁶ <http://syafiqe.wordpress.com/2008/03/26/sejarah-ringkas-perkembangan-sistem-perbankan-islam-di-malaysia/>, downloaded on July 4th 2011.

⁷ *Ibid.* See also Salahuddin Ahmed, *Islamic Banking Finance and Insurance: A Global Overview*, (Kuala Lumpur: AS Noordeen, 2009), pp. 206-209.

⁸ Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments*, (Kuala Lumpur: Ilmiah Publishers, 2000), p. 350.

conventional one.⁹

Malaysia has two fatwa institutions as far as economic sharia is concerned. First, Sharia Advisory Council (SAC) in Bank Negara Malaysia, an institution which function is to deliver fatwa upon the matters of banking, insurance and financial institution. This institution is placed under the supervisor of Bank Negara Malaysia as Malaysia's central bank. ¹⁰ Second, Sharia Advisory Council in the Malaysian Securities Commission, an institution entrusted with duty to deliver fatwa in the sphere of sharia capital market. ¹¹ Securities Commission Malaysia is a statutory board, which was established at the time Securities Commission Act 1993 came into effect.

In Malaysia, each state has an Islamic Council which primary function is to "help and provide advice to the Sultan on any matters relating to religion in the state as well as Melayu culture". ¹² In handling the issues, Religious Council normally issues fatwa. Apart from Islamic Council, in each state there is also the highest-level bureaucrat in the field of religion, Mufti. Mufti's task is (among others) to issue fatwa or helping the Department of Religious Affairs ¹³ The status of mufti in several states remain the prerogative rights of the Sultan, while in other states mufti is appointed by the Sultan at the advice of Sultan Advisory Board or Religious Board. In 1968, National Islamic Affairs Board was formed through the Sultans Conference. In this National Islamic Affairs Board, there is a Commission of Ulama known as Commission of Fatwa. Commission of fatwa is comprised of mufti from all states,

⁹ *Ibid.*, p. 265. *The Takaful (Islamic Insurance) 1984* which was a reaction against fatwa of *The Malaysian National Fatwa Council* pada tahun 1972 yang menyatakan bahwa "insurance, especially life insurance, was a corrupt practice as it contained elements of uncertainty (gharar), gambling (maysir) and riba, and it was consequently unlawful", *ibid.*, p. 264.

¹⁰ Engku Rabbiah Adawiah Engku Ali, "Development of Islamic Banking in Malaysia: Constraints and Opportunities From The Juriprudential Perspective", *IJUM Law Journal* vol. 11 No. 2, 2003: 256.

¹¹ *Ibid.*

¹² Ahmad Ibrahim, "Kedudukan Islam dalam Konstitusi Malaysia" dalam Ahmad Ibrahim, Sharon Siddique, dan Yasmin Hussain, ed., *Islam di Asia Tenggara: Perkembangan Kontemporer* [Readings on Islam in Southeast Asia], translated by Hasan Basari, (Jakarta: LP3ES, 1990), p. 184.

¹³ Department of Religious Affairs (Departemen Urusan Agama) is a department in charge with responsibility over daily administrative issues relating to Islam. *Ibid.*

which are also members to National Islamic Affairs Board and other five Ulama, which was appointed by Yang di-Pertuan Agong.¹⁴ Fatwa, which has been made public in state gazette, is binding to all muslims.¹⁵ In the Enakmen Pentadbiran Hukum Syarak (enakmen induk) it is regulated that fatwa prevails in each state which has Jawatankuasa Fatwa.¹⁶ Fatwa has a powerful legal force and binding subsequent to publication through state gazette.

In Malaysia, regulation concerning Islamic banking is governed in Islamic Banking Act 1983.¹⁷ In Section 5 of Islamic Banking Act 1983, it is stipulated that:

*... the central bank will not recommend the granting of a licence to the Islamic bank unless it is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of a Shariah advisory body. Therefore, no licence to establish an Islamic bank in Malaysia is issued unless there is a clause which describes the formation and other matters related to an SSB in the articles and memorandum of the proposed bank.*¹⁸

The function of Shariah Supervisory Board in Malaysia is made clearly in the Islamic Banking Law 1983. Specifically, its tasked is "to advise the bank on the operations of its banking business in order to ensure that they do not involve any element that is not approved by the religion of Islam".¹⁹

Sharia banking and sharia insurance merits another specific regulation in Malaysia. The regulations governing Islamic banking among others are; Banking Act 1973, the Islamic Banking Act 1983, the Bank-

¹⁴ *Ibid.*, p.190.

¹⁵ Rifyal Ka'bah, "Lembaga Fatwa di Indonesia", contribution of paper for Memorial Book of H. Mariana Sutadi, SH, p. 5. See also, Kamali, *Islamic Law in Malaysia...* *op. cit.*, pp. 274-275.

¹⁶ Hasnan Kassan dan Jasri Jamal, "Fatwa dalam Perundangan Islam dan Fungsinya Menangani Keperluan Hukum Semasa Menurut Siasah al-Syar'iyah", *Jurnal Undang-Undang dan Masyarakat*, 7: 89-111, 2003.

¹⁷ The construction of this law (*Islamic Banking Law 1983* consisting of 60 sections and eight chapters) is conducted also in connection with the establishment of Bank Islam Malaysia Berhad in 1983, and the implementation of this law is faced upon all sharia banks seeking to operate in Malaysia. See Sudin Haron, *Islamic Banking: Rules and Regulations*, (Selangor Darul Ehsan: Pelanduk Publications, 1997), p. 174.

¹⁸ *Ibid.*, pp. 104-105.

¹⁹ *Ibid.*, p. 109.

ing and Financial Institutions Act 1989.²⁰ Dispute between Islamic banks in Malaysia and their customers is settled in civil court, not Shariah court since the contract performed among them falls within the jurisdiction of civil court.²¹

In the field of sharia insurance, through The Malaysian National Fatwa Council a decision was made in 1972 stating that "insurance, especially life insurance, was a corrupt practice as it contained elements of uncertainty (gharar), gambling (maysir) and riba, and it was consequently unlawful".²² However, in 1984, Malaysian government issued the Takaful (Islamic Insurance) Act offering takaful as alternative insurance apart from the conventional insurance product.²³

As part of Bank Negara Malaysia, Syariah Advisory Council is tasked to oversee the conduct of Islamic insurance or Islamic banking, while Islamic capital market falls within the ambit of the Malaysian Securities Commission.²⁴ These two institutions are the authorized bodies to deliver advice (fatwa) in the implementation of economic sharia in Malaysia.

IV. Restructuring National Sharia Board is A Must

From the conduct and performance of several independent institutions in Indonesia, being Indonesia Broadcasting Commission (Komisi Penyiaran Indonesia, KPI), Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK), Judicial Commission (Komisi Yudisial, KY), Institution of Witness and Victim Protection (Lembaga Perlindungan Saksi dan Korban, LPSK), and Capital Market and Financial Institution Supervisory Board (Badan Pengawasan Pasar

²⁰ Kamali, *Islamic Law ...*, *op. cit.*, p. 350.

²¹ Haron, *Islamic ... op. cit.*, p. 181. In the *Civil Law Act 1956 Section (5)* it is decided that "in the absence of any written law, the law generally applicable to commercial matters and any matters incidental there to, is the English law" Kamali, *ibid.*, pp. 258-259.

²² Kamali, *ibid.*, p. 264.

²³ *Ibid.*, p. 265.

²⁴ Interview with Kanny Hidayat, Vice Secretary BPH (*Badan Pelaksana Harian*) of National Sharia Board of MUI, on 13 May 2009 in National Sharia Board, MUI, Jakarta. Engku Rabiah Adawiah Engku Ali, "Development of Islamic Banking in Malaysia: Constraints and Opportunities From The Juriprudential Perspective", *IJUM Law Journal* vol. 11 No. 2, 2003: 256.

Modal – Lembaga Keuangan, Bapepam-LK) it is apparent that those institutions carry their role as policy maker as well as supervisor. The policy that they created has a legally binding force to those relevant in the field. As an independent institution, such institution was established by the government, and it is responsible directly to the President. The formation of these institutions was laid upon the needs of society and the performance of the government.

In the case of National Sharia Board, seeing from the development of economic sharia that is rapidly growing and have obtained a great support from the society, entrepreneur, and even government, it could be deduced that economic sharia now holds an important role in national economy. For that purpose, in strengthening the implementation of economic sharia, the existence of a supporting institution is needed. More specifically, an institution that is capable of designing policy in the realm of economic sharia as well as performing a supervisory activity.

Hitherto, MUI is the sole creator of economic sharia policy. Through DSN, MUI released its fatwa known as DSN fatwa. DSN obtained such authority through regulation (UU), whereby decided that fatwa will be used as guidance in the implementation of economic sharia by those performing economic sharia. In this respect, in terms of legal-formal theory, there exists a deviation in the application of laws and regulations, that a societal organization possesses the authority to create a policy with capacity to be legally enforced and applied nationally. This is obviously not an appropriate situation.

Taking the form of fatwa institution in Malaysia as example, it is a government entity. This carries a significant impact for those who implement economic sharia. This fatwa institution acquires its authorities and legal power not only from legal products that it produced but also supported by its institutional legal-formal status. It is obvious that the attitude and reaction is going to be different against fatwa institution that is not a government entity as in the case of Indonesia. Fatwa institution in Malaysia is a government entity, which was given the authority to create fatwa and empower the fatwa to be enforced in the society.

Based on the regulations of independent institutions which has been previously elaborated, there is a very likely possibility for DSN

to be an independent entity. In this case, there are two ways to turn fatwa institution into government entity. First, by converting the status of MUI to government entity which will effectively convert DSN into government entity. However, this politically risky move, and it could possibly trigger negative reaction from the society so as to think that Indonesia will become an Islamic country, this is due to the fact that the social structure of Indonesian is not made up of Muslims. Second, by converting the status of DSN into government entity. In this case, this will effectively sever the organizational ties between DSN and MUI since DSN will be an independent institution. As government entity, DSN will only be dealing with the affairs in economic sharia. It imperative to be understood that economic sharia can be performed by everyone, and it is not exclusively reserved for Muslims.

As fatwa institution, DSN becomes government entity. In addition, as a government entity it will not be part of any ministry. The reasons of why DSN's status has to be converted into government entity are; (1) DSN will become authorized in issuing fatwa, (2) legal products produced by DSN will be legally binding to those involved in the implementation of economic sharia, (3) DSN will acquire respect and be more legally empowered as a formal government institution. DSN Institution will be placed under the President and will answer directly to the President. The reasons of why DSN should not be part of any ministry are; (1) fatwa in the field of economic shariah concerns the issues of religion, law, finance (banking, insurance, capital market, and financing), cooperation, and commerce. Accordingly, it is relatively difficult to put DSN under one ministry. (2) In order to maintain the impartiality of DSN as an independent entity. If it is placed under one ministry, all policies issued by the ministry will bind DSN in issuing its fatwa. This could affect the independency of DSN in producing the fatwa. (3) For the purpose of preparing DSN as the authorized institution to certify sharia supervisor.

V. Conclusions

The existence of National Sharia Board plays a very significant role in the face of the development of Islamic economics in Indonesia. For Islamic economics to run properly according to the Qur'an and hadits,

the rule and regulations that is implemented has to be consistent with the sharia. Fatwa created by DSN is a major guidance in order to perform Islamic economics that remains in the track of sharia.

DSN status as part of societal organization (MUI) is already in needs of restructurization in order to place it as government entity. As Government entity, DSN will be capable of creating legal products which are able to be legally enforced. As a result, all Islamic economic actors will be bound to implement such regulation. The biggest impact out of this situation is that Islamic economics be implemented as it should be.

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