



Journal of Arts & Humanities

Volume 08, Issue 03, 2019: 48-54

Article Received: 18-02-2019

Accepted: 07-03-2019

Available Online: 18-03-2019

ISSN: 2167-9045 (Print), 2167-9053 (Online)

DOI: <http://dx.doi.org/10.18533/journal.v8i3.1601>

Legal Position of Fatwa of National Sharia Supervisory Board (Dewan Syariah Nasional) of Indonesian Clerics Council (Majelis Ulama Indonesia) As Material Law of Sharia Economy

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ABSTRACT

Fatwa (legal opinion issued by Islamic cleric) is a part of Islamic law doctrine as a solution to problems in Islamic teachings that are not discussed in sources of Islamic law. The National Sharia Supervisory Board (Dewan Syariah Nasional) of Indonesian Clerics Council (Majelis Ulama Indonesia) issues several fatwa(s) to address matters in Sharia economics and banking often raised by the Bank Indonesia (the central bank of the Republic of Indonesia) and by other Sharia economic actors. This raises the question, whether or not the fatwa(s) issued by the National Sharia Supervisory Board of MUI are positioned as material law of Sharia economics by court judges in examining and releasing verdict of Sharia economics/banking dispute. A normative study with legal and conceptual approach was carried out to investigate the problem. The result shows that the fatwa(s) issued by the National Sharia Supervisory Board of MUI are positioned as basic references of Sharia economic and banking management by the products of Sharia economics and/or banking; as guidelines in conducting Sharia bank management by the Bank Indonesia; and as guidelines by court judges in settling Sharia economic dispute.

Keywords: Fatwa, National Sharia Supervisory Board of MUI, Material Law, Sharia Economics.

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1. Introduction

In formulating national law, one can refer to various law systems, e.g. customary law and international law. However, as it is the major religion in Indonesia, Islamic teachings are entrenched in most parts of public sector, e.g. in social, cultural, and political aspects. Moreover, Islamic law is also contextualized as material sources, in which its principles are embedded within most regulatory

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products³. Therefore, the formulation of national law has integrated these three different law system simultaneously.⁴

Islamic law, considering its state as one of national law sources, possesses significant position on matters related to Islamic principles and law material. There have been numerous unsolvable and undiscussed religious matters that actually need solutions based on fatwa approach. One can consider that fatwa is the suitable alternative to solve any rigidity in the development of Islamic law. As it is inseparable from religious propositions (*al-nusus, al-syari'iyah*), Islamic law faces serious hindrances when trying to address recent problems often not discussed in religious doctrines. It is critical, since religious doctrines within Islam have stopped growing in numbers, but the dynamics of problems and cases are rapidly developing.

In Indonesia, the Indonesian Clerics Council (Majelis Ulama Indonesia - MUI) is the authoritative body competent of addressing the religious matters. The MUI possesses significant position in providing solutions and reviews on government's policies related to the nation's interest. It is unacceptable within Islamic principles, either *i'tiqadior syar'i*, to let any unsolved problems hanging, and eventually causing the public in confusing situation without legal certainty. That being mentioned, it is the MUI's duty to provide solutions over hanging problems undiscussed in existing Islamic law sources and solves the public confusion.

As an authoritative body responsible for issuing fatwa, the National Sharia Supervisory Board of MUI have issued several fatwa(s) related to Sharia bank product and Sharia non-financial institutions, e.g. the Bank Indonesia, as the legislator of operationalization of Sharia economic products. However, fatwa does not have legally binding status, as it is an opinion of certain individuals/groups with qualified competence in Islam teachings, particularly Islamic law. Moreover, fatwa is not included in the whole Indonesian law hierarchy. On the other hand, fatwa issued by National Sharia Supervisory Board is used practically as operational guidelines by Sharia banks and non-financial institutes.

The previous context urges the author to conduct a study on legal position of fatwa issued by National Sharia Supervisory Board of MUI as material law references of Sharia economics for court judges to examine Sharia economic/banking disputes. The normative study employs legal and conceptual approach in order to elaborate the legal position of fatwa issued by the Board.

2. Discussion

2.1 The position of fatwa in Islamic law

Etymologically, fatwa is the firm answer to certain matters/events occurring within the society. As cited by Soleh Hasan Wahid, Zamakhyari in his book *al-Kasyaf* defines fatwa as "a straightforward way"⁵.

As a familiar term within Islamic law principles, fatwa is derived from Arabic "*al-fata*" (الفتى) meaning "a strong young man" (cited in al-Fayumi⁶). A man issuing fatwa to elaborate Islamic law perspective on certain matters is *mufti*⁷. Alternatively, a *mufti* is a *faqih* (an expert in Islamic jurisprudence) with qualified competence in issuing opinions and/or answers on Islamic problems undiscussed in existing Islamic law literatures. That being mentioned, it is essential for a *mufti* to have comprehensive background of Islamic law to respond on matters questioned by parties requesting for fatwa. As Wahbahaz-Zubail elaborates, *mufti* is also called *mujtahid fatwa* (an authoritative person of

³Sumarni, 2012. *Kedudukan Hukum Islam Dalam Negara Republik Indonesia* [Legal Position of Islamic Law in the Republic of Indonesia], Jurnal Al' Adalah, vol.10 No.2, Publisher: UIN RadenIntan, Lampung, hal.456.

⁴Mardani, 2009. *Kedudukan Hukum Islam Dalam Sistem Hukum Nasional* [Legal Position of Islamic Law within National Law System], Journal IUSTUM Vol.16 No.2, Univ. Islam Indonesia, Yogyakarta, p.272. In line with Mardani, Ali, in his book: *Menguak Tabir Hukum, Suatu Kajian Filosofis dan Sosiologis* [Unveiling the Law: A Philosophical and Sociological Study], PT. Gunung Agung, Jakarta, 2002, p.107 states that Indonesia has formally adopted Islamic law within religious courts.

⁵Soleh Hasan Wahid. 2016, *Pola Transformasi Fatwa Ekonomi Syariah DSN-MUI Dalam Peraturan Perundang-undangan* [Pattern of Transformation of Fatwa on Sharia Economics by The National Supervisory Board of MUI in Regulations], Jurnal Ahkam, Vol. 4 November 2016, p. 174

⁶Al-Fayumi, 1965. *Al-Misbah al-Munir fi Gharib al-Syarah al-Kabir li al-Rafii*. Vol. VI, Mathbaah al-Amiriyah. Kairo, p.2

⁷Mardani. 2013. *Ushul Fiqh*, Vol 1. Jakarta: Raja Grafindo Persada, p. 373-374

issuing fatwa), or a certain individuals/group with competence in understanding and explaining problems, as well as issuing the legal foundation of the problems⁸.

Fatwa (Arabic: فتوى, romanized *fatwā*) is a term referring to an opinion/interpretation on matters related to Islamic law. In Arabic language, fatwa means “advice”, “answer”, or “opinion”. The term refers to “an official but nonbinding decision/advice taken by an authorized institution/individuals and issued by a *mufti* to respond to questions raised by party(ies) requesting for fatwa (*mustafti*).” By that, the *mustafti* is not obliged to follow contents/rules of the fatwa given to him/her⁹.

In Sharia perspective, fatwa refers to a Sharia law explanation on matters, which is supported by propositions from the Quran, *Sunnah Nabawiyah*, and *Ijtihad*. As Mardani asserts in *Mafaahim al-Islamiyah*, matters addressed by fatwa are urgent in nature, since not everyone are capable to deduct an opinion based on rooted background in Sharia law. If everyone is obliged to possess such competence until *ijtihad* level, all works will and activities will be neglected¹⁰.

One can conclude the essence and characteristic of fatwa from previous concepts as follows¹¹:

1. It is a means of explaining
2. The explanation addresses matters of *shara'* law as obtained from the result of *ijtihad*.
3. Those who provide explanation are expert in the certain field.
4. The explanation is given to those who raise question and are unknown of the legal status of the matters.

From clerics' perspective, the status of fatwa is optional (*ikhtiyariah*, means legally nonbinding), however, it is legally binding to parties requesting fatwa (*mustafti*). A fatwa is treated only as information (*i'lâniyah*) to those not requesting the fatwa. The requester is allowed to follow the fatwa issued or to request for similar fatwa to different *mufti*.

In Islamic law, fatwa is considered as the result of collective *ijtihad*. However, it is not to be misunderstood with *ijma'* (a consensus of Islamic scholars), since the collective *ijtihad* process does not meet the requirements of taking an *ijma'*. An act of taking collective *ijtihad* (*ijthiadjama'i*) is possible to be conducted within different time and place, and may result differently even if it is conducted to address similar matters. On the other hand, there is no possibility of different opinion in an *ijma'*, as it is obliged for the clerics present in the process to reach a consensus.

In issuing a fatwa, one cannot deny that there are certain interests by the issuer, depending on the *mufti's* ideology and perspective on a problem, and the context to which the community, particularly the *mustafti* is directed into. In line with this, Syamsul asserts that¹²:

“Fatwa is the connecting bridge between an ideal Sharia condition and the concrete reality within the community.” Problems, concerns, expectations, aspirations, and the community's experience is discussed to seek out for the middle ground by applying Islamic moral approach mediated by the *mufti's* intellectual competence and *ijtihad*. In responding to a problem, the *mufti* has several considerations, e.g. his own aspiration, perspective, expectation, and interest. Moreover, a *mufti* can also be under social, political, economical, and cultural pressure. This illustrates that the dynamic of fatwa is influenced by a broad dimension. It carries certain missions, contains social criticism, defends the status quo, supports/resists the regime in power, spreads religious purification and social reform, enlightens the public, and even inspires the community's fighting spirit against colonialists.”

In line with Syamsul, Fauzi (based on Kaptein's view) mentions another crucial function of fatwa as an instrument of social reform. Fatwa connects religious idealism and social realism, in addition, it is the engine of social reform with roots from authoritative sources of religion initiated by cleric/*mufti* (individual/institution) to perform social engineering in attempt to shape, change, and improve the social condition¹³.

Further, QuraishShihab states that it is critical for a *mufti* to take into account the sociological condition of the community when issuing a fatwa. The issued fatwa(s) must not lead into any conflict or

⁸Wahbahaz-Zuhail, 2010, *UshulFiqhi al-Islamy*, Vol. 2, Damascus, Dar Al-fikr, p. 367.

⁹(<https://id.wikipedia.org/wiki/Fatwa>), accessed on 05 April 2017

¹⁰Mardani, 2013. *Opcit*, p. 374

¹¹Amir Syarifuddin. 2009, *Ushul Fiqh*, Jilid 2, Kencana, Jakarta, p. 429

¹²Syamsul. 2007, *Studi Hukum Islam Kontemporer* [Contemporary Islamic Law Studies], RM Books, Jakarta, p. 309

¹³Niki Alma FebrianaFauzi. 2017, *Fatwa Indonesia: Perubahan Sosial, Perkembangan, dan Keberagaman* [Fatwa in Indonesia: Social Reform, Development, and Diversity] *Jurnal Hukum Novelty*, Vol 8 No. 1, February, p. 4-5

chaos within the society. Concerning on social context is the first priority; all opinions, even if they are correct, must be postponed if the opinions are potential to trigger any social damage¹⁴. From the previous concept, one can conclude that MUI, as a non-governmental infrastructure institute, is responsible to address every religious matters questioned by Muslim community and/or the government without denying the current context on social and religious aspects within the community. Moreover, the MUI also needs to take into account of the common good when issuing fatwa(s).

2.2 Procedure of fatwa determination by MUI

The background, characteristics, method, and procedure of fatwa determination are clearly elaborated in chapter 2 until chapter 4 of the Guidelines and Procedure of Fatwa Determination by MUI. The determination of fatwa is rooted from basic Islamic principles, i.e. the Quran, Sunnah (*hadits*), *ijma'*, *qiyas*, and other *mu'tabar* (reliable) propositions¹⁵. The determination of fatwa is conducted by Fatwa Commission in responsive, proactive, and anticipative manner. Prior to determining a fatwa on a certain matter, the Commission initially reviews on opinions from the four Imam of *mazhab* and *mu'tabar* (accountable) clerics as well as existing propositions on the matter in meticulous manner. Problem with clear legal status should be delivered as it is. On problems with varying opinions between the Imams of *mazhab*, the fatwa is decided by referring to the middle ground between different opinions of different *mazhab* through *al-jami'uwa al-taufiq* method; should the Commission cannot find the midpoint between different opinions, therefore the fatwa is decided through *muqaranah* (comparison) by referring to the principles of *ushulfiqh* (Islamic jurisprudence) comparison. Moreover, if the Commission cannot find any reference of fatwa within opinions of the Imams of *mazhab*, fatwa is determined through *ijtihadjama'i* (collective *ijtihad*) by *qiyas*, *istihsani*, *ilhaqi* and *sadd al-zari'ah* methods.

In determining a fatwa, the Commission member must meet the minimum adequate number of presence by the meeting chairman. Under certain conditions, the Commission invites experts related to problems discussed. The Commission can conduct a meeting if there is a request of fatwa on certain matters from the public, from the government, social institutions/organizations, or from within the MUI itself; which are deemed necessary to be discussed. Fatwa is also issued as a response to new dynamics of religious matters due to changes within the community and advances in sciences, technology, and art.

2.3 Legal position of fatwa by MUI in national law

MUI is the medium of deliberation for the Islamic clerics, leaders, and scholars; as well as the leader of all Muslim community in Indonesia. Deemed as the most competent institution in religious problem solving, the MUI has gained full trust from the society and the government¹⁶. On solving religious problems undiscussed in existing literature, one needs to provide strong and relieving arguments for the Muslim community. The conduct is only able to be performed by individuals and/or institution with comprehensive religious knowledge.

The MUI is considered competent in performing the conduct, as it consists of Islamic clerics and scholars with extensive background in Islam and other fields of study. Therefore, as a *mufti*, the MUI is competent in issuing fatwa on matters related to Islamic law, either requested or not. The MUI is to accommodate and channel the aspiration of the Muslim community with various streams, ideologies, and organizations; as well as to provide law recommendation for the government.

Mahfud MD asserts that fatwa by the MUI is nonbinding and unable to be forced through law enforcer. That is to say that fatwa is only treated as legal opinion, in which one can choose to obey or disobey it. The fatwa is only legally binding when transformed into regulations by an authoritative body, thus acquiring positive legal status. A condition in which a Muslim chooses to obey a fatwa is considered only as one's personal religious awareness, not legal obligation. Moreover, Mahfud MD

¹⁴Diana Mutia Habibaty. 2017, "Peranan Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia Terhadap Hukum Positif Indonesia" [Role of Fatwa of National Sharia Supervisory Board of MUI towards Indonesian Positive Law]. *Jurnal Legalisasi Indonesia*, Vol. 14, December, p. 450

¹⁵Team of Editors, 2011, *Himpunan Fatwa MUI Sejak 1975*[Collection of Fatwa by the MUI since 1975], Jakarta: Secretariate of Majelis Ulama Indonesia. p. 5-6

¹⁶Editors, 2011, *Ibid*, p.935

adds that fatwa can be treated as information, expert opinion, and/or doctrine in the court in terms of solving concrete-individual cases (*in concreto*), not as an abstract regulation (*in abstracto*)¹⁷.

In line with that, Habibaty asserts that fatwa is a nonbinding set of rules of daily life, and the community is not legally forced to oblige to the fatwa. On the other side, the contents of the fatwa are capable to be transformed into materials of regulations with legal binding force to the community¹⁸.

The National Sharia Supervisory Board has issued several fatwa(s), which have been adopted as material law of Sharia economics in several regulations, i.e.:

1. Act 41 of 2004 on *Waqf*(endowment)
2. Act 19 of 2008 on Sharia Securities
3. Act 21 of 2008 on Sharia Bank
4. Act 33 of 2014 on Guarantee of Halal Products

Article 7 of Law Number 12 Year 2011 concerning the Establishment of Legislation Regulations regulates the type and hierarchy of regulations. Moreover, Article 8 paragraph (1) regulates types of legislation other than that referred in Article 7 paragraph (1) covering regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Financial Audit Board, the Judicial Commission, Bank Indonesia, the Ministers, agencies, institutions, and/or commissions established by Law or Government on behalf of the Law, Provincial Regional Representative Council, Governor, Regional Representative Council, Regent/Mayor, Village Head, or equivalent. Further, In paragraph (2), the Regulation as referred to in paragraph (1) is recognized and has legal binding force insofar as it is ordered by higher legislation or established based on authority.

Based on the previous Article 7 and 8, it is clear that fatwa is not included as a part of regulation, thus, unable to be treated as legal foundation. Nevertheless, in reality, fatwas often encourage the executive and legislative parties to accommodate the aspirations of Muslim communities; thus, the two institutions plan and compile legislative products complying to Islamic principles, such as Islamic banking.

2.4 Fatwa issued by national sharia supervisory board of MUI as material law of sharia economics

As the national central bank, the Bank Indonesia is allowed to compile specific regulations on certain bank products treated as operational guidelines. As a banking institution under the authority of Bank Indonesia, Sharia bank requires material law sources of Sharia economics from competent scholars with extensive Sharia economic principles, such as the scholars of the MUI.

The Bank Indonesia is competent in formulating regulations regarding Sharia banking. As elaborated by Gayo and Taufik¹⁹:

“... as a regulator of Sharia banking activities, the Bank Indonesia [also] considers the fatwa(s) released by the National Sharia Supervisory Board of the MUI. The fatwa issued by the Board is treated as reference in formulating the Regulation of Bank Indonesia, as well as releasing external circular letter. Moreover, in formulating regulation, the Bank Indonesia is only allowed to refer to fatwa(s) issued by the Board. Therefore, one can conclude that fatwa issued by the Board is a binding set of rules for Bank Indonesia as the regulator; in which the Bank is obliged to implement the contents contained in the fatwa in formulating Islamic banking regulations with legal binding force.”

From formal legal sources approach, the position of fatwa in the Indonesian positive law system is considered as doctrine; as referred to Mahfud MD's statement, in certain circumstances, a fatwa is customary if it transforms into legal value within in society, however, it is not included in the hierarchy of legislation. Based on this view, the fatwa is only treated as nonbinding opinion and advice of Islamic cleric. To be legally binding, the fatwa must be changed into a regulation, so that it can be used as a legal basis for judges to decide cases in court and have permanent legal force (jurisprudence).

¹⁷<http://www.hukumonline.com>, accessed on 05 April 2017

¹⁸ Diana Mutia Habibaty, *op cit*, 2017, p. 448 s

¹⁹ Slamet Suhartono.2017, *Eksistensi Fatwa Majelis Ulama Indonesia Dalam Perspektif Negara Hukum Pancasila* [The Existence of Fatwa of Indonesian Clerics Council in Pancasila-Based Law State]" *Jurnal Al Ahkam*, Vol. 12 No. 2, p. 14

The fatwa issued by the Board can transform into material law of Sharia economics and become a positive law if the fatwa becomes a statutory regulation in the form of Law, Government Regulations, Presidential Regulations in the form of technical regulations, namely Regulation of the Supreme Court, regulation of the Bank Indonesia, and Regulation of Minister of Finance. As cited in the article entitled “*Fatwa DSN Merupakan Hukum Positif Mengikat*”, Barlinti asserts that several fatwa(s) issued by the Board are positive law whose legally binding status, due to the legitimation through regulations by the government, thus the fatwa(s) are to be obliged by Sharia economic actors²⁰. The fatwa can also be applied as a legal opinion (doctrine) in the process of resolving Sharia economic disputes or as a living value in society that can be used as a consideration by court judges when deciding on a dispute that does not have a clear legal basis. This complies with the principle that a judge cannot decline to adjudicate a certain case reasoning that there is no legal foundation of the case. The matter is clearly stipulated in Article 10 Chapter (1) of Law No. 48 on 2009 concerning Judge’s Authority that the Court cannot decline to examine, adjudicate, and decide on a dispute with reason that there is no legal foundation on the case. Thus, in the case of vacuum of legal foundation in a case, the judge is given the freedom to explore the values contained in the views of legal experts or on legal values in society.

As cited in Manan, Van Duyvendijk states that religion is a part of material law sources in a tradition within a community (religious and moral opinion, tradition in law). Conversely, Utrecht includes religious law into formal law sources, explaining that in religious law is essential in several regions in Indonesia with close relation to religious principles²¹. The two law scholars have differing opinion on position of religious law; in which Manan positions it as material law source, while Utrecht considers it as formal law source. From both academicians’ perspective, one can deduce two propositions: *First*, the fatwa by National Sharia Supervisory Board acts as material law source in formulation of material law of Sharia economics. *Second*, the fatwa by the Board related to material law of Sharia economics is considered as formal law source when it is continuously used by Sharia economic institutions (becomes habit). Further, it also acts as doctrine or legal opinion, as long as it is not stipulated into regulation.

3. Conclusion

The fatwa by National Sharia Supervisory Board of the MUI on matters of Sharia economics in form of legislation has fulfilled the principle of legality (legal certainty). Moreover, the non-regulation fatwa used by the judge as a doctrine in consideration of resolving disputes has meet the principle of legal certainty with legally binding status.

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²⁰<http://www.hukumonline.com>, accessed 05 April 2017

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