



Ahkam

Jurnal Ilmu Syariah

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- ❖ M. IKHSAN TANGGOK
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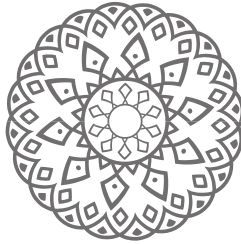
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THE POSITIVISATION OF NATIONAL SHARIA BOARD FATWA ABOUT MUDARABA INTO FINANCIAL SERVICE AUTHORITY REGULATION

Abdul Rohman Zulfikar Alfarouq & Nurhasanah

Abstrak: Positivisasi fatwa Dewan Syariah Nasional (DSN) tentang mudarabah ke dalam regulasi Otoritas Jasa Keuangan (OJK) merupakan upaya yang dilakukan OJK dalam menjalankan fungsi pengaturan sebagaimana diatur dalam UU No. 21 Tahun 2011 tentang OJK. Dengan positivisasi ini, fatwa DSN memiliki kekuatan hukum dan bersifat mengikat karena masuk dalam hierarki peraturan perundang-undangan sebagaimana diatur dalam UU No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan (P3). Namun, terdapat kesenjangan dan perbedaan konten antara ketentuan dalam fatwa DSN di atas dengan regulasi OJK akibat pola positivisasi. Selain itu, meskipun terdapat konten fatwa DSN yang belum terserap ke dalam regulasi OJK, namun fatwa tersebut tetap memiliki kekuatan hukum dan mengikat industri keuangan syariah bila ditinjau dari perspektif teori hukum H.L.A Hart.

Kata kunci: positivisasi, fatwa DSN, mudarabah, regulasi OJK, dan kekuatan mengikat.

Abstract: The positivisation of National Sharia Board (DSN) fatwa about mudaraba into Financial Service Authority (OJK) regulation is an effort conducted by OJK in running its regulating function such as arranged in the Law Number 21 of 2011 regarding OJK. With this positivisation, DSN fatwa has legal and binding power because it has become a regulation such as arranged in the Law Number 12 of 2011 regarding the Establishment of Legislation (P3). However, there are gap and the difference in terms of content between the provisions in DSN fatwa above with OJK regulation due to positivisation pattern. Moreover, although there is DSN fatwa content which has not been absorbed in OJK regulation, but it still has legal and binding power in shari'a financial industry if reviewed from the perspective of H.L.A Hart's legal theory.

Keywords: positivisation, DSN fatwa, mudaraba, OJK regulation, and binding power

ملخص: إن التحقق الفتوى من مجلس الشرعية الوطنية (DSN) بشأن المضاربة في لائحة هيئة الخدمات المالية (OJK) هو جهد يقوم به OJK في تنظيمه مثل الترتيب في القانون رقم ١٢ لعام ١١٠٢. وفقا للحال صارت الفتاوى لدي مجلس لها مادة قانونية و قوة ملزمة, لان الفتوى داخل في المادة مثل الترتيب في القانون رقم ٢١ لعام ١١٠٢ فيما يتعلق بتأسيس التشريع (٣P). ومع ذلك, هناك التعارض أو الاختلاف المحتويات بين الأحكام في الفتوى DSN أعلاه مع تنظيم OJK عن طريق نمط positivisation. علاوة على ذلك. على الرغم من وجود محتوى فتوى من شبكة DSN لم يتم استيعابه في لائحة OJK, إلا أنه لا يزال يتمتع بسلطة قانونية وملزمة في القطاع المالي الشرعي في حال تمت مراجعته من وجهة نظر نظرية H.L.A Hart القانونية. الوضعية, الفتوى DSN, المضاربة, تنظيم OJK, والسلطة الملزمة..

الكلمات المفتاحية: الوضعية, الفتوى DSN, المضاربة, تنظيم OJK, والسلطة الملزمة

Introduction

As a legal state, norms contained in Islam can be coercive and binding when it has been positivated into national legal. National legal is a legal established based on the constitution, both through legislative and regulatory processes. Based on these, the rules contained in Islamic certainly can have coercive and binding power in the context of modern state legal concepts.

In the context of sharia economic law, most after birth the Law Number 21 of 2011 regarding Financial Service Authority (OJK), than everything of financial institution generally and sharia financial institution particularly, regulated and supervised by OJK. Therefore, the positivisation of National Sharia Board (DSN) fatwa into OJK regulation is one function arrangement mandated by the Act to OJK.

Legal positivisation occurred because the norm system in time is need to process more concrete institutionalization through written pouring process accompanied by institutionalization of its enforcement infrastructure. Related to the positivisation of DSN fatwa into OJK regulation, the legal formation process is used by regulative rather than legislative.

DSN fatwa is recognized by institutions or financial authorities in Indonesia, such as Indonesian Bank (BI) and OJK. Such a scam, DSN fatwa is not a positive law in the regulative clan (made not by the State institution). To be a positive law, that legal norms are in the fatwa must transform into OJK regulation.

According to Shidarta, DSN fatwas have pre-positive legal position in the regulation/legislation. Because its legally formal, DSN fatwa not included in the hierarchy of legislation. But, legislation related to Islamic economic must be guided by fatwas issued by the DSN. The existence of DSN fatwa cannot be ruled out in the life of the Indonesian Muslim community. Therefore, the effort to transform the fatwa into OJK regulation is a necessity. It can be understood that every positive law is produced from a legal formulation process with strictly regulated, and formed by the ruler or authorized body.

The principle, positivisation of DSN fatwa into OJK regulation can be done well without gap. Both elements must show consistency with each other. But in fact, allegedly there is a gap between the provision

of DSN fatwa about mudaraba with OJK regulation. This is due to different patterns of positivisation between one provision and other provisions. This pattern is sometimes according to the text; namely in accordance with the fatwa content, but also not often different from the form of fatwa.

The Legislation System in Indonesia

The Indonesian legal system in the reform era (after the quit of GBHN) still refers to the National Ideology, namely Pancasila and the 1945 Constitution as the constitution, as well as other legislations such as the Law Number 17 of 2007 regarding the National Long Term Development Plan for 2005-2025 and its attachments and the Law Number 10 of 2004 j.o the Law Number 12 of 2011 regarding the Establishment of Legislation. Article 1 paragraph (2) and (3) of the 1945 Constitution states that: *1). Sovereignty is in the hands of the people and is carried out according to the Constitution, and 2). Indonesia is a legal state.* Based on these, the people have a core role in the sovereignty of the State, especially in the field of legal, and all of that must be based on the 1945 Constitution.

Everything related to norms must be based on law or according to law. Whereas in Article 29 of the 1945 Constitution, states that: *1). The state is based on the One God Almighty, 2). The state guarantees the independence of each citizen to embrace their respective religion and to worship according to their religion and belief.* The Article 29 explains that the State has accommodated the people to carry out their respective religions. The law that lives in Indonesia should be able to accommodate this. The law that applies in Indonesia must not conflict with any religious rules.

Whereas in Article 1 paragraph (2) the Law Number 12 of 2011, explained that: *The legislation is a written regulation that contains generally binding legal norms and is established or stipulated by a state institution or an authorized official through the procedures stipulated in the legislation.* As for article 7 paragraph (1), the hierarchy of legislation consists of: *1945 Constitution, Decree of the People's Consultative Assembly, Law / Government Regulation in Lieu of Law, Government Regulations, Presidential Regulation, Provincial Regulation, and Regency / City Regional Regulation.*

In addition, Article 8 paragraphs (1) and (2) explain that; (1). *The types of legislation other than those referred to in Article 7 paragraph (1) include the regulations stipulated by the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, the Minister, A level body, institution, or commission formed by law or government based on a law order, provincial legislative council, governor, regency / city regional parliament, regent / mayor, village head or the same level.* (2). *The legislations as referred to in paragraph (1) are acknowledged as being valid and have binding legal force insofar as they are ordered by the higher legislation or are formed based on authority.*

Then, as a logical consequence of that, any form of regulation that is not determined by or based on the authority of legislation cannot be called legislation. Thus, the formation process of legislation can be realized by mean and sure method, raw, and standard.

Pure Legal Theory of Hans Kelsen

In Hans Kelsen's thought, a norm remains valid as long as it is part of a valid rule. That means, the applicable law must be formed based on legal provision or according to certain rule as the criteria of the State.

The law is in the category *sollen*, not the opposite in the category *sein* (social reality). Law is a positive one (real, clear, firm) and applies generally (how the law is) and not something abstract and unreal (how the law ought to be). So, people should obey the law because he is obliged to obey it as a requirement of the State. The question of whether people in fact obey or not, it is outside of the law which simply a social reality.

The ideal law must be cleansed from elements outside the law itself (non-juridical), such as sociological, political, historical, and religious ethics. This purification of other values is the thought of Kelsen's positivism known as pure legal theory.

Kelsen's thinking can be seen from the doctrine of rule of law which has several characteristics: a. Formal rules: written in the form of legislation; b. *Procederis*: executed through strict rules; c. Methodologist; deify logic in its application; d. Bureaucracy: only

formal institutions are recognized as having the authority to make, implement and supervise the law (legislative, executive, and judicial).

The other Kelsen's theory is *Stufenbau Theory* (*stufenbau des recht*), which states that every rule of law in a country is a (hierarchy) rules (*stufenbau*) which all come from basic norms (*grundnorm*). Thus, it can be interpreted that a law is formed based on other legal provisions that have a higher position, and it's binding power according to that hierarchy. In Indonesia, this can be seen in the hierarchy of legislation as stipulated in Law Number 12 of 2011 regarding P3.

The rule of law has the essence which consists of: Order, Permit, Prohibition, and Sanction. This is the essence of binding power in positive law. In addition, the Law has very broad legitimacy of power. The law has sovereignty in a region, and with that sovereignty, it marginalizes all order institutions that were originally in the region. The sovereign law does not allow other arrangements except with its permission. The law appears to hold hegemony by almost clearing out the order communities that existed long before the presence of modern / positive law. The law makes the regulatory body and only the regulation produced by that body have valid power. Beyond that there is no law, that's the doctrine.

Kelsen's thought determined by Montesquieu's trias politica theory, in his book which title *l'esprit de lois* (1748). Trias politica divides State power into three parts of power (this separation is expected not to abuse the power), namely: executive, legislative and judicial functions. But, a series of Montesquieu and Hans Kelsen theories caused tension between written law and the reality that occurred in society. Because in addition the law that was born by a State institution, it is not part of the applicable law (*das sollen*).

The Legal Theory of H.L.A Hart

Herbert Lionel Adolphus (H.L.A) Hart (1907-1992) is a second generation figure of positivism or known as neo-positivism. Hart is the antithesis of the classical positivism thought (Austin and Kelsen) which formulated the natural/ moral law into the positivism course, which was initially completely separate.

Hart argues that law cannot be defined completely and can be

accepted by everyone. Law can be understood from the union between primary and secondary regulations. Hart sure that this primary and secondary regulation is the essence of law.

Primary regulations consist of standards for behavior that impose various obligations on the community that claims it. Primary regulations determine the behavior of legal subjects, stating what must be done and prohibited. The rule included in this type appear as a result of the need of the community itself. The binding power of this various types this rules is based on the majority of community acceptance. This regulation serves as a fundamental principle that guides human behavior.

There are certain conditions that must be fulfilled by the primary rule in regulating social order: 1). Make restrictions on violence, theft and fraud, 2). Receive majority support, 3). Society has relatively primordial attachments (blood ties, feelings, and beliefs).

Primary regulation is a means of social control, in the form of the group's general attitude regarding it's own behavior standard. While secondary rule is the rule of the game from the primary rule. According to Hart, the existence of secondary rule is a step forward from the pre-law world to the world of law and become a legal system.

Hart divides the secondary rule into three types: 1). Rule of recognition, 2). Rule of change, 3). Rule of adjudication. These three rules are a term of a legal system. Secondary regulation specify the ways in which primary regulations can be determined, submitted, eliminated, altered and fact about violation can be determined.

A community when regulated by primary rule, it has three weaknesses: 1). Uncertainty, this weakness can be strengthened by secondary rule, namely rule of recognition. This recognition rule allows people to recognize the primary rule that apply in their communities while supporting them with social pressure. In other words, this recognition rule determines the validity of the primary rule that apply in a society while reducing doubt related to it's existence. 2). These rules are static (static); its development tends to be slow, where the flow of behavior which is initially considered optional is then a common habit, and after that becomes mandatory, and the subsequent process is decay. This weakness can be eliminated by secondary rule, namely the rule of change. 3). Inefficient social pressure is used to carry out regulations,

because there is no institution specifically given the power to set penalty when a violation of law occurs. Therefore, secondary regulation is given the power to make authoritative provision for individual and group regarding compliance and violation of a primary rule that has weakness. This regulation is called the rule of adjudication.

Based on hierarchy, primary is under secondary regulation. In addition, the dialectic between law and moral does not have to be dichotomized so complexly. The most important thing is the social pressure behind the regulation, where it is the primary factor that determines whether it can be seen as giving rise to obligation or not. Structure resulting from a combination of primary and secondary regulation; signifying the existence of the most powerful mean to analyzes many things that have been confusing to legal experts and political theorists.

The Positivation of Islamic Law in Indonesia

The idea of positivation or constitutionalization of Islamic law into national law in Indonesia has been initiated by Hazairin, Bustanul Arifin and A Qodry Azizy. Hazairin introduced the theory of Receptie Exit where after Indonesia gained its independence, the 1945 Constitution became the basic law while all the legislations of the Dutch East Indies which were contrary to the spirit of the 1945 Constitution had to come out of the legal system of independent Indonesia. According to him, the Receptie theory initiated by Snouck Hougruene is contrary to the Qur'an and Sunnah, therefore it is also contrary to article 29 paragraphs (1) and (2) of the 1945 Constitution: *"The state is based on the Almighty God" and "the State guarantees independence of each - every resident to embrace his religion and to worship according to his religion and belief."*

Hazairin gave 2 interpretations of Article 29 paragraphs (1) and (2) of the 1945 Constitution, namely: 1). In the Indonesian state, something that is not contradictory to Islamic principles for Muslims, or that is contrary to the rules of Christianity for Christians, or which contradicts the Hindu-Bali rules for Hindu-Bali, or contrary to the morality of Buddhism for Buddhists. 2). The Republic of Indonesia is obliged to carry out Islamic Sharia for Muslims, Christian Sharia for Christians, and Hindu-Bali Sharia for Hindus-Bali, just running the sharia requires the mediation of State power.

Bustanul Arifin explained that the influence of the understanding of Sharia “in this context is jurisprudence (fiqh)”, gave a special style in the application of Islamic Law to the national law face in addition there is the Dutch colonial legal political engineering. The institutionalization of Islamic law sociologically is a social legal phenomenon due to the length of the three legal systems clash; Customary law, Western law and Islamic law by Dutch law politic. While philosophically normative is an effort to rectify perception of Islamic Sharia which have experienced chaos since the 10th century Hijri due to Islamic political upheaval.

In the context of Islamic Law renewal in Indonesia, the positivation of Islamic Law into national law remains actual. Islamic law in question includes criminal and civil law. A Qadry Azizy reinforces the concept of Islamic Law positivation because in accordance with the provision of the State Policy Outline (GBHN) in 1999-2004 (which is now not applicable), Law Number 17 of 2007 regarding the National Long Term Development Plan for 2005-2025, and Law Number 12 of 2011 regarding P3, especially Article 18 a-h. Islamic law movement towards positive law has a big chance with the reformation that is supported by national law politic which constitutionally strengthens the position of Islamic law based on Law Number 12 of 2011.

The Pattern of Islamic Law Positivation

The positivation of Islamic Law into national law is done by using the following patterns:

1. Normative and Cultural

The approach of normative and cultural in positivation of Islamic law were introduced by A Qodri Azizy. There are 2 (two) groups involved in the discussion of Islamic law, namely group that emphasizes normative approach or formalism and group that emphasizes cultural approach. These normative and cultural pattern are manifestation of the political life of each group.

2. Adoption, objectification, and adaptation

The Adoption of Islamic Law by the State is carried out with the ratification of Islamic Law in full and in part. This is in line with what Mudzhar explained, that in Indonesia the adoption of the DSN-MUI fatwa in various regulations was carried out in full or

in part. The examples of the adoption of Islamic law in the field of sharia finance and business are widely ratified in Muslim countries such as Indonesia and Malaysia.

Whereas objectification is the translation of religious subjective values in objective categories that can be understood by all people without need to understand the original values (religion) and can be approved by anyone without having to approve the original value. Objectivation is a method for presenting religion more substantively scientifically rather than ideological normative. In objectification, the objective values of all religions, ideologies, beliefs or philosophical schools can communicate with each other, regardless of their ideological egocentrism. This objectification pattern is the same as the cultural pattern.

The adaptation pattern is provisions in Islamic law that are accommodated and adapted to other provisions, so that Islamic law does not manifest in a complex form but transforms in various provisions, as in Islamic criminal law known as the qishas law, the death penalty for murderer. Whereas in certain national law adaptation pattern, capital punishment is applied, although in a different way.

3. Implicit and Explicit

Shidarta stated that so far the penetration model of Islamic law still uses two patterns. There is an Islamic law whose substance is implicitly included, without having to proclaim the public that the rule is Islamic law, for example what happens in the realm of marriage law. In addition, there are other patterns that are explicitly mentioned as Islamic law, for example in the field of Islamic economic.

4. Copy Paste, Substantive, and Extending Fatwa Provision

Soleh Hasan Wahid introduced three fatwa transformation patterns, namely: copy paste pattern in the form of copying fatwa into articles of a law, substantive pattern only taking substance from fatwa, then translated into articles of legislation with more language formal, and extending the fatwa provisions and / or translating general fatwa provisions into a more operational form so that they can be applied in the operational activities of a financial institution.

The Positivation Pattern and Binding Power DSN Fatwa on Mudaraba

In this paper, the DSN fatwa and the OJK regulation in question are DSN-MUI fatwas Number 07/DSN-MUI/IV /2000 and Number 115/ DSN-MUI/IX/ 2017 regarding mudaraba and POJK Number 16/POJK.03/2014 with it's SEOJK, and SEOJK Number 36/ SEOJK.03/2015 with it's attachment (codification of product and activity of BUS and UUS).

The DSN fatwa is generally positivated into OJK regulation as a form of normative, adoption and explicit patterns. The positivisation pattern of the DSN fatwa as above, is almost found in every regulation relating to the sharia financial industry, both in its provisions in whole and in part. Regarding fatwa Number 115 / DSN-MUI / IX / 2017, despite the issuance after the OJK regulation above, but the values contained in it have been absorbed into regulation with certain patterns. This happens because basically in the establishment of OJK regulation (especially POJK) always involves DSN, namely at the forum group discussion (FGD) or opinion hearing conference (RDP) stage so that Islamic values are contained in OJK regulation through thought or input from the DSN.

Following are the specific positivisation patterns used in the positivisation of the DSN-MUI fatwa Number 07 / DSN-MUI / IV / 2000 and Number 115 / DSN-MUI / IX / 2017 regarding mudaraba into OJK regulation as above:

The Provision of OJK Regulation which is Content Different from DSN Fatwa

Fatwa Numb. 07 / DSN-MUI/ IV/ 2000	POJK Numb. 16 / POJK. 03/ 2014
<p><i>Statement of ijab and qabul must be stated by the parties to show their intention to hold contract, taking into account several things:</i></p> <p><i>a) Offering and re-cepting must explicitly indicate the purpose of the contract,</i></p> <p><i>b) Recepting from the offering is made at the time of the contract.</i></p>	<p>Article (1)</p> <p>5. Financing is the provision of funds or equivalent claim in the form of profit sharing, leasing including leasing of service, sale and purchase, and lending transaction based on an agreement bet-ween the Bank and other parties requi-ring the financed party and / or given funding facilities to return that funds after a certain period of time in return for ujah, without compensation, margin, or profit sharing</p>

The provision of *ijab* and *qabul* in the DSN fatwa must contain the purpose of the contract, and acceptance and offer must be made at the time of the contract. In this case, the OJK regulation specifically POJK does not include the provision of *ijab* and *qabul* or even receipting and offering according to the text, only mentioning the term of the agreement between the Bank and the Customer. That provision is only mentioned in the definition of financing, not specifically regulated in the points of agreement.

The reason, *ijab* and *qabul* can be equated with the term agreement. OJK does not specify than sentence (*ijab* and *qabul*) in POJK or other OJK regulations, because the substance has been represented in terms of agreement. The agreement redaction is more often used by the Bank, making it easier for the Bank to understand the provisions. That word was used by OJK in formalizing *ijab* and *qabul* provision in the DSN fatwa. Positivation of this provision is to use a substantive pattern.

The positivation in this pattern shows a difference in content, but this difference does not change the essence of the DSN fatwa, so the binding power the values of DSN fatwa absorbed into POJK has a binding position equivalent to POJK, because the norm is no longer in the form of a fatwa, but has become OJK regulation.

In addition to the above pattern that causes difference in content, there is other pattern used by the OJK in formalizing that fatwa:

Fatwa Numb. 07 / DSN-MUI/IV/ 2000	Codification
In principle, there is no collateral in <i>mudaraba</i> financing, but in order <i>mudarib</i> not to makes deviation, Islamic financial institution (LKS) can request the collateral from <i>mu-darib</i> or third party. <i>This collateral can only be disbursed if the mudarib is proven to have violated the things agreed upon in the contract.</i>	II.1.1. <i>Mudaraba</i> Financing Bank can request the collateral from customer at the time of financing distribution.

The above positivation uses the partial adoption pattern of the fatwa. While the provision is partly (in the DSN fatwa): “*This collateral can only be disbursed if the mudarib is proven to have violated the things agreed upon in the contract.*,” not formalized. This is certainly a discourse, where the provision in the fatwa constitutes an inseparable

unity. Because, between clause with one another is a condition for the collateral. However, the OJK did not comprehensively formalize the provision of the fatwa. In practice this can lead to misunderstanding, where the collateral can be disbursed to compensate even if there is no default. That is, even if the loss of mudarib is not caused by mudarib error, the collateral can be taken as a substitute for loss. This is a practice that violates sharia principle.

The provision in this codification were largely opposed to the fatwa DSN, but as Researcher has described above, that by not positivated provision of DSN fatwa likely cause misrepresentation, more danger out of the sharia principle.

The principle of a collateral in mudaraba is as an effort to minimize mudarib in making default, but the collateral is an optional right, thus the DSN said.

In this context, the provision of the non positivated DSN fatwa has the binding power of it's own. This fatwa provision applies as a sharia compliance aspect, so that mudaraba product and activity do not deviate. If viewed from Hart's perspective, the DSN fatwa is categorized as primary regulation. Today's DSN fatwa is a norm that aliving and legitimizing by the majority of the people even by the government and it's recognition is poured into secondary regulation; Article 1 Paragraph (12) Law Number 21 of 2008 regarding Sharia Banking and Article 1 Paragraph (3) Law Number 40 of 2014 regarding Insurance; *"Sharia principle is the principle of Islamic law in banking / insurance activity based on fatwa issued by institution that have authority in determining fatwa in the field of sharia"* In addition, DSN implicitly contained in the provision of Article 26 paragraph (2) Law Number 21 of 2008; *"The sharia principle as referred to paragraph one is stated by the Indonesian Council of Ulama,"* and Article 32 paragraph (2): *"The Sharia Supervisory Board as referred to paragraph (1) is appointed by the General Meeting of Shareholder on the recommendation of the Indonesian Council of Ulama."*

While explicitly in the explanation of Article 21 paragraph (4) POJK Number 16 / POJK.03 / 2014 regarding Asset Quality Assessment of BUS and UUS, explained that: *"Fulfillment of the Sharia Principle refers to the fatwa issued by the National Sharia Board-Indonesian Council of Ulama"*. As for Article 1 paragraph (6) POJK Number 31 / POJK.05 / 2014 regarding Sharia Business Financing, that provision reads: *"The*

sharia principle is the provision of Islamic law based on fatwa and / or the sharia conformity statement from the National Sharia Board-Indonesian Council of Ulama”.

The binding power of DSN fatwa was strengthened by the Supreme Court Decree Number KMA / 032 / SK / IV/ 2006 regarding Enforcement of Book II Guidelines for the Implementation of Task and Court Administration; In the KMA stated in part II of the Judicial Technical, in the sub-chapter of the position and authority of the Religious Court/Shariah Court (Mahkamah Syar’iyah), there is a material legal discussion that is used by the Religious Court/Shariah Court; at number 19 the DSN-MUI fatwa is stated as material law used by the Religious Court/Shariah Court.

There is also a positivisation pattern in addition to the above, which has its own uniqueness. Where in this pattern, the DSN fatwa is actually not formalized, but textually it looks like there is a difference in content:

DSN Fatwa	Codification
Fatwa Numb: 07 /DSN-MUI/IV/2000 Second: Financing Pil-lar and Term Provider of fund (sahibul mal) and manager (mudarib) must be lawful.	II.1.1. Mudaraba Financing The Bank conducts an analysis of request for financing from customer which include personal aspect in the form of character analysis and / or business aspect, including analysis of business capacity (capacity), financial (capital), and / or business prospect (condition)
Fatwa Numb: 115 /DSN-MUI/IX/2017 Fourth: Provision of the Parties Sahibul mal and mudarib must be lawful with sharia and applicable legis-lation	

That legal provision is not accommodated in OJK regulation, even the provision looks different from fatwa. The reason is that there is no agreement between a lawful and unlawful person in the Islamic Banking environment.

Because of this, the provision of lawful not become concentrated in POJK, SEOJK or codification. Whereas the provision in the OJK regulation did not violate sharia principle, it was a manifestation of the prudential principle that recognized by the OJK. As for fatwa Number 115 / DSN-MUI / IX / 2017 in this context strengthens the position of fatwa Number 07 / DSN-MUI / IV / 2000.

Basically, the DSN fatwa as a fiqh product does not only discuss the provision of mudarabah in the scope of Islamic banking, but includes a broader scope, namely the transaction of Islamic economic in daily life. So, the provision of legal capability is also shown to individuals who have a tsuna'iyah status.

Positivisation in this context uses cultural and / or objectivation patterns, whereby the OJK does not formally lawful requirement as in the DSN fatwa into OJK regulation. The provision of lawful flows just like that, binds, and becomes a habit that must be carried out without having regulatory formalities (ideological normative). It can be understood by all people, especially actors in BUS and UUS without having to understand the original values of the DSN fatwa and can be approved by anyone without having to approve the original value.

The Result of Positivisation that Experiencing Gap

Fatwa Numb: 07/ DSN-MUI/IV/2000:	Codification
LKS as a provider of fund bears all losses due to mudaraba unless mudarib (customer) makes a deli-berate mistake, negligent, or violates the agreement.	II.1.1. Mudaraba Fi-nancing <i>Bank and customer bear the loss proportionally according to their respective capital portion</i>

If the loss in musyaraka is divided on the portion of each of the two parties, the loss in mudaraba is the responsibility of sahibul mal, except for mudarib default. It is positivated into POJK with a copy-paste pattern: ... *whereas the loss is borne entirely by the Bank unless the customer makes a deliberate, negligent, or violating agreement.*

Not so with the codification of the product and activity of BUS and UUS, there is gap in it's provision with the DSN fatwa as it's legal source. The Positivisation of DSN fatwa in the codification provision above uses the extending of fatwa provision pattern. Tha extending of fatwa led to gap between DSN fatwa and codification of BUS and UUS product and activity even with POJK, where loss in mudaraba on the basis of not the customer's fault (default), borne by both parties (sahibul mal and mudarib) in accordance with their respective capital portion. This clearly resembles the provision for the distribution of loss in the Musyaraka contract and out of the characteristic of the mudaraba contract.

That provision is out of the mudaraba principle, because: 1. Mudaraba is financing carried out by one party (sahibul mal) as a provider of capital without mixing capital with other parties, and the other party, namely mudarib, has the obligation to manage asset (capital) from sahibul mal. Whereas in the codification, it is stated that there is a portion of capital between the two parties; and 2. Financial loss in mudaraba is only the responsibility of sahibul mal (except mudarib in default), and not the responsibility of the mudarib. Mudarib's loss is in the term of the energy and time that has been spent without getting a profit (not replacing financial loss).

The gap must necessarily be revised immediately by the OJK as the codification publisher, so there will be no misrepresentation in financing practice and the practice of law enforcement. The reason, if there is a conflict between the DSN fatwa and the legislation (in this context is regulation), then the tradition of punishing civil law will put forward the legislation as the law should. The DSN fatwa's binding power and force have condition, namely if it does not conflict with the legislation. This is also consistent with what Hart said, which is essentially the hierarchy of primary regulatory under secondary regulatory.

However, in this case, because codification is contrary to the DSN fatwa or with the POJK as the regulation on it, the contradictory provision in codification must be ignored. This is in accordance with legal principle, *lex superior derogat legi inferiori*.

List of DSN Fatwas Not Been Adopted as OJK Regulations

Fatwa
Fatwa Numb: 07/DSN-MUI/IV/2000 First: Term of Financing Operational cost is charged to the mudarib Fatwa Numb: 115 /DSN-MUI/IX/2017 Seventh: Provision for Business Activity Costs incurred due to business activity on behalf of the mudarabah entity, may be charged to the mudarabah entity

The fatwa provision number: 115 / DSN-MUI / IX / 2017 regarding costs arising from mudarabah activity, differs from perspective with the provision of operational cost in the fatwa number: 07 / DSN-MUI / IV

/ 2000. In the fatwa number: 07 / DSN-MUI / IV / 2000, operational cost is charged to the mudarib, while the costs (operational cost) referred to fatwa number: 115 / DSN-MUI / IX / 2017 are allowed to be charged to the mudarabah entity sourced from sahibul mal fund.

The argument for the difference in perception is; that the fatwa provision Number: 07 / DSN-MUI / IV / 2000 is a provision related to operational cost in the context of mudarabah with profit sharing system using the method of gross profit margin (net revenue sharing). Basically the bank can use two methods in the distribution of profit (result), namely profit sharing, the profit sharing that calculated from income after deducting capital (ra'su al-māl) and operational costs, and may also based on the principle of net revenue sharing, namely the profit sharing calculated from income after deducting ra'su al-māl.

The costs referred to fatwa Number: 115 / DSN-MUI / IX / 2017 are in the context of mudarabah operational cost with profit sharing system and gross profit margin (net revenue sharing). Thus, sahibul mal can choose to charge operational cost, so the context may be charged to the mudaraba entity as above is able to charge costs to the mudaraba entity or be charged to the mudarib. Both of these DSN fatwas must be reference to Islamic banking regarding the operational cost of mudaraba.

Description	Amount	Profit Sharing Method
Sale	100	
Cost of goods sold	65	
Gross profit	35	<i>Gross Profit Margin</i>
Burden	25	
Net income	10	<i>Profit Sharing</i>

Regarding to operational cost, Sayyid Sabiq argued; the sustenance of the executor of mudarabah is taken from his own wealth while he is *muqim*, thus if he traveled for the sake of mudaraba. Because the sustenance (can be) is sometimes as big as profit, it means (if a sustenance is taken from mudaraba), he takes it all, while the owner

of the capital does not get a share. Even though the capital owner has the share right of the profit, as a legal requirement for *mudarabah*. The existence of sustenance taken from *mudaraba* means that the owner of the capital gets nothing. However, if the capital owner allows the *mudarib* to spend the capital of *mudaraba* for the purpose of himself in the middle of the trade trip or because it includes customary practice, then he may use *mudaraba* capital.

The provision of that fatwas are not in POJK, SEOJK or codification. The absence of that provision causes the fatwa to be bind and coercive in it's own form when viewed from Hart's theoretical perspective.

That standards for behavior that impose various obligations on the community that claims it, and it's recognition is contained in secondary regulation, has legal force and binding (as discussed in the previous sub-heading). The binding power of the DSN fatwa applies if it does not conflict with OJK regulation based on another DSN fatwa or OJK regulation relating to the Islamic financial industry. Because, the legal system in Indonesia is arranged hierarchically from the lowest to the highest, and applied the legal principle of *lex superior derogat legi inferiori*.

Conclusion

Indonesia today has accommodated various kinds of mixed systems, so the DSN fatwa is recognized in the development of legal dynamic in Indonesia, especially in the Islamic Financial Industry and Religious Court. Nonetheless, the civil law tradition or positive law which is influenced by the idea of classical positivism, still dominates the legal characteristic.

DSN fatwa about *mudaraba* is positivated into OJK regulation using several different patterns. It is make gap and difference in content. In addition, there is also that provision which not positivating, DSN fatwa which has positivated, it has binding power equivalent to the regulation, and the provision that has implication for the gap, then applied the legal principle of *lex superior derogat legi imperiori*. Likewise, the provision of the DSN fatwa that is not positivated, it has binding power, but that legal principle applying. Thus, the position of the DSN fatwa in Indonesia occupies the primary regulatory position as stated by Hart.[]

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