

JURNAL CITA HUKUM

Indonesian Law Journal



- **Human Trafficking in Accordance with Prosperity and National Economic Development**
Renny Supriyatni Bachro & Mien Rukmini
- **Disparity in The Judge's Ruling About Community Property Disputes After Divorce;
(An Analysis of The Verdict in The South Jakarta Religious Court, Religious Court of Jakarta
And Supreme Court)**
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- **Existence of Local Government Toward the Implementation of Coaching and Legal
Supervision for Franchisee Business**
Ika Atikah
- **Legislation Fatwa National Sharia Board-Indonesian Council of Ulama (DSN-MUI) In the State
Economic Policy**
Fitriyani Zein
- **Presidential Threshold Between the Threshold of Candidacy and Threshold of Electability**
Suparto
- **Mahar and Paenre'; Regardless of Social Strata Bugis Women in Anthropological Studies of
Islamic Law**
Yayan Sopyan & Andi Asyraf
- **Kedudukan Hasil Audit Investigatif Pada Kekayaan Badan Usaha Milik Negara Persero Dalam
Hukum Pembuktian Pidana di Indonesia**
Susanto
- **Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan
Pelayanan Kesehatan**
Yussy A. Mannas
- **Paradigma Orientasi Mencari Kebenaran Materil Dalam Proses Pembuktian Akta Otentik**
Yustika Tatar Fauzi Harahap & Isis Ikhwansyah

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INDONESIAN LAW JOURNAL

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TABLE OF CONTENTS

Human Trafficking in Accordance with Prosperity and National Economic Development	
Renny Supriyatni Bachro, Mien Rukmini	1-18
Disparity in The Judge's Ruling About Community Property Disputes After Divorce; (An Analysis of The Verdict in The South Jakarta Religious Court, Religious Court of Jakarta And Supreme Court)	
Kamarusdiana	19-44
Existence of Local Government Toward the Implementation of Coaching and Legal Supervision for Franchisee Business	
Ika Atikah	45-70
Legislation Fatwa National Sharia Board-Indonesian Council of Ulama (DSN-MUI) In the State Economic Policy	
Fitriyani Zein.....	71-94
Presidential Threshold Between the Threshold of Candidacy and Threshold of Electability	
Suparto	95-108
Mahar and <i>Paenre'</i>; Regardless of Social Strata Bugis Women in Anthropological Studies of Islamic Law	
Yayan Sopyan, Andi Asyraf	109-138
Kedudukan Hasil Audit Investigatif Pada Kekayaan Badan Usaha Milik Negara Persero Dalam Hukum Pembuktian Pidana di Indonesia (<i>Position of Investigative Audit Results on State Owned Enterprises' Property in the Criminal Proof of Law in Indonesia</i>)	
Susanto	139-162
Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan (<i>Legal Relations Between Doctors and Patients and The Accountability of Doctors in Organizing Health Services</i>)	
Yussy A. Mannas	163-182
Paradigma Orientasi Mencari Kebenaran Materil Dalam Proses Pembuktian Akta Otentik (<i>Paradigm of Orientation for Finding Material Truths in the Authentic Deed Proofing Process</i>)	
Yustika Tatar Fauzi Harahap, Isis Ikhwansyah.....	183-200

Legislation Fatwa of National Sharia Board- Indonesian Council of Ulama (DSN-MUI) In the State Economic Policy*

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Abstract:

The impact of the development of Sharia Banking System in Indonesia has led to the establishment of Sharia Supervisory Board and the National Sharia Board. Each institution has a different role. As for the DSN which is an institution under the Indonesian Council of Ulama has the authority in regulating the *fatwa* (a binding rule in religion) of Islamic financial *fatwa* which later can be referred as the reference of sharia banking actors, so that this role will close the chance of legal uncertainty in the world of Syariah banking. This is as the rule: "*Judge's law eliminates dissent.*" Herein lies the significant presence of the National Sharia Board. So that the legislative efforts of DSN-MUI fatwa are an Islamic political stance that seeks to convince that Islamic law can not be separated from the state. Therefore, the legislation of the DSN-MUI *fatwa* is a necessity for the Muslim community of Indonesia

Keywords: Legislation, National Economy, National Sharia Board

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Legislasi Fatwa Dewan Syariah Nasional MUI Dalam Kebijakan Ekonomi Negara

Abstrak:

Dampak perkembangan Sistem Perbankan Syariah di Indonesia menimbulkan adanya kebijakan pembentukan Dewan Pengawas Syariah dan Dewan Syariah Nasional. Masing-masing lembaga memiliki peran yang berbeda. Akan halnya DSN yang merupakan lembaga di bawah Majelis Ulama Indonesia memiliki kewenangan dalam hal melakukan regulasi fatwa-fatwa keuangan syariah yang nantinya dapat dirujuk sebagai acuan para pelaku perbankan syariah, sehingga dengan adanya peran ini menutup peluang ketidakpastian hukum di dunia perbankan syariah. Hal ini sebagaimana kaidah: "Hukum yang ditetapkan hakim menghilangkan perbedaan pendapat." Di sinilah letak signifikan kehadiran Dewan Syariah Nasional. Sehingga upaya legislasi fatwa-fatwa DSN-MUI yang dilakukan merupakan sikap politik Islam yang berupaya meyakinkan bahwa hukum Islam tidak dapat dipisahkan dari negara. Karenanya legislasi fatwa-fatwa DSN-MUI merupakan suatu keharusan dan kebutuhan bagi masyarakat muslim Indonesia.

Kata Kunci: *Legislasi, Ekonomi Nasional, Dewan Syariah Nasional*

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Introduction

Every period in the history of Indonesia, Islamic law has different forms and aspects of legislation in accordance with the challenges faced and the socio-political realities of the time. If traced further back, efforts to make Islamic law as a formal law in Indonesia (archipelago) has started since the establishment of Islamic archipelago like Samudra Pasai, Demak, Mataram, Cirebon, Goa, Tarnate and so forth. Previously, Islamic law has lived and practiced the Islamic community of Nusantara replace the customary law.

There are various forms of "legislation" in the pre-colonial era (the Islamic empire); First, in the form of written qanun (legislation) such as the Malacca Law on Samudra Pasai. Second, legislation in the form of personification of Islamic law in a king, where the king has two authoritative powers as the rulers of the state (political) and the ruler of religion. With that power, a king can decide on legal issues based on the provisions of Islamic law. This form of legislation generally occurs in the kingdoms of Java, such as the Kingdom of Cirebon, led by Sunan Gunung Djati. Third, the legislation of Islamic law through the institutional qadi (Supreme Court), mufti or headman (penghulu) in the body of the kingdom, such as Sheikh 'Abdul Rauf al-Sinkili who was appointed as Qadli Malik al-'Adil or Mufti by four Sultan who ruled the Islamic empire Samudra Pasai respectively, after the death of Sultan Iskandar Tsani.² In the period of Islamic empires the legislation of Islamic law encompasses various aspects of legal issues such as; matters of worship, adultery, murder, inheritance, trafficking, property rights violations, to rules relating to resistance to government.

In the early time of Dutch colonialism, Islamic law that was run during the period of Islamic kingdoms is still recognized as a form of law that applies to Muslim Nusantara. This is based on *Reception in Complexu theory* which became the basis for policy/politics of colonial law at that time. The recognition of the enforcement of Islamic law of the empire is embodied in the Basic Law of the Dutch East Indies, known as the *Regreerning Reglement (RR)* of 1855, which in article 75 of the RR is declared: "By the judge of Indonesia shall be treated by a religious law (*godsdiestige*)."³

Along with the development of the colonialism mission, the Dutch East Indies law policy that runs the theory of *Reception in Complexu* began to be sued.

² Azyumardi Azra, *Jaringan Ulama Timur Tengah dan Kepulauan Nusantara Abad XVII dan XVIII*, (Bandung: Mizan, 1994), p. 199-201.

³ Sajuti Thalib, *Reception a Contrario: Hubungan antara Hukum Adat dan Hukum Islam*, (Jakarta: Bina Aksara, 1985), p. 7.

As mentioned above, it is Christian Snouck Hurgronje (1857-1936) who initiated the *reception theory* which states that the law in the archipelago is not Islamic law but customary law. In the customary law there is the influence of Islamic law. Therefore, Islamic law can have valid power when it is accepted (*decipher*) as customary law. On the basis of this theory, then Islamic law can be recognized its validity if desired and accepted by customary law.

Since this *recipe theory* has been used as a reference for the politics of Dutch colonial law, there has been a marginalization attempt to eliminate Islamic law from state law from systematic and structured. This can be seen from the various legal policies that reduce the authority of religious judiciary institutions, such as the enactment of Staatsblad 1937 Number 116 which transferred the authority of regulating inheritance to the state court (*vandread*).

In Japanese colonialism which took only a short time of three years, there can be no significant change and development in the legislation of Islamic law in national law. The legal policies of the former Dutch colonial government remained in the status quo position. Similarly, with various public protests against 1937 Staatsblad above, also did not get a response from Japanese colonialism.

In the independence of the opportunity to implement Islamic law in the state and society in *kaffah*, which became the ideals of Muslims is very open. However, it does not mean that there are no more obstacles to realizing these ideals. If in the colonial period the people had to deal with the colonial government, then in the era of independence the main challenges and it came from secular groups.

Ahead of independence there has been a unanimous compromise on the existence of Islamic law within the Republic of Indonesia between Islamic and secular groups through the noble agreement of the nation, the Jakarta Charter. However, the noble agreement was injured by a precedent for the abolition of seven words in the first sanction of the Jakarta Charter by some of the nation's leaders without going through the formal deliberation mechanisms that represented various Islamic groups. This precedent has become the base of polemic and debate between Islamic and secular groups about the existence of Islamic law in the constellation of state law.

The reality of history shows that until this period the Islamic group has not succeeded in realizing the ideal of making Islamic law implemented in a formal and comprehensive form in the Islamic State. But secularists, on the other hand, fail to sterilize state law from religious law. Islamic law that has

been entrenched, institutionalized and practiced by Indonesian society since centuries ago is impossible to be erased. Therefore, the tug position of Islamic law in the state law since the beginning of independence is still ongoing. From this then there is the uniqueness and dynamics of the aspects and forms of legislation of Islamic law in state law.

During the Old Order, the Islamic group had failed to fight for Islamic law into the formal law of the country as a whole. However, *ad hock*, their struggle has succeeded in strengthening the position and existence of Islamic law and its institutions in state law. It is seen through various legislation products such as the issuance of Law no. 22 of 1946 concerning the Administration of Marriage, Divorce, Reconciliation (NTR) throughout Indonesia that is followed by Law No. 32 of 1954 for the determination of outside Java and Madura, as described above.

At the time of the Old Order was not born product of legislation that was withdrawn or sourced directly from Islamic law. However, Law No. 22 of 1946 and Law No. 32 of 1954 which strengthens the institutional position of the Religious Courts are contributing and a great way for the entry of Islamic law into state law. Thus, it can be said that aspects and forms of legislation in the Old Order period are more to strengthening the institutional position of Islamic law in the structure of the state.

Meanwhile, under the New Order regime that replaced the Old Order, the existence of Islamic law in the constellation of state law relies heavily on Islam's proximity to the ruler. In the early days of Suharto's leadership, who became the ruler of the New Order, there was the marginalization of Islam from the state. In this phase almost said that there is no meaningful development of the position of Islamic law before the law of the state from the previous phase.

As explained above, from the 1980s (the second 15th year of New Order powers) the aspirations of Islamic groups began to be accommodated by the authorities. The legal accommodation has spawned a number of law products that are aspirational to the wishes of Muslims. The most monumental is the birth of Law No. 7 of 1989 on Religious Courts followed by Presidential Instruction on the Compilation of Islamic Law (KHI). Another Momentum is the birth of Law No. 2 of 1992 on the National Banking System, which gives the opportunity to enact *dual banking system*, followed by the presence of banks with the first Syariah system is Bank Muamalat Indonesia.

From those two monumental events, it can be clearly concluded that the state, both *de jure* and *de facto*, has recognized the existence of Islamic law as an integral part of national law, although only to a limited extent.

Thus, it can be seen that in the New Order period has been born a number of law legislation derived religious law (Islam). The forms of legislation of Islamic law born in this period are a number of pure laws that fully accommodate Islamic lawsuits, such as Law Number 7 of 1989 on Religious Courts, or Laws that open the door (accommodate) for the entry of legal provisions Islam into state law, such as Law No. 2 of 1992 on the National Banking System.

The implications of the birth of these laws and regulations occur in the rules below. The mandate of various laws above "forced" the birth of various regulations such as Keppres, Inpres, Kepmen or Permen which become logical consequences of the Act. In addition, the consequences of the various regulations then implicate the changes (development) of government bureaucracy structure. Nevertheless, the New Order's ruling accommodation on the aspirations of Islamic groups in the field of law is still limited to certain aspects, such as civil aspects (this is limited to the issue of marriage, divorce, reconciliation, and inheritance), aspects of philanthropy (ZIS and wakaf) and the aspects of sharia economy. Beyond that aspect, moreover the political aspect, the New Order government was very strongly opposed to the wishes of the Islamic group.

Meanwhile, in the Reform Era as a substitute for the New Order Regime the obstacles of the Islamic political movement became widely open. Romanticism to revive the Jakarta Charter as the entrance to the formal constitutional enactment of Islamic law in Indonesia, in this era of democracy was re-enacted by some of the Islamic groups who had received strong political and security pressure by the New Order regime. However, as explained above, that idea has been given opposition not only from secular groups but also moderate Islamic groups who become the minority of the country.

Thus, the effort of legislation of Islamic law in the constitutional formal form in the reform era can not be realized. However, despite the failure of the constitutional level in this period, *ad hoc*, Islamic law legislation has been realized in various forms and levels of legislation in Indonesia such as Laws, Government Regulations, to Regional Regulations (Perda). The aspects of Islamic law that are enacted are very diverse, from philanthropy problem (Zakat and Waqf), Judiciary (Courtesy of Court Institutions in the Supreme Court following various laws and regulations), economy (Sharia Banking Law,

Sukuk Law, until regulation under it), and social (various local regulations on social order/public). Similarly, the enactment of special autonomy of the Special Region of Aceh which explicitly implements the full Shari'a of Islam and the emergence of the decision of the implementation of Sharia in various districts based on Islamic society in Indonesia.

The position of the National Sharia Board

With the presence of Islamic-based financial and business institutions, it requires various provisions of Islamic law as the operational basis. Come from the reality of the activities of Islamic legal studies were prosecuted for more intensive and deep. According to Ma'ruf Amin, the scholars today are not only required to continue to explore the existing view of the classical mu'amalah fiqh but also to develop it because the Islamic finance industry is currently growing very fast.⁴

Furthermore, according to Ma'ruf Amin, in view of the fact that the rapid development of such sharia banking and business, MUI together with other institutions, especially Bank Indonesia, responded positively and proactively, especially after the birth of Bank Muamalat Indonesia in 1992 as the first bank in Indonesia based on sharia principles in its transaction activities. The birth of this sharia bank is then followed by other banks, whether in the form of a Syariah or sharia unit. Not only that, various financial institutions and non-bank Syariah business was born and developed, such as insurance, finance, pawnshops, and sharia-based investment institutions (capital market).

To more increase the khidmah and meet the expectations of such a large community, the Indonesian Council of Ulama (MUI), as the initiator of Islamic economic development in the country, considers the need to establish a national sharia board specifically to formulate the values and principles Islamic law (Sharia), produces fatwas (provisions of Islamic law) relating to the activities of Islamic financial institutions (LKS) to be used as a guide in transaction activities in Islamic financial institutions, and oversee the implementation.⁵

⁴ Ma'ruf Amin, *"Target Pertumbuhan Bank Syariah Tercapai"*, Republika, Sabtu 20 November 2004, p. 2

⁵ Ma'ruf Amin, in the Preface to the book "Association of Fatwa of the National Sharia Board", Jakarta, Published by the cooperation of the National Sharia Board of the Indonesian Council of Ulama and Bank Indonesia.

For such purposes, the Indonesian Council of Ulama (MUI) in 1999 established the National Sharia Board (DSN). This institute, comprised of Islamic jurists (*fuqoha'*) as well as experts and economic practitioners, especially the financial sector, both banks, and non-banks, which serve to carry out the tasks mentioned above and encourage and promote the economy of the people.

The development of Sharia Banking in Indonesia gives consequences for the development of the number of Sharia Supervisory Board (DPS)⁶ within each LKS and oversees the Shariah compliance of each institution. This phenomenon gives rise to both positive and negative sides. On the one hand this is certainly a thing to be grateful for providing wide opportunities to muamalah Syariah experts in applying shariah provisions in sharia banking, but on the other hand this gave birth to its own problems. This problem is related to the possibility of a different fatwa from each DPS and this is not impossible to confuse people and customers. Therefore, MUI as an umbrella of Islamic institutions and organizations in the country, see the urgency of the position of the National Sharia Council (DSN) as the only institution of fatwa related to sharia economy in order to occur unity of law and provisions so it isn't confused the sharia economic actors.

Basically in Islamic law the difference in the result of ijihad is a matter of course. Even in history, this disparate permissibility gave birth to various schools of Islamic law, enriching the Islamic law itself. This diversity of opinions on the one hand makes it easy for people because of the wide range of legal options. This is in line with one of the Prophet's sayings: "*The difference of opinion among my people is a mercy.*"

But on the other hand, the different legal provisions that if used as a reference law of various parties/economic actors will certainly cause a legal uncertainty. Similarly, in the context of sharia banking and business, the difference in fatwa between one DPS and other DPS will result in no standardization or uniformity of effective oversight nationally and lead to public uncertainty to the assessment of sharia law.⁷ Therefore, there should be a

⁶The Sharia Supervisory Board (DPS) is an institution consisting of Islamic scholars and Islamic economists present in every Syariah financial institution (LKS) which oversees Sharia compliance in every LKS activity and provides sharia opinion on the questions and products to be run LKS. DPS is also an extension of the DSN for the monitoring and implementation of fatwas issued by DSN. Indeed, this institution (DPS) was born after the DSN, but in reality DPS first exist from the DSN.

⁷ Harisman, "*Pengawas dan Audit Syariah pada Bank Syari'ah: Konsep, Aplikasi, dan Kebijakan*", makalah disampaikan dalam Seminar Legal Audit Syari'ah, Fakultas Syariah UIN Syarif Hidayatullah Jakarta, 10 April 2002, p. 4.

body that is legally juridical to determine a choice of law that would be appointed as a law of reference, thus closing the opportunity for such uncertainty. This is as the rule: "Judge's law eliminates dissent." Herein lies the significant presence of the National Sharia Board.

In the Basic Guidelines of DSN-MUI stated that the meaning of the National Sharia Council is a Council established MUI to deal with issues related to the activities of Islamic financial institutions.⁸ DSN is an integral part of MUI and is within the MUI institutional structure. This council is responsible for developing the application of sharia values in economic activities in general and the financial and business sectors in particular, including banks, insurance, capital markets, financing and others.⁹

The proposed establishment of the National Sharia Council has surfaced since 1997 after the MUI held a workshop on Sharia Mutual Funds in Jakarta, one of the recommendations being the formation of this Council. This recommendation was followed up so that the DSN was formally formulated in 1999.¹⁰ That year also the board was approved at Mukernas MUI at Hotel Indonesia, precisely in February 1999. The presence of DSN is also parallel with the establishment of Sharia Development Expert Committee at Bank Indonesia in the same year that later switching the name to Bank Indonesia Sharia Bureau. If the Bureau regulates in terms of regulation / legal positivist, then the DSN set in terms of Islamic law (*fatwa*).

The DSN Institution is an autonomous institution under the Indonesian Council of Ulama led by the Chairman of the Indonesian Council of Ulama and Secretary (ex-officio). The daily activities of the National Sharia Council are run by the Daily Implementing Agency with a Chair and Secretary as well as a number of members.¹¹ In order to meet the demands of sharia economic development, currently in the body of the DSN management established a working group (Pokja) amounting to three areas namely Pokja Perbankan Syariah, Pokja Insurance and Sharia Business, and Sharia Capital Market

⁸ Pedoman Dasar Dewan Syari'ah Nasional Majelis Ulama Indonesia, BAB II, butir 3.

⁹ Bank Indonesia, *Petunjuk Pelaksanaan Pembukaan Kantor Bank Syari'ah*, (Jakarta: Bank Indonesia, 1999), p. 22.

¹⁰ Hasil Wawancara dengan Cecep Maskanul Hakim, anggota BPH DSN, 2005.

¹¹ Muhammad Syafi'i Antonio, *Bank Syari'ah, Wacana Ulama dan Cendekiawan*, (Jakarta: Tazkia Institute, 1999), p. 285.

The organization of the DSN is an autonomous body. Nevertheless, he remains an integral part and under the MUI¹² because the general chairman and secretary of MUI lead this council *ex officio*. While the members of this Council consists of scholars, practitioners, and experts in areas related to the economy and muamalah sharia and have morals karimap. Members of this Council shall be appointed by MUI for a term of 4 (four) years.

Position, Duties and Authority of the National Sharia Board

Jurisdictionally, DSN is also recognized by regulatory authorities. Prior to the establishment of the Financial Services Authority, the institutional DSN-MUI was recognized by Bank Indonesia as a regulator of bank supervision at that time, for example in article 31 of Dec DIR BI 32/34/1999 it was stated that in order to carry out its business activities, the Sharia Commercial Bank is obliged to pay attention to the National Sharia Board MUI. Similarly, in the case of a bank conducting business activities as referred to in Article 28 and Article 29 and in fact the said business activities have not been filed by the National Sharia Board of MUI, the bank shall request DSN approval before conducting such business activities. In other words, this decree authorizes the Council to provide guidance in the form of a *fatwa* (a binding rule in religion) to sharia banking so that the principle of conformity with shari'a (*sharia compliance*) adopted by Islamic banks can be achieved.

Since its establishment, the DSN-MUI has worked hard and strives optimally to perform these tasks. To be more effective, the institutional structure of DSN is divided into two: Daily Implementing Agency (BPH-DSN) and Plenary-DSN. The DSN Daily Executing Agency (BPH-DSN) is in charge of conducting research, excavation, and assessment as well as the formulation of various fatwa plans to be established. The draft of this Fatwa is then brought into the plenary meeting of the DSN Management to be discussed (the names of the DSN-MUI Board attached). It was decided to become the DSN *Fatwa* (a binding rule in religion). The finalization of this fatwa, especially from the editorial aspect, was handled by the drafting team of the BPH-DSN.¹³

The main function of the National Sharia Council is as an institution that has the authority to establish fatwas related to the various activities and products of Islamic financial institutions. In addition, DSN, through DPS, is also

¹² Hasil wawancara dengan Cecep Maskanul Hakim, anggota BPH-DSN, 2005.

¹³ Himpunan Fatwa Dewan Syariah Nasional, *Op. Cit*, p. x

tasked with overseeing the activities of Islamic financial institutions to conform with Islamic sharia (*sharia compliance*).

For the purposes of such supervision, the National Sharia Council creates guidelines for sharia products derived from sources of Islamic law. These guidelines serve as the basis for oversight of the Sharia Supervisory Board (DPS) of Islamic financial institutions and the basis for the development of its products.¹⁴ As for implementation in Islamic financial institutions submitted to the Supervisory Board of Sharia (DPS). DPS, in addition to being an extension of DSN in supervising LKS's compliance to DSN *fatwa* (a binding rule in religion) products, also serves to provide sharia opinion on the questions posed by LKS in developing LKS activities. DPS is also obliged to report the results of its surveillance activities to the DSN. The existence of DPS in the structure of financial institutions and sharia business now has gotten legal legitimacy in the Law on Limited Liability Company (PT).

DSN tasks in more detail are set out in the DSN-MUI Basic Guidelines Chapter IV point I, namely:

1. To develop the application of sharia values in economic activities in general and finance in particular.
2. Issuing a fatwa on the types of activities of sharia financial institutions.
3. Issuing fatwa on Sharia financial products and services.
4. Supervise the application of a fatwa which has been established.

While the DSN Authority, as set forth in item 2 of the same provisions, is:

1. Issuing a fatwa which binding the Sharia Supervisory Board in each Islamic financial institution and underlying the legal action of related parties.
2. Issuing a fatwa which forms the basis for the provisions/regulations issued by authorized agencies, such as the Ministry of Finance and Bank Indonesia.
3. Giving recommendations and/or revoke the recommendation of names that will sit as Sharia Supervisory Board in a Syariah financial institution.

¹⁴ *Himpunan Fatwa Dewan Syari'ah Nasional*, p. 285

4. Inviting the experts to explain a problem that is needed in the discussion of sharia economy, including the monetary authority/ financial institutions at home and abroad.
5. Give warning to sharia financial institution to stop deviation from fatwa which has been issued by National Sharia Council.
6. Propose to the competent authorities to act if warnings are ignored.¹⁵

The National Sharia Board is also tasked with providing recommendations to the ulama or experts of sharia economy who will serve as the Sharia Supervisory Board of a Syariah financial institution. The National Sharia Board may provide a reprimand to the sharia financial institution if the agency concerned deviates from the established guidelines. This is done after the National Sharia Board receives a report from the Sharia Supervisory Board of the relevant institution regarding the deviations. If the sharia financial institution does not heed the warning given, then the National Sharia Board may propose to the competent authority, such as Bank Indonesia and the Ministry of Finance to grant sanction in order that the company does not further develop its actions that are incompatible with sharia.¹⁶

From the description above, it can be seen how strategic role that is owned by DSN. It is a container that can determine the sharia values that will be applied in national sharia banking because these *fatwa* (a binding rule in religion) are not only binding but also the basis of sharia banking legal action. Even the fatwa also became the basis for the provisions or regulations to be issued by the authorized agencies, such as the ministry of finance and Bank Indonesia. Of course, this will be a challenge for DSN.

Fatwa* (a binding rule in religion) and Determination Mechanism of the National Sharia Board *Fatwa

To develop sharia economy, Syariah rules are required for every sharia financial institution. In this regard, the *fatwa* associated with the production and activities of LKS issued by the National Sharia Council Indonesia Council of Ulama (DSN-MUI), is highly valuable and plays a major role in the process of drafting government regulations, both Bank Indonesia and the Ministry of Finance (regulatory building). Bank Indonesia Regulation, for example, will, in

¹⁵ *Petunjuk Pelaksanaan Pembukaan Kantor Bank Syari'ah, Op.Cit.*, p. 22-23

¹⁶ *Himpunan Fatwa Dewan Syari'ah Nasiona*, p. 286

turn, be used as the basis for supervision of sharia aspects undertaken by Bank Indonesia as the supervisory authority of banks. In addition, the DSN *fatwa* is also the cornerstone of regulation and guidance of non-bank financial institutions operating under the principles of sharia under the Ministry of Finance.

As explained, one of the tasks of the National Sharia Council is to issue fatwas on the types of financial activities and sharia financial products and services. In general, this *fatwa* can be grouped into three parts. First, the *fatwa* group for transaction activities conducted by sharia banks, both in fund raising, fund distribution (financing) and banking services. Second, the fatwa group for sharia capital market activities. Third, the *fatwa* group for various financial institutions and other sharia business such as sharia insurance, sharia pawnshops, and sharia financing.¹⁷ Up to 2017 DSN-MUI has established 116 *fatwa*.¹⁸

Related to the fatwas that have been produced by DSN above, Ma'ruf Amin said that what is produced by National Sharia Board of MUI is binding for sharia financial institution in Indonesia. Sharia economic practice can not be applied before any MUI *fatwa* is associated with it.

In its daily work mechanism, DSN is driven by an agency called the National Sharia Executive Board, which is abbreviated as BPH-DSN. In fact, in practice, BPH-DSN is the driving force as well as the core management of the DSN. These BPH-DSN members are appointed by MUI and, as noted above, consist of those who have expertise in sharia, economics, banking, capital markets and other businesses.

To implement the *fatwa*-fixing function, the DSN has put its own mechanism. Firstly, a new *fatwa* will be reviewed after a proposal or legal question regarding a product of a Syariah financial institution submitted to the DSN through BPP. The proposal or question is submitted in writing to the BPH secretariat. Then the secretariat headed by the secretary no later than one working day after receiving the proposal / question should address the matter to the chairman. Then the head of BPH submitted it in the weekly meeting of BPH-DSN to be reviewed and discussed with members of BPP. If necessary, the

¹⁷ Ma'ruf Amin, Kata Pengantar buku "*Himpunan Fatwa Dewan Syariah Nasional*," p. v

¹⁸ Association of Fatwa National Sharia Council MUI Revised 2006 Edition Jakarta: DSN-MUI and Bank Indonesia, 2006. Last author's confirmation to the secretariat of DSN-MUI, until June 2008 fatwa which has been established by the National Sharia Council MUI has amounted to 72 fatwa.

review and discussion of the draft *fatwa* are done in particular through considering involving mustafa (who asks for *fatwa*) and regulators. The involvement of the regulators, whether Bank Indonesia, the Ministry of Finance or otherwise, is intended to make the *fatwa* products issued and applicable and not clash with existing regulations. The Chairman of BPH then brings the results of the discussion (draft *fatwa*) BPH-DSN into the Plenary Meeting of the National Sharia Council. Plenary Meeting held by the DSN is intended to:

1. To stipulate, alter or revoke various *fatwa* and guidelines for the activities of sharia financial institutions
2. Match or clarify the results of the BPH-DSN study on proposals or questions regarding a product or service of a sharia financial institution.¹⁹

Motives, Forms and Processes Legislation *Fatwa* (a binding rule in religion) DSN-MUI Become Banking Regulation

It can not be denied that the blessing of President Soeharto, as the ruler of the New Order regime most obeyed at that time, became the starting point of the entry of sharia banking (economic) system into the rule of law in Indonesia so that it was born Law Number 7 of 1992 which gave the foundation for the birth Bank Mu'amalat then followed by the birth of Law No. 10 of 1998 which certifies dual banking system.²⁰ As described in the previous chapter, at the end of the New Order government a harmonious relationship exists between the state and the Islamic group. So, a number of interests of Islamic groups are accommodated by the state, one of which is the problem of sharia banking.

The historical reality explains that the motive of inclusion of sharia banking system into the legislation of the state (legislation) is more motivated by the *politics of state accommodation* on the aspirations of Muslims and not the *Islamization* of legislation. The reason is clear, that the legislated issue is an economic problem, which at that time became the main agenda of development during the New Order regime, not a political issue. It can not be denied,

¹⁹ Dewan Syari'ah Nasional, *Pedoman Rumah Tangga DSN-MUI*, p. 3

²⁰ The approval is not separated from the success of political lobbying conducted by the MUI leadership, both against the government, the factions in the House, especially the Fraction of Development and Fracture ABRI very decisive and Fraction of Development Unity which is the basis of Islamic politics. Further see Wahiduddin Adams, *Pattern Absorption Fatwa Indonesian Council of Ulama (MUI) in Legislation 1975-1997*, (Jakarta: Research and Development Department of Religion, 2004), p. 233.

however, that the policy brings with it a certain degree of excess and access to juridical politics.

Political-juridical excesses occur in many ways. First, the law requires operational regulations under it which of course will inevitably have to refer to religion (*syariat Islam*) as the source or more explicit again is the *fatwa* ulama. Second, there is a "bureaucratization of religion" in the sense of the emergence of a special institution of religious nuance that deals with the issues of fostering and supervision of sharia banking in Indonesia. In this case, as mentioned earlier, BI has established a Sharia Banking Bureau which then developed into the Directorate of Islamic Banking.

While its political-juridical access is the opening of opportunities for religious scholars, especially Islamic scholars and Islamic economics graduates, to develop their scholarship and abilities in government institutions as well as the financial and banking industries that have been closed to them. Similarly, with the scholars, they have the opportunity to develop *ijtihad* in mu'amalah field which has been limited only to the problem of marriage, reconcile, divorce, inheritance, wakaf and zakat only.

With the enactment of Law Number 10 of 1998 concerning the amendment of Law Number 7 of 1992 concerning the National Banking System, which expressly states that the Sharia Banking System is placed as part of the National Banking System. If the implementation of Law Number 7 of 1992 is stipulated in Government Regulation No. 72 of 1992, then the implementation of Law Number 10 of 1998 shall be followed up with the implementation provisions in several Decrees of the Board of Directors of Bank Indonesia. The change in the provisions of the implementation regulation occurred due to the change of the position of BI in the institutional structure of the state.

In relation to the institutional of the National Sharia Council of the Indonesian Council of Ulama (DSN-MUI), on 12 May 1999, the Decree of the Board of Directors of BI was issued. 32/34/1999 which acknowledges the existence of the institutional authority of DSN-MUI. In Article 1 paragraph (i) of the Decree is stated:

"The National Sharia Council is a council established by the Indonesian Council of Ulama who is in charge of and has the authority to ensure conformity between products, services and business activities of banks with sharia principles."

The legitimacy of the existence of DSN-MUI institution as an institution that has *fatwa* authority on every product and activity of sharia banking is

getting stronger with the birth of Bank Indonesia Regulation (PBI) Number 4/1/2002 regarding Sharia Business Unit, which reads: "The National Sharia Council is a council established by the Indonesian Council of Ulama which has the authority to issue a *fatwa* on the products, services and activities of banks conducting business based on sharia principles."

Since then, various Bank Indonesia Regulations (PBI) related to sharia banking products and activities have always been referring to the DSN-MUI *fatwa*, in which the institution of DSN-MUI is explicitly referred to as the *fatwa* authority institution which is the foundation of *sharia compliance* sharia banking in Indonesia.²¹

Based on the regulation, it can be understood the consequence of the regulation is that every product of *fatwa* issued by DSN-MUI by itself is recognized as the basis of the formal rule for operational of sharia banking. On the basis, Bank Indonesia will issue one policy/regulation related to sharia financial industry will request for input and consideration of DSN-MUI in terms of *sharia compliance*. Thus, it can be understood that the position of the DSN-MUI *fatwa* becomes very strong and determines the direction of regulatory policy. According to Ma'ruf Amin, the DSN-MUI *fatwa* here becomes the operational legal source for LKS, either directly or indirectly, because regulations such as PBI refer to the DSN *fatwa*.²²

From this it can be understood that the legislative motives of the DSN-MUI *fatwa* as a reference to the rule of law of the state (PBI) are nothing but the inevitability of the Act as a higher regulation mandating it. Thus, it can be understood also that the form of Islamic law legislation in the field of Islamic banking here lies in the legalization/recognition or *legitimacy* of the *fatwa* authority institution (the religious institution, in this case, DSN-MUI) as the material legal and formal sources in LKS operational policy/regulation.

Making *fatwa*/fiqh established by a mufti (People/institution of *fatwa* authority) as a source of material and formal law has long been practiced in the historical journey of Indonesia, both in the Dutch colonial era and after independence. Prior to Islamic law stipulated as a written rule based on the law, then based on Circular Letter of Religious Bureau of Religious Court of RI No. 8/1/2735 dated February 18, 1958 the judges of the Religious Courts/Syar'iyah Court are encouraged to use as a guide for the books (fiqh)

²¹ See: PBI at year 2002-2006, such PBI No. 4/1/PBI/2002, PBI No. 6/17/PBI/2004, and PBI No. 6/24/PBI/2004.

²² *Majalah Legal Review* No: 54/TH IV/2007. p. 13.

below: Al-Bajuri; Fath al-Muin; Syarqawi 'ala at-Tahrir; Qalyubi/Mahalli; Fath al-Wahhab with his anger; Tuhfah; Targhib al-Musytaq; Qawanin al-Syar'iyah li Sayid Ibn Yahya; Qawanin al-Syar'iyah li Sayid Shadaqah Dahlan; Syamsuri fi al-Faraidh; Bughyah al-Musyatarsyidin; Al-Fiqh 'alaa Madzahib al-Arba'ah; and Mughni al-Muhtaj.

The establishment of the Jurisprudence books as a reference standard for judges of religious courts is the first step towards legal certainty, which then gave birth to the idea for the establishment of the Compilation of Islamic Law which was established as part of the formal legal source in Indonesia based on Presidential Instruction No. 1 of 1991.²³ In history law in post-independence Indonesia, in addition to the Compilation of Islamic Law (KHI), it is in this field of Islamic economics fatwa is adopted fully become the source of legal material and formal state.

When referring to the results of Wahiduddin Adams's study on the pattern of absorption of the fatwa Indonesian Council of Ulama in the legislation of Indonesia in 1975-1997, the difference between the New Order and Reformation periods was seen. According to Wahiduddin, since the founding of MUI (1975) until the end of 1997 (before the fall of the New Order 1998) there was the absorption of MUI *fatwa* in three patterns. Firstly, the material of the RUU relating directly to the interests of the legal services of Indonesian Muslims, the MUI is involved since the beginning of the discussion at the government level. Here the absorption of *fatwa* and input (advice) MUI into the legislation, both form, formulation, and provision of substance. This is evident in the Religious Courts Draft Law (RUU) and the regulations on zakat, infaq, and shadaqap.²⁴

Secondly, toward the laws and regulations that have moral excess (ethics) of Muslims, MUI make corrections and or take a stand against the rules, as seen in the Ministerial Regulation or the Directorate General of Primary and Secondary Education Decree on the subject of Veil.²⁵

Third, the Draft Law (RUU) on which the scope of the matter relates to all citizens, then there are two forms of MUI *fatwa* absorption:

²³ Departemen Agama, *Kompilasi Hukum Islam di Indonesia*, p. 131

²⁴ Wahiduddin Adams, *Pola Penyerapan Fatwa Majelis Ulama Indonesia (MUI) dalam Peraturan Perundang-undangan 1975 – 1997*, p. 231.

²⁵ Wahiduddin Adams, *Pola Penyerapan Fatwa Majelis Ulama Indonesia (MUI) dalam Peraturan Perundang-undangan 1975 – 1997*, p. 232.

- a. *Fatwa* and enter the MUI is absorbed, either the principles or the material contained in the formulation of the provisions of the articles in the RUU, such as the Draft Law on Health and Draft Law on Narcotics.
- b. *Fatwa* and enter the MUI is absorbed just keep referring to the existing conditions/rules, such as the Juvenile Justice RUU which is still passed into law but only contains the criminal only, while other provisions relating to Islamic law that has been regulated in Law no. 1/1989 still applies.²⁶

From the results of Wahiduddin's study, we can see significant differences in the legislation of Islamic law in the case of sharia banking. If during the New Order era, there was only the absorption or internalization of the MUI fatwa into formal legal law, then the sharia banking that occurs is the institutional legitimacy of DSN-MUI as the fatwa authority institution concerning sharia banking which is further legislated directly into various banking regulations (although of course there are adjustments to harmonize with existing provisions) by state institutions (BI). With the legitimacy, the position of the institution of DSN-MUI becomes very strong even can be said to be the institution "mufti" state in terms of sharia economy.

The Existence of DSN-MUI *Fatwa* (a binding rule in religion) In the Regulation of Bank Indonesia (PBI)

Prior to the introduction of the Law on Financial Services Authority (OJK), Bank Indonesia became the sole authority to regulate and supervise banking in Indonesia, including sharia banking. While DSN-MUI is recognized as the only institution that has *fatwa* authority related to sharia banking problem. Each *fatwa* product that was born by this institution became the foundation of BI in preparing the field of sharia banking. Therefore, any *fatwa* issued by DSN-MUI by itself becomes the source of material and formal law and operational basis for BI regulation.

If carefully reviewed, the various regulations of Bank Indonesia in the form of Bank Indonesia Regulation (PBI), Circular Letter (SE) or other related to the *fatwa* of DSN-MUI can be categorized to three kinds:

1. Regulations that are directly related to the aspect of Syariah product and sharia banking activities. Such regulation generally refers directly

²⁶ Wahiduddin Adams, *Pola Penyerapan Fatwa Majelis Ulama Indonesia (MUI) dalam Peraturan Perundang-undangan 1975 – 1997*, p. 232.

to the substance of the DSN-MUI fatwas, such as the PBI. 7/46/PBI/2005 concerning association agreement and Distribution of Bank Funds Conducting Business Based on Sharia Principles.

2. Regulations related to the institutional aspect of a syariah bank in the form of license for establishment or opening of Sharia Commercial Bank (BUS), Sharia Business Unit (UUS) or Sharia Rural Bank (BPRS). Such regulation usually does not refer to the substance of the DSN-MUI *fatwa*, but only contains provisions concerning the appointment of DPS required on the DSN-MUI recommendations, and the provision that the DSN-MUI institutional as *fatwa* authority and the obligations of LKS follow the DSN *fatwa* -MUI in activities and products. Example PBI N0. 6/24/PBI/2004 concerning Commercial Banks Conducting Business Based on Sharia Principles and PBI No. 6/17/PBI/2004 concerning Rural Banks based on sharia principles.
3. Regulations just related to the regulation, safeguarding, and supervision of sharia banks and national monetary policy. This third kind of regulation has nothing to do with sharia. Therefore, in such regulations, *fatwa* and the authority of DSN-MUI are not mentioned at all. Example: PBI No. 7/13/PBI/2005 and PBI 8/7/PBI 2006 concerning the Minimum Capital Requirement for Commercial Banks Based on Sharia Principles and PBI No. 8/3/PBI/2006 concerning Transparency of Financial Condition of Sharia Rural Banks.²⁷

Based on the categorization above, it can be seen that the aspects of the legislated edicts of the DSN-MUI are fatwas related to the problems of sharia banking products/services, which are indeed the "jurisdiction" areas of DSN-MUI. As for matters related to the issue of orderly guidance, monetary policy and supervision of sharia banks become BI's authority completely.

Critical Analysis of the Legislation of the *Fatwa* (a binding rule in religion) DSN-MUI

The *fatwa* of mufti, as well as the jurisprudence of ijtihad results from mujtahid, in the historical reality of social-law of Islam has contributed greatly in the formation of legal norms as well as being a guide in directing sharia-based Muslim life. Such conditions continue for centuries since Islam entered

²⁷ Bank Indonesia, *Himpunan Ketentuan Perbankan Syari'ah Indonesia February 2005-April 2006*, Jakarta: Direktorat Perbankan Syari'ah, tt.

the archipelago until now. Fiqh and *fatwa*, though very diverse and may contradict one another, are already part of the needs of society in the practice of sharia. Compared with the constitutional convention which constitutes the rules of the unwritten law, as defined in the explanation of the 1945 Constitution (prior to amendment), which became the basis of constitutional life as long as the rule arises and is preserved in the practice of state alignment even though it is not written, it appears that the fiqh and *fatwa* are in the reality has occupied a similar position as the convention in the practice of sharia. Guidelines for obeying fiqh and fatwas are not clearly stated in the Qur'an and As-Sunnah (compare with the status of the convention in the Constitution), but only the affirmation of the Qur'an about the necessity of obeying Allah and His Messenger and *ulil amri* from the people.

Such an analogical (*qiyasy*) pattern of thought can lead to the same conclusion. If the convention does not have law enforcement, there are no legal, legal or institutional sanctions that can be directly used to encourage compliance with conventions, but in reality, conventions are adhered to and effective. Similarly, fiqh as the normative jargon of sharia and *fatwa* as legal opinion or decision of mufti about a certain problem in the framework of the implementation of sharia does not have *law enforcement* but lies in moral sanction and religious emotion and (*guilty feeling*). In addition, intentional and overt violations of fiqh and *fatwa* are very likely to *confront the force of public opinion*, and this is actually one of the factors which are motivating the observance of fiqh and *fatwa*.²⁸

This socio-legal historical reality in Indonesia inspired the idea of formalizing Islamic law into the legal system of the state in the form of legislation (*taqnin*). Despite strong opposition from secular groups, the Islamic group's struggle to incorporate Islamic law into national law, both substantive and formal, has become the mainstream of the intellectual discourse of law in Indonesia.

The fact that Islamic law has become a legal and material legal source in Indonesia becomes irrefutable. Therefore, the liberal secularization movement which recently emerged as a phenomenal discourse in the Reformation era must deal diametrically with the mainstream of Islamic legal thought. According to Jimly Ashiddiqie:

²⁸ Bagir Manan, *Konvensi Ketatanegaraan*, (Bandung: Armico, 1987), p. 49 – 52. See also: Nur Rohim Yunus, *Restorasi Budaya Hukum Masyarakat Indonesia*, (Bogor: Jurisprudence Press, 2012), p.77.

"Secular groups are of the view that state affairs should not be confused with religious affairs, whereas religious matters are not supposed to be confused with state affairs. However, in the empirical reality of almost all modern states, it is not proven that religious affairs are entirely separated from matters of state. The reason is that the managers of the state are also ordinary people who are also bound by various kinds of norms that live in society, including religious norms. For example, although countries such as the United States, Britain, Germany, France and the Netherlands are countries that are declared secular states, many cases show that their involvement in religious affairs continues in history".²⁹

The secular group's view of the separation of religion and state in detail clearly indicates their level of understanding of a narrow and limited religion. It is a historical and conceptual reality that the Islamic teachings of kaffah do not recognize the limits of religion as mere rituals. Islamic doctrine covers everything from ritual worship, social, economic and even political.

The birth of the Islamic economic concept, as a solution to the globalizing economic system of capitalism that has spawned injustice and oppression, is a testament to the comprehensiveness of Islamic teachings. Islam has outlined the divine view of the paradigm of a just economic system without denying the efforts of the perpetrators.

In terms of legislation of the *fatwa* of the DSN-MUI is a necessity and consequence of the comprehensiveness of Islamic teachings plus the mainstream of the notion that Islamic law can not be separated from the state and therefore it is necessary to formalize Islamic law, either in the form of legislation or limited to the internalization of substance. Legislation of the *fatwa* through the legitimacy of the DSN institutional at a glance impressed like the Islamization (Shari'atization) of state law, but in fact what happens is due to the necessity of the birth of Law (higher regulation) which opens space for the running of the sharia-based economic system that requires the guidance of Shari'a conformity (shariah compliance) in the form of a clerical fatwa. In addition, the regulation is aimed at disciplining, securing, supervising and maintaining the national monetary policy so as not to pursue issues that have implications on the state's economy because the issue of sharia economy concerns the interests of the people who need state regulation.

Thus, the legislation of the DSN-MUI *fatwa* should not be seen from the political aspect, although it can not be avoided, but it must be viewed

²⁹ Jimly Ashiddiqie, *Konstitusi & constitutionalism Indonesia*, (Jakarta: Mahkamah Konstitusi, 2006). p. 95

thoroughly from various aspects ranging from aspects of the characteristics of Islamic religious teachings, social aspects, economic aspects and so forth.

Conclusion

Departing from reviews of legislation of *fatwa* of DSN-MUI to become Regulation/Banking Regulation in Indonesia above, can be drawn some conclusion as follows:

Firstly, the legislation of the DSN-MUI *fatwa* into a regulation originated from the momentum of the birth of Law No. 7/1992 which became the foundation of the bank's birth with a sharia system followed by the birth of Law No. 10/1998 which validated the enactment of a *dual banking system*. Both laws are born based on the policy of state politics at the end of the new order which is accommodative with the aspirations of Muslims. Restu Soeharto, as the most respected ruler of the New Order period, in this case certainly can not be ignored. Similarly, the active role of MUI is always fighting for the internalization (absorption) of Islamic law into the national legal system to give birth to Bank Mu'amalat as the first national public bank in Indonesia using sharia principles. Furthermore, in the reform era was born a law related to sharia financial institutions and its products in line with the growth and enthusiasm of the community towards Islamic financial products. Based on the fact, it becomes very clear that the motive of inclusion of sharia banking system as well as sharia capital market industry and other non-Syariah non-bank financial industry into the legislation of the state is more motivated by the politics of state accommodation on the aspirations of Muslims who want to run economic activities based on sharia principles and not as a regulatory movement of Islamization. The reason is clear, that the issue being legislated is economic, not political. Nevertheless, it can not be denied that the policy brings with it a certain degree of political and judicial excesses and access.

Second, the logical and juridical consequences of the presence of various laws relating to the sharia economy carry implications and lie excesses to the regulations below them. This is because (1) that the Act would require operational regulations/regulations under it which of course would inevitably have to refer to the religious law (syari'ah Islam) as the source or more explicit again is the *fatwa* ulama. (2) There is a "bureaucratization of religion" in the sense that within the structure of state institutions such as BI emerges special religious nuance institutions that specifically address the issues of fostering and supervision of sharia banking in Indonesia. In this case, in the BI body has been

established Sharia Banking Bureau which later increased to the Directorate of Islamic Banking.

Third, the legislation of the DSN-MUI *fatwa* occurred in the form of recognition of DSN-MUI institutions in various Bank Indonesia Regulations (PBI) such as Directors Decree which acknowledges DSN-MUI as the only institution that has authority to make fatwa in sharia banking. Thus, the legal consequence of such legitimacy is that every product of fatwa issued by DSN-MUI becomes the source of material and formal law as well as the operational basis for BI regulation which is related to Syariah problem and the activity of sharia financial institution (banking) in Indonesia. The aspects of the *fatwa* being legislated in the form of BI regulation are only related to the syari'ah compliant product and organizational Syariah (*shariah compliance*) issues, as for those issues related to licensing administration, supervision, monetary policy, etc. (before the establishment of OJK) is entirely in the hands of BI.

Fourth, the legislation of the DSN-MUI fatwa further reinforces the history of the existence of Islamic law as a source of state law that can not be separated. With the legislation in the field of banking and Islamic economics is increasingly making the position of Islamic law in the constellation of the national legal system becomes stronger as a source of legal material.

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- 2) Translated Book. Example: Roscoe Pound, *Pengantar Filsafat Hukum: Book III*, translated by Moh. Radjab, (Jakarta: Bharata, 1963), p.15.
 - 3) Journal, example: Nur Rohim Yunus, "Kontroversi Pembentukan Perppu No. 1 Tahun 2013 tentang Mahkamah Konstitusi Dalam Ranah Kegentingan Yang Memaksa", *Jurnal Cita Hukum*, Volume 1 Number 1 (2014), p.157.
 - 4) Article as a part of book (antology). Contoh: Hikmahanto Juwana, "Penegakan Hukum dalam *Kajian Law and Development: Problem dan Fundamen bagi Solusi Indonesia*", in Muhammad Tahir Azhary, *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam*, (Jakarta: Kencana Prenada Media Group, 2012), p.127.
 - 5) Article from internet, example: Ahmad Tholabie Kharlie, "Problem Yuridis RUU Syariah" in <http://ahmadtholabi.com/2008/03/03problem-yuridis-ruu-syariah>, downloaded on March 20, 2012.
 - 6) Article from magazine, example: Susilaningtias, "Potret Hukum Adat pada Masa Kolonial", in *Forum Keadilan*, No. 17, August 20, 2017.
 - 7) Article in Seminar, example: Jimly Asshidiqqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia", paper presented on public lecture at faculty of law Universty Sebelas Maret, Surakarta on March 2, 2014.
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 - 3) Journal, example: Rohim, Nur, "Kontroversi Pembentukan Perppu No. 1 Tahun 2013 tentang mahkamah konstitusi dalam ranah kegentingan yang memaksa", *Jurnal Cita Hukum*, Volume 1 Number 1 (2014).
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- 2) Artikel sebagai bagian dari buku (antologi), contoh: Hikmahanto Juwana, "Penegakan Hukum dalam Kajian *Law and Development*: Problem dan Fundamen bagi Solusi Indonesia", dalam Muhammad Tahir Azhary, *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam*, (Jakarta: Kencana Prenada Media Gorup, 2012), h.127.
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 - 4) Artikel dari majalah, contoh: Susilaningtias, "Potret Hukum Adat pada Masa Kolonial", dalam *Forum Keadilan*, No. 17, 20 Agustus 2006.
 - 5) Makalah dalam seminar, contoh: Jimly Asshiddiqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia", Makalah disampaikan dalam Kuliah Umum Fakultas Hukum Universitas Sebelas Maret, Surakarta, pada 2 Maret 2004.
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