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Sharia Supervisory Board in Limited Company-Based Sharia Banks

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Abstract. *This paper aims to examine the function of the Sharia Supervisory Board (SSB) due to the inconsistency of laws and regulations concerning this body. Law No. 21 of 2008 on Sharia Banking has required every Sharia Bank and Sharia Business Unit in the Banks to form an SSB. However, Law No. 40 of 2007 on Limited Liability Companies has not regulated the SSB as a corporate organ. This paper analyzes laws and regulations on the SSB and court decisions on cases resulting from legal inconsistencies, with the organizational structure and fiduciary duty theories as analytical frameworks. This study finds out that legal ambiguity results in the absence of coordination between the SSB and other bodies in the organization. Thus, this prevents the SSB from optimally carrying out its functions and roles. Among the consequences is the inability to ensure sharia compliance in business contracts leading to lawsuits to cancel the contracts.*

Keywords: *Company Organs; Sharia Supervisory Board; Fiduciary of Duty*

Abstrak. *Penelitian ini bertujuan menganalisis posisi Dewan Pengawas Syariah (DPS) di tengah inkonsistensi peraturan terkait dengan lembaga tersebut. UU No. 21 Tahun 2008 tentang Perbankan Syariah telah mewajibkan setiap Bank Syariah dan Unit Usaha Syariah pada Bank untuk membentuk DPS. Namun, UU No. 40 Tahun 2007 tentang Perseroan Terbatas tidak mengatur DPS sebagai organ perusahaan. Studi ini mengkaji berbagai peraturan tentang kedudukan DPS dan putusan pengadilan yang menunjukkan konsekuesi dari inkosistensi undang-undang tentang DPS, dengan menggunakan teori struktur organisasi dan fiduciary duty. Kajian ini menemukan bahwa inkonsistensi undang-undang membuat DPS tidak memiliki garis koordinasi dengan organ lain dalam organisasi bank dan tidak dapat sepenuhnya menjalankan fungsi dan perannya. Konsekuensinya adalah fungsi pengawasan tidak optimal, sehingga muncul tuntutan hukum untuk membatalkan kontrak yang dianggap tidak sesuai syariah.*

Kata kunci: *Organ Perseroan; Dewan Pengawas Syariah; Fiduciary Duty*

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Introduction

Ambiguity in current laws and regulations on Sharia Supervisory Board has led to a significant issue related to the role and position of this board. The Sharia Supervisory Board, in reality, has a similar role as a commissioner in a corporate organ, as a body supervising the company. However, In Indonesia, this role seems unclear or vaguely mentioned in the existing regulations. Consequently, this leads to critics and questions about the position and role of the Sharia Supervisory Board. One significant example is when the public questioned the position of Ma'ruf Amin as a vice presidential candidate. At the same time, he was one of the Sharia Supervisory Board personnel in two national banks, Bank Syariah Mandiri and Bank Nasional Indonesia Syariah. Some people saw that Ma'ruf Amin violated Article 227 Letter p jo 229 Paragraph (1) Letter g of Law No. 7 of 2017 on General Elections. This Article mentions that a candidate in the election should not hold a position at a State-owned corporation (BUMN) or Regionally-owned corporation (BUMD) (Hamdani, 2019).

The complexity of this case led the public to take it to the Constitutional Court. In the end, however, the Constitutional Court issued Decision No. 01/PHPU-PRES/XVII/2019. This Decision mentions that even though the position of the Sharia Supervisory Board is equal to the Directors and commissioners as a corporate organ, in addition to the General Meeting of Shareholders, the Board is not a part of or affiliated with the corporation. The Sharia Supervisory Board only acts as a consultant or auditor. The Sharia Supervisory Board, in principle, is regulated by Law No. 21 of 2008 on Sharia Banking. This Law explains the obligation of Sharia Banks and Conventional Commercial Banks with sharia business units to form Sharia Supervisory Board. Law No. 40 of 2007, Paragraph (2) jo Article 109 states that the Sharia Supervisory Board is appointed by the General Meeting of Shareholders based on the recommendation of the Indonesian Ulama Council. However, Article 109, Paragraph (1) of Law No. 4 of 2007 on General Election explains that the company organ is limited to the Shareholders' General Meeting, the Board of Directors, and the Board of Commissioners.

The question, after that, is if it is not a part of a company's organ, how can the Sharia Supervisory Board be responsible and maintain its role in the company to the fullest? In some cases, due to the inability of the Sharia Supervisory Board to play the role significantly, cases related to sharia compliance violations arise. This is because the weak position of the Sharia Supervisory Board has made it unable to provide legal certainty in carrying out its roles, functions, and duties. Gustav Radbruch explained that legal certainty (*Rechtssicherheit*) is one of the basic values

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of law besides justice (Gerechtigkeit) and legal benefit (Zweckmassigkeit) (Gustav Radbruch in Satjipto, 2000: 19).

Literature Review

In viewing the position of the Sharia Supervisory Board in Indonesia, Hidayatulloh (2017) poses similar questions. He sees that the Sharia Supervisory Board has to have a similar role as the commissioners with their supervisory roles. Ideally, they have to be in a unified body. On the other hand, the existing laws and regulations put the Sharia Supervisory Board outside the company's organizational structure, leading to its insignificant position (Hidayatulloh, 2017). However, this conclusion has not been supported by more evidence to show how the Sharia Supervisory Board's weakness leads to more serious legal issues, which will be presented in this paper.

A more comprehensive and wider study of the Sharia Supervisory Board was conducted by Kok et al. (2022), employing data from 140 Islamic Financial Institutions in 16 countries. This study argues for the positive impact of the Sharia Supervisory Board tenure on the performance of Islamic Financial Institutions. It is found that the long tenure of the Sharia Supervisory Board results in better working experience and knowledge about the firm (Kok et al., 2022). On the other hand, Farag et al. (2018) discuss the impact of the Sharia Supervisory Board size on the performance of Islamic Banks. Using data from 90 Islamic banks from 13 countries, this research finds out that the larger structure of the Sharia Supervisory Board leads to better financial performance the Islamic banks. The study by Mollah & Zaman (2015) also finds the positive impact of the Sharia Supervisory Board on Islamic bank performance when the board maintains its supervisory role and not only an advisory one.

Rokan (2017), in his research, explains the position of the Sharia Supervisory Board. 1) Sharia Supervisory Board personnel have limited competence in Islamic law related to economic and banking fields. 2) The supervision duty has not been done comprehensively as expected by the existing laws and regulations. Even though the supervision is conducted regularly, it has been conducted in sporadic and random methods. 3) double positions and duties hold by most of the Sharia Supervisory Board personnel make them unable to perform the duties well, as they have limited time (Latif et al., 2020).[1] At the same time, Sharia Banks are

[1] The multiple positions in a company can result in a conflict of interest and have implications for the responsibilities of the company's organs as stated in the fiduciary duty doctrine.

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companies with corporate governance standards. The physical presence of the Sharia Supervisory Board personnel in banks reflects discipline and enables intense supervisory activities. 4) Sharia banks mostly do not have Standard Operation Procedures as work guidelines.

Concerning the competence of the Sharia Supervisory Board members, most of them are highly knowledgeable in Islamic law or sharia. However, to perform their duty well, the level of education of those members is considered crucial (Fakhruddin & Jusoh, 2018; Mukhibad & Setiawan, 2022; Nugraheni, 2018). Apart from Islamic legal knowledge, it is more significant if the members have knowledge of economics and business (Fakhruddin & Jusoh, 2018). Mukhibad & Setiawan (2022) argue that the education level of the Sharia Supervisory Board members positively correlates with the reputation (of the Sharia Supervisory Board), sharia compliance assurance, investment equity, and risk index. Also, Sharia Supervisory Board members with higher education will likely encourage the directors to take greater risks and increase their income (Mukhibad & Setiawan, 2022).

Furthermore, cross-membership is another factor influencing the Sharia Supervisory Board's significant role in sharia banks. This means that the Sharia Supervisory Board members are also part of the Board of Directors (Nugraheni, 2018). Previous studies argue that cross-membership in the Sharia Supervisory Board positively influences the social performance of sharia banks and sharia compliance (Fakhruddin & Jusoh, 2018). However, the fact shows that only a limited number of Sharia Supervisory Board members are also part of the Board of Directors. However, some also argue that this duality function leads to a conflict of interest, as, ideally, the Sharia Supervisory Board should be independent and not be intervened during their supervisory duty (Meslier et al., 2020). This means the gaps in the organization caused by legal ambiguity remain an issue.

Methods

This paper relies on a qualitative inquiry. The data includes laws and regulations related to the Sharia Supervisory Board and six court decisions on shari'a banking cases. The laws and regulations analyzed are Law No. 40 of 2007 on Limited Corporate; Law No. 21 of 2008 on Sharia Banking; Supreme Court Decree No. 21 of 2017 on the State-Owned Company; Law No. 3 of 2004 on Bank of Indonesia; Law No. 21 of 2011 on the Financial Services Authority; The Central Bank Regulation No. 6/17/PBI/2004; The Central Bank Regulation Number 11/33 / PBI / 2009; Regulations No.7/35/PBI/2005; and Supreme Court Circular Number 2 of 2019.

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The court decisions analyzed are Decision No. 284/Pdt.G/2006/PA.Bkt; Decision No. 004/Pdt.G/2017/PTA.Pdg; Decision No. 63/Pdt.G/2011/PTA; Supreme Court Decision Number 88 K/Ag/ 2016; Supreme Court Number 557/K/Ag/2019; and Decision No. 48 PK/AG/2009.

Results and Discussion

Sharia Supervision Board in the Indonesian Legal System

Article 109, Paragraphs (1) and (2) of Law No. 40 of 2007 on Limited Liability Companies mentions that companies that carry out sharia-based-economic activities should have Sharia Supervisory Board in addition to a Board of Commissioners. The Sharia Supervisory Board consists of one or more sharia experts appointed by the shareholders' general meeting based on the recommendation of the Indonesian Ulama Council. Paragraph (3) Article 109 of the law explains the duties and authorities of the Sharia Supervisory Board, which is to provide advice to the Directors and supervise the company's activities to ensure their compliance with the sharia principles. Similar provisions can be found in Article 32, Paragraph (3) of Law No. 21 of 2008 on Sharia Banking. C.P. Chaplin explains that individual role is important in a group or institution. The role is also a function and behavior that the individual expects from someone (Chaplin, 1989).

The role and authority mandated by the Sharia Supervisory Board indicate the implementation of good corporate governance in Islamic banking institutions. This is because, with the Board, a sharia bank can conduct a self-assessment to ensure its compliance with the sharia. Good Corporate Governance has been regulated by Bank Indonesia Regulation No. 11/33/PBI/2009, further complemented by the Bank Indonesia Circular concerning the Implementation of Good Corporate Governance in Sharia Commercial Banks and Sharia Business Units. Article 109 Paragraph (3) of Law No. 2007 and Article 32 Paragraph (3) of Law No. 21 of 2008 maintain that such duties and authorities are mandated to the Board of Commissioners.

Furthermore, Article 108 Paragraph (1) and (2) of Law No. 40 of 2007 explains that the Board of Commissioners supervises management policies and the course of management concerning the company and the company's business and advises the Board of Directors to safeguard the interest of the company. This is to ensure that the company strictly maintains its aims and objectives. The difference between the two boards is in the object they supervise. The Sharia Supervisory Board focuses on ensuring the sharia compliance of the company. In contrast, the Board of Commissioners focuses on the individual aims and objectives stated in the company's Articles of Association or Bylaws.

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Ideally, a bank has internal and external supervision. Terry (1977) explains that internal supervision is the process of determining standards for supervision, comparing work results with the existing standard, ensuring differences, and correcting unwanted deviations by making improvements. Meanwhile, external supervision includes the productivity of service quality, responsiveness, responsibility, and accountability (Dwiyanto, 2021).

Besides, there are also direct and indirect supervision, as explained by Article 27 of Law No. 23 of 1992, amended by Law No. 3 of 2004 on the Bank of Indonesia. The Law mentions that direct supervision is a form of supervision accompanied by corrective actions. On the other hand, indirect supervision is conducted earlier through research, analysis, and evaluation of reports. In all supervision activities, a bank involves four types of power: the power to license, regulate, control, and impose sanctions (Hermansyah, 2020: 175).

Supervision duties and authorities have been regulated by Bank Indonesia Regulation No. 6/17/PBI/2004 dated July 2004 on Rural Bank (Perkreditan Rakyat) based on Sharia Principles; Bank Indonesia Regulation No. 6/24/PBI/2004 dated 14 October on Commercial Banks Operating Sharia Based Business Activities as amended by Bank Indonesia Regulations No. 7/35/PBI/2005 dated 29 September 2005 on Commercial Banks Operating Sharia Based Business Activities; Bank Indonesia Regulation No. 8/3/PBI/2006 dated 30 January on Changes in Business Activities of Conventional Commercial Banks Operating Sharia Based-Business Activities.

Article 27, Paragraph (1) of Bank Indonesia Regulation No. 6/24/PBI/2004 affirms the duties, power, and responsibilities of the Sharia Supervisory Board. These are: 1) ensuring and supervising the suitability of the bank activities with the fatwas (legal opinions) issued by the National Sharia Council; 2) assessing the sharia aspects in the operational guidelines and products; 3) providing legal opinions of the sharia implementation in the banking products and published in a report; 4) reviewing new products and services, in which no fatwas available from the National Sharia Council; 5) submitting a report regarding the supervision activities at least every six months to the Board of Directors.

In addition, Article 29 Paragraph (1) point f of Bank Indonesia Regulation No. 6/17/PBI/2004 adds the duties and authorities of the Sharia Supervisory Board, which is to request documents and direct explanations from the working unit of the Sharia Rural Bank and participate in the internal discussion, including the discussion of the financing committee.

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Sharia Principles in Banking

The very basic Islamic teaching is tauhid, or the doctrine of the unity of God. In the Islamic economic system, the most used principle is *muḍārabah*, *mushārakah*, *murābaḥah*, *bay'u al-mu'ajjal*, *ijārah wa iqtinā*, *qarḍ al-ḥasan*, *waḍī'ah*, and *raḥn*. These principles can be categorized into four principles: 1) the principle of profit and loss sharing, consisting of *muḍārabah* and *mushārakah*; 2) the principle of fees or charges, consisting of *murābaḥah*, *bay'u al-mu'ajjal*, *ijārah*, and *ijārah wa al-iqtinā*; 3) the principle of free service, consisting *qarḍ al-ḥasan*; and 4) ancillary supporting principles, consisting of *waḍī'ah* and *raḥn* (Lee & Detta, 2007: 39 & 47).

Sharia banking is often defined as a banking system without interests. Technically, the prohibited elements in Islamic banking include *ribā*, *gharar*, *maysir*, *ẓulm*, and *rishwah*. Riba, in the context of the financial industry, is gaining profit without efforts or increasing profits from the basic costs, without any efforts (Khir et al., 2008: 28).

Mustafa Zarqa explains that gharar is a sale without knowing the product's existence and characteristics, which likely leads to gambling. Al Darir explains four conditions for gharar to make a contract void: 1) the element of *gharar* must be excessive; 2) the contract must be commutative; 3) the contract must affect the fundamental components; 4) the commutative contract must contain excessive gharar (El-Gamal, 2006: 58–59).

Gharar in business means carrying out business without adequate knowledge of the object, or the business is known to have a high risk. *Gharar* makes the object of a contract unknown or hidden. The examples of transactions containing *gharar* elements are: 1) selling a broken machine without informing the buyer; 2) selling undeliverable goods; 3) selling unclear items; 4) selling items without specifying the mass selling price; 5) making a conditional contract without time certainty; 6) selling goods with inaccurate descriptions; 7) selling goods without allowing the buyer to check them properly (Khir et al., 2008: 39).

Article 1 Paragraph (12) of Law No. 21 of 2008 explains that sharia principles are Islamic legal principles in banking activities issued by the authoritative institution. It can be understood that these principles refer to the standardized contract based on the fatwas of the Sharia Supervisor Board. Consequently, the transaction strictly avoids *gharar, maysir, ẓulm, and rishwah*.

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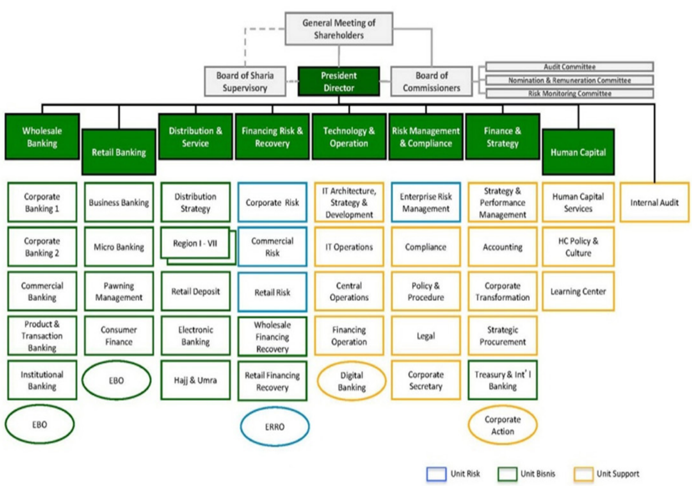
Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah *(Journal of Islamic Economics)*
Vol. 14 (2), Jul-Dec 2022

Sharia Supervisory Board in the Company Organizational Structure

Article 108 Paragraphs (1) and (2) and Article 109 Paragraph (3) of Law No. 40 of 2007 stipulate that the Sharia Supervisory Board and Commissioners have the same duties in terms of overseeing the objectives and principles of sharia and giving advice to the Directors for the benefit of the Company. However, apart from this, Article 29 Paragraph (1) f of Bank Indonesia Regulation No. 6/17/PBI/2004 adds another duty of the Sharia Supervisory Board, which is to request documents and explanations of business operations from the work unit of the Sharia Rural Bank and participate in the internal company's discussions, including the financing committee discussions.

This task strengthens the Sharia Supervisory Board's position as an internal part of a sharia bank. However, careful observation of the bank's structural organization shows an imbalanced role between the Sharia Supervisory Board and the Commissioners. Even though they have a similar position in the structure, the Sharia Supervisory Board seems to have a weaker position. This position is, then, weakened by Article 27 Paragraph 1 PBI No. 6/24/PBI/2004. It mentions that one of the Sharia Supervisory Board's duties is to submit a supervision report to the Directors, Commissioners, National Sharia Board, and Bank Indonesia. This regulation, in turn, seems to put the Sharia Supervisory Board under the Commissioners. Ideally, they both have similar positions as supervisors to the Directors, as shown in the following organizational chart.

Figure 1. The Position of The Sharia Supervisory Board in The Sharia Bank Structure



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Referring to the theory of Stoner and Wankel (Stoner & Wankel, 1993), the position of the Sharia Supervisory Board in the sharia bank structure can be analyzed based on four elements. *First,* there is a need for specialization activities for individual tasks and working groups in organizations. This aspect is important to avoid overlapping tasks between the Sharia Supervisory Board and other divisions. What has happened is that the above structure does not reflect this principle. The legal unit under the risk management division is responsible for developing a contract. Suppose the contract is not in compliance with the provisions stipulated by DSN-MUI. In that case, the Sharia Supervisory Board cannot interfere with the unit as they do not have a supervisory and coordination line in the organizational structure.

Therefore, it is not uncommon to find some contracts in Islamic banks that do not comply with the principle of sharia as stipulated in the fatwa of the National Sharia Council. This is shown by cases where the agreed contracts are canceled, leading to lawsuits. Concretely, there are cases related to contract defaults that became a violation of the law (Fuady, 2002). The followings are the examples:

No	Decision
1	Decision No. 284/Pdt.G/2006/PA. Bkt. In this case, the *murābaha* contract is null and void because its implementation by the sharia bank violates the fatwa of the DSN-MUI No. 4 of 2000 concerning *Murābaha* (Fitriana, 2018). In this case, judges anull the agreed *murābaḥa* contract as it is considered defective with some components missing. Therefore, the contract did not meet the requirement of *murābaḥa* but was close to *qard.* Therefore, the margin obligation of the customer was reduced after recalculation. This reduction was charged to the bank (defendant). The bank was requested to return the excess of the guarantee auction. On the other hand, all court fees became the joint responsibility of the plaintiff and defendant.
2	Supreme Court Decision No. 48 PK/AG/2009, a case between Efendi Bin Rajab and Fitri Effendi versus PT. Bukopin Syariah Bukit Tinggi Branch and the Government of Indonesia, cq. Ministry of Finance, Cq. Director General of Receivables and State Auctions Regional Office 1 Medan, Cq. Director General of Receivables and State Auction Bukit Tinggi. In this case, the Bank canceled the *murābaha* contract.
3	Decision No. 004/Pdt.G/2017/PTA.Pdg, a case between Azwar versus PT. Ampek Angkek Canduang Sharia Rural Financing Bank. This decision annulled a *murābaḥa* contract because the customer or plaintiff admitted that he or she never received a copy of the contract. The fact showed that the content of the contract contradicted the *murābaḥa* rules as stipulated in the DSN-MUI fatwas. In the contract, the BPRS (Rural Sharia Bank) stated that the financing had been directed toward the purchasing of capital goods, such as rice mills. The customer feels that the money given is only for business capital financing, and no purchase was made.

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4	Decision No. 63/ Pdt/G/ 2011/ PTA. Yl, the case between Yuli Trisniati versus KSU Syariah Baitul Mal Watamwil. This case is a dispute between a customer and a rural bank (KSU Syariah Baitul Mal Watamwil) regarding a fund deposit product, which amounted to IDR250,000,000, using a *muḍārabah* contract. It is mentioned in the contract that the bank will share the profit in a certain determined amount, and not the profit sharing scheme. After eight months, the bank was unable to fulfill its obligation. In this case, the customers submit a default lawsuit. In its rejoinder, the bank requested the judges to ask the customer to show evidence that her business is based on a *muḍārabah* contract. If this cannot be shown, then, the judges should decline the lawsuit. In this Religious Court Decision, the plaintiff's petition is not accepted. However, in the Appellate Religious Court Decision No. 63 of 2011, the judges grant the request of the appellant (previously the plaintiff). This means that the case is related to the incompatibility of the contract with the fatwa of DSN-MUI on *muḍārabah.*
5	Supreme Court Decision No. 557/ K/ Ag/ 2019, a case between Deana Yoga and others versus PT. Amanah Satria Sharia Rural Financing Bank. This decision annulls the *shirkah* contract between BPRS Amanah Satria as the defendant and Deana Yoga and others as the plaintiffs. The plaintiffs demanded the inclusion of the elements stipulated in the DSN-MUI fatwa but missed in the contract. In this case, the plaintiff only received money from *shirkah* financing. This means there other elements that were absent from the contract.

The above cases were tried in the Religious Courts, Appelate Religious Courts, and the Supreme Court. The main issue in those decisions is related to the contracts made between the customers and sharia financial institutions, whereby those contracts were considered incompatible with sharia standards stipulated in DSN-MUI fatwas. This indicates that the Sharia Supervisory Council has not yet been significant in ensuring the sharia compliance in sharia banks. The author's previous study presents an interview result with a legal division of a sharia bank, explaining that the legal division perform their duty to design a contract. Their duty, however, does not include a working coordination with the Sharia Supervisory Board (Hasanah, 2018).

Second, the standardization of activities becomes a procedure used by the organization to guarantee the predictability of its activities. Standard making means making the activities and work uniform and abiding by the principle. Structurally, the Sharia Supervisory Board is connected to the General Meeting of Shareholders and the Board of Directors only by dotted and indecisive lines. The relationship between the Sharia Supervisory Board and the General Meeting of Shareholders and the Board of Directors is unlike the relationship between the Board of Commissioners and the General Meeting of Shareholders and the Board of Directors, which is connected by a clear line. As a result, the work standards for Sharia Supervisory Boards are not well formatted, which makes the Board unable to carry out their duties in ensuring the sharia compliance of a sharia bank.

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Third, coordination is needed to integrate all activities with the sub-organizational functions in all departments within the organization. This is to create harmony among units to effectively and efficiently achieve the primary goals of the organization. In the case of sharia banks, as mentioned, all contracts are made by the legal unit. However, no structural line connects the Sharia Supervisory Board with the legal unit. Consequently, the Sharia Supervisory Board cannot ensure sharia compliance in the contracts formulated by the legal unit. The study by Meslier et al. (2020) shows how the Sharia Department, similar to the legal unit, works hand in hand with the Sharia Supervisory Board to maintain sharia compliance in every contract. However, this is not the case with sharia banks in Indonesia, whereby the legal units work independently without proper coordination with the Sharia Supervisory Board, as the structural organization does not allow them to do so.

Fourth, the decentralization of the decision-making process in sharia banks makes the Sharia Supervisory Board unable to maintain its monitoring and supervisory duties. In sharia banks, the decision-making process is decentralized. This means that the authorities are distributed to each board of directors member. Their decisions on a certain matter may not pay attention to sharia compliance. Based on the above organizational structure, the Sharia Supervisory Board does not have a coordination line with each board of directors member to supervise and monitor every business decision.

The Position of Sharia Supervisory Board in Fiduciary Duty Theory

The doctrine of fiduciary duty is the essence of corporate law. The Board of Directors, as fully responsible for the success and loss of the company, should carry out their duties in good faith, full of responsibility, and without any element of intent or negligence. In some contexts, such as in American courts, the fiduciary duty becomes a consideration in the case of bankruptcy (Sun, 2020). Bunting (2021) classifies three kinds of fiduciary duties. These include the duty of loyalty, the duty of care, and the duty of good faith. Fiduciary loyalty is related to company compliance. In this case, the managers are responsible for any failure caused by negligence in ensuring company compliance.

Furthermore, fiduciary loyalty is also related to the conflict of interest issue. In this case, every person should dedicate to the shareholders' interest and not their personal interest. Therefore, avoiding self-dealing becomes important (Bunting, 2021).

The fiduciary duty doctrine implies that the board of directors, as the head of the company, is fully responsible for achieving the goals and objectives of the

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company. The duties and obligations of the Board of Directors as stipulated in the laws and regulations and the Company's Memorandum of Association/Articles of Association, known as statutory Duties, are carried out based on good faith and the principle of prudence (Velasquez, 2002). The *ultra vires* (beyond powers) doctrine in Company Law provides guidance that directors must not exceed the rules outlined in their duties and obligations. If there are violations and deviations from the duties and obligations that cause harm to the company's stakeholders, then the Piercing the Corporate Veil doctrine applies.

Fiduciary Duty, which is adhered to by Law No. 40 of 2007 on Limited Liability Companies, has expanded its meaning to the duties and responsibilities of the Board of Commissioners, whose task is to oversee the duties of the Board of Directors in achieving the goals and objectives of the Company as outlined Articles of Association/by Laws. Suppose the Directors violate the ultra vires doctrine, or a loss occurs due to the Directors' negligence or conflict of interest. In that case, the losses incurred are borne jointly by all company management, namely the Directors and the Board of Commissioners (Aikin et al., 2016).

In sharia banks, the supervisory function of the Board Commissioners to the Sharia Supervisory Board. The latter plays a significant role in ensuring that the banks' performance aligns with sharia. Suppose the banks experience a loss due to contract cancelation, as in the above examples. In that case, the Sharia Supervisory Board should ideally be responsible for the legal consequences faced by the bank and the losses through Piercing the Corporate Veil. However, because the Sharia Supervisory Board does not include the company's organ as stated in Law No. 40 of 2007, the position of the Sharia Supervisory Board is weak, and its authority is limited.

Consequently, the Sharia Supervisory Board cannot fully be responsible and perform its sharia supervision duty well. Furthermore, suppose the banks experience a loss in the doctrine, such *ultra vires* as contract cancelation caused by the discrepancy between the contract and fatwa of DSN-MUI. In that case, the Sharia Supervisory Board will not participate in bearing the joint loss of the Board of Directors and the Board of Commissioner.

The Supreme Court Circular No. 2 of 2019 stipulates the lawsuit concerning the cancelation of the sharia contract by the debtor caused to sharia incompatibility. According to the Circular, the lawsuit can only be done when the debtor has not used the object. However, this Circular is insufficient to deal with such cases. Therefore, the Circular should not be permanently implemented. This is because the stipulations in the Circular cannot deny the stipulation stated in Article 1320

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of the Civil Code, regulating subjective and objective elements of a contract, as well as the fatwa of DSN-MUI. In this case, clearer and more decisive regulations are needed.

Therefore, regulations need to enhance the supervisory roles and functions of the Sharia Supervisory Board by placing it in a more authoritative position in the organizational structure of a bank as a company organ. However, at the same time, the structural relationship between the Sharia Supervisory Board and other company organs should be clear to maintain the board's independence. If becoming a part of the company organ is to be a solution in dealing with the low performance of the Sharia Supervisory Board, there is a need to consider the issue of the conflict of interest.

Nevertheless, this research does not recommend that the Sharia Supervisory Board members have a dual position in a sharia bank. This is considering previous studies showing that dual membership or cross-membership of the Sharia Supervisory Board in the Board of Directors or other organs negatively influences the company's performance (Neifar & Jarboui, 2018; Nugraheni, 2018). This is due to a possible conflict of interest and the limited or absence of control due to the power accumulation in one particular individual.

Conclusion

The existence, duties, authorities, and responsibilities of the Sharia Supervisory Board are regulated by Law No 40 of 2007; Law No. 21 of 2008; Bank Indonesia Regulation No. 6/17/PBI/2004, Bank Indonesia Regulation No. 7 of 35/PBI/2005 and Bank Indonesia Regulation No. 8/3/PBI/2006. However, these regulations cannot be maximally implemented due to the organizational structure that places the position of the Sharia Supervisory Board out of the organizational coordination. Ideally, this board should coordinate with other units based on the four points of organizational structure assessment. These are the specialization of activities, standardization of activities, coordination, centralization, and decentralization of the decision-making process.

According to the fiduciary duty theory, if the *ultra vires* doctrine is violated and results in losses, the Piercing of the Corporate Veil doctrine cannot be applied to the Sharia Supervisory Board. This is because the Sharia Supervisory Board is not treated as those other corporate organs. This means that the Sharia Supervisory Board is not responsible for the loss unlike the responsibility of the Board of Commissioners and the Board of Directors.

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