

AXIOLOGICAL HARMONIZATION OF SHARIA ECONOMIC LAW SUPREMACY AND DSN-MUI FATWA IN INDONESIA

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Abstract

This study aims to upgrade the position of the Compilation of Sharia Economic Law and Fatwa DSN-MUI to become a law. This is because it is very urgent and urgent to immediately publish the draft to be ratified. Because KHES and Fatwa DSN-MUI are special rules that regulate the operational system and dispute resolution of Islamic economics, of course its position is very strategic in the scope of Islamic economics. In addition to the urgency of the position of KHES and Fatwa of the National Sharia Council, it also contains weaknesses in the existence of National law. This is because its existence is not a source of law that has the legality of national law. As Law No. 12 of 2011 concerning the Formation of Legislation, does not mention fatwa as part of the legal basis in this country, Fatwa is just an opinion or advice conveyed by Islamic law experts who are members of an organization. The Fatwa of the National Sharia Council contributed to the birth of the Compilation of Sharia Economic Law. This is certainly a breakthrough related to the legality of sharia economic law. However, the existence of KHES is a reference for Religious Court Judges as a settlement of disputes, but KHES is not in the form of a law, in fact it is only a PERMA, and this certainly affects the legal force of national legislation. Therefore, to harmonize and formulate the National Sharia Council Fatwa into KHES and raise the status of KHES to become a law is important.

Keywords: Harmonization, DSN-MUI Fatwa, Syaria Economic Law

INTRODUCTION

Indonesia is a constitutional state, as stated in Article 1 (3) of the 1945 Constitution. In this context, the development of people's economic rights as social security and the development of human rights cannot be separated. This is because social economic security is part of economic rights. In principle, the rule of law requires that all actions or measures taken by the authorities have a legal basis. All aspects of social, national and state life, including government, must be governed by the law, which is in accordance with the national legal order (Hasbi, 2001). In addition to being a state of law, Indonesia is also a state based on the Almighty God, as affirmed in Article 29 of

the 1945 Constitution. Therefore, in the formation of laws and regulations, the law derived from religion should be used as the basic material (Darwin, 2015: 19-20).

The majority of Indonesian people are adherents of Islam, therefore life activities are identical to Islamic culture including in the economic field. Various sectors of the economic operational system are applied to the sharia economic system. The development of an economic paradigm labeled sharia is evidenced by the spread of sharia-based banking. According to data from the Financial Services Authority and statistics as of January 2021, it is stated that the number of Islamic commercial banks (BUS) in Indonesia, which originally amounted to fourteen BUS, since 2021 there has been a merger of three state-owned Islamic banks, namely Mandiri syariah bank, BNI syariah bank and BRI syariah bank into Bank Syariah Indonesia (Otoritas Jasa Keuangan, 2015). Thus, the number of Islamic commercial banks in 2021 will be 11 Islamic commercial banks, 20 Islamic business units, 162 Islamic rural banks (Kasmir, 2012: 52). Sharia-based insurance in 2014 there were 5 full sharia insurance companies with a total of 44 UUS. Sharia financing companies in 2014 there were 3 full sharia companies with a total of 44 UUS (OJK, 2014). Sharia-based mutual funds in January 2015 amounted to 73 (OJK, 2015). Sharia Financial Services Cooperatives registered in 2015 amounted to 432, and other sharia-based financial institutions, as well as the establishment of supporting institutions such as the Sharia Economic Community (MES), the Association of Islamic Economists (IAEI), ABSINDO and so on which are an important part in introducing sharia economics to the public (Dendawijaya Lukman, 2009: 33).

The above presentation shows the rapid development of Islamic economics in Indonesia. With this reality, it does not rule out the possibility that sharia economic disputes will also have more variants so that strong and clear arrangements are needed. It aims to realize justice, legal certainty and expediency in the variants of disputes that may occur. In addition, strong and clear legal arrangements in the field of Islamic economics are also needed to ensure the realization of sharia principles in the Islamic economic operational system.

The presence of Islamic economic law in the Indonesian legal system today, is actually no longer just a historical demand and the population of the majority Muslim arena) as mentioned above, but further than that is due to the needs of the wider community after it is known and felt how fair and equitable the Islamic economic system is in guarding the welfare of the people as envisioned by the founders of the Republic of Indonesia (A. I. Hadi, 2016: 60-61).

In connection with this, KHES and Fatwa DSN-MUI are used as the main legislation of Islamic economics in Indonesia. KHES and Fatwa DSN-MUI are the main guidelines in the operational system and dispute resolution of Islamic economics. The strength of KHES and Fatwa DSN-MUI in relation to sharia economy can be observed through the pattern of its transformation in legislation into positive law which is specifically subject to the principle of *lexspecialis derogat legi generalis*. KHES is transformed through PERMA No. 2 of 2008, while Fatwa DSN-MUI is transformed through Law No. 21 of 2008 concerning Islamic Banking (Mahkamah Agung RI, 2006: 35).

Based on the description of this background, the role of KHES and Fatwa DSN-MUI on the development of Islamic economics is an interesting study, because structurally the KHES law and Fatwa DSN-MUI have been guaranteed as the main

regulations to regulate the intricacies of Islamic economics. But unfortunately these two legal products are not yet in the form of laws. So this creates confusion and even chaos in the practice of the legal system that regulates Islamic economics. The confusion arises because these two legal products are regulated in two separate forms of regulation and both are not yet in the form of laws, both are still equally standing on the shoulders of legislation. More urgently, the laws on which these two legal products stand are also different, so it is possible that there will be inconsistencies between these two legal products in their arrangements. Then the nature of these two legal products has a different nature in its implementation. KHES is a binding regulation on judges in the settlement of sharia economic disputes in religious courts, while Fatwa DSN-MUI binds all business activities in Indonesia that carry out their business based on sharia principles.

When viewed from the perspective of the reach of these two legal products in responding to the development of Islamic economics there are also differences. KHES was passed in 2008 in the form of a standard legal product, so it is doubtful whether it will be able to reach the problems of the rapid growth of the Islamic economy until 2023. While the Fatwa DSN-MUI form does not exist if legal problems do not arise, his eyes are very observant in lurking legal problems. So that he continues to accompany the development of Islamic economics with his fatwas. However, the name fatwa certainly appears after legal problems run amidst public unrest, thus opening up opportunities for the running of legal abstractness in the midst of society. This condition can certainly raise doubts about the realization of the objectives of the establishment of KHES and Fatwa DSN-MUI, namely to ensure the realization of sharia principles on the operational system and settlement of sharia economic disputes in Indonesia. Based on the assumption of the chaos of the two legal products, the author tries to examine and examine more deeply to find out the answers to these problems, how the solution to the gap between KHES and Fatwa DSN-MUI is to guarantee the realization of sharia principles in the development of Islamic economics in Indonesia.

LITERATURE REVIEW

KHES and Fatwa DSN-MUI were formed in essence to ensure the realization of sharia principles in the operational system and the settlement of sharia economic disputes in Indonesia. The principles of sharia in the Islamic economic system are five fundamental principles that must be fulfilled (Iska Syukri, 2019: 227-229). First; 'aqidah, meaning the main basis for the need for belief that essentially Allah is the one who owns everything in the heavens and on earth. This means that for humans there are no ownership rights, except for management obligations and benefit rights. Secondly, fairness, meaning that management must be within the corridors of justice, in the sense of "neither oppressing nor being oppressed". Not in the sense of "you are entitled to what you work for" as the concept of justice in the theory of capitalism, nor is the definition of "equal equality equal taste" as the concept of justice in the theory of socialism.

Third; Nubuwwah, that tries to reflect the economic system of the Prophet in his daily life, because that pattern is the most correct. For example, the concept of tasharruf or business turnover of the Prophet is in the form of financing in the real sector. It means that the form of business carried out remains in the context of risk (loss) or return (profit), such as the mudharabah system, murabahah, musyarakah, and so on. Not

in the form, the intention is to be rotated, but do not want to bear the risk, such as investing money in conventional banks with an interest system. Fourth; *khilâfah*, meaning that the Islamic economic system cannot run optimally without the support of political will and supervision of the ruler or government in a country. As in Indonesia, Muslims need to be happy that to realize Islamic economic institutions have been constitutionally supported through regulations that apply in a country. In the context of the Indonesian state, it is explained in Law No. 12 of 2012 concerning Legislation in Indonesia.

Fifth; *ma'âd*, meaning about something that must be believed by Muslim economic actors is that the economic actions they take are not only worldly nuances, but integrated for the benefit of the afterlife, as the final estuary of his life journey. To ensure the realization of the sharia principles, the basic principles above are formulated into KHES and Fatwa DSN-MUI. To see the effectiveness of these two legal products in order to realize the realization of sharia principles in the realm of Islamic economics, it can be seen in the explanation below.

Compilation of Sharia Economic Law

The Compilation of Sharia Economic Law is material law in the field of sharia economic dispute resolution in the Religious Courts. KHES is divided into four parts (books), namely: Book I: Legal Subjects and Amwal, Book II: Akad, Book III: Zakat and Grant, Book IV: Sharia Accounting (MA. *Kompilasi Hukum Ekonomi Syariah*). The source of KHES refers to Islamic law, but as with other regulations, there is no explanation of the category of sources of Islamic law in KHES. Sources of Islamic law are scientifically divided into two categories: 1) The sources of Islamic law agreed by all scholars or the main sources, namely the Qur'an, Sunnah, Ijmâ' and Qiyâs. 2) Sources of law that are disputed, namely Istihâsân, Istislâh (al-Maslahah al-Mursalah), 'Urf, Istishâb, Sahâbi Mazhab, Shar'u Man Qablanâ, and others. KHES is a compilation compiled by referring to various sources, both at the level of sharia, fiqh, and qânûn (law). One of the sources for the preparation of KHES is *Majallah al-Ahkam al-'Adliyah*, which is a book of civil law laws in the Ottoman Turkish era, then adapted to the current context of Indonesia. Contextualization of fiqh is very important, considering that fiqh itself is flexible, in the sense that it can change with changes in time, place, circumstances and customs (I. E. Nashihul, 2016: 213-222).

KHES which is stipulated through the Supreme Court Regulation if observed through the approach of legislation can be assumed as follows: a) KHES is a regulation of a written nature; b) KHES is not a legal meteril that binds the public even though basically KHES is general abstract but only applies internally to the power of the Supreme Court; c) KHES is not a regulation formed by an institution that gets the authority of attribution or delegation authority to form legislation. It was created by the Supreme Court only as guidance for judges deciding sharia economic cases (H. Syamsul, 2018 : 5-7). Which since the enactment of Law Number 3 of 2006 Article 49 states that sharia economic disputes are the absolute authority of religious courts. So to fill the legal vacuum of sharia economic dispute resolution is filled through PERMA, PBI and Law Number 21 of 2008. PERMA transforms KHES into positive law to regulate the settlement of sharia economic disputes (Mahkamah Agung RI, 2006: 35).

The existence of KHES in positive law in Indonesia can be seen in the Supreme Court Regulation (PERMA) Number 2 of 2008. Article one paragraph (1) states that judges of the Religious Courts in the Religious Courts environment who examine, hear and resolve cases related to sharia economics use as guidelines the sharia principles in the Compilation of Sharia Economic Law (KHES). On this basis, judges are obliged to make KHES the legal basis in the decision of sharia economic cases, as long as it does not reduce the responsibility of judges to explore and find laws to ensure fair and correct decisions according to article 1 paragraph (2) of the PERMA. Meanwhile, the PERMA itself is also recognized as positive law in Indonesia, because this is also clearly seen in article 8 of Law No. 12 of 2011 concerning Legislation in Indonesia, namely as long as the PERMA is ordered by higher laws and regulations or formed based on authority, its existence is recognized and has binding legal force.

The authority of the Supreme Court in making PERMA is regulated in Article 79 of Law Number 14 of 1985 concerning the Supreme Court, namely "The Supreme Court may further regulate matters necessary for the smooth administration of justice if there are matters that have not been sufficiently regulated in this Law. Thus, the function of PERMA is to fill the shortcomings or vacancies in the law in carrying out judicial practices to avoid disparities in providing justice that cause legal certainty not to be realized. PERMA is a special regulation that is subject to the principle of *lex specialis derogat legi generalis*. Thus as long as the problems in sharia economic disputes are regulated in KHES, judges cannot set aside or not apply KHES by basing legal considerations on other general laws and regulations (Wahyudi Soetandyo, 2014: 57-66).

On the basis of the legal structural regulations that explain the existence of the KHES position in Indonesian positive law above, it can be said that KHES acts as a hero. First for religious court judges, legal practitioners and sharia economic practitioners because it makes it easier for legal practitioners to refer to the law in accordance with their wishes. The books of fiqh that are scattered in the Islamic world are full of differences of opinion which are sometimes confusing and difficult. With the compilation of sharia economic law. Judges, legal practitioners, and sharia economic practitioners no longer need to mentarjih various opinions in various fiqh books. Then in terms of the thirst of justice seekers who have been neglected, because of the void of binding material law on sharia economic disputes, KHES emerged as a hero for those who regulate in such a way related to sharia economics. Finally, according to the author, KHES acts as a hero for mu'amalah fiqh literature and Indonesian positive law.

Thus, because the presence of KHES is able to unite the perspectives of the books of mu'amalah fiqh which are dense differences so as to avoid the debate of differences in mazhab, because KHES is the result of an agreement of scholars derived from the deepening of various sources of fiqh books of course adapted to the development of Islamic economics in Indonesia. In addition, the more urgent KHES is also very meritorious for positive law in Indonesia, because with the transformation of KHES into a positive legal order allegedly strong will be able to harmonize positive legal regulations in Indonesia in accordance with the expected and loved the culture of the majority Islamic society in Indonesia. This is in accordance with the development of community law, as stated by Eugien Ehrlich that "a good law is a law that is in accordance with the laws that live in society." (P. Efendi Lotolung, 1997/1998).

National Sharia Council Fatwa

The national sharia council (DSN) is an institution formed by the Indonesian Ulema Council (MUI) which has the function of carrying out the duties of MUI in dealing with issues related to the activities of Islamic financial institutions. One of the main tasks of the DSN is to study, explore and formulate the values and principles of Islamic law (Shari'ah) in the form of fatwas so that they can be used as guidelines in transaction activities in Islamic financial institutions. Fatwa is an answer as an opinion or advice given by mufti about a problem. So fatwa is an attempt to provide an explanation of shara' law (Hardi Syamsul, 2019: 98). Thus, a fatwa is an opinion issued by a scholar and is not included as one of the sources of law in Islam. The nature of the fatwa is not binding, in the sense that the fatwa may be implemented and/or abandoned. However, the legal position of fatwa in Indonesia has authority and an important role in the process of designing and making positive laws that are binding as a binding legal basis for the development of Islamic Economics (Syamsul Hasan, 2019: 112).

However, after the enactment of Law No. 21 of 2008 concerning Sharia Banking, the National Sharia Council through the Shari'ah Supervisory Board (DPS) was given the authority to supervise the application of shari'ah principles in the system and management of shari'ah financial institutions (LKS). It should also be noted that DSN-MUI is an independent institution in issuing fatwas as a reference related to economic, financial and banking issues (Syamsul Hasan, 2019: 3).

The hierarchical structure of the National Sharia Council is under the Indonesian Ulema Council, which is an independent institution that is not affiliated with the government. Since its establishment until 2022, the National Sharia Council in Indonesia has issued a total of 152 fatwas relating to the operations of bank and non-bank Islamic financial institutions regarding the provisions of Islamic economic law (Hardi Syamsul, 2019: 98-100).

The National Sharia Council was formed to function in several aspects, namely: a) realizing the aspirations of Indonesian Muslims regarding the economy and encouraging Islamic means in the implementation of economics / finance according to sharia principles, b) the formation of the National Sharia Council is the efficiency and coordination steps taken by scholars in responding to sharia economic / financial issues. Various problems / cases that require a fatwa will be discussed to obtain a common view in handling them by each Sharia Supervisory Board within Islamic financial institutions, c) encouraging the implementation of Islamic methods in the realm of economics and finance, the National Sharia Council will always be involved and proactively contribute in addressing the dynamics of economic and financial developments in Indonesian society (R. Thohir L Sihabbudin & Siti, H. Elsy, 2020: 1).

Some of these aspects show how important the role of the National Sharia Council is in relation to Islamic economics. Although the Fatwa of the Indonesian Ulema Council is not a type of legislation recognized in Indonesia, but in its development, several fatwas issued by the National Sharia Council of the Indonesian Ulema Council (DSN-MUI) are binding positive law. This is because its existence is often legitimized through legislation by government agencies, so that sharia economic actors must comply. Among the forms of legitimization through legislation can be seen from the following provisions (Syamsul Hasan, 2018 : 8-9).

1. Law No. 40 on Limited Liability Companies. Article 109 of this law explains that:
1) Companies that carry out business activities based on sharia principles in addition to having a Board of Commissioners must have a Sharia Supervisory Board. 2) The Sharia Supervisory Board as referred to in paragraph (1) shall consist of one or more sharia experts appointed by the GMS upon the recommendation of the Indonesian Ulema Council. 3) The Sharia Supervisory Board as referred to in paragraph (1) shall be tasked with providing advice and suggestions to the Board of Directors and supervising the activities of the Company in order to comply with sharia principles.
2. Law Number 19 of 2008 on State Sharia Securities Article 25 of this law also explains the following provisions: "In the context of SBSN issuance, the Minister requests a fatwa or statement of SBSN conformity to sharia principles from an institution that has the authority to determine fatwas in the field of sharia". In the explanation of this paragraph, it is stated that "What is meant by "institutions that have the authority to determine fatwas in the field of sharia" is the Indonesian Ulema Council or other institutions appointed by the Government".
3. Law Number 21 of 2008 concerning Sharia Banking. Article 26 of this law further explains that: 1) Business activities as referred to in Article 19, Article 20, and Article 21 and/or sharia products and services, must be subject to Sharia Principles. 2) The Sharia Principles as referred to in paragraph (1) shall be issued a fatwa by the Indonesian Ulema Council. 3) The fatwa as referred to in paragraph (2) shall be set forth in a Bank Indonesia Regulation. 4) In the context of drafting the Bank Indonesia Regulation as referred to in paragraph (3), Bank Indonesia shall establish an Islamic banking committee.

On this basis, Islamic financial institutions have an attachment to the fatwa issued by DSN-MUI. This is due to the many provisions that require Islamic financial institutions, especially Islamic banking to comply with and submit to the DSN-MUI fatwa. In the legal structure in more detail, it explains that the DSN-MUI Fatwa in relation to the operational system and the settlement of Islamic economic disputes is a regulation that has been transformed into binding law.

The pattern of transformation can be seen through the collaboration of PBI and Law No. 21 of 2008 concerning Islamic Banking, among others, from the formulation of article 1 paragraph (7) of Law No. 21 of 2008 which reads that Islamic banks are banks that carry out business activities based on sharia principles. Meanwhile, what is meant by sharia principles itself is emphasized in article 1 paragraph (12) which states that sharia principles are the principles of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia (Fahmi Hilman, 2017: 30-31). Bank Indonesia Regulation No.11/15/PBI/2009 also provides an understanding of what is meant by Sharia Principles. According to the PBI, "Sharia Principles are the principles of Islamic law in banking activities based on fatwas issued by the National Sharia Council-Majelis Ulama Indonesia." (Hadi Syamsul, 2015: 5). Then the institution that has the authority to determine fatwas in the field of sharia is explained by PBI Number 6/24/PBI/ 2004, the National Sharia Council is one of the institutions formed by the Indonesian Ulema Council which is tasked and has the authority to determine fatwas about products and services in business activities that carry out business based on sharia principles (Fahmi Hilman, 2017: 30-31). Article 8 of Law

No. 12/2011 on Legislation in Indonesia states that PBI is one of the regulations recognized as positive law in Indonesia.

In connection with the settlement of sharia economic disputes, it is also explained by article 55 of Law Number 21 of 2008 concerning Islamic Banking which also states that dispute resolution must not conflict with sharia principles. So on this basis, the judge is obliged not to deviate from the MUI DSN Fatwa in the basis of legal considerations for deciding cases of sharia economic disputes, so it is natural that the judge makes the MUI DSN fatwa as a basis for legal considerations, it is even highly recommended to apply the MUI DSN Fatwa as a basis for legal considerations in deciding sharia economic cases (Hadi Syamsul, 2011: 5). Because the base of the transformation of the Fatwa of DSN MUI into positive law is Law No. 21/2008, the Sharia Principles by law have been applied as positive law with the principle of *lex specialis derogat legi generalis* in No. 21/2008 concerning Islamic Banking (Fikri dan Budiman, 2017: 158-159).

On that basis, the role of the Fatwa Institution of DSN-MUI is considered as the highest sharia authority in Indonesia. From the description of the role or duties of DSN-MUI, it shows 2 main functions of DSN-MUI, namely, issuing regulations in the form of fatwas and also overseeing the implementation of sharia principles in every Islamic financial institution in Indonesia, besides that DSN-MUI actively participates in the development of sharia values in various economic activities (Fikri & Budiman, 2017: 158-159).

In its research report, the Center for Sharia Business and Economics at the University of Indonesia explained that in general the development of the Islamic economy in Indonesia showed encouraging results. This can be seen from the increasing development of the Islamic financial industry in banks and non-banks. Good developments are also shown from the regulations that govern it. Currently, the implementation of Islamic economics has been regulated by adequate legal instruments. However, in some regulations, especially in KHES, there are still some provisions that are not in line with the legal content in several other regulations related to Islamic economics. For example, research conducted by the Sharia Economic Society (MES) states that there are still many material legal contents contained in the Compilation of Sharia Economic Law (KHES) that are not in accordance with the implementation of Islamic economics in Indonesia. The incompatibility can be seen from the use of inappropriate terms, the use of the same definition as conventional concepts, the existence of new provisions that elaborate on old concepts, and so on (Fikri & Budiman, 2017: 23).

It is evident that law and business are evolving together in a complementary relationship. Law has evolved as an order and system, from its limited function of meeting the needs of local communities to its new function of controlling the orderly life of society and the state on a national scale. Meanwhile, what is called business has also developed from patterns of activity that were originally local (in concrete markets) to patterns of activity that are very ready to dynamize in scenes that are national in scope, or even global in scope (in increasingly abstract markets) (N. Cholil, 2011: 41). According to Paul Scholten as quoted by Nuno Coelho, legal awareness is always related to what the law should be, how to distinguish the law from non-law, and how to sort out the behavior that should be done and what should be left behind (T. Agus, 2012: 74).

Thus, the harmonization of Islamic economic regulations needs to be done immediately, especially on the provisions contained in the Compilation of Islamic Law (KHES). Harmonization of KHES must be done immediately with other regulations governing the implementation of Islamic economics in Indonesia, especially with the Fatwa of DSN-MUI because all technical rules for the implementation of Islamic economics in Indonesia, whether issued by BI or OJK, always originate from fatwas issued by DSN MUI. material legal content contained in the

Compilation of Sharia Economic Law

The Compilation of Sharia Economic Law (KHES) still needs a lot of revision, this can be seen from the many articles in KHES that are not in accordance with the implementation of Islamic economic activities in Indonesia. Some examples of these discrepancies can be seen from the many inconsistencies between the provisions contained in KHES and Fatwa DSN- MUI. In this case the author makes the DSN-MUI fatwa as a comparison of KHES because various technical rules such as those issued by Bank Indonesia (BI) and the Financial Services Authority (OJK) which are regulators of the implementation of the financial industry in Indonesia always refer to the provisions contained in the DSN-MUI fatwa. The following table explains some of the disharmony of the provisions contained in KHES and Fatwa DSN-MUI (T. Agus, 2012: 10-13).

In the provisions contained in KHES, article 20 paragraph 6 states: Murabahah is mutually beneficial financing carried out by shahib al-mal with parties in need through sale and purchase transactions with an explanation that the procurement price of the goods and the selling price have a surplus value which is profit or profit for shahib almal and the return is made in cash or installments. While in Fatwa DSN MUI Number: 4/DSN-MUI/IV/2000 LKS in murabahah financing acts as a seller not shahib al-mal, murabahah is selling an item by confirming its purchase price to the buyer and the buyer pays more as profit.

Fatwa Number: 09/DSN-MUI/IV/2000 The definition of ijarah is limited to ijarah of goods, but includes ijarah of services. Ijarah is the lease of goods within a certain period of time with payment. Article 20 paragraph 23 Sukuk sharia mutual funds are non-bank financial service institutions whose activities are oriented towards investing in the portfolio sector or the collective value of securities. Fatwa Number: 20/DSN-MUI/IX/2000 The term mutual fund in sharia is Shunduq Istismar not sukuk maliyah. Then article 20 paragraph 26 Ta'min / insurance is an agreement between two or more parties, in which the insurer binds himself to the insured by receiving a ta'min premium to receive compensation to the insured due to loss, damage, or loss of expected profits, or legal liability to third parties that may be suffered by the insured arising from uncertain events.

Fatwa Number: 21/DSN-MUI/X/2001 The definition is still unclear, because the conventional definition (risk transfer) is different from the definition of Islamic insurance (risk filter) in the fatwa explained that: "Insurance is an effort to protect and help each other among a number of people/parties through investments in the form of assets and / or tabarru' which provides a pattern of return to face certain risks through contracts (agreements) in accordance with sharia". Fatwa Number: 21/DSN-MUI/X/2001 The definition is still unclear, because the conventional definition (risk

transfer) is different from the definition of Islamic insurance (risk sharing) in the fatwa explained that: "Insurance is an effort to protect and help each other among a number of people/parties through investment in the form of assets and or *tabarru'* which provides a pattern of return to face certain risks through contracts (engagement) in accordance with sharia".

Furthermore, it is mentioned in article 103 Payment for goods in *bai' salam* can be made at an agreed time and place. Fatwa Number: 5/DSN-MUI/IV/2000 "Payment must be made when the contract is agreed upon." While in article 236 the division of profit from business between *shahib almal* and *mudharib* is stated clearly and definitively. Fatwa Number: 7/DSN-MUI/IV/2000 It should be added "stated at the time of the contract in the form of a percentage (*nisbah*) of the profit as agreed". Article 238 paragraph 2 *mudharib* acts as the representative of *shahib al-mal* in using the capital he receives. Fatwa Number: 7/DSN-MUI/IV/2000: *Mudharib* is a partner of *shahibul Maal*, not a representative in the sense of a *wakalah* contract.

Article 242 The *mudharib* is entitled to profit in return for his work as agreed in the contract. Fatwa Number: 7/DSN-MUI/IV/2000 The profit obtained in *mudharabah* is joint property, so it is not a reward given by *shahibul Mal*. Article 244 *mudharib* may not mix his own wealth with the assets of cooperation in doing *mudharabah*, unless it has become a habit among business people. Fatwa Number: 7/DSN-MUI/IV/2000 In *Mudharabah* contracts mixing is possible.

Article 247 Travel expenses incurred by the *mudharib* in the course of carrying out cooperative business shall be borne by the capital of the *shahib al-mal*. Fatwa Number: 7/DSN-MUI/IV/2000 *Mudharabah* which states "Operating costs are charged to the *mudharib*." Article 300 if the *Musta'jir* becomes the owner of the *ma'jur*, then the *ijarah* contract ends by itself. Fatwa Number: 73/DSN-MUI/ XI/2008 In a *Musarakah Mutanaqishah (MMQ)* contract, the lessee (*musta'jir*) can be the owner of the *shirkah* object. Article 312 Maintenance of the *ma'jur* is the responsibility of the *musta'jir* unless otherwise specified in the contract. Fatwa Number: 9/DSN-MUI/IV/2000 Maintenance is the obligation of the *mu'jir*.

Article 338 *Makful bih/object of guarantee* must be, while in Article 339 *Makful bih* must be translated Object of Guarantee: Guarantee is valid in accordance with the agreed terms and time limit, Guarantee is valid until the rejection of the borrower. Fatwa Number: 11/DSN-MUI/IV/2000 The guarantee referred to in this article is the translation of *kafalah*. The correct translation for *kafalah* is guarantee, not collateral which can be understood as synonymous with collateral.

Article 365 *Hawalah/debt transfer* is not required to be received by the debt transferor from the party receiving *hawalah/debt transfer* as a gift or reward. Fatwa Number: 58/DSN-MUI/V/2007 It is possible to receive *ujrah/fee* for the willingness and commitment to pay *muhil's* debt in *hawalah bil Ujrah*. Article 375 The *rahn* contract is complete when the *marhun* has been received by the *murtahin*. Fatwa Number: 68/DSN-MUI/III/2008 The clause has been accepted needs further explanation, because in the conception of the fatwa there are two concepts of acceptance (*qabdh*), namely acceptance in essence and legally (*hukmy*), this is related to the concept of *Rahn tasjily* in Fatwa *Rahn Tasjily* - also known as *Rahn Ta'mini*, *Rahn Rasmi*, or *Rahn Hukmi*. Article 373 paragraph 2 In a pawn contract there are 3 (three) parallel contracts, namely: *qardh*, *rahn*, and *ijarah*. Fatwa Number: 92/DSN-MUI/IV/2014.

In the event that rahn (dain/marhun bih) occurs because of borrowing money (qardh contract), then Murtahin's income only comes from mu'nah (maintenance/custody services) for marhun, the amount of which must be determined at the time of the contract as ujarah in an ijarah contract; Article 469 If a fee is required for the proxy in a power of attorney transaction, the proxy is entitled to his fee after fulfilling his duties. Fatwa Number: 52/ DSN-MUI /III/2006 Ujrah is given at the beginning of the contract. According to Wahbah Zuhaili: Wakalah with compensation applies the law of Ijarah.

Article 597 The Akad used for Bank Indonesia Shari'ah Certificate Instrument is Ju'alah contract. Fatwa Number: 63/ DSN-MUI/XII/2007 The Akad that can be used for the issuance of SBIS instruments is not only Ju'alah, but can be done with Mudharabah, (Muqaradhah)/Qiradh, Musyarakah, Ju'alah, Wadi'ah, Qardh, and Wakalah. Then mentioned in article 548 Akad used in ta'min and i'adah ta'min are: a. Wakalah bil ujarah, b. Mudharabah; and c. Tabarru'.

Fatwa Number: 51/ DSN-MUI/III/2006 Akad for investment can also use mudharabah musyarakah. Article 561 Non-savings contracts in ta'min and i'adah ta'min are binding on all forms of transactions made in the form of grants with the aim of helping among participants, not for commercial purposes. The use of the term non-savings contract as a substitute for tabarru' contract is not appropriate. Article 579 The operational mechanism in Islamic mutual funds consists of:

- a. Between investors and investment managers is done by wakalah.
- b. Between investment managers and investment users is done with mudharabah system. Fatwa Number: 20/ DSN-MUI/IV/2001 The contract with the investment manager is carried out with Wakalah, the investment manager with the investment user is carried out with a sale and purchase contract when the initial purchase becomes a portfolio after the ba'i contract, the position of the investor represented by the investment manager can be mudharib, syarik, and others depending on the related contract. Article 611 Sources of qardh funds shall come from: 1) Part of the capital of the Shari'ah Financial Institution; 2) Profits of the Shari'ah Financial Institution that are set aside; and/or 3) Other institutions or individuals who entrust the distribution of their infusions to the Sharia Financial Institution.

Fatwa Number: 79/DSN-MUI/III/2011 Qardh funds are also sourced from customer funds /PK. However, qard contracts for non-commercial activities usually do not use customer funds. The correct term is not "qard funds" but "social funds". Article 612 Sharia current account financing is carried out with an agreement for representation.

Fatwa Number: 30/DSN-MUI/IV/2002 The word agreement in this article is an incorrect translation of wa'ad. Wa'ad means promise (statement of commitment). And in CHAPTER XXIX it is stated about Sharia Pension Funds. Pension Program Based on Sharia Principles. Fatwa Number 88/DSN-MUI/XI/2013 The contents of the Chapter related to Sharia Pension Funds are not in line with the fatwa on General Guidelines for Implementation.

National Sharia Council Fatwa

The National Sharia Council, as an institution that has the authority to issue fatwas on Islamic economics, is in a dilemma. On the one hand, the National Sharia Council must be able to find new laws related to modern economic activities that are very complex. On the other hand, the conservatism of the ulama is maintained by sticking to the opinions of classical scholars. Although there has been a shift in bermazhab which is reflected in the fatwas of the Indonesian Ulema Council, the ulama remain co-opted by the opinions of classical scholars and this is one of the weaknesses of the National Sharia Council fatwa if it is positivized into legal rules. That the ulama cannot break away from referring to the opinions of classical scholars (S. Fithriatus, 2016: 162).

So that the law should be used to realize order in achieving justice and legal certainty regarding its efficiency with the development of Islamic economics is still not effective. The long road in treading and tracing the life of law in society is increasingly felt in modern times, even entering the world of globalization today. Skeptical and ambiguous views of the law should be the commander in the modern century is increasingly needed. (S. Fithriatus, 2016: 120).

The position of fatwa on the development of Islamic bank products and services has a weakness, namely the fatwa comes later after the banking product is implemented. Thus, the fatwa of the National Sharia Council has less significant influence on the development of Islamic bank products and services in Indonesia (Rohadi Abdul Fatah, 2006: 34). This is because the launch of the fatwa was issued only to respond to Islamic bank products that have been running first as a demand of the Law related to Sharia Compliance. Then the position of the fatwa does not innovate by itself to provide law prior to the launch of Islamic bank products and services (S. Fithriatus, 2016: 42).

The fatwas of the National Sharia Council do not automatically bind every Sharia Financial Institution before they are made into rules (regulations) by regulatory institutions, either in the form of laws, Bank Indonesia regulations or Minister of Finance regulations. This is because the National Sharia Council as a private institution does not have the authority to directly regulate Islamic Financial Institutions. If the fatwa is to be used as the main guide and reference, then the fatwa of the National Sharia Council needs to be regulated first by the regulatory institution. The question arises, have the fatwas issued by the National Sharia Council been included in the regulations that have been established so that the fatwas of the National Sharia Council are truly binding on every Islamic Financial Institution in Indonesia? The answer is that the majority of fatwas are absorbed in the regulations for the implementation of muamalah fiqh through regulations made by regulatory agencies, although not thoroughly. There are also fatwas that are not absorbed in regulations because their contents are not applicable and difficult to translate into the language of legislation. The difficulty of applying such fatwas into legislation is well understood and known to regulators and the National Sharia Council (AI-Hadi, 2011: 1-13).

METHODOLOGY

This research uses normative legal research methods. The normative approach is an approach that is carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research. The research approach is carried out on legislation (statute approach), historical approach (historical

approach), comparative approach (comparative approach), and conceptual approach (conceptual approach) (Abdul Mughits, 2008: 35). The analysis used in this research is qualitative descriptive analysis, which describes the data processed in detail into sentence form (descriptive). Qualitative analysis is carried out by relying on data analysis whose deepening content is complemented by normative analysis. Based on the results of the analysis, deductive conclusions are drawn, namely conclusions that are based on general facts to then draw a specific conclusion.

RESULT AND DISCUSSION

The presentation of the strengths and weaknesses of KHES and the National Sharia Council Fatwa above when associated with its effectiveness and efficiency in ensuring the realization of sharia principles on dispute resolution and the operational system of Islamic economics, can be said to be not effective and efficient. Although structurally the law that supports and transforms both into a binding regulation is strong enough, but in the material content and scope and technical implementation of the regulation there are still some weaknesses. Thus, it certainly has a negative impact on ensuring the implementation of sharia principles in dispute resolution and sharia economic operational systems. The negative impact of each weakness can be seen in the explanation below.

The weakness of the first form of legal force of the Compilation of Sharia Economic Law is in its rigid nature, namely the Compilation of Sharia Economic Law was formed in 2008 to fill the void of material law for the settlement of sharia economic disputes that existed at that time. Meanwhile, the Islamic economy in the span of time until 2021 continues to develop and give rise to forms of operational development that seem new (Maslihan Mohammad Ali, 2015: 44). That way of course there is no regulation in the contents of KHES, so that there is again a legal vacuum in the settlement of sharia economic disputes. Then of course this situation opens up opportunities for the application of general rules in the settlement of sharia economic disputes. Second, in terms of its scope, KHES cannot bind sharia economics outside the occurrence of sharia economic disputes. The reason is because KHES is specifically made as the main guide for judges in resolving sharia economic disputes in religious courts. So it is strange if a rule regulates and binds in the event of a dispute, while its operation in the field is not bound by that rule. On that basis, of course this has an impact on the destruction of guarantees of legal certainty, justice, and usefulness in the purpose of the law being formed. In this case, the guarantee of sharia principles in dispute resolution and sharia economic operations certainly experiences a legal gap that regulates it.

While the National Sharia Council Fatwa in terms of its legal force has weaknesses in the technical issuance of fatwas. Namely, the name fatwa appears later, there has been a legal action that is questioned by the law, then the legal provisions are analyzed which leads to the determination of a fatwa on the legal action. With techniques like this, of course, it provides an opportunity for a wrong legal action to run in sharia economic operations (Rusli, 2011: 52). Because the technicalities do not come first to minimize the legal actions that will be carried out, the guarantee of the realization of sharia principles in sharia operations is not guaranteed. Then in the settlement of sharia economic disputes the National Sharia Council Fatwa is not emphasized to be applied because it is

the same as doctrine. There is only an emphasis that the settlement of sharia economic disputes should not be contrary to sharia principles, and what is meant by sharia principles is the Fatwa of the National Sharia Council. This situation is also a confusion in the legal system because all sharia economic operations cannot be separated from Fatwa-DSN-MUI, but in dispute resolution it is not strongly binding only limited to emphasizing that it should not conflict without obliging it to make the basis of legal considerations (Ahmad Rafuan, 2015: 62).

When viewed from the relationship between KHES and the National Sharia Council Fatwa, first there is a disharmony of regulatory statements between the two. This of course will have an impact on the destruction of legal certainty, because two rules regulate the same object, namely Islamic economics. So that it causes confusion in determining which legal guidelines are taken. Secondly, if it is related to the function of the two which seems to be in different directions, namely KHES specifically for the settlement of sharia economic disputes in religious courts while the Fatwa Compilation of Sharia Economic Law is more about regulating the operational system. This becomes a uniqueness and strangeness why one object of legal action is regulated in two different material rules. So that it causes inconsistencies with these rules. If that is the case, then of course the purpose of the establishment of these two rules is to ensure the realization of sharia principles in dispute resolution and the operational system will be difficult to realize.

The problems exposed above can be drawn a red thread that the effectiveness and efficiency of KHES and Fatwa of the National Sharia Council on the development of Islamic economics are still oscillating. To overcome the chaos of the legal system, according to the first author, KHES and the National Sharia Council Fatwa need to be harmonized about the incompatibility of the arrangements indicated above. Then because KHES is not able to reach the development of Islamic economics, there is nothing wrong if the Fatwa that continues to accompany the development of Islamic economics is formulated into KHES. So that it becomes a unity that is able to provide legal certainty in the realm of Islamic economics. Furthermore, because the strength of KHES is limited to PERMA which is supported by the Law, and its application is specialized in dispute resolution, then according to the author, in order for the regulation of Islamic economics to be comprehendship its strength, KHES needs to be raised to the level of law. That way all the confusion of the legal system as exposed above can be overcome to the maximum. Moreover, the realization of sharia principles in dispute resolution and the operational system of Islamic economics will be more guaranteed by making KHES which has been harmonized and formulated the Fatwa of the National Sharia Council into it will make a rule that is harmonious and comprehensive in the scope of Islamic economics.

CONCLUSION AND RECOMMENDATION

The existence of KHES and Fatwa of the National Sharia Council cannot be denied as part of the legal norms that influence Indonesian law. However, the weakness of KHES and Fatwa of the National Sharia Council, in the National legal system cannot be denied either. This is because its existence is not a source of law that has the legality of national law. As Law No. 12 of 2011 concerning the Formation of Legislation, does not mention fatwas as part of the legal basis in this country, so that fatwas cannot be

used as a legal basis. Likewise, the fatwa products of the National Sharia Council, which take a lot of opinions of the scholars, are the weaknesses of fatwa itself, so that the fatwa is less considerate of sociological, anthropological and national cultural aspects. Fatwa is only an opinion or advice delivered by Islamic jurists who are members of an organization.

On the one hand, Fatwa DSN MUI has influenced the birth of the Compilation of Sharia Economic Law. This is certainly a breakthrough related to the legality of sharia economic law. However, the existence of KHES which is a reference for Religious Court Judges as a settlement of disputes, KHES is not in the form of a law, in fact it is only a PERMA, and this certainly affects the legal force of national legislation. Therefore, harmonizing and formulating the Fatwa of DSN-MUI into KHES and raising the status of KHES to become a law is very important and urgent.

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