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**LAW AND
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YOGYAKARTA, 04 – 07 APRIL 2017

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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SOCIETY**

Yogyakarta, 04 – 07 April 2017

LP3M & Faculty of Law Universitas Muhammadiyah Yogyakarta
2017

PROCEEDING

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Message from Chairman

Yordan Gunawan

Chairman, International Conference on Law and Society 6,
Universitas Muhammadiyah Yogyakarta

Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among Universitas Muhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfelt thanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only an avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

Foreword

Trisno Raharjo

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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Position and Acceptance of Fatwa of Council of Indonesian Ulama (MUI) by the State in Indonesian Legal System and Religious Court

IFALATIFAFITRIANI

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ABSTRACT

Position and acceptance on fatwa of Council of Indonesian Ulama (MUI) in Indonesian legal system are questioned again. Generally fatwa is considered as unforceful legal interpretations which cannot be equated with a court decision or *qanun* (the acts). On Indonesian legal system, MUI and its fatwa position in Indonesia are complex enough to be classified. On one side, MUI is not a state organ and the products are not legally binding, but on the other side, both of them influence State and Muslim citizens legally, socially and politically. The acceptance of the fatwa by government, either fatwa of Sharia National Board or Fatwa Commission, is also depend on what State regulated in the Acts. It can be influenced by direct-indirect legitimation of MUI, and it affects whether adopting fatwa fully or its principle only in the formal laws. Regarding the acceptance and the position of fatwa in religious court, it is concerned on the Islamic finance dispute settlement cases. Related to the issue, although fatwa is the sole resource of Islamic transaction and there is a Compilation of Sharia Economic Law legalized and adopted mostly from the fatwas, but the used is quiet invisible, especially utilizing fatwa on 'unlawful act', particularly claim of 'it is against sharia principles' as its reason of case (*fundamentumpetendi*).

Keywords: Fatwa of MUI, Indonesian legal system, Religious court.

I. Introduction

Position of fatwa of the Council of Indonesia Ulama (MUI) was questioned again; after some concerns were happened indirectly accused triggered by the fatwa such in Ahok's case and MUI's fatwa of using non-Muslim attributes. Due to this condition, many people ask whether the fatwa has legal binding or not in Indonesian legal context. Institutionalizing of MUI basically was outside of state organ. However, in some formal laws, the accommodation of sharia principle is based on Fatwa Commotion MUI and fatwa of Sharia National Board MUI (Dewan Syariah Nasional/DSN MUI) have been adopted on legislation; furthermore, DSN MUI is selected as the sole resource and interpreter of Islamic finance. But still, the issue of the position and the acceptant of MUI and its fatwa is still unclear enough.

Position, acceptance and used of fatwa in religious court specifically in economic sharia case is should be seen objectively. It is still unclear understanding regarding the lawsuit on unlawful act (*perbuatanmelawan hukum/PMH*) as the reason of complaint (*fundamentumpetendi*) that mostly stated 'it is against to sharia principles', although there is Compilation of Sharia Economic Law (Kompilasi Hukum Ekonomi Syariah/KHES) taken mostly from fatwas. Concerning to these circumstances, this paper will discuss by qualitative normative analysis approach, where the legislation system theories and the state legitimation are the main points. The first will deal with how the position of MUI's fatwa and how it can be acceptant by state in national legislation context. The second will explain how the acceptant of fatwa especially as one of legal material of sharia dispute settlement in religious court.

II. Discussion

1. Position of Fatwa in Islamic Legal System

The Islamic legal system recognized two legal interpretation institutions. *Firstly*, Judicial interpretation by judge (*qhadi*), it has formal and legal binding power. *Secondly*, *Ifta'* (fatwa), non-binding and non-formal legal interpretation or advisory opinion, is submitted by *mufti*, either as institutional or individual representation. Terminology of fatwa is generally derived by word *al-fata*, generally specified into word forms of *futya*, *fatwa*, dan *fatwa*. The other words likely referring to a fatwa are *ifta* and *istifta*. There are diverse definitions of fatwa among Islamic scholars; but, most of them agree to define it as an answer or a response from a mufti or mufti council (*ijihadjama'i*) about a question that is asked by a questioner (*mustafi*), whether it is the law or other aspects of life. In fact, major *ulamas* approve that fatwa constituted as Islamic legal opinion issued by *ulama*. These two institutions have clearly distinctive aspects. While a judgment causes direct action, presumption of finality, and closely specific particular cases and its participants (*khâss*), a fatwa is general aspects (*'âmm*). Still, the fatwa can be enforced when the judge used it on its verdict, or the State utilized it on the *qanun* (formal law).

2. Position and Acceptant of MUI's Fatwa in Indonesian Legislation System

The position and the acceptance of MUI's can be seen by two aspects, firstly the position of the council on constitutional and state administration law, and secondly the accepted of its product on state formal rules. Discussing the first aspect, MUI was established on 1975 where Soeharto's government involvement obviously could not be denied. Concerning to the position of MUI, President Soeharto undoubtedly suggested the restriction, where its main function was advice giver on religious issue, and it did not allow doing a kind of practice program. After long periods, MUI became more recognized, and its position is evidently identified as a consensus forum of *ulama* outside the state, but it had more bargaining position to effect state policy.¹ Currently, MUI does not only deal with religious matters merely, but it also covers other aspects of muslim social-economy till politic matters—even though MUI cannot involve practically/political practice-, and some of fatwas are suspected as the controversial ones.² Two main boards of fatwa in MUI are established, Fatwa Commission (Komisi Fatwa) considering as the most competent on addressing the socio-religious issue; and, Sharia National Board (Dewan Syariah National/DSN MUI) mainly on sharia economic, finance and business portions. Both of their products are addressed as a part of '*fiqh Indonesia*'.

The establishment of MUI obviously cannot be separated with the first principle of Pancasila '*religiousness*' and the protection of citizen religious rights on Constitution of Republic Indonesia 1945. Therefore, although it is created as non-state organ, MUI obviously cannot be neglected by every period of government, mainly dealing with each regulation that affects legal materials for religious court jurisdiction. However, if MUI's fatwa is considered in general how the exactly the positions is, noticeably understood as informal law (unwritten positive law),³ as consequent, it has not binding legitimation. Fatwa which represents part of the principle of Islamic law in Indonesian context, it is must be understand as one of main law resources on formal regulation system, and it can be generally classcized as unwritten, unbinding, non-formal, and enforcing law due to the position of MUI as non-state organ.⁴

The position of the council and the adoption of its products on the acts, it is divided into two areas. *First*, the rules indirectly stated legitimation of MUI position, but clearly absorbed and used its products, advise, suggestion and considerations as part of Islamic law principle acceptance.

Second, the rules directly delegated 'MUI' legitimation position and adopted its fatwas.⁵ Focusing on the first, it can be seen in some of acts, where the position of MUI' fatwa is specified as the main resource of sharia principle beside the others when government asking the consideration and advice of *ulama*.⁶ In the second area the bargaining position is clearer than the first one, for the example: 1) Article 14 of Law No. 13/2008 about Hajj Organizing states that members of hajj commission can be taken from MUI; 2) Article 109 of Law No. 40/2007 on Business Company declares that all companies that operate based on sharia principle must have sharia supervisory board (Dewan Pengawas Syariah) appointed by recommendation of MUI; Furthermore, there are the Acts which evidently give the attributive authorities to MUI in all Islamic finance regulations, found noticeably on 3) Article 25 of Law No. 19/2008 on Sovereign Sukuk; 4) Article 26 of Law No. 21/2008 on Sharia Banking; and 5) Article 12 and Article 13 of Law No. 1/2013 on Micro Finance Institution. Comparing those five acts, the last three acts have more specific legitimation on MUI and fatwa, because the legitimation directly came from attributive authority of acts. Therefore, regarding the legal problems of those aspects, it must follow MUI's fatwa particularly DSN's Fatwa.

3. Acceptant and Position of MUI's Fatwa in Religious Court

Position of fatwa in religious court is mainly as one of its *materiil* legal resources. It also connected into the acceptance of the fatwa in the religious court found at KHI and KHES, which both are adopted from fatwa, and both of them are used as a reference by the judges and justice seekers. After dispute of Islamic economic became religious court' jurisdiction,⁷ the use of DSN' fatwa and KHES shall be preferred firstly, when the development and needs of sharia law on economic transactions are still not covered thoroughly by legal formal.⁸ In case of KHES, Supreme Court gives legitimacy to KHES through Regulation of Supreme Court No. 2/2008 (PERMA), which is different to KHI that used Instruction of President No. 1/1991 and Decision of the Minister of Religion No. 154/1991. According to terms of the legislation theory, the type of norm in PERMA is an internal regulation rule, however Jimly Asshiddiqie said that PERMA is binding inside and outside at the same time, when the authority and the legal power of the products are ordered directly by higher regulation. Therefore, in the context of PERMA KHES, it was born firmly based on the authority of the Supreme Court obtained from the Constitution and the Acts. Both the DSN fatwas on Islamic finance transaction and fatwas were adopted on KHES should consider the legitimacy.

The confusion that often occurs in many Islamic economic disputes filing is when the suit was filed using the excuse (*fundamentumpetendi*) 'tort/unlawful act' (perbuatanmelawan hukum/PMH). Based on several verdicts that are classified as a tort lawsuit, the plaintiffs generally argued that an act committed by the defendant is the act that is contrary to Islamic principles (against *syariat Islam*). The issue that arises then is, in lawsuit (PMH civil matters), should be made clear what the actions are considered illegal, and which the rules were violated, and how the cause and the effect of actions that caused the damage. Kesalahan penerjemahan Unfortunately, at the PMH lawsuit, the plaintiffs mostly only mention 'contrary to Islamic principles' or 'not in accordance with Islamic law' but do not specify which exactly rule of Islamic principles that has been infringed. If the case relates to Islamic finance such as Islamic banks or Islamic micro finance institution, 'Syariat Islam/ Islamic Principles' means what is stated by DSN MUI, because the Acts said sharia principles is what is ruled by fatwas of DSN MUI '. But still there are many lawsuit reasons do not specifically mention the fatwa that was broken or where the rules are desecrated.

Due to the vagueness of the clause in the context of a civil case, almost all of the lawsuit will be stopped or completed at 'eksepsi examination, regardless of the main subject matter of lawsuit.⁹

In addition, the use of fatwa by the judge as part of justification is still not clearly visible. Yeni S. Barlinti concluded that what was happened due to there is still the comprehension on DSN MUI' fatwa was legal opinion. Furthermore, this condition could be possible occur that because not all of fatwas set specific legal detail material, some of them only give general statements where it can be seen on the collateral execution and its rights (such as mortgage right on land and *fidusia* right) that arise mostly on Islamic economic cases. Regarding of the cases, judges will not likely refer to the fatwa that gives general statement, but they must consider primarily the acts. Similar to PMH' case transaction-sharia based, when there are neither rule nor fatwa, the meaning of 'against Islamic law', as consequences it is understood by what is stated on Civil Code;¹⁰ therefore, 'contrary to *Islamic* principles' must be specified also as 'contrary to Civil Code or others code'.

III. Conclusion

The position of MUI in the Indonesian context must be understood as a necessity for Muslims which is established into independent and non-state organ, so generally its product (fatwa) categorized as a legal opinion, informal and non-legal binding law. Nevertheless, this legal opinion cannot be neglected by the State, therefore fatwa often become the substance of the formal rules, of informal law (Unwritten legal source) into a formal law. State acceptance of the legitimacy of MUI can be classified into two types: indirectly stated legitimation, but clearly absorbed and used its products as part of Islamic law principle; and directly delegated 'MUI' legitimation position and adopted its fatwas. Specifically on the second type, it is found in Islamic finance legal framework; where the legitimacy of fatwa should be considered more powerful due to the Acts give direct authority to MUI. Meanwhile, related to the acceptance in religious courts in sharia economic cases, neither KHES nor fatwa are clearly used both by those justice seekers and judge. In case of *PMH lawsuit-against sharia principle (fundamentumpetendi)*, there are always be problem regarding the mean of against sharia principle, because in PMH civil case it must be stated clearly with acts that has been violated, on the other word they must state clearly which sharia principle clause on fatwa of Islamic finance that has been infringed. The condition must be clarified regarding the legal term of PMH-against sharia principle both in Islamic finance and Islamic business transaction for justice seekers in religious court.

ENDNOTES

¹President Regulation No. 151/2014 on Funding Support of MUI describes MUI as a consensus forum of ulamas, leaders and Muslim scholars dealing with Islamic life practices that aims to increase the muslim participation on national development programs.

²At the first period (1975-1988), many Islamic scholars assumed that the fatwas were mainly to support state policy; although, there were also fatwas opposite to government policy, like what Atho Mudzhar found on fatwa of the prohibition of abortion, ban on vasectomy and tubectomy, and ban on Muslim presence in Christmas celebration. In recent years, while in some areas it support public policies, in the other side, some fatwas also are accused as controversial ones due to its contradictive with state policy, and protested by some scholars and citizens. These days, I assume that fatwa of Ahok's case, fatwa of non-Muslim attributes and fatwa of BPJS are probably the most controversial ones. In case of BPJS, it mainly became the big issue because since 2013 BPJS has been offered as the most important government program; however, MUI stated the opposite due to some contradictive elements to sharia principle. In case of fatwa of non-muslim, it became problematic due to the used as the legitimation on some direct-indirect enforcement actions, and it was getting worst because of the

used of the fatwa non-muslim attribute as the consideration on two official circular letters (SuratEdaran) of chief police officer in KulonProgo and Bekasi.

- ³The hierarchy of Indonesian laws on all of acts on the establishment of legislation, no one of them declares the position of fatwa as part of positive law. See Law No. 1/1959, Provision of People Deliberation Assembly Republic Indonesian Union No.XX/MPRS/1966, Provision of MPR No. III/MPR/2000; Law No. 10/2004; and Law No. 12/2011.Regarding formal written law and non-formal unwritten law, we must see what A. Hamid. S. Attamimi said that although the State recognizes legal pluralism, but there is something else related to the primacy of the written law against the unwritten law. It can be understood when the drafters of the Constitution changed the “basic law” to “Undang-UndangDasar or Indonesian Constitution’ as written constitution. In addition, the general explanation of the sentence of the 1945 Constitution, which states:”...beside the Constitution applies the unwritten basic law...”, it can be concluded that the unwritten basic law is not ‘complementary’ on written basic law. Thus, if there is a conflict between the unwritten basic laws with the written basic law, then the priority is aimed to the written basic law. Analogically it can also be concluded that if there is a contradiction between the formal law/act and customary law or others then the act is must be prioritized. Fatwa although is written with strict form, but it is still cannot be equalized to formal law (written legal resource).
- ⁴According to administrative and constitutional law, an organization accepted as part of state organs at least requires some obvious aspects. The easies characters are undoubtedly specified as state organ in the formal law, directly stated the name or the function, independent or dependent, and an authority comes from attributive or delegated power, financial support by state or district income (APBN/APBD) that must be audit regularly by state organ. The rule is enforcement depend on the hierarchy of norm and the form and its *addressat*, and the authority of the organ. Institutionalizing of MUI doesn’t fulfill these aspects; though the establishment involved the president power, and getting financial support from state, it neither can be classified as state organ nor state auxiliary organ.
- ⁵The main aims of them are to protect Muslim interest and rights, and to regulate justice seeker for Muslim; moreover, it has proved that Islamic law, its principle and substation, can be practiced universally. Therefore, on Islamic banking transaction, it opens widely to all citizens regardless their faith and their religions. Consequently, the religious court main principle ‘Muslim personality principle’ can be extended to non-Muslims who become debtors. When they became Islamic finance customers, they legally accepted and practiced Islamic law principles, and they must chose religious court dealing with the dispute.
- ⁶Some of the laws are: Law No. 1/1974 on Marriage, the Laws on Religious Court, Law No. 13/2008 on Managing of Hajj’, Law No. 11/2006 on Aceh Government system.
- ⁷It is based on Law No. 3/2006 on Religious Court, Law No. 21/2008 on Islamic banking, Verdict of Constitution court No. 93/PUU-X/2012.
- ⁸The use of fatwa in the Islamic economic dispute resolution should be understood as a form of dealing with their ‘*vacuum law*’, moreover, in principle the judge may not refuse a case with no legal grounds as mentioned in article 16 paragraph (1) of Law No. 4/2004 on Judicial Power. This is also consistent with the conception of Islamic law understand the material is legally binding interpretation Came from *qhadi*.
- ⁹The Clarification is needed considering sharia economic disputes included ‘islamic/sharia business’ is still not regulated thoroughly in the acts. It can be seen on DSN’ Fatwa on sharia multi-level direct selling on Umrah travel service (PenjualanLangsungBerjenjangSyariahJasaUmrah/PLBS umrah service) Fatwa No. 83/DSN-MUI/VI/2012 as the example, many umrah travel companies offer PLBS’s model to muslims using the acceptability of the fatwa; but on the other hand Law No. 7/2014 on Treading doesn’t rule direct selling on service product. Thus, the emergence of ambiguity of laws that must be used when the dispute occur possibly will be happened.
- ¹⁰See article 1365 Indonesian Civil Code.

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