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Shariah Banking Laws and Fatwa (Islamic Legal Resolution) in Indonesia

Ahmad Hidayat Buang PhD
M. Cholil Nafis PhD

Introduction

Indonesia is a country with a population of 230 million, 80 per cent of which are Muslims, thus making it the largest country in the world with a Muslim population. For historical and political reasons, Indonesia does not identify itself as an Islamic country but rather based its religion of Islam in general and specifically to provide religious rulings based on Islamic Shariah.

In order to ensure that the needs of fatwa are acceptable to all at the national level especially to the Government, a central body is therefore required. With the blessing of the Indonesian Government, all of the main and important Islamic organisations in Indonesia as mentioned above agreed to establish MUI in July 26, 1975. Soon after that, MUI also established a special committee known as Komisi Fatwa or Fatwa Commission to study and issue fatwa. Since the formation of the Committee, it has issued many fatwas pertaining to religious rites, marriage, culture, politics, science, medicine and lately on economic transactions. All these fatwas are now published in the following compilations:

1. MUI Fatwa Collection (Himpunan Fatwa MUI),
2. MUI Fatwa Compilation (Himpunan Fatwa MUI).

In contrast to other Muslim countries or even non-Muslim countries with a Muslim minority such as Singapore and Thailand there is no state Mufti (a specialist in Islamic law) in Indonesia. The role of a Mufti or the task of issuing fatwa to the Muslim public and Government alike is managed by Muslim organisations through their fatwa committees. Historically, the issuance of fatwa by these committees goes back to colonial years with the formation of Nahdatul Ulama (NU) through its fatwa committee known as Lajnah Bajth al-Masā’il (Research Committee) in 1926. This was followed by Muhammadiyah in 1927 through its Majelis Tarih (Preference Committee). Muhammadiyah was actually established earlier than NU in 1912 whose main idea to propagate the use of ijtihad by directly referring to al-Quran and al-Sunnah. Other main organisations that have their own fatwa committee are Sarekat Islam (SI) with its Majelis Syuro (Consultative Committee), Persatuan Islam (PERSIS) with its Dewan Hisbah (Investigation Committee) and Al-Jam’iyyatul Washiyah with its Dewan Fatwa. The main task of these fatwa committees is to study the problems associated with religion of Islam in general and specifically to provide religious rulings based on Islamic Shariah.

Preparation of this article is a result of a research funded by University of Malaya Research Grant, namely UMRG275-11HNE and RG434-13HNE respectively for which the authors wish to record appreciation and gratitude.

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Guidance issued by the Director General of Islamic Community Development and Hajj Organiser of the Ministry of Religious Affairs in 2003.
With the introduction of Islamic banking and finance in 1992, the role to supervise the activities of Islamic banks is given by the Government to MUI for the simple reason that the establishment of Islamic bank was under the active and vocal initiative of MUI since 1988. It is also a continuation of what MUI, through its Fatwa Commission, has been doing, in issuing fatwa on banking and financial matters since the early years of Islamic banking in Indonesia. As matters pertaining to banking and finance is a specialised subject and involving institutions both government and private, it was realised that the task had to be assigned to a special body within MUI. A committee known as National Shariah Board or Dewan Shariah Nasional (DSN) was then established in 1999 for this purpose and received legal recognition in 2004 through Bank Indonesia Regulation No.6/24/PBI/2004. The regulation does not provide its function in detail but leaves the matter to MUI to determine. According to DSN’s general guidelines, its main task is to issue fatwas on Islamic financial products and services and monitor or supervise all Islamic financial institutions activities with the objective to provide certainty and assurance that products offered by the financial institutions comply with the Shariah. Other important task includes developing and fostering the application of Shariah values in banking and finance.

With the introduction of Law No.10/1998, which provides for the establishment of Shariah Supervisory Council or Dewan Pengawasan Syariah (DPS) of the banks and other financial institutions offering Islamic banking and financial products, the role of DNS is further enhanced to include making recommendations for appointment of DPS’s membership and to supervise and coordinate their activities. This arrangement to allow a semi governmental organisation such as MUI to supervise Islamic banking activities is perhaps unique and shows the importance, if not the overwhelmed dominance of anon-governmental organisation such as MUI, in Islamic matters in Indonesia.

Islamic financial banking laws in Indonesia

When the Government of Indonesia introduced some measures to reform the financial and banking system through a policy known as Pakej Kebijakan Oktober or PAKTO (October Policy Package) in 1988, Muslim scholars seized the opportunity to propose to the Government to introduce a bank based on Islamic principles. The idea was not successful since the law at that time still required every financial institution to charge interest in their banking operations and products, a requirement, which is against Islamic prohibition on *riba*. It was through a seminar in Bogor from August 18 to 20, 1990 that revisited the issue with more louder and specific demands for the establishment of Islamic bank. In just matter of days after Bogor seminar, from August 22–25, 1990, MUI in its Fourth National Congress in Jakarta recommended the formation of a working group, known as MUI Banking Team, to study the feasibility of establishing Islamic bank in Indonesia. The formation of this working group was facilitated as the proposal, as recommended above, was publicly supported by the then Indonesian President Suharto and the inclusion of the representatives from the Ministry of Finance and Central Bank of Indonesia. Among the tasks of this team was to approach and consult with all the stakeholders involved in the area of banking and finance. Finally, after two years of consultative work with the relevant parties, the Indonesian Parliament passed Law No.7/1992 on Banking, which allows quite cautiously, commercial banks in Indonesia to offer banking products based on the principle of profit sharing (known Prinsip Bagi Hasil).

This late and cautious introduction is due to the position of Indonesia Government not to be seen directly involved with any religious domination. Apart from this, there is a general feeling or rather indifferent attitude of the ruling elites in the past that the practice of modern banking is not something that Islamic religion views with disapproval. This is also a result of a relaxed understanding of the Shariah rulings not just in *mu’amalat* or transaction but also in other matters. In a survey conducted in the island of Java by Bank Indonesia (being...
the Central bank of the country) published in 2001, it was found that 55 per cent of the respondents had the view that charging of interest as practiced by the conventional bank is not against Islamic prohibition of *riba*. This is not a surprise since one of the largest Muslim organisations, Nahdatul Ulama in its 13th Congress in 1938 affirmed that bank interest is permissible when and if it brings benefit to the borrower. Interestingly, this stance remains unchanged until today. While the Muhamadiyyah prior to that in its 1936 national congress only declared bank interest as doubtful or *shubhat*. Another argument to explain this late entry is lack of regulations and laws to stimulate the development of Islamic banking and finance in Indonesia. For example, the concept of trust used in the establishment of special purpose vehicle company for the issuance of Islamic securities or *sukuk* is not properly addressed until the passing of Law No.19/2008. Claims by a certain writer that the protracted development of Islamic banking in Indonesia is partly due to its legal system inherited from the Dutch is probably less than true as some international financial centres, such as Japan and China, also use the same legal system as Indonesia. For this reason and slow progress of Islamic banking in Indonesia, MUI decided to decree a fatwa in 2004 which declares interest charge or payment by the Bank is a form of *riba* (deferment) and urges all Muslim to use Islamic banking services instead. A study carried out shortly after this fatwa was issued found that it had some positive impact on the performance of the Islamic bank. This despite the fact that the fatwa was initially resisted by certain circles in Indonesia by arguing the fatwa was released without proper consultation on the effect and ability of the financial sectors to fulfill the sudden demands from Muslims.

Law No.7/1992 is actually a general law on banking and did not specifically provide for the establishment of Islamic bank as it was the case in other countries such as Malaysia (through Islamic Banking Act 1983). As mentioned above, it only provides an opportunity to the conventional banks to offer banking business based on the principle of profit sharing (art.6(M)). Two government regulations relating to Banking released almost immediately after the passing of Law No.7/1992 provide the same opportunity. Obviously, the term profit sharing is not precisely the same to the Islamic banking terminology of profit and loss sharing. To clarify this ambiguity Law No.7/1992 (art.6(M)) and its Elucidation explains that the term is to include Islamic bank or Shariah bank. Similarly the Elucidation on Government Regulation on Banking Based on Profit Sharing Principle (No.72/1992) explains profit sharing as to mean *muamalat* based on Shariah in conducting bank activities and operations. Non-reference to the term Islamic banking or Islamic principle in text of the law is to avoid controversy or criticism on the realisation that religion is not a state business. This is similar to the situation in Malaysia where the introduction of the Islamic banking windows or counters in 1993 which was initially known as Interest Free Banking Scheme. Nonetheless, the Malaysia case is more for political reason than business as not to attract complaints or raise fear among non-Muslim in the country on the implementation of Islamic law. As to make the use of terms much more precise, Law No.7/1992 on Banking was amended by Law No.10/1998 by replacing the term profit sharing from the previous law with the term Shariah. Substitution of such a term is interestingly coincident with development in Malaysia where the Interest-Free Banking Scheme, as mentioned above, was renamed Islamic Banking Scheme in 1997 through the amendment to the Banking and Financial Institutions Act 1989. The amended law of No.10/1998 although still deals with matters relating to Islamic banking in a piecemeal treatment, but it added some substantial provisions. Thus, banking based on the Shariah principle is defined by art.1(13) of the Amended Law as rules of agreement based on Islamic law between bank and other party in a saving fund or financing, or other activities in compliance with the Shariah, among others based on the principles of profit sharing (*mudarabah*), joint capital (*musharakah*), sale of goods with profit (*murabahah*), leasing proper (*ijarah*) and leasing or hiring with option to buy (*ijarah wa iqtina*). This is nothing new in this provision and it is in fact an endorsement to the ideologue, in first two principles, and current practice, in the latter two, of Islamic banking worldwide.

Finally, after 16 years of existence of Islamic bank in Indonesia, a full-fledged legislation on Islamic Banking was introduced in 2008. The law was passed by Indonesian Parliament on June 18, 2008 and enacted in the National Gazette of the Republic of Indonesia Number 94 and Supplement to State Gazette of the Republic of Indonesia Number 4867 and known as Law No.21/2008 on Shariah Banking (Undang-Undang Perbankan

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21 This Act has now been repealed and replaced by a new legislation, Islamic Financial Services Act 2012 which covers both banking and Islamic Insurance or Takaful sectors.
22 Regulation on Commercial Banks No.70/1992—art.5 para.(3) and Regulation on People Credit Banks No.71/1992—art.6 para.(2).
24 State Gazette of the Republic of Indonesia Year 1998 No.182, Supplement to State Gazette of Republic of Indonesia No.3790.
In terms of Shariah supervisory control the new law requires the Islamic financial institutions to comply with the fatwa issued by the competent institutions, namely the DSN. To further strengthen the regulatory framework of the banking and capital market of the country, Law No.21/2011 was passed in 2011 to establish Indonesia Financial Services Authority or Otoritas Jasa Kewangan (OJK). This new body shall be in operation by December 30, 2013 with the function of micro prudential supervision of all financial institutions including that of capital market which is hitherto under the authority of both Ministry of Finance (Capital Market Supervisory Agency and Financial Institutions (Bapepam-LK) and the Central Bank respectively. With the introduction of this new law and independent supervisory body such as OJK, Indonesia government has laid down a clear path and foundation for the future development of Islamic banking and finance hitherto hindered by lack of clear legislations and effective supervisory framework.

Law No.21/2008 provides clear and specific provisions on the business of Shariah banking and contains 13 chapters and 70 articles with provisions relating to the regulatory control of the Islamic bank and the requirement to comply with the Shariah, specifically on the prohibition of usury, *maysir* and *gharar* in the banking business. The law also explains or, rather accentuates, in a reminding truism on the social function of the bank to partake the implementation of national development in raising the equal and common prosperity for the people. In this respect, Islamic banks should undertake functions as *Baitul Mal* in collecting and distributing public funds such as zakat payment (religious tax or tithe), gift (*khibah*), alms (*sakedah*) (art.4(1) and (2). Whereas in art.4(3), the law specifically provides for the collection cash wakaf and its management by the bank where the proceeds are to be delivered to the beneficiaries an instructed by the donor. The accentuation of this social role of the bank is unique as far as legislation pertaining to banking and finance is concerned compared to other jurisdictions.

There are three provisions worth mentioning in respect of government policy on banking. First, while conventional bank may opt to migrate into Islamic bank, the contrary is not allowed. Secondly, conventional bank with Islamic counter (known as Shariah Business Unit or *Unit Usaha Syariah*) is required to upgrade its Islamic counter into a full-fledged Islamic Bank once its Shariah Business Unit assets has reached 50 per cent of its parent bank or after 15 years of operation from the date on which the Law is enforced. And thirdly, in the event of a merger between Shariah bank and conventional bank, the former takes precedence and the new entity shall become Shariah bank. It is obvious that this requirement in the long run will expand the Islamic Banking in Indonesia and, in tandem with the development in other Muslim countries advanced in Islamic banking systems, especially Malaysia whereby the Government has encouraged the changing of status of the Islamic counter into a full-fledged Islamic bank beginning in 2007. This is clearly a structural effort to increase the assets of Shariah banks in Indonesia, which is now less than 3 percent of the overall banking assets.

**Adoption of Fatwa into Indonesian Shariah banking laws**

Principally fatwa is not binding and a person who is asking for it can even seek the answer from several scholars or Muftis that is eventually suited to his or her best needs or interests. Fatwa in this respect is a consultation process. However, in certain cases, fatwa is made binding by the force of law. As it has been stated above briefly, fatwa of DSN-MUI with regard to Islamic financial and banking is binding. As mentioned above the decision to consider MUI as the only institution authorised to issue *fatwa of fiqh muamalah* to be used in the practice of Islamic banking is not new because even before the law on Shariah Banking was promulgated, the conduct and practice of Shariah economy was under the guidance and supervision of MUI. Therefore, the law only strengthens the position of MUI in providing guidance and support for the development and advancement of Shariah banking in Indonesia. Reference to MUI is also for matter of uniformity as without MUI as a sole authority in providing advice in matter relating to Islamic banking, there certainly will be great variations in matter of fatwa, which can lead into confusion. As pointed earlier, there is more than one Islamic community-based organisation in Indonesia, namely; Persatuan Islam, Muhammadiyah and Nahdatul Ulama, which still remain as the most important fatwa bodies in Indonesia.

In contrast with other jurisdiction, the fatwa of DSN-MUI is absorbed or incorporated into the banking laws and regulations in Indonesia. This process of absorption of DSN-MUI fatwa into Laws started with the introduction of the Law No.7/1992 under provision of art.6(M). It is further strengthened and clarified by the new Law No.21/2008, which provides in art.1(12) that Shariah principles of the law are to be based on the fatwa issued by institutions having the authority to do so. The meaning of the word authority here is explained in

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25 State Gazette of the Republic of Indonesia Year 2008 No.94. This new law is also preceded by a special law on Islamic Government Securities or Sukuk by passing of Law No.19/2008.
26 Law No.21 art.5 para. (7) and (8).
27 Law No.21 art.5 para.68.
29 State Gazette Year 1992 No.31, Supplement to the State Gazette No.3472.
art.26(2) and (3) which explicitly provide that MUI has the authority to issue fatwa for the purpose of Shariah compliance and then be absorbed into the Regulation of Bank Indonesia being the Central Bank.

Indeed, at the time of promulgation of Law No.7/1992, DSN-MUI was newly formed and had not issued any fatwa in relation to banking and finance. Even so MUI assisted the government to settle some unclear points of the 1992 law. This period is considered as pioneering period for Shariah banking in Indonesia, when MUI conducted studies on interest and banking and, formulation on the establishment of a bank based on Shariah principles. However, prior to this period, certain issues relating interest-based banking and insurance were hotly debated by different fatwa committees. Some of these fatwas have been the basis for the current Shariah banking in Indonesia as evident from the prohibition of the interest-based banks. Nevertheless, the task of absorbing the Islamic Shariah or fatwa into the Legislation and Regulation is a challenging task as the principles of Islamic transactions and contracts cannot be adopted directly from the fiqh manuals. Much of the work is, therefore, concentrated on adjusting and even sometimes modifying these contracts so that they can be accurately absorbed into the law for its sound implementation. The absorption of the fatwa into Banking Laws and Rules is handed by a special joint committee between MUI and the Central Bank known as Komite Perbankan Syariah (“KPS”) or Islamic Banking Committee. Similar to other jurisdictions, in addition to this committee there are Shariah Supervisory Boards at institutional level of the Banks known as Dewan Pengawas Syariah (DPS). This Committee is obliged to observe fatwa issued by DNS-MUI. Following the practice in the Middle East, members of the DPS is appointed by the bank Shareholders’ General Meeting with the approval from MUI. In practice, DPS is responsible in providing advice and approval to the proposed products and services of the bank so that they are consistent with the Shariah principles as laid down by DSN. In addition, DPS is also responsible in monitoring the implementation of its fatwa in the banking products to ensure they complied with the Shariah. The appointment and function of DPS is also made under art.109 of Law No.40/2007 on Limited Liability Company which provides a much wider application to Islamic business generally than banking and finance. The figure below illustrates the organisational chart of these bodies.

From 2000 to 2008, DSN-MUI had issued 65 fatwas, all with the exception of two, were incorporated into the regulations and laws concerning banking and finance in Indonesia. The two are Fatwa on Overdraft Financing (No.30/DSN-MUI/VI/2002) and Musharakah Overdraft Financing (No.55/DSN-MUI/VI/2007) for the reason of the difficulty to apply them in the banking industry with respect to rules on bank secrecy. The table below shows fatwas that were issued and the percentage of their incorporation or absorption as regulations and laws.

<table>
<thead>
<tr>
<th>Fatwa Number</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absorbed into legislation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1–29</td>
<td>63</td>
<td>96.92</td>
</tr>
<tr>
<td>31–54</td>
<td></td>
<td></td>
</tr>
<tr>
<td>56–64</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not absorbed into legislation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 and 55</td>
<td>2</td>
<td>3.08</td>
</tr>
</tbody>
</table>

In issuing fatwa on Shariah Banking, DNS-MUI puts the emphasis on observing the general principles of Shariah, economic democracy and prudence. These three guiding fundamentals are explained in the law of Islamic Banking 2008 in art.2 and were actually taken from the

31 Elucidation of the Law of the Republic of Indonesia No.21, 2008 on Shariah Banking.
32 Elucidation of the Law of the Republic of Indonesia No.21, 2008 on Shariah Banking art.32 para.(1) Law No.21/2008 states that Shariah Supervisory Board shall be appointed in the Islamic banks and conventional banks which have UUS. Paragraph (2) states that Sharia Supervisory Board, as contemplated in para.(1) shall be appointed by the Shareholders’ General Meeting on the recommendations Indonesian Ulama Council.
33 Interview with Hasanuddin, Deputy Secretary of DSN-MUI on December 9, 2007.
fatwa itself. The specific meaning of general principles of Shariah are the one that relates to business activities such as the prohibition of riba (usury), maysir (gambling), gharar (uncertainty or over speculation) haram (illegitimate) and unjust. Economic democracy refers to the Islamic values in economic activities such as justice, solidarity, equality and beneficial. Lastly, the Islamic financial institution must emphasise prudence management for the creation of a strong and efficient banking business in accordance with the laws and regulations.

In addition to the above general principles of the Shariah, there are specific rulings of the Islamic fiqh that the law must always take into consideration such as the prohibition of false bidding (bay’al-Najsh), sale of subject matter that is not yet owned (bay’ al-ma’dum), using insider information to profit (insider trading), misleading information and hoarding (ihtikar). Prohibition of these activities covers both the contract and traded objects. In respect of banking and financing products, the Shariah principles that have been absorbed into the Indonesian banking laws are largely similar to contracts in other Islamic banking and finance jurisdiction. There are some instances where the provisions of the law and the Elucidation are not directly taken from the fatwa such as matters on short-term and long-term security trading. In these instances, the provisions of the law are largely coming from the Shariah Banking Committee. The table below shows MUI fatwa that has been absorbed into the Law No.21/2008.

<table>
<thead>
<tr>
<th>Articles of the law</th>
<th>Elucidation to the Law</th>
<th>MUI-DSN’s Fatwa</th>
</tr>
</thead>
<tbody>
<tr>
<td>1(12) and 2</td>
<td>Meaning on the principles of Shariah</td>
<td>—</td>
</tr>
<tr>
<td>19(1)(a)</td>
<td>Wadi’ah in Saving (Giro, Fund etc)</td>
<td>(1) No.01/DSN-MUI/IV/2000 on Giro (2) No.02/DSN-MUI/IV/2000 on Saving</td>
</tr>
<tr>
<td>19(1)(b)</td>
<td>Mudarabah in Investment (Deposit, Fund etc)</td>
<td>No. 03/DSN-MUI/IV/2000 on Deposit</td>
</tr>
<tr>
<td>19(1)(c)</td>
<td>Mudarabah in Financing</td>
<td>—</td>
</tr>
<tr>
<td>19(1)(d)</td>
<td>Murabahah in Financing</td>
<td>No.08/DSN-MUI/IV/2000 on Murabahah</td>
</tr>
<tr>
<td>19(1)(e)</td>
<td>Salam in Financing</td>
<td>No.05/DSN-MUI/IV/2000 on Salam Sale</td>
</tr>
<tr>
<td>19(1)(f)</td>
<td>Ijara</td>
<td>No.06/DSN-MUI/IV/2000 on Istisna’ (sic)</td>
</tr>
<tr>
<td>19(1)(g)</td>
<td>Qard</td>
<td>No.19/DSN-MUI/IV/2001 on al Qard (sic)</td>
</tr>
<tr>
<td>19(1)(i)</td>
<td>Hawalah</td>
<td>No.12/DSN-MUI/IV/2000 on Hawalah</td>
</tr>
<tr>
<td>19(1)(j)</td>
<td>Kafalah</td>
<td>No11/DSN-MUI/IV/2000 on Kafalah</td>
</tr>
<tr>
<td>19(1)(k)</td>
<td>Wakalah</td>
<td>No.11/DSN-MUI/IV/2001 on Wakalah</td>
</tr>
<tr>
<td>19(1)(l)</td>
<td>Debit Card</td>
<td>No.54/DSN-MUI/X/2006 on Syariah Card</td>
</tr>
<tr>
<td>19(1)(m)</td>
<td>Credit Card</td>
<td>No.42/DSN-MUI/V/2004 on Syariah Charge Card</td>
</tr>
<tr>
<td>19(1)(n)</td>
<td>Letter of Credit</td>
<td>No.34/DSN-MUI/IX/2002 on Letter of Credit (L/C) - Shariah Import,</td>
</tr>
<tr>
<td>19(1)(o)</td>
<td>—</td>
<td>No.35/DSN-MUI/IX/2002 on Letter of Credit (L/C) — Shariah Export</td>
</tr>
<tr>
<td>19(1)(p)</td>
<td>—</td>
<td>No.57/DSN-MUI/V/2007 on Letter of Credit (L/C) with Akad Kafalah bi al-Ujrah</td>
</tr>
</tbody>
</table>

In order to supplement the existing law on matters of Shariah banking, Bank Indonesia has issued regulations and circulars to guide on the implementation of the Shariah principles. These regulations must also conform to the MUI Fatwa. One of the earliest important regulations was Bank Indonesia Order 7/46/PBI/2005, 24, 34, 35, 36

25 Article 2 of Law No.21/2008 explains the meaning of all these terms.
36 See Problems Inventory List (PIL) on Islamic Banking, Minister of Finance of the Republic of Indonesia No.S-32/MK.011/2008.
which provided for the application of Shariah principles regarding the use and management of funds. This Order was repealed by Bank Indonesia Order 9/19/PBI/2007 as some of the provisions in the previous Order are not consistent with the MUI fatwa. Bank Indonesia also issued a Circular 10/14/DPBs 2008 on the implementation of Shariah principles on the use and management of funds as well as Islamic Banking services. This Circular technically sets the implementation of commercial banking services in accordance with Islamic principles as recommended by DSN. It further explains the general provisions of Bank Indonesia Order of 2007 as recommended by DSN. With the introduction of Law No.21/2008, Bank Indonesia Order of 2007 was modified by Order 10/16/PBI/2008 on the Implementation of Shariah Principles.

Settlement of disputes

The provisions of Law No.21/2008 seem to have answered a continuing debate in Indonesia on the appropriate forum of dispute settlement involving Islamic banking. Indonesia judiciary system consists of four main courts of law namely: state court, religious court, administrative court and military court. After the Reformation Period several special courts were established to deal with specialised subjects namely Constitutional Court (Law No.24/2003) Commercial Court (Presidential Decree No.97/1999), Juvenile Court (Law No.3/1997), Tax Court (Law No.14/2000), Human Rights Court (Law No.26/2000) and Labour Court (Law No.4/2004). As in other Muslim countries, religious court deals almost exclusively with Muslim litigants in the field of Muslim family law and properties, while the state court deals with other civil and criminal matters, which include commercial and banking issues. Nonetheless, art.49 Law No.3/2006 (Law on jurisdiction of the Religious Court) provides that the Religious Courts shall have the jurisdiction to determine and decide disputes arising from the practice of Shariah banking among the Muslims. Provision of the above law creates some difficulty considering Shariah banking in Indonesia is actually a commercial matter involving other aspects that may not fall under the purview of the Religious Court. This, in addition to the fact, as it has always been argued elsewhere especially in Malaysia, that the religious court has no experience including technical expertise to handle commercial disputes such as Islamic banking. Following this there was an intense debate among the public; with the Islamic groups insisting the Government uphold the provision of the Law No.3/2006, whereas others have argued that since dispute over Shariah banking is a business issue, the question should be resolved by the state court.

The new Shariah Banking Law through art.55(2) has come into a compromise between these two demands by retaining the religious court jurisdiction to settle dispute over Shariah banking, nonetheless at the same time allows parties of the dispute to choose their preferred forum and methods of settlement. Thus, Elucidation of the Law No.21/2008 explains that parties in the Shariah Banking dispute can choose to settle their dispute in the following order of Alternative Dispute Resolution:

1. negotiation,
2. banking mediation,
3. arbitration, especially by National Shariah Arbitration Board or Basyarnas and
4. litigation in State Court. To ensure the Islamic compliance of the forum’s resolution, art.55(3) requires that decision to settle the dispute (in any of these forums) must not contradict the principles of Shariah. In guiding the resolution of the Syariah banking dispute especially on the use of Syariah principles, the Supreme Court of the Republic of Indonesia issued Regulations No.2/2008 on the Compilation of Shariah Economic Law or Kompilasi Hukum Economy Syariah (KHES).

Nonetheless, interviews with bankers, practitioners and members of DSN suggest that less attention is given to this Regulation and this could further provide a potential conflict between the Regulation and fatwas issued by DNS.

The effect of this compromise in having choice of forums of dispute resolution offers parties different ways of having their complaints resolved as well as a choice of either Shariah court or State Court. Given the modern and technical nature of Shariah banking products, the preference of the Banks will probably be the State Court whereas the customer would prefer the Shariah court believing it is the appropriate forum. Nonetheless, it is predicted that Shariah Court will gain an upper hand in this competition given the religious assertiveness of

37 State Gazette Year 2006 No.22, Supplement 4611.
39 Some MUI Province in Indonesia, Nahdatul Ulama in East Java and Riau and others send rebuttal letters demanding the dispute in matters relating to Sharia Banking should be resolved by Islamic Court. See the documentation of Law and Human Rights in 2007 and 2008 RI. For further discussion see Abdul Ghafur Anshori, Penyelesaian Sengketa Perbankan Syariah: Analisis Konsep dan UU No.21/2008 (Yogyakarta: Gadjah Mada University Press, 2010) and Ahmad Mujahidin, Kewangan dan Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia (Ciawi, Bogor: Ghalia Indonesia, 2010), pp.98–99 and Ahmad Mujahidin, Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia (Bogor: Ghalia Indonesia, 2010), pp.20–21.
40 Interview with Dr Wahiduddin Adam, Facilitation Director for Provincial Regulations, Department of Law and Human Rights, RI on July 18, 2008.
41 The insertion of National Arbitration Board was based on MUI fatwa that if disputes cannot be resolved through consultation or negotiation.
42 Article 1 provides that judges that examine, hear and resolve matters relating to the Sharia shall use the Sharia principles as provided in the Sharia Economic Law Compilation as a guideline. This new compilation comprises of 4 books, 43 chapters and 796 articles. Book 1 explains on subject of the law and provisions on property according to Islamic principles with 3 chapters in 19 articles. Book 2 which is the longest, explains the contracts in 29 chapters in 655 articles. Book 3 contains provisions on Zakat and Hibah in 4 chapters in 66 articles and lastly Book 4 is provisions on Sharia Accounting in 7 chapters in 62 articles.
43 Field research conducted in Jakarta in July 2012. Interview with officials from Bank Indonesia and PT Bank Syariah Mandiri.
Indonesian society and preparatory steps taken by the judiciary to train Shariah court judges in matter of modern banking and finance.

**Conclusion**

Indonesia, despite being a state based on the five principles of *Pancasila*, the social and economic movement in the country on the other hand is moving towards reasserting Islamic values in its affairs. Absorption of fatwa and the recognition on the role fatwa committee in respect of Shariah banking and finance coupled with other favoured policies indicate the strong undercurrent of the masses and government of this reassertion. This is natural to Indonesia as the process of Islamic assimilation is organic and a balance between the economic and political needs, culture and social and national aspiration. In other jurisdictions, the fatwa or resolution of the Shariah Committee or Council in matter of banking and finance is largely limited for the private use of financial institutions under which these committees has been established. Indonesia has advanced a step ahead by making that its Shariah banking and financial laws and regulations should be compatible with the fatwa of its Shariah Committee. From Islamic point of view, this process is conceivably restrictive since it limits the independence of fatwa petitioner or *mustafti* to choose the most convincing fatwa. However, in business, commerce and trade especially in banking and finance, uniformity and standardisation is of paramount importance. This is probably what Indonesian fatwa attempts to achieve.
4 Maret 2015

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Assalamualaikum wrt.

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Untuk informasi selanjutnya, Bapak Dr. M. Cholil Nafis juga turut terlibat sebagai anggota proyek penelitian Universitas Malaya, Kuala Lumpur nomor RG434-13HNE bertajuk “Analysis on Fatwa Pertaining to Islamic Muamalat in Selected Countries” dengan jumlah biaya sebesar RM39,320.

Saya berharap pengesahan Pihak Yang Terhormat Bapak dapat memberi mengiktirafan kepada M. Cholil Nafis, PhD sebagai Penulis Utama bersama artikel di atas sebagaimana yang sewajarnya.

Sekian, terima kasih:

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