

# Rechtsidee

Vol 4 No 1 (2017): December  
DOI: <https://doi.org/jihr.v4i1.843>  
Article type: (Business Law)

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# RECHTSIDEE

PUBLISHED BY  
UNIVERSITAS  
MUHAMMADIYAH  
SIDOARJO

ISSN 2443-3497  
(online)



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Vol 4 No 1 (2017): December  
DOI: <https://doi.org/jihr.v4i1.843>  
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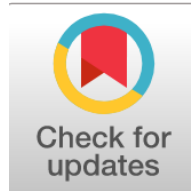
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# The Codification of Syar'i Norms in The Compilation of Sharia Economic Law

## *Kodifikasi Norma Syar'i dalam Penyusunan Hukum Ekonomi Syariah*

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### Abstract

It is a fact that The Compilation of Sharia Economic Law (CSEL) was arranged for a guiding of sharia principle in the settlement of Islamic economic disputes. As a guiding of sharia principle, ideally CSEL norms should contain the values of sharia as desired by God. The purpose of this article is to ascertain the level validity of CSEL norms when viewed from a sharia perspective. To achieve the intended purpose, the author used normative legal research and use the approach of theory *fiqmu'âmalâh iqtishâdiyah* and *fatwâ* of DSN-MUI. From the analysis we know that CSEL norms has not legitimized the Islamic sharia as a fundamental principle formally, so consequently the existence of the norm seems to replace God's verses. Of the total norms in CSEL, there are 98.48% norms which has contained the *shar'î* values, while approximately 1.52% is still found problematic norms so they needs to be revised.

Published date: 2017-12-05 00:00:00

## Introduction

The fact that practice of sharia economic in Indonesia has been gradually progressing along with establishment the number of sharia financial institutions. Islamic economic practices can be executed by human individually or partnership through companies, both of which they have legal entity or have not legal entity. To be able to run the practice of Islamic economics optimally, the society need to have adequate knowledge to avoid practices that are prohibited by law. Therefore, research for the development of sharia economics law is a necessity to provide a guidelines how to practices economic legally from perspective both sharia and its regulations in Indonesia. The law legitimation of an economic concept is intended to protect the present and future generations from prohibited action.

Law (*hukm*) is *ism mashdar* derived from the verb *hakama-yahkumu-hukm* which means determining/ stipulation. [1] The terminology, the law can be interpreted as the statutes of God pertaining to *mukallaf* either in the form demands (*iqtidhâ*) or optional (*takhyir*) and / or in the form of provisions set (*wadh'î*). [2] Law is a set of rules are closely related to human actions. In essence, all human actions will be held accountable, so that its existence will never escape from the law. It is said that, because the law does not only contain restrictions that should not be violated (*makru / haram*), also contains a provision which can give direct instructions for people to do as good as possible. Those guidance there are realized in the form of commands (*wajib/ sunnat*) or permissibility (*mubah*) to do something. [3] The boon of permissibility aspects inherent in the law is intended to facilitate people to be creative according to the nature of their creation. The laws applied in Indonesia is very diverse, including law regulating the practice of sharia economics which is currently being developed in the society.

The Compilation of Shara Economic Law (CSEL) in Indonesia is one of regulations was enacted based on Supreme Court Regulation Number 2 of 2008. According Article 1, the aim of this regulation is as a guidance of sharia principles for judges who make legal decision related to sharia economic dispute. This guidance is needed along with the extension of the absolute authority of the religious court judges as stated in Article 49 (i) Act Number 3 of 2006 regarding Religious Court: "*The religious courts are on duty and authorized to examine, decide, and resolve cases at the first instance between Muslims in the areas of: sharia economic.*" Through this authority, the religious courts who previously only resolved the disputes of family disputes, then it has been expanded to cover issues economic disputes that had previously been the authority of the general courts.

As a guiding sharia principles in the settlement of disputes, the drafting of norms in CSEL must adopt *syar'î* values. The existence of *syar'î* values in CSEL is to ensure the implementation of sharia law as required by God. Many of the verses that commanded the settlement with the sharia, namely: "*Determining the law is only God's right. He explains the truth and He is the best decision maker*(QS.Al-An'am[6]:57); *Judge their cause according to what God has sent down and do not follow their lusts by abandoning the truth that has come to you* (QS.Al-Maidah[5]:48). *Whoever does not decide according to what Allah has revealed, then they are those who kafirûn/ dzâlimûn/ fâsiqûn*" (QS. A-Maidah [5]: 44,45,47). *Then if you differ in the opinion of something, then return all matters to Allah (al-qur'ân) and His Messenger (al-sunnah), if you really believe in Allah and the lastday*" (QS.An-Nisa [4 ]:59).

Based on the quotation of verses above, it can be understood that sharia law is a guideline in making legal decision when the someone want settle the dispute. But in accordance with the Article 1 Supreme Court Regulation Number 2 of 2008, the guideline of sharia principles is CSEL which was arranged by the team formed by Supreme Court through issuing Decree No. KMA/ 097/SK/X/ 2006 related to determination drafter team of CSEL. [4] According Abdul Mughits, the birth of CSEL was originated from the issuance of Law Number 3 Year 2006 on the amendment of Law Number 7 Year 1989 on Religious Courts, ss an effort to expand their absolute authority in accordance with the needs of Muslims in Indonesia. [5] Then the question is whether the product of CSEL had contained the *shar'î* values so it is appropriate for guiding to substitute the revelation (*al-qur'ân* and *al-hadits*)? To answer that question, we need further scientific research toward entirety articles contained in CSEL.

## Materials and Methods

This writing is result normative legal research [6] with statute approach to analyze deeply all norms of CSEL. To find out whether its norms are in accordance with sharia law, we also use the approach of theory *fiqh mu'âmalâh iqtishâdiyah* and DSN-MUI's *fatwâ* both of which not only contained quotation verses of *al-qur'ân* and *al-hadits*, but also contained legal opinion (*ijtihad*) of Islamic scholars (*'ulama*) who have explained about sharia economic law. Norms of CSEL are called legitimate (*shar'î*) when they are contain the sharia teks/ substantial meaning of sharia teks (*bayani*) and/ or legal opinion derived form sharia sources interpretation both through to analogy (*qiyasy*) and to excavate the benefit (*istishlahi*). On the contrary, CSEL norms are said illegitimate if they conflict with both criterias.

## Results and Discussion

The fact that *fiqh* and *fatwa* have an important role in the development of national law in Indonesia. *Fiqh mu'âmalâh*

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*iqtishâdiyah* and *fatwâ* are products of excavations Islamic law (*istinbath al-ahkam*) from sharia sources (*mashâdir al-ahkam al-syar'iyah*) according understanding of Islamic jurists through a legal excavation methods contained in *ushûlfiqh* with its legal maxims, both rules of legal basic (*qawaid al-ushûliyah*) and its rules of legal product (*qawaid al-fiqhiyyah*). Through legal excavation methods, then the jurists construct the *fiqh* and *fatwâ* which contain quote verses derived from the al-quran and al-hadith, include contain their interpretation of both sources for guidance of human action. The truth of the sharia text is absolute, while the truth of the interpretation of the sharia text is relative, so enable there is differences of opinion.

*Fiqh* which law sharia of knowledge means terminology the while, (العلم) understanding means language in (اللغة) is practical that extracted from the detailed arguments.[7] *Mu'âmalah* is (المعاملة) *masdar* form of the word: to means which ((المعاملة - المعاملة - المعاملات) word with identical the (المعاملة - المعاملة - المعاملات) do each other.[8] The definition of *fiqhmû'âmalah* according to terminology can be divided into two, namely *fiqh mu'âmalah* in the broadest sense is the law that regulates human relationships (*hablum mina Allâh*) in all life. *Fiqhmû'âmalah* in the narrow sense is the law that regulates human relationships in the economic field to find a source of livelihood. Term *iqtishâdiyah* etymologically is derived from the word (التوازن) which means equilibrium. While (التوازن) *al-iqtishâdî* can be interpreted as a way of utilizing the source material in meeting human needs. *Fiqh mu'âmalah iqtishâdiyah* is knowledge of the sharia laws practically (*amaliyah*) in economics field excavated from the specific arguments (*tafsili*).

DSN-MUI's *fatwâ* is a legal opinion of DSN-MUI related contemporary problems that occurred in the economic field. DSN-MUI is part of the MUI established under Decree of the Chairman Board of MUI No. Kep-754 / MUI/II / 1999 on the Establishment of the National Sharia Board (DSN). DSN-MUI is a council which is formed by the MUI to address issues relating to the activities of Islamic financial institutions. According Barlinti, the position of DSN-MUI's *fatwâ* in the national legal order is indirectly binding due to there are some regulations which have legitimated it.[9]

CSEL generally consists of 4 Books, 45 Chapters, and 790 Articles. Book I on the Subject of Law and *Amwâl* which is divided into 3 Chapters, 19 Articles. Book II on *Akad* which is divided into 29 Chapters, 655 Articles. Book III on *Zakah* and *Hibah* divided into 6 Chapters, 60 Articles. Book IV on Sharia Accounting which is divided into 7 Chapters, 62 Articles. Broad aspects can be seen from the number of its books and chapters, while the depth aspects can be seen from the its articles. From all the articles of CSEL then will be analyzed using approach of theory *fiqhmû'âmalâhiqitishâdiyah* and *fatwâ* DSN-MUI.

BOOKS	CHAPTERS	ARTICLES
Book I Subjec of Law dan Amwâl	3	19
Book II Akad	29	648
Book III Zakat dan Hibah	6	60
Book IV Sharia Accounting	7	63
TOTAL	45	790

**Table 1.** *The Content of CSEL*

From analysis of all articles, the researcher discovered that CSEL norms has condiflicated the shar'î values either excavated directly from the source of sharia through the textual approach (*bayani*) or excavated from the result of interpretation through the approach of analytical (*ta'lili*) analogy (*qiyasi*) and even the goal orientation (*istishlahi*). The fact that absorption of economic concept which is derived from source of sharia is still limited, because it has not accommodated all the economic concept that has been described in *qur'an/ hadith*. Reciprocally, the absorbtion shar'î values derived from result of sharia interpretaion (*ijtihad*) also not done thoroughly either they which are derived from *fiqh* or *fatwa*. The inperfection of absorbtion then has caused CSEL's norms to have weaknesses in terms of the depth and the scope because there are many concepts which have no been accommodated in the form of article and chapter.

The fact that CSEL norms has not legitimized formally the Islamic sharia as a fundamental basic so it has consequently namely: (1) Shar'î values which are outside of CSEL are not binding for guiding although those are derived from text *al-qur'an/ al-hadits*; (2) CSEL should be the media of formal legitimacy, its existence precisely as replacing the Islamic sharia itself. Ideally, to make the Islamic sharia as a fundamental principle is not only at the time of the drafting of CSEL, but also more importantly at the time of its implementation. In the context of Indonesia, the formalization of the Islamic sharia as fundamental basic of regulation (*asas regulasi*) does not conflict with diversity principle when its enforcement uses approach that we term **Internally God's Legal Theory** i.e. the theory of God's legal enforcement internally for each follower of faith as described in sharia text *likuli ja'alnâ minkum syir'atan wa minhâjan* (QS. Al-Maidah[5]:48).

Even, in this research also found the existence of ambiguous norms of CSEL which caused by: (1) The norms that are contrary to the sharia principles namely Article 73-74 related to legalization of conditional sale which conflict with text hadits explaining prohibition of conditional sale, Article 712 related to legalization of withdrawal the grant (*hibah*) has been handed over, which conflict with the text hadits explaining prohibition of withdrawal the grant; (2)



The obscurity of the norms caused by the use of the term *akad* to replace the term *shighat (ijab qabul)*. In CSEL, there are 9 articles that are wrong in using the term *akad* because of violating the legal opinions of the Islamic scholars in their book of *fiqh* and *fatwa*.<sup>[10]</sup> If calculated, there are 98,48% of norms has been relatively accommodated the shar'i values, while the rest about about 1,52% of norms are not shar'i.

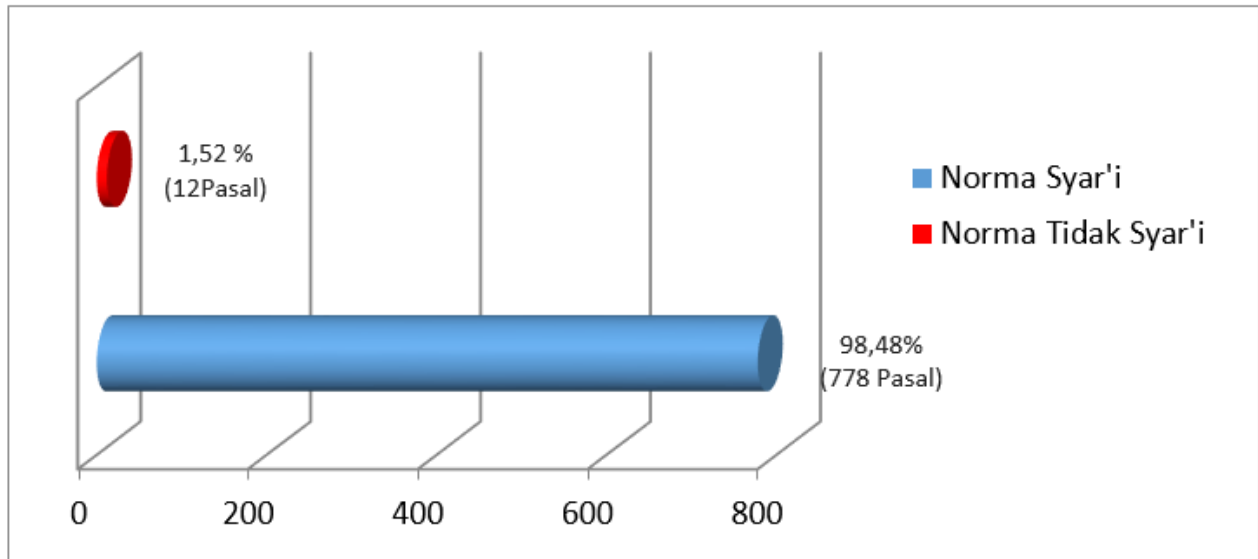


Figure 1. The Norms of CSEL

## Conclusions

If it is analyzed from *fiqhmu'âmalâhiqtishâdiyah* and *fatwâ* of DSN-MUI, the condification of *shar'i* values into CSEL's norms was not done comprehensively. Many *shar'i* values derived from *al-qur'ân* and/ or *al-hadith* as well as the results of *ijtihad* have not accommodated, so it caused those norms to have weakness both from the aspect of breadth and depth. Of the total norms in CSEL, there are 98.48% norms which has contained the *shar'i* values derived from both the verses of *al-qur'ân/ al-hadith* and result of *ijtihad*, so be guided with those *shar'i* norms is equivalent to be guided with the sharia that Allah revealed (QS Al-Maaidah[5]: 48). But it fact that there are approximately 1.52% is still found problematic norms because of conflict to sharia principles related to prohibition the conditional sale and the withdrawal of grants, and mistake using term contract (*akad*) as a substitute for agreement (*ijab qabul*). In addition, the drafting team also has not made the sharia as the fundamen of CSEL formally so it does not guarantee legal certainty. Consequently, the norms of CSEL which should only be a media for giving legitimacy, precisely as if they are replace the text of sharia itself. Hence the reluctance to contain formally the sharia as the basis for regulation is the great fault because it means to hide the truth (QS. Al-Baqarah[2]:42).

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