

SYARI'AH BANKING LEGAL SYSTEM IN INDONESIA

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Abstract

The spotlight is now focused on the banking Syari'ah as a way out of the shackles of a system of usury. Ideally, this could be a whip motivation to accelerate steps to move forward and to grow. Socio-anthropological and emotional, Islamic law is very close to the people of Indonesia are Muslim majority, but it has historically Islamic law was known long before the colonists into Indonesia. This article focus on syari'ah banking, where are many people use this system to achieve the results of alive. In this journal use methode normative research and sociological research. Where is this article make compare from the normative book (library research) and interview in social. The results is policy merely to satisfy the economic interests alone, namely within the framework of digging and collecting funds from the Muslim community, but rather based on the fulfillment of the rights of citizens are majority Muslim regulated and protected in the written constitution of Indonesia in the Constitution of the Republic of Indonesia Year 1945, so that national legislation based on the Syari'ah really inspired by Islamic law, and syari'ah banking system really has no existence as a bank that is based on Islamic law.

Keywords: Indonesia; Legal System; Syari'ah Banking.

A. INTRODUCTION

Fatwa Majelis Ulama Indonesia or MUI on bank interest is haram has pushed aside the curtain of public oppression to liberation Syari'ah. The gate is already open more than a decade ago are now finding the moment to be more open. New sheets more challenging. The spotlight is now focused on the banking Syari'ah as a way out of the shackles of a system of usury. Ideally, this could be a whip motivation to accelerate steps to move forward and to grow; be the best and give the best on the basis of values and principles syar'i.¹

To face the future, it is necessary to make the past as a lesson. Tracing back the roots of multidimensional problems facing the nation, the most fundamental factors that trigger the crisis (in addition to the religious aspect marginalized) As public awareness of the religious dimension which has been marginalized begin to experience

¹ Wan Andy, Ikhwan, and Agus Yuliawan (Editor), *Lead Bank Syari'ah MUI Fatwa Post*, Suara Muhammadiyah, Jakarta, in 2005, Page 181.

the renaissance, the presence of life that rests on the values *sya'i* that needs to be urgent and crucial.²

Islam as a religion followed by the majority of the Indonesian population, indeed affects the lifestyle of the Indonesian nation. The behavior of their adherents can not be separated from the *Syari'ah* conceived his religion. Implement the *Syari'ah* of religion in the form of laws into one of the parameters in running religious observance of a person.

Said the law is known in the Indonesian language is derived from Arabic meaning law verdict (judgment) or provision (Provision)., The law means set something on something or abolish them.³ While in a Dictionari of Law, the law is a set of rules that can be implemented to regulate/govern the society or of any rule that is created as a legal rule such action from Parliament.⁴

For Muslims, it is clear which is intended as the law is Islamic law, namely the overall rule of law is rooted in the Qur'an, and to a certain epoch is concretized by the Prophet Muhammad., In Her behavior, which is commonly called the Sunnah. In line with the Kaaba Rifyal ⁵argued that Islamic law is the translation of the term *Syari'ah* (sy-*Syari'ah* al Islamiyya) or Islamic fiqh (al-fiqh al-Islam), Islamic *Syari'ah* and Islamic law derived from treasury Islamic studies since long. Both terms are used together or alternated in Indonesia from the first until now with the understanding that sometimes different, but often similar, this often creates confusion among the public and even among experts.

The rules were sourced from Allah SWT then be concretized and aligned with the needs of his time through *ijtihad* or legal discovery by *Mujtahids* and experts in their respective fields.

In the course of national law codification Indonesia, where Islamic law is very important, as well as materials for the preparation of national law, Islamic law also

² Excerpted from paper to know Good Corporate Governance in Bank Indonesia by Wilson Arafat in the framework of the 50th Anniversary of Bank Indonesia, citing Wilson Published data from the Survey of Views of Institutional Investors in Singapore (2002). In this paper also explained that the multi-dimensional root causes of the nation, as indicated I Nyoman Tjager et.al. in Corporate Governance. Challenges and Opportunities (2003), Aminuddin Nurdin in Corporate Governance PT Astra International Tbk. (2003), and the World Bank (2000) states that the financial crisis that hit Indonesia caused because of poor practices, and the implementation or violation of the principles of corporate governance.

³ Hafiz Dasuki, H.A., 1997, *Ensiklofedia Islamic Law*, New Ichtiar van Hoeve, FIK-IMA, Jakarta, Page. 571.

⁴ Elizabeth A. Martin, (editor), *A Dictionary of Law*, (New York: Oxford University Press, Fourth Edition, 1997), Page. 259.

⁵Rifyal Kaaba, *Islamic Law in Indonesia*, Propagation Bulletin, May 19, 2006.

became inspiration in the development of national laws. Islamic law is very close to sosio-antropologis Indonesian nation, so that its presence can be easily accepted in society at large. Proximity sosioantropologis Islamic law and their communities become its own phenomenon marked by rampant efforts to formalize the application of syari'ah law in the various regions in Indonesia.

As a state based on law are philosophy Pancasila, the state protects religion, religions, and even tried to enter the religious law and the teachings of Islamic law in the life of the nation. Mohammad Hatta statement, that in a country setting laws of the Republic of Indonesia, Islamic syari'ah based on the Qur'an and Hadith can serve Indonesian legislation so that the Muslims have a system in accordance with the syari'ah that conditions in Indonesia.⁶

One of the rapidly growing financial institutions in supporting economic activity today is Syari'ah banking institutions. The existence of Syari'ah banking in Indonesia is already recognized in Law No. 10 of 1998. The law contained in chapter containing several Syari'ah Banking concept. Some of these provisions are provisions Commercial Bank, the bank conducting conventional business and / or based on the principles of Syari'ah in its activities providing services in payment traffic (Article 1 point 3). Rural Bank is a bank conducting conventional business or based on the principles of Syari'ah that the activities do not provide services in payment traffic (Article 1 paragraph 4).⁷

Syari'ah banking in Indonesia was developed since the enactment of Law No. 7 of 1992 on Banking. This law has provided the legal basis for the operation of Bank Muamalat which became an important milestone, marking the implementation of the dual banking system in Indonesia, namely the operation of conventional banks and Islamic bank in the national banking system,⁸ the banking system's two interesting to do a study, because there contention between the two do not have a difference in the operation, which distinguishes it just smells term used conventional or Syari'ah.

⁶ Ichtijanto, 1994, *Theory Development Applicability of Islamic Law in Indonesia In Islamic Law in Indonesia*, Moulds 2nd, Remaja Rosdakarya, Bandung, Page. 16-17

⁷ Gayus Lumbuun, *"Crime In The Syari'ah banking"*, Papers in the National Seminar on "Economic Implementation of Syari'ah in Indonesia", the Graduate Program Master of Law Universitas 17 Agustus 1945 Jakarta, Manhatan Hotel, Jakarta, Saturday, June 3, 2006.

⁸ Abdul Gani Abdullah, *"Syari'ah Banking Development and Perspectives"*, Papers in the National Seminar on "Economic Implementation of Syari'ah in Indonesia", the Graduate Program Master of Law Universitas 17 Agustus 1945 Jakarta, Manhatan Hotel, Jakarta, Saturday, June 3, 2006, page. 1.

B. DISCUSSION

"Systems" according Winardi, in his book Introduction to the Theory About the system and analysis system, can be discussed a series of definitions of this system. Among others, the definition of:⁹

JHR. Van der Poel, gives the following definition:

"...verzameling een van elementen waaratussen relaties bestan. Vaak treft men in de Literatuur bovendien nog de volgende toevoeging, elementen Gericht of de verwezenliking van bepaalde gemeenschappelijke doeleiden ".

Meaning: "... a set of elements of which are their relationships. Often in the literature they found ... the following additional elements directed towards the achievement of certain common goals ".

While in the Big Indonesian Dictionary states that the system is:¹⁰

1. Devices regularly elements interconnected to form a totality;
2. The orderly arrangement of the views, theories, parliamentary, and so on.

Mean while Mariam Darus Badruzaman, provide an understanding of the system as a set of principles that are integrated, which is the foundation upon which is built the rule of law. The principles were obtained through juridical construction (concrete) by analyzing (processing) data that are real to then take its properties are similar or common (collective) or abstract.¹¹

According Fuler in his book entitled "The Morality of Law (1971)"¹² that collection of rules of law in the new society can be described as a system of law if legal regulations that meet the 8 (eight) principle called "Perinciples of legality", that is :

1. A system of law should contain regulations, should not contain merely ad hoc decisions.
2. The regulations that have been made should be announced.
3. The regulations should not be retroactive.
4. Regulations should be drafted in a formulation that can be understood.
5. A system should not contain regulations that conflict with one another.
6. Regulations should not contain demands that exceed what can be done.
7. There should be no habit of frequently varying regulations that cause people to lose orientation.
8. There must be compatibility between the regulations promulgated by the day-to-day implementation.

⁹ Bachsan Mustafa, 1984, *the Indonesian Legal System*, Remadja Karya, Bandung, page.41.

¹⁰ Ministry of Education and Culture, 2003, *The Big Indonesian Dictionary*, Third Edition, Publisher Balai Pustaka, Jakarta, Page. 1076.

¹¹ Mariam Darus Badruzaman, 1983, *National Objects Legal System*, Publisher Alumni, Bandung, Page. 7.

¹² Satjipto Rahardjo, 1986, *Legal Studies*, Publisher Alumni, Moulds II, Bandung, Page 91

Bellefroid, mention the legal system as a continuum of legal regulations which are arranged in an orderly manner according to its principles.¹³ While Sudikno Mertokusumo, states, the legal system is a unit consisting of elements that have interactions with each other and work together to achieve the unity of purpose.¹⁴ Furthermore, according to Scholten, the legal system is the unity within the legal system there are no laws that contravene the regulations in other laws of that system.¹⁵

The description above, one can draw a conclusion, that what is meant by "legal system" means a unit of legal regulations, which consists of parts (laws) that have links (interaction) with each other, so arranged according to the principles, which serves to achieve a goal.¹⁶

The legal system itself is an abstract system (conceptual) because it consists of elements that are not concrete, which did not show visible unity. The elements in the legal system has special relationship with the elements of the environment. In addition, it also says that the legal system is an open system, because the legal rules with his terms of a general nature, is open to different interpretations and for interpreting the broad .¹⁷ With the legal system referred to above, the national legal system of Indonesia was formed or affected by the three pillars of the legal system, namely the western legal system, the legal system and the traditional system of Islamic law.¹⁸

In this world have diverse roots and legal systems to one another. Eric L. Richard, global business law expert from Indiana University, explained that the principal legal systems of the world (the world's major legal systems) as follows:¹⁹

1. Civil Law, which is a civil law system that is based on a civil code that has been codified. Obtain legal binding force as embodied in the form of legislation, which is arranged in a systematic and comprehensive in the form of codification or compilation. Codification according to continental European legal system is

¹³ Surojo Wignjodipuro, 1974, *Introduction to Law*, Publisher Alumni, Bandung, Page. 103.

¹⁴ Sudikno Mertokusumo, *Know the Law*, Liberty Publisher, First edition, Yogyakarta, 1985, Page. 100.

¹⁵ Utrecht, 1957. *Introduction to the Law of Indonesia*, Endeavor, Moulds IV, Jakarta, Page. 102

¹⁶ H. Ridwan Syahrani, 2004, *Summary Digest of Legal Sciences*, Citra Aditya Bakti, Bandung, Page. 159

¹⁷ Sudikno Mertokusumo, *Know the Law*, Liberty Publisher, First edition, Yogyakarta, 1985, Page. 101.

¹⁸ H. Muchsin, 2005, *Overview of Indonesia's Law*, after the Fourth Amendment of the 1945 Constitution and the Election of the President of Direct, Agency Publisher IBLAM, Jakarta Page.25-26.

¹⁹ *Ibid*, Page.25.

something that is very important to achieve legal certainty.²⁰ The legal system has its roots in Roman law (Roman Law) practiced by the countries of continental Europe, including also applied to the countries of the former colonies.

2. Common Law, which is a legal system based on custom or habit based on precedent or judge made law. With this legal system the judges on the court can make use of to make their own laws (judge made law) by looking at previous cases that have occurred. Act only regulates its subjects only, preferred is a habit and customary law society local. The common law system is practiced in Anglo-Saxon countries, such as Britain and America.
3. Islamic law, a legal system based on Islamic Syari'ah are the norms and principles of law that are directly based on the Al-Quran and Al-Hadith which has fixed and unchanging nature. And Fiqh, ie legal norms that are the result of human thought (jurisprudents) if the norms and principles contained in the Qur'an and the Hadith mentions only the basics only, while nature can be fickle adjust with place and time, and case by case,
4. Socialist Law, is a legal system that is practiced in socialist countries.
5. Sub-Saharan African Law, which is a legal system that is practiced in African countries that are in the mountains south of the Sahara.
6. Far East law, the legal system of the Far East is a complex legal system in the form of a fusion between legal systems Civil Law, Common Law and Islamic Law as the fundamental basis of society.

Bank is a business entity that raise funds from the public in the form simpanan and distribute it to the public in the form of credit and / or other forms in order to improve the standard of living of the people. From that sense, it is clear that the bank serves as a "financial intermediary" by a major effort to collect and distribute public funds as well as providing other services in payment traffic. The two functions that can not be separated. As a business entity, the bank will always try to get the maximum profit from the business being operated. Instead as the financial institution has an obligation to maintain the basic stability of the currency, stimulate economic activity, and the expansion of employment opportunities. By itself, Bank Indonesia is

²⁰ H. Riduan Syahrani, op.cit. Page. 162.

not included in the definition of "bank", because it is not a business entity that is trying to gain as much as possible in spite of conducting commercial business also.²¹

Based on Law No. 7 of 1992, banks are allowed to do business based on the principle of profit sharing. It is intended to meet the needs of the community will be the provision of banking services based on the principle of profit sharing. This is emphasized in Article 6 and Article 13 letter m letter c of Law No. 7 of 1992, that the bank may provide financing for customers based on the principle of profit sharing in accordance with the provisions adopted in government regulations. The bank's business can be managed by commercial banks and rural banks. Then by Law No. 10 of 1998, the bank can simultaneously run the pattern of financing and other activities based on the principles of Syari'ah, in accordance with the provisions stipulated by Bank Indonesia. Even Amended Banking Law provides the widest opportunity for the community to establish a bank to undertake business activities based on the principles of syari'ah, including the provision of opportunity for commercial banks to open a branch office specialized activities based on the principles of the Syari'ah. Once again the presence of the pattern of financing and other activities based on the principles of Syari'ah is intended to accommodate the aspirations and needs of the community.

Been allowed Bank with activities based on the principles of Syari'ah is expected to be situations that are complementary to other financial institutions that have already known in the Indonesian banking system. In addition, the establishment of the kind of Islamic bank will be able to provide services to the community as part of religious principles or beliefs are not willing to utilize the services of conventional banks. However, it must be recognized that in many community groups that have the principle that the system adopted by the banks interest is a violation of religious laws and is riba in Islamic law is a sin or forbidden. Accordingly, the Islamic bank is intended to serve this market segment.²²

In the Banking Law, the existence of banks based on Syari'ah principles mentioned in the venture Commercial Bank and Rural Bank with a different formulation. For Commercial Banks mentioned in Article 6, which reads the letter m

²¹ Rachmadi Usman, 2003, *Legal Aspects of Banking in Indonesia*, Gramedia Pustaka Utama, Jakarta, Page. 59.

²² Dahlan Siamat, 1993, *Commercial Bank Management*, Intermedia, Jakarta, Page. 121

commercial banks provide financing and / or do other things based on the principles of Syari'ah, in accordance with the provisions stipulated by Bank Indonesia. As for the Rural Banks mentioned in Article 13, which reads the letter c Rural Banks provide financing and placement of funds based on Syari'ah principles, in accordance with the provisions stipulated by Bank Indonesia. Thus the chapters is a legal basis for the implementation of the Bank under the Syari'ah Principles.

As a follow-up arrangements based on the Principle of Syari'ah bank, Bank Indonesia set a Decree of Directors of Bank Indonesia Number 32 / KEP / DIR dated May 12, 1999 concerning Commercial Bank Based on the Principles of Syari'ah and Bank Indonesia Board of Directors Decree Number 32 / KEP / DIR dated May 12, 1999 on Rural Bank based on the Syari'ah principle. Some things confirmed in the following provisions:

1. Commercial Banks conducting business based on the principles of Syari'ah or folk Syari'ah Credit Bank is prohibited from conducting conventional banking operations. Commercial Bank or Rural Bank of Syari'ah that are allowed to change their operations into a Commercial Bank or Rural Bank Syari'ah Conventional. Thus in principle a Commercial Bank or Rural Banks are not allowed concurrent operations are based on conventional principles. Commercial Bank or Rural Bank must select or specify the principle of a will dianutnya, would be based on the principles of Syari'ah, or purely conventional principles;
2. The principle of Syari'ah that is run by a Commercial Bank or Rural Bank in question is an agreement based on the Islamic law as referred to in Article 1 paragraph 33 amended the Banking Act.
3. Commercial Bank or Bank Credit Rakyat Syari'ah shall have the Syari'ah Supervisory based in the central office, which is to monitor the business activities of the bank to comply with Syari'ah principles by following the National Syari'ah Board Fatwa.

In the explanation of the Banking Law, banks may be allowed to perform the pattern of financing and other activities based on the principles of Syari'ah, namely:

1. Commercial Bank

Commercial Bank conducting conventional business can also do business based on the principles of Syari'ah through:

- a. Establishment of branch offices or offices under the new branches; or
- b. Changing branch or under branches conducting conventional business operations into offices that conduct based on the principles of Syari'ah. In preparation for the change of the bank offices, branches or offices under branches, which previously did conventional operations, can first establish a separate unit which carry out activities based on the principles of Syari'ah in the bank office.

Commercial Bank based on the principles of Syari'ah does not perform conventional operations.

2. Rural Bank

Rural Bank conducts its business activities based on the principles of Syari'ah allowed to carry out conventional operations. Likewise, rural banks are doing conventional operations are not allowed to do business based on the principles of the Syari'ah.

Supervision of the Islamic bank is done in duplicate, namely:

1. General Supervision

General supervision of the Islamic bank by Bank Indonesia, the same as conventional banks in general. Bank Indonesia acting as the Islamic bank supervising authority manager and supervisor of banks. In addition to that, internally, the Islamic bank is also overseen by the board of directors, board of supervisors, or supervisor of the bank concerned.

2. Special Surveillance

Special Trustees of the Islamic bank performed by the National Syari'ah Board and the Supervisory Board of the Syari'ah that comes with every bank that runs its business based on the principles of the Syari'ah. National Syari'ah Board established by the Indonesian Ulema Council in charge and has the authority to ensure compatibility between products, services and business activities of the bank with the principles of Syari'ah. While the Syari'ah Supervisory Board based at the headquarters of banks conducting

business activities based on the principles of the Syari'ah. Thus, this Syari'ah Supervisory Board:

- a. Serves to oversee the business activities of Islamic bank to comply with the principles of Syari'ah;
- b. In carrying out these functions, the Syari'ah Supervisory Board shall be followed the fatwa of the National Syari'ah Board;
- c. Position independent Syari'ah Supervisory Board, established by the National Syari'ah Board, with the task set by the National Syari'ah Board.

In line with the above description, it can be analyzed that the recognition of the new Syari'ah banking is the economic interest to explore and herd public funds that have not been stored in conventional banks because it is based on usury. Related to it is interesting to listen to what is stated by Bustanul Arifin, that the prospect of Islamic law into national law very positive development for the cultural, juridical and sociological have strong roots. According to Islamic law and offers legal concepts have a more universal and value basing on essential human values as khalifatullah not as homo economicus.²³

Related to the banking system Syri'ah imposed in Indonesia, only existence is merely economic interests, not the imposition of Islamic law as a whole, because kebeadaan syari'ah banks appear to address the economics of the crisis that hit Indonesia, and only to the extent to be able to collect public funds are would not deposited in the bank for reasons of usury, while the banking system is still using the conventional banking system even if the terms used are already using terms which apply in the Syari'ah. means Syar'ah banking system prevailing in Indonesia has not fully using Islamic Syari'ah is intact, but the new limited economic interest to raise funds that have not been collected through a conventional bank that is usury.

Sociologically, the position of Islamic Law (Fiqh Law) itself in Indonesia, involving the majority of the religious consciousness of the population to some extent also related to the issue of religious awareness majority of the population to some extent also related to the problem of legal consciousness. But such awareness should not be used for specific purposes, as well as economic interest in the banking Syari'ah,

²³ Ichtijanto, op.cit. Page 18

because of the position of religion in the context of the law guaranteed by Article 29 of the 1945 Constitution which states:

1. State based on Almighty God.
2. The State shall guarantee the independence of each citizen to profess his own Religion and to worship according to their religion or belief was.

Even if explored further, the recognition of the juridical against legislation deity in law in Indonesia, can also be seen in a variety of formulations others in the 1945 Constitution, such as the opening of the third paragraph, which reads: "On blessing Rahmat Allah Almighty and driven by a noble desire, so life's nationalities are free, then the people of Indonesia hereby declare their independence. "thus, the existence of banks that use a system of Syari'ah should be based on the Syari'ah itself, not the interests of economic and community fund raising through Syari'ah banking, because of the existence of Syari'ah bank today is merely using Islamic terms are not fully using Islamic Syari'ah should be, in respect of the fact that konvensionalah system imposed on the bank by using the term Syari'ah Syari'ah.

C. CONCLUSION

Historically Islamic law was known long before the invaders to enter Indonesia, so that the application of the dual banking system in Indonesia, namely the operation of conventional banks and banks of Syari'ah, particularly the Syari'ah bank welcomed by the people of Islam in Indonesia.

Enforcement of Syari'ah banking system, should not an economic-policy merely to satisfy the economic interests alone, namely within the framework of digging and collecting funds from the Muslim community, but rather based on the fulfillment of the rights of citizens are majority Muslim regulated and protected in the written constitution of Indonesia in the Constitution of the Republic of Indonesia Year 1945, so that national legislation based on the Syari'ah really inspired by Islamic law, and syari'ah banking system really has no existence as a bank that is based on Islamic law.

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