Purification of Sharia Banking Law in the National Banking System

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Abstract: *The development of sharia banking law can be seen from the accommodation of the state towards Islamic law in the field of sharia economics, including the development of sharia banking regulations. It is also due to the fact that the development of sharia banking regulations in Indonesia is based on the needs of the Indonesians whose majority are Muslims. During its development, sharia banking regulations have been carried through three stages, namely introduction, recognition, and purification. Meanwhile, the current legal fact shows that sharia banking existence does not meet its target of development, both institutionally and legally. To answer this problem, a normative legal method was used in conducting this research. The secondary data were qualitatively analysed concerning the purification of sharia banking law in the national banking system. The results shows that purifying sharia banking law can be done by strengthening the existence of sharia banking institutions through banking law policies. Refining the aspect of institutional can also be carried out by setting provisions regarding the settlement of sharia banking disputes in Indonesia.*

Abstrak: Perkembangan hukum perbankan syariah dapat dilihat dari akomodasi negara terhadap hukum Islam di bidang ekonomi syariah, termasuk perkembangan regulasi perbankan syariah. Hal ini juga karena perkembangan regulasi perbankan syariah di Indonesia didasarkan pada kebutuhan masyarakat Indonesia yang mayoritas beragama Islam. Dalam perkembangannya, regulasi perbankan syariah telah dilakukan melalui tiga tahapan, yaitu pengenalan, pengenalan, dan pemurnian. Sementara itu, fakta hukum saat ini menunjukkan bahwa keberadaan perbankan syariah tidak memenuhi target pengembangannya, baik secara kelembagaan maupun secara hukum. Untuk menjawab permasalahan tersebut digunakan metode hukum normatif dalam melakukan penelitian ini. Data sekunder dianalisis secara kualitatif mengenai pemurnian hukum perbankan syariah dalam sistem perbankan nasional. Hasil penelitian menunjukkan bahwa pemurnian hukum perbankan syariah dapat dilakukan dengan memperkuat eksistensi lembaga perbankan syariah melalui kebijakan hukum perbankan. Penyempurnaan aspek kelembagaan juga dapat dilakukan dengan menetapkan ketentuan mengenai penyelesaian sengketa perbankan syariah di Indonesia.

Keywords: *Purification; Law; Sharia Banking; National Banking System.*

INTRODUCTION

The importance of this article is to explain the purification of sharia banking law in the national banking system. This area is explored deeper in this article as the novelty of research since the tendency of the previous studies was more about the aspect of sharia banking development. The development of sharia financial market in Indonesia over the past few years has been quite rapid, which is proved by the increasing number of sharia financial institutions in Indonesia, such as sharia insurance, sharia mutual funds, sharia financial institutions, and sharia banking (Apriyanti, 2018). Sharia banking entity in Indonesia has been established since 1983 by releasing December 1983 Package which contains some banking regulations of which

there is a regulation that legitimate banks to provide loans with 0% interest. Such development has been followed by a series of banking policies determined by The Minister of Finance which are contained in October 1988 Package. Those policies provide convenience for the establishment of new banks which resulted in rapid development of banking industry at that time. (Syukron, 2013)

The expansion of sharia banking system in Indonesia is carried out along with conventional banking which is best known as dual banking system (Wibisono, 2019). The progress of sharia banking adjustment can be categorized into 3 stages: introduction, recognition, and purification (Tim Penyusun, 2010). This system began with Law Number 7 of 1992 concerning banking (banking law) and the operation of the first sharia commercial bank in Indonesia namely Muamalat Bank. Since then, sharia banking keeps growing based on the economic conditions and other factors that have affected it. (Otoritas Jasa Keuangan, 2015)

Sharia banking is introduced as profit sharing-based bank. This stage of recognition was marked by the enactment of Law Number 10 of 1998 concerning amendments to Law Number 7 of 1992 concerning banking (banking law). Philosophically, the regulations require the development of sharia banking in Indonesia to be directed at the welfare of the community and contribute to improving the Indonesian economy. For this reason, the relevant authorities have prepared strategic plans such as the blueprint for sharia banking development in Indonesia, the Indonesian banking architecture, the architecture of the Indonesian financial system, and the roadmap for sharia banking development. (Sjahdeni, 2014)

In the blueprint for the development of sharia banking in Indonesia, it is stated that the main target is the achievement of a significant market share (Bank Indonesia, 2015). Likewise, in the roadmap for the development of sharia banking, it is stated that the vision of developing the sharia banking industry in Indonesia is to realize sharia banking that contributes significantly to sustainable economic growth, equitable development, and financial system stability and is highly competitive. (Otoritas Jasa Keuangan, 2015)

It has been almost 3 decades of sharia banking in Indonesia, the reality does not meet the expectation. The development of sharia banking has not been in line with the increasing competitiveness on both national and global levels (Atsani, 2017). Sharia banking market share is nationally left behind compared to conventional banks. Based the data released by OJK, total assets of national sharia banking only reached 6.10%, and the remaining 93.90% is controlled by conventional banks. Globally, according to Islamic Financial Service Board (2016), Indonesia ranks 19th under Middle Eastern countries and Malaysia. (Otoritas Jasa Keuangan, 2020)

In this phase, sharia banking already got legal recognition as a sharia-based bank. The latest enactment of Law Number 21 of 2008 concerning sharia banking marks the journey of the Indonesian sharia banking industry into the purification stage. Based on its purification by means of sharia banking law, there are 3 discussing materials, they are: 1) dual banking system purification through spin off provisions of sharia business unit, 2) competent authority to control sharia compliance principles, and 3) the mechanism of dispute resolution. Sharia business unit is contained in Article 1 paragraph 10 (Law Number 21 of 2008, 2008): "a work unit from the head office of a

conventional commercial bank that functions as the main office of an office or unit that carries out business activities based on sharia principles, or a work unit at a branch office of a bank domiciled abroad that carries out conventional business activities that functions as the main office of sharia sub-branches and/or sharia units."

RESEARCH METHODS

This research is normative legal research with qualitative approach. To strengthen normative analysis, empirical data were also used. The stages of normative research concerning the purification of sharia banking law in Indonesian banking system involved: 1) searching bibliography related to legislation, 2) searching secondary materials (in order to find experts' analysis), 3) observing legal regulations, 4) conducting descriptive analysis towards positive law related to the problems to be studied through reasoning legal theories, 5) making legal comparisons. The analysis technique used for the legal material was qualitative which was carried out by means of interpretation based on the history of legislation, and interpretation according to grammar (grammatically).

RESULTS AND DISCUSSION

Purification of sharia banking law through sharia business unit spin off

Dual banking system has gained momentum since the enactment of the sharia banking law through provisions for the conversion of conventional banks to sharia banks and the permitting of conventional banks to have branches as sharia banks. Since the beginning, these two provisions have brought polemic if it is associated with paid-up capital for sharia banks, because sharia bank capital may not be sourced from funds that are prohibited according to sharia. In this context, if it refers to the capital provisions, then the provisions for conversion and the opening of sharia branches from conventional banks are clearly very strange (Djumhana, 2000). In line with the previous statement, Iska (2012) also states that it is considered bizarre if the capital for conversion and for opening sharia branches is taken from conventional banks' capital.

In addition to the capital aspect, the implementation of the Indonesian-style dual banking system has created problems concerning the intermediation function of sharia banks as financial institutions which vary in the distribution of funds to the public, since the intermediation function of conventional bank as financial institution can only distribute funds to the public in the form of credit. These two things lose their boundaries because the application of sharia banks' intermediation function is the same as the law regarding conventional banks which have different products and processes.

Besides causing complex problems, the concept of dual banking system which is applied in Indonesia also raises doubts regarding decision to separate or not company finances between sharia banks and conventional banks, as well as issues regarding laws that are regulated or enforced differently in one bank company that must run in parallel. The difference in the application of the legislation definitely raises its own problems in the harmonization of the supervisory system carried out by the sharia priciple supervisory agency, financial institution supervisor.

These dual banking system problems will be solved when sharia banking law is enacted. The initial draft of sharia banking bill compiled by the Commission XI of the House of Representatives of the Republic of

Indonesia did not actually contain provisions for limiting the existence of sharia business units as contained in Article 68 of that law. It shows the proponent's tendency to maintain the existence of the sharia business unit.

After going through a series of debates in several meetings of standing committee, finally there was an agreement that the limitation of the existence of a sharia business unit needs to be included in the transitional provisions. After listening to the considerations from Bank Indonesia, finally the House of Representatives and government agrees that the indicator used is if the assets of the sharia business unit have matched the assets of the main bank or after a period of 15 years after the law.

The birth of this spin-off provision, in principle, is to purify sharia bank. However, after 12 years of issuance of Law Number 21 of 2008, it is almost certain that no sharia business unit will meet the mandatory spin off criteria because the largest share asset of the sharia business unit at the end of 2019 was only in the range of 10%-12% (Otoritas Jasa Keuangan, 2020). Thus, the sharia business unit can become a sharia commercial bank through a deadline mechanism before July 16, 2023.

Based on the reality explained above, the Indonesian Sharia Banking Association once suggested that the government reconsider the implementation of mandatory spin off provisions in 2023 because it is constrained by capital aspect ("Republika," 2014). It means, sharia banking actors themselves basically still want the existence of the sharia business unit to be maintained.

These banking practices raise the public's desire and aspiration to formulate specific regulations regarding sharia banking and separate them from the existing banking laws through its representatives in the legislative. Those people of the community are not only Muslims, but also other customers who use sharia banking services, as stakeholders in the birth of the sharia banking law. These changes in society get a response from the executive and legislative governments to make a legal policy. When it comes to Mahfud MD who said that legal politics is legal policy, then the legal politics of sharia banking is based on the goal of the state which gave birth to a national legal system in the form of the sharia banking law through legal development and renewal of sharia banking legal materials in accordance with stakeholders' needs. This legal policy strengthens the existence of sharia banks in Indonesia both institutionally and operationally. Sharia banking legal policy has existed since the enactment of Law Number 10 of 1998 concerning the amendments to Law Number 7 of 1992 concerning banking which was strengthened by Law Number 3 of 2004 concerning the amendments to Law of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia (BI Law).

This phenomenon is addressed by the House of Representatives through the mechanism of bill legislation on sharia banking (sharia banking bill) as public policy. The process of making the bill and discussing it involves government's role in the executive sector, the president holds the power to make laws with the approval of the House of Representatives as mandated by the constitution. This public policy is government's political will to develop sharia banking as national baking alternative system, thus it is necessary to draw up banking laws based on sharia principles apart from conventional banking regulations.

The involvement of the government and the House of Representative shows that there is state intervention in the making of sharia economic regulations, especially banking. This intervention received input

from several parties who provided thoughts regarding the purification of sharia banking institutions. It is in line with Jimly Asshiddiqie who states that there is state intervention in regulations and licensing to produce legal policies in the economic dynamics that occur in society. (Asshiddiqie, 2010).

The purification of sharia banking law in Indonesia can be seen from legal political aspects. The existence of law in a country becomes the main requirements to be able to run the life of the state and society and create order and peace. The law must have values that can be applied by the local community. The national legal system in Indonesia is closely related to the basic law of the state, Pancasila, as the main guideline in forming national legal system which is followed by the 1945 Constitution as the basis for every law that is enacted. (Ramadhan, 2016)

The purpose of this purification stage is to increase the obedience of sharia banks to sharia principles as stated in the Quran and Hadith. Hence, purification is the most important stage because there are many assumptions that the current practice of sharia banking is still not in accordance with sharia principles. One of them is that there are still many sharia business unit attached to conventional banks. Such status results in the mixing of sharia and conventional management. For this reason, in the institutional context, the sharia banking law exists to provide regulations regarding institutional matters, such as the separation or spin off of sharia business unit from conventional commercial banks. In the sharia banking law, it is stated that there is an obligation for conventional banks to separate their sharia business units into sharia commercial banks if the asset value of the sharia business unit has reached at least 50% of the total value of its conventional banks or 15 years after the enactment of the sharia banking law. The separation can be done voluntarily or becomes mandatory if the sharia business unit of a conventional bank has met certain requirements. (Peraturan Pemerintah RI, 2008)

Likewise, the formulation of sharia bank compliance guarantee towards sharia principles. Sharia compliance is an absolute requirement that must be met by financial institutions that carry out business activities based on sharia principles. It is firmly stated that sharia compliance is *raison d'etre* for those institutions (Point I Islamic Financial Services Board- Exposure Draft Guiding Principles on Shariali Governance System, Islamic, n.d.). Sharia compliance is the fulfillment of all sharia principles in all activities carried out as a manifestation of the characteristics of the institution itself, including (in this case) sharia banking institutions.

Based on society's perspective, especially sharia bank service users, sharia compliance is at the core of the integrity and credibility of sharia banks. The existence of sharia banks is intended to meet the needs of the Islamic community for the implementation of Islamic teachings as a whole (*kaffah*), including the distribution of funds through sharia banks. Public trust and confidence in sharia banks is based and maintained through the implementation of Islamic legal principles adapted in the operational rules of the institutions. Without compliance with sharia principles, people will lose the privileges they seek, so that it will affect their decision to choose or continue to use the services provided by sharia banks. Disobedience to sharia principles will have a negative impact on the image of sharia banks and have the potential to be abandoned by potential customers or customers who previously have used the services of sharia banks. (Atsani, 2017)

The sharia banking law also regulates the system of sharia banking dispute resolution that applied in Indonesia. The authority to settle disputes over sharia banking has been regulated in law Number 50 of 2009 concerning the second amendment to Law Number 7 of 1989 concerning religious courts (Religious Court Law). (Lembaran Negara Republik Indonesia Nomor 4611, 2006)

The three materials above were formulated through debate and political interest. This strengthen Satjipto Raharjo's opinion, he said that law is an instrument of political decisions or desires, so that the making of laws and regulations is full of certain interests (Harefa, 2019). Thus, the field of law-making becomes a field of conflict and interests. The legislature will reflect the configuration of power and interests that exist in society. The debate in the discussion of provisions content for purification of sharia banking institutions, as described above, shows that in the context of discussing national law originating from religion (sharia law), it cannot be separated from the debate on the ideological realm of the relationship between the state and religion. This debate in the end did produce a win-win solution, but in the context of purification of sharia banking institutions, it can be said that it has not been fully carried out. It reinforces the views of the constitutional moderates who think that it is necessary to maintain a balance between sharia and the state in the relationship between the state and religion. Under certain conditions, Islamic law is formalized in state legislation, at other times Islam is as the source of moral ethics.

Legal Politics of Purification of Sharia Banking Institutions

Based on Article 29 of the 1945 Constitution, Islamic law can be implemented legally and formally by Muslims by being adopted into the national legal system. This constitutional basis is followed up by legislation at the lower level, therefore the sharia banking law was formed. The process of making sharia laws cannot be separated from the national authority in making legislative products. This means that an economic system based on sharia was developed in the Indonesian economic system by elevating its principles into the national legal system. Sharia banking legal politics occurs in the context of achieving national goals through national development.

National development is carried out by the government to realize social welfare as mandated by the 1945 Constitution. The implementation of national economic development is directed at an economy that is in favor of people-oriented economy, equitable, independent, reliable, fair, and able to compete internationally. To realize these national goals, it requires support from all elements of society such as community's participation and contribution, so that the process of economic acceleration can run well. National economic development includes sharia economic aspects. The idea of sharia economics in Indonesia arose because of the community's need to interact or make relations in accordance with sharia, including in the banking sector which is not in accordance with the teachings of Islamic values because it uses the concept of interest which is believed to be usury and contains uncertainty.

These banking practices raise the public's desire and aspiration to formulate specific regulations regarding Islamic banking and separate them from existing banking laws through their representatives in the legislature. This community is not only Muslims in

Indonesia but also users of sharia banking services as stakeholders in the birth of the sharia banking law. These changes in society has gained response from the executive and legislative governments to make a legal policy. If it is associated with Mahfud MD's opinion who stated that legal politics is legal policy, then the legal politics of sharia banking is based on the state's goal which gave birth to a national legal system in the form of the sharia banking law, through legal development and renewal of sharia banking legal materials in accordance with the needs of stakeholders.

CONCLUSION

The orientation of purification of sharia banking law in the national banking system is the development of sharia banking in Indonesia which is still oriented to increasing competitiveness and tends to ignore its characteristics as a bank based on Islamic law. Thus, it is necessary to reorient the direction of purification of sharia banking law through the development of Islamic banking from the institutional aspect by strengthening the social function of sharia banking which is not limited to *bait al maal* only, but the role of Islamic banks as banks that fully carry out business activities as social banks. Besides that, purification of sharia banking law can be carried out by strengthening the legal politics of sharia banking legislation in Indonesia which also regulates the authority to settle disputes in sharia banking.

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