

## Islamic Banking Law Perspective in the Concept of National Law

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### **Abstract**

*The focus of this article is the perspective of Islamic Banking Law in the concept of national law, both from the institutional aspect, the aspect of business activities. As well as aspects of liquidity management and financial instruments used, both at the level of laws and implementing regulations; and influencing socio-political, cultural and economic factors. Islamic banking law is a new entity in which there is interaction and mutual greeting between Islamic law and national law. In other words, Islamic banking law lies in two areas of law: Islamic law and national law. Sharia banking law, as the name implies, is Islamic law because it is formed on the principles of Islamic law. At the same time, Islamic banking law is also part of national law because it is formed by the competent state institution with the infrastructure and mechanisms that are formally justified. The discussion focuses on the dynamics of the encounter between Islamic law and national law as the elements of its formation. Such efforts can not ignore the factors - factors that influence it, whether political, cultural or economic.*

**Keywords:** *Sharia Banking, Politics, National Law.*

## A. INTRODUCTION

Banking is one of the end of the financial institution's which have a role and strategic function in life and the economy of a country[1]. Banking institution is an intermediary between parties that have excess funds (surplus of funds) and those who lack and need funding (lack of funds). Since the beginning of its existence in Indonesia, banking practices have based its operations on the interest system. The banking practice which relies on the interest system is felt to be contrary to the religious beliefs of the Muslim community in Indonesia, who are in fact the majority. According to Islamic law, - which is one of the most important pillars of the entire Islamic system and building itself, the system of interest is almost identical to usury, which is unquestionably harsh[2]. Islamic banking aims to mempromosikan and develop the application of the principles of Islam into financial transactions and banking as well as business related. The main principles of Islamic banking are (a) prohibition of usury in various forms of transactions, (b) conducting business and trading activities based on obtaining legal profits, and (c) giving zakat. [3] The prohibition of usury / interest in Islam is based on the concept of money. According to Al-Ghazali, money is not cool because of money itself. New money has value if it is used in an exchange. Al-Ghazali's assumption about money is ultimately related to the problems surrounding the demand for money, usury and currency trading.

The juridical foundation for Islamic banking was truly obtained when Law Number 7 of 1992 concerning Banking (hereinafter referred to as UUP 1992) was passed on March 25, 1992. The firmness of the juridical basis for Islamic banking which was originally introduced by PP BBH was later elaborated by Law Number 10 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as UUP 1998) which was passed on November 10, 1998 and further strengthened by the passing of Law Number 23 of 1999 concerning Bank Indonesia (UUBI 1999) on May 17, 1999. With the birth of two instruments Law on the term syariah not taboo anymore and the number of norms related to islamic banking even more and more and definitive[4].

In the perspective of national law, Islamic banking law is a sectoral and functional law which in its study eliminates the distinction between public law and private law, so that its scope is very broad. The application of Islamic law in banking / finance or other economic activities in the modern world is not an easy job. The study of Islamic banking law is an interesting and at the same time challenging study conducted in the context of law in Indonesia, where the applicable law (positive law) is different from Islamic law. Indonesia is not an Islamic country and therefore the imposition of Islamic law into positive law in social life cannot be done automatically. In writing this article , the author wants to further examine the application of Islamic Banking Law in the concept of national law, so that the title of the article that the author submits is "ISLAMIC BANKING LAW PERSPECTIVE IN THE CONCEPT OF A NATIONAL LAW".

## **B. PROBLEM FORMULATION**

As described above, the interest of researchers to study this issue in the form of research is based on two things, namely the absence of clear regulations regarding Islamic banking , and the application of Islamic banking in the concept of national law. So that in general the problems in this research plan are: "How is the Implementation of Islamic Banking Law in the Concept of National Law".

## **C. DISCUSSION**

Definition of Islamic law. The term Islamic law here is interpreted as Islamic religious law which relates to rituals / actions which are taken from specific arguments[5]. Definition of National law. While national law here is defined as a legal system, who sub-systems covering at least the substance of the law, sub- system structure huku m and sub-systems of law culture[6] , - that make the country as a raison d'etre and control of any unit that is in them, a group ethnically and wil father geographically, with agencies - state institutions as the

holder of the central position both in the making and implementation. In other words, national law here is a legal system that applies in the territory of Indonesia, established or recognized by an authorized institution and implemented / enforced by predetermined officials. Definition of Islamic banking law. Islamic banking law is all legislation concerning the Islamic bank in all its aspects which include, among others, institutional, business activities[7] , as well as the methods and processes in carrying out the business. In sharia law are very int interaction ensif and creative between Islamic Law and national law, when harmoniously and conflict. This is because in its business activities Sharia banking seeks to apply Islamic religious law to the banking sector or even other modern commercial activities, which have previously been regulated by conventional national law.

Islamic Law and National Law in Historical Trajectory. So far, people have identified the legal system in the world based on its legal traditions into two, namely the civil law system and the common law system[8] . This categorization only looks at the modern legal system, in the sense that a legal system that originates and is based on European and Western traditions, thus ignoring and denying the existence of other legal systems. The modern legal system (legal system) or also known as a legal order is characterized by its general nature and autonomy in substantive, institutional, methodological and occupational aspects[9]. If the legal system is understood as a unit consisting of several elements, including legal principles, legal regulations, human resources, legal institutions, legal institutions, facilities and infrastructure and legal culture, each of which is mutually interconnected. One each other, it has historically been the world's legal systems consist of at least five major legal systems. The five legal systems are the Common Law system adopted in England and its former colonies, the Civil Law system which originated from Roman Law and is now adopted by countries in continental West Europe and its former colonies, Customary Law systems in Asian countries. and Africa, the Islamic legal system adhered to by Muslims wherever they are, whether in an Islamic country adhered to by Muslims wherever they are, both in Islamic countries and other countries where the population is Muslim, and the Communist Law system. /Socialist. Islamic Law on

the one hand is one of the elements (material substance) forming a national law, but on the other hand he was a sparring partner for national law. In the first context Islamic law is subordinate to national law, while in the second context the position of Islamic law against national law is balanced and each is independent and has a different area of action. In the second context, Islamic law is universal, independent and identifiable as local and Indonesian law, although the influence of local situations and social conditions greatly affects its development and existence. The following will describe the dialectical relationship between Islamic law and national law in the formulation of Islamic banking law from time to time. The description will be divided into four parts based on the periodization of the development of Islamic banking law, namely the initiation period, the formation period, the consolidation period, and the development period. The period of initiation refers to the period where ideas and initiatives will need and the importance of Islamic banking law. A nation that tends to arbitrate the tradition of civil law system, the emergence of ideas and initiatives will need for Islamic banking law in conjunction with the emergence of the idea and initiative of the establishment of Islamic bank in Indonesia. Because, it is impossible for an Islamic bank to be formed and obtain an operational permit before there are written provisions / regulations governing it. This period lasted since the end of the 1960s decade late to the 1980s.

The period of formation is the period of the formation of Islamic banking law for the first time, which lasted from the enactment of Law Number 7 of 1992 until it was amended and then passed Law Number 10 of 1998. This period is characterized by its speculative regulatory patterns and seems to be casual, because it considers banking regulations sharia is enough to subordinate it to the regulation of conventional banking. In other words, the regulation in this period emphasized the legality of Islamic banking in Indonesia, after previously being considered illegal. So setup is more addressed to the recognition of Islamic banking is legally an sich, without technical setting of adequate operational in the field. The consolidation period is meant here as a period in which Islamic banking has been recognized and considered equal to conventional banking in a dual

banking system. Consolidation is carried out by increasing the certainty of compliance with Islamic legal principles, expanding the type of business, expanding and perfecting the required infrastructure, and giving greater attention to Islamic banking than in the previous period. However, the development of Islamic banking law in this period was still characterized by an impression of subordination, because the regulations were still integrated into Law Number 10 of 1998 which incidentally regulated conventional banking. The development period is a period in which Islamic banking is given the opportunity to grow and develop just like conventional banking, although here and there it still needs improvement and refinement. The period is characterized by a separate Islamic banking arrangement from conventional banking, although the separation is not absolute. UU Number 21 of 2008 concerning Sharia Banking is a *lex specialis*, while Law Number 10 of 1998 is the *lex generalis*. In other words, general matters concerning banking are applied to both conventional banking and Islamic banking. This is contained in Law Number 10 of 1998 as the main law. Likewise, conventional banking operational technical matters are contained in the Law, while technical matters of Islamic banking operations are specifically regulated in Law Number 21 of 2008, although in principle it has also been regulated in Law Number 10 of 1998.

Factors Affecting the Dialectic of Islamic Law and National Law in the Formulation of Islamic Banking Law. Discussing legal discourse cannot be separated from the social context in which the law is formed. The law does not appear in an empty space nor does it appear suddenly without being initiated by something behind it. The development of Islamic banking law in Indonesia is at least influenced by several factors such as the political system, cultural system, economic system, the Indonesian Ulema Council (MUI), and Bank Indonesia (BI).[10].

Islamic banking law formulation from *Ius Constitutum* to *Ius Constituendum*. Islamic Banking Law, enacted feed remarkable achievement for the strengthening of Islamic banking arrangements se Previously arranged

integrated in - and becomes subordination of the Banking Law, which dominated the color of conventional. With formal legal PbS Law Islamic banking really be nar parallel to the banking conventional within the framework of the dual banking system. Even if in certain cases some provisions in the PbS Law must be interpreted as referred to in the Banking Law, this does not negate the equality between the two banking systems. Must interpret some provisions of Law PbS in the context of the Banking Act meant that Islamic banking arrangement constitutes an integral part of the regulator 's banks nationwide that are de facto at first only know the conventional banking system. In this perspective, the PbS Law is a *lex specialis* with the Banking Law as the *lex generalis*. The regulation of sharia banking in a separate law was immediately followed by the emergence of several problems related to the substance of the law. Some of the problems that arise include the accommodation mechanism and the transformation of Islamic law in further Islamic banking arrangements in the form of PBS, the existence of the Sharia Banking Committee, the issue of concurrent positions and the recruitment mechanism of the Dewan Pengawas Syariah (DPS) and future sharia banking arrangements when the law is promulgated. Number 21 of 2011 concerning the Financial Services Authority (UU OJ K).

At the part of the end, as the previous chapters have argued settings Islamic banking who was and is applicable in chronological order as *ius constitutum*, chapters have suggested a number of ideas or thoughts towards improved governance of Islamic banking as *ius constituendum*. Of course, this idea is limited to sharia banking arrangements related to institutional aspects, business activities, and management of liquidity and financial instruments. Although this is not a political and policy choice at the moment, this *ius constituendum* is intended to bring Islamic banking arrangements closer to an objective condition that is acceptable to many parties . Or at least, approaching character of banking arrangements sharia as is stated in Sub section II B.

#### A. Accommodation and Transformation of Islamic Law

The passing of the PbS Law which then has been, is being and will be followed by the issuance of its implementation regulations-in the perspective of Islamic law is part of the law enforcement process (tasyri') . By being passed as part of the product of legislation, Islamic law which was originally only binding on the basis of religious beliefs for Muslims became state law which binds not only on the basis of these religious beliefs but also positively for all citizens.

#### B. Quo Vadis Committee of Sharia Banking (KPS)

The PbS Law introduced a new institution in Islamic banking, namely the Sharia Banking Committee (KPS). As stated in the PbS Law , KPS was formed in the framework of drafting a Bank Indonesia Regulation governing the DSN-MUI fatwa concerning the elaboration of sharia principles which serve as a reference for business activities, products and / or services of Islamic banks.[11] .

#### c . Concurrent Position and Recruitment Mechanism for Members of the Sharia Supervisory Board (DPS)

During the first ten years of the existence of Islamic banking, the number of people who were experts and mastered Islamic economics was very limited and could be counted on the fingers. The provision of opportunities for a member of SSB to concurrently hold the same position at a maximum of 5 Islamic financial institutions must be understood in the context of the limitations of this Islamic economist . However, when now the study and socialization of Islamic economics is increasingly being carried out, there are even many universities that organize these study programs , so there are more and more people who are experts in Islamic economics. Because in the future the opportunity for concurrent DPS positions needs to be eliminated, meaning that it is prohibited or minimized.

The limitation of concurrent positions for DPS members is not only due to the increasing number of Islamic economists, but also for reasons of performance improvement. If the DSN-MUI fatwa no longer has to be written down in advance in the PBI to gain binding strength, as has been stated in the paragraph above, then DPS is required to work even harder than what has been done so far. This is



because it is impossible for Islamic banks to make an effort to pick up the ball in implementing sharia principles as in the DSN-MUI fatwa. Restriction or elimination of the double post opportunities DPS also dipelukan that a member of DPS can focus on the sat u bank syariah certain it all out.

Sharia Banking Regulations after the enactment of the OJK Law. The enactment of Law Number 21 of 2011 concerning the Financial Services Authority (OJK Law) marks the beginning of a new era in relation to banking regulation and supervision , including sharia banking. In fact, the idea for the OJK has long been coinciding with the process of drafting the Bank Indonesia Law. As stated in the money in the Bank Indonesia Law, the task of supervising banks lies with the independent financial services sector supervisory institution. While the supervisory agency was not yet established, the supervisory task was carried out by Bank Indonesia, in conjunction with the regulatory task. In fact, the Financial Services Authority (OJK), which was assigned as the supervisory agency, was only established in 2012 or thirteen years after the enactment of the Bank Indonesia Law.

#### **D. CLOSING**

##### **Conclusion**

From the results of the research and discussion as stated, the following conclusions can be drawn. That Islamic law dialectics and national laws have been initiated since the colonial period and continues until now. This dialectic does not only involve Islamic law and State law, but also customary law. Until the 1980s decade internal dialectical law only concerned the areas of law which were the authority of religious courts, especially family law (aI-ahwal al-syakhshiyyah ). Apart from that, the field of law, especially Islamic economics, did not get enough attention either by the Muslims themselves or by the colonial government. Dialectics walk around the applicability of Islamic law in the areas referred to in the first as a theory receptio in complexu be like dikehend battery theory receptie .

For the majority of Indonesians who are actually Muslim, such dialectics of Islamic law and state law are very detrimental because the existence of Islamic law is very dependent on customary law. As for the colonial government, such dialectics were no more than tactics and strategies to maintain power and grip on the Indonesian nation. The dialectic of Islamic law and national law in the formulation of Islamic banking law follows the positivist tendency of Islamic law, namely the accommodation of Islamic law in national law, either explicitly or implicitly. The positivization of Islamic law, although still being debated internally by Muslims, has philosophical, juridical, and sociological grounding. The debate on the positivization of Islamic law is related to three things, namely whether the positivization itself is needed, the area of Islamic law that needs to be positivized and the mechanisms that must be taken.

The dialectic of Islamic economic law and banking law as referred to can be examined based on a certain period of time in accordance with the development of legal products regulating banking in general and Islamic banking in particular. The period for the development of statutory regulations in the banking sector can be divided into four, namely (1 ) the period before the enactment of Law Number 7 of 1992 concerning Banking (UUP), (2) the period after the ratification of the UUP, (3) the period after its amendment UUP, and (4) the period after the passing of Law Number 21 of 2008 concerning Sharia Banking (UUPbS).

## Recommendation

### 1. Government and DPR

a. With the enactment of the OJK Law, several regulatory substances in the UUP, BI Law and the PbS Law relating to the functions, duties and authorities of banking regulation and supervision are declared invalid. Therefore in the future it needs to be amended so that it is in sync with the related regulations in the OJK Law;

b. In the third amendment to the Act, the regulation of sharia banking and conventional banking must be balanced by providing more portions on sharia principles along with the elaboration and authority of the institution issuing fatwa.

c. Sharia principles which are the basis for Islamic banking operations should refer directly to the DSN-MUI fatwa without having to be formulated in advance in the statutory regulations under the PbS Law ;

## 2. The Financial Services Authority (OJK) and Bank Indonesia (BI)

a Transformation of the implementation of banking regulatory and supervisory functions, duties and authorities which will take effect from January 1, 2014 must run smoothly without causing noise and problems, both technical and non-technical;

b OJK and BI need to carry out intensive and synergic coordination so that the regulation and supervision of bandages can run thoroughly, both from the microprudential aspect and the macroprudential aspect;

c. Implementation of sharia principles which have been described by fatwas. The DSN - MUI was carried out elegantly without giving the impression of arrogance on the one hand and without any subordination from the DSN-MUI on the other;

## 3. National Sharia Council-Indonesian Ulema Council (DSN-MUI)

As a fatwa issuing institution of sharia DSN-mul required to maintain its independence in order fatwa issued correctly - absolutely neutral and objective. In this context , the DSN - MUI organizational structure needs a research and development organ , so that it is possible to discuss issues related to sharia fatwas more comprehensively and adequately.

## 4. Sharia Bank

Compliance with sharia principles is a special character that must be attached to every Islamic bank. In this context, Islamic banks need to make the DSN-MUI fatwa as a reference for the operation of their business activities and products

without questioning the adoption of the fatwa referred to in further statutory regulations or not, because the legality of the DSN-MUI's fatwa has been given by the PbS Law .

#### 5. Sharia Economic Associations

Socialization and education of Islamic banking, especially Islamic economics in general, is one of the main factors in the development of a legal culture related to Islamic banking. No matter how incomplete and inadequate regulation of Islamic banking dal am the legislation not be able to realize the situation and conditions diinginka n, in the absence of sufficient knowledge and understanding of tentan g m of Islamic banking among asy tion especially prospective customers.

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[1] In general, financial institutions can be grouped into two categories, banks and non-banks. Both of these financial institutions are engaged in raising and distributing funds. What distinguishes the two is the manner and orientation. If a bank raises funds either directly in the form of deposits, public funds (savings, current accounts, deposits) or indirectly from the public (valuable paper, investments, loans / credits from other institutions), then non-bank financial institutions only collect funds indirectly from the community (especially through valuable paper, and it could also be from participation and loans / credits from other institutions). In channeling bank funds, it does so both for the purpose of working capital, investment and consumption, to businesses and individuals, and for the short, high and long term. Meanwhile, non-bank financial institutions channel funds primarily for investment purposes, to business entities, and for the high and long term. Read more Totok Budisantoso and Sigit Triandaru, *Banks and Other Financial Institutions*, Issue 2, Jakarta: Salemba Empat Publisher, 2006, p. 5. Another perspective makes a different classification under the name of the financial system. According to this perspective, the financial system is divided into two, namely the monetary system and other financial institutions. Hermansyah, *Indonesian National Banking Law*, revised edition, 2nd printing (Jakarta: Kencana Prenada Media Group. 2006), p. 1-2.

[2] The prohibition of usury is certain because it has been stated explicitly in both the Koran and the Sunnah. However, whether the bank interest is usury, there are differences of opinion among the scholars. That is why the legal status of bank interest is still disputed among scholars. Some argue that it is absolutely haram, because it is identical to usury. Some are of the opinion that it is haram with restrictions, that is, if it is for consumptive purposes and not carried out by a government bank. There are also those who allow it. good for reasons not including riba which is forbidden. or for emergency reasons. Ahmad Azhar Basyir. *Islamic Law on Riba, Debt-Receivables, Pawn*, second printing (Bandung: PT. Alma'arif. 1983), p. 28-32; and Ahmad Azhar Basyir, *Reflections on Islamic*

Issues Regarding Philosophy, Law, Politics and Economics (Bandung: Mizan, 1993), p. 183.

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[4] The increasing number of legal norms related to Islamic banking and the term Sharia is seen from two perspectives, namely the main norms and norms of detail / implementation. From the perspective of the main norms , the increasing number and comprehensiveness of legal norms related to Islamic banking can be seen from the increase in articles and / or paragraphs in Law Number 10 of 1998 and Law Number 23 of 1999. If in Law Number 7 of 1992 the legal norms of PbS are only three post-sub article, then in Law Number 10 of 1998 the legal norm of PbS increases to more than 10 articles / sub articles, including Article 1 points 3, 4, 12, 13, 18, and 23, Article 6. Article 7, Pasa18, Pasa1 11 paragraph (1), (2), and (4A), Article 13, and Article 29 paragraph (3). If in Law Number 13 of 1968 there are no articles / sub-articles related to PbS, then in Law Number 23 of 1999 there are legal norms for PbS, including Article 1 point 7, Article 10 paragraphs (2) and (3) and Article 11. In the perspective of details / implementation norms . the increase in legal norms for PbS is no longer in the count of articles and / or sub-articles, but in the unit of legislation product in the form of Bank Indonesia Regulations (PBI) and Circular Letter B which are numerous. Compare this with the laws and regulations governing the

implementation of Sharia banking during the regime of Law Number 7 of 1992 which has only one piece, namely PP Number 72 of 1992.

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[7] Tan Kamello, "Character of Civil Law in Banking Functions through Relationships between Banks and Customers," Speech inaugurating the Position of Professor in the Field of Civil Law at the Faculty of Law, University of North Sumatra, Medan, 2 September 2006, p. 6

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[10] MUI though in fact part of the cultural system is called itself separately because of the role it plays. Likewise, with the same considerations, B1 is called itself separately even though in fact it is part of the economic system.

[11] Article 26 of the PbS Law .