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Legality of Sharia Banking in Indonesia

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ABSTRACT

Sharia Banking is everything that concerns Sharia Banks and sharia business units, including institutions, business activities and ways and processes in carrying out their business activities. This research aims to analyze the legality of Sharia Banking in Indonesia and the characteristics inherent in Islamic banking in Indonesia. The approach method used is normative juridical. The results shows that legality of Sharia Banking in Indonesia after the entry into force of the enactment of statutory law, Islamic law, and contracts made by parties between customers and Sharia Banks. The laws and regulations include, civil law, Law No.2 1 of 2008 concerning Islamic Banking and its implementing regulations, the provisions of Islamic law namely the Koran and al-Hadist and the contracts held by Sharia Banks and Customers made in writing. The characteristics inherent in Islamic Banking include: the cost of the agreement is agreed upon at the beginning of the contract, in the project financing contract, Islamic banks do not apply profit calculations. The surrender of public finds in the form of deposits is considered as a deposit (al wadiah).

Introduction

Indonesian Muslims have long longed for a bank that operates in accordance with Islamic law. K.H Mas Mansur, chairman of the Muhammadiyah Executive Board from the period 1937-1944 had outlined his opinion about the use of Conventional Bank services as a thing that must be done because Muslims do not have their own bank that is free of usury. Then it was followed by an idea to establish Islamic banks in Indonesia that actually had emerged as mid-1970s. This discourse was discussed at the national seminar on Relations between Indonesia and the Middle East in 1974 and in 1976 in an international seminar conducted by the Institute for Social Sciences Studies (LSIK) and the Bhineka Tunggal Ika Foundation. But there are several reasons that hinder the realization of this idea, namely: The operation of Islamic banks that apply the principle of profit sharing has not been regulated, and because it is not in line with the prevailing Banking Basic Law, namely Law No. 14 of 1967. The concept of Islamic banks in terms of politics is also considered ideological connotation, is part or related to the concept of an Islamic state, therefore the government does not want. At that time, it was still questioned, who would be willing to put up capital in such a

venture, while the establishment of new banks from Middle East countries was still prevented, among others by the policy of limiting foreign banks to open branch offices in Indonesia.

The implementation of the desire to implement sharia principles in the field of financial institutions in the country began with the establishment of the Baitut Tamwil financial institution that was a Cooperative Legal Entity in the 1 980s. It was first established in Bandung, namely Teknosa's Baitut-Tamwil Cooperative service on 30 December 1980 with an amendment dated 21 December 1982. This was driven by the issuance of the June 1 Banking Deregulation Package in 1983, which had shackled the government's interest in banking interest. Sharia banking is everything that concerns the Sharia Bank and Sharia Business Unit, including institutions, business activities, and the ways and processes in carrying out its business activities. Based on these provisions, the concept of Islamic Banking includes the following elements, namely: Institution of Sharia Banks, namely regarding business entities which are always in the form of legal entities of Limited Liability Companies, Sharia Bank Business Activities, namely activities in the field of financial services regarding the utilization of public investment funds and financing of businesses and other activities, which aim to improve the standard of living and the welfare of the people, The way and process of implementing Sharia Bank business activities, which are fundamental to Sharia Principles. The Sharia Principle is the principle of Islamic law in banking activities based on a fatwa issued by an institution that has the authority to determine the fatwa in the field of sharia. The institution authorized to establish fatwa in the field of sharia is the national Sharia Council of the Indonesian Ulema Council (Yustiady, 2003). Based on the background above, this research aims to analyze the legality of Sharia Banking in Indonesia and the characteristics inherent in Islamic banking in Indonesia.

Methodology

The approach method used is normative juridical. The purpose of the normative juridical approach is legal research that prioritizes the library approach. The normative juridical approach also seeks to examine the legal rules that apply in society and their relation to their application in practice. It aims to examine and test legal aspects and find the law in reality. Analysis of the data used in this study was carried out in an analytical descriptive manner, namely describing the laws and regulations that apply in a comprehensive and systematic manner and then the problem-solving analysis was carried out. The research phase in this study is carried out through: Research Library (Library Research), namely by examining secondary data relating to the object of research. In this study researchers examined and examined, among others: Civil Code, Sharia Banking Law and other related writings and can support understanding of the material regarding the subject matter. Data collection is done by: Documents study conducted on secondary data to obtain a theoretical foundation in the form of opinions or writings of experts or other parties to obtain information in the form of formal provisions.

Results and Discussion

Legality of Sharia Ranks in Indonesia

At Bank Sayariah in Indonesia, laws and regulations, Islamic law and contracts are made by parties, especially Custome rs and Islamic Banks. These laws include (Suma, 2002):

a. Civil law contained in the Codification of the Indonesian Civil Law specifically concerning the Engagement of Book III whose object is property, insofar as it does not conflict with Islamic law
b. Law No. 21 of 2008 challenges Sharia Banking, as well as all its implementing regulations, whether issued by the Government or by Bank Indonesia, which includes the institutional aspects and operational aspects of the Sharia Bank business.
c. In addition to the statutory provisions stated above, also the provisions of Islamic law originating from the Koran and Al-Hadist, especially regarding businesses financed by Islamic banks, or other businesses that are in accordance with sharia, whose objects are assets.
d. The contract held between the Sharia Bank and the Customer must be made in writing, either authentically before the notary, or not authentically made by the Sharia Bank and the Customer concerned. The contract made by a Sharia Bank and the Customer has worldly and ukhrawi consequences because it is based on Islamic law

Products of any business activity produced by a Sharia Bank; operations are always based on a written contract. The contract is based on principles that must be protected and guaranteed in the Sharia Banking law. The principles in question are the principle of willingness, the principle of benefit, the principle of justice, the principle of mutual benefit

1. The principle of willingness (ridha'iyah)

Every Islamic Economic Agreement in any form made between a Sharia Bank and the Customer must be based on a willingness principle (willing to be willing). This principle is derived from the verses of the Qur'an and al-1-Iadith, especially the letter Nisa verse (29): the translation: "O ye who believe do not eat (take) the property of others in vanity, except by way of trade which happens voluntarily (willingly willing) between you. Don't kill yourself. "Allah is merciful to you." Consequently, any contract that contains force (*ikrah*) or fraud (*gharar*), or tyranny must be rejected and declared null and void. Islam forbids any Economic Contracts that contain elements of physicality (*al-bathil*)

2. Benefit Principle

Every contract made between a Sharia Bank and the Customer regarding an object must be beneficial for both parties. Islam forbids the contract relating to matters that are detrimental (*mudharat*). Islam also forbids Akad which is beneficial to one party but harms the other party or is gambling (*maisir*).

3. Principle of Justice

Every contract made between a Sharia Bank and the Customer must apply and be treated fairly in a concrete sense. This is based on a number of verses from the Qur'an that uphold justice and anti-tyranny, as determined in the Qur'an Surat anNisa verse (58) which translates: "Verily Allah tells you to deliver the message to those who have the right to receive it and if you set laws between humans, justly..."

4. Principle Mutual benefit

Faithful Contracts made between Sharia Banks and Customers must be beneficial for both parties. Islam forbids *Akad* which contains elements of *gharar, maisir*, and *usury* that benefit one party, but harms the other party.

The legal consequences of the contract that fulfill the principles above are as follows:

a. The contract is declared valid, and the contract is a legitimate (*mulzim*) of both parties, namely the Sharia Bank and the Customer who makes it.
b. Islamic banks and customers who make contracts must have good intentions (*husnunniyah*) to fulfill their obligations and rights to each other. The continuation of the implementation of a contract depends on the *husnunniyah* of both parties who make it.
c. Islamic banks and customers who make contracts must pay attention to the prevailing economic conditions or traditions in the economic community insofar as they do not conflict with Islamic economic principles, not contrary to the principles of Sharia Agreement Law.
d. Islamic banks and customers who make contracts have the freedom to set conditions in the contract they make, as long as they do not violate general Islamic law provisions, and the morale of economic morals in Islam.

In comparison with Islamic banks, here is also discussed the legality of Conventional Banks. In conventional banks, applicable laws and regulations include provisions concerning the engagement of book III of the Indonesian Criminal Code, the object of which is assets, Law No.7 of 1992 in conjunction with Law No.10 of 1998 concerning Banking and all implementing regulations, both issued by the government or by Bank Indonesia. Contracts made between Conventional Banks and Customers must be in written form either authentically before the notary, or not authentic, only made by Conventional Banks and Customers. (Dewi, 2004) In order for the contract made between Conventional Banks and Customers to be valid according to the provisions of the law, the contract must fulfill the elements of the provisions of Article 1320 KUHPdt, namely (Dewi, 2004):

a. Contracts made between Conventional Banks and Customers must be based on agreement on the object, objectives and requirements as well as procedures for implementing the contract.
b. Conventional Banks and Customers who make contracts must be able to carry out legal actions in accordance with the provisions of the law.
c. Conventional Banks and Customers who make contracts must have objects in the form of certain objects or services, at least they can be determined

d. Conventional Banks and Customers who make contracts must have objectives that are not prohibited by law, not in conflict with public order and do not conflict with the morality of the community.

The legal consequences of a contract that fulfills the elements of Article 1320 KUHPdt Indonesia are declared valid, and a valid contract binds a Conventional Bank, and the Customer makes it. The effect of the law applies the provisions of Article 1338 KUHPdt Indonesia:

a. The contract applies as a law, for Conventional Banks and Customers who make it.
b. Contracts may not be canceled unilaterally by Conventional Banks or Customers.
c. The contract must be carried out in good faith by the Conventional Bank and the Customer who made it.

In Article 1320 and Article 1338 the Indonesian Criminal Code is concluded by the principles of agreement according to the capitalist concept. Every contract made between Conventional Banks and Customers is:

a. Must be fundamental to free agreement, without coercion or without deception.
b. Must be based on the ability to do (maturity) according to law.
c. Must have objects in the form of certain objects I services or can be determined.
d. Must have a goal that is not prohibited by the law on public order or morality of the people.
e. Must be carried out in good faith.

Characteristics of Sharia Banks in Indonesia

Islamic banks have characteristics that are very different from conventional banks. According to M. Sholahuddin, the very different characteristics are as follows (Sholahuddin, 2006):

a. A fee is agreed upon at the time the contract is made by the parties. These costs are manifested in the form of nominal amounts, the amount of which is not rigid and can be done with the freedom to bargain within reasonable limits that do not burden the parties. Determination of the percentage (%) in terms of the obligation to make payments is always avoided because the percentage (%) is the special inherent in the debt even though the deadline for the agreement has ended.
b. In Project Financing contracts, a Sharia Bank does not apply a definite calculation of profit determined in advance because in essence the knowledge of the profit and loss of a bank-financed project is only Allah. This causes an imbalance in income and welfare distribution.
c. The inflexibility of interest-based transactions that cause bankruptcy. This has an impact on the loss of the productive potential of society as a whole, in addition to unemployment of most people.
d. The system of interest-based transactions prevents the emergence of innovation by small businesses. Small entrepreneurs who do not have saving funds will always be afraid of making new innovations in the world of business, because he is worried that if the innovation fails, then he must return the debt and the burdensome interest

in the interest system, Banks will not be interested in Small Business partnerships if there is no guarantee of certainty of their return on capital and interest income.

Conclusion

The legal basis for Sharia Banking in Indonesia is: Civil law contained in the Codification of the Indonesian Civil Law specifically concerning the Engagement of Book III whose object is property, insofar as it does not conflict with Islamic law. Law No. 21 of 2008 challenges Sharia Banking, as well as all implementing regulations. The provisions of Islamic law originating from the Koran and Al-Hadist, especially regarding businesses financed by a Sharia Bank, or other businesses that are in accordance with sharia, whose object is wealth. The contract held between the Sharia Bank and the Customer must be made in writing, either authentically before the notary, or not authentically made by the Sharia Bank and the Customer.

The characteristics inherent in Islamic banks in Indonesia are as follows: A fee is agreed upon at the time the contract is made by the parties. In Project financing contracts, Islamic Banks do not apply profit calculations. Submission of public funds in the form of deposits by depositors is considered as a deposit (*al-Wadi'ah*). For Sharia Banks, Deposits are considered as deposits mandated as Fund Participation in projects financed by Sharia Banks that operate in accordance with Sharia Principles. Therefore, the depositors are not promised a definite reward. The DPS Sharia Supervisory Board has the duty to oversee the Operations of Sharia Banks from the point of its sharia. The function of Islamic Bank institutions is to bridge between the owners of capital and those who need funds and are responsible for the security of funds deposited and are ready at any time if the funds are taken by the owner.

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