

## Islamic Banking Judicial Review in Accordance with Sharia Principles

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**Abstract.** Islamic financial institutions, in particular of Islamic bank, is a bank that has Islamic principles in running their business which is always accompanied with the rules of Islam, both the Qur'an and Al-Sunnah. The presence of Islamic banks was greeted positively by the state to pass a law number 21 of 2008 concerning Islamic banking. But sometimes in practice the efforts of Islamic banks does not correspond with what is expected, such as the occurrence of new disputes in which the case can not be resolved by referring to the Quran and Al-Sunnah, then it is the law here which will be instrumental to run this authority as to bridge when the cases are a little tricky.

In this study, the authors take issues related to Islamic banks, about how principles of Islamic banks to appropriate Shari'a and law, and as to whether the settlement of disputes in Islamic banks, this is because there are many people who are unfamiliar related to understanding the principles of Islamic banks, so expect the fore capable a reference and material considerations in understanding Islamic banking.

**Keywords:** Judicial Review; Islamic Banking; Dispute Resolution.

### 1. Introduction

Banking is an institution that has the lead role in the development of a country. This role is manifested in the functioning of the bank as a financial intermediary (*Financial intermediary institution*) which is generally established with the authority to accept deposits, lend money, and issue promissory notes, known as bank note in order to improve people's living standard.<sup>4</sup>

Based on the principles of governance and bank operations are divided into 2 (two) of conventional banks and Islamic banks. Conventional Bank is a bank conducting conventional business in its activities providing services in payment traffic. Bank Sharia (Islamic Bank) is a banking institution that uses the operating system and based on the principle-Islamic law or sharia principles, as set out in the Qur'an and Al Hadith.

In the early 1980s, pioneering the establishment of Islamic banking started. The rise of seminars and discussions about the urgency of Islamic banks which do society and academia increasingly solidify it. As a test, they then put into practice the notion of Islamic banks on a small scale. Since then, stand *Bait Al-Tamwil* Salman Bandung Institute of Technology and Cooperative Ridho Gusti in Jakarta.<sup>5</sup>

Islamic banking industry in Indonesia is also the aspirations of the people of Indonesia that the majority of Muslims to have an alternative to the Islamic banking system. In addition, people believe that the Islamic banking system which applies to the very favorable results,

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<sup>4</sup> Khotibul Umam, 2016, *Perbankan Syariah: Dasar-dasar dan Dinamika Perkembangannya di Indonesia*, Rajawali Pers, Jakarta, p 1.

<sup>5</sup> Adrian Sutedi, 2009, *Tinjauan dan Beberapa Segi Hukum Perbankan Syariah*, Ghalia Indonesia, Bogor, p. 8.

both for the customer and the bank.<sup>6</sup>

Similarly, the Government's support in developing the Islamic banking system is next seen with the issuance of legal regulations operational support system of Islamic banks, namely Act No. 7 of 1992 on Banking and PP 72 of 1992. This provision marks the start of a banking system (Dual banking system) in Indonesia, namely the operation of the conventional banking system and the banking system with the principle of sharia. In this dual banking system, the banking system in a synergistic and together meet the needs of the community banking products and services, as well as financial support for the sectors of the national economy.<sup>7</sup>

But according to some experts Act No. 7 of 1992 is still not be enough to cope with the cases which will arise in the future. Only in 1998 the government issued and enacting Act No. 10 of 1998, and the legal basis of Islamic banks become even stronger because it is supported by the advent of Act No. 23 of 1999 concerning Bank Indonesia stated that Bank Indonesia can implement a monetary policy based on Islamic principles. Both laws became the legal basis for national banks to implement a dual banking system or the dual banking system, followed by the establishment of several banks Sharia and Islamic business units.<sup>8</sup>

## Research Methods

Research used in this research using normative legal research. Normative legal research is a type of which uses *legis positivist* concept stating that the law is identical with the norms made written and enacted by the institutions or authorities.<sup>9</sup>

This method approach is done by examining all the legislation that has to do with the problems (legal issues) are being addressed.

## 2. Results and Discussion

### 2.1. How Do The Principles Of Islamic Banks Run By Positive Law In Indonesia And The Islamic Law

In carrying out its business activities Islamic banks are required to carry out activities in accordance with the positive law in Indonesia in this case regulated in Law 21 of 2008 and the rules of other support, as well as the Islamic principles. Islamic principles used as a principle in conducting business activities. It also means a reference sharia principles and the positive law for the implementation of Islamic banking activities, as Article 2 Islamic Banking Act, which reads: "Islamic Banking in conducting its business activities based on Islamic principle, economic democracy, and the precautionary principle. Later in the article 26 of Law said that the Islamic Banking Islamic banking activities shall be subject to sharia principles by National *Fatwa* Council of *Ulama* Indonesia. Mahfuzd MD says in his article entitled "MUI Fatwa and Living Law We" found "a new fatwa can bind if you give a specific legal form by the competent authorities, for example, made into law or local regulations so that a positive law."<sup>10</sup>

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<sup>6</sup> Khotibul Umam., Op cit., p. 22.

<sup>7</sup> Adrian Sutedi., Op cit., p. 25.

<sup>8</sup> *Ibid.*, p. 32

<sup>9</sup> Ronny Hanitijo Soemitro, 1988, *Metode Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Jakarta, p. 11.

<sup>10</sup> Blog. Mahfud MD, "MUI Fatwa and Living Law Kita" <http://www.mediaindonesia.com/news/read/84453/fatwa-mui-dan-living-law-kita/2016-12-26>, Accessed on October 28, 2018.

Implementation of Islamic principles must be thorough and consistent in all aspects of business activities in the explanation that according to Article 3 of Law Islamic banking, which in running the sharia banking, practitioners of Islamic banks are required to run the Islamic Sharia (Islamic law) sharia *kaffah* (Overall) and focused (consistent). *Kaffah* in terms of overall, With all its aspects, all sides, related matters of faith or morals related with with, or related to worship, or related with *mu'amalah*, or related with personal affairs, household, community, state, and others are already regulated Islam as Allah says in surah *Al-Baqarah* 208. in implementation of Islamic Law must be done thoroughly, it means forbidden select appropriate lusts, which does not harm the interests of sharia implemented while opposing interests remove. Because God had clearly threatened retaliation for the people who do not run *kaffah* sharia in the verse.

In relation to the principles of sharia, Islamic banks have a business activity which is clearly different compared with conventional banks, based Islamic Banking Law Article 19 paragraph (1) states that the operations of Islamic Banking includes several business activities, but according Khotibul Umam, SH., LL.M. write more systematically divided into three (3) Islamic banking products, namely:

- Grouper Fund
  - Giro; on bank deposits which may be withdrawn at any time, or in Article 1 number 23 law number 21 of 2008 called *Wadiah*. Provisions concerning wadiah can also be found in the Qur'an *Surah an-Nisa* (2): 58 which means: Verily Allah sent you to convey to those entitled received mandate.
  - Savings; deposits in banks that can be withdrawn only under certain conditions that have been agreed upon, or in chapters 1 to 21 Act No. 21 of 2008 called *Wadiah mudaraba*. *Wadiah mudaraba* can also be found in the Qur'an *Surah Muzammil* (73): 20 which means: and of the people who walk the earth looking for a partial gift of God.
  - Deposit; deposits that can be withdrawn at any particular time based on your customer agreement with the bank or at maturity, or in Article 1 point 22 Act No. 21 of 2008 called *mudaraba*.<sup>11</sup>
- Fund distribution
  - Under the sale and purchase agreement; Products from banks in channeling funds to the people, the products on sale and purchase agreement consists of *Murabaha, Salam, Istishna*. As contained in article 19 item 1 letter i Act No. 21 of 2008. Was also be found in the Qur'an *Surah an-Nisa* (4): 29, which means: O ye who believe! Do not eat each other treasures thy neighbors by way of vanity, except by way of commerce (buying and selling) applicable to consensual among you.
  - Under the lease agreement; transactions of goods and services or hire wage on a service within a certain time, or in Article 1 point 25 letter b Act No. 21 of 2008 called *Ijara*. It is also stated in the Qur'an *Surah al-Baqarah* (2): 233 which means: And if you want your son milked by other people then there is no sin on you if you make the payment according to the worth.
  - Based on the contract for the result; This contract generally can be divided into two (2), namely profit and *Musharaka*. *Mudharabah* or qirad is the placement of funds from the funds (*shohibulmaal*) to the fund manager (*mudharib*) to conduct certain business activities. While *Musharaka* is an investment of capital owners to mix them in a certain business, as stated in Article 1 point 25 letter a Act No. 21 of 2008. Likewise *Musharaka* contract is a contract between two owners of capital to bring capital in certain business.

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<sup>11</sup> Khotibul Umam, 2016, op.cit., p. 80-95

- Based on the borrowing percentage contract; giving treasure to others who may be charged or asked, or in other words lend without expecting anything in return, or in Article 1 point 25 letter d of Act No. 21 of 2008 called *qard*. In the Qur'an can be found on the *Surah Al-Hadid* (57): 11 which means: who will lend the path of Allah with a good loan, He will multiply it for her loan.<sup>12</sup>
- Field Services
  - *Hiwalah*; transfer of debt from the debtor to another person who shall bear, as mentioned in Article 19 point 2 letter g of Act No. 21 of 2008. In the hadith of the Prophet has also been mentioned: delay payment for people who can afford is an injustice and if any one of you opted in to those who are able, *Hiwalah* accept it.
  - *Kafalah*; The mention of the term stipulated in article 19 paragraph 2 letter i Act No. 21 of 2008. According to M. Shafi Antonio *kafalah* which is a guarantee given by the insurer (*kafil*) to the third party to meet the obligations of both parties or covered. In the Qur'an also mentioned in the letter of Joseph (12): 72, which meant that we lost trophies king and anyone who can return it will receive a camel load weighing foods and I guarantee it.
  - *Wakalah*; an agreement whereby one delegate or cede some authority to another person to conduct an affair. as mentioned in article 19 item 1 letter o Act No. 21 of 2008.
  - Pledge; hold something in a way that justified that enables withdrawn. as mentioned in article 19 item 1 letter q Act No. 21 of 2008. In the Qur'an mentioned in *surah Al-Baqarah* (2) verse 283 which means: if you are on the way are you do not obtain a writer then let there dependents goods held (by the indebted).
  - *Sharf*; purchase agreement an exchange with other currencies. as mentioned in article 19 item 1 letter a Act No. 21 of 2008. In this case the foundation is the prophet hadith which means: buying and selling gold for gold, silver for silver, wheat by wheat, dates with dates, grapes with wine if one must be the same kind of quality and quantity and made in cash.<sup>13</sup>

## 2.1. How To Solve The Dispute In Islamic Banking

In practice, the bank can not be separated from a dispute that both conventional banks and Islamic banks, Islamic banking was sometimes also experienced disputes that require settlement so that it can provide the best solutions for each party.

Arrangements regarding Islamic banking disputes solution divided into two lanes, where it is so that the parties may choose the path which will be used approximately lead to the best solution for each maing parties. In article 55 of Act No. 21 of 2008 concerning Sharia Banking confirms that:

- Islamic banking dispute settlement conducted by the court within the Religious Cour
- In the event that the parties have foretell dispute settlement other than those referred to in paragraph (1); and
- Settlement of disputes referred to in paragraph (2) shall not be contrary to Islamic principles.

Later in the elucidation of Article 55 paragraph (2) confirmed that the definition of "settlement of disputes conducted in accordance with the contents of the contract" is an attempt through consultation, banking mediation, arbitration body national sharia (BASYARNAS) or institution other arbitration, and through the courts in general courts,

- *Basyarnas* Strip (National Sharia Board)

<sup>12</sup> *Ibid*,p. 101-149

<sup>13</sup> *Ibid*, p. 155-179

Has been regulated in Act No. 3 of 2006 and Act 21 of 2008, and the National Sharia Board fatwa Indonesian Ulama Council (DSN-MUI) number: 07 / DSN-MUI / IV / 2000 concerning the settlement of disputes *mudharabah (Qiradh)* ie, in the third section item 4 "if one party does not fulfill its obligations or if there is a dispute between two parties, the settlement through Sharia Arbitration Board after no agreement was reached by consensus.<sup>14</sup>

*Basyarnas* as a permanent institution established by the Indonesian Ulama Council serves resolve the possibility of disputes arising in relation *muamalat* trade, industry, finance, services. Besides, the agency is able to provide a recommendation or a legal opinion, which is binding advisory opinion on specific existence of a problem regarding the implementation of the agreement at the request of the parties entered into an agreement to solve. If the arbitration path can not resolve controversies, the judiciary is the last resort as the case breaker.

On the other views in reality there *Basyarnas* as arbitration institution of sharia in Indonesia there is currently a maximum of aspects of existence and development as the development of Islamic financial institutions. He still needs to improve the quality of management and Human Resources. Due to be trusted by the public, the agency should have a good appearance, the secretariat of which is always to serve the crisis. In addition to the internal state of a good and representative, should also be supported by the empowerment law (law enforcement) from the government, such as about the final and binding decision (final and binding) in the settlement. State court can also force those who do not want to carry out the execution and refused if the party re-file their case to court. It can make *Basyarnas* more authoritative and considered indispensable by the parties to the dispute.<sup>15</sup>

- Paths Religious Court

Under the law number 3 of 2006 regarding the amendment of Act No. 7 of 1989 on religious court and the second amendment through Act No. 50 of 2009. Religion Court the duty and authority as stipulated in Act No. 7/1989 declared in reality has prevailed since the Dutch colonial era although there have been changes and developments, but the changes are more significant and meaningful embodied in Act No. 3/2006 and Act No. 50/2009 on the amendment of Act No. 7/1989 on Religious Courts, namely the addition of duties and power of the Religious Courts examine, decide and finalize judge actions in the field of Islamic economics in accordance with Article 49 letter (i) 23 But further problems when a settlement is Islamic economics has handed over to the religious courts in accordance with the law, but: (a) In Article 1 (1) of Act No. 50 of 2009 turned out to limit the court only to Muslims only; (B) of the Act concerning the expansion of the authority of the Religious Courts reach the sharia economic problems yet lacks the other laws that can technically be used as a reference by a legal practitioner of religious courts as government regulations, for example.<sup>16</sup>

Thus the relationship between the judiciary Religion *Basyarnas* namely:

- Religious Court must reject the case in the field of Islamic economics who promoted him when the case is the basis of the legal relationship of the parties in the field of Islamic economics, there is an arbitration clause. That is a clause which states that all disputes arising relating to this Agreement will be resolved through *Basyarnas* ". With the clause in question, then *Basyarnas* have absolute competence in the case concerned.
- Religious Courts may also provide for the execution of the arbitral award fiat of

<sup>14</sup> *Ibid.*, p. 240

<sup>15</sup> Abdul Ghofur Anshori, 2008, *Tanya Jawab Perbankan Syariah*, UII Pres, Yogyakarta, p. 290-291

<sup>16</sup> Syukriska, 2012, *Sistem Perbankan Syariah di Indonesia*, Fajar Media Press, Yogyakarta, p. 296.

*Basyarnas* voluntarily in case one of the parties involved in the dispute are not willing to carry out the decision referred to nature is complete and binding (final and binding).<sup>17</sup>

### 3. Closing

#### 3.1. Conclusion

Based on research conducted by the author, here will conclude some conclusions as follows:

- That in carrying out operations of Islamic banks must be in accordance with what has been legislated by state law number 21 of 2008 and also based on Islamic principles based on the Qur'an's & Sunnah, this is a basic foundation that should be implemented in full by bank sharia, because of concerns the benefit of the people, where Islamic banks have become a bank in the modern era is increasingly in the account.
- In settlement of disputes in Islamic Banking is also different from the settlement of disputes in Conventional Banking. So the government passed Act No. 50 of 2009 on the change of Act No. 3 of 2006 on the Religious Courts Religious Courts establishes the authority of institutions to examine, try and finish judge actions in the field of Islamic economics. However, the Islamic economic dispute resolution should be put forward through the efforts deliberation when faced with a dispute. Through the efforts of this dialogical expected business and fraternal relations that exist can stay in touch and be able to maintain good relations among the parties, and can be more efficient in terms of time and cost. In the event that no agreement is reached new parties may pursue other, that is through negotiation, mediation, arbitration, and litigation through the courts as a last resort that can be reached by the parties in resolving disputes.

#### 3.2. Suggestion

- To remain an Islamic bank are taken into account in Indonesia even more in the world, the role of the government in order to achieve economies should give more space and special attention to Islamic banks, because the prospects for development of Islamic banks themselves very rapidly, so the government must take an active part in creating the law and regulations.
- In all financial institutions are not able to be separated from a dispute including Islamic banks, but actually the government should also issue rules there to organize cooperatives that are sharia, here there is no agreement between the government and the department of cooperatives as a legal umbrella cooperative sharia, so it must be published as soon as possible arrangements to cope with the occurrence of something that can make a split within the Islamic financial institutions.

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<sup>17</sup> Abdul Ghofur Anshori., Op cit., p. 40

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