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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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## TABLE OF CONTENTS

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Front Page .....	i
Information of the International Seminar .....	ii
Committee Composition .....	iii
Preface.....	iv
Greeting From The Dean Faculty of Law .....	vi
<b>INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS</b>	
Prof. Simon Butt .....	1
<b>CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?</b>	
Prof. Dr. Hikmahanto.,S.H.,LLM .....	4
<b>AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.</b>	
Rohimi Shapiee.....	7
<b>STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020</b>	
Dr. Jawade Hafidz, S.H., M.H .....	11
<b>THE NETHERLANDS INGLOBAL CORRUPTION</b>	
Siti Malifah Marlou Feer, M.A. ....	28
<b>ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA</b>	
Laras Susanti.,S.H., LLM.....	33
<b>LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)</b>	
Sumarwoto Umar .....	37
<b>THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY</b>	
Lantik Kusuma Aji .....	46
<b>THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020</b>	
Khalid .....	55
<b>THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA</b>	
Siska Diana Sari.....	62
<b>THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST</b>	
Elis Rahmahwati.....	78
<b>DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT</b>	
Agung Widodo.....	87
<b>DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)</b>	
Muhammad Andri .....	102

<b>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</b> Yati Nurhayati.....	111
<b>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL THROUGH ENFORCEMENT OF ETHICS</b> Dr. Sukresno, SH, M.Hum .....	118
<b>CORRUPTION POTENCIES IN LAND USE POLICY (A Case Study in Kuningan Regency)</b> Haris Budiman .....	126
<b>CORRUPTION PREVENTION AND CONTROLS</b> INP Budiarta .....	133
<b>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</b> Sri EndahWahyuningsih .....	145
<b>JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</b> Untoro .....	155
<b>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</b> Zulfiani.....	162
<b>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</b> Anis Mashdurohatun .....	171
<b>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF CORRUPTION ERADICATION IN INDONESIA</b> Muh. Afif Mahfud.....	181
<b>DISCOURSE POLITICAL LAW IN INDONESIA ON A COMPLETION OF PLATO PHILOSOPHY</b> Adrianus M. Nggoro,SH.,M.Pd.....	189
<b>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</b> Agus Saiful Abib.....	202
<b>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF GOOD GOVERNANCE</b> Aris Yulia .....	211
<b>ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE PERSPECTIVE OF HUMAN RIGHTS</b> Ariyanto,SH.,MH.....	221
<b>SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA</b> Desy Maryani.....	232
<b>LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDOVER TO OTHER COMPANIES IN INDONESIA</b> Endah Pujiastuti.....	244

<b>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</b> Pupu Sriwulan Sumaya .....	256
<b>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</b> Ifrani .....	267
<b>THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS</b> Yasmirah Mandasari Saragih.....	276
<b>AFFIRM ROLE OF EXISTENCE <i>RECHTSVERWERKING</i> TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</b> Rofiq laksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus.....	287
<b>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</b> Ida Musofiana.....	304
<b>FREED INDONESIA'S CORRUPTION BETWEEN HOPE AND REALITY</b> Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH.....	313
<b>UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TOWARDS THE SHAFT OF THE MARITIME WORLD</b> Dr.Lathifah Hanim, SH.M.Hum., M.Kn. and Letkol (mar) MS.Noorman, S. Sos., M.Opsla.....	319
<b>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</b> Lilik Warsito.....	325
<b>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</b> Sri Suatmiati.....	334
<b>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</b> Siti Zulaekhah.....	344
<b>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</b> Supriyanto, Hartiwiningsih, Supanto.....	354
<b>JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</b> Siti Rodhiyah Dwi Istinah.....	364
<b>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</b> Aryani Witasari.....	376
<b>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</b> Achmad J Pamungkas ( <i>Indonesia</i> ), Carlito Da Costa ( <i>Timor Leste</i> ) .....	390

<b>STUDYING THE WISDOM OF ZAKAT</b> Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) .....	398
<b>HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE</b> Agus Winoto .....	410
<b>RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON WELFARE</b> Mohamad Khamim .....	420
<b>THE TASK RECONSTRUCTION AND BPKP'S AUTHORITY IN THE CASE OF JUSTICE VAUE BASED CORRUPTION</b> Sarbudin Panjaitan .....	429
<b>THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE</b> Mustar .....	438
<b>JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED</b> Subiyanto .....	446
<b>REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE</b> Masduqi .....	452
<b>RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION IMPLEMENTATION OF VALUE-BASED JUSTICE</b> Kukuh Sudarmanto Alugoro .....	462
<b>ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999 JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE</b> As'adi M. Al-ma'ruf .....	472
<b>RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT LAW BASED ON JUSTICE</b> Christina N M Tobing .....	479
<b>THE LAW AND THE IMPACT OF MARRIAGE SIRRI</b> Sahal Afhami .....	489
<b>CRIMES AGAINST CHILDREN AS ACTORS</b> Muhammad Cholil .....	503
<b>RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW (KUHAP) ABOUT THE DETENTION</b> Muhammad Khambali .....	512

<b>BASED ON JUSTICE PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)</b>	
Esti Ningrum .....	520
<b>RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA</b>	
Urip Giyono .....	531
<b>IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)</b>	
Muhammad Yaman .....	539
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE</b>	
Hanuring Ayu Ardhani Putri .....	549
<b>REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR</b>	
Ansharullah Ida .....	556
<b>RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE</b>	
Teguh Anindito .....	569
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE</b>	
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito .....	579
<b>IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW</b>	
Aji Sudarmaji .....	587
<b>FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)</b>	
Bachtiar Simatupang .....	594
<b>RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE</b>	
M. Hasyim Muallim .....	616
<b>RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW</b>	
Salomo Ginting .....	625
<b>LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA</b>	
Muhlas .....	639

<b>IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)</b>	
Ahmad Zaini .....	648
<b>IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT</b>	
Ruslan .....	658
<b>RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE</b>	
Jufri Ghalib .....	667
<b>RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE</b>	
Elpina .....	679
<b>RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE</b>	
Ramon Nofrial .....	693
<b>RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY</b>	
Hakim Tua Harahap .....	706
<b>RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE</b>	
Ulina Marbun .....	726
<b>RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE</b>	
Zaenal Arifin .....	740
<b>THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE</b>	
Abdul Kholiq .....	751
<b>THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA</b>	
Adi Mansar .....	767
<b>MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)</b>	
Mariah S.M. Purba .....	778
<b>POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)</b>	
Warman .....	790

<b>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</b> Sekhroni .....	798
<b>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN'S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</b> Indriyana Dwi Mustikarini .....	809
<b>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</b> Bambang Sulistyowati .....	816
<b>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</b> Adya Paramita Prabandari .....	826
<b>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</b> Alwan Hadiyanto .....	839
<b>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</b> Sulistyowati .....	852
<b>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</b> Sarjiyati .....	863
<b>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</b> Erna Trimartini .....	873
<b>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</b> Sukmareni .....	885
<b>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</b> Anis Rifai .....	903
<b>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</b> Sri Setiawati .....	913
<b>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</b> Achmad Sulchan .....	922
<b>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</b> Herwin Sulistyowati .....	932
<b>STANCE AND AUTHORITY OF PEOPLE'S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</b> Ahmad Mujib Rohmat .....	944

<b>TAXES AND ALMS SEEN FROM ISLAMIC LAW</b>	
Mohammad Solekhan .....	954
<b>DIVERSION IN COURT (Case Studies in Karanganyar District Court)</b>	
Anita Zulfiani .....	964
International Seminar	
Photos.....	971

# THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE

By

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## ABSTRACT

This study aims to identify the struggle of Islamic Banking in theory and practice, analyzes the factors that affect the implementation of Islamic banking as well as the reformulation of Islamic banking in the future. This study used sociological juridical approach, and the data used were primary and secondary data, these data were then analyzed by using descriptive analytical. The results showed that Islamic banking has an important principles *la riba, la misyir, la gharar, la Dzulm and la haram* within the framework of basic fairness, balance and well-being, but in practice there are still aberrations on Islamic principles. Some factors affect the strength of the capitalist system are human resources and culture of capitalism in banking practices and lack of oversight and enforcement. Islamic banking solution in the foreseeable future need to be strengthen the Islamic banking system, Human Resources who are experts in sharia and revitalizing the Islamic principles of independent, separate from the frame *ta'awun* capitalist system, improve internal and external monitoring and enforce the principle of sharia (*kafah*) in whole, consistent (*Istiqomah*) and giving sanctions as *tarbiyah*.

**Keywords:** Reflection, Islamic banking, theory and practice.

### A. Background

Bank is known as the main activities of financial institutions that accept deposits and lend money for the community, through a loan agreement between creditors and debtors. Banking institutions assist in the fulfillment of capital for economic activities by providing loans money such as through bank credit in the form of a loan agreement between the Bank as a creditor (lender) to a debtor as a owe party.<sup>1</sup>

In line with the Indonesia's national development objectives is to achieve the creation of a just and prosperous society based on economic democracy based on values of justice, solidarity, equity in accordance with Islamic principles—it is called as Islamic banking.<sup>2</sup>

Islamic bank is a bank that applies the principle of sharing profits and losses.<sup>3</sup> Islamic Bank is also not only be able to provide services that can not be given in conventional banks because the services are usually provided by a non-bank financial institutions, but also it

<sup>1</sup> Kasmir, 2000, *Bank dan Lembaga Keuangan Lainnya (Edisi Baru)*, Raja Grafindo, Jakarta, page. 223.

<sup>2</sup> Constitution No. 21 Year 2008 about Islamic banking

<sup>3</sup> Sutan Remy Syahdeini, 2005, *Perbankan Islam dan kedudukannya dalam Tata Hukum Perbankan Indonesia*, Pustaka Pustaka Grafiti, Jakarta, page.1.

sometimes also performs a social function (charity) which is not usually performed by a conventional bank which orientate on "profit" eg financing facility called *Al-Hasan Qardhu*. It kind of loans without any benefit only has the obligation to return the same amount as the loan.<sup>4</sup>

A basic philosophy for the operation of Islamic banks which animates the entire relationship, the transaction is efficient, justice and solidarity. Efficiency refers to the principle of mutual help in synergy to obtain the greatest possible profit. Justice refers to a relationship that is not rigged, willing, with the approval of mature on the proportion of its inputs and outputs. Togetherness refers to the principle of offering help and properties to enhance their productivity.<sup>5</sup>

Islamic principles are based on the values of fairness, expediency, balance, and universality (*rahmatan lil 'alamin*). The principle of Islamic banking is a part of Islam with regards to economics. One of the principles of Islamic economics is the prohibition of interest in its various forms, and using the system includes the principle of sharing. With the principle of sharing, Islamic banks can create a healthy investment climate and fair because all parties can share the advantages and potential risks arising that would create a balanced position between the bank and its customers.<sup>6</sup>

So it is important to examine further with respect to the reflection of Islamic banking in the struggle theory and practice today. By focusing on several issues including how the implementation of Islamic banking as intermediary institutions between theory and practice, the factors that affect the implementation of Islamic principles and Islamic banking solution implementation in the future.

## **B. Methods**

In this study used sociological juridical approach, and the data used were primary and secondary data. These data were then analyzed by descriptive analytical.

## **C. Results and Discussion**

### **1. Reflection of Islamic Banking in Theory and Practice struggle**

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<sup>4</sup> Muhammad, op.cit.,

<sup>5</sup> Aziz dalam Edy Wibowo dan Untung Hendy Widodo, 2005, *Mengapa Memilih Bank Syariah*, Ghalia Indonesia, Bogor, page. 33.

<sup>6</sup> Explanation of Constitution No. 21year 2008 about Islamic Bank

Another term used for the designation of Sharia banks is the Islamic bank. In academic terms sharia and Islam are totally different, but technically to mention Islamic Bank and Islamic Bank have the same meaning. Islamic Bank is a financial institution which engages in providing credit and services in payment traffic and circulation of money that operation adapted to the principles of Islamic Sharia.<sup>7</sup> In addition, in the operation of Islamic banks to operate without relying on interest, so it can be called a bank without interest<sup>8</sup>. Meanwhile, according to Kernaen Perwataatmdja, Islamic bank is a bank that operates in accordance with the principles of Islamic Sharia. The Bank refers to the procedure of the operation of the provisions of the Quran and Hadith.<sup>9</sup>

Banks operates in accordance to the principles of Islamic Sharia means the bank is in operation it follows the provisions of Islamic law, especially regarding governance way in Islam. In the ordinance of *mualamat* was shunned practices that feared contain elements of usury, to be filled with investment activities on the basis of the results and trade finance or business practices are conducted at the time of the Prophet Muhammad or other forms of business that has been there before , but it is not forbidden by him.<sup>10</sup>

Based on the explanation above, the Islamic bank is a bank that the procedures for its operation are based on the procedure of the Islamic *muamalah* based on al-Quran and Hadith. In the ordinance *muamalah* were shunned practices that feared containing elements of usury to be filled with activities on the basis of profit sharing investment and trade financing.<sup>11</sup>

The main objective the establishment of an Islamic bank is to avoid interest money held by conventional banks.<sup>12</sup> Bank interest is close to *riba* in Islamic banks. *Riba* is an extra on top of the loan principal.<sup>13</sup> In Arabic means an additional, albeit slightly, in excess of the principal amount loaned, and that thus it both including usury and interest.<sup>14</sup> *Riba* is also defined without additional counterweight required to either one of the two parties do

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<sup>7</sup> Imamudin Yuliadi, 2001, *Ekonomi Islam Sebuah Pengantar*, Lembaga Pengkajian & Pengamalan Islam (LPPPI), Yogyakarta, page. 5.

<sup>8</sup> Muhamad, 2001, *Teknik Perhitungan Bagi Hasil di Bank Syariah*, UII Press, Yogyakarta, page. 1

<sup>9</sup> Karnaen Perwataatmdja dan Muhamad Syafi'I Antonio, 1992, *Apa dan Bagaimana Bank Islam*, Dana Bhakti Wakaf, Yogyakarta, page. 1

<sup>10</sup> Ibid.,

<sup>11</sup> Ibid., 1-2

<sup>12</sup> Hendi Suhendi, 2012, *Fiqh Muamalah Membahas Ekonomi Islam*, PT Raja Grafindo Persada, Jakarta, page. 286.

<sup>13</sup> Maulana Muhammad Ali, 1977, *The Religion Of Islam*, Terjemahan oleh R. Kaelan dan M. Bachrudin, Islamologi (Dinnul Islam). PT Ichtiar Baru Van Hoeve, Jakarta, page. 484.

<sup>14</sup> Afzalur Rahman, 2015, *Economic Doctrin of Islam*, Terjemahan Oleh Soeroyo dan Nastagin, *Doktrin Ekonomi Islam*, Jilid 3, PT Dana Bhakti Prima Yasa, Yogyakarta, page. 85.

*muamalah* debts or exchange of goods.<sup>15</sup> While in the explanation of Law No. 21 of 2008 concerning on Islamic banking, described *riba* is the addition of income illegally (vanity), such as in the exchange transaction of mutual goods unequal quality, quantity, and delivery time (*Fadl*), or in a loan transactions requiring customers receiving facility to refund received more than the loan, because the passage of time (*nasi'ah*). The other principles of sharia are as follows:

- a. Gambling (*maysir*) is a transaction that depends to a state of uncertainty and profit oriented.
- b. *Gharar* is a transaction that the object is not clear, not owned, not known to exist, or can not be delivered at the transaction date unless otherwise regulated in sharia.
- c. *Haram* is a transaction that is the object forbidden in Sharia.
- d. *Dzalim* is a transaction that causes an injustice to the other party.

The fulfillment of Sharia Principles is defined in Article 2 of Regulation

Bank Indonesia number; 10/16 / PBI / 2008 dated 25 September 2008 were conducted to the principal provisions of Islamic law, such as, the principles of fairness and balance (*adl wa tawazun*), *maslahatan* (*maslahah*), universalism (*alamiyah*):

- a. *Adl* is the placement of things just in place, and provide something only the rightful and treat something in position.
- b. *Tawazun* is a balance that includes aspects of the material and the spiritual, the private aspect. and the public, the financial sector and the real sector, business and social, and balance utilization and sustainability aspects
- c. *Maslahah* is all forms of worldly goodness and collective dimension and must meet three (3) elements of sharia compliance (halal), useful and bring good (*Thoyib*) in all aspects as a whole that does not cause trouble.
- d. Universalism (*Alamiyah*) is something that can be done and accepted by, and for all parties concerned (*rahmatan lil Alamin*)
- e. It does not contain *gharar maysir*, *usury*, *unjust* and *haram* objects which are mentioned above.

Besides, according to Law Compilation of Islamic Economics as an attachment section 29 of Supreme Court Rule number 02 in 2008, said that an agreement (*Akad*) does not contain elements of *ghalath* or a mistake, was made under *ikrah* or coercion, or deception *taghrir*, and *ghubn* or incognito.

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<sup>15</sup> Chuzaimah T. Yanggo dan Hafidz Anshary, 2015, Problematika Hukum Islam Kontemporer, Cetakan Ketiga, PT Pustaka Firdaus, Jakarta, page.34.

- a. The mistake did not result in the cancellation of a contract unless the mistake occurred regarding the nature of the subject of the agreement.
- b. Coercion is pushing someone to do something and this is not a free choice.
- c. Fraud is to influence others by deceit to establish contract
- d. Incognito is a state where there is no equality between the achievements with rewards achievements in a contract.

Besides, in agreement (*Akad*) always contain a clauses associated with Sharia principles, including the principle of transparency of products and services in an effort to realize the Islamic bank of integrity and trust, the principle of applicability of universal, always uphold the ethical and legal norms in economic activity to Islamic banks can be utilized by the whole society and accepted by all parties and bring *rahmatan lil alamin*.

There are three basic differences in *murabaha* transactions with interest instrument:<sup>16</sup>

- a. *Murabaha* way is a sale transaction rather than a direct loan transactions and lending;
- b. Sharia does not allow people to sell or lease anything that does not belong to him/her, financial services providers to take risks or leased;
- c. What is stated in the case of a sales transaction is not interest rates, and so the price is set. It can not be changed if there is a delay in payment for conditions that can not be predicted.

In its development, the idea is raised to avoid usury conventional banks, by establishing Islamic banks. Since it grows in a capitalist environment, a lot of contradiction (*tanaqudh*) between Islamic banks and the capitalist system become a place of life. For example, in Islamic banks apply the principle of sharing and for loss (profit and loss sharing)—in *mudharaba*, as stated in the rules of jurisprudence, "*Al-ghurmu bi al-ghunmi* (The risk of loss is run along with the rights of benefit)." On the contrary, in the capitalist system, particularly in the banking world, we do not share the term for the loss.

Islamic banking is simply serves as an intermediary. That is, banks only play a role in financing, and not buy things, to then resell. Since the regulations and in fact, the bank is not allowed to have a practical commercial practice. Fatwa No. 07 / DSN-MUI / IV / 2000, then serve as guidelines for the practice of Islamic banking. National Sharia Council (DSN/*Dewan Syariah Nasional*) states: "LKS (institute of Islamic Finance or in Bahasa *Lembaga Keuangan Syariah*) as a provider of funds, to bear all the losses resulting from the *mudaraba* unless *mudharib* (customers) make mistakes intentional, negligent, or violates the

<sup>16</sup> M.Umer Chapra,2001,*The Future of Economics*, An.Syariah Perspective.SEBI, Jakarta,page.267.

agreement." DSN again stresses of this by statement: "The financiers bear all the losses resulting from the *mudaraba*, and managers should not bear the loss of any, unless resulting from intentional error, omission, or violation of the agreement. The National Sharia Board through no: 25 / DSN-MUI / III / 2002 allow this practice. In the fatwa DSN stating: "Great cost of maintenance and storage marhun (goods mortgage) should not be determined by the amount of the loan." While the fatwa DSN No: 26 / DSN-MUI / III / 2002 which specifically explains the rules of the gold pawn, stated: "the cost referred to in paragraph 2 is based on the amount of expenditure manifestly necessary. (Muhammad Arifin Baderi: Muslim Entrepreneur magazine: Issue 25).

Based on the above description, Islamic banking has principles, such as *la riba*, *la misyir*, *gharar la*, *la la Dzulm* and *la Haram* within the framework of basic fairness, balance and well-being, but in practice they aberrations Islamic principles.

## **2. Factors that affect the implementation of Islamic Banking and solutions.**

Since 1992 the banking system in Indonesia, there are two kinds of systems that exist. They are conventional systems and sharia system which are allowed to operate side by side or dual banking system<sup>17</sup>. With the dual banking system that operates in Indonesia means that there are also differences in principle of both systems. Which in the conventional banking system with business activities focused on the system of interest, while Sharia bank focuses on the sharing system as its main activity, and coupled with the non profit-sharing system that is buying or selling (*al-bai '* ) and lease (*ijara*) and Services.

Dual Banking System has resulted in the community doubted the fulfillment of compliance the Sharia Bank operations. According to Arvin Hamid<sup>18</sup>, he commented that one side of Islamic Banking anti usury / interest while the other side are addicted conventional *riba* and many other principal difference indicates an impossibility if united in its implementation. According to Muhammad Arifin Badri<sup>19</sup> that the concept of Islamic Banking has not answered expectation People wanting Sharia. People of Islamic banking truly hope sharia-compliant.

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<sup>17</sup> Veithzal Rivai, dan Arviyan Arifin, 2010 *Islamic Banking, Sebuah Teori, Konsep dan Aplikasi*, Bumi Aksara, Jakarta, page. 149

<sup>18</sup> Arfin Hamid, 2007, Hukum Ekonomi Islam ( Ekonomi Syariah) DiIndonesia Aplikasi & Prospektifnya page 138.

<sup>19</sup> Muhammad Arifin Badri, 2012 Bank Syariah Sudahkan Menjawab Harapan Umat, Majalah Pengusaha Muslim nomor 24 page 8.

The desire to have a separate Act implemented by the Government promulgated Law No. 21 of 2008 concerning Islamic Banking should therefore be devised several conditions that must be adjusted to remain focused on six aspects, including:

- a. Obedience to Islamic principles,
- b. Compliance with prudential aspects,
- c. Development of operational efficiency and competitiveness,
- d. System stability and benefits for the economy,
- e. Improving the competence and professionalism of human resources, as well as the optimization of the social function of Islamic banks in facilitating the voluntary sector / social with people's economic empowerment<sup>20</sup>

Factors that arise in the implementation and development of Islamic banking, which are as follows (Antonio, 1999):

- a. Understanding people is not yet appropriate to the operational activities of Islamic banks.
- b. Banking regulations in force is not yet fully operational accommodate Islamic banks.
- c. Network sharia bank offices are not widespread.
- d. The human resources with expertise in Islamic banks are still limited.

In the implementation of financing in Islamic Bank is expected to comply with the provisions of Sharia that the two transactions were not allowed into the Agreement. Often called two in one<sup>21</sup>, yet again must be fulfilled Pillars and Conditions in any agreement. When examined turned out the definition as contained in Law 21 of 2008 there were compliance issues and requirements which can result in nullification either null and void or be canceled court.

In order to improve compliance adherence to Islamic principles, then issued Bank Indonesia Regulation Number: 7/46 / PBI / 2005 dated 14 November 2005 concerning the Agreement of Collection and Disbursement For bank conducting business activities based on Sharia Principles which contain minimal requirements in the Making Deed Agreement Products on any Islamic Bank. Infuriately, Bank of Indonesia Regulation No. 7/46 / PBI / 2005 these regulations revoked and declared invalid. It was later updated in the last Bank Indonesia Regulation Number: 10/16 / PBI / 2008 dated 25 September 2008 on the

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<sup>20</sup> Laporan BI year 1998 tentang perkembangan Bank Syariah

<sup>21</sup> Adiwarman, 2007, (dua akad sekaligus) atau dalam bahasa Arabnya: shafqatain fi al shafqah . This causes Gharar in the contract, namely a lack of clarity of the contract: eg Akad Hire purchase is valid lease agreement or purchase contract,page. 144.

Implementation of Sharia in Fund Raising Activities and Funds Distribution And Services Bank Sharia. Where is set a few things include:

- a. Business activities.
- b. The transaction does not contain elements of *usury, gambling, gharar, haram and unjust,*
- c. Process and manner in conducting business activities are required to make the Agreement in accordance with the provisions of the Sharia regarding the type of Islamic transactions are used, and must also fulfill the basic provisions of Islamic law, among others, the principles of fairness and balance (*adl wa tawazun*), *maslahatan (maslahah)*, universalism (*alamiy*)<sup>22</sup>

Until now the financing agreement entered into between the Bank and the Customer under the agreement based on the freedom of contract merely, where the usual position of both sides is not balanced. Therefore, it is possible the content is biased whereby customers get less legal protection.

In general, the Credit Agreement and the Agreement Funding is always made in the agreement form standard that the clauses have been prepared in advance by the Bank, so that the debtor or customer does not have any choice but to approve either directly signed the agreement, even they are only stamped his thumb, so it does not satisfy fairness and balance.

Within the framework of the development of the operating efficiency and competitiveness of Islamic banking, Bank of Indonesia has issued regulations related to institutions and the implementation of prudential principles included to accommodate the settlement of tax matters of Islamic banks. To further simplify the process of developing products and services for Islamic banks, the Book Codification of Islamic Banking Products has been released.

In the frame of Banks' goal both Conventional and Islamic Bank, these banks are in the same intends to benefit in addition aimed at supporting the implementation of national development directed at improved equity, togetherness, and distribution of welfare of the people in economic activities. Therefore, the implementation of Sharia principles in Islamic banking activities should be implemented fully (*kaffah*) and consistent (constancy) so as to achieve justice, solidarity and equality in economic activity.

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<sup>22</sup> Explanation of Article 2 PBI; 10/16/PBI/2008

On the other side of usury is a custom in the tradition of the economically ignorant society (*Jahiliyah*)<sup>23</sup>, which goes against the principles of Islam *muamalah*<sup>24</sup>. Free capitalist economic system value ultimately produced humans are greedy, wasteful and arrogant. The capitalist system has also spawned a number of great bankers, some wealthy industrialists, a number of successful entrepreneurs. Behind its success, this economic system has led many consumers who are not able to meet its minimum needs. The gap between rich and poor people was a sharply occurs. The companies that are weak are eliminated and fell. Understanding of capitalism that considers asset is the property of the man himself, for man is working on his own. In capitalism which adheres to the principle *laissez faire*, individual ownership rights are absolute, without limit. It ensures freedom of entering all kinds of economic activities and transactions by free competition. (Agustianto: 2011)

In Islamic economics, ownership intrinsic is only to God. (Qur'an, 24:33). God is the absolute owner (absolute), while the man holds the property rights relatively, meaning that humans are just as surrogate receiver, trustee (mandate holders) who must give an account to God. Thus, according to Islamic economics, human mastery over resources, factors of production or productive assets are merely surrogate of God. Man over property ownership is absolutely opposed to monotheism, because true ownership is only in Allah.

Thus the factors that influence of Islamic Banking in implementing the principles of the sharia as the strength of the capitalist system in a centralized banking practices. Human resources have not been based on sharia and the capitalism culture is still strong in banking practices and lack of oversight and enforcement. Islamic banking solution in the foreseeable future, need to strengthen the Islamic banking system, human resources experts in sharia and revitalizing the Islamic principles of independent, separate from the frame *ta'awun* capitalist system, improve internal and external monitoring and enforcing the principles overall sharia (*kafah*) and Consistent (*Istiqomah*) and sanctions as *tarbiyah*.

#### D. Conclusion

1. The Islamic banking has important principles, there are: *la riba, la misyir, gharar la, la la Dzulm andharaml* within the framework of basic fairness, balance and well-being, but in practice they aberrations Islamic principles.

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<sup>23</sup> Ahmad Rofiq, 2014, *Fiqh Aktual: Sebiah Ikhtiar menjawab Berbagai Persoalan Umat*, Putra Mediatama Press, Semarang, page.190.

<sup>24</sup> Muhammad Syafi'I Antonio, 2013, *Bank Syariah dari Teori ke Praktek*, Gema Insani Press, Jakarta, page.37.

2. Affecting factors which influence this Islamic banking is the strong capitalist system, human resources and culture of capitalism in banking practices and lack of oversight and enforcement. The solution in Islamic banking in the future, should revitalize the Islamic principles independently, separate from the capitalist system *ta'awun* frame, centralized the strengthen of Islamic banking system, increase knowledge and skills of Human Resources in Sharia Islamic banking and improve supervision internally and external and to uphold Islamic principles thoroughly (*kafah*) and Consistent (*Istiqomah*) and sanctions as *tarbiyah*.

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