

Creating Legal Certainty in Sharia Banking Law Systems through the Embodiment of Sharia Compliance Principle

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3

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Abstract

This work is aimed at creating legal certainty sharia compliance arrangements in sharia banking law systems. This idea is highly required to improve the credibility of the sharia-based business activities. Certainly, this study is relevant to solve some normative problems in regulating and managing of the sharia banking activities, particularly regarding sharia compliance. In detail those normative problems can be seen from the inconsistency and ambiguous norms, conflicted norms and legal vacuum in regulating sharia compliance principle. To visualize and elaborate the above issues, these works apply normative legal research, where all data are collected through intensive and extensive literature review. Those data will be analysed by philosophical, statute and conceptual approach. The core issues that will be elaborated in this work are: (i) formulating Islamic values to the some relevant sharia banking law principles; (ii) some normative problems construction of sharia compliance principles in sharia banking law systems; (iii) reconstructing of regulating sharia compliance principles to creating legal certainty. At the end, this work will offer appropriate model in coherence those normative problems in order to creating legal certainty in managing and regulating sharia banking law.

Keywords: legal certainty, sharia compliance principle, sharia banking law systems.

1. Introduction

Sharia banking activities in Indonesia have not fully reflected the principles of sharia compliance. Islamic banking practices that should not contain elements of *riba* (usury), *maisir* (gambling), *gharar* (deception), *haram* (proscribed), and *zalim* (unjust) in fact often make customers more heavily burdened than conventional banking business practices. The emergence of term "sharia" simply becomes a label, while the practice is not much different from conventional banking. It happened because of weak arrangement of sharia compliance in Islamic banking regulations.

A good and effective Islamic banking regulation is necessary for the realization of effective legal certainty for stakeholders of sharia banking, in particular their compliance with sharia principles. The enforceability should also be capable of binding and being enforced. The regulation can be realized if the norm is consistent, clear, and not collide with each other.

Sharia compliance arrangement in the legal system of sharia banking is still experiencing serious problems, such as inconsistency, ambiguity, collision and absence of norm in the system arrangement. The principles underlying the law are not constructed based on the norms of sharia compliance arrangement. The problems become the main cause of the weak and ineffective regulatory system in Indonesia sharia compliance. Therefore, "sharia banking" merely becomes a "label", while in fact the practice is not much different from conventional banking.

The above description becomes substantive reason for carrying out the normative legal research. Various secondary data, in the form of primary, secondary, and tertiary legal materials, are processed through inventory, identification, classification, and systematization. The study

implemented legal, conceptual, and philosophical approach and qualitative analysis by applying the principle of preference and interpretation of the law. The results of analysis were concluded with deductive method.

2. Method

This study is a normative legal research, conducted by reference to legal norms contained in the legislation and refers to court decisions. In addition, this study is descriptive analytics which reveals the legislation relating with legal theories as research objects. The approaches implemented in the study are statute approach, conceptual approach, and case approach.

3. Discussion

3.1 Formulating Islamic Values to Some Relevant Sharia Banking Law Principles

Establishment of the legal system of sharia banking in Indonesia is based on some of relevant legal principles. The principles are sharia compliance, legal certainty (legality), independence, and professionalism.

The four principles are formulated from Islamic values, such as fairness, expediency, balance, and universality (*rahmatan lil 'alamin*). Those values are derived from the Word of Allah in the Qur'an interpreted by Muhammad SAW in the hadith and become the way of life of mankind as individual and social being.

Analysis of the formulation of Islamic values in the four legal principles can be seen as follows:

3.1.1 The Principle of Sharia Compliance

Compliance to sharia is one of the principles underlying the enactment of Act No. 21 of 2008 concerning Sharia Banking (*Undang-Undang Perbankan Syariah/UU PS*) as a special regulation of sharia banking in Indonesia. This is indicated by sharia banking mandatory to use the word "sharia" on behalf of their establishment and use sharia principles as the foundation of any business activities.

Implementation of Islamic economic activity (including sharia banking) is basically a development of monotheism value. This value forms the foundation of a significant stand and implementation of sharia banking activities. The existence of sharia banking practice is to apply the values of Islamic law in the field of *muamalah*. The activities are not only individualistic profit-oriented, but also social-oriented as the manifestation of worship (slave obedience to the Creator).

3.1.2 The Principle of Legal Certainty

The principle of legal certainty in the context of sharia (Islamic law) is derived from revelation. By surah al-Isra verse 15, God says that a person will not be punished before a Messenger is sent. The teaching can be obtained from the verse is something new can be judged (allowed or not) when it is regulated by law. Thus, the principle of legal certainty is a principle derived from the value of the teachings of Islam (the revelation of Allah SWT).

Legal certainty in the realm of positive law is a principle which requires all acts of state administrators (related to the interests of the state) to be based on legislation, decency, and fairness. Legal certainty in Act Number 21 of 2011 on the Financial Service Authority (*Undang-Undang Otoritas Jasa Keuangan/ UU OJK*) is interpreted as a principle in law that prioritizes state foundation laws and fairness in every policy of Financial Service Authority (*Otoritas Jasa Keuangan/ OJK*) administration.

3.1.3 Principles of Independence

Independence is the formulation of the value of Islamic law teachings (sharia). Allah, in surah al-

Jumu'ah, verse 10, commanded His servants to always strive to be self-independent (not dependent) on others by always struggling to find the gift of God Almighty. Muhammad, in the hadith narrated by Bukhari and Muslim, taught that hand over (the one who gives) is better than the hand below (the one who receives). The teaching contains values that man must strive to be a strong individual and is not affected and dependent on others.

Independence is one of the most important principles in the discussion of the establishment of the regulation of financial institutions in general, particularly in the discussion of the establishment of sharia banking regulations. When the regulation of sharia banking determines the institution concerning on the implementation of sharia compliance, the independence of the institution becomes a serious discussion.

3.1.4 Principle of Professionalism

The principle of professionalism is the formulation of the value of the teachings of Islam. Allah, in Surah al-Isra verse 36, ordered to His servant not to do anything that is not based on knowledge (expertise/professionalism). The teaching was also expressed by Muhammad through the hadith which states that when everything is submitted to the not experts, watch the time of their collapse.

Based on both teachings, it can be summarized that professionalism (skill) is an significant principle underlying the establishment of sharia banking regulations, in which the regulation and supervision of Islamic banking operations must prioritize certain skills in the field of Islamic economic law (*muamalah*). Its presence in sharia banking regulation could create legal certainty and reassure the public about the implementation of sharia values in Islamic banking in Indonesia.

3.2 Constructing Sharia Compliance Principle in Sharia Banking Law Systems

Based on the description of normative construction of sharia compliance settings above, several crucial problems are found as follows:

3.2.1 Inconsistencies and ambiguities of norm

Paragraph 6 of General Explanation, Article 1 point (12), Article 26 paragraph (1) and (2) of UU PS establishes normative fact that MUI has been designated as the authority of the sharia compliance with the legality of the authority in the form of issuing fatwa of sharia principle. On the other hand, the provisions of Article 26 paragraph (3) and Article 51 of UU PS also authorizes BI (Bank Indonesia) to issue regulations on sharia principles, sharia compliance principles, and Islamic management principles. Granting authority to BI is in line with Article 6 (m) of the Banking Act. Researchers argued the provision of Article 26 paragraph (3), Article 51 of UU PS, and Article 6 (m) of the Banking Act is a form of inconsistency against the norm in Paragraph 6 of General Explanation, Article 1 point (12), and Article 26 paragraph (1) and (2) of UU PS. However, after MUI is designated as sharia compliance authority to set fatwa of sharia principles, in fact BI is still given the authority to issue rules on sharia principles, sharia principles compliance, and Islamic management principles.

The norm inconsistency problems have raised doubts (ambiguity) about the determination of sharia compliance authority and laws (regulation/determination) of sharia principles that must be adhered by sharia banking. The doubts might cause the stakeholders' multiple interpretations of these norms. The fundamental questions arise as a form of doubt (uncertainty) as follows: (i) *Who (which organization) is actually defined as sharia compliance authority? MUI or BI?*; (ii) *Which product of sharia principle must be the basis of sharia banking business activities? fatwa of sharia principles or PBI of sharia principles, or both?*; (iii) *If PBI (the product of PBI), POJK (the product of OJK), and fatwa (the product of MUI) are not the same or even contradictory, which one shall be the basis of sharia banking business activities?*

The ambiguity of the norm also occurs in the norms of assignment (authority) of sharia principle supervision to DPS. DPS authority is a form of "representation" of sharia compliance authority. The ambiguity emerges because even MUI is chosen as sharia compliance authority.

However, based on Paragraph 6 of General Explanation of UU PS, MUI authority must still be represented by DPS.

Problems of inconsistency and ambiguity are resolved by applying the interpretation of the law, namely teleological interpretation. Efforts are made to examine the ontological basis of UU PS and *ratio legis* of the inclusion of paragraph (1), (2), (3), (4), and (5) in Article 26 and Article 51 of UU PS.

Ontological basis of the emergence of UU PS is the strong will of society to make a separate legislation governing sharia banking. Philosophically, the formulation of UU PS is due to differences in characteristics between sharia banking and conventional banking. On the other hand, ontological basis of the emergence of UU PS based on juridical point of view is due to the setting of sharia banking in the Banking Act is not specific.

Based on the ontological description and the *ratio legis* above, it is found that the norms made in Article 26 paragraph (1) and (2) of UU PS is illogical because it contradicts the theory of the order of law, the theory of authority, and the theory of legal entities. In addition, MUI is not an institution of public law (state agency) and the fatwa issued by MUI is not one of legislation (positive law). By that reason, MUI cannot be appointed as sharia compliance authority and the fatwa of MUI automatically cannot be forced to be obeyed by the people, especially sharia banking stakeholders.

3.2.2 Conflict of norms

The series of norms in Article 6 (m), Article 26 paragraph (3), (4) and (5), and Article 51 of UU PS collide with the series of norms in Paragraph 6 of General Explanation, Article 1 point (12) and Article 26 paragraph (1) and (2) of UU PS. From these two sets of norms, it is found two (2) institutions that regulate sharia compliance. MUI has been designated as the authority of sharia compliance with the authority to establish fatwa of sharia principles and BI is also given the authority to issue regulations on sharia principles, regulate the establishment and duties of KPS, as well as set and assess the compliance with sharia principles and Islamic management principles.

The clash rises to two (2) types of regulations on sharia principles which are different. The first regulation is the establishment in the form of fatwa of sharia principles issued by MUI and the second is in the form of Bank Indonesia Regulation (*Peraturan Bank Indonesia/PBI*) on sharia principles issued by Bank Indonesia (BI authority is transferred to OJK).

The emergence of two (2) types of regulations of sharia compliance makes legal uncertainty on which sharia principles should form the basis of sharia banking business activities. The uncertainty arises, based on research conducted Sholahudin and Tuti Hasna, because the content of some PBI regarding sharia principles does not correspond with the fatwa of MUI on sharia principles. The difference, in turn, makes the lack of legal certainty of the arrangement of sharia principles. The legal uncertainty caused objectives of the regulation of sharia compliance in UU PS, which is to gain public trust on sharia banking business activities, cannot be realized.

Conflict of norms in the Banking Act and UU PS basically can be solved by applying the principle of legal preferences; *lex specialist derogat lex generalis*. The implementation of UU PS as the special law on sharia banking overrides the Banking Act (*lex generalis*). If UU PS stated that the arrangement of sharia compliance is the duty of MUI, BI should not be entitled to regulate sharia principles and compliance.

Based on these arguments, it is concluded that normatively it must be stated unequivocally that MUI is an institution of sharia compliance authority, instead of the current BI or OJK. The normative authorities should also be clearly and unequivocally given full authority to issue a decision on sharia principles and compliance.

3.2.3 The absence of norm

The absence of norm that occurs in the arrangement of sharia compliance is not the absence norm in UU PS that authorizes the supervision to sharia compliance authority. Normative facts are found that 70 articles in UU PS do not deliberately contain any of the provisions that authorize sharia compliance authority to supervise the practices of sharia banking business activities in order to

really adhere to sharia principles.

Such problems can be solved by applying grammatical and analogical interpretation method. Grammatical interpretation method is applied by searching for the essence of the meaning of "representation" and "sharia compliance authority". "Representation" is grammatically defined as to represent; being represented; and what represents; or representation. Judy Giles defined "*to representase*" into "to stand in for ...", "to speak or act on behalf of ...", and "to re-present". It can be concluded that the authority of DPS as internal institution that supervises sharia banks is to represent authority that should belong to sharia compliance authority.

Based on the interpretation, the institution that should be designated as sharia compliance authority is given the authority (functions) for monitoring compliance with sharia principles, besides the authority (functions) for arrangement. The opinion is reinforced by the analogies of sharia compliance authority with banking authorities or financial service authority, that the institutions which are defined as banking authority or financial service authority are given supervision authority, besides arrangement authority.

3.3 *Reconstructing Syariah Compliance Principle in Sharia Banking Legal Systems to Create Legal Certainty*

Based on the description above, the researchers argued that legal certainty of sharia compliance management in the legal system of sharia banking in Indonesia can be realized by reconstructing sharia compliance management systems contained in the Banking Act, UU PS, and UU PT. The norms which are experiencing the problems that have been described should also be reorganized by coherently formulating the principles of sharia compliance, legal certainty, independence, and professionalism.

The four principles should be formulated coherently on the various norms regulating the three things, which are: (i) the establishment of sharia compliance authority; (ii) the imposition of liability on legal products (establishment and management) of sharia principles; and (iii) the granting of authority to institutions performing various actions related to the regulation and supervision of sharia compliance in the legal system of sharia banking in Indonesia. The explanations of these three points are as follows:

First: In relation to the establishment of sharia compliance authority, the researchers argued that the norms in UU PS which determines MUI as sharia compliance authority does not reflect the principles of legal certainty (legality). The status and position of MUI in the national legal system does not include a state institution (public law institution) established by the legislation. MUI is a civic and religious institution. Thus, sharia compliance authority as an institution dealing with the interests of society, especially the Indonesian Muslim community, may not be submitted to the MUI.

Second: In relation to imposition of obligation to the community, particularly sharia banking stakeholders, to comply the fatwa of sharia principles issued by MUI, the researchers argued that these norms do not implement the principle of legal certainty and are contrary to the theory of legislation. The fatwa of sharia principles will not be able to be enforced by means of the State because the fatwa does not include legislation. Therefore, the enforceability of the fatwa would not be optimal because it is not enforced by the State.

Based on these arguments the researchers argued that reconstruction of sharia compliance management is made by returning the fatwa position merely as a legal opinion. To achieve legal certainty, Article 26 paragraph (1) of UU PS should be amended. Sharia principles that must be adhered by sharia banking should be included in the form of assessment or regulations issued by the public law institutions that have professionalism and independence.

Third: Dealing with the granting of regulatory and supervisory authority of sharia compliance, the researchers have found that norms giving legal authority to MUI to issue sharia principles in the form of fatwa contradict to the theory of authority and the theory of legal entities. MUI as a private legal institution cannot be forced as an authority to issue regulations related to the public interest. The authority of regulations related to the public interest can only be granted to public law institutions (state institutions).

4. Conclusion and Recommendation

4.1 Conclusion

Sharia compliance principle, legal certainty, professionalism, and independence are the formulation of Islamic values. The four principles are very relevant to be the foundation of the establishment of the legal system of sharia banking in Indonesia, more specifically about the arrangement of sharia compliance. The existence of these four principles in the legal system of sharia banking is interrelated, coherent and strengthening.

Reconstruction of sharia compliance arrangement is realized by making the package of amendment to the Banking Act, UU PS, and UU PT. The principle of sharia compliance, legal certainty, professionalism, and independence should be coherently formulated in a variety of sharia compliance arrangement norms. Through the amendment, it is created a public law institution (state institutions) that establishes an independent Sharia Compliance Authority (*Otoritas Kepatuhan Prinsip Syariah/OKPS*). Various regulatory and supervisory authorities of sharia compliance should be given entirely to the authority to bring the legal certainty and public confidence in the implementation of sharia banking in Indonesia.

4.2 Recommendation

Through this work, it is recommended to the Parliament to make an amendment to the Banking Act, UU PT, and UU PS. The three amendments are to create legal certainty by establishing an independent public law institution (state agencies) named Sharia Compliance Authority (*Otoritas Kepatuhan Prinsip Syariah/OKPS*). OKPS is given the authority to fully carry out the regulation and supervision of sharia compliance.

It is also suggested to stakeholders of sharia banking is to really give priority to sharia compliance principles in every implementation, whether the regulation, supervision, or operations of sharia banking. It needs to be done so that people really believe in the implementation of sharia principles in sharia banking operations.

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PAGE 1

PAGE 2

PAGE 3

PAGE 4

PAGE 5

PAGE 6

PAGE 7

PAGE 8
