

Proceeding ICLI_Artikel

Muhaimin

by Muhaimin Ismail

Submission date: 25-Jun-2023 10:59PM (UTC-0500)

Submission ID: 2122714847

File name: Proceeding_ICLI_2020_Artikel_Muhaimin.pdf (376.1K)

Word count: 5239

Character count: 31562



HUKUM ISLAM



HUKUM YANG HIDUP DI INDONESIA

**Bunga Rampai Tulisan
Para Partisipan 5th ICILI 2020
(Online Mode)**

**Editor :
Heru Susetyo, S.H., M.Si., LL.M., M.Ag. Ph.D.
Fahrul Fauzi, S.H.**



2021

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**Badan Penerbit
Fakultas Hukum Universitas Indonesia
2021**

Hukum Islam Hukum Yang Hidup Di Indonesia Bunga Rampai Tulisan Para Partisipan 5th
ICILI 2020 Editor Heru Susetyo, SH. LL.M. M.Si. M.Ag. Ph.D. dan Fahrul Fauzi, S.H.

x, 100 hal ; 17,6 cm x 25 cm

ISBN 978-602-5871-66-5

Edisi Pertama
Cetakan Pertama, April 2021

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Fakultas Hukum Gedung D Lantai 4 Ruang D.402
Telepon +61 21 727 0003, Ext. 173, Faksimile. +62 21 727 0052
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**KATA SAMBUTAN
LEMBAGA KAJIAN ISLAM DAN HUKUM ISLAM**

Assalamualaikum warrahmatullahi wabarakatuh,

Alhamdulillah biidznillah atas ijin Allah SWT buku bungai rampai berisikan tulisan terpilih dari para partisipan 5th ICILI 2020 yang berlangsung secara on-line karena situasi pandemi COVID-19.

Terimakasih banyak atas kontribusi partisipan, para pengajar dan peneliti Hukum Islam di Indonesia, panitia kegiatan dari Fakultas Hukum Universitas Indonesia. Terimakasih juga kami sampaikan kepada Ibu Dr. Wiryaningsih dan rekan-rekan dari Asosiasi Dosen Hukum Islam Indonesia (ADHII) selaku co-organizer dari 5th ICILI 2020 ini. Ungkapan terimakasih yang sama kami haturkan kepada seluruh pimpinan dan staf FHUI di bawah kepemimpinan Dekan Dr. Edmon Makarim dan the Dream Team, crew LKIH FHUI baik dosen, peneliti, alumni, maupun adik-adik LKHI Muda.

Semoga buku ini membawa pencerahan, kebaikan dan kemanfaatan buat kita semua. Utamanya untuk mendukung berkembangnya Hukum Islam selaku hukum yang hidup di Indonesia.

Wassalamu'alaikum warrahmatullahi wabarakatuh,



Heru Susetyo, SH. LL.M. M.Si. M.Ag. Ph.D
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REGULATION OF THE CONVERSION SHARIA BANKING AND ITS LEGAL ISSUES IN INDONESIA

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Abstract

The objective of this study was to analyze regulations on the conversion of conventional banks into sharia banks according to positive law. The method of this study was normative legal research with primary, secondary, and tertiary legal materials which are collected through documents and literature study, then a descriptive qualitative analysis was carried out through the legal interpretation method to build prespective legal arguments in order to obtain deductive conclusion. The findings showed that the conversion of conventional into sharia banks was regulated by the Act No. 10/1998 on the Amendment of Act No. 7/1992 on Banking, Act No. 21/2008 on Sharia Banking, and OJK Regulation No 64/POJK.03/2016 on the Conversion of Business Activities from Conventional into Sharia Banks. Legal issues were uncovered in the conversion of conventional banks into sharia banks as there was an absence of government regulation regarding the conversion of conventional into sharia banks. In particular, a solid legal basis for the conversion of a conventional into a sharia bank was lacking, and there were issues in obtaining permission from the Financial Services Authority and a change of legal status from conventional to sharia bank. The research results encouraged banks authority as well as the government to pay more attention to legal issues regarding to conversion from conventional banks to sharia banks.

Keywords: Sharia banks, conversion, legal issues.

1. INTRODUCTION

The Act No. 21/2008 on Sharia Banking and the Act No. 10/1998 on the Amendment of the Act No. 7/1992 on Banking allow Indonesian banks to apply dual banking systems, and conventional banks have started launching sharia business units to meet the demand of the market, particularly from their Moeslem customers. The fast contribution and growth of sharia banking in the last twenty years have shown that sharia banking meets the current demands of society.

The Indonesian government, the Bank of Indonesia, the Financial Services Authority, and sharia banks have made efforts to accelerate the development of sharia banks[1]. These efforts have been viewed positively by society, and conventional banks are now interested in changing their business into sharia banks. Conversion of business activities from a conventional bank into a sharia bank is legal, but the conversion of business activities from a sharia bank into a conventional bank is illegal.

A new trend that started in 2008 was the establishment of sharia banks through the acquisition and conversion of conventional banks into sharia banks. Three approaches have been used for these conversions. First, conventional commercial banks that have already had Shariah Unit Bussines (SUB) acquired smaller banks, converted them into sharia banks, and combined both of their Shariah Unit Bussines. In the second approach, conventional banks that did not have any SUB acquired smaller banks and converted these banks into sharia banks. In the third approach, conventional banks created independent companies (spin-off) and established their own sharia public banks[2].

After the establishment of government regulation on sharia banking, both converted and non-converted sharia banks developed significantly. Currently, there are 14 public Islamic banks in Indonesia; nine of them were the result of the conversion from conventional public banks, two were SUB spin-off, two were the result of converting conventional public banks that were then combined with SUB spin-off, and one was sharia bank since it was established:[3], [4].

Examples of SUB spin-off public Islamic banks are Bank Jabar Banten Shariah and BNI Shariah, while examples of acquired public Islamic banks are Bank Shariah Mandiri (acquired from Bank Susila Bakti), Bank Mega Shariah (acquired from Bank Umum

Tugu), and BCA Shariah (acquired from Bank Jasa Artha). Other sharia banks are Bank Syariah Bukopin, BRI Shariah (acquired from Bank Jasa Artha), Bank Victoria (acquired from Bank Swaguna), and Maybank Shariah (acquired from Maybank Indocorp).

These data showed that the conversion of a conventional bank into a sharia bank in Indonesia was pretty significant due to a strong legal basis. Conversions would increase as the due date gets closer for the Act No. 21/2018 spin-off obligations for business units which have established an independent sharia business unit, separated from the conventional bank.

The spin-off route was a requirement when a conventional bank has SUB with a value of at least 50% of the total value of the parent bank. This also works for all SUB, 15 years after the Act No. 21/2008 was established[5]. The requirements of Article 68 showed that sharia business units that still have a conventional parent company could become an independent business unit. The business performance of sharia business units, for instance, financial performance, management, human resources, and networking, is an indicator of their readiness to become independent business units. These will influence the development of sharia banks. The focus of this study was the regulation and legal basis for the conversion of conventional banks into sharia banks based on positive law.

2. RESEARCH METHOD

This study was a doctrinal or normative legal study that perceived law as a set of normative rules in books. This study focused on the regulations and legal issues for the conversion of conventional banks to sharia banks based on positive law. Two approaches were used, a statute approach, and a conceptual approach[6]. This study used secondary data, namely references and primary, secondary and tertiary legal documents, and written documents obtained from statutory regulations, court rulings, academic studies, and Islamic sources, findings of academic studies, official documents, archives, and dictionary and encyclopedia entries on banking and sharia banking. Once the library research and documentation had been conducted, the data were classified and analyzed using descriptive qualitative analysis through authentic and grammatical legal interpretation to develop legal arguments and then to draw deductive conclusions[7].

3. RESULT AND DISCUSSION

1. Regulation of the Conversion of Conventional Banks to Sharia Banks

The Great Dictionary of the Indonesian Language defines conversion as "change from one knowledge system to another." Other meanings of conversion are the change of ownership of an object or piece of land; a change of form (for example appearance);[8] or change from a previous concept to a current one. In banking terminology, conversion means a change in the legal status of a bank or financial institution into another. Conversion is the change of a particular system or instrument into another system or instrument and has been defined as:[9] "...Change of legal status of a bank or financial institution into another form of legal entity." Therefore, conversion is the change in business activities and the legal status of a bank. However, the Financial Services Authority only regulates the conversion of a conventional bank into a sharia bank and not the opposite and it does not change the legal status of the bank.

The conversion of a conventional bank into a sharia bank was prescribed in the Act No. 21/2018 on Sharia Banking. The implementation was given in the Regulation of the Bank of Indonesia, which was later replaced by the Financial Services Authority Regulation No. 64/POJK.03/2016 on the Conversion of Business Activities of Conventional Banks into Sharia Banks. The implementation of the Act governing the Financial Services Authority transferred some parts of the authority to supervise and

monitor Indonesian banks from the Bank of Indonesia to the Financial Services Authority. The Financial Services Authority has the authority to control and supervise financial services in the banking sector.

Article 2 of the Financial Services Authority Regulation No. 64/POJK.03/2016 explains that:[10]. (1) A conventional bank can change its business into a sharia bank; (2) The conversion of a conventional bank into a sharia bank can change (a) a conventional bank into sharia bank, and (b) a rural bank into sharia rural bank. An example of the legal basis of the conversion of a conventional bank into sharia bank was Article 5 paragraph (6) of the Act No. 21/2008 on Sharia Banking that explains "Conventional Banks can only change their business base on the principles of sharia with permission from the Bank of Indonesia." Furthermore, Article 4 paragraph (1) of the Financial Services Authority Regulation No. 64/POJK.03/2016 states that "Conversion of business activities from a conventional bank into a sharia bank can only be conducted with permission from the Financial Services Authority."

Article 7 of the Act No. 21/2011 on the Services Authority states that: "In order to carry out their control and supervisory function in the banking sector as stated in Article 6a, Financial Services Authority is authorized to: control and supervise banks, which involves:[11].

- 1) licenses for the establishment of banks, opening bank offices, Company Basic Regulation, work plans, ownership, management, and human resources, merger, consolidation and bank acquisition, revocation of bank business licenses; and
- 2) business activities of the bank, such as the sources of funding, hybrid products, and services."

Consideration of the terms permitted for the conversion of the business activities of conventional banks into sharia banks stated in Article 5 paragraph (6) of the Act No. 21/2008 on Sharia Banking[12], the terms described in Article 7 of the Act No. 21/2011 on Financial Services Authority, and Article 4 Paragraph (1) of the Financial Services Authority Regulation No. 64/POJK.03/2016 on the Conversion of Business Activities of Conventional Banks into Sharia Banks, it could be concluded that legal norms on the conversion of conventional banks into sharia banks was included a conflict of norm. Furthermore, Article 55 paragraph (2) of the Act No. 21/2011 on Financial Services Authority states that "starting from December 31, 2013, the function, task and authority for controlling and supervising activities in the banking sector are transferred from the Bank of Indonesia into the Financial Services Authority."

To overcome these conflicts, an analysis was required, which used legal basis instruments such as the principle of *lex specialis derogate lex generalis*, or specific regulation overrides general regulation. In this context, the Bank of Indonesia Act was no longer valid with the establishment of the Financial Services Authority Act. Furthermore, Article 55 paragraph (2) of the Act No. 21/2011 on Financial Services Authority reiterated the conflict between the Act No. 21/ 2008 on Sharia Banking and the Act No. 21/2011 on the Financial Services Authority on permits for the conversion of the business activities of conventional banks into sharia banks.

a. Requirements for the Conversion of Business Activities from a Conventional Bank into a Sharia Bank

Conventional banks that want to change their business activities into sharia banks should include their new business plan in the conventional bank business plan, as stipulated in Article 5 of the Financial Services Authority Regulation No. 64/POJK.03/2016, which states: "A Plan to conversion the business plan from a

conventional bank into a sharia bank should be fulfilled in the conventional bank business plan.”

Furthermore, Article 6 states: “A conventional bank that will change its business activities into a sharia bank should do the following: (a). Adjust its Company Basic Norm, (b). Meet capital requirements, (c). Meet the requirements for the Director and Board of Commissioners, (c). Establish Sharia Supervisory Board. (d). Make a preliminary financial report a sharia bank.”

A conventional bank that wants to convert into a sharia bank needs to meet these five requirements and submit them to the Financial Services Authority to obtain a sharia bank permit. Adjustment to the articles of association was governed by the Act on Sharia Banking, the Act on Limited Liability Companies, Statutory Regulations on Sharia Public Banks, and BPRS. To meet the provisions regarding sharia commercial bank capital, both the minimum capital and the minimum core capital requirements for sharia commercial banks must be fulfilled.

Article 9 of the Financial Services Authority Regulation No. 64/POJK.03/2016 states: “The Director and Board of Commissioners of a sharia bank should meet the Act and regulations on Sharia Banks.” The requirements, number, function, authority, and responsibility, as well as other affairs related to the Board of Commissioners, and Director of a sharia bank, is stated in the articles of association of the sharia bank and in the provisions of the applicable regulations. And the Article 10 of the Financial Services Authority Regulation requires that: (1) A conventional bank that will convert its business activities into a sharia bank should establish a Sharia Supervisory Board; (2). Prospective members of the Sharia Supervisory Board should meet the requirements of the Sharia Supervisory Board as regulated in the requirements for sharia banks stated in paragraph (1).

The Sharia Supervisory Board is responsible for giving advice and recommendations and supervising activities of the sharia bank. The Sharia Supervisory Board is also responsible for conducting internal supervision of sharia banking products in collecting funds from society and distributing the funds to society. The Sharia Supervisory Board has the rights and responsibility to decide whether or not a sharia banking product or service is marketable and whether sharia bank activities have matched the principle of sharia profit-sharing. Thus, Sharia Supervisory Board members should have an in-depth knowledge of sharia. In carrying out its function, the Sharia Supervisory Board can conduct consultation with Indonesian Ulema Council[13].

The function of the Sharia Supervisory Board in a bank that is based on the principles of profit-sharing was different from the function of the Board of Commissioners, Board of Trustees, and bank supervisors, which are also part of a sharia bank. The function of the Sharia Supervisory Board is limited to researching and determining whether a product, service, or business activities carried out by the sharia bank is in accordance with the principles of sharia. In contrast, the Board of Commissioners, Board of Trustees, and bank supervisors were responsible for ensuring that all operational and management activities of the bank meet the principle of profit-sharing.

2. Legal Issues in the Conversion of a Conventional Bank into a Sharia Banks

Several legal issues could be summarized from the regulations and their implementations conversion of a conventional banks into sharia banks, were as followed:

An absence of specific government regulations, the legal basis for the conversion should be concerned in the banking and sharia banking sectors, but it should also take account of the Act on Limited Liability Companies, the Act of the Bank of Indonesia, the

Act of the Financial Services Authority, the Act of the Regional Government and its implementing regulation, and the act on dispute resolution, and a strong and clear legal basis for the conversion of a regional government-owned conventional bank is lacking, and thus, legal issues may potentially appear in the future.

The conversion of regional government-owned conventional banks requires approval from the shareholders (Governor and Regent/Mayor) through shareholder's meeting (RUPS) or extra ordinary shareholder's meeting (RUPS-LB), as well as the Regional House of Representatives, through amendment of regional government regulation[14].

Before submitting their proposal to the Financial Services Authority, a conventional bank should change its statutes and by laws, and changes to the organizational structure of a sharia bank require approval from the Sharia Supervisory Board. The Sharia Supervisory Board should obtain a recommendation from the National Sharia Board of the Indonesian Ulema Council and conduct the Financial Services Authority fit and proper test.

After the conversion, the sharia bank should attach the word sharia to their name, both at the head office and branch offices, as stated in Article 16 of Financial Services Authority Regulation No. 64/2014: "A conventional bank that has been granted a license to change their business into a sharia bank should clearly state the word "Sharia" on its brand and iB logo, on its registration forms, products, office, and sharia bank network.[15].

The absence of regulation on the legal status of conventional bank customers after the conversion. That was whether or not these customers have the same legal status as conventional bank customers, including legal options for these customers or other interested parties, and lack of regulation on the conversion of credit agreements to *aqad* since *aqad* has its own distinctive characteristics and legal consequences.

Legal issues in the implementation of conversion namely; the bank depends on interest or another system similar to bank interest in its credit agreements (*murabahah* financing) and the corporate culture of the sharia bank, while profit-sharing in *mudharabah* and *musharakah* financing is different from conventional bank interest, and the absence of regulations on dispute settlement between banks and non-Moeslem customers after the conversion.

Conflicts arising in the licensing and conversion of conventional banks into sharia banks. These conflicts arise between the Act No. 21/2008 on Sharia Banking (in which bank licenses are obtained from the Bank of Indonesia) and the Financial Services Authority Regulation, which also grants sharia bank licenses.

Specific arrangements for the conversion of foreign-owned or non-Moeslem-owned conventional banks in order to avoid violation of the principles of sharia and Islamic law. The Act No. 21/2008 on Sharia Banking attributes authority to the Bank of Indonesia for the sharia banking sector, but this conflicts with the Financial Services Authority Act.

Consideration of the information presented in this study led to the conclusion that the government should consider various legal issues resulting from the conversion of conventional banks into sharia banks and establish law and regulations on the conversion to avoid legal issues [16],[17],[18],[19]. Legal experts consider a good law to be one reflecting philosophical, juridical, and sociological aspects. And good law in a democracy is responsive law to the demands and needs of society.

Lawrence Friedman's theory[20] states that law and legislation should pay attention to three aspect characteristics, namely [21] the legal structure, the legal substance and the legal culture in which the legislation is applied in order to run effectively or be marketability among the society. Clear legislation would minimize future legal issues on

the conversion of conventional banks to sharia banks. In other words, legislation will provide justice and legal certainty for the public as bank customers.

4. CONCLUSION

The conversion of conventional banks to sharia banks was stated in the following regulations: the Act No. 10/1998 on the Amendment of the Act No. 7/1992 on Banking, the Act No. 21/2008 on Sharia Banking, Financial Services Authority Regulation No. 64/POJK.03/2016 on Conversion of Business Activities from Conventional to Sharia Banks, the Act on the Financial Services Authority, the Bank of Indonesia and the Act No. 40/2007 on Limited Liability Companies. Legal issues in the conversion of conventional banks to sharia banks included an absence of regulation that specifically discussed the conversion of conventional banks to sharia banks and the absence of a legal basis for the conversion of conventional banks to sharia banks.

5. RECOMMENDATION

The government should establish regulations that specifically discuss the conversion of conventional banks to sharia banks as implementation for the Act No. 21/2008 on Sharia Banking, Financial Services Authority Regulation on the conversion of conventional banks to sharia banks should state clearly the legal status of bank customers after the conversion.

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