

THE EFFECTIVITY OF LEGAL SYSTEM ON SYARIA BANKING LAWS IN UU No. 21 TAHUN 2008 AND IT'S IMPACT ON ECONOMIC DEVELOPMENT

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Abstract

Economic development cannot be separated from the legal development as the efforts to manifest national development. UU No. 21 Tahun 2008 as an adequate law can provide better protection for investors. In Bagir Manan's views, adequate laws contain three important elements existing in Acts (UU). The three elements are juridical, sociological, and philosophical aspects. From the juridical aspect, the regulating syaria banking existing in UU No.21 Tahun 2008 is bound in nature. Sociological aspect is accommodated in offered products and services covering universal banking. Philosophical aspect is the improvement in justice based on syaria principles. The constraints of UU No. 21 Tahun 2008 are that this Act (UU) has not been comprehensive on regulating the implementation of banking activities or products by means of electronic facilities as the impacts of global economy bringing to national economic development. The aforementioned legal problems require specific rules such as separately regulating.

Keywords: Legal System, Syariah Banking, UU No. 21 Tahun 2008, Economic Development

INTRODUCTION

The goal of national development is to create people's welfare and justice, and a developed, independent country having competitiveness. Such goals should be developed continuously in many areas such as economic development relating to other areas (Kusumaatmadja,2002).

One of the obstacles in performing economic development relating to banking area is the legal apparatus factor that should be developed to balance the needs of continuously-developing society. The reality shows that the development in banking field and its facilities improves rapidly leaving the development of national laws. Therefore, the national legal development is expected

to anticipate any progress of social life included banking field.

The legal development is the realization of national legal system. The legal development in banking field, in the globalization and reform era, is that the attempt to implement the effectivity of banking legal system as the national laws covering legal substance, legal structure, and the involvement of the society having high legal awareness to support the formulation of the intended national banking legal system.¹

Banking institution, as an agent of trust, is the trust of society as the alternative investment and fund-deposit institution, and

¹ The law no 17 of 2007 on the Medium Term Development Plan Nasional Year 2005 to 2025 (National RPJP)

also banking service activities. As the agent of trust, banking institutions bring the consequences to the important aspects of institutional and individual integrity. Therefore, banking institutions are the agent of national development.

Banks, either *syaria*/Islamic banks (based on the *syaria* principles) or conventional banks, function as intermediary institutions – raising the fund from the society and rechanneling the fund to the society in need in the form of costing. The differences between them are that the *syaria* banks carry out their business not on the basis of interest (interest-free), but on the *syaria* principles, namely, profit and loss sharing principle (Sjahdeini,2005).

As the agent of development, *syaria* bank shows the increase despite not being so fast. The total asset-shares of syariah banking compared with conventional bank, indicate the increase of 1,84 % or Rp. 36.538 billion compared with Rp.1, 985.000 billion in December 2007. For the last years *syaria* banking increases from the total asset of Rp 20.880 billion in December 2005 to Rp. 36.538 billion in December 2007 or increases of 74, 9 %. The banking fund raising increases of 79,7% from Rp. 15.582 billion in December 2005 to Rp. 28.012 billion in December 2007. The payment increases of 83,4 % from Rp.15.232 billion in December 2005 from Rp. 27.944 billion December 2007(Rahmana and Purba,2009).

There is a view that slowly-developing syariah banking in Indonesia is caused from the lack of effective regulations, adequate regulations in the form of specific acts separated from the acts of conventional banking (Rahmana and Purba,2009).

All *syaria* banking regulations have been accommodated in *UU No.7 Tahun 1992* regarding banking. However, the regulations have not regulated strictly on the *syaria* banking. By paying attention to the realistic

needs on *syaria* banking, as the endeavour to implement the effectivity of national legal system in pursuing the achievement of people's justice and prosperity based on the economic democracy, the development of economic system based on the values of justice, togetherness, even distribution, and usefulness in accordance with *syaria* principles, the government has legislated regarding *syaria* bank hoping that this legislation can adequately give a better protection for investors in particular, and for society in general. *UU No. 21 Tahun 2008* is expected to be able to contribute to the operational *syaria* banking because the *syaria* banking has specifications. Despite the fact that *UU No. 21 Tahun 2008* regarding *syaria* banks has comprehensively regulated banking activities on the basis of *syaria* principles, it has not comprehensively regulated operational activities or bank products employing electronic facilities

Along with the global economy having impacts on national economic development the use and choice of electronic facilities in *syaria* banking are compulsory. Therefore, the legal system of *syaria* banking must be specific because the types of products and services derive from conventional banking. This legal system will be related to the *syaria*-based business model and *syaria*-based transaction model starting from how to conduct transaction, contract, business calculation until bookkeeping. Therefore, developing effective legal system of *syaria* banking including its relation to the electronic facilities of *syaria* banking is not enough through only doing something in an ad hoc manner or modifying the legal system of conventional banking facilities. Therefore, the legal system of electronic facilities for syariah banking should be the results of the re-engineering process of information technology starting from the core business. The entire re-engineering process should be conducted to obtain the legal sys-

tem that is truly based on the *syaria* so that this can accommodate the development of *syaria* business. The use of electronic facilities for *syaria* banking should not be lagged behind although in reality, the complexity of *syaria* banks can happen because if a *syaria* bank produces a product, then the product should firstly be registered in National Syariah Board Indonesian Ulema Council (DSN-MUI) to obtain the *fatwa*. If agreed, the product should be brought to *Bank Indonesia* (Central Bank) to obtain the approval of the Central Bank, while the product of conventional bank is only brought and registered in the Central Bank.

It is necessary to have the comprehensive regulations that regulate the operational activities or banking products using electronic facilities. The Acts on banking, Central Bank, and syariah banks are still limited and inadequate in regulating the activities using electronic facilities. Even there is not any Acts specifically regulating transactional activities through electronic media. This is very needed for balancing the development of international economy that has continually integrated to the global financial market. The circulation of fund crossing border has become the need for global economy players so that such condition can stimulate national economy. As a universal transaction, transactional activities involve many parties both from foreign and domestic parties. Partners of domestic business players need to get certainty relating to the smoothness and security of conducting transactions in Indonesia. The guarantee of the legislation availability as adequate legal system regulating transactional activities is needed not only for domestic parties but also for foreign parties. Perceiving the complexity and the wide scope regulated, the regulating of transactional activities using electronic facilities needs to be formulated in the form of Acts (*undang-undang*). In order to provide equal regulations to all business

players in performing banking activities using electronic facilities, regulating the electronic facilities should be effective for all kinds of financial institutions –banking institutions and non-banking institutions in carrying out their business activities either employing conventional principles or syariah principles. Today, the regulations relating to the electronic facilities are still in the form of the Regulations of Central Bank (PBI) and Circular Letter of Central Bank.

EFFECTIVITY OF LEGAL SYSTEM ON SYARIA BANKING LAWS IN UU NO. 21 TAHUN 2008

Syaria banking activities in Indonesia have started since 1992, through the operational activities of *PT Bank Muamalat Indonesia*. The regulations on *syaria* banking are previously accommodated in *UU No.7 Tahun 1992* regarding banking. The regulations have not regulated strictly on *syaria* banking. By the existence of amendment of banking Acts, *UU 10 Tahun 1998* regarding the changes to *UU No.7 Tahun 1992* concerning banking has accommodated several regulations on *syaria* banking activities among others the definition of bank covering *syaria* banks, *syaria* principles, costing, and other regulating.

UU No.7 Tahun 1992 regarding the aforementioned banking has provided more adequate legal base and greater opportunity in increasing the effectivity of legal system on *syaria* Banking in Indonesia. This can encourage the development of *syaria* banks so that these acts can reach more people in need all over Indonesia (Rae,2009).

According to *H.Thiery*,

Een system is een geheel van alkaar wederzijds beïnvloedende componenten, die volgens een plan georden zijn, teneinde een bepaald doel te bereiken.

System is a number of components which influence each other based on the intended planning to achieve the certain goals (Rae,2009). Legal system is a compilation or network of regulations that can create and maintain process and structure. Banking laws are,

Anything related to the rules and regulations that regulate banking activities.

Syariah Banking Laws are,

Anything related to the rules and regulations that regulate syaria banking activities.

The general sense of *syaria* banks, in some countries called Islamic Bank, is *syaria* banking activities or Islamic Bank applying Islamic laws (*syaria*) into banking sectors or even in other modern commercial activities. Karnaen Perwataatmadja and Muhammad Syafi'i Antonio define Islamic Bank as follows (Rae,2009),

Islamic Banks are banks conducting their operations on the basis of syaria principles, particularly, in terms of mu'amalah (islamic business).

In line with this, Warkum Sumitro defines Islamic Banks as follows,

Islamic Banks mean that the banks underlying their business operations on the Islamic mu'amalah referring to Al-Quran and Al-Hadits.

While according to Cholil Uman,

Islamic Banks are financial institutions carrying out their business operations based on Islamic laws.

Relating to the effectivity of legal system, Berkowitz and Walker stated that such a legal system effectivity is performed in the form of legal behaviour willingness, that is, obedience or use (Friedman. L,

2009). This requires legitimacy, among others in the form of adequate legislation that tends to go to the agreement leading to obedience or use. Obedience is the accordance between actions and norms or instructions on regulating *syaria* banking laws not only in the form of the instructions but also in the form of use or non-use, and misuse of the regulating. Effectivity of legal system on *syaria* banking laws will depend on the targets and objectives of the regulations.

In conjunction with the use, *syaria* banking is increasing despite not being so fast. At least, it is indicated by the increasing *syaria* bank performance from Desember 2005 to Desember 2007, namely, the increase of total asset by 1,84 %, the increase of total asset by 74, 9 %, the increase of fund raising by 83,4 % (Rahmana and Purba,2009).

The fact that *syaria* banking develops slowly in Indonesia is because it has not been supported with the adequate regulations in the form of the particular Acts separated from the Acts of conventional banking (Rahmana and Purba,2009). Therefore, they need perfecting or reviewing through legislating *UU No. 21 Tahun 2008* in order to perform the optimal obedience and use to the *syaria* compliance and *syaria* use, avoiding from non-use and misuse. Regulating *UU No.7 Tahun 1992* regarding such a banking has not been adequate as the requirement of effective *syaria* law system. The regulations have not been specific yet and lack of adequacy in terms of the characteristics of *syaria* banking operational as the growth of *syaria* banking business volume is relatively significant.

In Roscou Pound's view, law as a tool of social engineering, that later on this view was developed by Mochtar Kusumaatmadja in law conception as "a means" of renewal of Indonesian people through standing out the legislation. According to

Sunaryati Hartono, this can be carried out through perfecting.

Laws as a means of renewal, in Komar Kantaatmadja's opinion, should be able to meet the needs based on the level of progress and the phase of development in many different areas, and by sodoing, the orderliness and law certainty can be created to guarantee the programs of the development running well.

Still in Mochtar Kusumaatmadja's view saying that,

Laws is the means of the renewal for the people underlying on the assumption that the existence of orderliness is something intended, even this is perceived to be essential. Another further assumption existing in the law conception as the means of people's renewal is that the laws in terms of rules and regulations can function as the tool of regulator or the means of development in term of the guide for people's activities to the intended development or renewal (Kusumaatmadja, 1976).

In line with this, Sunaryati Hartono stated that the meaning of law development covers four parts: *first*, perfecting (improving to the better). *Second*, changing the better and more modern. *Third*, creating something that has not been existed, or; *four*, eliminating the obsolete and unsuitable things existing in the old system that does not fit to the new system (Hartono, 1991).

Laws become the means that cannot be ignored in the process of the development because both changes and orderliness are the two goals of the developing society. The legislation or the finding of a court or the combination of the two can support the regular changes (Kusumaatmadja, 1976).

The perfect-making covers 1) legal substance in terms of *syaria* aspects and new regulations such as governance, cautious principles, permission, and corporate body, risk management for resolving dispute, and sanctions.

Syaria banking in conducting business activities is based on the *syaria* principles, economic democracy, and the cautious principles (Article/Pasal 2). These rules and regulations emphasize on *syaria* principles according to the *syaria* banking characteristics. The *syaria* principles are the Islamic law principles employed in the banking activities based on the *fatwa* issued by *syaria* department (Pasal 1 angka 12), and the institution having the authority - *Majelis Ulama Indonesia*. It is different from the Acts on conventional banking stressing its objectives on the increase of even distribution, economic growth, and national stability, while the acts on *syaria* banking stress its objectives on the increase of justice, togetherness, and social welfare. Such objectives are in accordance with the *syaria* economic principles emphasizing on the aspects of unity, equilibrium, free will, and responsibility. Like conventional banks, the main functions of *syaria* banks are to raise and channel the fund from society or to conduct the function as an intermediary. Besides, *syaria* banks (and *syaria* Acts/UUS) have specifications - having social functions in the form of *baitul mal* institutions that receive the charity fund from *zakat*, *infak*, *sedekah*, grant or other social fund, and channel the charity fund to the *zakat* NGOs. Besides, they can raise social fund derived from *wakaf* cash and distribute the cash to the *wakaf* (*nazhir*) NGOs according to the intention of the *muwakif* (*wakaf* contributor).

To be able to run business activities, *syaria* banking must firstly obtain the permission from the authorized body, namely, Central Bank. Relating to this, there are two regimes of the regulations which

involve the banking permission regulated in the chapter regarding permission. It is effective for all parties conducting business activities of *syaria* banks or *UUS* must firstly obtain business permit from Central Bank (Article/*Pasal* 5), and in the chapter regarding business activities, which is effective for all parties carrying out fund raising in the form of deposit and investment (Article/*Pasal* 22). The regulations on the permission for fund raising from society is meant to avoid illegal fund raising unless such fund raising activities are regulated with particular Acts, for examples, the Acts for insurance, cooperation, and pension fund. It shows that the acts makers realize the importance of acts in providing protection to fund raising activities from society. This is meant to protect society's interest owning the fund. It is also meant to maintain the trust given by the society to banking institutions as the trust-based institutions. The violation of the two rules will be liable to get sanctioned as regulated in *Pasal* 59. While in the conventional banking Acts, the material concerning banking business permit is only related to the fun raising (Article/*Pasal* 16).

It is different from corporate bodies known in conventional banking acts as *PT*, *Koperasi*, or *Perusahaan Daerah*, in *syaria* banking Acts only recognizing the corporate body of *PT* (Article/*Pasal* 7). In this case, the corporate body of *PT bank* must obey the regulations existing both in *UU No.40 Tahun 2007* regarding Limited Companies (*Perseroan Terbatas*) and in *syaria* banking acts. It is in accordance with the rules in *Pasal 4 UU PT* which strongly states that *UU Perseroan Terbatas*, statutes of companies, and other rules and regulations included banking regulations must be effective for companies (*perseroan*). With the corporate body in the form of *PT*, it is hoped that *syaria* banks can easily meet the rules in banking area among others in the case of

capital increase because in limited companies, there is a principle known as one share one vote, so it is easier to make decisions compared with other corporate bodies, for examples, cooperations employing the principle of one man one vote. Besides, holding the public meeting for share-holders is relatively easier than holding the meeting for cooperation members.

Syariah banking is divided into two types: *Bank Umum* and *Bank Pembiayaan Rakyat Syariah* (*BPRS*). The main difference is that the *BPRS* must not receive deposit in terms of clearing account and involving in payment. Principally, the two kinds of banks are the same as conventional banking. Business activities of *syaria* banking, especially in terms of the offered products and services, basically have relatively wider (universal banking in nature) compared with conventional banking offered because besides carrying out business activities like conventional banks, *syaria* banks also offer services that are generally carried out by financial institutions like leasing service, and also costing for profit sharing which is generally offered by investment institutions such as *modal ventura*.

Business activities of *syaria* banking, in terms of products and services, must obey the *syaria* principles, in this case the *fatwa* issued by Indonesian Ulema Council (*MUI*). The intended *Fatwa* is implemented to become banking rules through the regulations of Central Bank because the *fatwa* issued by *MUI* is general in nature, for examples, financial transaction so that it needs translating into specific (banking) regulations.

Secondly, perfecting more effective legal structure in terms of regulating requirements on fit and proper test for executive board and controller share holders, (Article/*Pasal* 30), and controller share holders (Article/*Pasal* 27). Such regulations are needed because banking as society-trusted

institutions need to be managed by executive board, and also be owned by shareholders having capability/competence, and integrity. Therefore, not all people can become executive board or shareholder, only those who pass from the fit and proper test deserve it.

Besides, there is extended regulations on investigating officers. They are not only prosecutors or police but also parties out of them. Therefore, the investigating officers aside from police or prosecutors can ask for information about bank secret but this should be proposed by leaders of institutions/departments or those of minister level. This shows that bank secrecy is still kept although it is widened for investigating officers aside from police or prosecutors, it is only in the level of institution/department leaders who can ask for the intended information.

In conjunction with perfecting structure, UU entrust it to Central Bank to formulate the committee for *syaria* banking whose members are from Central Bank, Department of Religion, and society who has *syariah* competence. The number of the committee is 11 people with the equal composition.

Thirdly, the involvement of society supporting the formation of national *syaria* legal system intended through great support among the various society. This can be indicated through the process of organizing the list of the problems on the bill of *syariah* banking which can be finished in the relatively short time.

The Effectivity of Legal System on *Syaria* Banking Laws UU No. 21 Tahun 2008 and Its Impact on Economic Development

The effectivity of legal system will depend on the objectives and targets of the regulations. The impacts of the regulations will be perceived from their effectivity in terms of whether their objectives can successfully be achieved or not: UU No. No.21 Tahun 1992

regarding *syariah* banking is the renewal of UU No.7 Tahun 1992 regarding banking that having the following achievements: people's justice and prosperity based on the principles of economic democracy, the development of economic system based on the values of justice, togetherness, even distribution, and usefulness according to *syariah* principles². Maintaining such achievements should be accommodated in the specific regulations. The regulations are expected to provide adequate protection for investors in particular and other society in general so as to contribute *syaria* banking operational, and to support the *syaria* economic growth in Indonesia more rapidly because *syaria* banking has specifications compared with conventional banking.

In line with the renewal of the regulations, Sunaryati Hartono stated that to create people's welfare, to achieve people's justice and prosperity based on the principles of economic democracy, and to conduct legal renewal (review) in economic fields should be directed to the regulating aspects: "1). Regulating on activities for the economic development in terms of increasing national economic life entirely, and 2). Regulating on evenly-distributed efforts of the result of economic development to all over Indonesian people so that every Indonesia citizen can benefit from the results of economic development according to their contribution to the economic development (Hartono,1999)."

In conjunction with this, Sumantoro stated that laws can function as the agent of modernization and instrument of social engineering. Legal development can run along with the economic development in the attempt to bring Indonesian people to the just and prosperous people. Therefore, there should be interactions between legal devel-

² The law Decree no. 1 / 2008 About Islamic Banking. Point 1 weigh

opment and economic development. To make the development run proportionally, it is essential to have legal certainty and protection in terms of the availability of adequate legal apparatus factors.

Best practice in Indonesia indicates that legal apparatus factors should be developed in order to meet the progress need in the attempt to create justice and prosperity for Indonesian people so that such a situation can bring Indonesia into global financial market. In syariah banking, the existence of adequate legal apparatus is required to protect investors in particular and other society in general.

Legal development penetrating global financial market, as the attempt to implement the effectivity of national legal system, is conducted through legislating *UU No. 21 Tahun 2008* regarding *syaria* banking. Such regulations are expected to attract investors/business players in particular and other society in general. Moreover, Indonesia whose majority of its population is moslems, has great potential to support the growth of economic activities based on *syaria* principles included *syaria* banking. This is because *syaria* banking activities in particular and economic *syaria* in general are found in non-moslem countries like England, USA, Germany, and Singapore, and the activities develop relatively well. Therefore, it is false perception if there is an assumption that syariah banks are dedicated for moslem countries only. In reality, a *syaria* bank is a choice for people in choosing banking services. There are no regulations that limit the *syaria* bank services only for moslems. In fact, there many non-moslems becoming the customers of *syaria* banks (Rahmana dan Purba, 2009).

In line with this, Bagir Manan explained that adequate laws contain three essential elements involved in legislation among others its norms must have legal validity, be adequately effective because of

being acceptable by the society, be effective for long-term period. Such elements are categorized into juridical, sociological, and philosophical ones.

Viewed from juridical aspect, the regulations on *syaria* banking existing in *UU No.21 Tahun 2008* regarding *syaria* bank binding in nature. As the legal system of national banking binding in nature, the regulations of the banking are the effective facilities as the attempt to contribute *syaria* banking operational in order to support economic development. Sociological values are accommodated in the products and services offered covering universal banking. Philosophical aspects in terms of the increase of justice, are the main objectives of the legislation existing in the *syaria* economic principles that stress on the aspect of unity and equilibrium will support the progress of economic activities based on the *syaria* principles.

Nevertheless, related to the three important elements (juridical, sociological, and philosophical) that should exist in the legislation as the adequate laws, there are obstacles faced in attempt to implement the effectivity of legal system as the impact of global economy which later on will also impact on national economic development, namely, *UU No.21 Tahun 2008* which has not comprehensively regulated operational, business activities or bank products using electronic facilities.

The reality in practice shows that the use of electronic facilities is very needed because the development of international economy has already integrated to the global financial market. The border-crossing circulation of the fund has already become the need of world economy players so that such a condition can stimulate national economy. As a universal transaction involving domestic and foreign parties, it needs to obtain certainty in terms of smoothness and security in conducting transactions in Indonesia. This requires the protection guarantee

through adequate business calculation, until bookkeeping.

Therefore, developing legal system of effective *syaria* banking in relation to the electronic facilities for syariah banking in order to meet the three important elements as the adequate laws, namely, juridical, sociological, and philosophical, is not enough either by conducting this in an ad hoc manner or modifying the legal system on conventional banks, but must be the results of entire re-engineering process containing core business. The process should be carried out to obtain the most appropriate legal system to the *syaria* so as to be able to accommodate the development of *syaria* business. The use of electronic facilities of syariah banking should not be left behind despite the fact that in practice of *syaria* banks, the complexity can occur.

According to Sumantoro, laws can function as the agent of modernization and instrument of social engineering. Legal development runs along with economic development through adequate *syaria* banking regulations as the agent of economic development. So, it is necessary to have comprehensive regulations that regulate operational activities or bank product by using electronic facilities. The real practice indicates that the Acts on banking, the Acts on Central Bank, and the Acts on *syaria* banking are very limited and lack of adequacy in regulating business activities using electronic facilities. Even today, it can be found that there is no specific Acts regulating transactional activities using electronic facilities. Perceiving the complexity and wide range of materials regulated, regulating transactional activities using electronic facilities need formulating in regulations in the form of the Acts (*Undang-Undang*). To provide equal protection to those who carry out the banking activities by using electronic facilities, the regulations on electronic facilities should be effective not only for the banks carrying

out their business activities conventionally but also for the banks carrying out their business activities based on *syaria* principles, also for non-banking institutions performing their business activities both on the basis of conventional way and on the basis of syariah principles.

CONCLUSION

UU No. 21 Tahun 2008, as the legal system regulating national *syaria* banking contains more comprehensive rules, is expected that the legal apparatus can provide more adequate protection, effectively protect investors and other society, contribute syariah banking operational, reach more society in need all over Indonesia so that this can support *syaria* economic growth in Indonesia more rapidly that in turns it can impact on the efforts to achieve goals of economic development on the basis of *syaria* principles.

The obstacles faced in the efforts to achieve the goals of economic development based on *syaria* principles, as the effective impacts of *syaria* banking legal system in *UU No. 21 Tahun 2008* regarding *syaria* banks, are that the regulations have not comprehensively been able to protect and guarantee the smoothness and security for the activities carried out or bank products by using electronic facilities. The use of electronic facilities, as the impact of the development of global financial market, requires the specific regulations because of the obvious differences either in the kinds of products and services produced by conventional banking or business and transaction models on the basis of *syaria*.

The government needs to formulate legislation that can comprehensively accommodate all regulations dealing with the activities and products of *syaria* banks using electronic facilities. The law products are hoped to have legal power binding in nature in terms of Acts.

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