

Syari'ah Banking and Financial Institutions in a Positive Legal Perspective



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ABSTRACT: This article reviews the development of Islamic banking and financial institutions in Indonesia from a positive legal perspective. Starting in the early 1980s, an intensive discussion on Islamic banks as a pillar of Islamic economics was conducted, followed by the initiative to establish Bank Muamalat Indonesia in 1990. Significant developments occurred with the ratification of Law Number 10 of 1998, which provided a legal basis for the operation of Islamic banks and encouraged conventional banks to open Islamic branches. Islamic banks and conventional banks have some similarities in technical aspects, but the differences lie in the legal aspects, organizational structure, and work environment. Syari'ah banks operate based on the principle of profit sharing and must comply with the fatwa of the Syari'ah Supervisory Board. The main function of the National Syari'ah Council is to supervise the products of Islamic financial institutions to comply with Islamic law, issue fatwas, and provide reprimands if there are irregularities. Government Regulation Number 72 of 1992 explains the principle of profit sharing that must be applied by Islamic banks. In addition, Bank Muamalat Indonesia (BMI) operates three operational principles: a profit-sharing system, a buying and selling system with profit margins, and a fee (service) system. BMI products include various types of savings and financing that are in accordance with Syari'ah principles. From a positive legal perspective, there is a significant difference in handling usury. The traditional interpretation of riba focuses on prohibitions based on financial exploitation. However, there is an argument that the Islamic banking system needs to be more humane and fairer in its operations. The Qur'an's moral and humanitarian interpretation regarding riba emphasises preventing the exploitation of financial needs, not just the addition of interest.

KEYWORDS: banking, finance, Syari'ah, positive law

INTRODUCTION

In the early 1980s, discussions about Syari'ah banks as a pillar of Islamic economics began to be carried out. The figures involved in the study are Karnaen A. Perwataatmadja, M. Dawam Raharjo, A. M. Saefuddin, M. Amin Azis and others. Several trials on a relatively limited scale have been realized. Among them is Baitut Tamwil-Salman, Bandung, which had grown impressively. In Jakarta, a similar institution was also formed in the form of a cooperative, namely the Ridho Gusti cooperative (Antonio, 2001: 25).

However, a more specific initiative to establish an Islamic bank was only carried out in 1990. The Indonesian Ulema Council (MUI), on August 18 to 20, 1990, held a workshop on Bank and Banking Interest in Cisarua, Bogor. The results were followed up in the fourth national deliberation of the MUI, which took place at the Sahid Hotel Jakarta on August 22-25, 1990, and resulted in the establishment of an Islamic Bank in Indonesia. Namely, Bank Mu'amalat Indonesia, whose deed of establishment was signed on November 1, 1991.

The development of the Syari'ah Bank continued until the reform era. And this is marked by the approval of Law Number 10 of 1998. The law thoroughly regulates the legal basis and types of businesses that can be operated and implemented by Syari'ah Banks. The law also provides directions for conventional banks to open Syari'ah branches or even convert themselves completely into Syari'ah Banks.

This opportunity was enthusiastically welcomed by the banking community. A number of banks have begun to provide staff with training in the field of Syari'ah banking. Some of these banks want to explore opening Syari'ah divisions or branches in their institutions. Some even plan to fully convert themselves into Syari'ah Banks. This is anticipated by Bank Indonesia by holding a "Syari'ah Banking Training" for Bank Indonesia officials from all departments, especially directly related officials such as the Directorate of Banking Research and Regulation (DPNP), credit, supervision, accounting, research and monetary.

Another development of Syari'ah banking in Indonesia after the reform is the conversion of conventional commercial bank branches into Syari'ah branches. Some of the banks that have and will open Syari'ah branches include Bank IFI, Bank Niaga, Bank BNI'46, Bank BTN, Bank Mega, Bank BRI, Bank Bukopin, BPD West Java (has opened a Syari'ah branch in Bandung), BPD Aceh, and Bank Mandiri.

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In some ways, Conventional Banks and Syari'ah Banks have similarities, especially in terms of technical aspects of receiving money, transfer mechanisms, computer technology used, and general requirements for obtaining financing such as ID cards, NPWP, Proposals, Financial Statements and so on. However, there are many fundamental differences between the two. The differences concern legal aspects, organizational structure, finance businesses and work environment. The comparison between Syari'ah Banks and Conventional Banks is presented in the following Table 1.

Table 1. The comparison between Syari'ah Banks and Conventional Banks

CONVENTIONAL BANKS	BANK ISLAM
Halal and haram halal investments	Make halal investments only
Wearing a flower set	Based on the principle of profit sharing, buying and selling or renting.
Profit Oriented.	Profit and Oriented Falah.
Relationship with customers in the form of debtor-debtor relationship	Relationship with customers in the form of partnership relationships.
There is no type of hall	The collection and distribution of funds must be in accordance with the Fatwa of the Syari'ah Supervisory Board.

Since its inception, Syari'ah banking has been based on the presence of two modern Islamic renaissance movements: neo-revivalist and modernist (Abdullah Saeed, 1996: 18) The main purpose of the establishment of this ethical financial institution is none other than the efforts of Muslims to underlie all aspects of their economic life based on the Qur'an and the Sunnah.

The initial efforts to implement the profit system and loss sharing were recorded in Pakistan and Malaysia around the 1940s, namely efforts to manage the funds of pilgrims in an unconventional way. Another institutional pioneer was the Islamic Rural Bank in the village of Mit Gharn in 1963 in Cairo, Egypt. After those two fairly simple initial start-ups, Islamic banks grew very rapidly. According to Prof. Khursid Ahmad's analysis and the international report of the Association of Islamic Banks, until the end of 1999, there were more than 200 Islamic financial institutions operating around the world both in Muslim-populated countries in Europe, Australia, and America.

It is also worth noting that currently, many big names in the international financial world, such as Citibank, Jardine Flemming, ANZ, Chase Chemical Bank, Goldman Sachs, and others, have opened branches, and funds are now crowded with trading, something that prompted the world's capital market lion Dow Jones to issue the Islamic Dow Jones Index. Therefore, it is not surprising that Scharf, the former president of the Christian Danish Islamic Bank, stated that the Islamic Bank is a new development partner.

Among others, Syari'ah financial institutions are applied in Baitul Mal Wa Tamwil (BMT), Syari'ah Takaful, etc. This financial system implements the Musyarakah, mudharabah, muzara'ah or musaqah system. This Islamic financial and banking system is here to provide a variety of religiously acceptable financial services to Muslim communities. In addition to this special function, banking and financial institutions, like other aspects of Islamic society, are expected to contribute appropriately to the achievement of the main Islamic socio-economic goals. The most important of all of these are economic welfare with full employment and a high rate of economic growth, socio-economic justice and fair distribution of income and wealth, stability of money value, and mobilization and investment of savings for economic development that can provide guaranteed profits (profit-sharing) to all parties involved.

Perhaps the religious dimension should be put forward as a clear next goal, in the sense that the opportunity to carry out religiously legitimate financial operations has a value far beyond the value of the financial operation model itself. And the validity of this general purpose is rarely in question. However, there is no consensus on the proper structure of the entire financial system needed to achieve these goals.

BANKING AND FINANCIAL INSTITUTIONS' PERSPECTIVE ON POSITIVE LAW

The Role of the Syari'ah Council (DPS) and the National Syari'ah Council (DSN)

The main role of the Syari'ah supervisory board is to supervise the daily operation of the bank so that it is always in accordance with the provisions of Syari'ah. This is because the transactions that apply in Syari'ah banks are very special when compared to conventional banks. Therefore, a guideline is needed to regulate it. These guidelines are compiled and determined by the National Syari'ah Council.

The Syari'ah Supervisory Board must make periodic statements that the banks it supervises have been running in accordance with the provisions of Syari'ah. This statement is contained in the bank's annual report. Another task of this DPS is to research and make new product recommendations from the banks it supervises. Thus, the Syari'ah supervisory board acts as the first screener before a product is re-examined and fatwa by the national Syari'ah council.

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In line with the development of Syari'ah financial institutions in the country, the number of existing DPS has also grown, and each of these institutions has been supervised. The main function of the national Syari'ah council is to supervise the products of Syari'ah financial institutions to be in accordance with Islamic Syari'ah. This council supervises Syari'ah banks and other institutions such as insurance, mutual funds, venture capital, and so on.

Another function of the national Syari'ah council is to research and give fatwas for products developed by Syari'ah financial institutions. These new products must be submitted by the management after being recommended by the Syari'ah supervisory board to the institution concerned. In addition, it provides recommendations for scholars who will be assigned to a national Syari'ah council at a Syari'ah financial institution.

The national Syari'ah council can give a reprimand to a Syari'ah financial institution if the institution deviates from the guidelines that have been set. If the Syari'ah financial institution does not heed the reprimand given, the national Syari'ah council may propose to the competent authorities, such as Bank Indonesia and the Ministry of Finance, to impose sanctions so that the company does not further develop its actions that are not in accordance with the Syari'ah.

POSITIVE LEGAL PRINCIPLES IN SYARI'AH BANKING AND FINANCIAL INSTITUTIONS

Banks based on the principle of profit sharing in Indonesia, which has not been regulated/known in Banking Law number 7 of 1992 which states that one of the businesses of Commercial Banks is to "provide financing for customers based on the principle of profit sharing in accordance with the provisions stipulated in Government Regulations" (article 6 letter m of Law number 7 of 1992), and one of the businesses of People's Credit Banks is to "provide financing for customers based on the principle of profit sharing in accordance with with the provisions stipulated in the Government Regulation" (article 13 letter c of Law number 7 of 1992).

The Government Regulation appointed by Article 6 Letter M and Article 13 Letter C of Law number 7 of 1992 only existed on October 30, 1992 (so it only existed after Bank Muamalat Indonesia was established and began operating), namely, Government Regulation number 72 of 1992 concerning Banks based on the Profit Sharing Principle. According to this Government Regulation, a bank based on the principle of profit sharing is a Commercial Bank or People's Credit Bank that carries out activities solely based on the principle of profit sharing (article 1 paragraph (1) of Government Regulation number 72 of 1992). His explanation states: "What is meant by the principle of profit sharing in this Government regulation is the principle of muamalat based on Syari'ah in carrying out bank business activities."

Commercial banks are banks that can provide services in payment traffic (article 1 number 2 of Law number 7 of 1992), while People's Credit Banks are banks that only accept deposits in the form of time deposits, savings, and/or other forms that are equivalent to it (article 1 number 3 of Law number 7 of 1992).

The profit-sharing principle referred to in Government Regulation 72 of 1992 is the profit-sharing principle based on Syari'ah used by banks based on the principle of profit sharing. First, determining the rewards that will be given to the community in connection with the use/utilization of public funds entrusted to them; Second, determining the rewards that will be received in connection with the provision of funds to the community in the form of financing, both for investment and working capital purposes, Third, determining rewards in connection with other business activities that are commonly carried out by banks with the principle of profit sharing (article 2 paragraph (1) of Government Regulation number 72 in 1992).

Letter of the Minister of Finance of the Republic of Indonesia number-1223/MK.013/1991 dated November 5, 1991, Business License Decree of the Minister of Finance of the Republic of Indonesia number 430/KMK: 013/1992 dated April 24, 1992, on May 1, 1992 BMI started its operations. Besides BMI, which is a commercial bank, several Syari'ah BPRs have also been born.

In running its commercial business, BMI has three operational principles: First, the Profit-Sharing System is a system that includes procedures for distributing business results between fund providers and fund managers. The business proceeds can be distributed between the bank and the depository customer or between the bank and the recipient (borrower) of the funds. Second, the Buying and Selling System with Profit Margin is a system that implements buying and selling procedures where the bank appoints the customer as a bank agent, and the customer in his capacity as a bank agent, purchases goods on behalf of the bank, then the bank will act as a seller of the goods to the customer who originally acted as a bank agent with a price of a certain purchase price plus profit for the bank (margin/mark-up); Third, the Fee System (Services) covers all non-financing services provided by banks, such as Bank Guarantees, Clearing, Inkaso, Transfer Services, and others.

Banks have (1) fund mobilization products, which are bank efforts to collect funds from the public and (2) fund distribution products, namely bank efforts to channel funds to bring profits. The products of BMI fund deployment are: first, Giro Wadi'ah, which is customer funds entrusted to banks. At any time, customers have the right to take it and are entitled to a bonus from the benefits of using current account funds by the bank. The bonus amount is not set in advance, but it is really the "discretion" of the bank. Nevertheless, the nominal is sought in such a way that it is always competitive. (note: according to article 1 number 7 of Law number 7 of 1992): "Current account is a deposit that can be used as a means of payment, and its withdrawal can be made at any time by using a check, other means of a payment order, or by way of book transfer."

Second, Mudharabah Savings, which are customer savings funds that will be managed by the bank to earn profits. Profits will be given to customers based on mutual agreements. (note: according to article 1 number 10 of Law number 7 of 1992): "Savings

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is a deposit whose withdrawal can only be made according to certain agreed conditions, but cannot be withdrawn by a check or an instrument that can be equated with it."

Third, Mudharabah Investment Deposits are funds deposited by customers and can only be withdrawn based on a specified period of time, with profit sharing based on mutual agreements. (Note: According to Article 1 Number 8 of Law Number 7 of 1992): "Time Deposit is a deposit whose withdrawal can only be made at a certain time according to the agreement between the depositor and the bank concerned".

Fourth, Hajj Mudharabah Savings, which are customer deposits whose withdrawals are made when the customer is going to perform the Hajj or under certain conditions in accordance with the agreement. These savings also earn a profit share; Fifth, Qurban Savings are customer deposits collected for Qurbani worship. The withdrawal is made at the time when the customer is going to carry out the Qurbani worship or by agreement between the bank and the customer. These savings also earn a revenue share. BMI's fund distribution products are, First, Mudharabah Financing, which is investment capital financing or working capital that is fully provided by the bank, while the customer provides the business and management. The profits will be divided according to mutual agreement in the form of a certain Misbah. Second, Mudharabah Financing is financing for the purchase of local or international goods. Banks benefit from increased prices of goods (selling prices consist of purchase prices plus profit margins). This financing is similar to working capital loans in conventional banks, with a term of not more than one year; Third, Ba'i Bithaman Ajil Financing, which is financing for the purchase of goods in installments. Banks benefit from the increased price of goods (the selling price consists of the purchase price plus the profit margin). This financing is similar to Investment Credit in Conventional Banks, with a financing period of more than one year. Fourth, Al-Qardhul Hasan Financing is a soft loan for small entrepreneurs who are really short of capital. The customer does not need to share the profits with the bank but only pays administrative fees, which are real costs that can be avoided for the occurrence of the contract, for example, project research costs, notaries, employee wages, etc.; Fifth, Musharakah Financing, which is financing part of the total capital. The bank can be involved in the management process. The profits obtained are divided according to the agreement. Sixth, other service provision products, such as L/C issuance services, inkaso services, transfer services, and bank guarantees, are divided according to the agreement.

BANKING PERSPECTIVE OF SYARI'AH FINANCIAL INSTITUTIONS AND IJTIHAD

The views and methods of the Syari'ah councils in determining what is not in Islamic banking or financing show that they are constantly referring to the Fiqh literature to justify or reject modern financial transactions, a method that is almost unjustifiable given the fact that most of the institutions we witness in the world of banking and financial institutions are new and unprecedented in the early days of Islamic history. Although there is a greater need today to perform Ijtihad, perhaps greater than ever, the method of these Syari'ah councils does not show that Ijtihad is happening on a large scale in Islamic banking.

After carefully examining the traditional interpretation of riba in the context of Islamic banking, perhaps it is necessary to look at what can be done to pay attention again to the riba problem. First, a critical analysis of the problem of riba is carried out by highlighting the weaknesses in their position and arguing for approaching the problem based on the new Ijtihad. Second, an argument is put forward to show that the approach in question is necessary by mentioning the postulates from the main sources of Islam and the theory and history of Islamic law. These analyses show that the laws in the two main sources of Syari'ah, namely the Qur'an and the Sunnah, are flexible enough to allow the development of various institutions needed by Muslim society based on the principles of welfare and justice. This argument also shows that there is ample evidence that a reassessment of the issue of riba is not only possible but should be the norm given the attitude of the leading companions and early authorities regarding Ijtihad and the importance that most of them place on the grounds underlying each commandment and prohibition.

Since the traditional interpretation of riba is unjustified, it is necessary to look at the issue from a broader perspective from the perspective of Syari'ah moral principles such as honesty, justice, and equality. From this perspective, in the context of financial and banking transactions, the factor of injustice ultimately determines what is riba and what is not. An addition in a financial transaction given to a creditor just because it is solely an addition does not constitute riba. When applied to the interest of the Modern Bank, this will mean that not all types of interest are riba, except only the type of interest that contains injustice to one of the parties to the contract. Therefore, any transaction based on interest that contains injustice must be prohibited as riba. Similarly, a transaction, even though it does not explicitly contain an element of interest but leads to the discretion of one of the parties, can be considered as riba. The idea that I want to convey here is that the circumstances of a particular transaction, the parties involved in the transaction, the relative strength of one party in front of another party, as well as the economic and social environment in which the transaction occurs all of which must be determined whether a particular transaction is forbidden as riba.

Islamic banks' practice shows that they cannot remove interest from their transactions, which are practiced under various guises and names. There is no good reason to believe that Islamic economists have developed a method of financing that is interest-free and, at the same time, practical enough to be the foundation of a modern banking system. Therefore, perhaps it is time to look realistically at riba. In banking, perhaps having the label 'Islamic' is not enough to become an Islamic bank. First and foremost, banking institutions, whether they are named 'Islamic' or not, need to be more humane and able to give people access to funds on humane terms and at a reasonable cost.

CONCLUSION

The modern Islamic banking system and financial institutions are based on the interpretation of riba that some Traditional Fiqh schools accept. Theorists and practitioners of Islamic banking and financial institutions have struggled to realize this interpretation in practice. Their success in this endeavour is questionable, however. Various efforts to provide alternative interpretations of this riba and the claims made in the literature for its successful implementation. The view that highlights the emphasis on the moral and humanitarian side given by the Qur'an and the Sunnah concerns the issue of riba and, at the same time, an argument to support the view that such emphasis is valid in the current debate on riba and Islamic banking.

The issue of interest as riba in the Qur'an shows that the prohibition by the Qur'an is based on moral and humanitarian considerations, not legal considerations. A search of riba as practiced in pre-Islamic times reveals that what is forbidden in the Qur'an is basically the exploitation of the needs of people who are experiencing financial difficulties, rather than something "extra" that is simply given to creditors in a debt transaction. This view is supported by the comparisons of usury with shadaqah, (alms) performed by the Qur'an and also the specific mention of the reason for the prohibition, namely tyranny, at the end of the verses that prohibit usury. The Sunnah does not mention much about the nature of riba, which is forbidden in the Qur'an because the focus is on certain forms of buying and selling. The jurists, who basically focus on the forms of riba that are forbidden by the Sunnah, almost exclusively build their theory of riba based on the Sunnah, ignoring the development of a theory based on the Qur'an.

The Qur'an's moral and humanitarian reasons for prohibiting riba have not received emphasis in fiqh literature, and jurisprudence discussions have gradually become more legal and semantic. As the jurists interpret it, riba does not address the problem of people's need to borrow for non-human purposes.

The perspective of the development of banking and Syari'ah financial institutions will grow dynamically into positive law through national legislation. The legislation of Syari'ah law in the social order will make Islamic law the state's law, meaning that the position of the banking system and financial institutions is strengthened to become state law or a positive law. In terms of legislating the banking system and Syari'ah financial institutions into positive law. This is the role and efforts of the Syari'ah Council for Ijtihad that do not contradict fiqh literature to determine what is Islamic and what is not in banking and financial institutions to become positive law.

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