

**SHARIA BANKING POSITION IN THE ECONOMIC AND THE NATIONAL  
LEGAL SYSTEM**

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**Abstract**

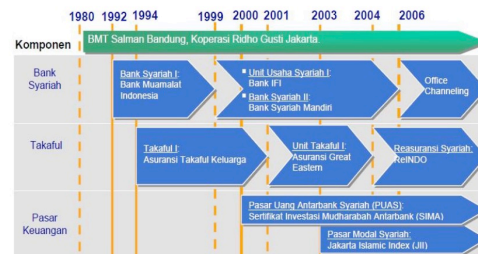
The Position of Sharia banking in Indonesia legal system is important. The study aims to find out how is the position of sharia banking in the national legal system. The method used in this research is normative juridical with qualitative analysis approach. Moreover, the result is the position of Islamic banks in the economic system is as a bank institution that helps the Indonesian economy in increasing financial inclusion and becomes an institution that carries out an intermediary function. In relation to the national legal system, Islamic banking has a strong position, because it is an inseparable part of the legal system in force in Indonesia.

**Keywords:** Sharia Bank; legal system; the position

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**INTRODUCTION**

The establishment of Islamic banks in Indonesia was first established in 1992 where the government implemented a dual banking system policy. The government's commitment to the development of Islamic banking has only begun to be felt since 1998 which provided broad opportunities for Islamic banks to develop, then in 1999 Bank Indonesia was given the mandate to develop Islamic banking in Indonesia. The development of sharia banking is encouraged through a market driven strategy, fair treatment, as well as a gradual sustainable strategy – a continuous and gradual implementation of sharia principles. The development of Islamic banking from 1980 to 2006 is shown in Figure 1 (Zainuddin, Hamja, & Rustiana, 2017).



**Figure 1. The development of Islamic banking (1980-2006)**

Source: Zulkifli, Yahya, Rustiana (2016)

Ascarya, Kiki in Zulkifli Zainuddin, Yahya Hamja, Siti Hamidah Rustiana said that the basic stage is the foundation for a solid Islamic banking growth (2002 - 2004). While the second stage is strengthening the structure of the Islamic banking industry (2004 - 2008). Meanwhile, the third stage of Islamic banking is directed to be able to meet international financial standards and service quality (2008 – 2011). In 2011 it is hoped that Indonesian Islamic banking will have a significant share that takes part in developing

the Indonesian economy, the banking system is public participation in the formation of a sharia economy (bottom up) which requires an alternative Islamic banking system (Zainuddin, Hamja, & Rustiana, 2017).

The development of Islamic banks is still below the development of conventional banks where the market share of Islamic banking in the national economy is based on the OJK in 2017 Indonesian Islamic banks reached their highest growth levels, with assets growing at 23.5%, and financing and deposits registering 19.4% and 25.1% growth, respectively. However, the contribution of Islamic banking in the economy will continue to increase due to several factors as explained by Imam and Kpodar in Supriani, Fianto, Fauziah, & Maulayati said that Islamic banks provide lending to persons and companies that lack assets through a risk-sharing scheme. Spiritual principle of Muslim customers fulfilled by Islamic banks, then they encourage financial stability through profit and loss schemes that create fewer crises in crisis-prone system. The World Bank (2015) reports that risk-sharing principles and the avoidance of speculative financial products helps Islamic banks to face crises and strengthens the financial stability (Supriani, Fianto, Fauziah, & Maulayati, 2021).

The profit-sharing system becomes the "spirit" for Islamic banking which brings fairer benefits to all parties (Alamsyah, 2012), which is shown in the following table regarding the development of the Islamic banking industry from 2008 - 2014. Islamic banking operates its business with sharia principles and The sharia principles are as described in QS AL-Baqarah Verses 277 – 282 where the practice of prohibiting usury shows that the economy is an Islamic concern and safeguarding rights, its attention to the benefit of servants and its attention to the problem of mu'amalah between themselves (Meeftha, 2015). Salim Bahreisy and Said Bahreisy in Sujian Suretno said that in the narration of Ibn Jarir this verse was revealed

because the Arab Muslim community at that time ate the property of each other in a false way, sought profit in an illegitimate way and carried out all kinds of deception as if according to sharia law (Nasaruddin, 2019).

Antonio, Nikmah, Solahuddin in Zulkifli Zainuddin, Yahya Hamja, Siti Hamidah Rustiana said that the business carried out cannot be separated from the sharia filter that supports financing or capital in MSME activities is one of the important factors that can grow and develop a business. Because the most complex problem encountered is the lack of capital to achieve the optimal level of income in order to maintain the viability of the business. MSME actors run their business by relying on their own capital. This was motivated by a circular letter from Bank Indonesia No. 14/22/PBI/2012 reveals that the main problems faced in the economic sector are still lacking in empowerment and development of medium and small-scale community businesses. It is hoped that with this the government through banking services and roles can help the community to carry out business activities and community economic activities by providing assistance in the form of additional capital for business actors (Zainuddin, Hamja, & Rustiana, 2017).

Indonesia has a legal system that has its own style and structure. The legal systems are the customary law system, the Islamic legal system and the western legal system (Tutik, 2016). Bank is a business entity that is engaged in financial services with the aim of seeking profit and social, by collecting and distributing public funds by means of demand deposits, banks have wealth, especially in the form of financial assets (Imaniyati, 1967). Hasibuan, Kasmir, In Neni Sri Imaniyati and Verryn Stuart in Chainnur Arrasyid said that the notion as a financial institution which is an intermediary institution from parties who have excess funds (surplus of funds) with parties who lack funds (lack of funds), has a function as an intermediary. public finance (financial intermediary) (Imaniyati, 2008) see (Arrasjid, 2013) see (Isnaeni, 2016b) see

(Undang Undang Nomor 10 Tahun 1998 Tentang Perubahan Atas UU Nomor 7 Tahun 1992 Tentang Perbankan (Lembaran Negara RI Tahun 1998 Nomor 182, Tambahan Lembaran Negara RI Nomor 3790), 1998)

Regarding Banking - Regulations regarding banking are based on Law Number 10 of 1998 which is an amendment to Law Number 7 of 1992 as a result of the banking crisis (Kusumaningtuti, 2009). The crisis does not have a systemic impact, the government issued Government Regulation Number 17 of 1999 concerning The National Bank Restructuring Agency (Dirdjosisworo, 2003) while sharia banking services have not been regulated in it, so that Indonesia's national development goals are to achieve the creation of a just and prosperous society based on economic democracy, an economic system is developed based on the values of justice, togetherness, equity, and benefits. according to sharia principles (Undang-Undang Republik Indonesia Nomor 21 Tahun 2008 Tentang Perbankan Syariah (Lembaran Negara RI Tahun 2008 Nomor 94, Tambahan Lembaran Negara RI Nomor 4867), 2008).

Meanwhile, Sharia Banking is regulated by Law Number 21 of 2008 concerning Sharia Banking. Islamic banking is an institution / financial institution that has grown and developed in Indonesia since 16 years ago, starting with the establishment of Bank Muamalat Indonesia. The position of the bank as a creditor must be prudent in lending so that it is necessary to deviate from the provisions of Article 1131 of the Civil Code by making an accessor agreement with the debtor in the form of guarantees of material rights (Isnaeni, 2016b) see (Belanda, 1847). Material guarantee results in the transfer of ownership rights to the object but the material rights have been guaranteed in the form of material rights (fiduciary) or *inbezitstelling* - the right of control over the object is transferred without losing the right of ownership - to transfer control over the object (pawning) (Isnaeni, 2017).

Regulations related to banking are inseparable from the legal system that underlies them, as for the understanding of the legal system according to Mertokusumo in Asasriwarnia M. Jandra and Roy Mathen Moonti that the legal system is a system of norms that has an interrelation between what is regulated and the rules, formed according to the methods and rules that have been determined. by the regulator, or a collection of elements that exist in interaction with each other which is an organized unity and cooperation towards goals and is based on fairly basic philosophical values which after being explored by the founders of this nation and crystallized these values become a The basis of the state and the ideology of the nation is Pancasila which is strengthened in the MPRS Decree No. XX/MPRS/1966 which states that Pancasila is the source of all sources of law (Asasriwarnia & Jandra, 2018) see (Moonti, 2017). However the current law - *the ius constitutum* - is a mixture of various legal systems, including colonial law, customary law, Islamic law, and Pancasila law (Trijono, 2020) since the legal system based on Pancasila is open which is able to accommodate aspirations that grow and develop in the international world due to the influence of globalization, it must also be adaptive, that is, it can adapt to the personality of the Indonesian nation (Maryanto, 2015).

However, the issuance of laws made by regulators, because there is no main corridor that is used as a trajectory for the manufacturing process, resulting in disharmony and un synchronization (Isnaeni, 2016a) with other laws, so that a special institution is needed so that the law-making can have an attractive effectiveness in general, through the delegation of legislation as regulated in the law on the formation of legislation or inconsistency with the main law. Considering that we adhere to a regulatory hierarchy as stated in Article 7 of Law Number 12 of 2011 concerning the Formation of Legislations (UU P3), the content of all

laws and regulations must be in accordance with the type (Fadli, 2020).

Functionally, Islamic banks are not different from conventional banks, so that the basic principles of regulation and supervision developed for the banking system mostly apply to Islamic banks. What is different is the philosophy and operational principles of Islamic banks resulting in differences in the regulation and supervision system of Islamic banks. Abidin in the Tutik Quarterly Point said that the special characteristics of Islamic banks that resulted in differences in the regulation and supervision of Islamic banks were mainly: First, the need for guarantees for compliance with provisions and adherence to sharia principles in all activities of Islamic banks. Second, the difference in operational characteristics, especially as a result of the prohibition of interest, which is replaced by the PLS scheme with a profit-sharing ratio instrument (Tutik, 2016).

Islamic banking and conventional banking are regulated in the national legal system, where Indonesia is based on the Civil Law legal system – the influence of the Dutch legal system – where the legal sources are formal in the form of laws and regulations, customs, and jurisprudence. Countries that adhere to civil law place the constitution at the highest order in the hierarchy of laws and regulations. All civil law countries have written constitutions (Nurhadianto, 2015) see (Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembaran Negara RI Tahun 2011 Nomor 82, Tambahan Lembaran Negara RI 5234, 2011) see (Undang-Undang Republik Indonesia Nomor 15 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembaran Negara Republik Indonesia Tahun 2019 Nomor 183. Dan Tambahan Lembaran Negara Republik, 2019)

Suma in Neni Sri Imaniyati said that the interaction of sharia economics affects the national legal system, which was initially

limited to family law or in the field of special civil law as understood so far (Imaniyati, 2011). The position of the Sharia Banking Law is that it is *lex specialis lex specialis derogat lex generalis*, namely laws that are special in nature, overriding general laws. Thus, if in the Sharia Banking Law there are different arrangements from those stipulated in the Banking Law, then for Sharia Banking the law used is the Sharia Banking Law (Imaniyati, 2008).

The development of Islamic financial institutions in Indonesia, raises legal problems, especially with regard to national contract law. Indonesia's national treaty law still refers to Book III of the Civil Code which incidentally was born from the Continental European legal system. Meanwhile, the contract law that was born from the Islamic legal system or popularly known as Sharia Economic Law is related to national contract law (Imaniyati, 2011). Because of the interaction between these legal systems is a necessity because referring to a single national legal system can be high-cost and ineffective, however, gradual changes are needed (Maryanto, 2015).

Development of Islamic banks is influenced by internal and external factors, where internal is related to the service network while external factors are related to MUI fatwas and public perception (Imaniyati, 2008). Islamic banks were born from the Islamic economic system which has different sources, principles and principles from the capitalist economic system that gave birth to the conventional banking legal system. These differences in economic systems lead to differences in the banking system (Imaniyati, 2011).

The very principle difference between conventional financial institutions and Islamic financial institutions is philosophy as the basic orientation of the economy. The basic orientation of Islamic economics is based on the principle of divinity (*tawhid*), namely the relationship of economic activity, not only with fellow human beings, but also with God

as the creator. In addition, there are instrumental values, namely the prohibition of usury. Zakat obligations, economic cooperation social security, and the role of the state (Imaniyati, 2008).

In the civil sphere, disputes that occur in business transactions are unavoidable for disputes (disputes/ differences) between the parties involved. Every type of dispute that occurs always demands a quick solution and settlement, as well as what happens in the banking world. T. Mulya Lubis In Chainur Arrasyid said that the law is lagging behind in the growing and complex economic traffic while the nature of the law is conservative, while Roscoe Pound stated that the law is social reengineering, so that the law can adapt to the conditions of community development, because the law must be able to frame activities economic cost efficiency business must be enforced to avoid high cost economy. legal provisions as a buffer for business activities, including banks, must be based on such efficiency through prudent actions in accordance with the provisions of banking laws. The credit agreement between the customer and the bank is also related to the law of agreements and contracts based on the provisions of article 1233 of the Civil Code where the agreement was born from the law (Arrasjid, 2013: P.31) see (Isnaeni, 2016b:45-46).

As a consequence of business efficiency and the application of the principle of freedom of contract (freedom of contract), if a dispute occurs it is caused by business practices that are not in accordance with the contents of the contract in the business agreement, such as different opinions, different understandings, and different interpretations by the parties and not being fulfilled. the rights and obligations that have been agreed in the business contract can be made a clause on the procedure for resolving disputes.

The principle of freedom of contract (freedom of contract), then the parties can determine their own procedures for resolving business disputes, which include the choice of

law (choice of law), choice of forum (choice of jurisdiction), and choice of domicile (choice of domicile) as stated in Article 1338 of the Civil Code, namely the principle of *pacta sunt servanda*. Dispute resolution in the business sector which also includes business disputes can be resolved through two ways or choice of law, namely through litigation by the general court institution and through non-litigation institutions or through alternative dispute resolution (ADR) by negotiation, mediation, conciliation, and arbitration. In general, dispute resolution by arbitration in Indonesia on a national scale is carried out through arbitration institutions, it is known that there are two kinds, namely Institutional Arbitration (permanent or institutionalized as an organization) and Ad Hoc Arbitration (temporary) (Astiti, 2013).

## METHOD

The method used in this research is normative juridical with qualitative analysis approach. The collected data is then compiled and put into writing (narrative), interpreted and analyzed the research approach uses a statutory approach (Efendi & Ibrahim, 2016). In legal analysis analyzes legal understanding, legal principles, legal rules, legal systems. The data collection technique used in this research is to use literature review to study and collect data and information from the literature related to this research including primary, secondary and tertiary legal materials. In this study, a review of the law was carried out (Efendi & Ibrahim, 2016).

## RESULTS AND DISCUSSION

Indonesia is very interested in controlling the market share of Muslim products and also the world's sharia economy considering Indonesia's position as a Muslim and the largest market in the world, so a strategic stage is needed and also government support to make it happen.

As part of driving national economic growth, financial institutions - the Islamic

Finance sector - are required to establish synergy with economic innovation in order to accelerate the post-Covid-19 economic recovery. This synergy is very urgent considering that in supporting superior halal products which continue to increase as well as global trade support for world halal products through e-commerce channels, so that this increase will increase the role of Sukuk as a source of sharia financing as well as sustainable growth in financing disbursed (PYD) and digitalization of the Islamic social finance sector through productive waqf (Bank Indonesia, 2021).

The development of sharia banking that is able to survive (durable), competitive and efficient in improving the national economy. These three strengths can be achieved through optimizing the role of the Islamic banking industry through three pillars, called strengthening the identity of sharia banking, synergizing the sharia economic ecosystem, and strengthening licensing, regulation and supervision. Optimizing the development of sharia banking should not ignore the challenges where strategic issues that are considered to be able to hinder the growth of sharia banking are the absence of significant business model differentiation. The quality of human resources is still weak and the use of technology is not optimal, besides that the inclusion index and the community's sharia financial literacy are still low (Suryowati, 2021).

Supriadi and Yayat in Lady Yulia said that Halal vocabulary is not only related to a religion but is a guarantee of the quality of a product and is also a symbol of a global lifestyle. The high growth of Islamic economics and finance in two decades – an estimate of three trillion dollars in 2023 – this is influenced by one of them being influenced by one of the demographic trends of the world's Muslim population which in 2030 is more than a quarter of the world's population (27.5%), still creating a gap - optimization of the halal value chain is still small, net imports are still higher than the net exports of world

halal products. Indonesia should be a leader in Indonesia's halal value chain, but in reality it is in the top 10 in the world despite being the country with the largest Muslim population in the world. The above conditions are caused by several obstacles faced by Indonesia as follows (Komite Nasional Keuangan Syariah, 2018):

1. Inadequate regulations related to the halal industry;
2. Public literacy and awareness of halal products is still low;
3. Interlinkage of the halal industry and Islamic finance is still low;
4. The high consumption and demand for halal products is not matched by an increase in production capacity;
5. The governance and risk management of the halal sector is still inadequate;
6. Utilization of technology is not optimal in the halal industry;
7. Global recognition of Indonesia's halal standards has not been maximized.

Hari in Therefore, various strategies are needed that can balance the industrial sector and Islamic financial institutions, one of which is maximizing cooperation with OIC member countries and Islamic banking institutions - the Islamic Development Bank (IDB), which has been proven to be able to play its role in meeting the needs of Islamic countries in development and development of the Islamic economic system (Hari, 2015).

Widi Dwi Ernawati said that the development of Sharia banks needs to be supported by regulations and fiscal incentives in taxation through tax equal treatment, because so far there has been a distortion of the meaning of Mudarabah - buying and selling in financial services in financial leases, factoring, credit card business and/or or consumer financing – where the delivery of Taxable Goods based on the Mudarabah principle is subject to VAT, whereas financial services are VAT-free. This difference in treatment can hinder the growth of Islamic banks because it makes Islamic financial services more expensive than conventional

(non-competitive) banks. Therefore, it is necessary to take the government's side through regulations that can provide specificity in the form of tax holidays – within a certain period of time as is the case with the Malaysian and Dubai governments – to be able to make a maximum contribution to the national economy, because the provision of tax incentives will not trigger competition with conventional banks. Regulatory support that facilitates sharia banking operations and is able to accommodate sharia-based business dynamics. In the fatwa concerning murabahah Number 4/DSN MUI/IV/2000 it is stated that banks buy items needed by consumers under the bank's own name and then sell them to consumers without usury and the property rights of the goods become the property of the buyer in full after levering - delivery goods (Hari, 2015).

The National Legal System is a law or statutory regulation that is formed and implemented to achieve the goals, principles, and legal ideals of a country. In this context, Indonesian national law is a legal entity or statutory regulation that is built to achieve state goals that are sourced from the highest legal sources, namely Pancasila and the 1945 Constitution and in accordance with Law No. 12 of 2011 which was renewed by Law No. 15 of 2019 Regarding the Formation of Legislation. The process of law formation in democratic perspective requires that the inputs that are taken into consideration for determining the law come from and are the aspirations of the community/people covering various interests in their lives.

Legal system based on Pancasila is open which is able to accommodate aspirations that grow and develop in the international world due to the influence of globalization. Legal restructuring, especially law in the economic field, needs to be carried out, because Indonesia has ratified the Agreement on Establishing the World Trade Organization (hereinafter abbreviated as WTO Agreement) based on Law Number 7 of 1994 (hereinafter abbreviated as Law No. 7/1994).

Besides global influence, it is also due to adaptation from other legal sources that are still valid, namely being able to adapt to the personality of the Indonesian nation as well as regulated in the transitional article paragraph 2 of the 1945 Constitution where the Dutch heritage law is still declared valid before there is a new law, (Triyono, 2020) and the formation of new laws must be in accordance with the theory of the formation of laws and regulations, then the reconstruction of laws and regulations must be in accordance with their types (Fadli, 2020) see (Nurhadianto, 2015) see (Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembaran Negara RI Tahun 2011 Nomor 82, Tambahan Lembaran Negara RI 5234, 2011) see (Undang-Undang Republik Indonesia Nomor 15 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembaran Negara Republik Indonesia Tahun 2019 Nomor 183. Dan Tambahan Lembaran Negara Republik, 2019).

Without ignoring other laws, economic crimes, corruption and banking crimes are contained in the Indonesian Criminal Code and contained in the Banking Law, namely Law Number 7 of 1998 concerning Banking - Regulation on banking based on Law Number 10 of 1998 1998 which is an amendment to Law Number 7 of 1992, (Kusumaningtuti, 2009) and Undang-Undang Nomor 3 of 2004 concerning Amendments to Law Number 23 of 1999 concerning Bank Indonesia, as *lex specialis lex specialis derogat lex generalis* (Neni, 2008).

The financial crisis caused by the banking sector in 1998 had pushed the crisis without a systemic impact, so the government issued Government Regulation Number 17 of 1999 concerning the National Bank Restructuring Agency, (Dirdjosisworo, 2003) see (Arrasjid, 2013). Regulations related to banking are inseparable from the legal system that underlies them, as for the

understanding of the legal system according to Mertokusumo In Asasriwarnia M. Jandra and Roy Mathen Moonti that the legal system is a system of norms that has an interrelation between what is regulated and the rules, formed according to the methods and rules that have been determined. by the regulator, or a collection of elements that exist in interaction with each other which is an organized unity and cooperation towards goals and is based on fairly basic philosophical values which after being explored by the founders of this nation and crystallized these values become the basis of the state and the ideology of the nation is Pancasila which is strengthened in the MPRS Decree No. XX/MPRS/1966 in which it is stated that Pancasila is the source of all sources of law. (Asasriwarnia & Jandra, 2018) see (Moonti, 2017) however, the current law - the *Ius Constitutum* - is a mixture of various legal systems, including colonial law, customary law, Islamic law, and Pancasila law (Triyono, 2020).

Banking is regulated in the national legal system, where Indonesia is based on the Civil Law legal system – the influence of the Dutch legal system – where the legal sources are formal in the form of laws and regulations, customs, and jurisprudence. Countries that adhere to civil law place the constitution at the highest order in the hierarchy of laws and regulations. All civil law countries have written constitutions (Nurhadianto, 2015) See (Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan, Lembaran Negara RI Tahun 2011 Nomor 82, Tambahan Lembaran Negara RI 5234, 2011).

## CONCLUSION

Pancasila is the basis of the state and the ideology of the nation, so Pancasila is the source of all sources of law, so all form of legal system in Indonesia based on UUD 1945 and which is strengthened in the MPRS Decree No. XX/MPRS/1966 that the current

law - the *Ius Constitutum* - is a mixture of various legal systems, including colonial law, customary law, Islamic law, and Pancasila law

The position of Islamic banks in the economic system is as a bank institution that helps the Indonesian economy in increasing financial inclusion and becomes an institution that carries out an intermediary function. In relation to the national legal system, Islamic banking has a strong position, because it is an inseparable part of the legal system in force in Indonesia. The sharia filter that supports financing or capital in MSME activities is one of the important factors that can grow and develop a business. Because the most complex problem encountered is the lack of capital to achieve the optimal level of income in order to maintain the viability of the business. MSME actors run their business by relying on their own capital.

Regulations related to banking are inseparable from the legal system that underlies them, as for the understanding of the legal system

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