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DUALISM OF BANKING LEGAL SYSTEM IN INDONESIA LEGAL ANALYSIS OF THE REGULATION GAP BETWEEN SHARIA BANKS AND COMMERCIAL BANKS

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Abstract

Indonesia has officially adopted a dual banking system since the enactment of Law Number 10 of 1998 concerning Banking and Law Number 21 of 2008 concerning Sharia Banking. This system is expected to guarantee the existence of sharia banks as an integral part of a pluralistic national financial system. However, in practice, the dualism of the banking legal system has actually given rise to various regulatory gaps and serious legal problems. This study aims to analyze the regulatory imbalance between sharia banks and commercial banks from the aspects of legislation, institutions, supervision, legal protection, and dispute resolution. This study uses a normative legal approach with a descriptive-qualitative analysis method of laws and regulations, DSN-MUI fatwas, and sharia economic law literature.

The results of the study show that Islamic banks have not received equal legal treatment with conventional banks, both in terms of deposit guarantees, supervisory structures, and dispute resolution mechanisms. The function of the Sharia Supervisory Board (DPS) which is only administrative without law enforcement authority, as well as the less than optimal protection of sharia contracts in the national civil law system, strengthens this inequality. In addition, the ambiguity of judicial jurisdiction between religious courts and district courts in resolving Islamic bank disputes further worsens legal certainty.

This study recommends legal harmonization through strengthening sharia regulations, integrating sharia contracts into national law, strengthening DPS institutions, and establishing independent sharia dispute resolution and guarantee mechanisms. Thus, the dualism of the banking legal system can be directed towards a more just, inclusive system based on national legal principles and sharia values.

Keywords: Legal Dualism, Islamic Banking, Regulatory Gap

INTRODUCTION

The banking legal system in Indonesia has undergone significant transformation since the introduction of the dual banking system at the end of the 20th century, where Islamic banks began to be accommodated in the national legal framework alongside conventional banks. The existence of this dual banking system is a manifestation of legal pluralism in the economic field that tries to respond to the needs of the Muslim community for a financial system that is in accordance with sharia principles, without neglecting the conventional system that has existed and developed dominantly. However, the integration of these two banking legal systems has not taken place ideally. A number of normative and structural problems still arise, especially related to the regulatory gap between Islamic banks and commercial banks which have implications for legal certainty, institutional equality, and legal protection for customers.

Since the enactment of Law Number 10 of 1998 as an amendment to Law Number 7 of 1992 concerning Banking, the national banking system has given limited recognition to the existence of sharia-based banks. However, comprehensive recognition was only given through Law Number 21 of 2008 concerning Sharia Banking. On the one hand, the presence of this law is significant progress, because it recognizes sharia banks as an independent sub-system in the national economic structure. However, on the other hand, this separation of regulations actually gives rise to legal fragmentation between two different systems of sharia banks and conventional banks which leads to substantive legal dualism.

This dualism does not only occur in the formal normative aspect, but also in the implementation level. In practice, the lack of synchronization between the two legal systems gives rise to various gaps, for example in terms of regulating customer fund protection, dispute resolution mechanisms, supervisory systems by authorities, and the legal status of banking contracts based on Islamic law. This difference becomes problematic when the two systems must operate in the same national economic space, but are burdened with different normative standards (Antonio, 2011).

Conceptually, general or conventional banks carry out business activities based on an interest-based system, while Islamic banks operate based on the principles of profit sharing, buying and selling, renting, and other forms of contracts regulated in the fiqh of muamalah. This fundamental difference requires the existence of a legal framework that is also particular, not only at the level of principle, but also in its normative substance. However, in the practice of national legislation, there is still a lack of norms or even overlap between the Islamic Banking Law and general banking regulations issued by the Financial Services Authority (OJK), Bank Indonesia (BI), and the Deposit Insurance Corporation (LPS). For example, in the context of deposit guarantees, although Law No. 24 of 2004 has regulated it generally, the implementation for deposits with wadiah or mudharabah contracts still does not fully reflect the principle of legal protection that is equivalent to interest-based deposits (Kusuma, 2018).

Furthermore, the supervision structure of Islamic banks is also fundamentally different from conventional banks. Commercial banks are directly supervised by the OJK, which focuses on compliance with laws and regulations and the principles of banking prudence. Islamic banks are not only supervised by the OJK, but also by the Sharia Supervisory Board (DPS) which is tasked with ensuring compliance with sharia principles. Unfortunately, the DPS often only functions as a formal administrative organ, not as a substantive supervisory institution with legal force. This makes sharia supervision normative, but does not have a firm sanctioning effect on violations of sharia principles (Zainuddin, 2020). As a consequence, many Islamic banks in practice experience "sharia decadence", where the products offered resemble conventional bank products, but are packaged with sharia contracts in a pseudo manner.

In terms of dispute resolution, legal gaps are also apparent. Disputes between customers and conventional banks are resolved through general mechanisms in district courts or mediation at the OJK. Meanwhile, for Islamic banks, Article 55 paragraph (1) of Law No. 21 of 2008 stipulates that dispute resolution is carried out through religious courts. However, this provision faces legal challenges because in practice, some religious courts do not yet have competent human resources to handle Islamic economic cases, and have not been optimally integrated with the national civil procedural law system. In fact, in some cases, customers actually choose to resolve Islamic bank disputes in district courts due to ignorance or practical preferences (Sari, 2021).

Inequality is also apparent in terms of institutions. Conventional banks, especially large banks that fall into the category of general business banks (BUKU) 3 or 4, have a much wider structure, IT system, and reach compared to Islamic banks. This has an impact on market dominance and public trust. Meanwhile, Islamic banks, despite having moral and spiritual strength based on religion, often experience limitations in terms of legal literacy and public education, especially in explaining that Islamic contracts are not just a name change for conventional transactions (Muhammad, 2017).

The issue of dualism in banking law also has an impact on the legislative aspect. The lack of harmonization between the Civil Code and sharia contract law causes a legal vacuum when a dispute occurs over a sharia banking contract. For example, in a mudharabah or murabahah contract, if there is a breach of contract, not all judges understand the basis of muamalah fiqh which is used as a reference for the contract. As a result, judges often return to articles of the Civil Code that are not compatible with sharia principles. In this case, the urgency of codifying sharia economic law as a positive legal system becomes very important (Shidarta, 2020).

In the future, to achieve a fair and proportional banking legal system, there needs to be a legal reformulation that is able to integrate the values of fiqh muamalah into the national legal system without causing legal segregation. Strengthening the authority of the National Sharia Council (DSN-

MUI), revitalizing the role of DPS, strengthening Islamic legal literacy among law enforcement officers, and establishing LPS Syariah as an independent institution, are strategic steps that must be taken. In addition, there needs to be a revision to the General Banking Law so that it can adjust to the dynamics of sharia banking that continues to develop, and no longer dominates the national financial system monolithically.

Indonesia as the country with the largest Muslim population in the world has great potential to become a global Islamic financial center. However, to realize this, the legal gap between Islamic banks and commercial banks must not be allowed to continue. The dualism of the banking legal system must be overcome through a harmonization approach, not through legal competition that negates each other. National law must be able to create normative and structural equality between the two systems, so that the integrity of the national financial system is maintained, while providing space for the development of Islamic financial principles substantially.

Thus, this study is important to examine legally the gaps that arise due to the dualism of the banking legal system, with a normative-comparative approach between the General Banking Law and the Sharia Banking Law, and highlighting the regulatory, institutional, supervisory, dispute resolution, and legal protection aspects of customers. It is hoped that through this study, legal reform ideas will be obtained that are able to bridge the fragmentation between the national positive legal system and sharia principles in the banking sector.

METHOD

The research method used in writing this journal is normative legal research with a statute approach and a conceptual approach. This study aims to analyze the laws and regulations governing the banking system in Indonesia, especially Law Number 10 of 1998 concerning Banking and Law Number 21 of 2008 concerning Sharia Banking, and to examine the normative gaps arising from the dualism of the law. Secondary data were obtained from literature studies in the form of primary legal materials (laws, OJK regulations, DSN-MUI fatwas) and secondary legal materials (books, journals, legal articles). The analysis was carried out descriptively-qualitatively in order to identify legal problems and offer ideas for constructive legal reform.

RESULTS AND DISCUSSION

Legal Configuration of Dual Banking System in Indonesia: Between Legislation and Reality

Indonesia is a state of law (rechtsstaat) as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which means that all aspects of national and state life, including the financial and banking sectors, must be organized based on law. In the context of the national banking system, Indonesia has officially adopted a dual banking system since the early 1990s. This began with the establishment of Bank Muamalat Indonesia in 1991, which operated based on sharia principles, and was later reinforced through the amendment of Law Number 7 of 1992 to Law Number 10 of 1998 concerning Banking, which recognizes two types of banks: commercial banks and banks based on sharia principles.

Legally, recognition of Islamic banks in a more systemic manner was only given through the enactment of Law Number 21 of 2008 concerning Islamic Banking. This law explicitly provides a solid legal basis for the establishment, regulation, and supervision of Islamic banks. However, the existence of the two separate laws, namely Law No. 10 of 1998 for conventional banks and Law No. 21 of 2008 for Islamic banks, has resulted in a legal configuration that is side by side, and often overlaps in terms of substance and implementation (Shidarta, 2020).

In practice, this dual banking system raises serious legal issues, especially in terms of regulatory synchronization and institutional equality. Conventional banks still dominate structurally and

operationally because they have a more established legal infrastructure, financial system, and network. Meanwhile, Islamic banks are often marginalized regulatoryly because their legal position is subordinate to the conventional banking legal system. For example, in the regulation regarding deposit guarantees by the Deposit Insurance Corporation (LPS), although Law No. 24 of 2004 states that deposits in Islamic banks are also guaranteed, in its implementation, the guarantee mechanism for Islamic deposit products such as wadiah and mudharabah still does not have the same standards as interest-based deposits in commercial banks (Kusuma, 2018).

The fundamental difference between Islamic banks and conventional banks lies in the operational system and the underlying legal principles. Conventional banks run their businesses based on an interest-based system, while Islamic banks use the principle of profit and loss sharing and muamalah contracts such as mudharabah, musyarakah, murabahah, wadiah, and ijarah. Due to these differences in principle, different and independent legal regulations are needed to avoid ambiguity in implementation. Unfortunately, in many cases, Islamic banks must still comply with OJK and BI regulations which are basically based on conventional legal approaches, not Islamic law (Antonio, 2011).

This lack of synchronicity is evident in several policies that are general in nature but applied uniformly to conventional and Islamic banks. For example, provisions regarding the formation of minimum core capital for banks, financial reporting standards, risk management systems, and liquidity provisions do not take into account the specific characteristics of Islamic banks. In fact, Islamic banks have different sharia contract and risk structures, which cannot be measured identically to the conventional banking system (Zainuddin, 2020). This shows that the banking regulatory framework in Indonesia still tends to be monolithic and has not fully accommodated the principles of Islamic law.

From the legislative aspect, a fundamental question arises regarding the legal position of Law No. 21 of 2008 in the national legal system. This law is hierarchically equivalent to the Conventional Banking Law, but in practice it is often considered as lex specialis which only applies to certain entities. The problem is, in a legal system that adheres to dualism like Indonesia, both systems should have equal status both in substance and operation. However, in reality, Islamic banks are often still treated as "subordinates" of the national banking system that is centered on conventional banks. This is contrary to the spirit of legal pluralism and the principle of equality before the law as guaranteed in the 1945 Constitution.

The implications of this legal system inequality are also felt in terms of institutional supervision. Conventional banks are only supervised by the OJK and Bank Indonesia in terms of prudence and compliance with financial regulations. Meanwhile, Islamic banks must undergo dual supervision, namely from the OJK and from the Sharia Supervisory Board (DPS) to ensure compliance with sharia principles. Although theoretically this is an advantage, in practice it is an additional burden because the DPS does not have the authority to impose sanctions or make binding decisions. The function of the DPS is more consultative and administrative. As a result, many Islamic banks carry out sharia cosmetic, namely using sharia contracts symbolically but carrying out operations similar to conventional banks (Arifin, 2022).

In addition, another crucial issue is the recognition of sharia contracts as part of positive law. In the Sharia Banking Law, sharia contracts such as murabahah, mudharabah, wadiah, and others have been recognized as valid forms of contracts. However, when a dispute occurs and is brought to the courts, many judges do not understand the characteristics of these contracts. As a result, the resolution of cases often returns to using the principles of agreements in the Civil Code which are not compatible with Islamic contracts. For example, in a wadiah contract, a sharia bank may not promise a return because it is only a deposit, but if a lawsuit occurs because the bonus is not given, the legal basis becomes unclear because the Civil Code does not recognize the concept of "voluntary grants" in the banking context (Sari, 2021).

These problems indicate the existence of legal fragmentation between the national civil law system and Islamic banking law, which results in legal uncertainty. In fact, in the modern legal system, legal certainty is the main pillar besides justice and benefit (Satjipto Rahardjo, 2006). Therefore, efforts to harmonize the law are very necessary so that the national legal system can accommodate the existence of the Islamic financial system without normative conflict.

It should also be noted that in the dispute resolution system, there are differences in legal channels between conventional banks and Islamic banks. Conventional banks resolve disputes through the District Court, while Islamic banks legally refer to Article 55 of Law No. 21 of 2008 which states that disputes are resolved through the Religious Court. However, in practice, there are still many Islamic bank disputes that are submitted to the District Court for various reasons, one of which is the unpreparedness of religious courts to handle complex Islamic economic cases. This creates a legal anomaly because it violates the provisions of lex specialis as stipulated by law (Nugroho, 2021).

To overcome these problems, there needs to be a reformulation of the national banking legal system that guarantees equality between the sharia and conventional systems, both in terms of normative substance, institutions, supervisory mechanisms, and dispute resolution. One concrete step is to strengthen the legal position of sharia contracts in the Civil Code or to compile a National Sharia Economic Law Codification that can be used as a legal reference in drafting contracts, resolving disputes, and drafting Islamic-based banking regulations. In addition, there needs to be institutional strengthening of the DPS so that it has a substantive role and authority that is equal to the OJK supervisor, including granting authority to sanction violations of sharia principles.

In the perspective of constitutional law, the state is also obliged to provide fair legal protection guarantees to all economic actors, including sharia economic actors. Therefore, the state must be present through the formation of regulations that support the principle of substantial justice, not just formal justice. When the legal system only accommodates conventional banks and treats sharia banks as a complementary system, then there has been a structural injustice that is contrary to the principle of the welfare state implemented by Indonesia (Asshiddiqie, 2011).

From the above explanation, it can be concluded that the dualism of the banking legal system in Indonesia has not been fully balanced with adequate and fair legal instruments. Fragmentation of norms, institutional imbalances, and the lack of synchronization between positive law and sharia principles are still serious challenges. Therefore, legal harmonization is an urgent agenda to ensure the sustainability of a strong, credible, and competitive sharia banking system in the national financial system.

Legal Problems and Challenges of Harmonizing the Banking Legal System in Indonesia

The main problem raised in this study is the existence of regulatory gaps and legal treatment between the conventional banking system and the Islamic banking system in Indonesia. This dualism of the legal system, although intended as a form of respect for legal pluralism and the aspirations of Muslims in the financial sector, actually gives rise to a number of serious legal problems at the normative and practical levels. The main focus of this problem includes: (1) regulatory gaps; (2) institutional and supervisory imbalances; and (3) unequal legal protection for Islamic bank customers and business actors.

First, the regulatory gap is very visible from the legal structure of national banking which still prioritizes the interest-based approach as the main framework. Although Law Number 21 of 2008 has separately regulated Islamic banking, a number of technical regulations from Bank Indonesia and OJK are still general approaches and have not differentiated in principle between the characteristics of Islamic banks and commercial banks. For example, the provisions of the capital adequacy ratio (CAR), liquidity ratio, and bank health assessment are applied the same, even though Islamic banks have very different risk patterns, contract structures, and profit approaches (Zainuddin, 2020).

Another regulation that is in the spotlight is Law Number 24 of 2004 concerning the Deposit Insurance Agency (LPS). Although Article 4 paragraph (2) states that LPS guarantees deposits of

conventional and sharia bank customers, until now the guarantee mechanism for deposits based on wadiah or mudharabah contracts does not have a complete legal protection standard. This results in legal uncertainty for sharia bank customers, especially in force majeure situations such as liquidation or bankruptcy of the bank (Kusuma, 2018).

Second, the institutional and supervisory system imbalances between the two types of banks are still very striking. Commercial banks are sufficiently supervised by the OJK and Bank Indonesia in terms of prudence and financial system stability. In contrast, Islamic banks must meet double standards: in addition to prudential supervision from the OJK, they must also be supervised by the Sharia Supervisory Board (DPS) appointed by the MUI National Sharia Council. In practice, the function of the DPS is often normative and symbolic, without having the legal authority to impose sanctions or enforce violated rules. This makes the principle of sharia compliance tend to be an administrative formality, not a strong internal control system (Arifin, 2022).

Furthermore, weak supervision of sharia operations has an impact on the phenomenon of sharia mimicry or imitation of conventional models with a sharia label. For example, murabahah financing products which in theory are sales and purchase agreements, in practice are run like interest-bearing loans, where banks only add margins and schedule installments like regular credit. This kind of practice not only deviates from sharia principles, but also widens the gap between the substance of Islamic law and its implementation in the national legal system (Antonio, 2011).

Third, legal protection for Islamic bank customers is still lagging behind compared to conventional banks. In the general banking system, agreement instruments, guarantees, execution, and dispute resolution mechanisms have been established and protected by the Civil Code and civil procedural law. On the other hand, contracts in Islamic banks—such as ijarah, wakalah, murabahah, and mudharabah—have not been fully recognized as part of the positive legal system, but are still understood as ethical or religious norms. This causes general courts and even some religious courts to not yet have the legal and technical capacity to decide cases based on the characteristics of sharia contracts (Sari, 2021).

In addition, the provisions of Article 55 paragraph (1) of Law No. 21 of 2008 which states that Islamic banking disputes are resolved in the Religious Court also raises ambiguity. Many customers and business actors still choose to resolve disputes in the District Court for reasons of effectiveness, even though this is contrary to the provisions of the law. Even several Supreme Court decisions still show inconsistency in determining the jurisdictional forum authorized to handle Islamic banking cases (Nugroho, 2021). This ambiguity not only gives rise to forum shopping, but also has the potential to reduce trust in the Islamic legal system institutionally.

Another problem is the formal recognition of sharia contracts in the national contract law system. When there is a breach of contract in a mudharabah or musyarakah contract, not all judges understand the concept of risk sharing and compensation provisions according to sharia. Due to the absence of a specific legal framework in the Civil Code, sharia contracts are often decided based on conventional civil law that does not consider the principle of maqashid sharia (Shidarta, 2020). This shows how important it is to codify national sharia economic law that stands on par with the Civil Code, especially to overcome the inequality of legal interpretation at the judicial level.

In the context of policy formulation, this dualism also creates overlapping authority and regulatory disharmony, because some policies are still universal without considering the characteristics of Islamic law. As a result, Islamic banks are required to adjust to conventional standards that are actually incompatible with their business structure. For example, tax provisions, recording of Islamic financing in PSAK, and minimum capital treatment, all still refer to capitalist patterns that are difficult to apply in the fiqh muamalah paradigm. This is a serious challenge for the sustainability of the Islamic financial system which should offer alternatives, not just name substitutions (Zainuddin, 2020).

Therefore, the main solution to this problem is not merely separating the legal system formally, but rather harmonizing the legal system substantially. This harmonization includes three important aspects:

1. Strengthening sharia regulations that are not merely symbolic, but also have a set of sanctions and an independent monitoring system.
2. Integration of sharia contracts into the national contract law system, so that they can be recognized and enforced by the courts effectively.
3. Establishment of special sharia guarantee and dispute resolution institutions, such as LPS Syariah and sharia arbitration based on religious courts.

Ultimately, the main problem in the dualism of banking law in Indonesia is the imbalance between normative recognition and practical implementation. Sharia banks are legally recognized, but are not given legal and institutional space equal to conventional banks. National economic law reform is a must so that sharia banking does not only exist as a complement to the system, but as an integral part of a pluralistic and equitable national financial system.

CONCLUSION

The dualism of the banking legal system in Indonesia, reflected in the existence of Law Number 10 of 1998 concerning Banking and Law Number 21 of 2008 concerning Sharia Banking, has created a legal structure that normatively guarantees the existence of sharia banks. However, in practice, this system has given rise to a number of regulatory, institutional, and legal gaps that have not been comprehensively resolved. These gaps include unbalanced supervisory standards, less than optimal legal protection for sharia bank customers, and limited legal recognition of sharia contracts in the national judicial system. Sharia banks must still comply with the conventional legal framework in many technical aspects, which in turn reduces the substance of sharia principles that should be the basis of their operations.

Therefore, legal harmonization steps are needed that are not only formal, but also substantive, so that the national legal system is able to accommodate both banking entities fairly and equally. This harmonization includes the preparation of regulations that are responsive to sharia characteristics, strengthening the position of the Sharia Supervisory Board within a binding legal framework, integrating sharia contracts into the Civil Code or the formation of a codification of sharia economic law, and the formation of a dispute resolution mechanism and special and independent deposit guarantee for sharia banks. Thus, sharia banks can grow as financial entities that not only have legal legitimacy, but also structural empowerment in the national financial system.

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