



Good Corporate Governance in Sharia Banking

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ABSTRACT

Islamic banking business is growing in Indonesia. The implementation of sharia banking business is a tangible manifestation of the adoption of the Sharia Law System in Indonesia. Islamic banking business is carried out by Islamic banks. As a subject of law, in the implementation of Islamic banking business, Islamic banks are legally obliged to apply GCG Principles. The non-implementation of legal obligations to apply GCG Principles in the implementation of Islamic banking business creates legal liability for Islamic banks. This study discusses the application of GCG Principles in the implementation of Islamic banking business by Directors acting on behalf of Islamic banks. In this regard, this study is focused on examining the legal responsibility of Islamic banks due to the non-application of GCG Principles in the implementation of Islamic banking business. This research is a type of normative research. The method used in this study is the normative juridical research method. This research is a prescriptive analysis, using various types of data as appropriate in legal research.

INTRODUCTION

Law is a system of rules as a system of rules about people's behavior. Law does not refer to a single *rule*, but a set of various rules that have a unity so that they can be understood as a system. Consequently, it is impossible to understand the law if you only pay attention to 1 (one) rule.¹

Law governs various aspects of life, one of which is the business aspect. The term "business" comes from the English word "*business*" which means business activities.² *Business is an activity done by people on a regular and ongoing basis, with the ultimate aim is to earn a profit.*³

Broadly speaking, business activities can be grouped into 3 (three):

1. Business in the sense of trade (*commerce*), which is the entire buying and selling activities carried out by people, both domestically and abroad or between countries with the aim of obtaining profits;
2. Business in the sense of industrial activities (*industry*), namely the activity of producing or producing goods whose value is more useful than the origin;
3. Business in the sense of service *activities*, namely activities that provide services, both carried out by people and entities.⁴

The business continues to develop from time to time. One of the benchmarks of a country's progress is its economic progress. The backbone of economic progress is business.⁵ One of the growing businesses in Indonesia is business in the sense of service activities, namely the banking business.

In Indonesia, banking has been regulated by the Government in Law Number 10 of 1998 concerning Banking (Law Number 10 of 1998), and various derivative regulations. In Article 1 point (1) of Law Number 10 of 1998, it is determined that: "Banking is everything that concerns banks, including institutions, business activities, and ways and processes in carrying out their business activities".

The term "bank" comes from a foreign term, namely "*bance*", which means seat bench. Because in medieval times, Italian bankers who made loans, did this by sitting on the benches of the market yard.⁶

Regarding the definition of bank, in Article 1 point (2) of Law Number 10 of 1998, it is determined that: "Bank is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and/or other forms in order to improve the standard of living of the people". According to G.M. Verryn Stuart: "A bank is a body that aims to satisfy credit needs, either by its own means of payment or by money obtained from others, or by circulating new means of exchange in the form of giral money".⁷

In Indonesia, banking business (by banks, both commercial banks and rural banks) is not only carried out conventionally, but also carried out in a sharia manner. The implementation of sharia banking business is a tangible manifestation of the adoption of the Sharia Law System in Indonesia.

According to Lawrence M. Friedman: "The legal system is a system that includes 3 (three) elements:

1. Structure, which is the framework of the legal system as a whole;
2. Substance, which is the applicable legal rules, norms, and behavior patterns of every member of society within that system;
3. Culture, that is, attitudes and values related to law, together with attitudes and values related to behavior related to law and its institutions both positively and negatively".⁸

Sharia Law System is a legal system that places Islamic Law as the formal law of the state.⁹ The Sharia Law System refers to the provisions of Islam, with 2(two) main sources of law:

1. *Quran*;
2. *Hadith*.

Legally Positive in Indonesia, Islamic banking business is carried out in accordance with the provisions in Law Number 21 of 2008 concerning Sharia Banking (Law Number 21 of 2008) and various derivative regulations. In Article 1 point (1) of Law Number 21 of 2008, it is determined that: "Sharia Banking is everything concerning Islamic banks and sharia business units, including institutions, business activities, and ways and processes in carrying out their business activities". Regarding the definition of Islamic banks, in number (7), it is determined that: "Sharia Bank is a bank that carries out its business activities based on sharia principles and according to its type consists of sharia commercial banks and sharia people's financing banks".

Sharia banks (sharia commercial banks, as well as sharia people's financing banks) are legal entities. In accordance with the provisions of Article 7 of Law Number 21 of 2008, the legal entity form of a sharia bank is a Limited Liability Company (PT), as referred to in Law Number 40 of 2007 concerning Limited Liability Companies (Law Number 40 of 2007) and its various derivative regulations.

A legal entity is one of the subjects of law, in addition to humans. As a legal subject with the form of a legal entity PT, each sharia bank (through its respective directors, both sharia commercial banks and sharia people's financing banks), in carrying out sharia banking business, must apply the Principles of *Good Corporate Governance / GCG (Good Corporate Governance)*. If GCG principles are not applied in the implementation of Islamic banking business, Islamic banks are subject to legal liability.

METHODOLOGY

This research is a type of normative research. The method used in this study is the normative juridical research method.¹⁰ This study was a prescriptive analysis.

The data used in this study are data as commonly used in legal research in general, namely primary data, secondary data, and tertiary data.¹¹ All data obtained will be used to examine the problems in this study, in order to obtain answers.

DISCUSSION AND ANALYSIS

One of the growing business activities in Indonesia is the Islamic banking business. The implementation of Islamic banking business is a tangible manifestation of the adoption of the Sharia Law System. Sharia banking business is carried out by Islamic banks in the form of legal entities PT.

Legal entity, is one of the subjects of law. Legal entities have rights and obligations, and can also perform various legal acts as human beings as legal subjects.¹²

The Entity Law theory was developed by Rudolf von Jhering, Otto Friedrich von Geerke, Friedrich Carl von Savigny, Alois von Brinz. Legal Entity Theory is needed to support legal certainty and legal construction along with the development of legal relations in Economic Law traffic, where at that time legal entities have not obtained proper legal construction, so legal entities have not made an optimal contribution to Economic Law traffic. With the existence of Legal Entity Theory, legal entities can act in the traffic of Economic Law.¹³

According to Nindyo Pramono: "The philosophy of establishing a legal entity is that with the death of its founder, the property of the legal entity is expected to still be useful by others, therefore the law creates a creation of 'something' which by law is then considered or recognized as an independent subject just like a human being (*natural person*). Then that 'something' by Legal Science is referred to as a legal entity. In order for a legal entity to act like a natural person, an organ is needed as a tool for the legal entity to establish legal relations with third parties".

As a legal entity, PT has 4 (four) substantive characteristics:

1. Limited liability;

2. Neither the death of the owner nor the transfer of shares affects existence (*perpetual succession*);
3. Have own wealth;
4. Has contractual authority and can sue and be sued on his own behalf.¹⁴

According to Ridwan Khairandy: "Limited liability, means that basically the founders or shareholders or members of a PT are not personally responsible for losses or debts of the PT. The responsibility of shareholders is only limited to the maximum nominal number of shares controlled. The rest is irresponsible. *Perpetual succession*, meaning that as a PT that exists in its own right, the change of membership has no effect on its status or existence. Shareholders can transfer their shares to third parties. The transfer does not pose a problem for the continuity of PT. Even for a PT that is included in the category of an open PT and its shares are listed on a stock exchange, there is freedom to transfer shares".¹⁵

Furthermore, according to Ridwan Khairandy: "Having your own wealth means that all existing wealth and owned by PT. Wealth is not owned by owners, by members, or shareholders. Thus, ownership of wealth is not based on members or shareholders. Having contractual authority and being able to sue and being able to be sued on behalf of itself, means that as a legal subject PT is treated like a human being who has contractual authority. The LLC may enter into a contractual relationship in its own name. As a subject of law, PT can be sued and sued before the court".¹⁶

As a legal subject, Islamic banks in the form of legal entities PT, are persons with legal rights and obligations. In accordance with the Organ Theory, and the provisions of Article 92 paragraph (1) of Law Number 40 of 2007, the legal actions of Islamic banks (related to legal rights and obligations) are represented by the President Director.

In accordance with the provisions of Article 92 paragraph (4) of Law Number 40 of 2007, Islamic banks are required to have at least 2 (two) Members of the Board of Directors, which is further in accordance with the provisions of paragraph (5), the distribution of duties and management authority of Members of the Board of Directors is determined based on the resolution of the General Meeting of Shareholders (GMS). In accordance with the provisions of paragraph 29 (1) of Law Number 21 of 2008, one of the Directors is tasked with ensuring compliance of Islamic banks with the implementation of Bank Indonesia (BI) regulations and other related laws and regulations.

In carrying out sharia banking business, sharia banks represented by the Board of Directors are required to apply GCG Principles. The legal basis regarding the legal obligations of Islamic banks applies GCG Principles in carrying out Islamic banking business:

1. Article 15 letter a of Law Number 25 of 2007 concerning Capital Investment (Law Number 25 of 2007), which specifies that: "Every investor is obligated to: a. Apply the Principles of Good Corporate Governance";
2. Article 34 paragraph (1) of Law Number 21 of 2008, which specifies that: "Islamic banks and UUS must implement good governance which includes the principles of transparency, accountability, responsibility, professionalism, and fairness in carrying out their business activities".

GCG is the principle underlying the process and mechanism of PT management based on laws and regulations and business ethics.¹⁷ According to Amin Wijaya Tunggal: "GCG is a system that regulates the direction in which business activities will be carried out, including making targets to be achieved, as well as measures of success".¹⁸

According to Indra Surya, and Ivan Yustiavandana: "*Corporate governance* is an issue that is never obsolete to continue to be studied by business people, academics, policy makers, and so on. Understanding of *corporate governance* practices continues to evolve over time. The study of *corporate governance* began to be mentioned for the first time by Adolf Berle and Gardiner Means in 1932 through a book entitled '*The Modern Corporation and Private Property*', which in the book examines the separation of share ownership and control. The separation has implications for the emergence of conflicts of interest between shareholders and management in the *dispersed ownership* structure of the corporation".¹⁹

According to Ainum Na'im: "The implementation of GCG Principles is expected to achieve at least 4 (four) ideal situations that are the target of achievement:

1. Existence of fair business: efficient market, efficient regulation, and efficient contract;
2. Information regarding the (fair) price and specification of goods and services being exchange is available to all parties;
3. Each party he can afford is willing to comply to the rules and regulations, and term and condition in contract;
4. Judicial processes exist and are able to implement the rules and to execute punishment to the non compliant of the contract".²⁰

According to *the Forum for Corporate Governance in Indonesia* (FCGI), the implementation of GCG Principles can provide 4 (four) benefits:

1. "Improving PT performance through the creation of a better decision-making process, increasing operational efficiency, and further improving services to *stakeholders*;
2. Make it easier to obtain cheaper and less *rigid* financing funds (due to trust factors) which will ultimately increase *corporate value*;

3. Restoring investor confidence to invest in Indonesia;
4. Shareholders will be satisfied with the performance of PT because at the same time it will increase *shareholder value* and dividends".²¹

In the practice of conducting sharia banking business, of course, it is possible that the Board of Directors who act in legal acts on behalf of Islamic banks, make mistakes (intentionally or negligently) so as to violate the principles and provisions of articles in laws and regulations. Thus, the legal acts of Islamic banks can be categorized as legal acts that do not carry out legal obligations to apply GCG Principles.

Legal actions of the Board of Directors that can be categorized as not applying GCG Principles (violating the principles and provisions of articles in laws and regulations, specifically referred to in Law Number 21 of 2008) in the practice of implementing Islamic banking business, for example:

1. Collecting obligations to facility recipient customers (who delete books) in a cruel way, thus violating the principles of sharia principles mandated by Article 2, Article 24 paragraph (1), and Article 26 paragraph (1) of Law Number 21 of 2008;
2. Provide financing facilities to customers receiving facilities by not applying the precautionary principle mandated by Article 2 and Article 23 of Law Number 21 of 2008, which results in a large number of Islamic bank bills, thus affecting the health of Islamic banks;
3. Collecting funds from the public in the form of investments without prior permission from BI, which in fact violates the provisions of Article 22 of Law Number 21 of 2008;
4. Carry out various activities that are prohibited under the provisions of Article 24 paragraph (1), and Article 25 of Law Number 21 of 2008.

Implementing GCG Principles in carrying out sharia banking business is a legal obligation for sharia banks (which in fact are legal subjects in the form of legal entities PT). This is affirmed based on the provisions of Article 15 letter a of Law Number 25 of 2007, and Article 34 paragraph (1) of Law Number 21 of 2008.

A concept related to the concept of legal liability is the concept of legal responsibility (liability).²² In his book entitled "*Pure Theory of Law*", according to Hans Kelsen: "The concept of legal responsibility, or *liability* is essentially connected, but not identical with, the concept of legal obligation. An individual is legally obligated to behave in a certain way, if his opposite behavior is made the condition of a coercive act. But this coercive act need not be directed against the obligated individual-the "delinquent"-but may be directed against another individual related to the former in a way determined by the legal order. The individual against whom the sanction is directed is said to be liable or legally responsible for the delict".²³

Further in the book entitled "*General Theory of Law and State*", according to Hans Kelsen: "*That a person is legally responsible for certain behavior or that he bears the legal responsibility therefor means that he is liable to a sanction in case of contrary behavior. Normally, that is, in case the sanctions are directed against the immediate delinquent, it is his own behavior for which an individual is responsible. In this case the subject of the legal responsibility and the subject of the legal duty coincide*".²⁴

According to Hans Kelsen: "In traditional theory two kinds of responsibility {or liability} are distinguished:

1. Responsibility based on fault;
2. Absolute responsibility {liability}.

The technique of primitive law is characterized by the fact that the relation between the conduct and its effect has no psychological qualification. Whether the acting individual has anticipated or intended the effect of his conduct is irrelevant. It is sufficient that his conduct has brought about the effect considered by the legislator to be harmful, that an external connection exists between his conduct and the effect. No relationship between the state of mind of the delinquent and the effect of his conduct is necessary. This kind of responsibility is called absolute responsibility {liability}".²⁵

Studied based on the Theory of Legal Responsibility proposed by Hans Kelsen, with the error of the Board of Directors (which violates the principles and provisions of articles in Law Number 21 of 2008) so that the legal actions of the Board of Directors (representing Islamic banks) can be categorized as legal acts that do not carry out legal obligations to apply GCG Principles, it gives rise to legal liability to Islamic banks. In accordance with Hans Kelsen's opinion, the concept of legal liability in question is the concept of legal liability based on the element of guilt.

In accordance with the opinion of Jimly Asshiddiqie and M. Ali Safa'at, it is impossible to understand the law if you only pay attention to 1 (one) rule. In Law Number 10 of 1998, Law Number 40 of 2007, and Law Number 21 of 2008, there is no stipulation regarding the legal responsibility of Islamic banks because they do not carry out legal obligations to apply GCG Principles. In the absence of legal provisions in the 3 (three) laws, the legal responsibility of Islamic banks for not carrying out legal obligations to apply GCG Principles is reviewed based on the provisions in Law Number 25 of 2007.

In Article 34 of Law Number 25 of 2007, it is determined that:

1. "Business entities or individual businesses as referred to in Article 5 that do not fulfill the obligations as specified in Article 15 may be subject to administrative sanctions in the form of:
 - a. Written warnings;
 - b. Restrictions on business activities;
 - c. Suspension of business activities and/or investment facilities; or
 - d. Revocation of business activities and/or investment facilities;

2. Administrative sanctions as referred to in paragraph (1) are given by authorized agencies or institutions in accordance with the provisions of laws and regulations;
3. In addition to administrative sanctions, business entities or individual businesses may be subject to other sanctions in accordance with the provisions of laws and regulations".

In accordance with the Theory of Legal Responsibility proposed by Hans Kelsen, and based on the provisions of Article 34 of Law Number 25 of 2007, it is affirmed that the legal responsibility of Islamic banks for not carrying out legal obligations to apply GCG Principles is subject to administrative legal responsibility by authorized agencies or institutions in accordance with the provisions in laws and regulations. Administrative sanctions can be in the form of written warnings, restrictions on business activities, suspension of business activities and/or investment facilities, and revocation of business activities and/or investment facilities. In addition to administrative sanctions, other sanctions may also be imposed in accordance with the provisions in laws and regulations.

In Law there is one legal adagium, namely *gouverner c'est prévoir*, which means that in organizing the government must be seen / studied in the future and planned that must be done.²⁶ Regarding the absence of legal provisions regarding legal responsibility due to not carrying out legal obligations to implement GCG Principles in Law Number 10 of 1998, Law Number 40 of 2007, and Law Number 21 of 2008, it is expected that in the future the Government together with the House of Representatives (DPR), will revise it by containing these matters in the 3 (three) laws above. Thus, the 3 (three) laws above are harmonious with Law Number 25 of 2007.

Regarding the unclear and unequivocal regarding the authorized agencies or institutions in accordance with the provisions of laws and regulations to apply administrative sanctions and other sanctions, it is expected that in the future the Government together with the House of Representatives will revise Law Number 25 of 2007 by reinforcing and clarifying the agencies or institutions authorized to apply administrative sanctions and other sanctions imposed. According to Dominikus Rato: "Legal certainty can only be answered normatively, not sociologically".²⁷ Thus creating normative legal certainty.

CONCLUSION AND RECOMMENDATION

The application of GCG principles in the implementation of sharia banking business, based on the provisions of Article 15 letter a of Law Number 25 of 2007 and Article 34 paragraph (1) of Law Number 21 of 2008 is a legal obligation of Islamic banks. The legal responsibility of Islamic banks due to the non-application of GCG Principles in the implementation of Islamic banking

business is that Islamic banks are subject to administrative legal responsibility by authorized agencies or institutions in accordance with the provisions in laws and regulations. The imposition of administrative sanctions, does not close the imposition of other sanctions in accordance with the provisions in laws and regulations. This is affirmed based on the provisions of Article 34 of Law Number 25 of 2007.

ADVANCED RESEARCH

This research still has limitations so that further research is still needed on this topic.

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