

THE ESTABLISHMENT OF ISLAMIC BANKING LAW IN POLITICAL PERSPECTIVE

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Abstrak: *Pembentukan UU Perbankan Islam dalam Perspektif Politik.* Artikel ini mendiskusikan sejarah berdirinya perbankan syariah di Indonesia. Pada awalnya, di masa Orde Baru, hubungan antara umat Islam dengan pemerintah diliputi dengan kecurigaan dan prasangka bahwa setiap yang berbau Islam dianggap upaya untuk merealisasikan Piagam Jakarta atau untuk mendirikan negara Islam. Tetapi kemudian, ketika Indonesia mengalami kegoncangan ekonomi yang begitu hebat dan diikuti dengan perubahan dalam struktur politik/pemerintahan, gagasan umat Islam Indonesia untuk mendirikan Bank Syariah akhirnya dapat diwujudkan. Keberhasilan pembentukan lembaga perbankan syari'ah ini, berdasarkan data yang penulis peroleh, tidak terlepas dari situasi politik yang melingkupinya.

Kata Kunci: pembentukan hukum perbankan Islam, politik, sejarah

Abstract: *The Ratification of the Islamic Banking Act in Political Perspective.* This article discusses the history of the formation of Islamic banking in Indonesia. At first, in the New Order era, the relationship between Muslims and the government was filled with suspicion and prejudice that every activities related to Islam was considered as an attempt to actualize the Jakarta Charter or to establish an Islamic state. However, when Indonesia experienced economic hardship followed by changes in the structure of politics/government, the idea of Indonesian Muslims to establish shariah bank can ultimately be realized. The success of the establishment of the shariah banking institutions, in many ways, can not be separated from the then political circumstances.

Keywords: Islamic Banking Law, politic, history

Introduction

When we talk about the politics of Islamic banking law, we may imagine in our minds that the law is a weak institution, thinking that law is an object of politics, and politics is the subject that gives effect to the law.¹

This shows that the law is a political product, so that when discussing the politics of law we tend to describe the political influence of the legal or political system on the development of the law to change the political climate that brings order towards better governance.

¹ The law of attraction is the result of various political forces that manifest in the legal product. In this case Satjipto Raharjo said that the law is the instrumentation of the ruling or the political will, so that the legislation is loaded with specific interests, and thus the field of law making the field clash and struggle of interests. Law-making body will reflect the configuration of forces and interests that exist in society. Configuring the strengths and interests in law-making body is important because modern law-making is

not just a matter of law formulated by default the following signs juridical, but to make political decisions in advance. Besides the configuration of forces and interests in law-making body, external interventions cannot be ignored in the formation of legislation. The intervention was conducted primarily by groups who have power and strength, socially, politically and economically. See Jazuni, *Legislation Islamic Law in Indonesia*, (Bandung: Citra Aditya Bakti, 2005), first printing, p. 9.

In addition to this the Indonesian nation is increasingly growing up in terms of the application of law² and democracy,³ law enforcement,⁴ legal equality, human rights,⁵ social equality and so forth.

Bellfroid defines that *rechtspolitik* (legal politics) is the process of the formation of *iuscontitutum* (positive law) from *iuscontituendum* (law that would and should be set) to meet changes in social life. Political law is sometimes also associated with public policy which, according to Thomas Dye, is “whatever the government chooses to do or not to do”. Besides that, Political law is also defined as the development of the law.⁶

Law has a great connection with various aspects of life, namely, State ideology, social, political, economic, legal system and cultural systems, both local and regional,

² Sri Wahyuni, Politik Hukum Islam di Indonesia (Studi terhadap Legislasi Kompilasi Hukum Islam), *Jurnal Mimbar Hukum* No. 59 T XIV, al-Hikmah, 2003.

³ The essence of democracy is a process, it is a dynamic system towards a better and advanced than that being experienced by the public (state), or previous Nurcholish Madjid, *Demokrasi dan Demokratisasi di Indonesia*, in Elsa Pedi Taher (ed.), *Demokratisasi Politik, Budaya dan Ekonomi*, (Jakarta: Paramadina, 1994), p. 203.

⁴ Equality before the law for all citizens, it is generally accepted (lex generalis). While all residents were given the right to profess and to practice in accordance with their respective religions, this special applies (lex specialist). There is a law of specificity to a particular religious affiliation. Ismail Suny, Sekitar UUPA, in Zuffran Sabrie, *Peradilan Agama dalam Wadah Negara Pancasila*, (Jakarta: Pustaka Antara, 1990).

⁵ In Indonesia, respect for human rights have been secured by Pancasila and Act of 1945, as a way of life, philosophy and constitutional bases for the Unitary State of Indonesia. Although the embodiment of a new formal material and exist after the issuance of the law No. 39 Year 1999 on Human Rights Court. The law was issued as one series of national plans of action for human rights based on Presidential Decree. 129 of 1998. As known, the discharge of the law after violent incidents occurred in Indonesia, especially during the New Order government, such as the Tanjung Priok case, Tim-Tim, clover and so forth. These cases are still in process. There are at least two major obstacles in solving human rights cases in the past, namely technical problems involving procedural and evidentiary legal political constraints that characterized by the presence of a large force to hamper efforts to settle through the court. Moh. Mahfud MD, *Politics Human Rights Law in Indonesia* “, Inauguration Speech in office Professor, Islamic University of Indonesia Yogyakarta, 23 September 2000.

⁶ Sri Wahyuni, Politik Hukum Islam di Indonesia (Studi terhadap Legislasi Kompilasi Hukum Islam), *Jurnal Mimbar Hukum*, No. 59 T XIV, al-Hikmah, 2003, p. 74.

and even global. This synergistic relationship has resulted in the growth of facts that influence the formation of law. When *shari'a* banking law will be and even has been established, pros and cons among people come to surface. Some see it positively, and others consider that it has nothing to do with the implementation of *shari'a* law. The Partai Damai Sejahtera (Prosperity and Peace Party) faction party spokesman Rosmanita Retna Situmorang, for example, states that “things regarding Islamic banking have been regulated in the Law of the Republic of Indonesia No. 10 of 1998. So, a special law needs not to be issued to regulate the activities of Islamic banking.”⁷

In the politics of law on *shari'a* banking, the political elite of Islam have strong bargaining power in the political interaction and there is large opportunity for the development of Islamic law in the political superstructure.⁸ Conversely, during the Dutch colonial period, the position of Islamic law was much marginalized. Islamic law was seen as the law only when it was recognized in customary law (*adatrecht*): it was in the third strata of European law and customary law of a foreign Easterner (Arabic, Chinese and Indian).⁹ Indonesia had undergone the process of introduction and the development of foreign legal systems within indigenous law.¹⁰ It is therefore clear that there have been many factors involved in the establishment of Islamic law in Indonesia.

At first, the politics of Islamic law in Indonesia, in terms of development of national law, was influenced by the “receptie”

⁷ Cik Hasan Bisri, Transformasi Hukum Islam ke dalam Sistem Hukum Nasional, *Jurnal Mimbar Hukum*, No. 56 Tahun XIII, (Jakarta: al-Hikmah, 2002), p. 31.

⁸ Cik Hasan Bisri, *Transformasi Hukum Islam ke dalam Sistem Hukum Nasional*, p. 32.

⁹ Sri Wahyuni, Politik Hukum Islam di Indonesia (Studi Terhadap Legislasi Kompilasi Hukum Islam (KHI), *Jurnal Mimbar Hukum*, No. 59 Tahun XIV (Jakarta: Al-Hikmah, 2003), Januari-Maret, p. 80.

¹⁰ <http://aanaboodzforlife.com/2010/02/sistem-perbankan-syariah%E2%80%99ah-dalamperspektif-politik-hukum-indonesia-pada-saat-ini>, downloaded 12 Maret 2010.

theory developed by Snouck Hurgronje. However, at the end of the reign of the new order, this theory began to diminish in its influence and eventually was presumed dead. During the current reform period there has been proven acceptance of Islamic law (civil and Muamalat) unanimously as positive law. This is evidenced by the inclusion of the Religious of the Judiciary, the abolition of fiat executing the decision of the Religious, no longer an option in the Islamic inheritance laws and the implementation of Islamic economy and the expansion of the authority of the Religious. However there is still political elite that possesses a phobia towards the implementation of Islamic law.¹¹ Political elites have a shallow understanding of religious law, and assume that the religious affairs are merely individual matters that only regulate human affairs with God.

A legal expert from Austria, Eugen Ehrlich, argued that the influence of law in society has to do with the legal approach to living within the community itself. This means that, "A good law is the law in accordance with the law of people who live in the community." This theory stems from the difference between positive law and the law of the living (living law) in the community. He stated that positive law will only be effective if in harmony with the law of people who live in societies, which in terms of anthropology is known as culture patterns (culture patterns).¹²

Eugen Ehrlich advocated for the conduct of legal reform through legislation with the consciousness to pay attention to the fact which is exist in that society. The facts are called "living and just law", which is the "inner order" of the community reflecting the values that live in it. If you want a change of law or to make any law for the

law or the Act which will be acceptable and effective in their lives, then one thing worth noting is the law that lives in that society.¹³ If this does not get attention, then the consequences the law cannot be effective, even it will be challenged (rigid).

Embryo of Islamic Banking Law

The political struggle for Islamic banking law is partly efforts in the implementation of Islamic law in Indonesia by the Indonesian people, especially Muslims. These efforts have long been formatted through the Jakarta Charter, but have always failed.

Despite the common or frequent failure of efforts for the formalization of Islamic law the struggle of Muslims did not stop there, but continued until the Constituent Assembly at its peak in 1959. In the Constituent Assembly, there was a forum where Islamic parties fight for Islam to become the basis of the State, which then means that Islamic law is to be applied not only to Muslims, but also to the entire people of Indonesia.¹⁴ In the end, this struggle becomes stranded, because the supporting voice of Islam as the basis for the State was still smaller than the votes which rejected it. However, though, many assumed that Muslims have a huge desire to impose Islamic law in Indonesia.

In the context of contemporary political Islam, although Islam has its own system and style in managing the government. most Islamic countries are more colored by the Western system and its instruments. Why is that? The answer is that the interaction of civilizations between the West and Islam gives effect to a number of Muslim intellectuals to accept the alternative offered by the West in politics, rather than maintaining an existing system which has proven its

¹¹ Soejono Soekanto, *Pokok-pokok Sosiologi Hukum*, (Jakarta: Rajawali, 1991), p. 36.

¹² W. Fridmann, *Legal Theory*, 3rd Edition, (Stevens and Sons Limited), p. 52.

¹³ M. Dawam Rahardjo, Kata Pengantar, in Adiwarmanto Karim, *Bank Islam Analisis Fiqih dan Keuangan*, p. xiii.

¹⁴ Daud Rasyid, *Reformasi Republik Sakit Peluang dan Tantangan Penerapan Syariat Islam Pasca Kejatuhan Soeharto*, (Bandung: Syaamil, 2006), p. 82.

truth and efficacy.¹⁵

Western countries today are haunted by not only the establishment of the Islamic Caliphate, but also by a state based on Islam as an ideological principle. They exert every effort to obstruct and suppress the Islamic state that has been established because they fear the spread in the formation of a new state based on Islam as an ideological principle.

For that, the West has rejected the concept of Islamic State of interests through which ideas and thoughts expressed by figures of Muslims themselves who have been influenced by western education and ideas. At this level of thought, the West has managed to produce intellectuals who are ready to agree and become spokespersons for the West, and who, whether intentionally or not, will not accept the establishment of an Islamic state for any reason. They are more familiar with Western thought than liberals of the method al-Qur'ân and Al-Hadith. They Indonesian Intellectuals, have an ease in scrolling through his thinking, because, they live in the midst of the Muslim community and many hold strategic positions in government, both as practitioners and academics. West people feel the difficulty, arising from the Western people themselves (*orientalist*),¹⁶ because they believe (and will certainly get) there is a big challenge from the Muslim community World.

Nurcholish Madjid, which has high commitment to Islam, throws the idea of "Islam, Yes"; Islamic Party, No ". This was a reflection of counteracting the emergence of many Islamic parties in 1970s. It also departed from the disappointment of the Islamic parties who did not succeed in building a positive image and sympathy.¹⁷ In other

words, the rejection of the Islamic political party institutions must be understood as a rejection, not of Islam, but a rejection of the use of Islam by those involved in the life of the Islamic party. Political behavior and the use of Islam in turn would impose the values of the true Islamic teachings.¹⁸

But on the other hand, Nurcholis Madjid's thinking about, "Islam, Yes"; Islamic Party, No "give a message that that Muslims should not establish an Islamic state with Islam as a political vehicle. Jargon is then used by the government as a tool for Islamic political burned actually, this idea has been contaminated¹⁹ by the New Order regime²⁰ which is not accommodating to political Islam. As well it can be seen as a reflection of the desire of the ruler at the time of and not caused by the Indonesian people are very diverse, both from the tribe, nation and religion. Another idea expressed by Nurcholish Madjid about secularization in the 1970s, was that it affected the freedom of thinking and the emergence of attitudes of openness among Indonesian Muslims not to idolize everything in the material world, and this has made the Muslim community aware of the nature of value pluralism, tolerance and assessment of the all is not absolute.²¹ Unfortunately, this thought revolves among the high class intellectuals only, not among

Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan dan Kemoderenan, p. 205.

¹⁵ That concern will be the emergence of fineness that smells of SARA. Though the term itself is the terminology SARA created the regime at that time to beat up political power of Muslims. See Daud Rasyid, *Reformasi Republik Sakit Peluang dan Tantangan Penerapan Syariat Islam Pasca Kejatuhan Soeharto*, p. 72.

¹⁶ Another indication that the government also weaken or hinder political party. The climax is when all political parties, mass organizations and even forced to change each principle to the principles of Pancasila as the sole principle. Ali Murtopo, political henchmen of the new order, through its agency CSIS, trying to burned political hotbed of the most major is the "political Islam". Daud Rasyid, *Reformasi Republik Sakit Peluang dan Tantangan Penerapan Syariat Islam Pasca Kejatuhan Soeharto*, p. 74.

¹⁷ Yasmadi, *Modernisasi Pesantren Kritis Nurcholis Madjid Terhadap Pendidikan Islam Tradisional*, (Jakarta: Ciputat Press, 2002), p. 30.

¹⁸ Harun Nasution, *Islam Rasional*, (Bandung: Mizan 1996), p. 193.

¹⁵ Daud Rasyid, *Reformasi Republik Sakit Peluang dan Tantangan Penerapan Syariat Islam Pasca Kejatuhan Soeharto*, p. 83.

¹⁶ Nurcholis Madjid, *Islam Doktrin dan Peradaban, Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan dan Kemoderenan*, (Jakarta: Paramadina, 1992), p. 204.

¹⁷ Nurcholis Madjid, *Islam Doktrin dan Peradaban*,

the lower class people.

Many people have rejected the idea of secularization espoused by Nurcholis Madjid, including Harun Nasution, a prominent modernist contemporary, Western-education scholar. He does not accept the idea of secularization which has come into the behavior of the separation of the world and the hereafter. Between these two forms there is a clear dividing line.²² In this context, what Ibn Taymiyyah viewed is interesting to refer. He said that establishing a state is not an order from the *shari'a*. However, he argued that enforcing Islamic law is a command or obligation.²³ Power must be run by *shura* (*consultation*) and the law should be enforced fairly. A legal maxim that states that, "*ma la yatimmu al-wajib illâ bihi, fahuwa wâjibun*" is relevant to this. It means that something that can lead another thing obligatory to be done become compulsory., meaning that a tool becomes compulsory if without that tool an obligatory thing cannot be perfectly manifested. It further then means in this context that to enforce *shari'a*, there must be mean, i.e., state (Islamic state).²⁴ This thought is not suitable to the reality, due to carry out the commands of God and left His ban, facing difficulties in the absence of binding rules set by the state. Therefore islamisation of the state is necessity. When it cannot enforce Islamic laws in the country, then establish an Islamic state and / or make an Islamic

state or absolutely becomes obligatory to do and if not done surely Allah does not reduce the blessings of life, even the punishment of Allah is very surely painful fall.

Factors Affecting the Legal Politics

The concrete interdependence of economy and political Islam can be clearly seen in the idea of Indonesian Muslims's establishing of Islamic banks, which is loaded with political content. At first, the relationship between Muslims and New Order was characterized by suspicion and prejudice. The rulers of the New Order in the 1970's were still suspicious of the idea, as one manifestation of the movement to establish an Islamic state or the realization of the Jakarta Charter. Therefore the government at that period did not support the establishment of these institutions.²⁵

Before I go further to the historical success of the establishment of Islamic bankings, I shall here discuss factors that influence the establishment of *shari'a* law, which I categorize it into two prominent factors, i.e., internal and external factors.

1. Internal Factor

Internal factors include a number of issues, including ideology, religion, politics, economy, social and culture. I will discuss these issues in the following.

a. Ideology

Pancasila,²⁶ as the basic philosophy of the Republic of Indonesia guarantees the life of the people and the nation. Article 29 of the 1945 Constitution which concerns freedom

²² The obligation is something that must be executed in Islam. Sharia is the whole of the teachings themselves. In the understanding of the sharia legal terminology in both al-Qur'an and contained in the Hadith of the Prophet. Containing an appropriate legal norms that have evolved. See Preface Yusril Ihza Mahendra in MS. Kaban, *Mengawal Syariah*, (Jakarta: Pustaka al-Raihan, 2007), p. v.

²³ Yusril Ihza Mahendra in MS. Kaban, *Mengawal Syariah*, (Jakarta: Pustaka al-Raihan, 2007), p. viii.

²⁴ The official reason put forward by the Government of not allowing the establishment of Islamic banks is because of the way the operation of Islamic banks, which demanded a more equitable distribution of revenue-sharing system, not in line with prevailing legislation, namely Law no. 14 of 1967, Chapter I Article 1, which does not allow the operation of the bank's interest-free credit. See M. Dawam Rahardjo, "Bank Islam", in *Ensiklopedi Islam Tematis*, (Jakarta: PT. Ichtiar Baru Van Houve, 2002), p. 399.

²⁵ <http://www.nggersik.com/tinjauan-politik-hukum-perbankan-syariah-di-indonesia.htm>, 17/02/10, downloaded 25 Maret 2010.

²⁶ Basic philosophy of the state and nation and the state of the Republic of Indonesia comprising the five precepts, namely 1) Belief in God Almighty, 2) a just and civilized humanity, 3) unity of Indonesia; 4) Democracy, led by the wisdom of wisdom in deliberation and representation, and 5) Social justice for all Indonesian people.

of belief and its implementation should be viewed as a strong sign of freedom for the Islamic community to manifest their religious faith. This article can mean many. For some Muslims, in achieving the ideals of Islam, formalization is a must with determination of the provisions of *shari'a* in the legal provisions (formal legal), neglecting the fact that the formation of Indonesia is based on social contract.²⁷ The enactment of the Islamic Banking Law is actually in relevance with the State ideology of Indonesia whose majority of its inhabitants conceive Islam and need laws governing religious-based economy.

b. Religion

In Indonesia, whose inhabitants are predominantly Muslim, the teachings of *al-Qur'an al-Sunnah* serve as guidelines for life (way of life) and daily worship, either vertically or horizontally. Included in this are basic ideas about the financial system, based on the scheme for results (profit and loss sharing). Islam has introduced its economic system as a solution to the world economy which has been experiencing a business downturn caused by usury.

Islam does not offer a system of interest (interest). Islam invites depositors to participate in the business, with depositors receiving a share of profits (banks) in accordance with a predetermined ratio. Thus, it established a partnership between the banks and depositors on one hand, and between the bank and customer savings depositors on the other hand, who manage investments in various productive enterprises.²⁸

²⁷ Mervyn K. Lewis & Latifa M. Algaoud, *Islamic Banking*, translated on Burhan Subrata, *Perbankan Syariah: Prinsip, Praktik dan Prospek*, (Jakarta: PT. Serambi Ilmu Semesta, 2007), p. 9-10.

²⁸ Students and two terms of sociological *abangan* are already familiar among the Muslims of Java. Culturally, students used to describe a group of devout Muslims in the run religion. While *abangan* contrary, the term for which no devout Muslim religion in running, especially in the areas of sociology Java *ubudiyah* Within each group it is a community that seems to make each other sociological association boundaries

In the era of economic development the role of banking institutions is very great/important and decisive. Banks based on Islamic principles are expected to have a considerable effect on the establishment of an Islamic economic system: which has became the desire of every Islamic country or countries where the majority of the population are Muslims.

c. Political Power of the New Order

In the face of condemnation and criticism of various policies in operation, the Chairman of the New Order, Soeharto, built alliances with political parties, hoping to mobilize popular support for him. There are two political parties that provided support to this; *Nahdhatul Ulama* (NU) and Indonesian National Party (PNI). NU was prevalent among students in rural areas and among Muslim entrepreneurs who form the majority of indigenous Indonesian business community. NU also possessed a relatively united leadership. Alternatively, PNI was popular among *abangan* (community groups who embraced Islam, but did not practice Islam as a whole) and, most importantly,²⁹ among the civil service and state bureaucracy. In simplifying the number of parties, the government (in this case the majority members of parliament were Golongan Karya (Golkar), deputy armed forces and regional representatives) proposed to align the flow of mysticism with the existing five religions of Indonesia, and with easy approval. Marginalizing the involvement of Muslims took place with the enactment of a single principle³⁰: Socialization Pancasila

exclusively. Each has a culture and patterns of social relationships on their own, so that seems exclusive. Exposure famous for sharing this dichotomy. See Clifford Gretz, *The Religion of Java*, (London: The Free Press of Glencoe, 1960), p. 6.

²⁹ After the application of this single principle, all political magnitude (party) and all social organizations must make it as a basis for party ideology or organization. See Francois Raillon, "*The New Order*", p. 204.

³⁰ Jamhari, "Islam di Indonesia" in *Ensiklopedi Tematis Dunia Islam*, jilid 6, (Jakarta: PT Ihtiar Baru Van Hoeve, 2002), p. 360.

with the P4 program (appreciation and Implementing Guidelines Pancasila) intended to avoid the conflict of ideology.

Despite this, strong reaction against the government's policy was still visible, such as in the case of the Tanjung Priok incident on September 12, 1984. However, Muslims realized that confrontational resistance would not succeed. Accordingly, the young intellectuals, such as Bachtiar Effendi and Nurcholis Majid, reoriented the political meaning of Islam which had been elaborated in shades of legality and formality. The new politic orientation led to a more substantive and integrative political view. The new approach meant that more emphasis was applied to the aspects of the content of Islamic values as a source of inspiration for political power and attitude in accepting and adjusting to each other between Muslims and the state.³¹

In the period 1982-1985, a good relationship between Islam and the state began to materialize, although it had not yet reached an ideal stage. The Third National Conference of Golkar in October 1983, marked the beginning of a new era of the elite political role of Islam in the body of the New Order state party. Akbar Tanjung, the Chairman of HMI (Himpunan Mahasiswa Islam) competed with Sarwono Kusumaatmadja, from the student activists "Group of Bandung" which had a patronage relationship with General LB Moerdani. Both fought for the position as Golkar Secretary-General. Akbar, who had a HMI background course had a more Islamic vision than Sarwono, who was more socialist-oriented. Although Akbar was defeated in this battle, it still gave new meaning to the development of Golkar in the future/ Golkar's future. In the first two decades of the New Order Golkar mastered/controlled abangan (community groups who embraced

Islam, but did not practice Islam as a whole) who were more anti-Islamic. However, the appearance of Akbar as a secretary general candidate, gave leaders of Islamic movements greater hopes to be able to play a better/stronger/more influential role in the body of Golkar in the next period.³²

d. Economic

Prolonged global recession has resulted in a decline of export revenues and foreign investment flows at the same time. While oil exports and foreign investment, together with foreign aid by the former Minister of Finances, Mr. Sumarlin, are three sources of "windfall," in the meantime, there are new challenges against it. In addition, a number of the previous problems remain unsolved, including, in particular, the unemployed working age population, whose number is estimated to grow each year, roughly 2 million people. In facing these challenges the government has conducted a series of economic policies by introducing savings and spending reductions, tax reform, reorganization of customs, fiscal reform, monetary, and public administration, with the spirit of "deregulation and bureaucratization."³³

In this context, it was hoped the presence of Islamic banks such as Bank Muamalat Indonesia (BMI) could help answer the economic problems faced by the government. It must be mentioned that this prolonged economic crisis, due to the scarcity of sources of funding post-oil boom of the new order also encouraged countries to use financial assistance and credit facilities from the Islamic Development Bank (IDB). IDB was established by the Organization of Islamic Conference (OIC) on 23 April 1975, and was aimed at promoting economic growth and improving the social welfare of its 44

³¹ Community groups who embraced Islam, but not practicing Islam as a whole.

³² Leo Suryadinata, *Golkar dan Militer*, (Jakarta: LP3ES, 1992), p. 21.

³³ Mochtar Mas'od, *Ekonomi dan Struktur Politik*, p. 179.

member countries, including Indonesia. IDB is intended to function as well as the World Bank, International Monetary Fund and Asian Development Bank (ADB) in attempting to achieve its objectives; encourage economic growth in Muslim countries, raise bank stock purchase dues of its member countries and then provide assistance or facilities to its members. Facilities or assistance provided varies widely, but generally in the form of equity participation, loans are not binding and do not interest, either private or government.³⁴

e. Social

According to Bachtiar Effendy, there are two main reasons why the New Order recruited Muslims. Firstly, from a sociological angle the opening of access to education and economic activity provided many opportunities for scholars studying abroad. Their return from their studies was accompanied by social mobility which made the value of Muslim's bargaining power higher/stronger, so they needed to be accommodated into the structure of the country. Secondly, improving the quality of Muslim education and the ability to spread the ideas of Islamic scholars in Islamic thought has meant that the government was not likely to ignore their existence, especially since these thoughts in some respects were in accordance with the direction and policies developed by the New Order.³⁵

Furthermore, the New Order government shaped its accommodation of Islam in four other areas; structural, legislative, infrastructural and cultural accommodation. Structurally this accommodation meant the recruitment of Muslim leaders onto executive agencies (bureaucracy) and legislative institutions of the state. This accommodation was clearly visible when President Soeharto agreed to the establishment of ICMI (Association of

Indonesian Muslim Intellectuals) in 1990. The legislative accommodation was associated with the issuance of laws or regulations relating to Islam as an independent and legitimate rule. Among this policy of accommodation were ratification of the National Education Act of 1989, the enactment of laws on religious courts, the permissibility of wearing the *hijab/jilbab* (a long headscarf or loose shirt to the knee) in 1991 and legislation relating to Islamic banking in Indonesia in 1992.

f. Culture

It is known that the Indonesian nation has a culture of living together and cooperativeness. There were a number of evidences of this such, as the idea of gotong royong. This is also clear in article 33 paragraph (4) of the Constitution which reads: "The national economy maintained by the principle of economic democracy with the principles of togetherness, equitable efficiency, sustainability, environmental friendliness, independence, and balancing economic progress and national unity." The most appropriate economic institution to translate the above is Islamic Banking, due to a number of reasons; (1) *Shari'a* banking is in accordance with the aspirations of society and is very appropriate for the Indonesian people that run most of the micro business, small and medium enterprises (economic democracy), (2) its priority is to progress together rather than have individual advancement (principle of togetherness), (3) It is a very fitting solution for small communities so that they can enjoy banking services and to empower themselves (principle of fairness and independence), (4) it rejects to be supported or partnered with entrepreneurs or companies involved in environmental damage (the principle of sustainability and the environment), (5) it combines worldly demands with the demands of the next (principle of balance), and (6) it is strong in maintaining the progress of the real sector, which is very suitable with a national economy based on natural and

³⁴ IDB relations and BAPINDO, Infobank, No. 53/1984, p. 16-17

³⁵ Bachtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktek Politik Islam di Indonesia*, (Jakarta: Paramadina, 1998), p. 37-38.

human resources (Principle of national economic unity and cooperativeness).³⁶

In line with Indonesia's national development objectives to achieve the creation of a just and prosperous society based on economic democracy, Indonesia needs to develop an economic system based on values of justice, solidarity, equity, and usefulness. Islamic Banking is the only one, and the most appropriate institution, to translate the national development objectives at the top in real life.

2. External Factors

The establishment of the IDB then triggered the establishment of Islamic banks worldwide, including in the European region. In the Middle East, Islamic banks began popping up/emerging in the second half of the 1970's, for example Dubai Islamic Bank (1975) and Kuwait Finance House (1977). In Iran, the Islamization of the banking system was carried out nationally after the founding of the Islamic Republic of Iran. In Southeast Asia, a banking development milestone occurred in the early part of the '80s, with the establishment of Bank Islam Malaysia Berhad (BIMB) in 1983: by the year 2000 BIMB had developed 70 branches throughout Malaysia. BIMB's success was mainly thanks to cooperation with a number of economic institutions and saving for pilgrimage programs. Its success that led to the birth of Islamic banks is similar to what happened in Indonesia.³⁷

In Indonesia, the first Islamic bank, Bank Mu'amalat Indonesia (BMI) was only established in 1991, whereas the thinking about Islamic banks had been happening since the 1970's. The obstacle to its establishment was a political factor, namely, that the establishment of Islamic banks was considered as part of the ideals of establishing an Islamic

state. The establishment of BMI was also as a result of political factors, namely the birth of ICMI and then the embracement the Indonesian Ulama Council (MUI). Previously they had not approved the establishment of Islamic banks because they are based on laws that are not familiar with the banking system without interest. But, because of the attitude of the government, especially after the approval of President Soeharto at the time, then the BMI could be established. President Soeharto himself even took part to raise capital initially and the role of government in the capital raising was very important, including asking the state to participate and become shareholders.³⁸

a. External Politics

The driving factor behind the establishment of Islamic banking is the fact that, Muslim countries, and in particular, generally secular states, have opened up and operate bank profit-sharing principles. In regards to that, Indonesia, as the second largest Muslim country in the world, was intrigued to realize that Indonesia has received a great amount of assistance from Islamic banks in the world. After the establishment of Islamic banks in Indonesia, the IDB provided assistance on technical skills to prospective managers and sponsored studies and seminars necessary for the establishment of Islamic bank in Indonesia. Special assistance was provided by the IDB as stipulated in the articles of association, article 2, paragraph (xi) in clause 103 reads. IDB has provided technical assistance, either in the form of economic organization of seminars and Islamic banking around the world or in the form of financing to bank personnel who study in Islamic banking and Islamic banking experts that the new stand.³⁹ Bank Muamalat Indonesian (BMI), also sponsored studies and seminars

³⁶ Zubairi Hasan, *Undang-Undang Perbankan Syariah, Titik Temu Hukum Islam dan Hukum Nasional* (Jakarta: Rajawali Press, 2009), p. 11-12.

³⁷ A. Riawan Amin, *Menata Perbankan Syariah di Indonesia*, p. 87.

³⁸ A. Riawan Amin, *Menata Perbankan Syariah di Indonesia*, p. 88.

³⁹ Karnaen Perwataatmaja dan Syafii Antonio, *Apa dan Bagaimana Bank Islam*, p. 67.

required for the establishment of Islamic banks in Indonesia.

b. Economic

The Islamic world community wants out of the bondage that gripped the influence of the capitalist system. The international financial system has faced barrage of crises over the last two decades, which has brought about a new awareness of the need for reform of the financial-system architecture. This situation has also provided fresh air for the development of Islamic financial systems. An Islamic financial system is expected to inject discipline as well as pushing for the fulfillment of prudential regulation and supervision in the financial industry. These phenomena have encouraged Islamic banks in large numbers to pop up all over the world throughout the last 30 years.⁴⁰

Factors of economic relations between countries, especially the 1974 and 1979 oil crises, lead to financial strength in the form of petro-dollars to countries in the Middle East and North Africa and included Indonesia, Malaysia and Brunei in Southeast Asia. Seeing the symptoms, arising the thought of turning petro-dollar funding through financial institutions of *Shari'a*.⁴¹ Before the founding of BMI, Indonesia has long been utilizing assistance from the IDB.

The Formation of Islamic Banking Law

Now I am turning to the discussion of the enactment of Islamic banking law. For this, I will focus on stages of the law-making mechanism which consist of four phases.

a. Submission and Review Bill⁴²

Discussion of the Bill is derived from the President and Parliament. Article 5,

⁴⁰ M. Umer Chapra & Habib Ahmed, *Corporate Governance in Islamic Financial Institution*, (Jeddah: Ocasional Paper IDB, 2002), p. 1.

⁴¹ M. Dawam Rahardjo, "Bank Islam", p. XVI.

⁴² Next term writer Bill Short Bill.

paragraph 1 of the Act of 1945 changes the article that entitles the President to propose draft laws and changes are not stated explicitly in the formulation of the constitutions of 1945. The right to bring this bill arises from the authority of Parliament as the holder of power established by law. Since the Parliament is a representative institution, of course, the power to make laws is also reflected the rights held by members of Parliament,⁴³ and for that Article 21 of the Act of 1945, is the results of changes that entitle lawmakers to propose the bill. As regulated, a proposed bill that comes from the members should be discussed by the Parliament for approval as a draft. Discussion of a bill between the President and the Parliament is relevant to the constitutional provisions as stated in article 20 paragraphs (2). This, this is in contrast to conditions before changes where requirement of discussions with the terms of constitutuality of law was not needed. Article 20 paragraph (2) of the 1945 constitution before the amendemnet states that "if a bill is not approved by the board of the representatives, the draft was not to be brought forward again in the House of Representatives trial period"

b. Joint Agreement on the draft proposal stage

A forum to discuss the draft proposal made by the President and Parliament is very important and even became a Statutory constitutional requirement. The next requirement is that in the discussions joint agreement must be reached. Approval should be concerned with two things: (i) the formal aspect and (ii) the substance of the interrelated aspects. From

⁴³ The difference between the legislation and regulations in this regard is that the legislative activities undertaken by representative institutions of the people or at least involve the role of the elected people's representative bodies through elections, while the regulation is a regulation by the executive that runs the product of legislation and get the delegation of authority to regulate (regulation) that the relevant legislation of the product. Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Konspres, 2006), p. 27.

the formal aspect of these discussions a draft agreement on issues should be produced that has been agreed upon and to which both parties sign consent.

From the aspect of substance, to accommodate the things is stated in the agreement text which is the substance of the discussion together. In the case of joint discussions, if there has not been, or cannot be, agreement on the proposed bill, then, agreement or approval of the manuscript has not been or cannot be formulated. This text is very important because the process of making constitutional law is associated with the mutual consent of the President and the Parliament that has been stated in the text as reflected in this phase. If it turns out that the President and Parliament fail to reach mutual agreement on the bill of material within a period of trial time, then the provisions of Article 20 paragraph (3) prohibits the bill from being filed back in the House of Representatives hearing during that period.

c. Ratification Bill to Become Islamic Banking Act

Constitutional processes required for making a legal bill into law are found in the legal arrangements contained in Article 20 paragraph (4) and subsection (5) of the 1945 Constitution after (amendment). Article 20 paragraph (4) and subsection (5) of the 1945 Constitution after the change. Article 20 paragraph (4) states "The President passes a bill that has been mutually agreed to become law." Given this provision, the changing of a bill into law is because of an act of the President to pass legislation that has been agreed with the House. On the other hand, the 1945 Constitution provides an alternative when a bill that has been agreed to by the President and Parliament to change their legal standing to become a law. It is stipulated in Article 20 paragraph (5), which states, "If this bill mutually agreed upon is not authorized by the President within thirty days since

the bill's approval, the bill is legitimate to mandatory laws and enacted."

The House of Representatives (DPR) passed the Draft Law of Islamic Banking into the Act in a plenary session led by the chairman of the House, Agung Laksono at the Plenary Meeting room, Building Nusantara II, Tuesday, June 17, 2008. Views of some factions on Islamic banking can contribute to the national economy.⁴⁴ There are a lot of supports provided by a number of people who are not only representatives of Islamic parties but also of non Islamic-national parties.

At to restore the national economy through investment in the world of Islamic banking, especially investment from overseas, especially the countries in the Middle East. Therefore need to arrange for a more detailed and more clearly about Islamic banking.⁴⁵

F-FBR spokesperson, Zainul Abidin, explained that anyone can take advantage of financial services of Islamic banks. When the monetary crisis hit Indonesia in mid-1997, *shari'a* has been consistently giving the benefits to many groups. It became one of the fact that Islamic banks in Indonesia contributed significantly to the resilience and growth of the country's economy.

Meanwhile, F-PKS through its spokesman Mustafa Kamal hoped that "the implementation of Islamic banking should be followed by greater partisanship and real in terms of distribution of funds for small and medium enterprises as well as easy access to funds for SMMEs: so as to move the real sector and have greater benefits for the creation of prosperity and welfare of the people."

More simply, the views of the F-BPD expressly agreed the bill was enacted into law. However, not all agreed that Fraction *shari'a* banking law should be enacted into law. Of the 10 factions in the House, one of them, F-*Shari'a* Banking PDS, rejected the bill being

⁴⁴ dpr.go.id, dated June 18, 2008, p. 1.

⁴⁵ dpr.go.id, dated June 18, 2008, 2, accessed date February 21, 2010.

passed on the grounds that *shari'a* banking is not in accordance with Indonesia's basic law of the Pancasila and UUD 1945. Fraction through its spokesman, Retna Rosmanita Situmorang, said that "...information in some countries he knew, it is evident that Islamic banking products are not in the form of the Act, only a derivative of the banking laws that exist, not in law special."⁴⁶

From the Government side, the Minister of Religious Affairs, Maftuh Basyuni, stated that he "...hope in the adoption of Islamic Banking Act to encourage the domestic banking industry to grow and develop better. We hope to quickly set up the rules of implementation of this Act by Bank Indonesia."

d. Phases of Enactment

Provisions regarding the promulgation of the Law in the 1945 Constitution are mentioned in Article 20 paragraph (5) which regulates that the bill is not authorized by the President to declare "enacted mandatory." This case was certainly not intended that the mandatory enacted only bill that became law because according to Article 20 paragraph (5). The bill that became law did so because the President was obliged to enactment. Section 22A of the Constitution states that "Further provisions concerning the procedures for the establishment of laws regulated by law." Thus, the enactment of ordinances can be set in the legislation implementing the Article 22A.

The legal basis is the fourth stage of the above, stipulated in Law No. 10 of 2004 on the Establishment of Laws. A draft bill should contain in it: (1) substantive law contained in the formulation of regulations that have been agreed between the President and Parliament. It is necessary to be authentic evidence about things that have been approved. (2) Evidence of the House of Representatives and the President of agreed with the substance that has a law by affixing

signature of the President and Speaker of the House as an institution. (3) Momentum or the time when agreement was reached that when signed by the President and chairman of the House Of representatives.

Conclusion

Religious teachings, which can provide a foundation of universal values and morals, are a fundamental requirement for the people of Indonesia which is undergoing the process of modernization in various areas, whether social, political, economic and legal culture.

Attempts by a number of the parties to try to end the meeting and if possible even seal the reform of Islamic law into national law has always failed. They, who opposed the implementation of Islamic law had, no choice than to accept *shari'a* banking law whose regulations are taken from the Koran and al-Hadith and see it accommodate into national law in the form of legislation.

While, the state was before hostile to Islam and its implementation, Islamic banks are experiencing significant progress, and even many conventional banks have opened Islamic divisions. When considering the various quite rapid changes from the development of an Islamic economic system, that is manifested in the form of Islamic banking, to the accommodation of banking regulations, there arises a big question: Why did it all happen so quickly? With the assumption that between economics and politics there occurred 'interdepended' (a very close relationship). Another question then came up of what political event that let it all happen. The answer seems to be that the establishment of *shari'a* law thanked to the values of religious faith, ideological, political, economic, social and cultural rights.

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⁴⁶ dpr.go.id, dated June 18, 2008, 3. , 2, accessed date February 21, 2010.

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