

Criminal Liability of Sharia Banks in Financing Disbursement

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Abstract—This research aimed at finding the qualifications of banking crimes in financing disbursement to sharia banks and the application of corporate liability system in financing disbursement in sharia banks. This research by using a normative juridical approach, analytical descriptive, secondary data types, data retrieval through literature study and document study, data analysis, and qualitative normative. The results concluded that the policy of financing disbursement approval to sharia banks violating prudential principles and sharia principles could be qualified as a banking crime. The criminal liability system for banking institutions as corporations cannot be implemented because the criminal provisions in Banking Law and Sharia Banking Law still used the principle of “*societas delinquere non potest*” or the principle of “*universitas delinquere non potest*” which considers that corporations are impossible to commit a crime and cannot bear criminal liability.

Keywords—*criminal; liability; sharia bank*

I. INTRODUCTION

The existence of corporations in the form of banking institutions must be alerted because their existence as corporations does not always have positive impacts. The existence of banking institutions can also have a negative impact. This is due to corporations (banks) can become criminals and commit various criminal acts that disserve the wider community but are frequently untouched by the law [1].

Some forms of crime that can frequently or at least be carried out by banks and diserving the public are insider trading conducted by banks, telemarketing fraud, client fraud, in various types of criminal acts, customer fund eradication, various credit crimes, engineering report or double bookkeeping to secure its reputation, authority abuse, embezzlement of debtor/customer funds, advertising fraud, collusion with large capital holders, false recording for certain interests of banking institutions, not recording and reporting as should be done, and various other forms of criminal acts [2].

Banking criminal acts are frequently equated with banking crimes. As described above, the typology of banking crimes includes credit fraud, embezzlement of public funds, misappropriation of public funds, violation of currency regulations, and money laundering [3].

Banking criminal acts are part or a form of criminal acts or white-collar crime. Criminal acts or organized crimes are systemic and extraordinary [4]. Banking criminal acts are also the criminal acts with new dimension of crime. It is also necessary to realize that these crimes can work because of the involvement of the bank’s own business actors, both from the lower classes to the directors and even shareholders of the bank [5].

The rise of banking crimes committed by banks is caused by banks having great power in conducting their activities and business so that they often perform activities or businesses that are contrary to the applicable law [6]. This is exacerbated by the condition of the bank as a corporation that can easily eliminate the evidence of criminal acts, which have been committed. The juridical issue is almost no process until now to ask for bank criminal liability as a corporation. The implementation of corporate criminal liability system for banking criminal acts and the application of corporate criminal liability system for banking institutions cannot necessarily be implemented. This is what causes “bias” in the application of corporate criminal liability system for banking institutions that commit criminal acts because there is a very fundamental difference of opinion about the issue of whether banking is qualified as a criminal law subject or not [7].

The developments that have emerged today are that banking crime is not only conducted by conventional banking but also sharia banking, which is carried out based on the prudential principles and sharia principles. This form of crime is a fictitious financing disbursement transaction conducted by employees and internal officials of sharia banks. This financing disbursement has ever taken place in sharia banks, which creates a condition that is harmful to the bank’s business activities. The modus operandi are by using the customer name fictitiously for the property purchase financing in the form of kiosks/shop houses that are ready to build with a transaction value of hundreds of millions rupiahs for one kiosk/shop house. Meanwhile, in quantity the amount of financing is not low. In fact, the one who applies for financing is a bank employee not a customer [8].

At the end of 2012, Bank Syariah Mandiri or BSM found a violation of internal provisions indicated a banking criminal act since September 2012. Based on the findings, BSM delegated

the internal audit team. The results reinforced allegations of banking crimes [9].

The policy of financing disbursement approval made by employees of sharia banks is undertaken without regarding to the prudential principle, which is a reference and guideline in carrying out the business activities of banks and sharia principles based on fatwas issued by institutions that have authority in determining fatwas in the field of sharia. In fact, ideally, these two principles become guidelines that must be held firmly in making decisions or policies on financing disbursement. The decision to make this financing disbursement is impossible without approval from bank officials or directors. Therefore, in practice, the officials of sharia banks are mostly involved in the criminal acts [10].

Juridical issues, especially in the criminal law perspective that arise in the case of financing disbursement, are whether the status or position of financing policy that does not fulfill the prudential principles and sharia principles can be qualified/grouped/categorized as criminal acts (*strafbar feit*) or not. The answer to this question requires an assessment in the perspective of criminal law because in determining an act/decision/policy as a criminal act requires knowledge of the elements of crime. In addition to the problem of determining criminal acts committed by employees of sharia banks, the next problem is how to demand criminal liability against sharia banks as a corporation that does not adhere to the prudential principles and sharia principles in financing disbursement. Both of these issues become urgent to find answers as a form of contribution to solve the problem of financing disbursement that endangers the business activities of sharia banks [11].

- Is the policy of financing disbursement to sharia banks that do not meet prudential principles and sharia principles able to be qualified as a banking crime?
- How is the implementation of corporate liability system for sharia banks in financing disbursement that violates prudential principle and sharia principles?

II. RESEARCH METHOD

The approach used in this research was a normative legal research method because it examines legislation and principles related to banking, especially in sharia banks. Research specifications used analytical descriptive using secondary data types that were analyzed qualitatively.

III. RESULTS AND DISCUSSION

In the study of criminal law, an act carried out by a particular legal subject can only be held accountable for criminal liability if it has committed what is classified as a criminal act or a criminal offense. The occurrence of criminal acts or criminal offenses is the reason for the state to apply criminal law for the subject who violates it. In other words, criminal acts are the reason for the state in using its right to impose criminal law through its equipment, such as the Police, Attorney General's Office, and the Court. The state's right is the right to prosecute, judge, and impose a criminal offense against someone suspected of committing a crime. Strictly

speaking, the first stipulation to sentence someone is whether the act fulfills all elements of a criminal act [12].

The difference between ordinary legal actions and criminal acts is that in criminal acts there is an element, which is the basis for the denunciation of someone who commits the act [13]. The question is what kinds of things constitute a criminal act. An act is categorized to be a criminal act if it meets at least three elements, namely:

In the criminal law, an act can be categorized as a criminal act if it has the element of "against the law", which is a very important for the existence of a criminal act. At the level of theory and practice, the nature of against the law is known in both civil and criminal law. The acts of against the law in Dutch are called as "wederrechtelijk" in the criminal sphere and "onrechtmatige daad" in the civil sphere. Initially, many parties doubted whether the term was indeed a separate field or just a legal term that was not included in one of the existing legal fields. In the mid-19th century, the acts of against the law began to be counted as a separate field of law, especially in Continental European countries, for example the Netherlands with the term "onrechtmatige Daad" or in Anglo Saxon countries with the term tort [14].

The element of against the law is an objective assessment of an action, not the maker. The next question is when an act is said to be against the law. In general, people say: It will be happening if the act is included in the formulation of the offense as formulated in the Act. The answer is against the law in a narrow sense, and considered invalid because not every act that meets the formulation of the offense is not always illegal. It is because there may be things that eliminate the nature of against the law act.

Since 1933, the concept of nature of against the law in criminal acts can be divided into two types [15], namely:

A. Teachings of Nature of Against Formal Law

Based on the teachings of nature of against formal law, it stipulates that "in term of an against the law act, if the act is threatened with a criminal offense and formulated as a criminal act in the law, the nature of against the law act can be removed only based on a law".

B. Teachings of Nature of Against Material Law

The teachings of nature of against material law determines that "an act is against the law or not, not only that which has been determined in the law, but must be seen based on the unwritten law principles of the law. The nature of against the law act can be erased not only based on the law, but also can erase based on unwritten rules.

In Criminal Code (KUHP/*Kitab Undang-Undang Hukum Pidana*), the elements of nature of against the law from an act are explicitly stated in its formula, but some are not explicitly stated (secretly considered to exist). It is expressly stated, for example in Articles 167, 168, 335 (1), 522 of Criminal Code with the utterance "against the law". Article 303, 548, 549 of Criminal Code is stated with the utterance "without rights" and "without permission". Article 429, 430 is stated with the utterance "through the authority", "without heeding" and so on.

Other provisions can be seen in Articles 198, 333, 372, 378, 406 of Criminal Code. It is still being questioned why the legislator needs to state the elements of against the law explicitly, even though every prohibition and order specified in the Act is aimed to an unpermitted act or behavior. Therefore, the aforementioned actions in the Act are against the law. Nothing else is to avoid worries so that people who actually use their rights will be declared as having violated the criminal law. Thus, the legislator considers it is necessary to include “against the law” or other words that have the same equivalent in every formulation of a crime (Article 406 of Criminal Code).

As mentioned above, in an illegal act, someone can be released from a criminal threat if there are certain reasons that exclude the act, called justification. This reason, based on the study of the element of criminal acts, is exceptional because the Criminal Code itself regulates some actions, which have legally violated the law, but the act is excluded from criminal liability. The following examples are the actions that have an element of justification [16]:

- Firing squad/executor team;
- Acts of detention carried out by the Police or Prosecutors, do not conflict with Article 333 of Criminal Code;
- A father who hits a young man who raped his daughter;
- A biologist who dissects animals.

Based on the aforementioned examples, if the elements of justification are applied in an act in the form of financing disbursement policy by sharia banks, it is necessary to pay attention to whether the policy has fulfilled the element of crime or not. Theoretically, the financing disbursement policy that occurs in sharia banks can be qualified as a criminal act based on the following theoretical foundation for justification:

Decisions or policies on financing disbursement that occur in sharia banks are said to be the act of against the law. It is because in the reality, bank employees and authorized officials do not apply sharia principles as mandated by Article 2 of Law Number 21 year 2008 [17] concerning Sharia Banking which confirms that: “*Sharia banking in conducting its business activities is based on Sharia Principles, economic democracy, and prudential principles*”.

Business activities based on Sharia Principles, among others, are business activities that do not contain elements:

- *Riba* or usury is the illegal addition of income (*batil/vanity*), among others in the exchange transaction of similar goods which is not the same as the quality, quantity, and time of delivery (*fadh*) or in the lending and borrowing transactions requiring the Facility Recipient Customer to return the received funds exceed the amount of loan due to the time (*nasi'ah*);
- *Maisir* is a transaction that is dependent on an uncertain and chancy condition;
- *Gharar* is a transaction whose objects are unclear, its whereabouts are unknown, or cannot be submitted when

the transaction is carried out unless otherwise regulated in sharia;

- *Haram* is a transaction whose object is prohibited in sharia, or
- *Zalim* or wrongdoing is a transaction that causes injustice to other parties.

What is meant by “economic democracy” is sharia economic activities that contain the value of justice, togetherness, equity, and benefits. Meanwhile, what is meant by “prudential principle” is the bank’s management guidelines that must be adhered to realize a health, strong, and efficient banking system with the provisions of legislation. This prudential principle is known as the 5C principles, namely: (1) character (2) capacity (3) capital (4) collateral, and (5) condition.

Financial disbursement policies for sharia banks that do not pay attention to the prudential principles and sharia principles tend to be motivated by ill will and use the opportunity to misuse customer funds aiming at benefiting themselves or others both individually and jointly. The characteristics of such actions have been explicitly stipulated in Law Number 21 year 2008 [17] concerning Sharia Banking as a criminal act which states as follows:

1) *Directors or employees of Sharia Banks or Conventional General Banks that have UUS who deliberately:*

- Commit an act that is contrary to this Law and an act that has caused a loss to sharia banks or UUS or generated the financial condition of sharia banks or UUS to be unhealthy;
- Deter inspection or do not help the examination conducted by the board of commissioners or public accountant offices assigned by commissioner board;
- Provide fund disbursement or guarantee facilities by violating the applicable provisions required by sharia banks or UUS, which results in losses that endanger the business continuity of sharia banks or UUS; and/or
- Do not take the necessary steps to ensure compliance of sharia banks or UUS with regard to the provision of Maximum Limit of Funds Disbursement as stipulated in this Law and/or the applicable provisions.

2) *They will be sentenced to imprisonment of at least 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp. 1,000,000,000.00 (one billion rupiah) and a maximum of Rp. 2,000,000,000.00 (two billion rupiahs).*

Members of the board of directors and employees of sharia banks or Conventional Commercial Banks that have UUS who intentionally misuse customer funds in sharia banks or UUS will be sentenced to imprisonment of at least 2 (two) years and a maximum of 8 (eight) years and the minimum fine of at least Rp. 2,000,000,000.00 (two billion rupiahs) and a maximum of Rp. 4,000,000,000.00 (four billion rupiahs).

In some cases, the financing disbursement conducted by employees of sharia banks and authorized officials to issue

decisions regarding the approval of customer funds were not found the reasons to justify the issuance of agreement. That is why when a bad financing occurs, the customer and the state experience material losses because the decision is not based on prudential principles. Losses suffered by customers and the state create conditions that endanger the continuity of sharia banks' business.

Based on the description of the elements of criminal acts or criminal offenses stated above, it can be concluded that the policy of financing disbursement by employees and officials of sharia banks can be qualified as a banking crime in which it is a criminal act committed by a bank. However, there are differences in the use of terms because in the literature there is a term of banking crime and criminal acts in the banking sector. Banking crime is a crime committed by banks as perpetrators, while criminal acts in the banking sector are all types of unlawful acts related to activities in running a bank business, both banks as targets and banks as a means [18]. The difference terms affect law enforcement. Banking crime will be dealt with using criminal provisions stipulated in the Banking Law, while criminal act in the banking sector is dealt with through a Law outside the Banking Law. In the context of customer funds disbursement policies that do not pay attention to the prudential principles and sharia principles, its qualification includes banking crime because sharia banks are the perpetrators of criminal acts and will be dealt with using the criminal rules contained in Law Number 21 year 2008 [17] concerning Sharia Banking.

In general, the law does not only regulate people (*natuurlijk persoon* or natural man) or individuals as legal subjects, but also regulates legal entities or corporations with legal rights and obligations like an individual [19]. To find out what is meant by a corporation, it cannot be separated from the field of civil law. This is because the term "corporation" is closely related to the term "legal entity" known in the field of civil law [20].

Nevertheless, broadly as a corporate understanding in criminal law, Sjahdeini [21] defines corporations as follows: "*In criminal law, corporations include both legal entities and non-legal entities. Not only legal entities such as limited liability companies, foundations, cooperatives or associations that have been legalized as legal entities classified as corporations according to criminal law, but also firms, limited partnerships or CVs, and maatschap or partnerships, namely business entities in which according to civil law is non-legal entity*".

In Article 1 Number 2 of Law Number 21 year 2008 [17] concerning Sharia Banking, the meaning of a bank is a business entity that collects funds from the community in the form of deposits and distributes them to the public in the form of credit and/or other forms to improve people's living standards. Meanwhile, sharia bank is a bank that runs its business activities based on sharia principles and, according to its type, consists of Sharia Commercial Banks (BUS/*Bank Umum Syariah*) and Rural Banks (BPRS/*Bank Financial Society Syariah*). In Article 7, it is stated that the form of sharia bank legal entity is a limited liability company.

Based on the brief description above, it can be concluded that sharia bank can be categorized as a corporation that is a legal entity. Consequently, sharia bank is categorized as criminal law subjects so that the bank should be judged to be able to commit a criminal act (in this case committing a banking crime) and can be accountable for criminal acts.

When sharia banks as a corporation are declared as criminal law subjects, sharia banks should be criminally liable for crimes committed by their organs or management, then generally there are 3 (three) corporate criminal liability systems [22], namely as follows:

This system is applied if a criminal act committed by an organ or management is carried out privately. In other words, this criminal act is not carried out for and on behalf of the bank, it is not committed within the scope of bank's work and for the crime, the bank does not receive any benefits or profits. Considering that the criminal act committed is private (even in this case the bank can be a victim of criminal acts), the criminal liability is also personal to the management as the perpetrator of criminal act. This criminal responsibility model dominates the criminal liability system in the Republic of Indonesia Law Number 10 year 1998 [23] concerning Amendments to the Republic of Indonesia Law Number 7 year 1992 concerning Banking [24].

In this case, a criminal act is committed by an organ or management within the scope of their work. It is conducted when the perpetrator acts for and/or on behalf of the corporation (in this case the bank) or even the criminal act committed provides benefits or profits to the bank concerned. However, when a criminal act occurs as stated above, criminal liability cannot be applied or charged directly to the corporation. It is only charged to the organ or management who clearly commit that crime.

In this model, the corporation is considered to have been the subject of a criminal act. Therefore, the corporation is considered to be able to commit a criminal act and can be responsible for criminal acts. The valid current banking law is the Republic of Indonesia Law Number 10 year 1998 [23] concerning Amendments to the Republic of Indonesia Law Number 7 year 1992 [24] concerning Banking and Law Number 21 year 2008 [17] concerning Sharia Banking. The law has not adhered or adopted the criminal liability model system. It is because in the Republic of Indonesia Law Number 10 year 1998 [23] concerning Amendments to the Republic of Indonesia Law Number 7 year 1992 [24] concerning Banking, corporations are deemed unable to commit criminal acts and therefore the corporation (in this case the bank) cannot be criminally accounted for (criminal liability is only charged to the manager or organs).

The idea of criminal prosecution of corporate crimes to date, including banking in this case sharia banks, still adheres to the principle of "*universitas delinquere non potest*" or "*societasdelinquere non potest*" which means, "the corporation is impossible to commit a crime". If in an association (business entity) a criminal offense occurs, the criminal act is deemed to be committed by the corporate management. It is influenced by the idea that the existence of corporations in criminal law is only legal fiction that does not have a mind. Thus, this

corporation has no moral values required to be punished criminally (element of error).

The system of criminal liability for banking crimes in Law Number 21 year 2008 [17] concerning Sharia Banking is still influenced by the principle of the “*universitas delinquere non potest*” or “*societas delinquere non potest*”. This principle is a typical example of the dogmatic thinking of nineteenth-century law scholars who viewed errors according to criminal law required the fault of natural man (*naturlijk person*).

Theoretically, the corporate criminal liability system for sharia banks is very possible to be implemented or conducted by applying the criminal law policy (penal policy) [25]. This is based on the following reasons:

- Sharia bank can be categorized as a corporation because sharia bank meets the definition of a corporation in criminal law, namely a collection of organized people and/or assets, both legal entities and non-legal entities;
- In the development of special criminal law, a corporation has been regulated as the subject of criminal acts in which a corporation is judged to be able to commit criminal acts and account for criminal acts;
- Pragmatic reasons in which the application of corporate criminal liability system for banks is needed to maintain public trust in banking institutions, prevent criminal acts of banking by organs or bank employees, and so forth;
- The application of corporate criminal responsibility system for sharia banks can increase the prudence of banks and their organs or management in carrying out an act. This will affect the health of the bank;
- The application of corporate criminal liability system for sharia banks can be seen as a form of protection for customers who use sharia banking services;

Sentencing the management is not enough to hold a repressive (prevention) of criminal acts by banking institutions as a corporation.

IV. CONCLUSION

Policies in the form of the agreements of customer funds disbursement that violate the prudential principles and sharia principles can be qualified as banking crimes because: (1) they fulfill the element of against the law in the form of not paying attention to the prudential principles and sharia principles, (2) the providing funds disbursement or guarantee facilities by violating the applicable provisions required by sharia banks or UUS have been established as banking crimes, and (3) there is no reason to justify customer funds disbursement that violate the provisions of legislation. Determination of financing disbursement that does not pay attention to the prudential principles and sharia principles as banking crimes will be dealt with by using the criminal provisions in Law Number 21 year 2008 [17] concerning Sharia Banking. Sharia banks can be categorized as legal entities that should be judged to be able to commit banking crimes and be liable for criminal acts, but until

now the system of banking criminal liability and sharia banking as corporates (liability system) still adheres to the principle of “*universitas delinquere non potest*” or “*societas delinquere non potest*”, which views corporations as not being able to commit criminal acts and cannot account for criminal acts.

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