

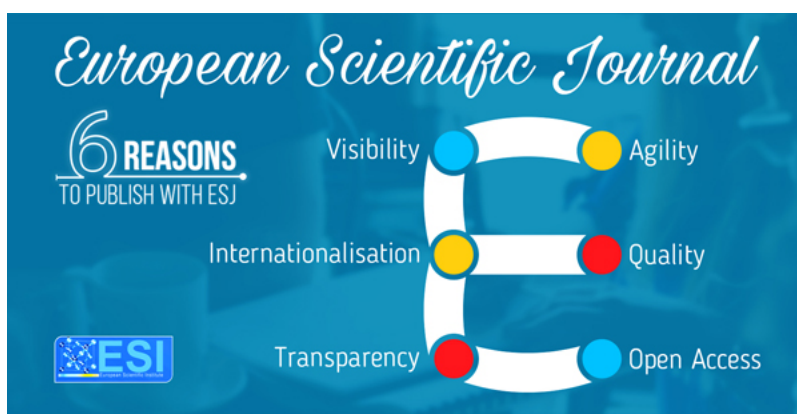
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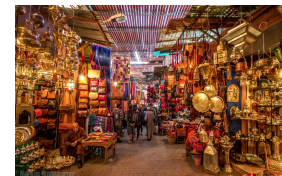
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## VOL 14, NO 7 (2018)

## ESJ MARCH EDITION

DOI: <http://dx.doi.org/10.19044/esj.2018.v14n7>

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# Banking Law Amendment as a Tool of Social Engineering

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Doi: 10.19044/esj.2018.v14n7p191 [URL:http://dx.doi.org/10.19044/esj.2018.v14n7p191](http://dx.doi.org/10.19044/esj.2018.v14n7p191)

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## Abstract

An amendment to law is a step in an effort to enable law for always following society development to meet the purpose of law. On the other hand, it is essential to study further whether existed draft of bank law already makes the law as a means of development. Problem formulations of this research are: *first*, what are the juridical factors causing banking law need to be amended immediately? and *second*, has the plan of banking law amendment design manifested the law as a tool of social engineering? This normative law research uses qualitative data analysis as the analysis technique. As the result, this research shows that : *first*, juridical factors causing Banking Law needs to be amended immediately are the importance of sharpening bank function both in micro and in macro in this case through the implementation of monetary policy and financial system stability and the importance of protection national interests through restriction of share ownership and synchronization of legislative regulations between Financial Services Authority Law and Banking Law about Financial Services authority in conducting management and supervision and *second*, plan of amendment on banking law always tries hard to adapt to the speed of economic development embodying law as a tool of social engineering .

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**Keywords:** Banking, law, authority, regulation, development

## Introduction

The national development done continuously aims to manifest prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia. To achieve this goal, the implementation of the national development needs to be supported by policies on the economic and conducive finance. In addition, national development needs to be supported by the strong banking sector, in which banking institutions can perform its function well and be able to compete not only nationally but also internationally. A law is needed to regulate banking activities. Legal and economic relationship is strong.

David Harrison examined how asset price bubbles and similar financial phenomena could be compatible with the basic competition rules of the rest of the market economy (Harrison, 2014). For the time being, banks had been regulated by Law No.7 of 1992 about Banking, which was later amended by Law No.10 of 1998. However, as it progressed, a provision in a law was seen inappropriate to the development of law, the needs of society, and institutional expansion in terms of finance and banking since economic development always moves quickly, competitively, and integrated with the increasing of more complex challenges and more advanced financial system, especially in globalization era. Normatively, a law is a tool of social engineering. The law is a crucial determinant, not only of economic outcomes but also of the incidence of crises in market (Glinavos, 2014).

The amendment in the draft of Banking Law includes banking definition, bank function, the percentage of shareholders labeled by Indonesian citizens and/or Indonesia law agency; or Indonesian citizens and/or Indonesia law agency and foreigners and/or foreign corporate bodies in partnership considering good governance, bank health level, capital adequacy and contribution to national economy, and the authority of Bank Indonesia supervision after the emerging of Financial Services Authority. An amendment to an act constitutes a step in an effort in order that it always follows society development to meet the purpose of law (Rato, 2010). On the other hand, it is essential to conduct further review toward the amendment draft design on the Act of Banking, and make law as a means of the development, becoming a guideline in achieving the objectives of law. It is to reach justice. The problems of this research are: *First*, what are the juridical factors that cause banking law need to be amended immediately? *Second*, has the plan of banking law amendment design manifested the law as a tool of social engineering?

### **Methods of Research**

This research is the study of law in the realm of normative juridical/doctrinal. A doctrinal legal research is an inventory attempt of positive law, a finding of the principles and basic philosophy of positive law, and an effort to find *inconrito* law (Wignyosoebroto, 1994). This research uses legislative approach to seek the *ratio legis* and ontological basis of each chapter and the Law as a whole. The types of data in this research are secondary data, literature data or law materials. Law materials consist of primary, secondary, and tertiary law materials. To collect the data, literature study toward the primary, secondary, as well as tertiary law materials, and interviews with the interviewees that will complement the secondary data are used. In testing the used data trustworthiness, this research uses triangulation technique (Moleong, 1995). The obtained data later is analyzed by using qualitative analysis.



## **Results and Discussion**

### **Function of Law in Economic Development**

Law in terms of its function can be divided into 2 views, namely an opinion that law is only able to attend society development and law serves as a means to engineer community. The first view is put forward by 2 doctrines. First, the doctrine of the Sect History put forward by Von Savigny (in Prasetyo & Barkatullah, 2007) stated that law was not made, but it existed and grew together with the community (*das ist nicht recht gemacht ist aber und wird mit dem volke*). This doctrine initiates that this world consists of many countries in which each of them has their own *Volkgeist* (the soul of the people) and it is different in accordance to both time and place (Salman, 2009). The second doctrine is Ter Haar's doctrine, known as theory of Decree (*beslissingenleer*), suggesting that only the habit of a custom recognized by the rulers (the Head of Tribe) inside the rules is said as legal (Hartono, 1982). The consequence of law function will grow as well as the changes of the community, so law change will wait for the changes occurring in society. Law will exist after the development and changes of the community occurred. Law makers are said backward looking. This is proficient that if seen from function of law perspective in economic development, law will always be left behind by the fast dynamics of society development. From its function, Roscou Pounds states that law is a tool of social engineering (in Wignjosoebroto, 2008). Law function as a tool of social engineering carries a consequence that law must be a tool or a means to change and renew the community. As the consequences of law function as a tool of social engineering, law should arrange and direct society development, so it must come earlier than changes occurring in society. Law makers have an obligation to *forward looking*. In order to face social changes in recent economic development, legal certainty in regulating those changes is needed. Thus, law can be precisely said as law or act used as a tool to change and engineer the society. Law makers must have oriented forward in predicting social change, so that law objectives to give justice and benefit can be embodied.

### **Juridical Factors Causing Banking Law Need To Be Amended Immediately**

Juridical factors causing banking law need to be amended immediately can be found by investigating some changes in law planning of Banking Law. They are analyzed using the draft of Banking Law of 2012. Juridical factors causing banking law need to be amended immediately are:

#### **Sharpening Banking Law**

Article 2 Law No.10 of 1998 stipulated that the function of law is to gather fund from customers and distribute them again to society in form of

credit. This function is known as intermediary institution or bank function as mediator between party having excessive fund to those who lack of it. The proposal of amendment can be seen in the draft of Banking Law in Article 4 stating:

#### **Article 4**

(1) Indonesian Banking functions as unity and fund distributor of the society. (2) Beside its function as mentioned in paragraph (1), banking has functions as: a. tool to increase public financial assets, b. a media to hold payment services, and c. media of policy transmission and stability of financial system. The explanation above gives an understanding that the function of bank in new Banking Law is not only as an agent of institution as stated in Article 3 Law No.10 1998, but also as an agent in conducting monetary policy and financial stability system and holding payment services, as well as increasing financial asses as stated in the draft of Banking Law. The intention of the lawmaker is to sharpen function of bank in draft proposal law amendment. Concerning Indonesian banking function, in this law, Indonesian Banking functions not only in collecting and distributing society finance but also in conducting monetary policy and financial stability system. In addition, the importance of sharpening bank function is aimed in order that bank does not only considering bank function in term of micro business only through collecting and distributing social finance, but also macro function of bank through monetary policy and financial stability system. The explanation above gives a study and an understanding that juridical factor of the importance of sharpening bank function recently is not only its micro function through collecting and distributing social finance but also macro function through monetary policy and financial stability system.

#### **The Restriction of Foreign Ownership**

In relation to ownership of a bank, the Law No.10 of 1998 regulates the ownership of bank becoming one with permission letter and law form. The provision about ownership of a bank gives understanding that foreign party is allowed to get involved in general banking. As defined in Article 22 point 1b, General Bank is only built by Indonesian citizen and or Indonesian law agency with foreign citizen or foreign law agency cooperatively. There are new provisions in draft of Banking Law which was not found in Law No.10 of 1998, as it can be examined from Article 27 in the draft of Banking Law amended and added from Banking Law Article 26 No.10 of 1998. The addition and amendment can be seen from Banking Law Article 26 paragraph 2 No.10 of 1998 stating “The Indonesian citizen, foreign citizen, Indonesian company and/or foreign company can buy General Bank shares, either directly or through stock exchange” which was amended or added by Banking Law

Article 27 paragraph 2 stating “Each person can buy General Bank share, either directly or through stock exchange”. The words “*Indonesia citizen, foreign citizen, Indonesian Law Agency and or foreign law agency*” were replaced by “each person”. Banking Law Article 26 paragraph 3 states that “buying execution in Article 1 will be regulated further in Government Ordinance“. This provision was amended and added in the draft of Banking Law in Article 27 paragraph 3 and 4. Article 26 paragraph 3 in the draft of Banking law states “Financial Services Authority has an authority to determine or change the limit of General Bank’s share ownership for each person through share buying as intended in Article 2, among them by considering good governance, capital adequacy and contribution toward national economic”. Article 4 in the draft of Banking Law further states that “further provision concerning share buying execution as intended in Article 2 and limitation of share ownership as intended in Article 3 is regulated in the regulation of Financial Services Authority”.

Law former had the intentions to give ordinance about restriction of share ownership able to be seen in the explanation of draft of Banking Law. The first intention of law maker is to give authority to Financial Services Authority, in which according to Act, Financial Services Authority has the authority to conduct regulation and supervision to all financial institutions. The second intention is that Financial Services Authority has the authority to determine or amend the limitation of share ownership of General Bank for each person through share buying. This was aimed to give national interest protection considering the existence of banking institution in supporting national economics. The explanation above gives an understanding that factor of national interest protection becomes the priority to be considered due to the importance of banking institution in supporting national economics by the existence of Financial Services Authority having the authority to determine and amend the General Bank’s share ownership through share buying. The urgent of national interest protection was tried to be included in Banking Law.

### **Bank Indonesia Duty as Regulation and Supervision Institution**

Bank Indonesia’s duty as Regulation and Supervision Institution can be seen in Article 29 to Article 37 Law No.10 of 1998. As already known, in 2011 there was Financial Services Authority based on the Act No.21 of 2011. The mandate of Law of Financial Services Authority was already mandated by Law No.23 of 1999 jucto Law No.3 of 2004 about *Bank Indonesia* (Indonesian Bank). The Law about Financial Services Authority gives an authority to Financial Services Authority to conduct regulation authority and financial institution supervision in form of bank or authority institution, not in the form of bank. Banking constituting financial institution in form of bank was supervised and regulated by Financial Services Authority. The changes of

supervision and management previously given to Bank Indonesia can be seen in the draft of Banking Law in Article 31 to 32. In the general explanation of the draft of Banking Law, it is stated that "In the effort to embody healthy banking institution, credible and professionalism in conducting their business and good supervision and management toward bank are needed". For this reason, supervision previously existing in Bank Indonesia becomes existing in Financial Services Authority. Remembering that the management is bounded to supervision function, management previously existing in Bank Indonesia then moved to Financial Services Authority. As the result, Financial Services Authority has the authority to conduct anything concerning to management and supervision of bank which is micro prudential, including giving sanction to banks which do not obey law ordinance. Meanwhile, micro prudential authority still belongs to Bank Indonesia, so that the obligation of the bank is to fulfill provision determined not only by Financial Services Authority but also by Bank Indonesia. From the provision above, it can be examined that the existed amendment is the change of supervision and management bank authority previously in Constitutions to Bank Indonesia as mandated by Article 29 Law No.10 of 1998 into provision of Banking Law in Article 31 giving supervision and management authority to Financial Services Authority. Law makers' intention is to manifest healthy banking institution and have credibility and professionalism in conducting their business.

Juridical factor causing the Banking Law amendment, as known in Law No.21 of 2011, gives an authority to Financial Services Authority to conduct regulation and supervision toward Banking Financial Institutions and Non-Banking Financial Institutions. From the regulation, Financial Services Authority will take over the authority from Bank Indonesia and it is also included in Banking Law. Thus, the amendment of the Act to Bank Indonesia's authority in conducting supervision becomes an obligation. The changing authority from Bank Indonesia to Financial Services Authority in the effort to manifest healthy banking institution and have credible and professionalism in conducting their business.

### **The Draft of Banking Law as A Tool of Social Engineering**

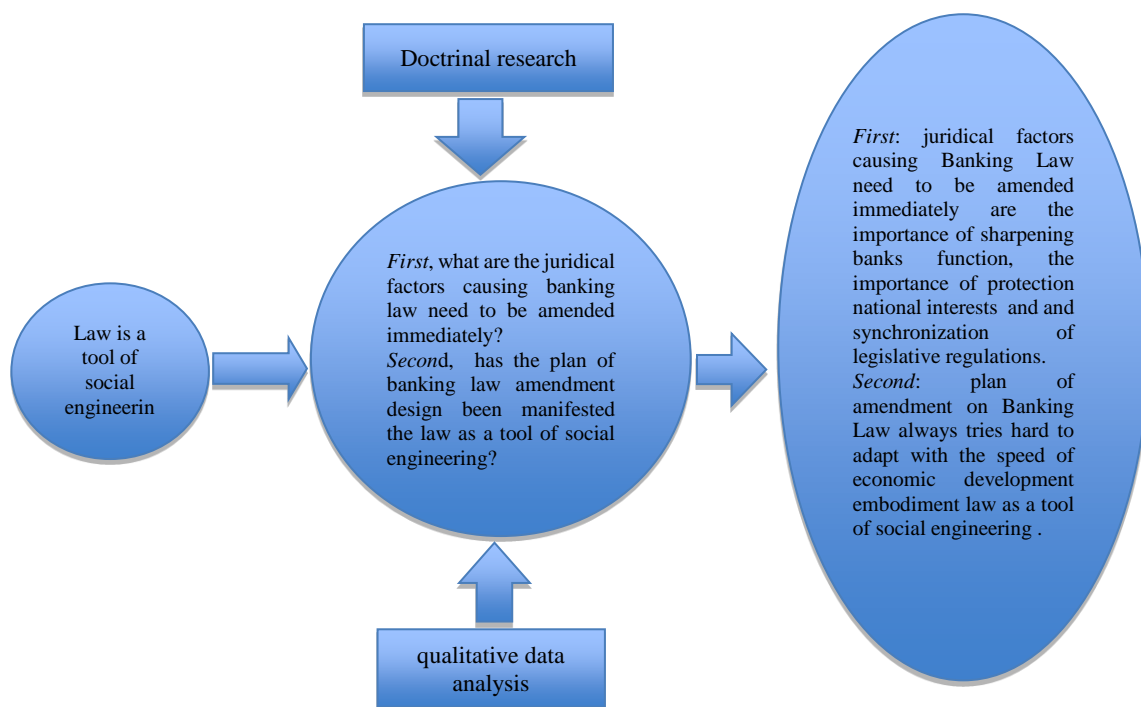
Seen from law function perspective in economic development, law will be always left by the development of the society. From its function, Roscoe Pound states that law is a tool of social engineering (in Wignjosoebroto, 2008). Law function as a tool of social engineering carries a consequence that law must be a tool or a means to change and renew the community. As the consequences of law function as a tool of social engineering, law will arrange and direct society development. Hence, it must come earlier than the changes occurring in society. Law maker has an obligation to forward looking. Subsequently, in facing social changes in recent economic development, law

or act can be used as a tool to create and change the society. Law maker must orient forward, meaning predicting social change in order that law objectives to give justice and benefits can be manifested.

From the explanation above, it can be examined that the changes happen between bank function sharpening, foreign ownership limitation and authority supervision, and have intentions as described in General Explanation in banking amendment. For the time being, it was regulated by Law No.7 of 1992 about Banking, then amended by Law No.10 of 1998 about the amendment of Law No.7 of 1992 about Banking. However, in the development, the provision in that law was viewed not appropriate to law development, social need, and institution development in financial sector and banking since economic development in finance and banking always moves quickly, competitively and integrated with complex challenges in globalization era. Besides, the increasing social demand toward safe and quick bank services, law certainty, and the demand of banking development in accordance to good bank management principles according to Law requires the perfection of Law No.7 of 1992 about Banking as already amended with Law No.10 of 1998.

A sentence in the draft of Banking Law states *“However, in the development, the provision in that law was viewed not appropriate to the law development, social need, and institution development in financial sector and banking since economic development in finance and banking always moves quickly, competitively and integrated with complex challenges in globalization era.”* The sentence gives an understanding that banking law keeps on looking forward hardly to adjusting with the speed of economic growth.

The conducted research flow chart is described as below.



## Conclusion

From the above exposition, it can be concluded that juridical factors causing banking law need to be amended soon are: *first*, the importance of sharpening bank function aimed in order that bank does not only consider its function in term of micro business through collecting and distributing social finance but also macro function of bank through monetary policy and financial stability system; *second*, the importance of national interest protection by the limitation of share ownership; *third*, asynchronization of law provision between Financial Services Authority Law and Banking Law about Financial Services Authority in conducting supervision and management. The draft of Banking Law keeps on trying hardly, looking forward to adjusting the speed of economic development in realizing law as a tool of social engineering.

The dynamics of the society development in general and the regulation of the banking world in particular demand an immediate amendment of the banking law. The emergence of Law No.9 of 2016 on the Prevention and Handling of The Financial System Crisis as well as the dynamics of the Law on Bank Indonesia have an impact in the regulation in the Banking Law which requires further research.

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