

AUTHORITY OF RELIGIOUS COURT IN SETTLEMENT OF SHARIAH BANKING DISSOLUTION

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Abstract

The principle of Islamic banking is part of Islamic teachings relating to the economy. One of the principles in Islamic economics is the prohibition of usury in its various forms, and using the system, among others, in the form of profit sharing principles. With the principle of profit sharing, Islamic banks can create a healthy and fair investment climate because all parties can share both the benefits and potential risks that arise so that they will create a balanced position between the bank and its customers. Seeing the development of Islamic banks so far, sharia principles which are the main foundation of Islamic banks in carrying out their duties have not been able to be implemented and enforced optimally, especially in the event of a dispute between parties, Islamic banks and their customers. This study aims to determine and understand the authority of the Religious Courts in resolving sharia banking disputes and the principles of handling sharia banking dispute resolution. This research is a sociological juridical legal research. This approach was chosen considering that in order to achieve the objectives of the study not only based on legal provisions. However, there are sociological factors which need to be addressed, such as social phenomena related to sharia banking dispute resolution. Methods of data collection were conducted through interviews, questionnaires, and literature studies. Data collected includes primary data and secondary data then will be analyzed qualitatively and identified and carried out categorization. From the results of the analysis, conclusions will then be drawn as answers to existing problems. With the issuance of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts since 30 March 2006 has provided a legal umbrella for the implementation of Sharia Economics in Indonesia and disputes in sharia banking are the authority of the religious court environment, dispute resolution related to sharia banking economic activities completed in two ways, namely litigation and non-litigation, besides that the issuance of Law Number 21 of 2008 concerning Islamic Banking further reinforces the dispute resolution mechanism between the bank and the customer as stipulated in Article 55 paragraph (1), (2) and (3) that dispute resolution is carried out in accordance with the contents of the contract.

Keywords: *Dispute Resolution; Syariah Banking*

INTRODUCTION

The development of Islamic banking in Indonesia has experienced rapid and impressive developments. The average growth of Islamic banking assets reaches more than 30% per year. From the legal aspect, the development of Islamic banking is also significant which is marked by the birth of Law Number 21 of 2008 concerning Islamic Banking.

Like conventional banks, Islamic banks have a function as intermediary financial institutions, which carry out a mechanism for collecting and channeling funds in a balanced manner, in accordance with the applicable provisions.¹ Therefore the development and growth of Islamic Banking requires support from 4 (four) aspects. First, strengthening aspects of government regulation in supporting the growth rate of the Sharia Economy in Indonesia. Second, the development of practical aspects of Islamic business and financial institutions. Third, the development of Islamic economic science through research both individually and institutionally, such as the development of the Islamic Economics College and Islamic

Economics Higher Education. Fourth, the acceleration of the growth of Islamic Economics institutions in Indonesia.

The enactment of Law Number 21 of 2008 concerning Sharia Banking, recognizes the existence of Islamic banks in Indonesia that carry out the functions of financial intermediary institutions in accordance with sharia principles as an operational foundation. Sharia Banks according to Article 1 paragraph 7 of Act Number 21 of 2008 concerning Sharia Banking are banks that carry out business activities based on sharia principles and according to their types consist of Sharia Commercial Banks (BUS) and Sharia People Financing Banks (BPRS).

The principle of Islamic banking is part of Islamic teachings relating to the economy. One of the principles in Islamic economics is the prohibition of usury in its various forms, and using the system, among others, in the form of profit sharing principles. With the principle of profit sharing, Islamic banks can create a sound and fair investment climate because all parties can share both the benefits and potential risks that arise so that they will create a balanced position between the bank and its customers.

¹ Mohamme, *Sharia Bank System and Operating Procedure*, (UII: Press, Yogyakarta), p. 3

Seeing the development of Islamic banks so far, sharia principles which are the main foundation of Islamic banks in carrying out their duties have not been able to be implemented and enforced optimally², especially in the event of a dispute between parties, Islamic banks and their customers.³

The development of sharia banking that is so significant certainly has consequences for the possibility of a problem that can cause disputes in banking transaction activities. Disputes arise due to various reasons and problems, mainly due to a conflict of interest between the parties. This condition certainly raises the need for a rule to resolve the dispute. In the context of sharia banking transactional activities, the disputes between customers and banks have been mostly caused by three things:⁴

1. There are differences in interpretation regarding the agreed contract
2. There is a dispute when the transaction is running
3. There is a loss experienced by one party so that it defaults

With the birth of Law Number 3 of 2006 concerning Amendments to Law

Number 7 of 1989 concerning Religious Courts since 30 March 2006 has provided a legal umbrella for the implementation of Sharia Economics in Indonesia and disputes in the field of Islamic banking are within the authority of the Religious Courts, field disputes Islamic banking is the authority of the Religious Courts environment as stipulated in Article 49 of Law Number 3 of 2006 junto Law Number 50 of 2009 concerning the Religious Courts, which states that the Religious Courts have the duty and authority to examine, decide and settle cases in the first level between people Muslim people in the fields of: a. Marriage, b. inheritance, c. will, d. Grants, e. waqf, f. Zakat, g. Infak, h. Alms, and i. Sharia Economy.

According to the explanation of Article 49 letter I of Law Number 3 Year 2006 junto Act Number 50 of 2009 concerning Religious Courts, what is meant by the law with sharia economy is the act or business undertaken pursuant to sharia principles, among others, covering sharia banks, so from the explanation it can be concluded that sharia banks are one of the areas of sharia economy that are included in the absolute authority of the Religious Court environment.

The birth of Law Number 21 Year 2008 on Sharia Banking further reinforces

² Cak Basir, 2012, Settlement of Sharia Banking Disputes in PA and the Kharisma Putra Utama Sharia Court, Jakarta.p.5.

³ *Ibid*, p. 6

⁴ Khopiatuziadah, "Juridical Study of Sharia Banking Dispute Settlement" 2013. Vol.10-No.3, Indonesian Legislation Journal, p.279.

the dispute settlement mechanism between the bank and the client. the settlement of sharia banking disputes has been regulated in Article 55 paragraph (1), (2) and (3) of Law Number 21 Year 2008 regarding Sharia Banking as follows:

"Paragraph (1) settlement of sharia banking disputes is conducted by a court within the Religious Court.

Paragraph (2) in the case that the parties have pledged to settle the dispute other than as meant in paragraph (1), settlement of the dispute is made in accordance with the content of the contract.

Paragraph (3) of the dispute settlement as referred to in paragraph (2) shall not conflict with the principles of syariah ".

Elucidation of Article 55 section (2) specifies that "settlement of dispute is made in accordance with the content of the contract" is the following:

- a. Deliberation,
- b. Banking mediation,
- c. Through the National Sharia Arbitration Board (Basyarnas) or other arbitration institutions; and or
- d. Through a court within the General Court environment.

Under the provisions of Article 55, settlement of disputes relating to sharia banking economic activities is settled in two ways, through litigation and non liti-

gation. There is a choice of forum for possible dispute resolution in Article 55 paragraph (2), and (3) Law Number 21 Year 2008 regarding Sharia Banking.

With the growth and development of sharia economic activities, the opportunities for disputes, the conflict between shari'a economic actors is also increasing. A dispute arose from a later protracted dispute that was not resolved between legal subjects who have previously entered into a contractual legal relationship, so that the implementation of the rights and obligations incurred is not harmonious.⁵

Settlement of economic disputes in litigation in court is an act of ultimum remedium through an authorized judicial environment. Ultimum Remedium in the form of the last action that can be taken if there is no family settlement solution.

To facilitate the discussion, the problems in this study concerning the authority of the Religious Courts in resolving sharia banking disputes and the principles of handling sharia banking dispute resolution.

METHODS

The methods used by researchers in conducting this research are as follows:

⁵ Cik Basir, 2010, *Sharia Banking Dispute Settlement in the Religious Courts and Sharia Courts*, Kencana Prenada Media Grup, Jakarta.p. 5.

Research Type

The type of research that will be used in this study is the type or type of non-doctrinal legal / sociological legal research. This approach was chosen considering that in order to achieve the objectives of the study not only based on legal provisions but there were sociological factors that needed to be given attention such as social phenomena related to the settlement of sharia banking disputes that occurred in the Central Java Province and the Special Region of Yogyakarta.

Research Location and Sample Determination Method

This research will be conducted at the Semarang District Religious Court and the Jogjakarta Special Region. In addition, the selection of research locations as samples is based on the method of determining purposive sampling, namely the selection of samples for the purpose of certain considerations, namely in the two regions.

Data Collection and Analysis Techniques

Data collection techniques were carried out through interviews, questionnaires, and literature studies. Data collected includes primary data and secondary data. Data from the good research results, primary data and secondary data will be

analyzed qualitatively then identified and carried out categorization. From the results of the analysis, conclusions will then be drawn as answers to existing problems.

ANALYSIS AND DISCUSSION

Authority of the Religious Courts in Settling Banking Disputes Sharia

The birth of the Law concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts on March 21, 2006 known as Law Number 3 of 2006 (Law on Religious Courts) has laid new mandates and responsibilities in the Religious Courts. Religious justice is one of the judiciary bodies that exercise judicial authority to uphold law and justice for people seeking justice. Religious courts are given the authority to examine, decide, and resolve certain cases between people who are Muslim. The authority of the Religious Courts is expanded including the Islamic economic field .. Based on Article 49 letter I of the Law on Religious Courts, the authority of the religious court is expanded from before. In the past (Law Number 7 of 1989 concerning the Religious Courts), the authority of the Religious Courts only had the authority to settle marriage, inheritance, will, grant, endowments and sadaqah cases, so now

based on Article 49 letter i, the authority of the Religious Courts was expanded including zakat, infaq and sharia economy. Article 49 of Law No. 3 of 2006 states that religious courts have the duty and authority to examine, decide, and settle cases in the first level between people who are Muslim in the fields of: marriage, inheritance, will, grant, endowment, zakat, infaq, shadaqah, and sharia economy. Article 49 letter (i) of Law No. 3 of 2006 which states that religious courts have the duty and authority, examine, decide, and settle matters in the field of Islamic economics. explanation of letter (i) of this article states that what is meant by "sharia economy" is an act or business activity carried out according to sharia principles (sharia contract), which includes: a. Islamic Bank; b. sharia macro financial institutions; c. sharia insurance; d. sharia reinsurance; e. sharia mutual funds; f. Islamic bonds and sharia medium-term securities; g. sharia securities; h. sharia financing; i. sharia pawnshop; j. Islamic financial institution pension funds; and K. sharia business.

From the explanation of the article, it can be seen that the scope of the authority to try the religious court environment in the field of Islamic economics has covered the entire field of Islamic eco-

nomics. This can be understood from the meaning of the word sharia economy itself, which in the explanation of the article means as an act or business activity carried out according to sharia principles.

Furthermore, the explanation of Article 49 states that a person or legal entity that naturally submits itself voluntarily to Islamic law concerning matters that are the authority of the Religious Courts. Then all customers of financial institutions and Islamic finance institutions, or conventional banks that open sharia business units) such as Bank Syariah Mandiri, BNI Syariah and others who use sharia-compliant contracts are automatically bound by the provisions of Islamic economics, both in implementing contracts and in dispute resolution.

Whereas according to Article 55 of the Law of the Republic of Indonesia Number 21 of 2008 concerning Sharia Banking it is stated that settlement of disputes that may arise in Islamic banking, can be resolved through a court in the Religion Court. However, there is a possibility of dispute resolution through the agreement of the parties written in the contract (contract). Further in the explanation of Article 55 paragraph (2) No. 21 of 2008 concerning Sharia Banking also states that "dispute resolution is carried

out in accordance with the contents of the contract" is an effort to resolve disputes through non-litigation such as deliberation, banking mediation, through the National Sharia Arbitration Agency or other arbitration institutions; and / or through litigation such as resolving disputes through courts in a religious environment that is under the general court.

In financial transactions between Islamic banks and their customers, in the event of a dispute, the majority is caused by the existence of non-performing financing (NPF) ⁶financing. Other problems can also arise because of the choice of profit and loss sharing or revenue sharing on the capital participation contract. This problem arises when the distribution of funds to the public in mudharabah contract where the bank is not allowed to interfere in the daily activities of the manager's business (mudharib)

Sharia banking disputes are the authority of the parties to resolve the dispute, because the dispute is essentially the actualization of a difference and / or conflict between two or more parties.⁷ Dispute resolution is or is included in the

scope of the agreement law, so that its nature is open (open system). The prevailing principle is the freedom of contract. This means that the parties are free to make a choice of law or determine procedures and procedures, as well as a forum that will be used as a means of resolving the dispute it faces.⁸

Formal law used in the process of proceedings in the religious court

In the Religious Courts Law, relating to the Procedure Law / Procedure for Examining Sharia Economic Disputes used by the Religious Courts environment is not specifically regulated. There was not found a single article governing the Procedure Law for the Dispute on Sharia Economy cases. Regulations concerning Procedural Law, are only regulated in general as contained in Chapter IV of the first section, namely Article 54 of the Religious Courts Law which reads: "Procedural Laws that apply to Courts within the Religious Courts are Civil Procedure Laws that apply in the General Courts except those specifically regulated in this law".

⁶ Abdul Ghofur Anshori, 2010, Establishment of Sharia Banks Through Acquisition and Conversion, UII Press, Yogyakarta.p.215.

⁷ Bambang Sutyoso, 2006, Business Dispute Resolution: Solutions and Anticipation for Business Enthusiasts in Facing Current and Future Disputes, Citra Media, Yogyakarta. p. 3.

⁸ The principle of Freedom of Contract is based on Article 1338 of the Civil Code which states that "All agreements (contracts / contracts) made in accordance with the law apply as laws for those who make them. The agreement is irrevocable other than with the agreement of both parties, or for reasons determined by law. Agreements must be carried out in good faith.

Based on this, the process of examining sharia disputes starting from filing a lawsuit, answering, replying, duplicating, verifying, and verdict is all subject to the procedural law that applies to the General Justice environment, as stipulated in *Het Herzience Indonesie Reglement (HIR)* for Java and Madura, and *Rechtsreglement Voor de Buitengewesten (RBg)* for areas outside Java and Madura.

Execution of the Religious Courts Decision

Regarding the execution of court decisions contained in the court's decision the form of the decision has its own executorial power. If the verdict is listed as condemning (punishing or requiring to do or not doing something), then the decision is attached to the executorial power. If the losing party does not want to comply with a voluntary decision the decision can be enforced by the provisions of Article 195 HIR or Article 206 RBg.⁹ In this case the verdict contains a condemnatory verdict, then, the court in the Religious Courts has the authority to carry out the deliberation of the decision, thus, since the birth of the 1989 law, the religious court may not carry out its own execution.

⁹ Yahya Harahap, 2005, *Position of Authority and Event of Religious Courts*, Sinar Grafika, Jakarta. p. 311.

Based on Law Number 50 of 2009, the Religious Courts are given the authority to adjudicate sharia economic disputes, the Religious Courts also have the authority to carry out executions of collateral goods pledged to Islamic banks, because basically the guarantee agreement is an agreement that is accessibility to the principal agreement. If in a type of financing (*musyarakah*, *mudharabah*, *murabahah*) accompanied by a guarantee agreement, then the guarantee agreement is also attached to sharia principles, so that if it happens then the Religious Court has the authority to settle it, as long as the agreement the principal is based on sharia principles, the additional agreement follows the principal agreement so that the Religious Court has the authority to settle it.¹⁰

Based on this, the Religious Court has the duty to complete every request for execution of both the execution of collateral in Islamic banking, which is submitted in accordance with the applicable legal provisions.

Legal Basis of Judge's Decision in the Sharia Dispute Settlement Case

The judge is the determinant of a case decision that has been disputed by the parties to the dispute. Therefore, the

¹⁰ Dadan Muttaqien and Fakhruddin Cikman, *Sharia Banking Dispute Settlement*. 1, Total Media, Yogyakarta.h. p. 41.

verdict from the judge is a law for the defendant in particular and becomes a jurisprudence if followed by other judges in deciding the same case. If a dispute that has been decided is wrong and in the end becomes a jurisprudence, what happens is that justice is not created based on the Almighty God as stated in each judge's decision.

A court decision is a decision of legal provisions pronounced by a judge in a court session which is open to the public through legal procedures and procedural law and has legal force. Decisions are objectively dropped without being polluted by personal interests or other parties. Decisions must also have clear and understandable legal reasons and be consistent with systematic legal reasoning, where the arguments must be monitored and followed and can be accounted for to ensure the nature of openness and legal certainty in the judicial process.

In civil matters (such as the case of sharia banking disputes), a judge must choose one of three final types of decisions known in civil procedure law, three of which are:

- 1). Declaratory judgment (declaratory vonnis, declaratory judgment), the verdict which only defines, affirms a state of law solely.

- 2). The Constitutive Decision, the verdict that negates a state of law or raises a new legal state, such as a decree stating that someone was bankrupt.

- 3). Condemnatoir's verdict, a sentence of conviction, for example, the defendant was sentenced to hand over a piece of land and the building thereon to pay his debts.

The judge in each decision shall thoroughly examine and prosecute every aspect of the claim (PETITUM) as well as the grounds or grounds of a claim / mid-delen van den eis (posita) and ignore the rest of the lawsuit. The Judge shall not decide anything beyond what the plaintiff requires, or in other words, the court may not only examine part of the claim filed by the plaintiff. While in dropping the judge's verdict it should give an overview:

1. To the interested parties have been given a full opportunity to give their opinion or argument in defense of his interests and provide full evidence to strengthen his argument before the court;
2. A judge must have a strong notion of evidence and must have the conviction of the offense committed by the accused;
3. In considering the decision of a case, the judge has no free right, meaning

that the judge is also in compliance with the law;

4. The Judge must provide an overview that judgment judgment is exercised with a high sense of responsibility and honesty under the law.¹¹

To make a decision, the judge should consider, know and understand everything that happened, examine the evidence and facts found in the trial. These considerations not only become a condition of a decision as stipulated in the law, but also to provide a basis for the conviction and reason for making a decision.

Legal Aspects of Implementing Sharia Principles in Financing Contracts in Indonesian Islamic Banking

The term contract is often called a contract or agreement, which is a meeting of consent granted by one of the parties with qabul given by another party legally according to Shari'ah law and creates legal consequences, namely the emergence of rights on the one hand and obligations on the other. From this understanding, in a contract in Islamic banking, contract making is the main key. Without a contract,

the transaction is doubtful and can cause disputes at some point.

The financing contract implies a contract that is made by default, in which one party has prepared the standard requirements on the existing contract form and then offered to the other party for approval with limited negotiation opportunities. The validity of the contract is determined by whether the clauses stated in the sharia contract conflict with Islamic principles or not.¹²

The banking system that is based on sharia by applying the principle of profit sharing in financing to customers either through fund raising or channeling of funds, assessed from the aspect of private law is the legal relationship between the bank and the customer which is a contractual agreement or fund contract (sahib al-mal) with fund management investors (mudharib) who work together to conduct productive businesses and share profits fairly (mutual investment relationship). Therefore, Islam firmly and clearly fully encourages every legal subject consisting of individuals and individuals

legal entity when entering into various contracts to be careful and always pay

¹¹ Republic of Indonesia Supreme Court, Guidelines for Implementation of Duties and Administration of Courts, Book II (April, 1194), p. 192-194.

¹² Alamsyah, Judge of the Sengeti Religious Court, "Exemption Clause in Sharia Standard Contracts", in www.badilag.net, access February 21, 2013.

attention to harmony and the legal requirements of the contract as specified in Islamic law.

In sharia business financing transactions, contract making is the main key, without any contract, the transaction is doubtful, because it can cause disputes at any one time. The firm and clear incitement fully encourages the citizens and especially the adherents to be careful and must make a contract from every transaction they carry out between fellow humans.

Every financing transaction in an Islamic bank requires a contract. The contract happened at the beginning. In making financing contracts, many Islamic banks still refer to the format of credit agreements in conventional banks. However, adjustments were made in the articles so as not to conflict with sharia principles.

Adjustments made are guided by applicable Islamic law, and after that also refers to the provisions of Indonesian Positive Law. Indonesian law which is noteworthy also in the making of this Agreement includes the Law on Sharia Banking, Limited Liability Company Law, Decree of the Board of Directors of Bank Indonesia, Fatwas of the National Sharia Council (DSN), and so forth.

Effectiveness of the Application of Sharia Principles in the Compilation of Sharia Business Contracts

The effectiveness of applying sharia principles in sharia business contracts is reflected in the capital owners and capital managers themselves. The financing effectiveness of the capital manager (customer) side is based on several parameters, namely:

- a. A financing procedure that shows the convenience of prospective customers to understand it;
- b. Funding requirements that show the ability / convenience for prospective financing customers to fulfill them, including the presence or absence of collateral;
- c. Disbursement time or realization that shows the speed of Islamic banks to realize the proposed financing;
- d. The location of banks that shows the convenience for customers to access the capital sources provided;
- e. Impact of financing that shows the level of stability of financing.

If viewed from the side of capital management, the effectiveness of profit sharing financing with the *mudharabah* and *musyarakah* principles can be measured through the distribution of funds. This is related to the extent to which the

owner of the capital distributes financing with the sharia system, meaning that the more funds channeled, the financing of the sharia system will be more effective.

The effectiveness of applying sharia principles in business contracts in Islamic banking can also be measured by looking at the stability of financing procedures based on the following factors:

- a. Number of customers who indicate that the financing system is acceptable and able to reach widely;
- b. The diversity of customer livelihoods that shows the flexibility of the financing procedures implemented;
- c. The frequency of customer loans, as the level of frequency of customers taking financing;
- d. Frequency of arrears, as the level of frequency of customers in delinquent payments in a loan process;
- e. Financing services, the extent to which service levels are carried out starting from the filing of financing to the realization of financing.

The implementation of murabahah financing in Islamic banks is not entirely (purely) based on Islamic principles that are adjusted to the applicable laws and regulations concerning sharia, namely: Law Number 21 of 2008 concerning Sharia Banking, Bank Indonesia Regula-

tion No. 6/24 / PBI / 2004 concerning Commercial Banks that carry out Business Activities based on Sharia Principles, and Fatwa National Sharia Council Number 04 / DSN-MUI / IV / 2000 concerning Murabahah. But it is also still based on other positive laws. Therefore, the implementation of financing based on the murabahah principle does not always run as determined and agreed to in the contract agreed upon by the parties. There are risks and concerns from the owners of capital on this murky financing, one of which is feared is how if the financing provided by banks to customers is not smooth, and becomes problematic financing which becomes a dispute between the customer and the bank. So that there is a need for special steps taken by banks to save financing funds and steps in resolving disputed financing disputes between banks and customers to prevent risks in murabahah financing carried out by customers. because the funds available at the bank not only come from the capital owner's funds, but also from the customers who deposit their money with the bank. So it is appropriate for banks to maintain and account for the trust of these customers.

CONCLUSION

Law on Sharia Banking Number 21 of 2008 has given competence or authority

to courts in the general court environment in resolving sharia banking disputes has reduced the absolute competence of religious courts, in Law Number 3 of 2006 it is very clear that religious courts have competence absolute in the field of Islamic economics, including concerning Islamic banks.

One of the provisions stipulated in Law No. 21 of 2008 is Article 55 Paragraph (1) which regulates the place for resolving sharia banking disputes. The article states "Sharia Banking Dispute Settlement is carried out by courts within the Religious Courts". However, the provisions of paragraph (2) and paragraph (3) of the article open the opportunity for dispute resolution elsewhere. The conditions for the place of completion have been agreed upon by the parties before in the contract.

With the presence of Sharia Banking Law the competence of the court in handling problems in sharia banking disputes is not only the authority of the religious court, but the general court has the same authority to handle sharia banking dispute cases.

There needs to be contributions from various parties to examine and review the Sharia Banking Law regarding the competency of litigation institutions in

sharia banking disputes. So that the mandate of Law Number 3 Year 2006 which gives full authority to religious courts in resolving economic disputes in Islam including Islamic banking can be fully implemented.

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