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Juridical Study On The Competence of Religion Courts In Completing Syariah Banking Disputes Based On Article 55 Law Number 21 of 2008 Concerning Banking Syari'ah

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ABSTRACT

If we want to respect Law No. 3 of 2006 concerning Religious Courts, give full competence in sharia banking disputes to the Religious Courts. Including the issue of mortgages (guarantees, red) and their execution, "the trial of Article 55 paragraph (2) and (3) Law No. 21 of 2008 concerning Islamic Banking. Sharia Economics Expert Muhammad Syafii Antonio believes that the settlement of Islamic banking disputes should be the full authority of the Religious Courts. This is to ensure that the religious court's verdicts are truly in accordance with sharia law based on Law No. 3 of 2006, the Religious Courts have been given the authority to adjudicate issues of sharia economics, banking, finance and insurance based on sharia law.

Keywords: Competency, Syariah Banking,

1. INTRODUCTION

The significant growth of shari'ah banking indicates the potential problems (disputes/ *differences*) regarding financial transactions in the shari'ah field are also increasingly numerous and diverse. Suyud Margono stated that with the proliferation of business activities (including Islamic economics), it is impossible to avoid the occurrence of disputes (disputes/ *differences*) between the parties involved, both between business actors (companies) and other (corporate) business actors, or business people (company) with its customers[1]. In this case, the competence of courts that specifically deal with various cases or legal issues in the field of shari'ah banking and sharia economics, is absolutely necessary.

However, there are still a number of records that need to be taken into account by various parties, including the limited number of HR who have adequate competence in resolving sharia banking cases. In addition, a fundamental problem in the form of authority confusion arises due to the emergence of Law Number 21 of 2008 concerning Sharia Banking before the Constitutional Court Decision Number 93 / PUU-X / 2012. This law has the effect that there is an option of authority in the settlement of shari'a banking disputes, which can be through Basyarnas, Religious

[1] Abdul Jalil, 2013: 643

Courts, General Courts, depending on the agreement between the two parties (Yustianti and Roesli 2018).

These provisions are contrary to the mandate of Article 1 paragraph (3) of the 1945 Constitution, that the State of Indonesia is a legal state in which there are two senses, namely the *supreme of law* and *equality before the law*. One interpretation of the *supreme of law* is legal certainty (*rechtstaat*). Given the choice of law for those who entered in the judiciary, especially in the banking dispute resolution sharia, would cause legal confusion*(confuse)*to the community. From here, the author is interested in researching and making the focus in this paper.

The method used in this paper is the library method (*library research*) and uses aapproach *juridical-empirical*. The juridical approach aims to review the competence of the Religious Courts in the settlement of sharia banking disputes. While an empirical approach is useful to review, the extent of the effectiveness of the Religious Courts in the settlement of sharia banking disputes. To review this, the author uses thetheory *three elements law system* proposed by Lawrence M. Friedman, especially in terms of the two elements of the legal system, namely *substance* and *structure* .

2. ABSOLUTE COMPETENCE OF RELIGIOUS COURTS THE

Absolute competence of the Religious Courts as one of the actors of judicial power experienced a strategic change in response to the development of law and the legal needs of the community, especially concerning the shari'ah economy[2]. The authority of the Religious Courts in the settlement of shari'ah economic disputes begins to be regulated in line with the development of sharia economy in Indonesia. Law Number 7 of 1989 concerning Religious Courts has not regulated the authority of the Religious Courts in solving shari'ah economic disputes. Starting in the 1990s, sharia financial institutions emerged in Indonesia and their development has grown in the last decade. For this reason, it is necessary to regulate and confirm what institutions are given the authority to complete this new authority, namely the shari'ah economic dispute.

Then came Law No. 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts which explicitly regulates the competence of the Religious Courts to resolve shari'ah economic disputes. Urgent absolute competence, which is contained in Article 49 and Article 50. Wildan Suyuti (2008: 9) argues, that Law No. 3 of 2006 brought important changes to the Religious Courts. This law was born from social demands in the midst of the growing transaction market based on sharia economic practices.

[2] Sudikno Mertokusumo, 2002: 78

Judging from the philosophical aspects, the absolute authority of the Religious Courts shows that the development of the legal needs of the Muslim community (in particular) towards the awareness of carrying out Islamic law is increasing. That is, the legal pluralism must be accepted as reality*(realof*entity)which compound*(legalfluraly)*in social life, as revealed by Cotterral,*"Weshould think of law as a phenomenon pluralistically, as a regulation of many krud existing in a veriety of relationships, same of the quit tenuous, with the primary legal institutions of the centralized state*. [3]Article 49 states that the Religious Courts have the duty and authority to examine, decide and settle cases at the first level between people who are Muslim in the field of marriage, inheritance, will, grant, endowment, zakat, infaq, shadaqah, and sharia economy. Explanation of Article 49 states that the settlement of disputes is not limited in the field of sharia banking, but also in other shari'ah economic fields. The purpose of "Between people who are Muslim" is including a person or legal entity [4] which in itself submits voluntarily to Islamic law regarding matters that are under the authority of the Religious Court in accordance with the provisions of this Article.

Article 50 states that in the event of a dispute over property rights or other disputes in the case referred to in Article 49, the object of the dispute must be decided in advance by the court in the general court environment. Then if there is a dispute over property rights as referred to in paragraph 1 whose legal subject is between people who are Muslim, the object of the dispute is decided by the Religious Court together with the case as referred to in Article 49.

There are two principles for determining the absolute competence of the Religious Court, namely if a case concerns the legal status of a Muslim, or a dispute arising from an act / legal event committed / occurring based on Islamic law or closely related to the legal status as a Muslim. Based on the provisions of Article 49 and its explanation, it can be understood that legal subjects in shari'ah economic disputes, namely people who are Muslims, people who are non-Muslims but submit themselves to Islamic law and legal entities that conduct business under the law Islam. That is, the person or legal entity has made *choice of law* (has chosen the law), which is ready to follow the provisions in Islamic law.

Whereas the provisions of Article 50 and their explanations show that the principle of Islamic personalities related to religion adopted by parties to disputes over civil rights regarding property rights is prioritized in determining the absolute authority of the judiciary that handles the dispute. If the parties to the dispute are Muslim, the Religious Court has the authority to resolve the dispute. This provision has close relevance to the settlement of sharia economic disputes related to material guarantees.

[3] M. Ali Mansyur, 2011: 6.
[4] Chidir Ali, 2005: 21

The presence of people other than Islam are subject to law in the shari'ah economic case, which shows a legal development in which business activities based on the Shari'ah principle are not only in the interest of Muslims. In practice, there are a lot of customers who are not Muslim who enjoy sharia banking products and services. Therefore, it is appropriate if the shari'ah economic problem is submitted by Law Number 3 of 2006 to the Religious Courts and determined to be the absolute competence of the Religious Courts.

3. *CHOICE OFFORUM* SYARI'AH BANKING SETTLEMENT SETTLEMENT

Based on the above explanation of Law Number 3 of 2006 concerning Religious Courts, the absolute competence of the Religious Courts also includes resolving sharia banking disputes. Article 50 of Law Number 3 of 2006 concerning Religious Courts affirms that when actions or business activities carried out based on the principles of Shari'a give rise to disputes, then the litigation is resolved to become the competence of the Religious Courts. Whereas the settlement through non-litigation channels can be done through an arbitration institution, in this case Basyarnas, and alternative dispute resolution by taking into account the provisions of the Republic of Indonesia Law Number 30 of 1999 concerning Arbitration and Dispute Settlement, by adhering to the principles of Shari'ah .

The problem arises, when Article 55 paragraph (2) and the explanation of the Law of the Republic of Indonesia Number 21 of 2008 concerning Sharia Banking and Article 59 paragraph (3) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power gives competence to the court in general court environment to resolve sharia banking cases. Article 55 of the Law of the Republic of Indonesia Number 21 of 2008 concerning Sharia Banking mentions:

1). The Shari'ah Banking dispute settlement is conducted by a court within the Religious Courts.

2). In the event that the parties have agreed to settle the dispute other than as referred to in paragraph (1), the settlement of the dispute is carried out in accordance with the contents of the Contract.

3). Dispute resolution as referred to in paragraph (2) may not conflict with the Shari'ah Principles.

Elucidation of Article 55 paragraph (2) of the Law of the Republic of Indonesia Number 21 of 2008 concerning Syari'ah Banking states:

What is meant by "settlement of disputes carried out in accordance with the contents of the Contract" is the following efforts:

a). discussion;

b). banking mediation;

c). through the National Syari'ah Arbitration Board (Basyarnas) or other arbitration institutions

; and / or

d). through a court within the General Courts.

Likewise with Article 59 paragraph (3) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power which reads:

Article 59:

1. Arbitration is a way of resolving a civil dispute outside the court based on an arbitration agreement made in writing by the parties dispute.
2. The arbitration award is final and has permanent legal force and is binding on the parties.
3. In the event that the parties do not implement the Decision of

Explanation Article 59:

Paragraph (1) what is meant by "arbitration" in this provision includes also shari'ah arbitration.

Dispute resolution through Basyarnas still has weaknesses in the field of implementation, because it is not a judicial institution. Therefore, for each time the action is executorial, the title of execution must still be requested to the local District Court. So that the Supreme Court issued Circular of the Supreme Court Number 8 of 2008 concerning absolute authority to adjudicate and execute decisions of the National Sharia Arbitration Board in the case of shari'ah economic disputes which are the authority of the Religious Courts[5].

The provisions of Article 55 paragraph (2) of Law Number 21 of 2008 and Article 59 of Law Number 48 of 2009 along with the explanation above, indicate that there has been a reduction in the competence of Religious Courts in the field of sharia banking. In Law No. 3 of 2006, the Religious Courts have the competence in handling sharia economic matters, which include sharia banking. It turns out that the provisions of the Act were reduced by other legal instruments, namely by Law Number 21 of 2008 concerning Sharia Banking and Law Number 48 of 2009 concerning Judicial Power which is actually intended to facilitate the handling of disputes over shari'ah.

After the promulgation of Law Number 21 of 2008 concerning Sharia Banking, the handling of shari'ah banking disputes in the Religious Courts is only optional, depending on the agreement of the parties, namely the Religious Courts, Basyarnas (Abritase), and also General

[5] Ikhsan Al Hakim, 2013: 218

Courts. Whereas the authority of the judiciary in examining certain cases is absolutely not examined by other judicial bodies, both in the same court environment and in different courts[6].

Based on these facts, the legal politics of the government (legislative and executive) towards shari'ah banking seems to be still ambivalent which still gives options for the settlement of sharia banking disputes. The option of judicial competence within the Religious Courts and General Courts in the field of shari'ah banking shows the reduction and narrowing and leads to the dualism of competence in prosecuting by two litigation institutions, even though the competencies given to the general court are related to the contents of a contract, especially regarding *choice of forum.* In connection with Article 59 of Law Number 48 Year 2009 not only as an option, but explicitly abolish the authority of the Religious Courts.

With the explanation above, it appears that shari'ah banking dispute resolution can be done through a process outside the judiciary (*non-litigation*) and through a judicial process (*litigation*). Outside the judicial process the dispute is resolved through deliberation, banking mediation, and Basyarnas or other arbitration. The dispute resolution through the court can be carried out by the Religious Courts or General Courts. With these choices, the Religious Courts do not have absolute competence in solving shari'a banking disputes as stipulated in Law Number 3 of 2006. These two different provisions lead to the problem of two forms (*choice of forum*) in resolving disputes. for a similar substantive law and the same legal subject.

Regarding this *choice of forum* there are two opinions, there are opinions that agree and disagree. Opinions that agree on the argument are based on the principle of freedom of contract in the agreement. In the treaty law stipulated in the Civil Code, the principle ofapplies*freedom of contract*. Based on the principle of freedom of contract, the parties are free to promise what they want as an agreement (the terms and conditions of the agreement), as long as it has been stated in the contents of the agreement and does not conflict with law, decency and public order[7].

Article 1338 of the Civil Code paragraph (1) states that all agreements made legally apply as laws for those who make them. The word is all understood to contain the principle of freedom of contract, which is a principle that gives freedom to the parties to make or not make an agreement; make an agreement with anyone; determine the contents of the agreement, implementation and requirements; and determine the form of agreement both written and oral.

The background to the issuance of Article 55 of Law No. 21 of 2008 in order to reinforce the principle of freedom of contract, namely in the case of settlement of the muamalah dispute. The parties are free to determine the procedures and media for resolving disputes as long as they do not conflict with the Shari'ah principle. However, in the event that the parties do not promise or there is

[6] Retnowulan Sutantio, 1985: 59
[7] Neni Sri Imaniyati, 2010: 12

no agreement on the mechanism for resolving the dispute, the Religious Courts have absolute competence in resolving the shari'ah banking disputes based on Article 49 letter i of Law Number 3 of 2006.

Furthermore, if the *choice of forum is* related to the principle of the new law abolishes the old law and the specific legal principle which excludes the general law, these two principles cannot be used to review Law No. 3 of 2006 and Law No. 21 of 2008. That is because these two laws regulate different matters, Law No. 3 of 2006 regulates Religious Courts while Law No. 21 of 2008 regulates Sharia Banking. In addition, these two laws cannot be determined as generally applicable laws and laws that apply specifically.

Finally, on August 28, 2013, Constitutional Court Decision Number 93 / PUU-X / 2012 canceled the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking which regulates the selection of settlement of disputes between the customer and the bank in accordance with the contract. The reason is, there is dualism (Religious Courts and General Courts) the settlement of shari'a banking disputes which creates legal uncertainty. This was reinforced by the explanation of M. Akil Mochtar (m.kiblat.net) when reading the decision to examine the Sharia Banking Law with Petitioner Dadang Achmad, "*Explanation of Article 55 paragraph (2) of the Shariah Banking Law does not have binding legal force*" .

4. JUDGES IN THE RELIGIOUS COURTS

Post-enacted Law Number 3 of 2006, Religious Court Judges face new tasks that require more special attention, namely shari'ah economic issues. The problems of muamalah will be the absolute authority of the Religious Courts. Not even less than 11 (eleven) kinds of new issues that become the authority in the shari'ah economy. In connection with such a task, the Chair of the Indonesian Syari'ah Lawyers Association (APSI) said that the expansion had consequences on human resources within the Religious Courts (Judges in the Religious Courts). In addition, the expansion of authority is a challenge for the Religious Courts apparatus, especially judges. The judges are required to understand all matters that become their competence, namely the judge is considered to know the law, so the judge may not refuse to examine the case with no or less clear legal reason (*adagium ius curia novit*)[8].

Religious Court Judges have long been included in training on sharia economics. The Supreme Court itself has prepared a useful and effective curriculum to anticipate the expansion of the authority of the Religious Courts. In addition to training Religious Court Judges at the

[8] Abdul Ghofur Anshori, 2010: 112

Pusdiklat, MA also cooperates with Bank Muamalat, Bank Indonesia, and a number of law universities.

Indeed, the rapid business based on sharia economy and the expansion of the authority of the Religious Courts to deal with disputes in it, has its own consequences for the Religious Courts. In addition to having special capable judges in handling sharia economic disputes, judges are also required to be more responsive to the development of more modern judicial management. In addition, the Religious Courts must also appear clean, transparent, accountable, and can fulfill the sense of justice and truth. With the addition of a number of fields that became the authority in the new Religious Court Law, it is hoped that the practices of Muslims who have been running in the community have juridical power. Therefore, if there is a shari'ah economic dispute between parties who are Muslim, justice can be sought through the Religious Courts institution.

There are several things in the context of the authority of the Religious Courts with regard to their new competence to deal with shari'a banking disputes: *First*, the Religious Court Judges must continue to improve legal insights on the shari'ah economy in the framework of Indonesian regulation and the actualization of Islamic fiqh. *Secondly*, the Religious Court Judges must have adequate insight into service products and operational mechanisms of sharia banking, shari'ah microfinance institutions, shari'ah medium-term securities, and others. They also have to understand the shari'ah financing, shari'ah pawnshops, Islamic financial institution pension funds, and sharia business. *Thirdly*, Religious Judges also need to improve legal insights about predictions of disputes in a sharia-based economic contract. In addition, it is also necessary to increase the insight of the legal basis in regulations and legislation, as well as conception in Islamic fiqh.

5. LEGAL EFFECTIVENESS OF SYARI'AH BANKING DISPUTE SETTLEMENT THE

effectiveness of the competence of the Religious Courts in shari'ah banking disputes can be seen with thetheory *three elementslaw system* proposed by Lawrence M. Friedman. According to Friedman, there are three legal systems that determine the functioning or functioning of a law, namely: *substance*, *structure*, and *legal culture*. Of the three system elements, they are interrelated. A good legal structure and will work well if it is supported by good legal substance, and vice versa. Both elements will work well if followed by a good legal culture from the community.

Judging from the substance (*substance*), the competence of the Religious Courts in shari'ah banking disputes has been regulated in Article 49 and Article 50 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, and Article 55 paragraph (1) Law Number 21 of 2008 concerning Sharia Banking. However, the provisions of Article 55 paragraph (2) of Law Number 21 of 2008 and Article 59 of Law Number 48 of 2009 along with their explanations, indicate that there has been a reduction in the competence of

Religious Courts in the field of sharia banking. Although there are already regulations governing the competence of the Religious Courts in shari'ah banking disputes, in practice there is still an ambiguity of competence in resolving shari'ah banking disputes. Finally on August 28, 2013, the Constitutional Court canceled the explanation of Article 55 paragraph (2) UU no. 21 of 2008 concerning Sharia Banking which regulates the selection of settlement of disputes between the customer and the bank in accordance with the contract. The reason, namely there is dualism (Religious Courts and General Courts) the settlement of shari'ah banking disputes which creates legal uncertainty.

Furthermore, when viewed from *structure*its, law enforcement (judges) in the Religious Courts must master and deal with shari'ah economic issues and sharia banking. Because the Shari'ah economic case is a new authority within the Religious Courts, Religious Judges need to improve their knowledge and skills. Judges serving in the Religious Courts should be able to practice the provisions of Article 16 of Law Number 4 of 2004, namely that judges are obliged to explore, follow, and understand the legal values and sense of justice that lives in society.

The last is *legal culture* . In the beginning, the practice of muamalah based on shari'ah principles has been applied in daily life by Indonesian Muslims. Since the establishment of Bank Muamalat in 1992 and the promulgation of Law No. 21 of 2008 concerning Sharia Banking, the Muslim community and non-Muslim Indonesia have begun to become familiar with banks and other sharia-based financial institutions. Here it is seen that Indonesian people in general are familiar with sharia-based financial institutions. Although prior to the issuance of the Constitutional Court Decree, there were still many that caused people to be confused in the settlement of sharia banking disputes. Is it in the Religious Court or in the General Court?

Of the three systems above, the competence of the Religious Courts in shari'ah banking disputes before the cancellation of the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking by the Constitutional Court is less effective. This is based on the existence of abiguity on judicial competencies that are entitled to handle the settlement of sharia banking disputes. In addition, the Religious Courts Judges must add and*upgrade* their knowledge in the settlement of sharia banking disputes in particular. For this reason, training is needed in the field of sharia economics and shari'ah banking in terms of carrying out the mandate of Article 16 of Law Number 4 of 2004.

6. CONCLUDING REMARKS

on the competence of the Religious Courts in shari'ah banking disputes (Study of Article 55 of Law No. 21 of 2008 concerning Sharia Banking), there are several things that need to be underlined. *First*, Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989

concerning the Religious Courts which explicitly regulates the competence of the Religious Courts to resolve sharia banking disputes. This Law was born from social demands in the midst of the rampant transaction market based on sharia economic practices and brought important changes within the Religious Courts.

Secondly, the presence of Law Number 21 of 2008 concerning Sharia Banking provides competence or authority to courts in the general court environment in the settlement of sharia banking disputes, which previously only constituted the absolute competence of the Religious Courts. This provision raises the problem of the existence of two forms (*choice of forum*) in resolving disputes for the same substantive law and the same legal subject. However, after the Constitutional Court canceled the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Syari'ah Banking, the Shari'ah banking dispute settlement competence is only the competence of the Religious Courts again.

Third, the absolute competence of the Religious Courts in shari'ah banking disputes is inseparable from the principles of Islamic personality and shari'ah principles. Cancellation made by the Constitutional Court against the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking gives legal clarity the authority to prosecute Religious Courts in sharia banking disputes. With this provision, avoiding loss to the Muslims in the form of confusion in choosing the judiciary and becoming a benefit with the existence of legal certainty in the settlement of sharia banking disputes.

REFERENCES

Alamsyah, "Reducing the Absolute Competence of Religious Courts in Sharia Banking", in www.badilag.net. Access on 29 May 2014.

Anshori, Abdul Ghofur, *Syari'ah Banking Dispute Resolution (Analysis of Concepts and Law No. 21 of 2008)*, Yogyakarta: Gajah Mada University Press, 2010.

Arto, A. Mukti, *Practice of Civil Cases in the Religious Courts*, Yogyakarta: Student Library, 2004.

Imaniyati, Neni Sri, "*Choice of Forum* in Syari'ah Banking Dispute Resolution," in the *Journal of Law and Development*, No. 3, Th. 40, July 2010.

Subekti, R., *Trade Arbitration*, Bandung: Binacipta, 1992.

Law Number 21 of 2008 concerning Sharia Banking.

Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.

Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power.

Yustianti, Surti, and Mohammad Roesli. 2018. "Bank Indonesia Policy in the National Banking Crisis Resolution." *YURISDIKSI: Jurnal Wacana Hukum Dan Sains* 11 (1):77–90.

Yahya Harahap, *Civil Procedure Law Regarding Lawsuit, Trial, Verification, and Court Decision*, Jakarta: Sinar Grafika, 2009.

Yulianti, Rahmani Timorita, "Between Competencies of Religious Courts and Sharia Arbitration Bodies)", in *Al-Mawarid Journal*, Edition XVII, 2015.