LEGAL FRAMEWORK MODEL OF SHARIA BANKING BUSINESS DISPUTE RESOLUTION ACCORDING TO INDONESIAN LAW

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ABSTRACT

Dispute resolution was an important thing in the shariah banking business because it was the final solution for resolving the problems of the parties. The research objective was to analysis dispute resolution model and the model legal framework for disputes resolution of shariah banking business in Indonesia. This research was normative legal research using a conceptual and statute approach, which used primary, secondary, and tertiary legal materials, which are collected through document studies for qualitative analysis to get deductive conclusions. The results of this study; Firstly, the sharia banking business dispute resolution model through litigation was carried out through the Religious Court based on Article 49 letter (i) of Law No. 3/2006 and Article 55 paragraph (1) of Law No. 21/2008 and in non-litigation through deliberation, banking mediation, BASYARNAS based on Law No. 30/1999 and aqad as agreed by the parties. Secondly, the legal framework regulation model of Sharia Banking business dispute resolution by revising Article 55 of Law No. 21/2008, namely restoring the authority of the Religious Courts by Article 49 letter (i) of Law no. 3/2006 and specifically for non-Moeslem sharia bank customers, they were given the choice of law to settle the dispute by the contents of the contract agreed upon by the parties, and through special law arrangements in the Sharia banks dispute resolution.

Keywords: Legal Framework, Regulation, Dispute Resolution, Sharia Banks.

INTRODUCTION

The desire of the Indonesian Moeslems to apply an economy based on Shari'ah values and principles in all aspects of life based on Shari'ah rules has become a necessity. This desire is based on the awareness to fully implement Islam in all aspects of life, as explained in the Al-Baqarah verse (208) which means as follows: O people who believe, comprehensively enter into Islam (Ayat, 1995).This verse reminds the Islamic ummah to implementation Islam as a whole not partially, Islam is not only manifested in the form of the ritualism of worship alone, and is marginalized from the world of politics, economy, banking, etc., if this happens, then the Islamic ummah has kept Islam from his life. In connection with this Antonio (1999), stated that: "*It is very unfortunate, today there are still many people who see that Islam does not deal with banks and money markets because the first is a white world while the second is a black world full of trickery and cunning".*

Regulations in the banking sector inspired sharia economic actors to establish sharia banks in Indonesia so that in 1992 this wish was realized by establishing Bank Muamalat Indonesia (BMI) as the first sharia bank in Indonesia which was better known as the bank profit-

sharing system. Then in 1998 with the passing of the Law hereinafter abbreviated as Law No. 10/1998, provided sufficient space for the development of Sharia banks in Indonesia, then the existence of Sharia Banks became stronger with the passing of Law No. 21/2008 concerning Sharia Banking.

The development of Islamic banking in Indonesia continues to experience growth after the passing of Law No. 10/1998 and Law No. 21/2008 which allows banks to operate a dual banking system Chapra, (2000); Rianda (2018), namely conventional banks and Islamic banks simultaneously. So that, conventional banks that control the market begin to look and open sharia business units or convert conventional banks into Islamic banks (Syarif, 2019). Since Islamic banking existed 28 years ago until the end of 2020 there were 14 Islamic Commercial Banks (BUS), 7 BUS came from the conversion of commercial banks, while 6 BUS were the result of a spin-off. Besides, there are still 20 Sharia Business Units (UUS), consisting of 13 UUS Regency Development Bank (BPD) and 7 UUS for National Private Commercial Banks (BUSN) which will determine the conversion or spin-off attitude (Sulmaihati 2020).

The strategic role of banking in achieving development goals requires a careful study of the banking concept that has been operationalized, both conceptually and in its application, to create a strong banking system in the era of globalization in the future. The existence of sharia banking cannot be separated from the potential market for the Indonesian Muslim community as the largest market in the world, making the banking business very important for its role in supporting other Islamic business activities that have developed in Indonesia.

This paper was very important, to build new concepts and new arguments that underlie the settlement of sharia banking business disputes in Indonesia, and also to find out the legal model for the dispute resolution of sharia banking business in Indonesia. One of the issues that were often debated among scientists, scholars, banking practitioners in the practice of sharia banking today was related to the resolution of sharia banking business disputes, which still have the overlapping authority (Jalil, 2013). Until now, scholars have not written about the legal framework for the dispute resolution of sharia banking business models according to Indonesian law.

Sharia banking dispute resolution could be done through litigation (judicial) and non-litigation (outside court) mechanisms, however, legal problems arose after the enactment of Law No. 21/2008 concerning Sharia Banking which provides a choice of law for the parties to resolve disputes, whereas previously it was regulated in Law No. 3/2006 that sharia economic disputes were resolved through the Religious Courts, in addition to the presence of foreign (non-Moeslem) owned customers and banks that still use public courts based on a contract agreed by the parties. This could lead to conflicts of legal norms. Based on this, this research was important to find out solutions and answers to these legal problems, so that in the end it could lead to legal certainty in the enforcement of Islamic banking law in Indonesia.

The problems that studied and researched as the focus of this research were: What was the model for the dispute resolution of Sharia banking business according to the positive law in Indonesia? And what was the legal framework model for the dispute resolution settlement of Sharia banking business in Indonesia.

RESEARCH METHOD

This research was normative legal research, which examined the norms of legislation,

written documents, and applicable laws. The laws and regulations reviewed were those related to the legal framework model for the regulation of sharia banking dispute resolution according to Indonesian law. This study was based on doctrinal or normative research (Muhaimin, 2020). The approach used was the statute approach and conceptual approach (Marzuki, 2004). Sources and types of legal materials used included: primary legal materials; laws and regulations namely the Religious Courts Law, the Law on Alternative Dispute Resolution, the Banking Law, the Sharia Banking Law, and various implementing regulations relating to sharia banking disputes resolution. Secondary legal materials, such as draft laws, textbooks, journals, doctrines, legal dictionaries, legal journals, and comments on court decisions. Tertiary legal materials; law dictionary, language dictionary, encyclopedia, and legal encyclopedia. Legal materials were collected through library research which was carried out by document study, then qualitatively analyzed to build prescriptions and deductive conclusions

RESULT AND DISCUSSION

Bank Sharia is a bank that carries out business activities based on Shari'ah Principles or according to the rules in Islamic Law based on the Al-Qur'an, Hadith, Ijma, and Qiyas (Pasal, 1998). According to Article 1 of Law No. 21/2008, "*Sharia Banks are banks that carry out their business activities based on sharia principles and by type consist of Sharia Commercial Banks and Sharia Rural Banks*" (Pasal 1998).

The term dispute in English was known as conflict and dispute, both of which contain the meaning of differences in interests between the two or more parties, but both could be distinguished. Conflict Shadily (1992), in Indonesian becomes a conflict, while dispute means dispute. A conflict is a situation in which two or more parties were faced with different interests. It would not become a dispute if the party who felt aggrieved was just silent and harboring dissatisfaction. The dispute is defined as; (1). Something that causes a difference of opinion in the form of a fight or argument. Disputes or disputes and Case (Depdikbud, 2002).

Some of the material and formal legal bases of laws and regulations related to sharia banking dispute resolution include Law No. 7/1992 concerning Banking, Banking Law No. 10/1998 concerning Amendments to Law No. 7/1992 concerning Banking, Law No. 21/2008 concerning Sharia Banking, Law No. 7/1989 concerning Religious Courts, Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts, Law No. 50/2009 concerning the Second Amendment to Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts, Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution, Bank Indonesia Regulation No. 8/5/PBI/2006 concerning Banking Mediation, Bank Indonesia Regulation No. 10/1/PBI/2008 concerning Amendments to Bank Indonesia Regulation No. 8/5/PBI/2006 concerning Banking Mediation, Regulation of the Supreme Court No. 2/2008 concerning Compilation of Sharia Economic Law.

Also, the legal basis was in the form of contract law, a fact that what happens was that most transactions between Islamic banks and their previous customers were preceded by the existence of a standard contract (aqad) provided by the bank concerned. Consequently, the provisions of the agreement law originating from Book III of the Indonesian Civil Code also applied to transactions in the world of Islamic banking. Then the legal basis was in the form of Islamic law, that all products or activities of a sharia bank are based on Islamic Law, so all activities carried out by sharia banks must not conflict with sharia principles of Islamic law,

namely al-Qur'an, al-Hadith, Ijma 'and Qiyas as well as the Fatwa Sharia National Board of the Indonesian Ulema Council.

The Problems of Sharia Banking Business Dispute Resolution

Regulations on the dispute settlement mechanism for sharia banking begun with the issuance of Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts, as amended by Law No. 50/2009 concerning Amendments to Law No. 3/2006, and the last was through Law No. 21/2008 concerning Sharia Banking. According to Simbolon & Perundang-undangan that the means of dispute resolution for Islamic banking are regulated in Article 55 paragraph (2) and (3) of Law No. 21/2008 concerning Sharia Banking has provided legal certainty and was by and does not contradict the 1945 Constitution. This article provides options for means of shari'ah banking dispute resolution by continuing to apply signs as long as it did not conflict with the principles of sharia (Simbolon & Perundang-undangan, 1945).

It was further explained that the settlement of Islamic banking disputes was part of the principle of freedom of contract and the principle of pacta sun servanda, where the parties are free to determine the content and form of the agreement, and the agreement made by the parties was considered as law for those who make it. This was in line with Islamic sharia which gives freedom to everyone to carry out the contract as desired by the parties as long as it was by the principles of sharia, this was in line with the principle al-musammah.

Then it was emphasized that the provisions of Article 55 paragraph (2) and (3) of the Sharia Banking Law respect the agreement made by the parties in the selection of the appointed dispute resolution forum if at any time there was a dispute between the parties where it was applied in banking arrangements based on sharia principles. Robinson also said that this provision would encourage the general public to use Islamic banking services. Article 55 paragraph (2), (3) of Law No. 21/2008 concerning Sharia Banking considers that the articles regulating the choice of dispute resolution are confusing and contradictory with each other which was detrimental to them, because Article 55 paragraph (1) and (2) of the Sharia Banking Law are contradictory, causing legal uncertainty.

The Religious Court was one part of the judicial environment under the Supreme Court so that the Religious Court was a place to carry out law enforcement and justice for the people in dispute. After the enactment of Law No. 50/2009 concerning Amendments to Law No. 3/2006 concerning Amendments to Law No. 7/1989, particularly in Article 49 the authority to resolve Shari'ah Banking disputes was the absolute competence of the Religious Courts.

Article 49 also explained the parties who were allowed to dispute, namely "*between people who are Muslim*" which means people or legal entities which automatically submit themselves without intimidation to Islamic law, regarding matters that fall under the authority of the Religious Courts by the provisions that were in that article. The explanation stated: "*What was meant by*" *between people who are Muslim "was including a person or legal entity which automatically submits itself voluntarily to Islamic law regarding matters that fall under the authority of the Religious Court by the provisions of the Article*".

Apart from the authority as described above, Article 49 of Law No. 3/2006 also regulates the absolute competence of the Religious Courts. Therefore, the parties who enter into an agreement based on sharia principles cannot make a choice of law to be tried in another court. Based on the description above, it appears that the General Courts have the authority to resolve

sharia banking disputes. If in aqad the parties agree in the dispute resolution clause to appoint a District Court if in the future there was a dispute over the contents of the contract that have been agreed by the parties. Because the existence of the agreement was a law for those who make it (the principle of pacta sun servanda), so was the sound of the Al-Qur'an Surat al-Maidah verse (1) which states that; "*O you who believe, fulfill your covenants*".

The Shari'ah Banking Law provides room for District Courts to handle sharia banking cases, it can be understood that legal cases related to the shari'ah economy have been handled by the Religious Courts which are substantially very competent, considering that the bases of legal deepening were sharia law, whereas District Court based on positive law in resolving disputes between the parties.

The dualism of judicial competence in the environment of religious courts and general courts in the field of Islamic banking, apart from showing a reduction, also leads to a dualism of competence in judging by two litigation institutions. The choice of the forum of Islamic banking dispute resolution based on Article 55 paragraph (2) letter d of the Sharia Banking Law shows the inconsistency of lawmakers in formulating legal rules (Muttaqien, 2012). Also, the existence of the choice of forum will greatly affect the competence of the Religious Courts and will raw case conflict of norms which in turn can lead to legal uncertainty in the community. Legally, there are differences between the Sharia Banking Law and the Law on Judicial Powers. These two laws have their own juridical, philosophical, and sociological foundations. However, this dualism ended after the Constitutional Court decided to declare that it did not have legal powers against the provisions of Article 55 paragraph (2) of Law No. 21/2008 21 (Ekonomi, 2019).

Abdul Gani Abdullah admitted that the article gave was a contradiction in terms was (opposite meaning). On the one hand, all disputes are resolved at the Religious Courts, but on the other hand, it opens up opportunities for the District Courts. Though both have different absolute competencies. Abdul Gani explained that this problem could lead to a dispute over authority between judicial institutions (Abdullah, 2012). Therefore, about the principle of choice of law, Sunarsip explained that; based on the Shari'ah Banking Law, the dispute resolution that occurs in sharia banking was carried out at the Religious Courts, however by the principle of choice of law, the possibility of a settlement outside the court was also open to the possibility, as long as the consensus of the agreement (Sunarsip, 2010).

It explained that: "*the formulation of Article 55 paragraph (2) and its explanation confused because it included and equated the General Court with the Arbitration Institution, further explained that the clause that could be included in the contract was through arbitration instead of the General Court"*. An interesting thing was also explained by Widiana (2012), in explaining the legal subjects of Muslims and non-Muslims that: in this context, two principles apply, namely the principle of personality and the principle of submission. The principle of personality was applied to contracts that are carried out between fellow Muslims, while the principle of submission of oneself was applied to contracts between Muslims and non-Muslims.

Therefore, the law used to resolve Islamic banking disputes will depend on the institution used to resolve the dispute. This raises a problem because on the one hand it was stated that the settlement of sharia banking disputes should not be contrary to sharia principles, but on the other hand, it was possible to carry out dispute resolution without being guided by sharia principles through general courts, arbitration institutions, and banking mediation Ichsan. Dispute resolution through non-litigation channels or known as peace mechanisms, whether carried out between

parties or through other parties or institutions. In Islamic law, it was known as shuro and shuluh (Ichsan, 2015), The court as the first and last resort. In dispute resolution was still viewed by some as only producing artificial agreements, not being able to embrace common interests, tending to create new problems, slow in resolving them, requiring high costs, not being responsive, causing problems between the disputing parties, and there have been many violations in its implementation.

Arbitration was regulated in Law No. 30/1999, disputes or differences of opinion in the Islamic civil sector can be resolved by the parties through arbitration based on an agreement and based on good faith by ruling out litigation settlement. Regarding mediation institutions, the Government has accommodated the need for mediation by issuing Supreme Court Regulation (PERMA) No. 02/2003 on Mediation Procedures in Courts. Meanwhile, banking mediation was regulated in Bank Indonesia Regulation No. 8/5/PBI/2006 as amended by Bank Indonesia Regulation No. 10/1/PBI/2008 concerning Banking Mediation.

Based on the Supreme Court Circular No. 08/2008 concerning the Execution of the Decision of the Sharia Arbitration Board (BAS). Then in point 3, it was explained that the BAS decision was final and has permanent and binding legal force based on Article 60 of Law No. 30/1999, therefore the parties must implement the BAS decision voluntarily. In point 4 the possibility was opened to be brought to the Religious Court provided that, if the BAS decision was not implemented voluntarily, then the decision was implemented based on the order of the Chairman of the Court in charge of the request of one of the disputing parties (Sriwulan, 2020). And because it was by Article 49 of Law No. 7/1989 as amended by Law No. 3/2006, as amended again by Law No. 50/2009. The Religious Courts also have the duty and authority to examine, decide and settle cases in the field of sharia economics including sharia banking, so the Head of the Religious Courts was authorized to order the implementation of the BAS Decision.

However, This was not the case if the parties resolve through BANI, then if the BANI Decision was not implemented it should be resolved in the District Court because, in the opinion of the author, disputes relating to the economy and shari'ah business are resolved through shari'ah-compliant institutions such as in the Religious Courts and BAS, but for disputes that are conventional (non-sharia) banks resolved through the District Court and BANI, so that the expected results are maximized and can be accounted for both in the world and the hereafter

Legal Framework Model of Sharia Banking Business Dispute Resolution

Regulations on the dispute resolution mechanism for sharia banking begin with the issuance of Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts, as amended by Law No. 50/2009 concerning Amendments to Law No. 3/2006, and the last was through Law No. 21/2008 concerning Sharia Banking. Sharia banking dispute resolution as regulated in Article 55 of Law No. 21/2008 concerning Sharia Banking does not provide legal certainty and creates legal confusion and conflict of norms. This article provides options for means of sharia banking dispute resolution by continuing to apply the rules of law as long as it does not conflict with the principles of sharia.

Although it was realized of sharia banking dispute resolution was part of the principle of freedom of contract and the principle of pacta sun servanda, where the parties are free to determine the content and form of the agreement, and the agreement made by the parties was binding as law for those who make it. This was also in line with Islamic sharia, which gives

freedom to everyone to carry out the contract as desired by the parties as long as it was by sharia principles; this was in line with the principle al-musammah. But on the other hand, the contract that was made must not contradict the law and shari'ah law.

Therefore, to obtain a legal model for the regulatory framework for the settlement of Sharia banking business disputes in Indonesia, including; First, for the short term it was necessary to amend the provisions of Article 55 of Law No. 21/2008, by returning to the provisions of Article 49 letter (i) of Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts as amended by Law No. 50/2009, in which the authority to settle sharia banking disputes was the absolute authority of the Religious Courts (Pasal, 1999) with special additions for those who are not Muslim (non-Moeslem) it can be exercised through the General Court. On the other hand, another alternative can also be made, that "for customers, employees or sharia bank companies that are run by non-Muslims, it can be settled through conventional arbitration institutions or the General Courts as long as it does not contradict the principles of sharia.

In order not to confuse legal norms, the revision of the formulation of Article 55 of Law No. 21/2008 can be formulated as follows:

1. Settlement of Sharia Banking disputes was carried out by a court within the Religious Court.
2. For non-Moeslem customers and/or sharia banks that are managed by non-Muslims, the dispute settlement was carried out by the Court within the General Court.
3. If the parties have agreed to settle a dispute other than as referred to in paragraph (1), the dispute settlement shall be carried out by the contents of the contract through; deliberation or banking mediation or the National Sharia Arbitration Board or other arbitration according to sharia principles.
4. If the parties have agreed to settle a dispute other than as referred to in paragraph (2), the dispute resolution shall be carried out following the contents of the contract through; deliberation or banking mediation or the Indonesian National Arbitration Board or other similar arbitration by sharia principles.
5. Dispute resolutions as referred to in paragraphs (1), (2), (3) and (4) must not contradict the Law and Shari'ah Principles.

The formulation of legal norms as meant in the above-revised article was intended so as not to conflict with Islamic law and the provisions contained in Article 49 of Law No. 3/2006 concerning Amendments to Law No.7/1989 as amended again by Law No. 50/2009 and Law No. 30/1999. This was also based on the reason that the agreement/contract made by the parties may not contradict the law, even though it was based on the freedom of contract principle and pacta sun servanda. The freedom of contract principle was based on Article 1338 of the Civil Code which states that "All contracts made following the law apply as laws for those who make them. The agreement was irrevocable other than with the agreement of both parties, or for reasons determined by law. Agreements must be carried out in good faith.

The formulation of these norms was a way of compromise and takes into account the responsive aspects of the law considering there are non-Moeslem enthusiasts to become customers, employees or employees and managers of sharia banks in Indonesia, and Sharia also teaches to be rahmatan Lil-aalamiin, even more so the issue discussed was not a matter of aqidah and faith but was a matter of muamalah or human relations which are more social and "*mundane*" in nature which almost all the time we interact with each other without differentiating between Muslims and non-Muslims. This will also be a model for the legal framework for regulating business and other sharia economies that are currently developing in Indonesia and other aspects of dispute resolution, it should not conflict with the principles of sharia.

Another legal framework that needs to be considered comprehensively for the medium and long term was the importance of a special law that regulates sharia economic dispute resolution, especially Islamic banking. This law was a lex special was procedural law from existing procedural law which contains legal framework arrangements, among others concerning; clarify the definition of sharia economics and sharia banking, the bases for its regulation, principles, requirements, and procedures for the appointment and appointment of judges, types of cases that are competent, techniques and proceedings, evidence and witnesses, promise, promise procedures for non-Muslims who submit oneself (choose) dispute in sharia, types of decisions for Muslims and non-Muslims, implementation and execution of decisions, accommodating developments in information, communication, and technology (ICT), with an online or online trial model, as well as for materials to accommodate Shariah Economic Compilation Law by making improvements.

CONCLUSIONS

Sharia banking business dispute resolution according to Indonesian law can be done through a litigation mechanism, namely through the Religious Courts and non-litigation can be resolved through deliberation, banking mediation, BASYARNAS, or other arbitration according to sharia principles. However, the laws and regulations regarding Islamic banking dispute resolution still cause legal problems, namely Article 49 letter (i) of Law No. 3/2006 concerning Amendments to Law No. 7/1989 and Article 55 paragraph (1) of Law No. 21/2008. The legal model for the regulatory framework of Sharia banking business dispute regulation in Indonesia by revising Article 55 of Law No. 21/2008, by restoring the authority to resolve sharia banking disputes, it becomes the absolute authority of the Religious Courts. Especially for customers and sharia banks which are managed by non-Muslims, they can choose a District Court under the agreement of the parties, so to regulate it comprehensively it needs to be regulated in a special law on sharia economic dispute resolution or sharia banking.

RECOMMENDATION

It was necessary to revise Article 55 of Law No. 21/2008 concerning Sharia Banking, in which the authority to sharia bank dispute resolution was the authority of the Religious Courts. Especially for customers of sharia banks who have religions other than Waslam (non-Moeslem) and Islamic banks managed by non-Muslims, they can be given the choice of law to the dispute resolution through the Religious Court or District Court, or under the contract agreed by the parties.

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