

Urgency Of The Establishment Of A Special Court For The Resolution Of Sharia Economic Dispute In The Religious Courts

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URGENCY OF THE ESTABLISHMENT OF A SPECIAL COURT FOR THE RESOLUTION OF SHARIA ECONOMIC DISPUTE IN THE RELIGIOUS COURTS

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ABSTRACT

1
Article 55 of Law Number 21 of 2008 concerning Sharia Banking raises the polemic of law enforcement on sharia economic dispute, since it opens the choice of forum for the parties in dispute resolution. After the decision of the Constitutional Court No. 93/PUU-X/2012 concerning the authority to resolve sharia economic dispute, it is affirmed that the Religious Courts have authority in the settlement of sharia economic disputes. In reality, however, the decision of Constitutional Court is ineffective due to various factors, such as the qualification of judges and the high level of cases to be resolved by the Religious Courts. Therefore, it is necessary to set up a Special Court to resolve the dispute of sharia economy within the Religious Courts so that the matter of choice of forum does not happen again, because theoretically the choice of forum shows the inconsistency of the formation of law. In addition, the choice of forum also influences the competence of the Religious Courts. Thus, the urgency to establish a special court of sharia economic within the Religious Courts is a conviction in an effort to realize an effective and efficient judicial system by promoting the principle of professionalism. The legal construction of the establishment of special courts that resolve sharia economic disputes within the Religious Courts is based on Article 24 paragraph (2) of the 1945 Constitution, Article 1 point 8 and Article 27 paragraph (1), paragraph (2) of Law Number 48 of 2009 on Judicial Power, Article 3A and Article 49 of Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Courts in conjunction with Article 3 paragraph (1), (3) (4) and Article 13B of Law number 50 of 2009 on the Second Amendment to Law Number 7 of 1989 on Religious Courts. It is expected that with the establishment of a special court in the settlement of sharia economic dispute will foster trust and legal certainty to the justice seeker community.

Keywords: Establishment, Special Court, Sharia Economic Dispute.

INTRODUCTION

After the enactment of Law No. 3 of 2006 on the amendment of Law No. 7 of 1989 on Religious Courts, the development of Religious Courts related to the expansion of authority in sharia economic matters is expected to get the historic place and momentum (Jenal, 2008). Thus, the authority to examine, decide and resolve sharia economic dispute is the absolute authority of the courts within the Religious Courts that cannot be resolved by other courts, as it would violate the principle of absolute jurisdiction. However, after the enactment of Law Number 21 of 2008 concerning Sharia Banking, it raises legal uncertainty. This can be seen from the provisions of Article 55 of Islamic Banking Law stipulating that:

- Resolution of Sharia Banking disputes shall be conducted by courts within the Religious Courts.
- In the event that the parties have agreed to a dispute resolution other than as intended in paragraph (1), dispute resolution shall be conducted in accordance with the contents of the Agreement.
- The settlement of disputes as referred to in paragraph (2) shall not be contrary to Sharia Principles.

Referring to the provision of Article 55, there are contradictions in formulating the norms (*contradictio in terminis*), where paragraph (1) confirms the dispute resolution of sharia banking through Religious Court, but this provision is weakened by the possibility of parties to formulate the norm of dispute resolution based on the agreement. Thus, in the explanation of Article 55 paragraph (2) it is possible to settle the dispute over sharia banking through deliberation, banking mediation, the National Sharia Arbitration Board or other arbitration institution and/or through the courts within the General Courts.

This is in line with Abdul Gani Abdullah's opinion stating that the article is *contradictio in terminis* (Edi, 2005). All disputes are resolved in the Religious Courts, while in fact it opens opportunities to the District Court. Both cases have absolute competence. Abdul Gani predicted this issue could lead to a dispute of authority among judicial institutions. There may be a dispute over authority. On the other hand, it is the authority of the Religious Courts, but because of the contract they promised, it could be the authority of the District Court (Mahir, 2014). What was predicted by Abdul Gani and other experts has been decided by the Constitutional Court with No. 93/PUU-X/2012 which strengthens the Religious Courts as an institution authorized in receiving, examining, deciding cases of sharia economy. In this verdict, it can be seen that the resolution of sharia economic dispute becomes the absolute competence of the Religious Courts, thus it closes the chance of the emergence of choice of forum.

The authorities of the Religious Court are receiving, examining and deciding family affairs, zakat, waqf, grants, shadaqah, testaments and so forth in the context of sharia.¹ On the other hand, the resolution of sharia economic dispute requires special handling considering sharia economy has a very wide subject, such as sharia contracts, sharia insurance, sharia investment, sharia based reinsurance, sharia pawnshops, sharia securities, sharia bonds and other sharia business (Abdul, 2012).

Sharia economic dispute resolution should be done by professionals, while in the context of the judiciary in Indonesia the resolution is still done by judges in the general judicial environment. In Saudi Arabia, all banking disputes, both sharia and conventional, are handled by special courts with ad hoc judges. This is done so that the judicial process is more effective and efficient.² Similarly in Pakistan, the settlement of sharia economic disputes is resolved through a special court called the Banking Tribunal (Director General of Badilag MARI, 2016).

Based on the description above, this article will discuss 2 (two) issues concerning the background of the importance of the establishment of special courts within the Religious Courts in the resolution of sharia economic disputes and how the legal construction of the establishment of a special Sharia economic court within the Religious Courts works.

RESULT

Urgency of the Establishment of Special Courts in the Religious Courts in the Resolution of Sharia Economic Dispute

The importance of the formation of a special Sharia economic court is motivated by several facts. However, this article solely focuses on the juridical aspect. Nonetheless, the non-juridical aspect is indirectly indispensable, since law is not independent. Therefore, a law policy that will be taken will be influenced by several aspects, especially sociological, economic and political aspects.

From the sociological aspect, it can be seen that the level of awareness of businessmen and society (especially Muslims) on the consciousness of running the Islamic Sharia as a consequence of higher confidence. This means that legal pluralism must be accepted as a reality (Real of Entity) of the compound (legal fluraly) in the life of society (Ibid). Based on these conditions, the resolution of sharia economic dispute must be conducted within the judicial environment that substantively controls the values of Islamic sharia and understands the practice of sharia business contracts (Decision of the Constitutional Court, 2012).

This is in line with the authority of the Religious Courts as stipulated in Article 45 of the Religious Courts Law, which gives the authority to settle cases within the scope of family law reaching almost 90% (ninety percent).³ Given the fact, the resolution of the sharia economic dispute requires special handling, considering that sharia economy has a very wide subject and affects many fields (Abdul, 2012). Therefore, an ad-hoc judge is required to qualify various aspects related to sharia economy. This is done to minimize errors in breaking sharia economic dispute (Ahmad, 2014).

On the other hand, Indonesia is also faced with the growth of regional economic regions, such as ASEAN Free Trade Area (AFTA) or ASEAN Economic Community. In this case, the people of Indonesia should be able to compete with other citizens, especially in the field of both conventional and sharia investment. This is inseparable from the demographic aspect, in which Indonesia is a country with the largest Muslim population in the world and is projected to be ranked fourth of the potential development of sharia financial industry after Iran, Malaysia and Saudi Arabia (Halim, 2012). For that reason, it needs to prepare a model of dispute resolution of Islamic economy that can be trusted by public (public confidence).

Sharia economic activities not only discuss about products, but also include legal relations and legal consequences, including a dispute between sharia economic actors, which must be based and resolved in accordance with the principles of sharia (Basir, 2012). Therefore, it requires human resources that have capacity and capability recognized by stakeholders. The successful implementation of sharia principles in economic aspects can bring Indonesia to be the centre of sharia economic growth, especially the largest banks in the world.

In 1998, the government enacted Law Number 10 of 1998 on Amendment to Act Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law) which has accommodated banking operations based on sharia principles. However, the resolution of sharia economic dispute has not been clarified. Although the settlement through Sharia Arbitration has been designated as the sole method of dispute settlement, it is not supported by clear regulation, resulting in legal uncertainty.

However, the issuance of Article 55 of Law Number 21 of 2008 concerning Sharia Banking (Sharia Banking Law) raises the issue related to the resolution of disputes which opens the choice of forum. This provision is precisely counter-productive and causes legal uncertainty, as it revokes the absolute authority of the Religious Courts in the settlement of sharia economic disputes as mandated by Law No. 3 of 2006.

Despite the judicial review of Article 15 Paragraph (2) to the Constitutional Court has been conducted and it has been decided in the decision of the Court No. 93/PUU-X/2012 that the Religious Courts as the institution authorized to receive, examine, decide the case of Islamic economics, in fact, the Constitutional Court's verdict is not appreciated by the parties, even the District Court keeps processing it, which might cause legal uncertainty.

Based on juridical analysis, the main cause of the legal uncertainty is derived from the law, such as Article 23 of Law Number 8 of 1999 on Consumer Protection, which stipulates that consumers may file a lawsuit against the businessmen through Consumer Dispute Resolution Agency or to the judiciary. Article 45 Costumer Protection Law mentions that the resolution of consumer dispute can be reached through court or outside the court based on the voluntary choice of the parties to the dispute. Furthermore, Article 52 Costumer Protection Law affirms that one of the authorities of the Consumer Dispute Resolution Bodies is to receive both written and unwritten complaints from consumers regarding the occurrence of violations of consumer protection.

What is mandated in Costumer Protection Law concerning the settlement of disputes between the Customer (debtor) and the creditor (Bank) of sharia financial institution needs a deep understanding related to the meaning of the court as intended Article 45. The court referred to in this case shall be a court having competence as referred to the Constitutional Court Decision above. In other words, Consumer Dispute Resolution Agency still receives consumer complaints, but objections to the Consumer Dispute Resolution Agency decision are submitted to the Religious Courts, not on the District Court.

Legal Construction for the Establishment of Sharia Economic Special Court in the Religious Justice Environment

Legal Construction (*Rechtsconstructie*) is a series or law building related to authority, one of the constructions of analogy (*argumentum per analogiam*). Analogy is a process of construction done by finding the ratio of legion (genus) of a law.

Constitution of the 1945 Constitution

The Religious Court is one of the courts as the judicial authorities under the Supreme Court similar to the courts within the General Courts, as the constitutional provisions in Article 24 Paragraph (2) of the 1945 Constitution states: "Judicial power is exercised by a Supreme Court and the judiciary under it within the General Courts, the environment of the Religious Courts, the military court environment and the administrative court of the state and by a Constitutional Court". The constitutional provisions are elaborated in the Religious Judicature law.

The Religious Judicature Law stipulates that Religious Courts are one of the judicial executive exercises for Islamic justice seekers (the principle of Islamic personality) concerning

certain civil cases regulated in this law. So that the application of the Islamic personality principle in the sharia economic dispute needs to be interpreted as self-submission for those who are non-Muslims at the time of signing.

Judicial Power Law

The establishment of a special judicial agency is stipulated in Article 15 paragraph (1) of Law Number 4 of 2004 stating that: "Special courts can only be established within one of the judicial environments as referred to in Article 10 regulated by Law".

The definition of "special" in Article 15 paragraph (1) of Law No. 4 of 2004 is different from the definition of "special" in Law No. 14 of 1970; in this case "special court" gives the meaning as specificity in every environment of its court. On the other hand, the specificity in Article 15 paragraph (1) of Law No. 4 of 2004 is meant by the meaning of the room (*Raad-kamer*). It is known that within the General Courts, there are special courts for child crime cases, corruption criminal cases, human rights cases. Therefore, the purpose of special court in Article 15 paragraph (1) of Law No. 4 of 2004 is specialization (differentiation). It is also emphasized that special courts can only be established within a single court environment and special courts are part of a judicial environment. For example, juvenile justices, corruption court, human rights court, are within the jurisdiction of the General Courts (Ahmad, 2017).

The position of the special court is further confirmed by the enactment of Law Number 48 of 2009 concerning Judicial Power which supersedes Law Number 4 of 2004. Based on the above description, the establishment of a special Sharia economic court within the Religious Courts is appropriate to the fulfilment of aspects in the law on Judicial Power.

Religious Courts Law

The juridical aspect of the establishment of special courts within the Religious Courts is a necessity as mentioned in Article 3A of Law No. 3 of 2006 stating that: "In the environment of Religious Court specializing courts regulated by law can be held". The construction of the law of the establishment of a special court is affirmed again in Law Number 50 of 2009 on the Second Amendment to Law Number 7 of 1989 on Religious Courts. Article 3A paragraph (1) of Law Number 50 of 2009 concerning Religious Courts which reads: "In the environment of Religious Courts special courts regulated by law can be set up". In the explanation it is stated: "That which is meant by the specialization of the court is the existence of differentiation/specialization within the Religious Courts where a special court can be established". "Special courts are courts which have the authority to examine, hear and decide certain cases which can only be established within one of the courts under the Supreme Court regulated by law⁴.

Article 3A of the Religious Judiciary Law is inserted in Article 3A paragraph (3) which reads: "In special courts an ad-hoc judge may be appointed to examine, hear and decide cases requiring expertise and experience in a particular field and within a certain period of time". In the explanation it says: "That the purpose of appointing an ad-hoc judge is to assist in the resolution of cases requiring special expertise such as "the crime of sharia banking".

CONCLUSION

Urgency of the establishment of a special sharia economic court within the Religious Courts is a certainty in an effort to create an effective and efficient judicial system by promoting the principle of professionalism, since the burden of the case in the Religious Courts based on the disputes in the family law is very dominating and the scope of sharia economic law is more complex. Therefore, the existence of professional judges in the resolution of sharia economic dispute is needed in the environment of Religious Courts.

The legal construction of the establishment of a special sharia economic court within the Religious Courts is under Article 24 paragraph (2) of the 1945 Constitution, Article 1 point 8 and Article 27 paragraph (1), paragraph (2) of Law Number 48 of 2009 on Power Justice, Article 3A and Article 49 of Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Courts in conjunction with Article 3 paragraph (1), (3) (4) and Article 13B of Law Number 50 of 2009 on the Second Amendment to Law Number 7 of 1989 on Religious Courts.

ENDNOTE

1. http://www.kompasiana.com/bangdepan/inilah-penyebab-perceraian-tertinggi-di-donesia_55094acaa3331122692e3965
2. www.republikaonline.com
3. http://www.kompasiana.com/bangdepan/inilah-penyebab-perceraian-tertinggi-diindonesia_55094acaa3331122692e3965 (retrieved on August 26, 2017 at 15:16)
4. Law Number 48 Year 2009 on Judicial Power of the State Gazette R.I. Year 2009 Number 157 and Supplement to the State Gazette of R.I. Number 5076, Article 1 point 8

REFERENCES

- Abdul, M. (2012). *Law of Sharia Economics: In Perspective of the Authority of Religious Courts*. Kencana, Jakarta.
- Ahmad, M. (2007). *One-Roof Judicial In Indonesia*. Refika Aditama, Jakarta.
- Ahmad, Z.F. (2014). *Settlement of Sharia Economic Dispute in Religious Courts*. Peradilan Agama Magazine (Third Edition), Jakarta.
- Cik, B. (2012). *Settlement of Sharia Banking in Indonesia (part 1 of 2 posts)*. Kencana, Jakarta.
- Directorate General of Badilag MARI. (2016). *Majalah Peradilan Agama: Sengketa Ekonomi Syariah Publik Percaya Peradilan Agama*.
- Edi, H. (2015). *Penyelesaian Sengketa Perbankan Syariah Pasca Putusan MK Nomor 93/PUU-X/2012: Litigasi dan Non Litigasi*, UII Press, Yogyakarta.
- Jenal, A. (2008). *Peradilan Agama dalam Bingkai Reformasi Hukum di Indonesia*, Prenada Media, Jakarta.
- Halim, A. (2012). *Perkembangan dan Prospek Perbankan Syariah Indonesia: Tantangan Dalam Menyongsong MEA 2015*, IAEI, Jakarta.
- Judicial Commission of Indonesia. (2013). *Putih Hitam Pengadilan Khusus*, Pusat Analisis dan Layanan Informasi Sekretaris Jenderal Komisi Yudisial, Jakarta.
- Mahir. (2014). *Kewenangan Pengadilan Agama dalam Sengketa Perbankan Syariah*, Jurnal Al-Qanun Pemikiran dan Pembaharuan Hukum Islam, Vol 17 No 1. <http://jurnalfsh.uinsby.ac.id/index.php/qanun/article/view/186>.
- Muhammad, S.A. (2008). *Bank Syariah dari Teori ke Praktek*, Cetakan kedua belas. Gema Insani, Jakarta.
- State Gazette of the Republic of Indonesia*. (2009). Supplement to the State Gazette of the Republic of Indonesia Number, Law number 48.
- State Gazette of the Republic of Indonesia*. (2009). Second amendment to law number 7 and additional state gazette number 507.

- State Gazette of the Republic of Indonesia.* (2006). Amendment to law number 7 and supplement to the state gazette of the republic of Indonesia number 4611.
- State Gazette of the Republic of Indonesia.* (1989). Law number 7 and supplement to the state gazette of the republic of Indonesia number 3400.
- Decision of the Constitutional Court.* (2012). Number 93/PUU-X/2012 at www.hukumonline.com. Hirarki Putusan, Mahkamah Konstitusi.

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