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Sharia banking dispute resolution in Indonesia after the verdict of the constitutional court no. 93/puu-x/2012

Resolución de controversias bancarias de sharia en Indonesia después del veredicto del tribunal constitucional no. 93 / puu-x / 2012

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ABSTRACT

Constitutional Court has issued a verdict No. 93/PUU-X/2012 that repeal and declare the provisions of Article 55 paragraph 2 of the law No. 21 year 2008 on Sharia banking null and void. The method used in drafting this article is normative research using a conceptual and statutory approach, which results in the conclusion that due to the principle of Sharia banking operations differ from conventional banking, the procedure for the settlement of the dispute must also be different, which in this case is the religious court.

Keywords: Choice of forum, dispute, sharia banking.

RESUMEN

El Tribunal Constitucional ha emitido un veredicto No. 93 / PUU-X / 2012 que deroga y declara nula y sin efecto las disposiciones del artículo 55 párrafo 2 de la ley No. 21 del año 2008 sobre la banca Sharia. El método utilizado en la redacción de este artículo es una investigación normativa con un enfoque conceptual y estatutario, lo que da como resultado la conclusión de que debido al principio de la Sharia, las operaciones bancarias difieren de la banca convencional, por lo que el procedimiento para la solución de la controversia también debe ser diferente, que en este caso se trata en el tribunal religioso.

Palabras clave: Banca de la sharia, disputa, elección de foro.

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INTRODUCTION

Sharia banking is a bank institution that underlies the operational activity of its banking in accordance with the aspects of economic life based on Islamic Sharia principles. In its system, sharia banking avoids the interest system in operating its business (Thalib *et al*., 2019). The existence of Sharia banking in Indonesia can be used as an alternative solution to the question of the conflict between interest and riba that is often debated by Indonesian people. This is because the majority of Indonesian citizens are Muslims who mostly avoid the business of usury or *riba*. Conventionally, the role of banking is to raise funds and drain funds in accordance with the laws and regulations of conventional banking. In conventional banking system known term interest. Interest is the advantage or addition of the principal asset, in the Sharia banking language most of the interest of the bank is interpreted as a *riba* on Islamic banking (Usanti & Thalib, 2020). There is a solution of the prohibition, namely the existence of profit sharing. Profit sharing is a principle that relates to the sharing of profits fairly and according to the ratio in the contract between the customer and the bank. Profit sharing is familiar with the name of the system for the outcome here is the basic foundation for the sharia banking operations as a whole (Thalib *et al.,* 2018).

The history of the birth of Bank Muamalat Indonesia as the first sharia Bank in Indonesia in 1992 occurred in the support of legislation No. 7 year 1992 on banking (Wibisono, 2009). Then in the year 1999, sharia bank grew rapidly due to adequate regulatory support, namely Act No. 10 of 1998 on the amendment of Law No. 7 of 1992 and Law No. 3 of 1999 on Bank Indonesia. In 2002, Bank Indonesia corrected the rules on Sharia business units through Bank Indonesia Regulation No. 4/1/PBI year 2002 on the change of business activities of conventional general Bank into commercial banks based on Islamic principles (Thalib, 2018a) and opening of Bank offices based on sharia principles by conventional banks (Thalib, 2018a). Sharia banking industry officially entered a new era in year 2008 and has sharia banking regulation of Law No. 21 year 2008 on sharia banking.

Since sharia banking has undergone considerable development after the ratification of Law No. 21 of 2008 on Sharia banking, many sharia banking disputes are often faced by the public. Basically, the settlement of Sharia banking disputes has been discussed in Law No. 21 of 2008 in chapter IX of the dispute resolution of article 55 paragraph (1), (2), and (3) which states:

Settlement of banking disputes is conducted by the courts within the judicial environment of religion; In case the parties have promised the settlement of the dispute other than as intended in paragraph (1), the settlement of the dispute is conducted in accordance with the contents of the contract. The settlement of the dispute as referred to in paragraph (2) shall not contradict the Shariah principle. In the explanation of the article and verses are: Quite clear The meaning of "dispute resolution is done in accordance with contract" is the following attempt; Deliberation; Mediation of banking; Through the National Sharia Arbitration Board (Basyarnas) or other arbitral institutions; and/or Through the courts in the environment in the general judiciary. (3) quite clear.

In the explanation in Article 55 paragraph (2) LAW No. 21 year 2008 explained that the commendation with "settlement of disputes conducted in accordance with the content of the agreement is a dispute resolution effort in the manner of deliberation, banking mediation, through the National Sharia Arbitration Agency (Basyarnas) or other arbitral institutions and or through the courts in the public judicial environment. The explanation is a problem surrounding the authority to resolve sharia banking disputes because in the explanation there are dualism of the designated litigation institutions, namely the Justice of the religion in article 55 paragraph (1) Act No. 21 of 2008 and the District Court (explanation on Article 55 paragraph (2) Act No. 21 year 2008).

Then there is a verdict of the Constitutional Court (Hereinafter referred CC) No. 93/PUU-X/2012 on the subject of material test of Law number 21 year 2008 on sharia banking, the dispute resolution dualism is eliminated. The Constitutional Court's decision also essentially strengthens the authority of the religious court in resolving sharia banking disputes through litigation (Imaniyati, 2015). But raises new problematics regarding the resolution of non-litigation path disputes. Therefore, after the verdict of the Constitutional Court No.

93/PUU-X/2012 then Timbu as a result of the law void and the norm is blurred in Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking. Based on this, the authors will try to explain more about the settlement of Sharia banking disputes after the verdict of CC number 93/PUU-X/2012.

METHODOLOGY

The method used in drafting this article is normative research using a conceptual approach and a statutory approach, which results in the conclusion that due to the principle of Sharia banking operations differ from conventional banking, the procedure for the settlement of the dispute must also be different, which in this case is the religious court.

RESULT AND DISCUSSON

Analysis of The Verdict of Constitutional Court No. 93/PUU-X/2012 Concerning The Judicial Review on Article 55 Sharia Banking Law.

Based on Constitutional Court verdict No. 93 number 93/PUU-X/2012, authority to adjudicate Sharia banking disputes pursuant to Article 50 of the general judicial law, the District Court is authorized to deal with civil disputes at the first level whereas the religious court pursuant to article 49 of the Judicial Justice Act is authorized to deal with the first level of dispute between the Muslims who are one of the sharia economics in particular the sharia banking dispute in Islam including the rulings classification. Under the authority to adjudicate sharia banking disputes, by applying the principle of *Lex specialist Derogat legi generalis* religious court is a *Lex specialis* of authority owned by the District Court. It is appropriately applied given that in applying the principle should pay attention to 3 (three) principles (Widodo, 2016).

First, the two legislation must be in the same hierarchy. Secondly, both laws must be in the same regime. In this case already fulfilled the principle that is, in the same hierarchy, namely the law and both are in a regime, namely the regime of judicial power. Third, in the case of such principle the terms obtained in the general legal rules shall remain in effect, except as specifically stipulated in the specific law. Accordingly, the existence of the Constitutional Court verdict, then the authority to examine, terminate and resolve Sharia banking disputes is the absolute authority of the religion court authority as long as stipulated in the Act of Religion Court. Then the provisions of Article 55 paragraph (2) of the Law number 21 year 2008 on sharia banking states: "In the event that the parties have promised the settlement of the dispute other than as intended in paragraph (1) of the settlement of disputes conducted pursuant to the content", in this case means the settlement of disputes other than the religion Court can only be done if The *akad* (Islamic contract) here is likened to a covenant that the principles of the Treaty apply also to the contract. In the agreement there is a principle of freedom of contract (freedom of contract) meaning that the parties are free to contract and arrange for themselves the contents of the contract. (Widodo, 2016).

Similarly, in chapters 55 paragraph (2) of Law No. 21 of 2008 on sharia banking should provide freedom for the parties to determine the settlement of its disputes. A legally made agreement will have a binding law. As for the validity of an agreement in article 1320 Indonesia Civil Code there are 4 (four) conditions that must be filled namely, 1) agree those who bind themselves, 2) capability to make contract, 3) A certain thing (object of Agreement), and 4) a lawful cause (not contrary to law, public order and morality). If the validity of a contract is fulfilled, then the agreement has a full legal bond in clause 1338 Indonesia Civil Code stating "All agreements made legally valid as laws for those who make it". With the validity of the agreement as a law for those who make it then the provisions of the agreement is a more specific provision of a law. As is the case in article 55 paragraph (2) of the law number 21 of 2008 on Sharia banking, if the parties have agreed to the resolution of

the dispute, then the provisions of the agreement are executed. With the validity of the agreement as a law for those who make it, the agreement has contained an element of legal certainty.

The verdict of the Constitutional Court No. 93/PUU-X/2012, then concerning the settlement of banking disputes under the scope of Law No. 3 of 2006 on religious justice is possible resolved in the environment of the General Court. However, with the decision of the Constitutional Court with respect to the Decree No. 93/PUUX/2012 with the decision that is: stating the explanation of Article 55 paragraph (2) contrary to the Constitution of Republic Indonesia 1945 conditional and has no binding legal force except as follows (Widodo, 2016) (1) agreed to the parties based on deliberation in the contract. (2) The election of the courts in the general judicial environment may be selected and only between sharia banking and non-Moslem customers (not the subject of religious courts), while for customers and sharia banks if there is a dispute and the customer is an Islamic religion must be in the religion court.

The Legal Consequences Explanation of Article 55 Paragraph 2 of The Law No. 21 Year 2008 on Sharia Banking

After the verdict of the Constitutional Court No. 93/PUU-X/2012 which has explained that the explanation in Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking is stated that no legal force is binding, then in this case if there is a dispute both the sharia bank and the customer no longer have to follow the explanation of Article 55 paragraph (2) in Basically, if there is a dispute on sharia banking, deliberation remains an alternative option before being taken to the next level when not finding the meeting point. Deliberation is an initial option for the sharia banking disputes as it is the communication of two parties designed to reach an agreement (Manan, 2006). In addition to deliberation, banking mediation is also an alternative disputes. It is based on Indonesia Bank Regulation (hereinafter called PBI) No. 10/01/PBI/2008 concerning PBI change number 08/05/PBI/2006 on banking mediation. In the implementation of mediation, Bank Indonesia does not provide dispute resolution decisions to both customers and banks. In this case, the implementation of mediation is conducted by an independent banking mediation agency established by the Banking Association. The mediation process can be done at the nearest Bank Indonesia (Indonesia Central Bank) office with the customer's domicile to dispute. In the decision of the Constitutional Court No. 93/PUU-X/2012 does not affect the power of banking mediation. Banking mediation is still an alternative if the disputing parties have agreed not to bring the dispute to an advanced level that is in this case the religious court. However, in that case the disputing parties must remain clearly listed in the contract.

The verdict on the Constitutional Court No. 93/PUU-X/2012 also describes the existence of the National Sharia Arbitration Agency (hereinafter called Basyarnas). The ruling does not offend or narrow the authority of Basyarnas as an alternative to sharia banking dispute resolution. However, to reinforce the parties in dispute if they wish to bring their tickets to Basyarnas, it must clearly include the contract when the customer and the Sharia bank do a treaty. Through the verdict of the Constitutional Court No. 93/PUU-X/2012 also expressly describes the authority of the general judiciary. The Constitutional Court ruling explains that the courts within the scope of the general judiciary must refuse to accept and deal with sharia banking disputes, because if accepting and addressing disputes will be contrary to article 25 of Law No. 48 year 2009 on judicial power. In the competence of the District Court is not authorized to handle sharia economic disputes which in this case include sharia banking.

The Legal Consequences of the Parties in Dispute after the Verdict of the Constitutional Court No. 93/PUU-X/2012

The verdict of the Constitutional Court No. 93/PUU-X/2012 raises the new norm especially in the case of Sharia banking dispute resolution. The choice of parties in resolving the dispute that is already in the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 on sharia banking in some cases raises an uncertainty law that harms the parties. This is because there is an overlaps of the authority to prosecute matters because there are two courts given authority to settle sharia banking disputes. In fact, under Act No.

3 of 2006 on religion courts it has been explicitly explained that the religious court was given the authority to settle sharia banking disputes because the dispute was entered into the Sharia economic realm. The settlement of banking disputes is absolutely the authority of the Court of religion. As of article 49 letter (i) Act No. 3 year 2006 concerning amendment to law number 7 year 1989 concerning religious court and Article 55 clause (1) of Law No. 21 of 2008 on Sharia banking.

The parties who conduct the sharia banking activities can make choices when there is a dispute that occurs in the customer and the sharia bank to not agree to resolve the dispute through the courts of religion. However, it must be clearly contained in the contract of the parties and should clearly mention if any dispute should be resolved through what is already contained in the contract. Then with the verdict of the Constitutional Court No. 93/PUU-X/2012 stating the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking. The parties no longer have to resolve disputes non-litigation on deliberations, banking mediation, arbitration through Basyarnas. However, in this ruling, the parties in resolving the dispute may pursue other non-litigation pathways such as consultation, negotiation, conciliation or expert judgment.

Due to the ruling on the verdict of the Constitutional Court No. 93/PUU-X/2012 against Non-litigation dispute settlement of Sharia banking

Business activities including business with sharia systems may not be completely avoided from disputes between the parties. In anticipation of this, business people and business law experts are looking for an effective and efficient form of dispute resolution to resolve the problem. Real conflicts are resolved by implementing real legal norms and in accordance with applicable positive laws. There are three elements in the concrete law: (Mertokusumo, 2004) A) The rule of law relates to human behavior, both active/real or passive conduct do not do so; b) The rules of law are generalized that govern a particular conduct in a certain situation; c) The legal regulations are prescriptive/determining what should be, and d) the general nature according to time. The law on the principle is valid for no specific/general time until revoked or there is a new regulation.

In the resolution of the dispute in the field of Sharia banking before the decision of Constitutional Court No. 93/PUU-X/2012, there is still a choice in resolving disputes that can be in the courts of religion or general Court. However, with the issuance of Verdict No. 93/PUU-X/2012, the authority to prosecute Sharia banking matters that enter the realm of sharia economics, then the competent judge of the dispute is the religion court. This was strengthened by the Law No. 3 of 2006 on religion court. The verdict of Constitutional Court number 93/PUU-X/2012 is an important thing to improve the service to the community by preparing the strengthening of material law and the law of the Sharia Law compilation (hereinafter called KHES). So normatively, sharia banking disputes become the competence of the religion court since the validity of the Act No. 3 year 2006 year. However, creating a new problematics because of the ruling there is a legal void regarding the settlement of disputes through non-litigation path. This is because the Constitutional Court has clarifying all explanations of Article 55 paragraph (2) in which it contains non-litigation dispute resolution forms. This situation makes the main norm in article 55 paragraph (2) to be blurred, resulting in a void of law.

In answering the problem of law in the form of a vague norm and the void of law, it should also be discussed the provisions of article 10 paragraph (1) of Act No. 48 year 2009 on judicial power, which states the court shall not be able to inspect, prosecute and discontinue any matter submitted to it, with the legal evidence is not present or unclear. The essence of Article 10 paragraph (1) is a non-determined basis of refusing an object (*rechtsweigering*).

The principle of *rechtsweigering* is the forerunner of the theory of discovery of the law due to a no-clear or unclear law. Therefore, if the judge does not find its law in the written rules, then the judge must seek his law outside the written law as affirmed in article 5 paragraph (1) Act No. 48 year 2009 on judicial power, the judge is obliged to dig, follow, and understand the legal values that live in society. The provisions of the legislation that are generally and abstract, are not applicable directly to concrete events, therefore the provisions of the law must be meant, described or construed and adjusted for the event to be applied to the

occasion. His legal events should be sought first of his concrete events, then law interpreted to be enforceable. The method of discovery of law commonly used in the practice of law discovery by judges is a method of interpretation and construction (Mertokusumo, 2004). This method of interpretation as a means to know then the law, this method is used against the law rules are unclear and incomplete.

Based on the explanation on the previous paragraph, the occurrence of the legal void after the verdict of the Constitutional Court No. 93/PUU-X/2012 of Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking, then to fill the void of law and explain the norms of the norm, then methods interpretation is very appropriate to use as a solution to the problem (Thalib, 2013).

The interpretation method is suitable for filling the void and the blurring of the norm Article 55 paragraph (2) of Law No. 21 of 2008, then a method of systematic interpretation, i.e. methods of interpreting legislation by linking it to other laws or regulations, or with the entire legal system. In this case, article 55 paragraph (2) Act No. 21 of 2008 on sharia banking can be attributed to a systematic interpretation by looking at Act No. 30 year 1999 on arbitration and Alternative dispute resolution which provides the possibility of settlement of disputes through non litigation procedure.

Implementation of Constitutional Court verdict No. 93/PUU-X/2012

In order to implement the law as a system, it is necessary to have a method of finding a law that becomes an adjustment between existing laws and concrete events that occur in the community. Therefore, the existing law needs to be explained, interpreted, equipped and created by its legal rule in order to be found. As explained in the previous sub-chapters of the method of discovery of the law in theory is distinguished into three types namely interpretation methods, methods of argument and methods of free legal finding (Mertokusumo, 2004). The method of interpretation of the understanding is the method or means of providing an interpretation of the text that is considered unclear, so that the legislation can be applied to certain concrete events. The teaching of interpretation in the discovery of the law is known also by the term legal hermeneutics. The method of Argumentation is also called the legal reasoning method or reasoning.

The process of finding a law that uses this method or way can be done in several ways. While for the free legal finding method is where the judge sees the act only as a tool in creating the law on its own basis as a judge who can find the law and should not absolutely adhere to the existing legislation. Thus the judges are required to create the right solution for a concrete event (Riyanta, 2008).

Implementation of Constitutional Court verdict No. 93/PUU-X/2012 for Sharia banking dispute resolution can be realized, among other things through the implementation of the method of discovery of existing law based on Islamic principle and Islamic legal maxim (Thalib, 2018b) so that the ruling can apply and have the legal force for the institution. Sharia banking is part of the sharia economy and hence there is a common essence covered by Sharia law. The verdict of the Constitutional Court No. 93/PUU-X/2012 is essentially a part of law enforcement that provides an affirmation of the competency in the judiciary of religious justice in the field of Sharia economics. Therefore, against disputes in sharia finance and business institutions outside Sharia banking, this ruling also applies. This means that the agreement between the Parties shall be disputed and unlawful, and the Parties in establishing the agreement choose the district court forum for the settlement of Sharia banking disputes. The district court judges should not accept the dispute, even if the parties have agreed through written agreement.

Hopes And Challenges Of Sharia Banking Dispute Resolution After The Verdict Of The Constitutional Court No. 93/PUU-X/2012

Constitutional Court verdict No. 93/PUU-X/2012, provide a great opportunity for the justice of the religion because the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking is not to bind the explanation of the article then this authority with and immediately be in the religious court because the meaning of having no binding law strength is the result of the law does not apply rules that contain equations

that may occur in the future. So in this case it is not an mandatory binding for all organs of the State, both central and regional levels as well as all other authorities (Maddatuang, 2013).

The verdict of the Constitutional Court No. 93/PUU-X/2012 is expected to the community in particular who understands the law to know if there is a dispute about sharia banking should already understand the authority of the Court (litigation) where to resolve the Sharia banking dispute. In the event that non litigation should also be understood, after the verdict of the Constitutional Court No. 93/PUU-X/2012 which has explained that the explanation in Article 55 paragraph (2) of Law No. 21 of 2008 on Sharia banking is stated that no legal force is binding, then in this case see Act No. 30 year 1999 concerning arbitration and Alternative dispute resolution which provides the possibility of settlement of disputes through non litigation procedure.

In the face of the challenge of the public or the most special Sharia business perpetrators against the management of Sharia banking disputes is very large. This is because the religious courts are not separated from the stigma inherent in the religious courts are merely authorized to prosecute the case of marriage, Talak (Islamic divorce procedure), divorced and heir. So there needs to be a particular awareness of legal practitioners to understand the verdict of the Constitutional Court No. 93/PUU0X/2012. On the other hand, the Constitutional Court verdict also needs to increase the human resources of religion court judges by deepening and strengthening the economic sciences both conventional and Islamic economics, this is because sharia banking disputes have been the authority of the religion court.

CONCLUSION

Due to the verdict of the Constitutional Court No. 93/PUU-X/2012 which has decided about the explanation in Article 55 paragraph (2) Act No. 21 of 2008 on Sharia banking is stated no legal force binding, then in this case, in case of a dispute both the sharia bank and the customer shall no longer have to follow the explanation of Article 55 paragraph (2) in selecting a dispute resolution non-litigation. Basically, if there is a dispute on sharia banking, deliberation remains an alternative option before being taken to the next level when not finding the meeting point. The legal consequences after the verdict of the Constitutional Court No. 93/PUU-X/2012 also explained that in particular the authority of the District court to prosecute sharia banking disputes can not be used anymore, but for the Basyarnas (Islamic Arbitration) can still be used as long as agreed by the parties when the contract. Implementation of Constitutional Court verdict No. 93/PUU-X-2012 against the settlement of Sharia banking non litigation disputes, article 55 paragraph (2) of Act No. 21/2008 on Sharia banking can be attributed to a systematic interpretation by looking at Act no. 30 year 1999 on arbitration and Alternative dispute resolution which provides the possibility of settlement of disputes through non litigation procedure.

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