Justice Aspect

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Submission date: 10-Mar-2022 11:08AM (UTC+0700)
Submission ID: 1780790745
File name: A.1.1.1._Artikel_Justice_Aspect.pdf (168.75K)
Word count: 4704
Character count: 25699

JUSTICEASPECT OFTHE SETTLEMENT DISPUTE INSHARIA BUSINESS THROUGH THE RELIGIOUS COURT

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ABSTRACT

Purpose of this research is to know howthe justice aspect of the settlement dispute sharia business through religion court and legal culture of the parties in choosing the institution to resolve the dispute. Furthermore, method research of this article uses social legal study approach. It means in how religious court gives a justice to the parties in their disputes. Subsequently, the methode of collected second data by literature study for primer and second sources. Some of data are gainned by doing confirmationto the judge of religious court in Surakarta, shariah banks and some of customers. For getting answer of problems in this research, there are three flows of activities in same time which are reductiondata, data presentation and conclusion/ verification syllogism deduction. The results and discussions of this research are obtained some conclusions, such as: first, in giving a decision on the Dispute Shariah business proposed to the basic law of HIR and Civil Code (KUHPerdata), where the verification of the settlement is more put forward in formal truth. The judge decides who wins and loses based on what the agreement made by the parties. Basically, because the agreement applies as a law for the parties that made it. Second, legal culture of the parties in choosing the settlement of the contract dispute that is agreed to vote in religioous court. Its because settlement of this dispute through religious court still opens opportunities for the losers to file for legal remedies. Meanwhile, if the settlement is done by Basyarnas, then the verdict is final and binding.

Keywords: Justice, Dispute Settlement, Sharia Business

A. Introduction

The development of sharia banking system in Indonesia is done in framework of dual banking system within the framework of Indonesia Banking Architecture (API) to present more complete alternative banking services to Indonesia people. Along together, the sharia banking system and conventional banking are synergistically support the mobilization of public funds more broadly to improve financing capabilities for the sectors of the national economy.

The characteristic of sharia banking systemoperating on basis of the profitsharing principles. provides an alternative banking system to a mutually beneficial banking system for both parties such as community andbank as well as highlight the aspects of fairness in transaction, ethical investments, putting forward the value of togetherness and brotherhood in production, and avoiding speculative activities in financial transactions. By providing a diverse range of products and services with a more varied financial scheme, sharia banking is an alternative system to a credible banking system that can be shared all of Indonesian people without any exception.

With the enactment of Law No. 21 / 2008 on Sharia Banking which was published on July 16, 2008, the development of sharia banking industry has a more adequate legal basis and will encourage its growth more rapidly. With its impressive development progress, which has achieved an average growth more than 65% annually over the past five years. It is hoped that the role of sharia banking industry in supporting the national economy will be more significant.[1]

Based on the Financial Services Authority (OJK) report contained in Sharia Financial Development Report in 2013, the number of banks conducting business based on sharia principles is increasing. Currently, there are 11 sharia commercial banks (BUS), 23 sharia business units, and 163 sharia financing banks (BPRS). This is certainly very encouraging, although the total assets of sharia banking nationally is smaller than conventional banking, which is in range of 5 %.[2]

The Islamicbanking system as a part of the Islamic economic concept is not only required to generate profits through every commercial transaction, but also to implement sharia values in accordance with the Qur'an and Al hadith..[3]

To maintain development of the sharia banking in the future,legal support to sharia banking from various aspects is needed. One important aspect that needs to be considered is the resolution of Islamic banking disputes that may occur between sharia banks,

[1] http://www.bi.go.id/id/perbankan/syariah/Contents/Default.aspx, Retrieved on 20 September 2016

[2] Abdul Rasyid, 2015, *Penyelessaian Sengketa Perbankan di Indonesia,* from http://business-law.binus.ac.id/2015/02/17/penyelesaian-sengketa-perbankan-syariah-di-indonesia-bagian-1-dari-2-tulisan/ , Retrieved on 27 April 2016.

[3] Abd. Shomad, *Hukum Islam, Penormaan Prinsip Syariah dalam Hukum Indonesia,* (Jakarta: Kencana Prenada Media group, 2010), hlm 83.

consumers and stakeholders. Like other businesses, the dispute in Islamic banking is also unavoidable. Because sharia banking is based on sharia principles (sharia based), the dispute resolution mechanism must also be based on sharia (in compliance with sharia).[4]

In any intentionally deliberated legal relationship, the parties require the legal consequences. However, sometimes the consequences of indeed law do not appearance. This can be caused by several things. The first possibility is something that happens beyond ability and willingness of the parties in the form of *force majeure* or *wheel forcibly*or *overmatch*. Another thing that resulted in the failure of legal effect is reluctance of parties to perform the achievement or even the possibility of any difference of opinion or interpretation of the parties about rights and obligations that previously formulated by them in the agreement. If this happen, the possibility of a dispute arose between the parties.[5]

JG Merrils illusrates the dispute is a disagreement especially concerning the matter of fact, law and policy in which a claim or a statement of a party is denied, charged back or denied by other party. Almost same as the previous formula of disputes, according to The Permanent Court of International Justice, it said that disagreement about the issues of law or facts as a conflict about the point of view of law or interests between the two parties. Thus, it can be concluded that the dispute can be formulated as a situation that places a party that wants to impose its will tothe other side that opposes the will and make resistance of it. Generally, if the word dispute resolution occurs, the shadow of the person who hears, it will be the first lead to the court institution. This is not wrong entirely, because the main task of the court is to resolve the dispute.[6]

To anticipate the sharia economic dispute occurring in LKS such as in community, Sharia Financial Institutes in both sort which are bank or non-bank as well as its services users, realize that they cannot be rely on to the general justice institutions if they really want to enforce the sharia principles. Because the legal grounds for settlement of cases are different. Prior to the enactment of Law No.3 of 2006 on Religious Court, the sharia economic dispute was settled by The Indonesian Armed Forces Arbitration Board (BAMUI) which is now called as The National Sharia Arbitration Board (BASYARNAS) jointly established by The Attorney General of Republic of Indonesia and The Indonesia Ulema Council (MUI).[7]

The occurrence of disputes is actually not desired by business man, but in doing business the risk of disputes is still possible. Disputes are essentially a reflection of the nature and willingness of human beings who cannot be similar. In the community, when disputes are existed, it will be resolved through various ways. Each approach uses a different paradigm according to the purpose, culture and value that the parties believes in the dispute. In the business community, there are two common approaches used to resolved disputes. The first approach uses paradigm of litigation dispute settlement. This approach means to getting justice through the resistance system and using coercion in managing disputes and generating decision as a win-lose solution for the parties to the disputes. Meanwhile, the second approach uses a non-litigation dispute resolution paradigm. This paradigm, in achieving justice, is priorities the consensus approach and seeks to bring together the interests of the disputants. It aims to get the result of a dispute resolution towards a win-win solution.[8]

In Indonesia, Sharia Arbitration was established in conjunction with the establishment of Indonesia Muamalat Bank (BMI) in 1992. The objective is to handle disputes between the customers and the first sharia bank which is Muamalat Bank. That arbitration is known as The Arbitration Board at Muamalat (BAMUI) based on Decree No. Kep-3992/ MUI/V/1992. In 2003, several banks or sharia business units (UUS) were born. That one of reasons, BAMUI has changed to The National Sharia Arbitration Board (BASYARNAS) until now. The amendment was based on Decree of MUI No. Kep-09/MUI XII/2003 dated on December 24, 2003.[9]

However, the existence of Basyarnas cannot simply be functioned. It should be highlight that the settlement through Basyarnas can be done if in the contract had a clause on the settlement of disputes through Arbitration. This refers to the provisions of Law No. 30 of 1999 on Arbitration and The Alternative Dispute Resolution. The dispute resolution in Sharia economy able to be resolved in Religious Courts. All of these are based on provisions of article 49 of Law No.3/ 2006 on Amendment to Law No.7 of 1989 about Religious Courts. Its authority includes sharia bank, sharia micro finance institution, sharia insurance, sharia re-investment, sharia mutual fund, sharia bond and medium term of sharia securities, sharia securities, sharia finance, sharia pawnshop, sharia retired finance institution and sharia business.

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[4]Abdul Rasyid,*Penyelesaian ……..,* Retrieved on 27 April 2016.

[5]M. Faiz Mufidi, http://hukum.unisba.ac.id/syiarhukum/index.php/jurnal/item/134-alternatif-penyelesaian-sengketa-menurut-undang-undang-no-30-tahun-1999-tentang-arbitrase-dan-alternatif-penyelesaian-sengketa, Retrieved on 25 Agustus 2016.

[6]*Ibid.*

[7]Nur Rozi, http://nurozi.staff.uii.ac.id/2015/06/06/prosedur-dan-mekanisme-arbitrase-majelis-ulama-indonesia-mui/, retrieved on 2 Juni 2016.

[8] Adi Sulistiyono, *Mengembangkan Paradigma Non-Litigasu di Indonesia,* (Surakarta: Sebelas Maret University Press, 2006), h. 2-5.

[9]Fahmi Rusydi, *Penyelesaian Sengketa Bisnis Syariah.* Lihat dihttp://fahmirusydi.blogspot.co.id/2009/05/penyelesaian-sengketa-bisnis-syariah_9260.html, retrieved on 26 April 2016

There are some advantages of settlement dispute in sharia business are solved by National Sharia Arbitration Board. Thus, it may be right if the choice for settlement dispute is be done in outside the court which means by using non-litigation. However, it might not a guarantee. There are still many dispute sharia businesses that doing in religion court. By looking at two types options that be able to use to resolve the dispute, why do the parties more use court than the Basyarnas. Whether the settlement of dispute through the court is more fair than Basyarnas. Therefore, this research is important to see The Justice aspect of the settlement dispute sharia business through The Religious court.Subsequently, to see legal culture from the parties in resolve the dispute of sharia business oriented is based on litigation or non-litigation.

B. Theory Review

1. The Justice Theory of John Stuart Mill

The basic notion of utilitarianism is simple or effortless. It means the right thing to do is to produce the greatest good. The facts show because ofthat idea, there are many people approach ethical decisions. That is the reason why this theory has tremendous appeal. Although, it should be examined in more detail.[10]

In brief, the utilitarian principles by Mill as the following statement: "The benefit or the greatest principle of happiness said that certain actions is true if they tend to increase the happiness. In contrary, it is wrong if it tends to decrease of happiness. It means that happiness is a pleasure and the absence of any pain."[11]

Shortly, there are two crucial assumptions underlying all discussions about The Justice according to a utilitarian perspective. First of all, the purpose of life is the happiness. But, what is happiness? Bentham defines it in term of pleasure and absence of pain. Mill developed it further by explicitly dividing the differences between the types of pleasure and pain. Intellectual pleasure for Mill is not only more useful than pleasure of the flesh but it is intrinsically superior. Hence, the utilitarian can be divided who those consider their ultimate happiness to be found in pleasure and pain. On the other side, those who add other aims of life such as truth and beauty. These two groups are called as a hedonistic utilitarianism and an ideal utilitarianism.

2. The Justice Theory of John Rawls

John Rawls argues that the theory of justice or fairness is a method for learning and producing justice. This theory is an elaboration of the social contract of John Locke, Rosseau and Kant to a higher level of abstraction.[12] The social contract itself is not enough to achieve prosperity. There is an important notion related to the creation of justice which is fairness principles. Rawls worked on these theories about principles of fairness as an alternative theory of utilitarianism as suggested by Hume, Jeremy Bentham and John Stuart Mill.

Actually, a contract can create a fairness in business community. Because the contract is deliberately made by the parties. It is also because of a mutual desire to do a cooperation of a different concept. Subsequently, it made together in balanced, fair, transparent way to conduct certain activities with a particular purpose as well. This is called as an essence of fairness or justice in the contract.

According to Rawls, those who choose in the starting position will choose two principles of justice or fairness. Firstly, they will focus in securing their freedom to remain equal. Moreover, they will choose a principle to anticipate: "Every person has equal rights to the most extensive total system of basic freedoms. It is similar to a system of equal freedom for all." It means they will separate our basic human freedoms and protect them to against any unequal distribution.[13]

3. Theory of Legal System

Based on Friedman, the legal system consistsof the legal structure, legal substance and legal culture. The substance of law isrules that are used by the law enforceman when performing legal acts and relationships.[14]

Subsequently, the legal stucture in this research is the structure of the dispute resolution of sharia business through religion court. The mechanism settlement of dispute sharia business conducted through religion court whether it has provided the Justice of the parties or not.

Moreover, the legal culture is attitud and values associated with the law. It also put together with attitudes and values associated with behaviour related to law and its institutions in positively and negatively. In this case, the legal culture of businessman in resolving of dispute. [15]

Law as a social institution. It also involves roles of the people who involved within, especially for ordinary people who are subjected to administrative law. In other for the law works in accordance with its function such as a mean of integrating. Thus, people must be moved to submit the dispute to the court. Actually, with this attitude the law will be a mean of integrating. However, it can be seen vice versa. People are not willing or less moved to use court services. This condition as a signal that the people are more enstrusted with the settlement of their dispute with the institution or bodies outside the official tribunal. This

[10] Karen Lebacqz, *Teori-Teori Keadilan,* (Bandung: Nusamedia, 1986), h. 14
[11] *Ibid,*
[12] John Rawls, *Teoi Keadilan,* (Jogjakarta: Pustaka Pelajar, 2006), h. 12
[13] *Ibid,* h. 53
[14] Satjipto Rahardjo, *Ilmu Hukum,* (Bandung: Citra Aditya Bhakti, 2000), h. 154
[15] *Ibid,* h. 82

process is not impossible, especially if we try to resolve it in anthropology sort. From statement above, it is said that the previous official judgement was only one of possibilities in the course of nation's experimentation on the settlement of its dispute. Beyond the official, it can still arise other bodies that can perform similar functions but in different levels of inauguration.

According to Friedman quoted by Satjipto Raharjo, the legal culture is one element of the legal system. He sees that law is not worthy to be discussed only in term of its stucture and subtance, but also in term of its culture.

C. Research Methodology

1. Research Approch

The value in a preparation of a good article which are about discussion and problem solving of legal issues studies is depend on the approach that researcher used.[16] To examine the justice aspect of dispute settlement of sharia business through the religious court, it uses normative legal research. By using a conceptual approach.[17] It means the conceptual approach in this research is to investigate the justice aspects of dispute resolution of sharia business through the religious court.Whether it is in accordance with John Rawls's justice theory and how the concepts of sharia contracts in Islamic Law are implied in the contract between sharia banks and customers. As well as legal culture is a part of legal system in choosing of settlement dispute.

2. The Research Characteristic

This is a prescriptive reseach. It describes how the settlement of sharia business dispute should be resolved through religious court. Moreover, it also depicts how Sharia Principles should be reflectedin the contracts established between sharia banks, customers and the legal culture of dispute settlement. Furthermore, this research illustrates prescriptive of dispute settlement of sharia business through The Religious Court by using justice theory of John Rawls and Islamic Law. Meanwhile, to know how the legal culture of dispute resolution of sharia business through the religious court by using legal system theory of Friedman as its a benchmark.

3. Types and Data Sources

At least, there are two data in this research. Firstly, the judgment of dispute settlement of sharia business through religious court. Secondly, sharia contracts are agreed between two parties namely sharia banks and customers. Both types of data are obtained from secondary data which are public secondary data, primary and secondary legal materials.

The secondary data used in this researchinclude: the religious courtjudgement on Islamic economic dispute, sharia contracts between sharia banks and customers. Moreover, the primary legal sources are Qur'an, Law of Sharia Banking, KUHPerdata (The civil code). Furthermore, the second legal sources are some publications related to resolution of Sharia Business Dispute.

4. Data Collection

Secondary data collection is done through literature study and content analysis documents, archives, primary and secondary legal materials. Some data are requested for explanations and confirmation from religious court, customers and some sharia bank in Surakarta.

5. Data Analysis

To obtain the significant of research problems is used a deduction syllogism. [18]To answer first research problem, it used the theoryor concept of justice in sharia contract as the major premise. Conversely, the minor premise is the religious court ruling. Subsequently, to answer the second problem, the Friedman's legal system theory is used as the main premise of the legal system. Meanwhile, the minor premise is sharia contracts that are used in conducting islamic transaction between sharia banks and customers.

D. Result of Research and Discussion

Nowadays, the settlement of Islamic Banking disputes can be done through two models namely a litigation and non-litigation model. Moreover, the non-litigation model has two types such as Arbitration and ADR (Alternative Dispute Resolution). Subsequently, litigation processes result in adversarial agreement have not been able to achieve any common interest. The processes also tend to cause new problems. These processes are slowly and costly in their resolutions. These are also unresponsive and hostile among the disputing parties. Conversely, though out-of-tribunal proceedings result in win-win solution of agreements. It is guaranteed confidentiality of stockholder disputes, avoided delay caused by procedural and administrative matters, solving problems comprehensively in togetherness and maintaining good relationships. However, in certain countries the judicial process able to be faster than others. The only merit of this non-litigation process is the nature of secrecy, as the proceeding and even the results of decisions are not published. This out-of-court dispute settlement is commonly referred to as Alternative Dispute Resolution (ADR).

Although the kind of non-litigation guarantee more confidentiality, many parties still choose to resolve sharia economic dispute through litigation sort. The researchers conducted research in the religious court of Surakarta to obtain data on the settlement of dispute sharia business.

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[16]Johnny Ibrahim, T*eori dan Metodologi Penelitian Hukum Normatif,* (Malang: *B*ayumedia Publising, 2006), h. 299.

[17] Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Kencana prenada Media group, 2008), h. 137.

[18] Soerjono Soekanto and Sri Mamuji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat,* (Jakarta: Rajawali Press, 1990), h. 88.

During the last four years since 2013-2016, Surakarta religious court has checked and decided 4 (four) cases of dispute sharia business. Three of them were due to auction of collateral and the rest was because of a blurred lawsuit. One of these four caseshas still under investigated. The dispute was caused because the customers did not accept that their goods were confiscated by bank. The unacceptability of this bank's decision is because the customer feel that he or she is not doing any fault.[19]

In the eaxamination of clients in court, many customers or clients do not know the contents of their contracts that have been made with Islamic Banks. They do not even have any copy of the contract. This is one of the causes of customers ignorance of their rights and obligations. In a situastion that a customer does not do his or her obligations it can be said as a *wanprestasi* or breach of contract. Then, if this situation is happened, the goods of customer as security good will be sold auction.

The judges of religious courts who examine and decide the cases are guided by the applicable law of material and formil law. The existing material laws are the sharia law itself, Islamic law and civil law. According to the judge's opinion, a contract is a law for the parties that involved and made it. Furthermore, the judge will not come out from the contract or agreement of the parties. The judges realize that within the contract there are obligations for both parties including the customer. Moreover, if the customer does not execute the contents of contract, based on this situation, the judge's decision is stronger to be won to the bank.

The used formal law in deciding cases is a civil procedure law. The truth in the civil procedure law is demanded a formal truth.Thus, the stronger party is the winner in the dispute. According to the judges, usually the evidence used by the bank is much more complete and stronger than the evidence of the customer. That is why many sharia banks prefer to settle disputes through the courts.[20]

The religious court ruling settles that sharia business dispute between the sharia bank and the customer refers to the evidence held by the parties. One of the stronger evidences of such rights and obligations is an *akad* or a contract agreement. In the contract has been agreed by the parties on rights and obligations of the parties. Although, based on the results ofinterviews with judges in religious courts and customer, it indicates an imbalance of position between sharia bank and customers. However, the judges of religious courts will not go beyond the principle of proof in civil procedure law, ie strong evidence of course that wins in litigation.

Subsequently, legal culture of the parties in settlement of sharia business dispute is prefer to the religious court than non-litigationsuch as National Sharia Arbitration. The choice of dispute settlement is more dominated by the bank. Generally, the customer must accept the option in the contract signed.

The resolution of Sharia business dispute is a mutual agreement between sharia banks and customers. If the parties allow to settle through basyarnas, then the *akad* is valid as a law for the parties. Likewise, if in contract of the parties agreed upon the settlement through the religious court, then the authority to settle disputes is in the religious court.

The choice of dispute settlement through the courts depicts that sharia banks as a profit oriented financial institution still consider win and lose factors in resolving disputes. Since the contract as a law. It is a strong evidence of bond of the parties. The bank prefers resolution of the disputes through litigation.

In the case of the election of the religious courts as the dispute resolution institution, it shows that the legal culture of the parties prefers legal institutions to resolve disputes over other institutions. Religious courts are more trusted to provide justice for the parties compared to Basyarnas. Some factors that influence these options already decribes above. Meanwhile, the procedure in court settlement is more time consuming.

The legal culture of sharia banks in choosing religious courts as a dispute settlement institutions is based on factor in which more profitable than Basyarnas. Thus, the emergence of the election of the institutions is not solely because of a positive assesment of the tribunal. This describes that the legal culture of sharia banks prefer the settlemet of win-lose solution in court.

E. Conclusion and Recommendation

According to results of research and discussion above, it can be concluded:

1. The Religious Court in giving judgement on dispute of sharia business submitted to it using the legal basic of HIR and The civil code (KUHPer). In this situation, a prove in settlement of dispute put forward the formal truth. The judge decides who will be a win or lose party based on strong evident. The stronger side of proof is the winner in the conflict. According to the judges, usually the evidence used by bank is more complete and stonger than the evidence of the customer.
2. The *akad* or contract is a reflection of freedom of contract. Based on John Rawls, justice is actually reflected of parties' freedom in making a deal in a contract. If the agreement is determined by one party such as shariah bank, then the unbalanced circumtances may cause the contents of the contract to be unfair.
3. Legal culture of the parties is more prefer to use the religious court in dispute resolution, especially Shariah Bank. In Bank's perspective, tribunal is more advantage in dispute resolution although it take longer than Basyarnas.

[19] Mahmuddin, Interview with Wakil Ketua PA Surakarta, date on 21 Juni 2016

[20] Mahmuddin, Inteview withWakil Ketua Pengadilan Agama Surakarta, date on 15 Juni 2016.

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