

Religious Court Challenges in Adjudicating Islamic Economics Disputes

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Abstract

Indonesian religious courts got tides competence along with the history of the nation through Indonesia. Religious Courts Law No. 7/1989, which it has been amended for the first by Religious Courts Law No. 3/2006 that gives new authority to adjudicate Islamic economic disputes. Implementation of religious court competence against Islamic economics disputes isn't running well. There are some impediments, such as mutually reduce impediments or other impediments technically. Both are the judge ability to solve Islamic economic disputes and the public trust against the judge ability in religious court. Constitutional Court Decision No. 93/PUU-X/2012 on August 29, 2013 has abolished dualism of religious court competence against Islamic economics disputes, Islamic banking especially and to raise the trust against religious court. Strategic steps is able to realize Religious Court competence in resolving Islamic economic disputes by strengthening the human resources of religious court through formal education and professional training. Especially Islamic economic discussions which it is tiered and scalable at every unit.

Keywords: Religious courts, Islamic economics disputes.

1. Introduction

Article 2 The Act Number 3 of 2006 about The First Amendment upon the act No. 7 of 1989 about Religious Court, mentioned that religious court is "one of the actors of judicial power for moslem justice seekers regarding specific cases as appointed in this act."¹

At while, in public opinion, religious court known well as place for someone who wants to submits divorce case. This fact arising related with history of religious court competence which had been reduced by colonialist of Dutch, through Staatsblad of 1937 Number 116 and 610 about amendment upon Staatsblad 1882 Number 152, that religious court had been given limited competence, as following:²

Article 2a

(s.d.u. dg. 1937-116)

- 1) Religious court has only authorize to inspect/look into disputes between moslem husband-wife, and other cases regarding talak (divorce base on husband will), rujuk (reconciliation [return for a marriage]) and divorce amongs moslems that was needed (Religious Judges) at all, and to state the requirment for realizing suspended talak. But at those disputes and those cases all of payment pursuit or giving specific goods must be looked/inspected and decided by district court judge, except mahar pursuits and all of basic wife need guaranteed by husband (*nafkah*) which was inspected and decided by religious district court.
- 2) Religious court has no competences to look into mentioned cases at section above if there is applied civil law book (KUHP data).
- 3) (s.d.u. dg 1937 -610), If one decision of religious district court or religious appeal court regarding mahar or basic necessities of wife life, or decided payment of cases cost at the decision was not paid fully and voluntary, so the interested parties could submit the copy of decision letter to chairman of district court at similar religious court jurisdiction of it.

Based that role, discribed properly that colonialist had no willing at all to create religious court existence as the best one of judicial power, at least like it should be as one of judicial power institution same with and equal with the other judicial power institution. It looked commonly when the parties did not do voluntary the decision of religious court, it's needed fiat execution by distric court.

After Indonesia has reached a freedom, through the Act No 14 of 1970 about Principles of Judicial Power, religious court has been acknowledged as one of judicial power institution in Indonesia. Even although, in this era, religious court has absolute competence that never seen before, namely adjudicating islamic economics disputes.

The implementation of Religious Court absolute competence at islamic economic still be arising any faced obstacles, besides empowering, opportunities and supportings regarding islamic economic disputes as

¹Pemerintah Republik Indonesia, *Pasal 2 Undang-Undang Nomor 3 tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama*.

²Keputusan Raja Belanda, *Pasal 2a Staatsblad 1882 Nomor 152 yang telah diubah dengan Staatsblad 1937 Nomor 116 dan 610 tentang Pengadilan Agama di Jawa dan Madura*.

religious court competence. From this circumstance, the writer make it as a background to write and to analyze into an article by title, *Religious Court Challenges in Adjudicating Islamic Economic Disputes*.

2. Discussion

1. Religious Court Competence

The Competence is defined as authority of court institution to adjudicate cases, both kind of cases (*absolute competence*) and jurisdiction area (*relative competence*).

According to article 25, section (3) The Act No 48 of 2009 about Judicial Power, religious court competence is “*Religious court as meant at section (1) authorize to inspect, adjudicate, decide and to settle the cases amongs moslems agree with law/role*”.¹ For detail of absolute competence of religious court will explain at next chapter.

Relative competence is distributing of authority (*distributie van rechtmacht*) amongs religious district court based on jurisdiction.² According to article 4, section (1 and 2) the act No. 7 of 1989 about Religious Court, relative competence of religious court are:

- (1) Religious District Court is located at city or capital city of regency, and its scope jurisdiction is city area or regency area.
- (2) Religious Appeal Court is located at capital city of province, and its scope jurisdiction is province area.

a. Religious Court Competence before The Act No. 3 of 2006.

Religious court competence in Indonesia has the tide of growing along with the history throught by Indonesia. Existence of religious court as court institution (*qadha*) was belived has been arised aling with coming of islamic spreading in Indonesia. In Sulthan authority era (*kingdom system*) religious court was arising and growing along with islamic law existence, which has moved applied norms before, even erased it.³

When colonialist came to nusantara, not only efforting to dominate all of nusantarass assets, but also to implant influences strongly at the other life aspect, include law aspect. In the latter era, the Dutch as colonialist had strong-willed to far away moslems the doctrine and religious law. One of the ways was throught receptie theory. Receptie theory told that applied law for native civilization (*pribumi*) was traditional law. Meanwhile, islamic law would be applied if the tradition (law) had received it.⁴

Receptie theory was realize at Staatsblaad 1937 No. 116 and 610 removing religious court competence about inheritance, and moved to district court competence. This situation, the fury of moslems was appeared that suggested it as objection against the used old⁵ habit.

In 1942, Indonesia had been colonized by Japan. The taken policy against The Act and court was The Act and court had been applied as long as there was no contradiction. Religious court had been maintained and not change as should be, but based on additional regulation article 3 Soldier of Japan (*Osanu Seize*) on March, 7th 1942 No. 1, name of religious court was changed to “*Soo Rioo Hooin and Kaikoo Kootoo Hooin*” for Religious Appeal Court.⁶

Entering freedom era, the regulation of judicial power had been applied and acted certainly. Religious existence as one of national courts had stood hardly till rightnow, especially since The Act No. 14 of 1970 about Mains of Judicial Power, was born. In the act, mentioned properly that Indonesian consist of four courts institution, they were: District Court, Religious Court, Military Court and State Administrative Court.⁷

After through long debating and discussion, as a following up on December 29th of 1989, applied the act No. 7 of 1989 about Religious Court. According to article 49 section (1) at the act, Religious Court competence was:

“Religious court has a duty and authority to inspect, to decide, and to settle all of cases at first level among moslems, at:

- a. Marriage.
- b. Inheritance, testament, and gift, which was made based on Islamic law.

¹Pemerintah Republik Indonesia, *Pasal 25 ayat (3) Undang-Undang Nomor 48 tahun 2009 tentang Kekuasaan Kehakiman*.

²Mukti Arto, *Praktek Perkara Perdata Pada Pengadilan Agama*, (Yogyakarta: Pustaka Pelajar, 2008), cet. Ke-8, hal. 44-45.

³Hasbi Hasan, *Kompetensi Peradilan Agama Dalam Penyelesaian Perkara Ekonomi Syariah*, (Depok: Gramata Publishing, 2010), hal. 33.

⁴Rifyal Ka'bah, *Peradilan Islam Kontemporer (Saudi Arabia, Mesir, Sudan, Pakistan, Malaysia, dan Indonesia)*, (Jakarta: Universitas Yarsi, 2009), hal. 112.

⁵Hasbi Hasan, *op.cit.*, hal. 39.

⁶Departemen Agama RI, *Peradilan Agama di Indonesia, Sejarah Perkembangan Lembaga dan Proses Pembentukan Undang-Undangannya*, (Jakarta: Direktorat Jenderal Pembinaan lembaga Agama Islam, Direktorat Pembinaan Badan Peradilan Agama Islam, 2001), cet. Ke-3, hal. 18

⁷Pemerintah Republik Indonesia, *Pasal 10 ayat (1) Undang-Undang Nomor 14 tahun 1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman*.

c. *Wakaf* and donation.¹

b. Religious Court Competence after The Act No. 3 of 2006.

According to assessment of Global Islamic Financial Report (GIFR) of 2011, Indonesian settle down at the best four of potential and secure nation in increasing of Islamic economic industries category, which was after Malaysia, and Saudi Arabia. By highlighting several aspects in index amount, Indonesian projected will be the first at several years latter. The optimism will be set along with institution spreading and acceleration of highly Islamic bank assets, besides increasing volume of published *sukuk*.²

Simultaneously, more activities or Indonesian citizen within Islamic economics, certainly, futher more it will appear several Islamic economics disputes. Meanwhile, the growth of investation depends on law certainty.

Before applying the act No. 3 of 2006 about first amandement upon the act No. 7 of 1989 about Religious Court, moved wealth case, material wealth case, and business engagement case including Islamic economics have to be settled at district court or institution of national islamic arbitration (Basyarnas).

At a court institution, absolute competence sets as general issue. Its mean arised disputes from law connection based on Islamic principle brought to religious competence. It is clear base on purpose principle of court principle, so kind of cases of religious competence seen by cases aspect not by person aspect.³

Based on above theory, clearly known that religious court competence has left behind from growth of Islamic law in Indonesian, include at Islamic economics. Absolutely, by this background, the act No. 7 of 1989 revised by government and National Assembly (DPR) to the act No. 3 of 2006. That reason, properly explained at consideration of the act revision. It's mentioned that religious court at the act No. 7 of 1989 did not appropriate with law public need.⁴

At article 49 section (1) point i the act No. 3 of 2006 clearly mentioned that religious court has authority to inspect, to decide and to settle cases at first level of court in Islamic economics. It consists of 1) Islamic Bank, 2) Islamic micro-financial Institution, 3) Islamic insurance, 4) reinsurance, 5) Islamic virtual fund, 6) Islamic bond, 7) Islamic secure fund, 8) Islamic funding, 9) Islamic pledge, 10) Pension fund of Islamic financial, 11) Islamic business.⁵

Settling of Islamic economics disputes-resolution on district court is quite strange. Why? Because district court as a conventional court is given authority to adjudicate Islamic economics disputes which is surely the Islamic economics uses Islamic principle law as a basic.

c. Islamic Economics as Absolute Competence of Religious Court

It is quite hart to realize religious competence in settling Islamic economics disputes. Director of Shari'ah Mandiri Bank, Hanawijaya said that religious court had no competences to be executorial institution against decision of institution of National Islamic Arbitration (Basyarnas). It agrees with article 61 the act No. 30 of 1999 about arbitration and alternative dispute resolution, explained that just district court only that has a competence to be executorial institution.⁶

The ex-vice chief Justice of Indonesian Supreme Court, Mr. Taufik did not agree with Hanawijayas opinion. In his opinion upon this case, the act No. 30 of 1999 could not be applied at this era. The act No. 30 of 1999 was a *lex generalis*, meanwhile the act No. 3 of 2006 was a *lex specialis*.⁷ Therefore, according to the principle of *lex specialis derogate legi generalis*, *lex specialis* existence erases all of *lex generalis* role.

It was different from the previous instruction, National of Islamic Council of MUI released seven instructions about funding of Islamic bill, review role of *ujrah* at Islamic financial institution, letter of credit of *kafalah* contract, *hawalah bil ujarah*, Islamic bond, conventional of *mudharabah*, export factoring, import factoring, by instruction statement that the disputes had to be settled at institution of national islamic arbitration or at religious court.⁸

The development of religious court competence of Islamic economics is face to many contact with the

¹Pemerintah Republik Indonesia, Pasal 49 ayat (1) Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama.

²Halim Alamsah, "Perkembangan dan Prospek Perbankan Syariah Indonesia: Tantangan dalam Menyongsong MEA 2015", Ceramah Ilmiah Ikatan Ahli Ekonomi Islam (IAEI), Milad ke-8 IAEI, 13 April 2012: hal. 1.

³Irfan Husaeni, "Pak Mukti Arto Juga Hadiahkan Kado Istimewa Untuk Badilag.Net", resensi Mukti Arto, *Peradilan Agama Dalam Sistem Ketatanegaraan Indonesia, Kajian Historis, Filosofis, Ideologis, Politis, Yuridis, Futuristis dan Pragmatis*, (Yogyakarta: Pustaka Pelajar, 2012), cet. Ke-1, hal. 2.

⁴Pemerintah Republik Indonesia, *Konsideran poin c Undang-Undang Nomor 3 tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama*.

⁵Pemerintah Republik Indonesia, *Penjelasan Pasal 49 ayat (1) poin i Undang-Undang Nomor 3 tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama*.

⁶"Kompetensi Pengadilan Agama Terbentur Undang-Undang Arbitrase", <http://www.hukumonline.com/berita/baca/hol17114/kompetensi-pengadilan-agama-terbentur-uu-arbitrase>.

⁷*Ibid*.

⁸"Fatwa Baru DSN-MUI Perkuat Kompetensi Peradilan Agama", <http://www.hukumonline.com/berita/baca/hol17024/fatwa-baru-dsnmui-perkuat-kompetensi-peradilan-agama>

other court, namely district court. Eventually, in spite of explanation article 55 section (2) the act No. 21 of 2008 about Islamic banking, at a beginning there's possibility for parties to agree in settling disputes through district court. But now, it is cancelled by Constitution Court through decision No. 93/PUU-X/2012 on August 29th 2013.¹

In spite of explanation article 55 section (2) the act 21 of 2008 has been cancelled by Constitution Court, but giving authority of Islamic economics dispute resolution to religious court still be a debatable matter, as seem at explanation article 59 section (3) the art No. 48 of 2009 about Judicial Power, which is along with article 61 the act No. 30 of 1999.

d. Supporting Factor and Obstacle Factor of Religious Court Competence of Islamic Economics

a. Supporting Factor

At least, there are two supporting factors in implementation of religious competence of Islamic economics, they are as following bellow:

1) Law Factor

Before and after borning of the act No. 3 of 2006 there were law products as operational reference of Islamic economics programe in Indonesian, among others Al-Qura, Hadits, constitutions, fiqh and ushul fiqh, traditional law and jurisprudence.² And the last and more important was decision of Constitution Court No. 93/PUU-X/2012 on August 29th 2013. That decision had cancelled dualism of authority in adjudicating Islamic banking between religious court or district court.

2) Existence of Islamic Financial Institution Factor

In Islamic economics discuss programe on January 18th 2014, Mr. Adiwarmen A. Karim said that Islamic bank in Indonesian had grew up as the biggest Islamic retail bank in the world. Because of customers of Islamic bank in Indonesian was the biggest customer of Islamic bank in the world.³ Therefore, along with its fast development, there will be more disputes surely settled at religious court.⁴

b. Obstacle Factor

The obstacle factor in implementation of religious court competence in Islamic economics are:

1) Un-unificated Basic Law Factor

In spite of article 49 section (1) point i the act No. 3 of 2006 surely mentioned that Islamic economics was included into religious competence. But it was found many other law products was in contradiction with that role. For example, article 61 the act No. 30 of 1999 about Arbitration and Alternative of Dispute Resolution. Article 59 section (3) the act No. 48 of 2009 about Judicial Power and The Supreme Court circular letters No. 8 of 2010 that has cancelled by The Supreme Court circular letters No. 8 of 2008 about Executorial of decision of National Islamic Arbitration.⁵

2) Trust Factor and Public Opinion

There are still any public doubt regarding religious judges ability in looking into Islamic economics cases. At while, dispute resolution of Islamic economics, especially Islamic banking dispute has settled through district court or institution of national Islamic arbitration. It is still caused by public opinion that religious court only has ability to adjudicate marriage cases, inheritance cases and testament case among Moslems.⁶

3) Judge Capability Factor

Externally, besides low of public trust to judges of religious court ability, internally specification of judges education is shariah bachelor or law bachelor with Islamic law mastery (master of law).⁷ Meanwhile, the judges by shariah bachelor as a background is shariah bachelor on Islamic family law mastery (*Ahwal al Syakhsiyah*)

Based on educational background above, of course academically the judges with shariah bachelor of Islamic law family as a background has never studied deeply before in Islamic economics operational-field. In the case of there is Islamic discussion, it just discuss by *fiqh muamalah* persfpective not in newest Islamic economicsoperational

¹Dewan Redaksi, "Babak Baru Penyelesaian Sengketa Ekonomi Syariah Direktorat Jenderal Badan Peradilan Agama", Majalah Peradilan Agama, Edisi 3, Desember 2013, hal. 3.

²Asep Ridwan H, "Faktor Pendukung dan Penghambat Pelaksanaan Kekuasaan Pengadilan Agama Bidang Ekonomi Syariah", <http://www.pa-kalianda.go.id/gallery/artikel/201-faktor-pendukung-dan-penghambat-pelaksanaan-kekuasaan-pengadilan-agama-bidang-ekonomi-sya-riah>.

³Adiwarmen Karim, Video Diskusi Ekonomi Syariah Hakim Peradilan Agama Indonesia, 18 Januari 2014.

⁴Purwosusilo, "Peradilan Agama Sangat Siap Mengadili Sengketa Ekonomi Syariah Direktorat Jenderal Badan Peradilan Agama", Majalah Peradilan Agama, Edisi 3, Desember 2013, hal. 45.

⁵Asep Ridwan H, *loc.cit*.

⁶Edy Setiadi, "Yakin Peradilan Agama Mampu Tangani Sengketa Ekonomi Syariah", Majalah Peradilan Agama, Edisi 3, Desember 2013, hal. 53.

⁷Pemerintah Republik Indonesia, *Pasal 13 ayat (1) poin e Undang-Undang Nomor 50 tahun 2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama*.

e. Strategic Step in Reinforcing Absolute Competence Of Religious Court in Islamic Economics

To create law certainty and to build religious court competence in settling Islamic economics disputes, surely needed strategic steps as following below:

a. To create synergy Law Unification

Legislative and executive assembly have to consist to make material and formal law, supporting religious competence in settling Islamic economics disputes. Up next, it is forbidden still found role or regulation reduces one another. Moreover it is seen forced to reduce one another, because crosswisely between different regime law reduces one another, as like explanation of article 55 section (2) the act No. 21 of 2008 about Islamic Banking.

If there still any contradictions among role one another, so it has to be reviewed, for example, the explanation article 59 section (3) the act No, 48 of 2009 seem as if made a new norm which is in contradiction with old law norm at the other act, namely article 49 section (1) point i the act No. 3 of 2006. For law certainty, if really needed, it is good to review and to reinterpretate material law to Constitution Court.

Constitution court has ever cancelled explanation of the act that clearly bears a new norm or norm in contradiction with other norm, for example decision of No. 005/PUU-II/2005 on March 22nd 2005, review of explanation article 59 section (1) the act No. 32 of 2004 about region government and decision No. 79/PUU-IX/2011 on June 5th 2012 review and reinterpretation upon explanation article 10 the act No. 39 of 2008 about State Ministry.¹

Besides creating consistent regulations, legislative council and government, financial author and judiciary (court institution) have to build law unificated of Islamic economics together. Law unification is not mean all of the law of Islamic economic has to be codificate to one act or other similar regulation, but the role at whole has to be unificated in on standard of similar law philosophy.

The unificated law application can support the creation of law certainty at middle of public, especially as profesionalist at Islamic economics. It will be in a chaotic if there is different law resources usage among the authority of financial services (OJK) as supervisor, and court as judicial power institution. When it happened, absolutely the public will be a loser both as a subject of Islamic economics operational and as user of Islamic economics service.

b. Reinforcing of Human Resources at Religious Court

Increasing of judges ability at Islamic economics field can be reached both through formal education, official education as like certification of judges at Islamic economics field, and adding quantity of scientific study at each religious district court by newest topics of Islamic economics.

Till right now, there are total number 380 judges who have certificate for settling Islamic economics disputes. In other hand, more that total number 3.080 judges at first level, who has graduated from postgraduated level(S2) more than 1278 judges, and 20 graduated from doctoral level (S3). Meanwhile, the judge of religious appeal court, among 553 graduated judges there is 338 judges have graduated doctoral program.And total number 6 Honorable judges of the supreme court have graduated doctoral program.

In Mr. Muliaman D. Hadad's opinion, public doubt to religious court will be a bad impact in development of Islamic economics industry widely. Therefore, the authority of financial service (OJK) will effort to disappear public doubt.²

Scientific discuss, especially at Islamic economics has to organize gradually. Not only satisfied by technical guidance program which held by Directorate General of Religious Court Affairs (Badilag), or Religious Appeal Court, studies and training program at office by topic Islamic economics can be held at each religious district court by empowering internal organization as like Indonesian Judges Society (IKAHI).

Based on experience in Religious Appeal Court, there are several religious district court that has held scientific discuss program, one of them is Religious Court of Sengeti. This held program was expected could increase judges ability and capability in Islamic economics especially for adjudicating and settling cases. Therefore, many given subjects had been delivered both material law and formal law even a practice to settle Islamic economics disputes..

It will be better if this scientific discuss program of Islamic economics taken apart external participant as like the authority of financial service (OJK). On June 5th 2014 Indonesian Supreme Court with Indonesian Bank (BI) and the authority of financial service had taken an agreement in cooperation of judges training regarding centralize banking and financial service field.

This agreement is quite very important to reinforce judges capability, exactly judges of religious court in adjudicating Islamic economics disputes.³ Rising of human resource quality of religious court is believed that

¹Lihat Putusan Mahkamah Konstitusi Nomor 005/PUU-II/2005 tanggal 22 Maret 2005 dan Nomor 079/PUU-IX/2011 tanggal 05 Juni 2012.

²M. Isna Wahyudi, et.al., Ahmad Zaenal Fanani, Achmad Fauzi, Mahrus, "Menggantang Asa mencari Solusi", Majalah Peradilan Agama, Edisi 4, Juli 2014, hal. 22.

³Dewan redaksi, "Sengketa Ekonomi Syariah dan Kepercayaan Publik", Majalah Peradilan Agama, Edisi 4, Juli 2014, hal. 3.

will be similar with public trust.

Indonesian Supreme Court together with Indonesian Bank and the authority of financial service should be able to follow up the agreement by organizing the Islamic economics discuss at each religious district court or technical guidance at religious appeal court by keynote speaker from Indonesian Bank or from the authority of financial service (OJK). This program can support a progress to make united vision between professionalist, supervisor and court institution (Judiciary). Therefore it could be one motto that “the preventive solution is more better than the settling disputes”

To make a measured law discuss at every religious district court exactly regarding Islamic economics. So at later, scientific discuss can be a the best one program with guidance and supervision gradually by religious district court level untill religious appeal court as frontliner of Indonesia Supreme Court.

3. CLOSING

1. Conclusion

- a. Through the act No. 3 of 2006 religious court has a new absolute competence, namely to adjudicate Islamic economics disputes. But in implementation really has obstacles both regulation factor and technical factor.
- b. Decision of Constitution Court No.93/PUU-X/2012 on August 29th 2013 has erased dualism and grewed up optimism of religious court competence to adjudicate Islamic economics disputes. The needed strategic steps to prepare human resource in settling Islamic economics disputes is by reinforcing religious court human resource through formal education and official education with programming Islamic economics discuss gradually and measured from each religious district court.

2. Suggestion

I do hope you can give the best critical statement for mistakes if any. That it will be additional knowledge into treasure of Islamic knowledge.

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