

Analysis of Dispute Settlement of Syaria Banking in Indonesia Review of Theory of Justice

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ABSTRACT

Banking activity as one of Islamic economy institutions, all of aspects of human life refer and based on Islamic syaria, which are Al-Qur'an and Sunnah. Precept of Islam consists of three components, which are: *Aqidah*, *Sharia*, and *Akhlaq*. The characteristic of *Aqidah* is constant and it does not change by the difference of time and place. Syaria is always changed based on the need and level of mankind civilization where a Rasul is delegated. The principles of determining Islamic Syaria are by vanishing the objection and easing, creating benefit and justice. The settlement of syaria banking in Indonesia, any regulations that have been formulated is still far away from justice which is one of purposes of law and Islamic law.

Philosophically, orientation of basis of Islamic economy is based on principle of divinity (*tauhid*), which is a presence of relation of economic activity, not only with fellow human being, but also with The God as Creator. From the basis of this *tawhid*, it emerges the basic principles of building of the social framework, law, and behavior, which are the principles of *khilafah*, justice (*'adalah*), prophethood (*nubuwwah*), brotherhood (*ukhuwwah*), responsible freedom (*Al huriyah walmas'uliyiyah*). Besides, there are instrumental values, namely the prohibition of usury, the obligations of *zakat*, economic cooperation, social security and the role of the state.

Keywords: dispute, Syaria banking, fair.

A. Introduction

Since the establishment of sharia bank in Indonesia in 1992, the government has made laws and regulations related to sharia banking. Now, sharia banking is regulated in Law no. 10 of 1998 on amendment to Law no. 7 of 1992 on Banking and Law No. 21 of 2008 on Sharia Banking. The Act shows that in Indonesia there are two banking systems, namely conventional system that uses interest system and sharia system that is based on the provision of Islamic law.

Business activities that may be performed by sharia banks are regulated in Article 36 of Bank Indonesia Regulation Number 6/24 / PBI / 2004 that regulates in detail the legal basis and the types of business that can be operated and implemented by Islamic banks. The law also provides guidance for conventional banks or even totally converts themselves into sharia banks. Based on this opportunity, there are many banks that base their operations on sharia system, namely Bank Syariah Mandiri, BNI Syariah, BRI Syariah, Bukopin Syariah, Danamon Syariah, Bank Mega Syariah, Bank DKI Syariah, BPD Jabar Syariah, Bank IFI Syariah, and even there are foreign banks that open sharia branch, namely HSBC. Non-bank financial institutions are now quite a lot that use the system of sharia, such as insurance, reinsurance, pawnshops, bonds, capital markets, mutual funds, and others.¹

The more developed the sharia financial institutions in Indonesia are, the greater the possibility of disputes between Islamic financial institutions and their customers will be. The dispute resolution mechanism of civil sharia business in general can be solved through 3 alternatives: First, taken through peace or known as ADR (Alternative Dispute Resolution); secondly, through sharia arbitration institutions; third, through litigation (judicial process in the Religious Court or the District Court depends on the entire agreement clause).²

¹ Madani, Dr. (2011), "Hukum Ekonomi Syariah DI Indonesia", PT Refika Aditya, Bandung.

² Ibid, hal. 98

According to Wirdyaningsih et al, that the settlement of disputes can be done through two processes, namely the settlement of disputes in the court and the settlement of disputes outside the court. They are further explained that the out-of-court process resulted in a win-win solution, ensuring the confidentiality of the parties' disputes, avoiding delays caused by procedural and administrative matters, solving problems comprehensively in togetherness and maintaining good relationships. Disputes that cannot be resolved through peace (*sulh*) or in arbitration which are out-of-court settlements, will be settled through the judiciary¹.

Fundamental issues related to religious jurisdiction in the settlement of sharia banking disputes are contained in Article 55 paragraph (1) of UURI No 21 of 2008 concerning Sharia Banking which mandates that the settlement of Sharia Banking dispute is conducted by the court within the Religious Courts which is inconsistent with Article 1 point 1 UURI No 50 Year 2009 on Religious Courts mandated that the Religious Court is a judiciary for people who are Muslims, whereas seeing the reality in the field that customers of sharia banking are not only Muslims, but also non-Muslims².

Based on the background above, this research has one problem, How is the dispute settlement of syaria banking if it is reviewed from justice theory in Indonesia?

B. Research Method

UURI No. 50 Year 2009 about the Second Amendment on Religious Court, precisely in article 1 point 1 UURI No 50/2009 has narrowed the space for the legal subject who will seek justice despite the existence of the principle of submission is still far from the fair dimension. Justice comes from a word in English called justice and Arabic *'adl* which is defined as a combination of moral and social values and also shows honesty, balance, simplicity and frankness. Justice throughout its direction has a variety of views, both from the East and the Western world. From the East, various principles of justice are taught, both Ancient Chinese, Ancient India, Babylonian, Persian, Ancient Egypt, and others. The perspective of Islam in justifying justice according to Jubair that the justice which want to be realized is the justice that is in line with the word of God, fulfill the principles of propriety, does not harm others, able to save themselves and must be born from good faith.³ According to Murtadha Motahhari, the concept of justice can be known in four aspects:⁴

1. Fair, it means that the balance in the sense of a society which wants to stay and settle, then the society must be in a balanced state, where everything that exists within it must exist with the proper level and not with the same level.
2. Fair is the equation of denial of any differences. Justice that is meant is maintaining the equality when it has the same right, because justice obligates such equality and requires it.
3. Fair is to preserve the rights of the individual and give the right to every person entitled to receive it. This kind of justice is social justice that must be respected.
4. Fair is to preserve the right for the continuation of existence.

The "just" word in the Qur'an is mentioned more than 1000 times after the words of "Allah" and "science". The principle of justice is applied in every aspect of human life especially in legal, social, political, and economic life, because justice is the starting point as well as the process and purpose of all human actions.⁵

Discussion about the settlement of sharia banking disputes that occur between the parties on the essence cannot be released in relation to justice (got the prefix "ke-" and suffix "-an"). The word 'adl⁶ is the mashdar form of the

¹ Makalah "Perbankan syariah dan sengketa penyelesaiannya" (Kajian Historis pasal 52 RUU perbankan syariah) oleh Misman Hadi Prayitno.

² Bank Syariah dalam menjalankan kegiatannya, tidak terbatas hanya untuk orang Islam saja, tapi juga terbuka bagi non muslim (Inilah yang dinamakan Islam adalah agama yang "Rahmatan lil'alamin"). Pada saat sekarang ini Bank Syariah tumbuh dengan pesat di seluruh dunia, tidak hanya di negara Islam/mayoritas berpenduduk muslim, namn juga di negara-negara yang bukan Islam seperti, Amerika Serikat, Singapura, Britania Raya (United Kingdom), dll. Bahkan, Britania Raya pada saat ini bertekad menjadi pusat keuangan syariah di dunia dengan memperlonggar peraturan-peraturan terkait perbankan syariah sehingga bisa berkembang dengan pesat. Di Malaysia, hampir 15 persen nasabah bank syariah non-muslim. Abdul Rasyid, 2015, Apakah Bank Syariah hanya untuk muslim?. (Sumber: business-law.binus.ac.id/2015/01/29/apakah-bank-syariah-hanya-untuk-muslim/. Di akses tanggal 30-12-2015)

³ Majid Khodhuri, *Teologi Keadilan Perspektif Islam*, (Surabaya: Risalah Gusti, 1999) hlm. 8.

⁴ Murthadha Muthahhari, *Asas Keadilan Ilahi Pandangan Dunia Islam*, (Bandung: Mizan, 1995), hlm. 53-58

⁵ Zainudin, Ali 2008, " *Hukum Ekonomi Syariah* ", Sinar Grafika, Jakarta.

⁶ Terminologi adil sebagai mana dijelaskan pada kamus Al-Munjid Fillughoh wal'a'lam halaman 492, sebagai berikut:

عَدْلٌ - عَدْلًا الطريق : مال || وَعَدْلًا وَعَدُولًا عن الطريق : حاد || و- عَدُولًا اليه : رجع , عَدِلَ- عَدَلًا: ظلم وجار. عَادَلَ عَدَا لا وَمُعَادَلَةُ الشَّيْءِ : || و- في الأمر : ارتبك فيه ولم يُمضِهِ * إِنْ عَدَلَ عن الطريق : حاد * العَدَلُ : القصد في الأمور * العَدَالُ مصدر عَادَلَ. يقال (قطع العدل في امره) اي صمَّ عليه * المَعْدِلُ

verb 'adala – ya'dilu – 'adlan – wa 'udûlan – wa 'adâlatan (وَعْدُولًا - وَعْدَالَةً - عَدَلَ - يَعْدِلُ - عَدْلًا). The verb is rooted in the letters 'ain (عين), dâl (دال), and lâm (لام), whose main meaning is 'al-istiwâ' (الإستواء = straight state) and 'al-i'wizâj' (الأغوجاج = deviant state). So, the series of letters contain contrasting meanings, i.e. 'straight' or 'equal' and 'bent' or 'different'. The first meaning, the word 'adl' means that to establish the law correctly'. So, an 'adl means walking straight and his attitude always uses the same size, not double size. The 'equation' is the original meaning of the word 'adl, which makes the perpetrator "impartial" to the one who is at loggerhead, and essentially the one who is 'adl "on the right side" because both right and wrong sides must earn right.

Doing something decent and not arbitrary. The Great Indonesian Dictionary, the word "adil/ justice" means: (1) not partial / impartial, (2) side with truth, and (3) right/ not arbitrary. Justice in English is called "justice" derived from the word "just" or "Justus" which means honest, right and according to law (legal right, proper, fair, or righteous). On the contrary, in the Black's Law Dictionary, the word "justice" is defined as a constant and continuous division to give everyone what they deserve (the constant and perpetual disposition to render every man his due).

C. Results and Discussion

1.1 Litigation Settlement

Generally, in handling every case brought to him, the judge is always required to first study the case carefully in order to know the substance and the things that always accompany the substance of the case. Determining the direction of the examination of the case in the trial process, the judge must already have a resume on the case he or she handled before the examination process in the court started. Related to this, in the process of examination in the court in the case of examining the sharia economic case especially sharia banking case there are some important things that must be done first before the trial process begins.

The important things that must be done first, namely:

- a. Ensure that the case is not a matter of arbitration agreement. This is the first thing that must be done first before further examining the sharia banking case submitted to the religious court, which is ensuring in advance that the sharia banking case handled is not including the case agreements in which there is an arbitration clause. The importance of ensuring in advance whether the case included in an agreement dispute containing the arbitration clause or not, it is intended not to allow a religious court to enforce or adjudicate a case which is beyond the scope of its absolute authority while the examination of the case has been run in such a way, or even already decided.
- b. Learn carefully the agreement (contract) underlying the cooperation between the parties after it is assured that the sharia banking case that is handled is not a matter of agreement containing the arbitration clause, then it is proceeded to seek peace for the parties in accordance with the steps outlined above. Furthermore, if the peaceful effort is not successful, another important thing to do is to learn more the agreement or contract that underlies the cooperation of the parties that becomes that dispute.

1.2 Settlement Through Religious Court

Part of the absolute competence of religious courts is the field of sharia economy, which is in this case sharia banking. Talking about the settlement of disputes of sharia banking in the Religious court, it means that it talks about how to handle sharia banking case in the religious environment¹ according to the prevailing laws and regulations. The procedural law (formal law) applied in the religious court environment is as a procedural law applied in the general justice environment unless it is specifically determined.

Based on Article 55 paragraph (1) of Law no. 21 of 2008 concerning Sharia Banking states that: Settlement of dispute of Sharia Banking is conducted by the courts within Religious Courts. Any activities and forms becomes clear, as long as the economic activities are using the sharia system, then if there is a dispute settlement through

والمُعْدُولُ الْمُصْتَرَفُ . يقال ((مَا لَهُ مُعْدُولٌ أَوْ مُعْدُولٌ عَنْ كَذَا)) أي مصرفٌ ؛ و - ((أَخَذَ مُعْدِلًا لِبِئْرٍ)) أي طَرِيقَهُ . (سومير : قاموس المنجد "في اللغة والأعلام", صحفة : 492)

¹ Penerapan ketentuan-ketentuan hukum acara perdata dimaksud dalam menyelesaikan perkara-perkara dibidang ekonomi syariah dilingkungan peradilan agama jelas bersifat *imperative*. Artinya, dalam hal menerima, memeriksa, mengadili, serta menyelesaikan perkara-perkara dibidang ekonomi syariah umumnya dan bidang perbankan syariah khususnya, pengadilan agama harus (wajib) menerapkan ketentuan-ketentuan hukum acara perdata sebagaimana yang berlaku di lingkungan peradilan umum tersebut. Apabila menyimpang dari ketentuan-ketentuan tersebut berarti hal itu merupakan suatu pelanggaran yang dapat dikualifikasikan sebagai *undue proses* sehingga proses pemeriksaan tersebut dianggap tidak sah dan karena itu dapat dinyatakan batal demi hukum. (Drs. Cik Basir, S.H., M.H.I., (2009), , "Penyelesaian Sengketa Perbankan Syariah Di Pengadilan Agama & Mahkamah Syariah", Ed. I. cet 1-Kencana Prenada Media Group). Hal. 125.

the religious court. As written in the background, there are legal problem, namely: 1) The occurrence of ambivalence and inconsistency in legislation. 2) The occurrence of Disharmonisasi legislation, and 3) There is a conflict of norms in the legislation which then followed by the technical rules to meet the clarity in the case of execution of dispute of sharia banking.

Some of the regulations that have become a foothold in the settlement of banking disputes still leave the injustice¹ to those who in fact are not Muslim, meaning that there is inconsistency in legislation.²

Based on the latest data of the annual report of Religious Courts in 2012, the number of sharia economic cases received by the Religious Courts within the religious court there has been 31 (thirty-one) cases recorded and 24 (twenty four) cases has been decided, and based on the Agency's annual report Religious Courts in 2011 the number of sharia economic cases received by the Religious Court only as 5 (five) sharia economic cases that are recorded and only 2 (two) cases that has been decided. That the existence of settlement of dispute of Islamic sharia needs special attention because of the increasing number of cases.³

1.3 Analysis of discussion of UURI No 21 of 2008 on Sharia Banking

The settlement of disputes in Law Number 21 of 2008 concerning Sharia Banking is inconsistent with Law No. 3 of 2006, because there is a "reduction" of the absolute competence of the Religious Courts, namely by granting authority to the general judicial environment to participate in resolving the dispute in the field of sharia banking as long as the parties promise it. Legal uncertainty impacts on the practice of dispute settlement in the field of sharia banking that occurs between banks and customers. At the empirical level, the dispute over sharia banking that uses the forum of public courts and religious courts, namely the dispute between Bukittinggi Branch of PT Bank Bukopin Sharia and its customers. In the beginning, the dispute was submitted to the Bukittinggi State Court and it has obtained a permanent legal force (*in kracht van gewijsde*)⁴. The choice of the forum chooses the Court of the Bukittinggi State Court and at the time of the dispute occurred Law No. 3 of 2006 has not yet born. After Law No. 3 of 2006, the customer then filed a lawsuit to the Bukittinggi Religious Court with the same object. The Bukittinggi Religious Court also accepted this case which ultimately won customers⁵. The case did not stop at the first level but continued at the appeal⁶, cassation⁷, and reconsideration stages⁸, in which at this extraordinary legal effort, the Bukittinggi Branch of PT Bank Bukopin Sharia was judged to win over the case.

1.4 Interpretation of Article 55 of Law Number 21 Year 2008 concerning Sharia Banking in Settlement of Dispute by PT Bank Syari'ah Bukopin

The absolute competence of Religious Courts in sharia economic case is set in Law Number 3 Year 2006 concerning Amendment of Law Number 7 Year 1989 concerning Religious Courts and then reinforced in Law Number 21 Year 2008 concerning Sharia Banking. Both laws regulate the solution for the settlement of sharia economic case, which in this case especially in the field of sharia banking. Based on Article 49 of Law Number 3 Year 2006, it is stated that "Religious Courts have the duty and authority to examine, decide and settle cases at the first level among the Moslems in the field of: a. Marriage, b. heir, c. Testament, d. Grants, e. Endowments, f. Zakat, g. Infaq, h. Shadaqah, and i. Sharia Economics. The provision of Article 49 of Law Number 3 Year 2006, the state has provided absolute competence to the courts within the Religious Courts to accept, hear, decide and settle sharia economic cases.

¹ Artinya; terdapat beberapa faktor yang mempengaruhi penegakan hukum. Faktor tersebut cukup mempunyai arti sehingga dampak positif dan negatifnya terletak pada isi faktor tersebut. Menurut Soerjono Soekanto bahwa faktor-faktor tersebut ada lima, yaitu: 1) Hukumnya sendiri, yang didalam tulisan ini akan dibatasi pada undang-undangnya saja., 2) Penegak Hukum, yakni pihak-pihak yang membentuk maupun menerapkan hukum., 3) Sarana atau fasilitas yang mendukung penegakan hukum., 4) Masyarakat, yakni lingkungan dimana hukum tersebut berlaku atau diterapkan., 5) Kebudayaan, yakni hasil karya, cipta dan rasa yang didasarkan pada karsa manusia didalam pergaulan hidup. (Baca Buku Ishak, S.H. M.Hum., 2009, "Dasar-Dasar Ilmu Hukum" Cetakan ke II, Penerbit Sinar Grafika. hlm. 245).

² Baca pasal 1 angka 1 UURI No. 7/1989, pasal 49 UURI No. 3/2006 Tentang Perubahan UURI No 7/1989 Tentang Peradilan Agama, dan pasal 1 angka 1 UURI No. 50 Tahun 2009 Tentang Perubahan Kedua UURI No 7/1989 Tentang Peradilan Agama.

³ Majalah Hukum Varia Peradilan., ISSN 0215-0247., No. 37 Desember 2013.

⁴ Putusan Pengadilan Negeri Bukittinggi No. 08/ PDT.BTH/2004/PN.BT Tahun 2004

⁵ Putusan Pengadilan Agama Bukittinggi No. 284/Pdt.G/2006/PA.Bkt Tahun 2006.

⁶ Putusan Pengadilan Tinggi Padang No. 32 dan 33/Pdt.G/2007/PTA.Pdg Tahun 2007.

⁷ Putusan Mahkamah Agung No. 292/K/AG/2008 Tahun 2008

⁸ Putusan Mahkamah Agung No. 48 PK/AG/2009 Tahun 2009.

The normative interpretation that can be drawn from the historical framework of the provision is that the state in this case includes the governmental component held by the people with its representation in the Representative and the government conducted by the President, with mutual consent has given absolute competence to the court within the Religious Courts in the case as meant in Article 49 of Law Number 3 Year 2006 above, including one of them is a sharia economic case. The juridical mandate of the country in the field of sharia economy to the Religious Courts there should no longer be assumptions, judgment, displeasure and distrust to the judiciary within the Religious Courts to solve the cases.

That is, all components of the nation must put completely the trust to the Religious Courts by obeying any decision that is imposed in the form of legal products after receiving, examining, hearing *mengadili*, deciding, and settling the case according to procedures of judicial administration for sharia economic case¹.

Related to the principles of sharia, the Elucidation of Article 49 letter I of Law Number 3 Year 2006 states that what is meant by "Sharia Economy" is an act or business activity carried out according to "Sharia Principles", including: sharia bank, sharia micro finance institution, sharia insurance, sharia reinvestment, sharia mutual fund, sharia bond and medium-term sharia security, sharia security, sharia finance, sharia pawnshops, pension of sharia financial institution, and sharia business.

The phrase "sharia principle" in addition to what has been mentioned in Article 1 point 12 of Law Number 21 Year 2008 regarding Sharia Banking, also referred to in Article 55 paragraph (3) Sharia Banking Act, namely that "dispute settlement as referred to in paragraph (2) shall not be contrary to the Sharia Principles". Thus, it can be concluded that the meaning of economy of sharia is business or business activities conducted by individuals, groups of people, business entities with legal or non-legal entities in order to meet the commercial and non-commercial needs according to the principles of sharia.

The normative meaning found in this provision is that there are three main elements of the legal matter to be considered, namely: (a) the subject of law, (b) business activity, and (c) the principles of sharia. Related to the subject of law, in sharia economy basically it does not require the principle of Islamic personality in the sense that the customer must be Moslem. By signing the sharia contract, it means that even if the customer is not a Moslem, it is deemed to have obeyed to the provision of Islamic law covering the sharia agreement. The subject of the law sufficiently meet the requirement in the form of legal competence or have the ability to perform an act deemed legally valid, namely to support the rights and obligations. But then the question appears when Law Number 21 Year 2008 on Sharia Banking provides an opportunity to the courts within the General Courts to solve the case of sharia banking.

Article 55 of Law Number 21 Year 2008 states that: (1) Settlement of disputes on Sharia Banking shall be conducted by the courts within the Religious Court; (2) In the case that the parties have agreed to a dispute settlement other than as intended in paragraph (1), dispute settlement shall be conducted in accordance with the content of the Agreement; (3) The settlement of dispute as referred to paragraph (2) shall not be contradictory to the Sharia Principles². Elucidation of Article 55 paragraph (2) states that what is meant by "dispute settlement conducted in accordance with the contents of the Agreement" is an effort through: a. discussion; b. banking mediation; c. National Sharia Arbitration Board (*Basyarnas*) or other arbitration institution; and / or d. through courts within the General Court³.

The provision of Article 55 paragraph (2) along with its explanation according to Hasbi Hasan indicates that there has been a reduction in the competence of Religious Courts in the field of sharia banking. Based on Law Number 3 Year 2006 as amended by UURI no. 50 Year 2009, Religious Courts have the competence in handling sharia economic case, which includes sharia banking case. Apparently, the provision of UURI No. 3 of 2006 was reduced by other legal instruments, namely UURI no. 21 of 2008 which is actually intended to facilitate the handling of sharia economic cases, especially in the field of sharia banking.

The politics of the government's law (legislative and executive) toward the sharia banking seems still ambivalent, as reflected in Article 55 paragraph (2) and explanation of letter d which still gives the option of settling the dispute over sharia banking through the courts within the General Courts. The existence of the option of judicial competence within the Religious Courts and General Courts in the field of sharia banking shows the

¹ Hasbi Hasan. 2010. *Kompetensi Peradilan Agama (Dalam Penyelesaian Perkara Ekonomi Syariah)*. Depok: Gramata Publishing, hlm. 124.

² Lihat: Pasal 55 Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah

³ Lihat: Penjelasan Pasal 55 ayat (2) Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah

existence of reduction and narrowing and leads to the dualism of competence prosecuted by two litigation agencies-even if the competence given to the General Court is related to the content of a contract, especially on the choice of forum and choice of jurisdiction.

If the provision of Article 55 paragraph (2) is understood by the theory of contract law, then the provision is related to the principle of freedom of contract¹. Islam gives freedom to the parties to engage. The form and content of the engagement are determined by the parties. If it has been agreed upon the form and contents, then the parties are obliged to implement the content of the engagement. This freedom is not absolute, meaning that it can be done as long as it is not against the Islamic sharia or the prevailing laws and regulations, public order and morality². According to Faturrahman Djamil, Islamic sharia gives freedom to every person who perform contract in accordance with the desired, but the aspect that determine the legal consequences is the teachings of religion³.

Related to the explanation of Article 55 Paragraph (2) of Law Number 21 Year 2008, firstly it should be emphasized that the explanation in the law and regulation that is meant cannot be used as a legal basis for further regulation. Therefore, it should be avoided to make the norm formulation in the explanatory section and avoid the formulation containing the veiled changes to the provision of the law and regulation. Based on the law, the position and function of explanation is as an official interpretation of the shaper of law and regulation or certain norms in the body, so that the explanation only contains or further explains the norm regulated in the body, as well as a mean to clarify the norm in the body which should not result in the unclearness of the norm described⁴.

The explanation of Article 55 paragraph (2) according to Abdul Ghofur Anshori is not intended to make the formula of norm, but further explanation of the norm set in body. The problem is not appropriate if the general courts are aligned with non-judicial institutions, such as mediation and arbitration.

In relation to the provision of Article 55 of Law Number 21 Year 2008, Abdul Gani Abdullah⁵ had proposed a normative-juridical analysis of the provisions. Concerning paragraph (1), it has become a legal principle that the settlement of sharia banking case through litigation process becomes the absolute competence of the court within the Religious Courts. In relation to the interpretation of paragraph (2) it can be explained that paragraph (1), namely litigation, must deal with paragraph (2), i.e. non-litigations, banking mediation, BASYARNAS or other arbitration institutions, and / or courts within the General Courts.

The structure of this law, the courts within the General Courts are positioned as non-litigation. Since the Court of Justice is a litigation institution, then in this law there is incorrect placement of norm. The explanation of Article 55 paragraph (1) and paragraph (2) indicates that there has been *contradictio in terminis*. Therefore, based on analysis and legal rules, the phrase "court within the General Courts" which has positioned the General Courts in a non-litigation position may be dismissed by a judge because the settlement through the General Courts is a non-litigation settlement. It is this juridical interpretation which then encourages the Supreme Court to take steps by taking the juridical system to facilitate the administration of justice by submitting the case of sharia banking to the competence within the Religious Courts⁶.

Abdul Ghofur Anshori argues that to avoid *contradictio in terminis*, the explanation of Article 55 paragraph (2) does not need to exist or eliminated. It is not necessary for lawmakers to provide a limitative definition of dispute settlement in accordance with the contract, it is sufficient to be submitted to the parties in the financing agreement of that is made. Researchers argue that the mentioning of Article 55 of Law Number 21 Year 2008 related to the settlement of dispute is not appropriate. Arrangements that need to exist in the Banking Act, namely in the form of general provision, bank classification, business activity, licensing, bank secrecy, administrative sanction, and criminal sanction.

¹ Abdul Ghofur Anshori. 2010. *Penyelesaian Sengketa Perbankan Syariah (Analisis Konsep dan UU No. 21 Tahun 2008)*. Yogyakarta: Gadjah Mada University Press, hlm. 169

² Gemala Dewi, dkk. 2005. *Hukum Perikatan Islam di Indonesia*. Jakarta: Kencana Prenada Media, hlm. 31

³ Faturrahman Djamil. "Hukum Perjanjian Syariah" dalam Mariam Darus Badruzaman (ed.). 2001. *Kompilasi Hukum Perikatan*. Bandung: PT Citra Aditya Bakti, hlm. 249.

⁴ Anonim, 2006, Analisis dan Evaluasi Hukum Penyelesaian Sengketa Melalui Arbitrase Undang-Undang Nomor 30 Tahun 1999. Jakarta: BPHN.

⁵ Abdul Gani Abdullah. 2009. "Solusi Penyelesaian Sengketa Perbankan Syariah Menurut Pasal 49UU No. 3 Tahun 2006 tentang Perubahan AtasUU No. 7 Tahun 1989 tentang Peradilan Agama dan Pasal 55 UU No. 21 Tahun 2008 tentang Perbankan Syariah". Makalah disampaikan di Yogyakarta, tanggal 7 Februari

⁶ Ibid,

However, related to the settlement of banking disputes, it is quite regulated through other laws, namely the Judicial Power Law (currently in the form of Law No. 48 of 2009 on Judicial Power, Law No. 49 of 2009 on General Courts, and Law Number 50 of 2009 on the Second Amendment to Law Number 7 Year 2009 on Religious Courts) and the Law of Arbitration and Alternative of Dispute Settlement (currently in the form of UURI No. 30 Year 1999 on Arbitration and Alternative of Dispute Settlement). In summary, the banking legal regime does not need to regulate something that has been regulated in the legal regime of dispute settlement, both litigation and non-litigation.

1.5 Interpretation of PT Bank Syariah Bukopin against Article 55 of UURI No. 21 Year 2008 related to Article 49 of UURI No. 3 of 2006

PT Bank Syari'ah Bukopin in interpreting Article 55 of Law Number 21 Year 2008 is associated with Article 49 of Law Number 3 Year 2006, namely that Article 55 of Law Number 21 Year 2008 is *lex specialis* of Article 49 letter i Undang- Act No. 3 of 2006. Therefore, it applies the principle of *lex specialis derogate legi generali*, namely that the provision of a special law will override general legal provisions¹.

Further it is stipulated that specifically for the dispute of sharia banking, then PT Bank Syariah Bukopin guided and bounded by Article 55 UURI No. 21 Year 2008. Limited Liability Company (PT) Bank Syari'ah Bukopin is free to choose the desired dispute settlement forum, including choosing court within the General Court.

Such interpretation according to the author's opinion is not appropriate. That for the implementation of the legal principle *lex specialis derogat legi generali* there are 2 (two) conditions that must be fulfilled, namely that both laws and regulations must be in the same hieraki and both are in one regime. The first requirement is fulfilled, namely that they are both in the level of law, but the second condition is not met because the two laws are not in one regime. Law Number 21 of 2008 concerning Sharia Banking with one regime with Law Number 10 Year 1998 concerning Amendment to Act Number 7 of 1992 concerning Banking, so that UURI no. 21 Year 2008 is *lex specialis* of Law Number 10 Year 1998 and not *lex specialis* of UURI No. 3 of 2006. The principle of *lex posterior derogat legi priori* (in the case of a conflict, the applied legal provision later won over previous legal provision) also cannot be used in this case for the same reason.

The dispute settlement regime is governed by the Law on Judicial Power, the General Courts Act, the Religious Courts Act, the Military Justice Act, and the State Administrative Justice Act for litigation and the Law on Arbitration and Alternative of Dispute Settlement for non-litigation. This also strengthens the researcher's argument that it is not appropriate for UURI. 21 of 2008 concerning Sharia Banking that regulates the settlement of dispute. After the enactment of UURI No. 21 of 2008 concerning Sharia Banking which is in Article 55 it regulates the dispute settlement, according to the researcher it does not reduce the absolute competence of court in Religious Courts. This means that the choice of the forum is entirely the authority of the parties, provided that the wherever the forum is, the dispute settlement must be in accordance with the principle of sharia².

1.6 Implementation of Article 55 UURI No. 21 Year 2008 on Sharia Banking in Dispute Settlement in PT Bank Syari'ah Bukopin

The dispute settlement clauses contained in the financing agreement between PT Bank Syari'ah Bukopin and its customers are as follows:

- 1) if there is a difference in understanding or interpreting the Articles in the contract, so that it makes a dispute in conducting the contract, the customer and the bank agree to settle the matter deliberately for consensus.
- 2) If a deliberate settlement for consensus does not provide a decision agreed by both parties, it is hereby the customer and the bank agree to settle it through the Central Jakarta District Court in Jakarta to give the decision in accordance with applied law.

The next question is how to implement Article 55 UURI No. 21 of 2008 concerning Sharia Banking which is related to Article 49 letter i of Law Number 3 Year 2006 concerning Amendment of Law Number 7 Year 1989 concerning Religious Courts, especially in PT Bank Syari'ah Bukopin.

¹ Ibid,

² Tanjungpura Law Journal, Vol. 1, Issue 1, January 2017: 1-13. ISSN Print: 2541-0482 | ISSN Online: 2541-0490. Open Access at: <http://jurnal.untan.ac.id/index.php/tlj>

According to the respondent's explanation, that almost all clauses of dispute settlement contained in the financing agreement that exist in PT Bank Syariah Bukopin after the enactment of Law Number 21 Year 2008 was chosen to resolve the dispute that may occur at the court within the General Courts after the deliberate settlement are unsuccessful, except for the West Sumatra region which mostly chooses court within the Religious Courts. This is in line with their interpretation that Law Number 21 Year 2008 is a *lex specialis* of Law Number 3 Year 2006 *jo* Law Number 50 Year 2009 as long as it concerns the settlement of sharia banking disputes.

Another reason stated by respondents to prefer a court within the General Courts is because in public court the bank is more likely to win when dealing with customers. This is because the courts within the General Courts do not pay much attention to the fulfillment of the terms and conditions of the sharia financing contract but rather focus on the principle of freedom of contract where the parties are free to determine the contents of the agreement and if it is agreed, it is considered a law.

The bank also realizes that there are still many financing contracts that have not complied fully with the principles of sharia, for example *murabahah* financing agreement that do not specify objects in the form of goods, but only mention the financing ceiling. However, in the *murabahah* agreement the absolute thing that must be known by the parties is the object / goods, the historical cost, and how much margin (mark up) is desired as a bank profit. If a dispute arises in the implementation of this Agreement, the Religious Courts tend to state that the meant agreement is null for law batal demi hukum.

This reason according to the researcher is not correct, because it appears that there is an indication that the bank (probably sharia bank in general) has not had an intention to really comply with sharia. Sharia banking parties still adhere to the general principle that they hold that it is better that sharia banks exist, rather than not at all though it is still not fully obedient to the principles of sharia. It should be noted that the introduction of sharia bank juridically has been started since 1992, but until now that kind of reason is still attached to Islamic banking institution.

According to the researcher, therefore, that need to be improved by sharia banking institution is the quality of standard contract until it is completely in accordance with the sharia principle, namely the fulfillment of minimum requirements as regulated in the fatwa of the National Sharia Council - Majelis Ulama Indonesia (DSN-MUI) or already embodied in the Bank Indonesia Regulation and Bank Indonesia Circular Letter related to the sharia contract. In addition, the quality of supervision by the Sharia Supervisory Board also needs to be improved, since all this time thing that has been done is only the sampling procedure and then generalize that certain sharia banks have carried out their business activities in accordance with the principles of sharia.

The need to affirm that the environment of the Religious Courts is the institution that has an authority in the dispute of sharia banking by stating that Article 55 of Law Number 21 Year 2008 is unconstitutional is a way that can be pursued in order to support the strengthening of Religious Courts which is expected to also encourage the sharia bank to comply more with the principles of sharia, without having fear anymore that it will be defeated at the time of lawsuit process within the Religious Courts.

1.7 Analysis of Article 61 of the UURI. 30 Year 1999 About Arbitration and Alternative of Dispute Settlement and Article 59 (3) UURI No. 48 Year 2009 on Judicial Power in connection with the settlement of Sharia Banking in Indonesia

Conflict caused by differences of interest will develop into the disputes if the losing party expresses dissatisfied or concern about, directly or indirectly, to the party who is considered the cause of the loss. Principally, in the case of law enforcement in Indonesia, it is only done by judicial power which is constitutionally institutionalized commonly called the judicial body badan yudikatif in accordance with Article 24 of the Constitution of 1945. The institution authorized to examine and adjudicate disputes is only a judicial body under the authority of the judiciary culminating in the Supreme Court of the Republic of Indonesia and the Constitutional Court¹.

Article 2 of UURI no. 4/2004 on Judicial Power also explicitly states that the has the authority and function in conducting justice is the judicial bodies established under the law². Beyond that institution, it is not right because

¹ Ibid.

² Pasal 24 ayat (2) UUD 1945 menyatakan; *Kekuasaan kehakiman dilakukan oleh sebuah Mahkamah Agung dan badan*

it does not meet the formal and official requirements and also it is contrary to the principle under the authority of law. However, based on Article 1851, 1855 of Civil Code, the explanation of Article 3 of Law No.14 / 1970¹ and Law no. 30/1999 on arbitration and alternative of dispute settlement, it is possible for parties to resolve disputes by using institutions other than court, such as arbitration or peace.

Related to the settlement of sharia banking disputes that the provision of article 55 (1) UURI No. 21 Year 2008 on Sharia Banking states: "Settlement of sharia banking disputes is conducted by the courts within the religious court. Its formal juridical meaning is that religious courts have absolute competence and not other courts; including the implementation of the execution, but when referring to article 61 of UURI no. 30 of 1999 Concerning Arbitration and Alternative of Dispute Settlement, it states contradiction; if the parties do not execute its decision voluntarily, the mandate of the law gives its authority to the state court, it is not in accordance and not in line with the independence of judicial institutions that have been determined based on the law.

This is certainly ambivalent because sharia banking is considered something special than conventional, so UURI no. 21/2008 entirely gives to the religious court because religious identity is inherent with the source of sharia banking law. Tragically, with the emerge of article 59 (3) UURI no. 48/2009 which states similar to the article 61 UURI no. 30/1999. It is because lack of control in accommodating the parties to be involved in the formulation of legislation in order not to overlap. Justice restoration must be done so that legal certainty, legal justice and benefits and advantage in accordance with sharia *iuscontientudum* will be realized.

The above description shows the dualism of judicial competence in the religious courts and general courts in the field of Islamic banking. In addition, it indicates a reduction that leads to the weakening of competence to try by the Religious Courts. The legal offer of choice of forum in the settlement of sharia banking dispute under Article 55 paragraph (2) letter d of the Sharia Banking Law – it shows the inconsistency of the legislators in formulating the rule of law. In addition, the existence of choice of forum will be very influential on the competence power of religious courts. The logical consequence of the inconsistency of legislator in formulating the rule of law is the absence of synchronization of the law especially concerning the authority of the handling sharia economy. There are four solutions that researchers can offer to remove the legal polemics related to this issue:

1. Filing judicial review to the Constitutional Court (it has been implemented);
2. Amending the relevant laws;
3. The Supreme Court of the Republic of Indonesia reaffirms through the legal remedy possessed by the Supreme Court such as circular letter, rule of Supreme Court and other regulations.
4. Considering the prospect of sharia economic growth will increase as time goes by, it is necessary to establish a new judicial institution, especially the banking court.
5. The compliance of the judicial institution into a public court and not a religious court.

D. Conclusion

Settlement of sharia banking dispute in Indonesia is still far from the point of justice, with the establishment of Law No. 21 of 2008 is one of the strongest building on the existence of sharia banking in Indonesia, but on the other hand it makes a problem that cause ambivalent so that the legal subject oscillating with the building of that regulation.

The settlement of banking dispute is sufficiently regulated by law, such as the Law on Judicial Power (currently in the form of Law Number 48 Year 2009 regarding Judicial Power, Law Number 49 Year 2009 on General Courts, and Law Number 50 of 2009 on the Second Amendment of Law Number 7 Year 2009 on Religious Courts) and the Arbitration and Alternative of Dispute Settlement Act (currently UURI No. 30 of 1999 on Arbitration and Alternative of Dispute Resolution). In summary, the banking legal regime does not need to regulate something that has been regulated in the legal regime of dispute settlement, both litigation and non-litigation. Settlement of sharia business dispute can be done through several alternatives, namely mediation, through institution of sharia arbitration, and litigation. The dispute settlement in court is applied because of

peradilan yang berada dibawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan, militer; lingkungan peradilan tata usaha negara, dan oleh sebuah mahkamah konstitusi

¹ Pasal 2 UURI No. 4/2004 menyatakan: *Penyelenggaraan kekuasaan kehakiman sebagaimana dimaksud pasal 1 dilakukan oleh sebuah mahkamah agung, dan badan peradilan yang berada dibawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan, militer, lingkungan peradilan tata usaha negara, dan oleh sebuah mahkamah konstitusi*

choice of law, which depends on the agreement of the parties that conduct business agreement in the agreement clause; the dispute could be settled in a religious court or a district court. The more increasing sharia financial institution in Indonesia, which most likely there is sharia business dispute, then we have great hopes to the institution of national sharia arbitration, mediators and judges of religious courts or the local courts to improve their competence in the field of sharia economy, so they can settle business dispute professionally.

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