

THE SETTLEMENT OF SHARIA ECONOMIC DISPUTES IN INDONESIAN ISLAMIC CLASSIC TRADITIONS AND POSITIVE LAW

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ABSTRACT

Using a qualitative method with a sociological-normative approach, it was found that today's rapid development has caused various kinds of disputes. In this article, the author discusses sharia economic disputes and their resolution in the Islamic tradition and positive law in Indonesia to understand the problems of economic disputes and their resolution so that they can become knowledge and guidelines in conducting business transactions. The results of the discussion that the author obtained, namely sharia economic disputes, are disputes that occur in *muammalah* activities. This occurs in banking, non-banking, capital market, as well as the economy as a whole due to several factors such as default, *tadlis*, *taghrir*, or other things that can harm the rights of others. Settlement of disputes in Islamic law, namely *sulh* and *tahkim*. As for the applicable law in Indonesia, namely peace both by litigation and non-litigation, ADR, and arbitration, includes BANI, BASYARNAS and other arbitration institutions. In this case, the authors conclude that every community who will conduct business transactions requires the principle of prudence and there have been many legal attempts by the government in resolving these disputes.

Keywords: Dispute; Peace; Arbitration.

ABSTRAK

Dengan menggunakan metode kualitatif dengan pendekatan sosiologis-normatif, ditemukan bahwa Maraknya perkembangan dunia perbisnisan saat ini telah menimbulkan berbagai macam sengketa di dalamnya. Dalam artikel kali ini penulis mengangkat pembahasan tentang sengketa ekonomi syariah dan penyelesaiannya dalam tradisi islam dan hukum positif di Indonesia dengan tujuan untuk memahami permasalahan sengketa ekonomi dan penyelesaiannya sehingga dapat menjadi sebuah pengetahuan serta pedoman dalam melakukan transaksi bisnis. Hasil diskusi yang penulis peroleh yaitu sengketa ekonomi syariah merupakan pertikaian yang terjadi dalam aktivitas muammalah. Hal ini terjadi pada lembaga-lembaga perbankan, non perbankan, pasar modal, serta perekonomian secara keseluruhan yang disebabkan oleh beberapa faktor seperti terjadinya wanprestasi, *tadlis*, *taghrir*, ataupun hal lainnya yang dapat merugikan hak-hak orang lain. Penyelesaian sengketa yang terdapat dalam hukum islam yakni *sulh* dan *tahkim*. Sedangkan untuk hukum yang berlaku di Indonesia yakni perdamaian baik secara litigasi maupun non litigasi, ADR, serta arbitrase yang meliputi BANI, BASYARNAS dan lembaga arbitrase lainnya. Dalam hal ini penulis menyimpulkan bahwasannya setiap masyarakat yang akan melakukan transaksi bisnis memerlukan prinsip kehati-hatian dan sudah banyak upaya hukum yang dilakukan pemerintah dalam penyelesaian sengketa tersebut.

Kata Kunci: Sengketa; Perdamaian; Arbitrase.

INTRODUCTION

The growing economic development in Indonesia, especially with the progress of large institutions and companies, has resulted in many opportunities for disputes or cases to arise in them. Disputes that often occur in institutions or companies, especially in the banking world, are business disputes. Business is a collaborative effort carried out by two or more people to generate profits. Disputes that often occur in the world of business include the negligence of the parties or referred to as default, neglect of a right, violations of the agreed contents of the agreement, the existence of an element of fraud in the agreement by either party or both. These disputes do not only occur in the banking business world, but also often occur in the business world and the economy in general. Economic disputes generally do not only occur within institutions or companies, but also often occur in two or more parties who are not members of a company or institution conducting business transactions (Hariyanto, 2014).

In the case of sharia economic and business development, both in sharia-based institutions or companies for disputes or cases are also resolved in a way that is in accordance with sharia, when speaking of sharia what comes to mind is in accordance with the principles of sharia or God's provisions. As for the causes of disputes in sharia economics and business, among others, is that during the agreement process, one party is ignorant of the contents of the agreement, or in other words there are elements of *tadlis* (fraud), *tadlis* (unclear), payment of *najasi* (demand manipulation), *ihthikar* (supply manipulation), this occurs due to ignorance of one of the parties about who the business partner is, then sharia economic disputes also occur usually in terms of agreements or agreements that are careless in their implementation, defaults, violations, and neglect of rights by people who concerned. The act becomes a dispute because of the loss to one or both parties.

In this case, there are several ways to prevent disputes in the economy and business world, so the parties who enter into the agreement must clearly know their business partners so that fraud does not occur, must be able to understand the contents of the agreement before it is agreed, must understand their rights and

obligations, and be careful in implementation of the contents of the agreement so that there is no default. With some of these steps it may be able to prevent or avoid disputes between the two parties.

Basically, the more sharia economic disputes, the greater the impact on the world economy, this triggers opportunities for depreciation of power or production capacity. Thus, it requires a method or procedure for sharia economic dispute resolution. This is so that people who have disputes can find out how to handle them. It is different from conventional economic dispute resolution in general with sharia economic dispute resolution. There are two ways to settle sharia economic disputes in Indonesia, namely in Islamic law, namely *sulf*, *qadha* power, and *tahkim*, then dispute resolution in Indonesian positive law, namely peace, ADR, and arbitration. The resolution of sharia economic disputes in Indonesia is the duty and power of the religious courts so that when there are cases or disputes on sharia economics, they are reported to the religious court. Dispute resolution through religious courts is called litigation, besides that there are also non-litigation and arbitration channels (Ishom, 2015).

In previous researches, the author did not find any articles that discussed the problem of settlement of sharia economic dispute in classical Islamic tradition and Indonesian positive law, most of the problems regarding sharia economic dispute resolution were only studied from the perspective of sharia economic law. Then this is what distinguishes it from previous research, namely by examining it from the point of view of the classical Islamic tradition and also from the point of view of the positive law that applies in Indonesia.

RESEARCH METHOD

In every scientific research, always use certain methods so that research can run in a directed manner and achieve the expected results (albi & Johan, 2018), The methods used in this research are as follows:

1. Types of Research and Research Approach

This type of research is included in qualitative research with library research methods, namely research procedures that produce qualitative-descriptive

data in the form of written or spoken words from various literature sources studied (Prastowo, 2011).

The approach used in this article is a juridical-philosophical approach, a juridical approach, namely research by examining the laws and regulations that form the basis of legal relations and the literature related to the problems to be discussed in the article. Meanwhile, the philosophical approach (*uṣhul fiqh*) examines the classical Islamic tradition.

2. Nature of Research

The nature of this research is descriptive-analytical-philosophical. Descriptive in question is to provide data and information carefully regarding matters regarding the settlement of sharia economic disputes. Analytical is meant to explain and analyze the data and information obtained from the research results sharply. The philosophy in question is to look deeper into how to resolve sharia economic disputes in the classical Islamic tradition and positive law in Indonesia.

3. Data Source

This study uses two data sources, namely primary data sources and secondary data sources.

a. The primary data sources of this research are:

1. Regulation of the Supreme Court Number 14 of 2016 on December 22, 2016 concerning Settlement of Sharia Economic Cases.
2. Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.
3. Perma Number 1 of 2008 concerning Mediation Procedures in Court
4. Journal articles regarding the settlement of economic disputes, especially Islamic economics.

b. Secondary data sources, supporting data for research projects that support primary data and complement primary data. The data is in the form of a video seminar on the settlement of sharia economic disputes.

4. Data Collection Method

Library Research, the study of written information about the law that comes from various sources and can be published widely and is needed in normative legal research. A literature study was conducted to obtain the data

needed in the research, namely conducting a series of documentation study activities, by reading, taking notes, and citing books or literature related to the title of this research.

5. Data Analysis

In this qualitative research, the data analysis technique used is inductive, which is done by explaining the specific things first, then general conclusions from the particulars. In the early stages, the research results will be described in detail. Furthermore, will be explained and analyzed the results that have been described. In the final stage, general conclusions will be drawn from the research (Lexy J. Moleong, 2019).

RESULTS AND DISCUSSION

Definition of a Sharia Economic Dispute

A dispute in language is a matter or event that can lead to a dispute, debate by several people and the definition according to the term dispute is a dispute that occurs between two or more people due to differences in thoughts or opinions on something related to a person's rights and causes legal consequences and legal sanctions therein. In general, disputes originate from transactions of economic activity from one party to another with respect to property and property. This dispute occurred on the execution and implementation of the transaction (B & Fariana, 2017).

The definition of Islamic economics is a knowledge that discusses an economic system based on Islamic values. Islamic economics can also be interpreted as all the actions or activities of human muammalah which in its implementation refer to the principles of sharia or provisions that have been established by Allah.

Thus, the definition of a sharia economic dispute is a dispute by several parties caused by the occurrence of economic activity transaction problems based on sharia principles.

Factors of Sharia Economic Dispute Occurrence

The cause of sharia economic disputes that often occur is due to differences in thinking between the parties who carry out the engagement,

resulting in violations of rights and obligations. Basically, sharia economic disputes occur because of the elements of irregularities that can harm one party or both parties entering into an economic activity agreement (Hadiyanto, 2020).

One of the causes of the dispute is in the agreement, where one of the parties does not understand the contents of the agreement, does not know his business partner well, so that fraud may occur. Then because of its implementation, where one party does not carry out its obligations or neglects the rights of others, so this is very detrimental to other people or in other words the occurrence of default. In this case the aggrieved party can bring this problem to legal channels and can cause legal consequences and sanctions for the party who violates it. This is what can lead to sharia economic disputes (Delfa Yona, 2014).

The cause of the occurrence of sharia economic disputes stems from the existence of a party who entered into an economic agreement which was then agreed upon by the parties. The agreement creates a statement or in other words it is the agreement that binds the two as according to civil law, that the agreement that has been approved by the parties acts as a law for the maker. The agreement that is already in effect as a law can result in legal consequences and legal consequences will result in sanctions for those in dispute. These sanctions can affect one party but also both parties. These various factors lead to the fact that the community desperately needs an institution or agency that handles sharia economic disputes. This is intended to create justice and legal certainty in a country and to build a prosperous society (Muaidi, 2017).

Sharia Economic Dispute Resolution in Classical Islamic Tradition

Basically, in Islamic teachings there are 3 ways to deal with or resolve sharia economic disputes, namely:

1. As-Sulh

As-Sulh is an agreement between disputing parties to end disputes or disputes between them by means of peace. The settlement of this peace system is carried out by the disputing parties through deliberation or compromise. By deliberation, it means that the parties concerned must speak well and find a core solution to the problem in dispute (Cahyadi, 2011).

Settlement of disputes with this peace agreement is the main settlement method that must be prioritized by the related parties. In this case, Allah SWT has emphasized in his words which are found in the Qur'an in Surah an-Nisa 'verse 126 that peace is something good. In making a peace agreement, several conditions must be fulfilled, namely the consent of the *qobul* and the contents of the peace agreement. Some of these things are conditions for the validity of an agreement or agreement. If all the conditions are met, then the agreement is valid, but if one or more of the conditions are not fulfilled, then the agreement is invalid so that the peace agreement cannot be continued as the person concerned.

In this case, a legal peace agreement results in the relationship of the parties making the peace agreement bound. The purpose of being bound here is that each party has rights and obligations, in which the obligations must be obeyed and carried out by the parties and each party is obliged to fulfill the rights of the other party. The relationship between the parties is called a legal bond, and a legal bond can have legal consequences for the parties. The legal consequences occur when rights are neglected and there are obligations that are not carried out or there are negligence in the engagement (Al Hakim, 2014).

In the peace agreement, there are several legal conditions, namely, among others, the parties who carry out the peace agreement must be legally competent, have authority and not be forced. The object that is used as a peace agreement is a useful property and the object is clear so that it does not contain *gharar* elements in it. The case in dispute is a matter in human-human affairs or in other words in *muammalah* affairs.

In the process of implementing this peace agreement, it can be done in 2 ways, namely through the litigation and non-litigation channels. In the litigation line or what is known as the court route, it is one way of resolving dispute problems by means of peace by involving other parties as intermediaries between the disputing parties in court. Meanwhile, the non-litigation route, known as the out-of-court route, is a dispute resolution process by the disputants without involving other parties as intermediaries. This out of court dispute resolution is a settlement carried out by deliberation by the disputing parties outside the court.

2. *Tahkim*

Tahkim or what is often equated with arbitration is a dispute resolution system by appointing or making someone a third party to mediate for the parties in dispute. The settlement of disputes with the *tahkim* system is carried out by a third party in order to reconcile the disputing parties in a peaceful manner.

Tahkim in terms of also means someone who is entrusted and mandated or appointed as a support by the disputing parties to handle and resolve problems and make decisions on the issues in dispute. Whereas *tahkim* according to the group or followers of the Imam Syafi'i is to decide disputes that occur between several people, two or more who are at odds with reference to the rules of Allah's law.

In the case of a decision on hakam in settling the *tahkim*, it is immediately binding on both parties even before the disputing parties agree to a statement. This is based on one of the hadiths of the Prophet, which states that when the judiciary has decided a case it must be obeyed by the parties (Osman & Abdillah, 2019)

3. *Wilayat al-Qadha*

Dispute resolution using the *wilayat al-qadha* system is the settlement of disputes between the disputing parties through the judicial authority. The lines of judicial power include:

a. Power of Hisbah

Hisbah power is the power of an official body that has the power to resolve disputes without having to go through court proceedings. The power of al-hisbah must be in accordance with the goal of goodness and keep away from harm to the disputing parties.

b. *Madzalim's* power

Madzalim's power is the power of government agencies with the aim of resolving the problem of violations by state officials and officials from an abuse of power. This power aims to protect parties or individuals who are discriminated against by acts of abuse of authority by government officials.

c. Power of *Qadha*

The power of *al-Qadha* is the power to decide problems or disputes fairly, namely determining legal remedies that are divine provisions or Islamic rules (Dantes, 2017).

Economic Dispute Resolution in Positive Law in Indonesia

1. Peace and ADR

In positive law, resolving disputes using peace and Alternative Dispute Resolution or ADR is a dispute handling process that is valid and recognized by Indonesia as where this system has been recognized by law. Basically, the existence of peace as a resolution of this dispute has existed since pre-classical Islamic times. This peace is one of the beliefs of economic dispute resolution which is a priority in sharia law. With these conditions it proves that the existence of dispute resolution by reconciling the disputing parties is something that is natural for humans (Hariyanto, 2014).

Settlement of disputes by way of peace which has been regulated in the Law is a reference for the disputing parties in resolving their cases. In this case, all processes, efforts and efforts from implementation to dispute resolution decisions have been recognized by the government. In other words, the government gives freedom to disputing parties to settle disputes outside the court. Settlement of disputes outside the court (nonlitigation), namely:

a. Consultation

The purpose of consultation is that the disputing parties and their mediator or advisors agree on the disputed case.

b. Negotiation

What is meant by negotiation is that the parties make a compromise and apply for relief by making an agreement on the case in dispute.

c. Conciliation

ADR settlement with conciliation is a settlement by accommodating and matching the views of the disputing party's understanding of the disputed case as a reference by the council in making a decision.

d. Expert View

In resolving a dispute by means of an agreement, the parties are allowed to ask for an understanding of the case from an expert in the field of dispute or from an arbitrator to be asked for some advice and knowledge of the case (Nurhayati, 2019).

2. Arbitration

In general, arbitration is a process of handling cases or legal remedies for disputes by parties who have made an agreement at the beginning of the contract. In Indonesia, this arbitration settlement has been recognized and stated in law. This statement of Law on arbitration confirms the existence of arbitration and the results prove the validity of an arbitrator's decision. The decision which has been determined by the arbitrator must be acknowledged by the government and the parties to the dispute.

Basically, dispute resolution by means of arbitration is a mandate or power of attorney from the party involved in the dispute to an arbitrator to handle the case and create a decision from the beginning of the case process to the final. An arbitrator is a person who is authorized by one or more parties who are mandated over a case to determine a fair decision. This arbitrator is someone who comes from the membership of an arbitration institution who must have the competence and integrity in resolving a problem as stated in the Law.

In Indonesia, there are several types of arbitration institutions in dispute resolution, including:

a. Indonesian National Arbitrage Agency

BANI is an arbitration institution that has powers similar to judicial powers that are not interfered with by other powers. Therefore, BANI as an institution in Indonesia has the same position and authority as the judiciary must have the principle of being honest and fair in handling various cases. BANI is an arbitration body that is not only national but also international. The Indonesian National Arbitration Board is one of the arbitration bodies in Indonesia whose techniques and efforts to handle cases have been recognized in law.

The scope of the Indonesian National Arbitration Board (BANI) is an agency that handles dispute cases based on a breach of an agreement in both business and financial economic transactions. One of the aims of establishing the Indonesian National Arbitration Board (BANI) is as an effort to enforce the law. Cases that fall under the authority of this type of arbitration institution are corporations, insurance, licenses, franchises, fabrication, telecommunications, finance, and so on.

b. Indonesian Capital Market Arbitration Board

The establishment of the BAPMI institution originated from the many disputes that occurred in the capital market due to regulations set by the government. Dispute resolution with this institution has 3 ways, namely mediation, expert opinion, and arbitration. BAPMI is an institution which in its implementation does not allow for sides. Cases that are included in this arbitration institution are those relating to problems in the private capital market. In the process of submitting disputes to this institution, the parties concerned must prioritize the agreement. When the contract has been agreed, the relationship between the parties is bound. In the case of a party giving a mandate to an arbitrator, the arbitrator has the right to accept or reject the power of attorney.

c. Indonesian Futures Commodity Arbitration Board

Dispute settlement through the Indonesian futures commodity arbitration agency is an agency that provides efforts to handle cases that are private or non-public. An arbitration body of this type is one of the fast and affordable case handling bodies. This aims to help communities who have disputes but do not have sufficient costs.

In the case of the case handling mechanism by the commodity futures arbitration body, it can be done in two ways, namely adjudication and non-adjudication. Adjudication is a treatment that is forcing while non-adjudication is not forcing.

d. Indonesian *Muammalat* Arbitration Board

Dispute resolution through BAMUI is an institution that handles sharia economic disputes, especially sharia banking. Sharia banking dispute problems are related to customers and banks as well as investors or business partners in these banks. BAMUI is an institution that handles *muammalat* bank disputes due to the initial formation of BAMUI together with the establishment of Bank *Muammalat* Indonesia. The first Islamic banking institutions in Indonesia, namely Bank *Muammalat* Indonesia and the Indonesian *Muammalat* Arbitration Institute, were formed in 1992.

At the BAMUI institution, an arbitrator in carrying out his role and responsibilities as a judge who handles disputes must prioritize mediation. In this case an arbitrator makes the disputing party to enter into an agreement on the peace act. If this method does not work, then an arbitrator will proceed with his handling by collecting evidence from the disputing party (Khotibul Umam, 2016).

e. National Shariah Arbitration Agency

BASYARNAS is a substitute institution for BAMUI (Indonesian *Muammalat* Arbitration Agency) which aims to handle sharia economic disputes both in banking and non-banking institutions that refer to the sharia system. BASYARNAS stands on the basis of the Qur'an, the Law, as well as fatwas and decision letters.

Basically, the implementation of a dispute until its resolution begins with a written agreement on the problem that is being disputed by the person concerned as well as resolution by consensus or deliberation without involving matters of personal interest (Hendra Winnarta, 2019)

The existence of BASYARNAS as a special sharia institution to resolve economic disputes has a strong legal foundation and positive quality legal aid in Indonesia. Recognized as a positive law by the state then this board can be a judge of disputes that arise in society (Setiady, 2015).

CONCLUSION

Based on the results of the discussion that has been described above, the author concludes that the problems of sharia economic disputes are very important to be understood in conducting economic and business activities. About any steps that must be understood so as not to cause disputes that is to know and understand clearly our business partners, understand the content of the agreement before agreeing, understand with certainty the promised object, and must understand the rights to be fulfilled and obligations to be carried out in conducting business transactions or such *muammalah* activities. Here are some ways to prevent or anticipate the occurrence of sharia economic disputes. About legal efforts in resolving sharia economic disputes is also very important for us to learn. This is to become a knowledge of how and the steps and places to deal with cases of dispute

when there is a sharia economic dispute around us. For efforts to resolve sharia economic disputes in Islam there is *sulh* or peace and *tahkim* or arbitration. Meanwhile, in the positive laws that apply in Indonesia, namely peace, ADR, and also arbitration. Regarding the settlement through the male reconciliation, there are also two ways, namely peace in justice and peace outside justice. For extrajudicial peace includes negotiations, consultations, mediations, and consultations. Meanwhile, the settlement of arbitration path is a settlement through institutions such as BANI, BASYARNAS, and also other institutions that have been recognized by the Law as the institution to resolve sharia economic disputes. Regarding the results of the decision of the institution or arbitration body must be recognized as valid as the existence has been recognized by the Law.

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