

Indonesian Supreme Court Judicial Decision on Sharia Economic Disputes

Fitriyani Zein. S. Ag., MH.¹, Dr. Alfitra, MH,¹ Aminudin Yakub, MA.,¹ Mu'min Roup, MA.,¹
Dr. Rr. Dewi Anggraini, SH., MH.²

^{1,2,3,4}Universitas Islam Negeri Syarif Hidayatullah Jakarta, Jl. Ir. H. Juanda No. 95 Ciputat, Indonesia

⁵ Universitas Pamulang, Jl. Surya Kencana No.1, Pamulang Bar., Pamulang, Kota Tangerang Selatan, Indonesia

fitriyani.zein@uinjkt.ac.id, alfitra@yahoo.com, aminudinyakub@gmail.com, muminrauf@uinjkt.ac.id,
dewifhunpam@yahoo.com

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Abstract: The Religious Court in settling Sharia Economic disputes started on whether the decision of judges at the level of the Religious Courts to the level of appeal in the Supreme Court in deciding on cases of Islamic Financial Institutions (LKS) has fulfilled the provisions of the fatwa and regulations. The scope of this study is cases of which are only at the level of appeal in the Supreme Court. While the objective of this research was the result of a cassation verdict in the Supreme Court related to disputes in Islamic financial institutions that were limited to banking and Islamic insurance institutions. This research method utilizes Qualitative methods, namely literature study and documentation as well as field research, namely, conducted to obtain information on the cassation in cases of sharia financial institution disputes in the Supreme Court. In addition, documentation studies and in-depth interviews were also conducted with the officers of the related Islamic financial institutions such as the director / compliance and legal division of the company. After all data has been reviewed comprehensively and systematically, it will be formulated and outlined with descriptive-analytical methods in order to be analyzed and reviewed through 2 (two) approaches, namely through historical socio-legal analysis and juridical-philosophical analysis.

1 INTRODUCTION

Sharia economic growth in Indonesia is currently growing rapidly, the implications of this growth are developments related to cases in Islamic Financial Institutions (LKS). The emergence of various disputes in LKS gives birth to several ways of settling sharia economic disputes, both through litigation and

non-litigation. Non-litigation procedures are regulated in Law no.30 of 1999 on arbitration and Alternative Settlement of Disputes¹ and Law No. 48 of 2009 concerning Judicial Power. Article 58 of the Judicial Authority which states: *Efforts to resolve civil cases can be done externally through arbitration or alternative case resolution*. While the litigation procedure is carried out through religious

¹ Indonesian Law No.30 of 1999

court which is limited by Law No. 7 of 1989, which at the beginning of the religious court was only authorized to handle marriages, inheritance, wills, grants, endowments, and *shodaqah*. However, the Law No. 3 of 2006 then expanded the authority of the Religious Courts, in article 49; the authority was supplemented by the handling of cases of zakat, *infaq* and Sharia economics.

Article 49 of the Law also states that what is meant by sharia economy is an act or business activity carried out according to sharia principles, including but not limited to Sharia law, Islamic economic financial institutions, sharia micro financial institutions, sharia insurance, sharia reinsurance, Sharia mutual funds, Sharia bonds, and Sharia medium-term securities, Islamic securities, Islamic finance, sharia pawnshops, sharia pension funds and sharia business institutions.²

The history, preceding policies and the internal atmosphere of the courts and religious courts place religious courts before other judicial environments in the early days of the one roof system according to Prof. Dr. Bagir Manan, SH. There are three effective solutions to catch up. First, awareness that change towards progress is inevitable. Second, awareness to work harder. Third, is the awareness to build and maintain religious judicature.³

The joint effort of all religious courts with the full support of the ranks of the Indonesian Supreme Court leaders to continue to improve them has brought significant change in the religious courts in Indonesia. One indicator of these changes is the high level of public trust and public satisfaction with religious justice.

As explained above, along with the development of Islamic Financial Institutions (LKS), the disputes related to Islamic economics have also arisen and developed in court. The occurrence of disputes are generally due to one of the incomppliance of parties upon the agreement that has been stipulated upon or in the agreement itself that are not in accordance with

the regulations, fatwas and legal provisions of the agreement resulting to a dispute.

2 METHOD

This study uses qualitative research methods with an empirical normative approach. Normative research is used to identify legal norms relating to the laws and regulations governing Sharia economic matters with the enactment of law No. 3 of 2006 which authorizes the authority of Islamic economics to religious courts. Previously there was a polemic related to the settlement of sharia financial institutions. In Law No. 21/2008 concerning Sharia Banking has the ambiguous authority between the settlement of disputes in the District Courts on one hand and with the provisions of the obligation to settle disputes based on sharia principles on the other. Resolution of settlement with the obligation in accordance with the provisions of sharia carried out in the justice of this country is certainly impossible as the judges in this judicial institution do not possess the competence of sharia law. Therefore, to provide legal certainty, the Supreme Court finally issued a circular letter (SEMA) No. 08 of 2008 in October 10th, 2008 stating that the execution of the decision of the Sharia arbitration to be carried out on the orders of the chairman of the religious court.

The data collection technique used in this study is in the form of literature studies and field studies. Literature studies are used to collect and analyse legal sources, both primary legal sources and secondary legal sources. While the field study is used to collect data in the form of opinions from related parties. Field studies carried out by means of interviews is a question and answer process in research that takes place orally in which two people or more face to face listen directly to information or statements. Interviews are conducted freely using tools in the

² Syamsul Anwar. *Hukum perjanjian Syariah*, Rajawali Press. Jakarta 2007

³ Adiwarmar Karim. *Bank Islam Analisa Fikih dan Keuangan*. Grafindo Jakarta 2004

form of a list of questions that have been prepared (as an interview guide) in accordance with the disputes that will be necessary for solutions without diminishing the possibility to add other questions that are impulsive in accordance with the answers provided by the respondent.

3 THEORITICAL REVIEW

There are several theories that can be used as benchmarks in this paper. Among them are: Compliance Theory, Agreement Theory, Estoppel Theory, and Transaction Theory.

The Judiciary is an institution under the auspices of the State that functions to prosecute legal cases; this institution is called a judicial institution that carries out the judicial authority of the State.⁴

Religious Court Judges can describe the understanding in terms of resolving the Sharia Economic dispute. It starts whether the agreement deeds made by the Islamic Financial Institution (LKS) have fulfilled the provisions of the fatwa and regulations, and the decisions of judges at the Religious Court level to the cassation level in the Supreme Court are in accordance with the regulations and provisions of the Theory of Contracts.

Furthermore, this study describes the understanding of the opinions of Religious Court judges in completing the Sharia Economic case. The question answered in this study is how the understanding and thought of the judge in the legal consideration of the decision of the Supreme Court of the Republic of Indonesia concerning sharia economic matters. This study analyses the thinking of Supreme Court judges from the perspective of *ushul fiqh* and law.

In addition, among others, there must be an improvement in human resources for judges in understanding the rules of Islamic banking. In addition to understanding and mastering the legal guidelines for sharia economic disputes, it is expected that judges can also apply the fatwa provisions of the Indonesian Ulema Council (MUI) as an affirmation of the dispute resolution system in religious courts.

Therefore among them human resource of judges who must understand the rules of Islamic banking must be increased. In addition to understanding and mastering the legal guidelines for sharia economic matters, it is expected that judges can also apply the fatwa provisions of the Indonesian Ulema Council (MUI) as a strengthening of the dispute resolution system in religious courts.

The results of the doctoral research (S3) in Law of the University of North Sumatra concluded that the dispute between sharia banking was not purely resolved based on sharia principles (*fiqh*) but also included the articles of the Indonesian Civil Code. This is partly due to the unavailability of Islamic law in the form of legislation and the existence of national legislation governing the issue of arbitration in general, namely Law No. 30 of 1999 concerning arbitration and alternative dispute resolution while another obstruction is the inadequacy of experts mastering Islamic arbitration law.⁵

The Law Article 24 paragraph (1) of 1945 states that the judicial authority is an independent authority to conduct judicature to enact law and justice. Here judges are required to uphold law and justice rather than prioritize and enforce cases that are oriented to economic values, pragmatism which can distort morality, legal text, and ethical values, uphold justice, logic of rationality that stands on legal reasoning on formal legality principle. In other words, they are free

⁴ Sri Soemantri, *Lembaga Negara Menurut Undang-Undang Dasar Negara Republik Indonesia*. 1943, (Bandung, Alumni, 2006) p. 58

⁵ Utary Maharany Barus, *Penerapan Hukum Perjanjian Islam Bersama-sama dengan Hukum Perjanjian Menurut*

KUHPerdata: Studi Mengenai Akad Pembiayaan Antara Bank Syariah dan Nasabahnya di Indonesia. University of North Sumatera Postgraduate Dissertation. Sustained on 13th January 2006: p. V-Vii, 290-292.

in terms of interpretation or interference from other parties.⁶

The focus of this article is the role of judges in court in upholding a very strategic role in creating justice and legal truth enabling to maintain order and peace of the community by being just and beneficial in providing legal decisions for the parties in dispute, especially cases of debt to bankruptcy.

The judge's role is one of the most important components in a court institution. In the history of Islam, the function and role of judges at that time were not as popular as the *fuqoha*, formerly the *fuqoha* functioned to find the discovery of the law (*istinbat al-hukm*) and the application of the law (*tathbiq al-hukm*). However, currently limited judges have sufficiently strong authority to produce legal decisions in court (*qadla*), this is due to direct contact with cases. This means that there is no possibility of the outcome of the case's decision being influenced by political authority and influenced by a school of thought that was adopted.⁷

Until now there is still a debate about the factors of non-functioning or ineffectiveness of law in society. Among them is the factor of law enforcement. That is the legal factor here as if it is only functions as a "scapegoat" against the unnerving law caused by the low quality of judges, so that the functions within it are not realized. This is shown in the low intellectuality and professionalism aspects. If measured from the aspect of education and experience, it has indeed resolved many cases although in terms of competence, behaviour and mentality there are still many among the judges who are unable to demonstrate their quality in terms of actualizing their important roles, especially in respect of truth and justice. Perhaps some of them have exerted and determined something useful, but the

benefits may only be felt only by an insignificant number of party.⁸

The Judicial Law of Authority provides the judges with the highest position, which is to give judicial authority to the justice seekers. The contents include certain rights and obligations where these rights and obligations are the role or "rule".⁹ Therefore, judges play a role in law enforcement and justice. This role according to Soerjono Soekanto is an "ideal" role.¹⁰

During this period the settlement of Islamic economic disputes was carried out by the Religious Courts, although in this case there was a need for improvement in the matter of resolving the Islamic economic dispute. Opportunities to resolve disputes through district courts will result in legal uncertainty. Therefore the need for the role of the Supreme Court is substantial in providing determination relating to cases of Islamic economic disputes to be settled in a religious court specifically and based on law.

Contributing considerations on the analysis of the judges' thoughts in the determination of the Supreme Court's legal decision on sharia economic disputes was the main objective of this study. In addition, this research is also intended to: Strengthen the knowledge of legal / contractual practices in Islam in Islamic financial institutions, Explain differences in agreements / contracts in Islam and the law of engagement in the law, assessing the legal compliance of sharia financial institutions to agreements in authority regulations and regulations, and analysing judges' considerations and decisions in the Supreme Court's cassation decision regarding sharia economic matters.

The scope of this article is a dispute that only reaches the level of appeal in the Supreme Court. While the research method used in the object is the result of a cassation decision in the Supreme Court

⁶ Ery Setyanegara, *Kebebasan Hakim Memutus Perkara Dalam Konteks Pancasila (Ditinjau Dari Keadilan "Substantif")*. Law and Development Journal Year 44 No. 4 October – December 2013, p: 461

⁷ Siti Nurhayati, p: 322

⁸ Rusli Muhammad, *Eksistensi Hakim dalam Pemikiran Yuridis dan Keadilan*. Law Journal of IUS IUSTUM No. 3 Vol. 21 July 2014: 426 – 443. p: 428

⁹ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegak Hukum*, Penerbit Rajawali, Jakarta, 1983. p: 11

¹⁰ Soerjono Soekanto, p: 15

and data collection on banking institutions and the Islamic insurance industry. This research method uses Qualitative methods, namely literature study and documentation as well as field research, namely, conducted to obtain information on the result of cassation in cases of sharia financial disputes in the Supreme Court. While the documentation method and in-depth interview are referred to the authorized parties such as to the Judges who determines the ruling and to the compliance and legal to the director of a corporation.

A variety of information that has been explored comprehensively and systematically both through literature study and field study is then formulated and outlined in the discussion using descriptive-analysis method. That is, all important findings will be systematized and described descriptively in the discussion. Furthermore, the descriptive explanation of the judge's decision was analysed and reviewed through the approach of Ushul Fiqh and the Fatwa of DSN-MUI to see its validity, consistency and suitability. Critical analysis is also carried out through two approaches namely historical socio-legal analysis and juridical-philosophical analysis.

4 PROBLEM

Based on the previous analysis, it can be seen that there are some interesting issues to be examined from the study of judges' thoughts in legal determination related to agreements / contracts in the Islamic finance economy in Indonesia. In this article, the problem of this research is limited to the following issues:

- 4.1 The rationalization of the Judge in the legal determination of the Supreme Court's judicial decision on Islamic economic matters.
- 4.2 Analysis of judges in the legal considerations of the Supreme Court's judicial decision on Islamic economic matters from the Islamic law point of views especially Islamic Agreement.
- 4.3 Analysis of judges in the legal considerations of the Supreme Court's decision on sharia economic matters from the Ushuliyah approach and the DSN MUI fatwa.

5 DISCUSSION

- 5.1 **The rationalization of the judge in the legal considerations of the Supreme Court's judicial decision on Islamic economic matters.**

In legal considerations related to disputes in Islamic Financial Institutions (LKS), the judge's decision refers to the following legal considerations:

- 5.1.1 Consideration of the provisions of sharia law is the main legal source in resolving disputes in LKS. The source of sharia law referred to here is the decisions of the National Sharia Council of the Indonesian Ulama Council (DSN-MUI). The DSN MUI fatwa, as it is known, is a fatwa institution recognized by laws and regulations - such as the Sharia Banking Law, the State Sharia Securities Law, Insurance Law, and related regulatory regulations such as the OJK Regulation and BI Regulation - as an authoritative institution to decide Sharia aspects from LKS activities and products.
- 5.1.2 Consideration of laws and regulations - such as the Sharia Banking Law, State Sharia Securities Law, Insurance Law, and related regulatory regulations such as OJK Regulations and BI Regulations -. Various laws and regulations, especially regulations from the relevant authorities, are the basis for consideration of judges' decisions in sharia economic matters.
- 5.1.3 Opinion of the Sharia Supervisory Board (DPS). DPS as stipulated in the Law on the Company is a Board of Commissioners level in a Deposit which is an extension of the DSN-MUI which has the duties and functions of supervising and ensuring sharia compliance of products and activities carried out by LKS. In this case, Sharia Opinion from DPS is the basis for LKS to carry out products and activities in accordance with sharia principles.
- 5.1.4 Company SOP. The Standard Operating Procedure (SOP) serves as a reference for the activity guide and stages of LKS activities in both funding (fund collecting) and financing (fund distribution / financing) processes. The SOP becomes a benchmark for an activity to fulfil the application of standard procedure. By this it can often be revealed whether there is a violation and moral hazard.
- 5.1.5 Agreement Deeds including Notary deed. The deed of agreement between the LKS and the customer is notarized in a notarial deed. This deed reflects the substance of the agreement, terms and conditions agreed by the parties.

5.1.6 Agreement implementation based on witness statements and legal evidence.

5.2 Analysis of judges in the legal considerations of the Supreme Court's legal decision on Islamic economic dispute from the point of view of Islamic law, especially Islamic Agreement.

5.2.1 Judges' consideration in the legal determination of the Supreme Court's legal decision regarding sharia economic disputes are reflected in a single decision ranging from consideration) to the decision. Of the several cases studied, it was reflected that the judge's understanding of the DSN-MUI fatwa was still lacking. Understanding of this Fatwa indeed requires the ability and knowledge of fiqh *muamalat maaliyah*, and for analysis it requires knowledge in the field of *ushul fiqh* and *qawa'id fiqh* and *ushul fiqh*.

5.2.2 In addition, the competence in the field of Islamic agreement is also substantial. Several decision shortcomings were found due to the lack of understanding in the field of Islamic Agreement, especially related to transaction theory and understanding of the agreements themselves.

5.2.3 Another aspect that is significant to the shortcomings of the Judge's legal decision in sharia economic disputes is the understanding of business activities carried out by the LKS where each business practice of the LKS has distinctions and characteristics. Banking and insurance, for example, are two very different business entities with very different characteristic and regulatory provisions.

5.3 Analysis of judges in the considerations of the Supreme Court's legal decision on sharia economic disputes from the Ushuliyah approach and the DSN MUI fatwa.

The *Ushuliyah* approach is an important tool for reviewing and analysing a case. *Ushul Fiqih* is a substantial comprehension to be obtained by every activist of Islamic law including judges. Without this knowledge it will be difficult to understand the background and substance of a legal decision. The DSN-MUI fatwa is also the same, it must be

understood through the *ushuliyah* approach and also understood by the *wurud asbab* and *maqashid* fatwa. Judicial legal consideration in the Supreme Court's decision regarding the dispute in LKS is quite adequate from the *ushuliyah* approach. The judge can understand the substance of the case and the understanding of the core of the matter that is being disputed by the parties. However, unfortunately as mentioned above the judges' comprehension of the DSN-MUI fatwa is still inadequate.

6 SUMMARY AND CONCLUSION

Based on the study, it can be concluded with the findings as follows:

6.1 Judges' decisions in sharia economic disputes are based on many considerations, such as the DSN-MUI fatwa, relevant Authority Regulations, DPS Sharia Opinion, the Company's SOPs and the Deed of Agreement made by the parties concerned. Furthermore the judge's determination is also a judge's legal decision in his consideration.

6.2 Understanding the judges of the DSN-MUI fatwa, as a reference for sharia law is still inadequate. Shortcomings in the understanding of this fatwa are based on a lack of understanding of the knowledge of *fiqh muamalat maaliyah*. Judges' competence in the field of Islamic agreement is also still limited, especially related to an understanding of the contract and debate theories and the weakness of understanding of the agreement. In addition, the judge's understanding of the business / company activities of each Islamic financial institution with their respective distinctions also needs to be strengthened.

6.3 Judicial legal consideration in the Supreme Court's legal decision regarding the dispute in LKS is quite adequate from the *ushuliyah* approach. The judge can comprehend the substance of the case and the understanding of the core of the matter that is being disputed by the parties. But unfortunately, as stated in conclusion number 2, the judges' understanding of the DSN-MUI fatwa and the contract theories and LKS business activities is still limited.

REFERENCES

Anwar, Syamsul, 2007. *Hukum perjanjian Syariah*, Rajawali Press. Jakarta

- Karim, Adiwarmanto, 2004. *Bank Islam Analisa Fikih dan Keuangan*. Grafindo Jakarta
- Soemantri, Sri, 2006. *Lembaga Negara Menurut Undang-Undang Dasar Negara Republik Indonesia Tahun 1943*, Bandung: Alumni.
- Utary, Maharany Barus, 2006. *Penerapan Hukum Perjanjian Islam Bersama-sama dengan Hukum Perjanjian Menurut KUHPerduta: Studi Mengenai Akad Pembiayaan Antara Bank Syariah dan Nasabahnya di Indonesia. Dissertation.*
- Setyanegara, Ery 2013. Kebebasan Hakim Memutus Perkara Dalam Konteks Pancasila (Ditinjau Dari Keadilan “Substantif”). In *Jurnal Hukum dan Pembangunan* Year 44 No. 4 October – December.
- Nurhayati, Siti, 2016. Penguatan Peran Hukum Pengadilan Dalam Penyelesaian Sengketa Perbankan Syariah Pasca Putusan Mahkamah Konstitusi nomor 93/PUU-X/2012. In *Yudisia*, Vol. 7, No. 2
- Muhammad, Rusli, 2014. Eksistensi Hakim dalam Pemikiran Yuridis dan Keadilan. In *Jurnal Hukum IUS IUSTUM* No. 3 Vol. 21 July
- Soekanto, Soerjono, 1983. *Faktor-Faktor yang Mempengaruhi Penegak Hukum*, Penerbit Rajawali, Jakarta.