

AUTHORITATIVE INSTITUTION IN DISPUTES RESOLUTION IN THE CONVERSION OF CONVENTIONAL BANK TO SHARIA BANK

Muhaimin, Universitas of Mataram

ABSTRACT

The purpose of this research was to analysis the institution which is authorized to disputes resolution between bank and customers in the conversion of conventional banks to sharia bank according to positive law. This research method uses normative legal research with primary, secondary, and tertiary legal materials, which are collected through documents and literature study, then a descriptive qualitative analysis was carried out through the legal interpretation method to build prescriptive legal arguments in order to obtain deductive conclusions. The result of this research was that the institution authorized dispute resolution between banks and customers in the conversion of conventional banks to Islamic banks by litigation carried out the authority of the Religious Courts, and non-litigation is resolved through deliberation, mediation, and BASYARNAS. The ideal regulatory model in dispute resolution between banks and customers in the conversion of conventional banks to sharia banks according to Positive Law in Indonesia, namely by amendment Article 55 paragraph (1) of Law No. 21/2008 or making a special law Sharia economic dispute resolution, including Islamic banks.

Keywords: Dispute's Resolution, Conversion, Sharia Bank and Customers.

INTRODUCTION

The development of Islamic banking in Indonesia continues to experience growth after the passing of Law No. 10/1998 and Law No. 21/2008 which allows banks to run a dual banking system, Chapra & Khan, (2000), namely conventional banks and Islamic banks, Rianda, (2018), simultaneously. So that conventional banks that control the market begin to look and open sharia business units or knowledge of conventional banks to become Islamic banks (Syarif, 2019). Since Islamic banking existed 28 years ago until the end of 2020 there were 14 Islamic Commercial Banks (BUS), 7 BUS came from the conversion of commercial banks, while 6 BUS were the result of a spin-off. Besides, there are still 20 Sharia Business Units (UUS), consisting of 13 UUS Regional Development Bank (BPD), and 7 UUS for National Private Commercial Banks (BUSN) which will determine the conversion or spin-off attitude (Sulmaihati, 2019).

Conversion is one of the options that conventional banks are interested in. 4 regional banks have been converted into Islamic banks, 2 banks have officially become Islamic banks, namely Bank Aceh Sharia and Bank NTB Sharia, 2 others are Bank Nagari and Bank Kepulauan Riau in the conversion process. Especially for regional banks, currently, 12 banks have UUS, and one bank has been spin-off, namely BJB Sharia. Based on Law No. 21/2008, in 2023 all sharia business units, including those from regional banks, must be spun off or separated into separate business entities into conventional bank subsidiaries and another option was to convert banks

into Islamic banks (De-Groot,1995).

Since 2008, conversion to Islamic banks has become a new trend (Shafii et al., 2016; Al-Harbi, 2020; Alani & Yaacob 2012).

The formation of Islamic banks through the acquisition and conversion mechanism of conventional banks into Islamic banks. The implementation can be done through three approaches. First, a conventional commercial bank that already owns UUS acquires a relatively small bank then converts it to sharia and releases and merges its UUS with the newly converted bank. Second, conventional commercial banks that do not yet have UUS, acquire relatively small banks, and convert them into sharia. Third, conventional commercial banks do a spin-off and become separate Islamic Commercial Banks.

However, with the increasingly rapid development of Islamic banking today, it is very possible for problems to arise in the future, both institutionally and in legal relations between the parties. This includes the conversion of conventional banks to Islamic banks, which will allow disputes between banks and their customers and overlapping authority Purna, (2018) by the institutions that the dispute resolution. So, it is very urgent to carry out a study with a focus on the theme of the institution authorized to settle disputes between banks and customers in the conversion of conventional banks to Islamic banks.

Based on the background description above, the formulation of the problem examined in this study is focused on: Which institution is authorized to dispute resolution between banks and customers in the conversion of conventional banks to Islamic banks, and what is the model for dispute resolution between banks and customers in the conversion of conventional banks to Islamic banks.

METHOD

This research was a doctrinal or normative legal research study Soekanto (1995) & Muhaimin (2021), using a statute approach, and a conceptual approach (Marzuki, 2004). This study uses legal materials; primary, secondary, and tertiary legal materials, which use collected through library research and document study collected by identification, classification, and validation. Then the analysis was carried out using a qualitative descriptive analysis method through the method of legal interpretation. The legal material has been collected, classified, and validate all legal rules through legal interpretation in building argumentation through prescription to be able to deductive conclusions (Muhaimin, 2020).

FINDINGS AND DISCUSSION

Sharia banking dispute resolution is a process in which the disputing parties try to find a way out of disputes that occur between the parties, in this case between Islamic banks and customers of Islamic banks in the conversion of Islamic banks to conventional banks. The disputing parties (between the bank and the customer) can choose such a settlement without any intervention from other parties.

Dispute resolution was generally divided into 2 parts, namely; in litigation (court) and non-litigation (outside the court). For litigation disputes regulated in Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts. The Religious Court is an institution of judicial power that has absolute authority to examine and adjudicate sharia

economic disputes, including sharia banking. This is by the principle of Islamic personality and the provisions of the applicable laws and regulations based on Article 49 letter (i) of Law No. 3/2006 on Religious Courts Angka, (2008) and Article 55 point (1) of Law No. 21/2008 concerning Islamic Banking (Angka, 2008). Non-litigation dispute resolution was regulated in Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution was a dispute resolution institution or difference of opinion through outside court procedures using consultation, negotiation, mediation, conciliation, or expert judgment as stipulated in Article 1 point 10 of Law No. 30/1999 (Angka, 1999).

In litigation, the legal basis for dispute resolution in the conversion of conventional banks to Islamic banks includes Article 49 letter (i) Law No. 3/2006 concerning Amendments to Law No. 7/1989 as amended again by Law No. 50/2009, then in Article 55 paragraph (1) of the Law No. 21/2008 concerning Sharia Banking.

Then on a non-litigation basis, the legal basis was regulated in Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution. To mediation institutions, the Government has accommodated the need for mediation by issuing Supreme Court Regulation No. 02/2003 concerning Mediation Procedures in Courts. Regulation of the Supreme Court (MA) No. 1/2016 on Mediation Procedures in Courts, Supreme Court Regulation No. 2/2008 concerning Compilation of Sharia Economic Law, Regulation of the Supreme Court No. 14/2016 concerning Settlement Procedures for Sharia Economic Cases, meanwhile, banking mediation is regulated in Bank Indonesia Regulation No. 8/5/PBI/2006 as amended by Bank Indonesia Regulation No. 10/1/PBI/2008 concerning Banking Mediation. Then POJK No. 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector, and POJK No. 1/POJK.07/2014 concerning Financial Services Sector Dispute Resolution.

The Institution Authorized to Resolve Disputes Between the Bank and The Customer in The Bank Conversion

The settlement of Sharia Banking disputes according to positive law can be carried out through a litigation mechanism, namely through the Religious Courts based on Article 49 letter (i) of Law No. 3/2006 concerning Amendments to Law No. 7/1989 as amended by Law No. 50/2009, then in Article 55 paragraph (1) of Law No. 21/2008 concerning Sharia Banking. In dispute resolution, it is necessary to pay attention to Abdullah, (2009), *Lex Posteriori Derogat legi Priori* principles and the principle of *Lex Specialis Derogat Legi Generalis*.

Religious Courts

Litigation or in other words through the judicial process was a litigation process by submitting it to the court which is authorized to examine, decide, and resolve cases or disputes that occur. Sharia banking dispute resolution in Indonesia was a process in which the disputing parties try to find a solution or a way out of disputes that occur between the parties. The dispute resolution can be chosen by the disputing parties absolutely without any intervention by any party as the legal principle of *pacta sunt servanda* (a binding agreement as to the law for those who make it).

The Religious Court is one part of the judicial environment under the Supreme Court so that the Religious Court was a place to carry out law enforcement and justice for the people in

dispute. After the enactment of Law No. 50/2009 concerning Amendments to Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts, especially in Article 49 the authority to resolve Shari'ah Banking disputes was the absolute authority or competence of the Religious Courts.

Sudikno Mertokusumo (2002) explained that *"the absolute competence of the Religious Courts as one of the holders of judicial power has progressed as a response to legal developments and the legal needs of the community"* Article In Article 49 letter (i) Law No. 50/2009 concerning Amendments to Law No. 3/2006 on Amendments to Law No. 7/1989 concerning Religious Courts, outlining that; *"The Religious Court has the authority to examine, decide and settle cases at the first level between people who are Muslim, among others in the field; Marriage; Legacy; Will; Grant; Waqf; Zakat; Alms, and Shari'ah Economics"*. Elucidation of Article 49 letter (i) includes the settlement of sharia banking disputes or cases (Mertokusumo, 2002).

In the article, it was also explained that the parties who are allowed to dispute are *"between people who are Muslim"* meaning people or legal entities who automatically submit themselves voluntarily to Islamic law without coercion. What is meant by *"between people who are Muslim"* is including a person or legal entity which automatically submits itself voluntarily to Islamic law regarding matters which fall under the authority of the Religious Court.

The disputes in the field of sharia economics under the authority of the Religious Courts include disputes in the field of sharia economics between financial institutions and Islamic financing institutions and their customers. Apart from the authority as described above, Article 49 of Law No. 3/2006 also regulates the absolute competence (absolute authority) of the Religious Courts. Therefore, the parties who enter into an agreement based on sharia principles cannot make a choice of law to be tried in another court. In this regard, Rifyal Kaaba explains that *"with the issuance of Law No. 3/2006 gave full authority to the Religious Courts which led to a fundamental change, namely the addition of authority in the field of sharia economics covering sharia banks, sharia insurance, and others"* (Kaaba, 2006).

Based on the description above, that the institution authorized to resolve disputes between banks and customers in the conversion of conventional banks to Islamic banks becomes the authority of the Religious Courts, after the enactment of Law No. 3/2006 and Law No. 21/2008. Meanwhile, before the conversion is carried out, it was still subject to the agreement agreed by the bank with the customer by the freedom of contract principles agreement and *pacta sun servanda*.

Non-Litigation

Settlement of disputes through non-litigation channels or not using a judicial institution was known as a peace mechanism, whether carried out between parties or through other parties known in Islamic law as *syuro* (deliberation) and *shuluh* (Ichsan, 2015). Court as the first and last resort Ichsan. In dispute resolution, it is still seen by some circles that it only produces false agreements, has not been able to embrace common interests, tends to cause new problems, was slow in resolving it, requires high costs, was not responsive, causes problems among the disputing parties, and occurs many violations in its implementation.

This was seen as less profitable in the business world, so a new institution was needed which is seen as more efficient and effective. As a solution, a non-litigation dispute resolution

model was developed, which is considered to be more able to accommodate the weaknesses of the litigation model and provide a better solution. The process outside of litigation is seen as producing a win-win solution, ensuring the confidentiality of disputes of the parties, avoiding delays caused by procedural and administrative matters, resolving problems comprehensively in togetherness, and maintaining good relations. In the Arbitration Law and Alternative Dispute Resolution, it was explained that the definition of Alternative Dispute Resolution was a dispute resolution institution or difference of opinion through a procedure agreed by the parties, namely settlement using consultation, negotiation, conciliation, or expert judgment.

Law No. 30/1999 explained that the out-of-court dispute resolution was better known as ADR (Alternative Dispute Resolution). Therefore, the types of dispute resolution outside the court that can be carried out by the parties are based on the explanation of Article 55 of Law No. 21/2008, namely deliberations, banking mediation, National Sharia Arbitration Board (BASYARNAS) and National Indonesian Arbitration Board (BANI). Therefore, apart from the judiciary, the parties can resolve the dispute through peace or arbitration or what was known as ADR.

In the event of a dispute between a sharia Bank and its customers regarding the issue of the contents of the contract or *aqad*, the parties can resolve the dispute through non-litigation channels as regulated by applicable laws and regulations and do not contradict shari'ah principles as regulated by Islamic Law which sourced from the al-Qur'an, al-Hadith and other sources of Islamic law.

Arbitration is the first institution to handle sharia banking cases because at that time the authority of the Religious Courts did not yet exist. In Islamic terminology, it is known as *Ash-Shulhu*, which means to cut off quarrels or disputes. In the sense of sharia *ash-shulhu* is a type of contract to end the dispute between 2 disputing people. Alternative dispute resolution is only regulated in Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution. Disputes or differences of opinion can be resolved by the parties through Alternative Dispute Resolution based on good faith by ruling out litigation settlement.

Regarding mediation institutions, the Government has accommodated the need for mediation by issuing Supreme Court Regulation No. 02/2003 concerning Mediation Procedures in Courts. Meanwhile, banking mediation is regulated in Bank Indonesia Regulation No. 8/5/PBI/2006 as amended by Bank Indonesia Regulation No. 10/1/PBI/2008 concerning Banking Mediation. Article 3 paragraph (2) explains that: Mediation in the banking sector is carried out by an independent banking institution determined by the banking association.

About Sharia Banking disputes, the settlement was carried out through the "BASYARNAS" Article 60, this was based on Article 55 paragraph (2) of Law No. 21/2008 concerning Sharia Banking as well as through the BANI. Based on the Circular Letter of the Supreme Court of the Republic of Indonesia No. 08/2008 concerning the Execution of the Decision of the Sharia Arbitration Board (BAS), it is explained that the definition of BAS is "an institution chosen by the disputing parties to give decisions regarding certain disputes in the field of sharia economics, including sharia banks.

Then in point 3, it is explained that the BAS decision is final and has permanent and binding legal force Article 60 of Law No. 30/1999, therefore the parties must implement the BAS decision voluntarily. However, point 4 opens the possibility to be brought to the Religious Court with the provision that, if the BAS decision is not implemented voluntarily, then the

decision was implemented based on the order of the Chairman of the Court in charge of the request of one of the disputing parties, (Pasal, 1999). Therefore, by Article 49 of Law No. 7/1989 as amended by Law No. 3/2006, as amended again by Law No. 50/2009. The Religious Courts also have the duty and authority to examine, decide and settle cases in the field of shari'ah economics including sharia banking, so the Head of the Religious Courts has the authority to order the implementation of the BAS Decision. However, this was not the case if the parties resolve through BANI, if the BANI Decision is not implemented then it should be resolved at the District Court, because in the opinion of the author, disputes relating to sharia banks are resolved through shari'ah-compliant institutions such as in the Religious Courts and BAS so that the expected results are maximized and can be accounted for both in this world and in the hereafter.

However, specifically for an agreement or aqad made before conversion, it is still possible to settle it non-litigation based on the agreement between the parties (the bank and the customer) as stated in the agreed agreement and by the legal principles of the agreement including; the principle of legal certainty, the principle of justice, the principle of expediency, the principle of agreement or consensual, the principle of *pacta sun servanda* (the agreement binds the parties as to the law for them), so that the settlement is carried out using; deliberation, mediation, arbitration including conventional arbitration.

Ideal Regulation Model for Conversion Dispute Resolution Between Sharia Banks and Customers

Sharia banking dispute settlement as regulated in Article 55 of Law No. 21/2008 concerning Islamic Banking does not provide legal certainty and conflict of norms. This article provides a choice of means of resolving sharia banking disputes by continuing to apply the legal signs as long as they do not conflict with sharia principles. Although it was realized that the settlement of sharia banking disputes is part of the freedom of contract principle and the principle of *pacta sun servanda*, where the parties are free to determine the content and form of the agreement, and the agreement made by the parties was binding as law for those who make it. This is also in line with Islamic law, which gives freedom to everyone to carry out the contract as desired by the parties as long as it is by sharia principles, this is in line with the principle *al musammah*. But on the other hand, the contract that is made must not contradict the law and shari'ah law.

The existence of the provisions of Article 55 paragraph (2) in the framework of respecting the contract that has been made by the parties in terms of selecting the appointed dispute resolution forum if at any time there is a dispute between the parties before the Constitutional Court Decision No. 93/PUU-X/2012 which has canceled it. Then this provision will encourage the general public to use Islamic banking services. But on the other hand, the provisions of Article 55 of Law No.21/2008, regulating dispute resolution options can be confusing and contradictory with each other which will cause legal problems and legal uncertainty.

Therefore, to obtain an ideal regulatory model for resolving Sharia banking business disputes in Indonesia, it was necessary to revise or amendments the provisions of Article 55 of Law No. 21 2008 concerning Sharia Banking, by returning to the provisions of Article 49 letter (i) of Law No. 3/2006 concerning Amendments to Law No. 7/1989 concerning Religious Courts as amended by Law No. 50/2009, in which the authority to sharia banking dispute resolution was

the absolute authority of the Religious Courts, but especially those who are non-Moeslem can be done through the District Court. On the other hand, another alternative can also be made, that for customers, employees or sharia bank companies that are run by non-Muslims, it can be resolved through conventional arbitration institutions or general courts as long as it does not contradict the principles of sharia. In order not to confuse legal norms, the revision of the formulation of Article 55 of Law No. 21/2008.

The legal norms as meant in the above-revised article was intended so as not to conflict with Islamic law and the provisions contained in Article 49 of Law no. 3/2006 concerning Amendments to Law No. 7/1989 as amended again by Law No. 50/2009. This was also based on the reason that the contract made by the parties may not conflict with the law, even though it was based on the freedom of contract principle and *pacta sun servanda*. The principle of freedom of contract was based on Article 1338 of the Civil Code which states that All agreements are made by the law apply as laws for those who make them. The agreement is irrevocable other than with the agreement of both parties, or for reasons determined by law. Agreements must be carried out in good faith (Pasal, 1999).

The formulation of these norms is a way of compromise and takes into account the responsive aspects of the law considering that there are non-Moeslem enthusiasts to become customers, employees, and managers of sharia banks in Indonesia, moreover Syari'at also teaches to be *rahmatan Lil-aalamiin*, even more so. the issue discussed is not a matter of *aqidah* and faith but is a matter of *muamalah* or human relations which are more social, which almost all the time we interact with each other without distinguishing between Muslims and non-Muslims. This will also be a legal model for other shari'ah economic businesses that are developing in Indonesia such as sharia insurance, shari'ah pawnshops, shari'ah capital markets, shari'ah financing institutions, shari'ah cooperatives, ah, and various sharia businesses and economies. ah other. And in other aspects, dispute resolution should not contradict the principles of sharia. However, the most ideal regulatory model is the drafting of a special law on sharia economic dispute resolution including sharia banking as a *lex specialis* from various existing laws and regulations.

CONCLUSION

Dispute resolution regulation between banks and customers is regulated in Law no. 7/1989 as amended by Law No. 3/2006, Law No. 21/2008, Law No. 30/1999, MA Regulation No. 2/2008, POJK No. 1/POJK.07/2013, OJK Regulation No. 1/POJK.07/2014, and Aqad as agreed by the parties. So that the institution authorized to resolve disputes between banks and customers in the conversion of conventional banks to Islamic banks was litigation carried out by the Religious Courts, and non-litigation was resolved through deliberation, mediation, and BASYARNAS. The ideal regulatory model in disputes resolution between banks and customers in the conversion of conventional banks to sharia banks according to positive law in Indonesia, namely by amendments Article 55 paragraph (1) of Law No. 21/2008 or making a special law sharia economic dispute resolution, including Islamic bank.

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