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The Analysis of The Decision No. 1706/Pdt.G/2020/PA.Mdn. Based on The Decision No. 93/PUU-X/2012

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Abstract

This research discusses regarding the sharia economic dispute resolution based on akad which usually occures, with analyzed of the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. according the Constitutional Court Decision No. 93/PUU-X/2012 regarding sharia economic dispute resolution based on akad. The type of this research is library research and in the form of normative legal research. The research approach uses statute approach and case approach with theoretical review by pure theory of law and positivism theory of law. The primary legal materials consist of UUD 1945, KUHPerdata, Law No. 21 of 2008 regarding the Sharia Banking, Law No. 3 of 2006 regarding Religious Courts, Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Law No. 3 of 2004 regarding the Constitutional Court, Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. and Constitutional Court Decision No. 93/PUU-X/2012. The secondary legal materials are books, thesis, and law journals according to the research problems. The colecting datas technique is documentation and the analysis technique uses desciptive analysis. The result of this reseacrh shows that the consideration of the Medan Religious Court Judges' on the decision No. 1706/Pdt.G/2020/PA.Mdn. who declares that It was not authorized to try the lawsuit based on the explanation of Article 3 of Law No. 3 of 1999 which principally states that the court is not authorized to try between parties who have been bound in an Arbitration akad and the Constitutional Court Decision No. 93/PUU-X/2012 does not make it has no legal force. Because the two legal standing is separated. Then, by reviewing of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. regarding the sharia economic dispute resolution

based on akad is contradict with law according to the pure theory of law and positivism theory of law. Because the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 that stated sharia economic dispute resolution through arbitration contradict with UUD 1945.

Keywords: Sharia Economic Dispute, Dispute Resolution, Akad

Abstrak

Penelitian ini membahas permasalahan penyelesaian sengketa ekonomi syariah sesuai ketentuan akad yang sering terjadi, yakni dengan menganalisis putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn. berdasarkan putusan Mahkamah Konstitusi No. 93/PUU-X/2012. Jenis penelitian ini adalah penelitian pustaka dan merupakan penelitian hukum normatif. Pendekatan penelitian berupa pendekatan perundang-undangan dan pendekatan kasus dengan kajian teori hukum murni dan teori positivisme hukum. Sumber hukum primer berupa UUD 1945, KUHPerdata, UU No. 21 Tahun 2008 tentang Perbankan Syariah, UU No. 48 Tahun 2009 tentang Kekuasaan Kehakiman, UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa, UU No. 3 Tahun 2004 tentang Mahkamah Konstitusi, Putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn. dan Putusan Mahkamah Konstitusi No. 93/PUU-X/2012. Sumber hukum sekunder berupa buku, jurnal dan skripsi yang berkaitan dengan masalah penelitian ini. Teknik pengumpulan data berupa dokumentasi dan teknik analisis data menggunakan analisis deskriptif. Hasil penelitian ini menunjukkan bahwa dasar pertimbangan yang digunakan oleh hakim Pengadilan Agama Medan pada putusan No. 1706/Pdt.G/2020/PA.Mdn. yang menyatakan tidak berwenang mengadili perkara tersebut adalah Pasal 3 UU No. 30 Tahun 1999 yang menyatakan bahwa pengadilan harus menyatakan diri tidak berwenang mengadili para pihak yang mencantumkan klausul arbitrase pada perjanjian, dan putusan Mahkamah Konstitusi No. 93/PUU-X/2012 tidak menyebabkan perjanjian tersebut batal demi hukum karena memiliki dasar hukum yang terpisah. Kemudian berdasarkan tinjauan putusan Mahkamah Konstitusi No. 93/PUU-X/2012 terhadap putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn. tentang penyelesaian sengketa ekonomi syariah berdasarkan akad menunjukkan bahwa putusan tersebut bertentangan dengan Undang-Undang berdasarkan teori hukum murni dan positivisme hukum. Karena penjelasan pasal 55 ayat (2) UU No. 21 Tahun 2008 yang menyatakan penyelesaian sengketa berdasarkan akad melalui badan arbitrase telah dinyatakan bertentangan dengan UUD 1945.

Kata Kunci: Sengketa Ekonomi Syariah, Penyelesaian Sengketa, Akad

A. Introduction

The development of sharia economic system in Indonesia has increased today. The products of this economic system are provided by sharia banking. So, all of people can enjoy all of the contract/*akad* that served by the board with sharia rules as the legal basis. To organize the positive law of Indonesia about sharia economic system, the government creates laws and regulations.

With the rapid development of it, there are often found the problems and many obstacles. One of them is called sharia economic dispute. To resolve this problem, the government create the board, law and procedure in guaranting the certainty of the people and parties among the akad.[1] Then the board that known as Religious Courts is the institution with the competence to try and resolve regarding sharia economic dispute by establishing the decision based on the law No. 3 of 2006 regarding Religious Courts and strenghten by the Article 55 paragraph (1) Law No. 21 of 2008 regarding Sharia Banking.[2]

Although the board and regulation have made, there still occures problems about the sharia economic dispute resolution. In this research, the researcher has choosen one of the contradict dispute that has established by the Religious Court, that is one of the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. which regarding the sharia economic dispute resolution.

This dispute refuse the lawsuit that has submitted by the plaintiff to cancel the *akad* with the defendant because he feels wronged by the contract. But, the Medan Religious Court states that it is not their authorized because the

[1]Nurhotia Harahap, "Perlindungan Hukum Terhadap Konsumen Terkait Dengan Kenaikan Harga Masker di Masa Pandemi COVID-19", *Yurisprudentia,* Volune 7, No. 1, June 2021, p. 124.

[2]Aden Rosadi, *Peradilan Agama di Indonesia Dinamika Pembentukan Hukum* (Bandung: Simbiosa Rekatama Media, 2015), p. 82.

resolution has created on the contract to resolve the dispute through arbitration board.

The legal basis of the statement is the Article 55 Paragraph (2) Law No. 21 of 2008 regarding Sharia Economic Dispute Resolution that states In the event that the parties have agreed on a dispute resolution other than as referred to in paragraph (1), the dispute resolution is carried out in accordance with the contents of the contract. With the explanation states that the resolution of disputes referred to other than paragraph (1) is through deliberations, banking mediation, Basyarnas or the other arbitration bodies, or through courts within the General Courts.

According to the Constitutional Court Decision No. 93/PUU-X/2012, the explanation of the Article 55 Paragraph (2) Law No. 21 of 2008 has stated that it contradict with the UUD 1945 and states that the explanation of it has no legal force anymore. So, the absolute competence of Religious Courts regarding sharia economic dispute resolution is the thruth through the litigation. This states to guarantee the certainty by the law as the aim of islamic law system for the *maslahah.*[3]

But in this case, according to the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., has known that the decision is contradict with the Constitutional Court Decision No. 93/PUU-X/2012. Because the Medan Religious Court refuse the lawsuit that submitted by the plaintiff.

Whereas the decision of the Constitutional Court has binding legal force on reviewing articles of the Law based on Article 10 paragraph (1) of Law No. 24 of 2003 regarding the Constitutional Court. So that decision becoming the law

[3]Ikhwanuddin Harahap, "Pendekatan Al-Maslahah Dalam Fatwa Majelis Ulama Indonesia (MUI) Nomor 24 Tahun 2017 Tentang Hukum dan Pedoman Bermuamalah Melalui Media Sosial", *Yurisprudentia,* Volume 3 No. 1, June 2017, p. 4.

that must consider by the next decision with relate to the sharia economic dispute resolution based on *akad.*

B. Research Method

This research is a normative legal research, so it belongs to library research category. That research conduct analysis based on document studies on written regulations with the aim of solving research problems.[4] This research use two type approaches, namely the statute approach and the case approach. Collecting datas used by documentation in the form of legal sources from several decisions, laws and regulations, books and journals in resolving sharia economic disputes. For the data analysis, used by descriptive analysis with law interpretation to construct the legal argumentation as a conclussion in the form of prescription which stated and recommend. There are two types of legal material in this research. The primary legal materials are UUD 1945, KUHPerdata, Law No. 21 of 2008 regarding the Sharia Banking, Law No. 3 of 2006 regarding Religious Courts, Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Law No. 3 of 2004 regarding the Constitutional Court, Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. and Constitutional Court Decision No. 93/PUU-X/2012. The secondary legal materials are books, thesis, and law journals according to the research problems about sharia economic dispute resolution. The problem of this research are the consideration of Medan Religious Court Judges' that refuses the lawsuit and the reviews of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. about

[4]Ahmad Iffan and Mustafid, "Kajian Sosio Legal Dalam Pemahaman Syariat Islam dan Hukum Sosial Masyarakat Terhadap Penguatam Perkawinan, *Journal el-Qanuniy,* Volume 1, No. 7, Januari-Juni 2021, p. 98.

sharia economic dipute resolution based on *akad*.

C. Discussion and Research Result

Sharia economic dispute are disputes arising from sharia business law actions. Contradict is a dispute between two or more people regarding a right and obligation due to a difference in understanding of something that was agreed upon in an engagement based on sharia. To resolve the dispute, there are two ways to choose between litigation and non-litigation.

The resolution of sharia economic dispute in litigation is the the way through a judicial body formed by the Government to resolve disputes in society.[5] The court that has absolute competence with this problem is Religious Courts according to the Article 55 Paragraph (2) Law No. 21 of 2008 regarding Sharia Banking. And strengthen by Law No. 3 of 2006 regarding Religious Courts that state the sharia economic dispute resolution is the absolute competence of Religious Courts.

Then the other ways to resolve sharia economic dispute is non-litigation. this is a process of resolving disputes through an alternative dispute resolution agency in accordance with the procedures agreed upon by the parties. The types of dispute resolution are in the form of mediation, negotiation, conclusion, conciliation, and arbitration. The legal basis related to the method of resolving disputes outside of the court/non-litigation is Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Although the ways that can choose for sharia economic dispute resolution have established, there still occures the problem. The problem that often occures is the resolution based on Akad. That can observe from the Medan Religious Court Decision No.

[5]Lukman Santoso Az, *Aspek Hukum Perjanjian* (Yogyakarta: Penebar Media Pustaka, 2019), p. 144..

1706/Pdt.G/2020/PA. Mdn. That states not authorized to try the lawsuit submitted, because the parties have agreed to resolve the problem through Basyarnas on the akad.

To find out the considerations used by the Medan religious court judges in deciding case No. 1706/Pdt.G/2020/Pa.Mdn., required an analysis using statute approach and a case approach. The statute is the type of approach uses a review of the laws and regulations related to the case. The the case approach type of approach that carried out by examining cases related to the main issues involved, so the reason of the Consideration can conclude with the similar cause.[6]

By analysis of statute approach, that found that the contents of Article 49 of Law No. 3 of 2006 explains that the Religious Courts has the competence to resolve cases regarding sharia economic disputes. The similiar is also explained by theLaw No. 21 of 2008 in article 55 paragraph (1) that the resolution of Sharia Banking disputes is carried out by courts within the scope of the religious courts.

But, based on the Medan Religious Court Decision's consideration, accordance with Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Article 3 states that the District Court, Which in this case is equated with the Religious Court, is not authorized to adjudicate disputes between parties who have been Bound in an Arbitration agreement. This is a provision made to carry out a separation of powers with the aim of alleviating the task of the religious courts in deciding various cases brought forward.

The courts institution is an important part and becomes the center of attention for the continuity of human life because in general social obligations aim to maintain

[6]Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: KENCANA, 2021), p. 133.

the stability of social life and protect the personal rights of each individual.[7] So that the judiciary must carry out its duties truthfully in order to protect the rights of citizens to create the rule of law, especially sharia law in Indonesia which is the absolute competence of religious courts.

Then by the analysis of case approach, the researcher chooses some decisions that established by Medan Religious Court. There are the Medan Religious Court Decision No. 2206/Pdt.G/2015/PA.Mdn., then the Medan Religious Court Decision No. 2539/Pdt.G/2019/PA.Mdn. and for the last is the decision No. 1516/Pdt.G/2020/PA.Mdn. All of theese disputes state that It is not authorized of Medan Religious Court to try the lawsuit because of the arbitration clause on the akad/contract.

After discussing the dispute, the researcher proceeded to the dispute among the parties. According to the positive law of Indonesia on the Article 1320 KUHPerdata states that there are four conditions for an agreement to be valid, namely the existence of an agreement by both parties, the ability to act, the object of the agreement (a certain matter), the existence of a lawful cause according to law.

The existence of a lawful case according to the law means that the agreement in akad must be allowed by the law and not contradict. If it contradict the law, it must state null and void for the law. That is the legal basis to review the Medan Religious Court Decision No. 1706/Pdt.G/PA.Mdn. based on Constitutional Court Decision No. 93/PUU-X/2012. Because the sharia economic dispute resolution that created on akad through arbitration

[7]Hendra Gunawan, "Sistem Peradilan Islam", *Journal El-Qanuniy,* Volume 5, No. 1, January-June Edition 2019, p. 92.

Board like Basyarnas has stated contradict to the law.[8]

However, the Constitutional Court Decision No. 93/PUU-X/2012 makes article 55 paragraph (2) Law No. 21 of 2008 has no further explanation, resulting in a legal vacuum. But, the decision must be clearly interpreted for the editorial that has been stated in the decision. Then It caused the law dualism of interpretation the dispute and makes the chance about uncertainty of the law with the law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution that rules the dispute resolution through arbitration board.

For the next observed, the researcher discuss the sharia economic dispute resolution based on akad by using *fiqh muamalah.* Because the source of sharia economic system especially for akad is according to the islamic law.[9] Akad is formulated as an engagement between some parties or something said from someone binding effect on both parties between the will and the realization of what has been committed. Basically, every type of akad/contract activity carried out by humans is generally permissible as long as it does not conflict with Islamic law.[10]

According to the of sharia economic dispute resolution in Indonesia, the institution that has competence to try the lawsuit is Religious Courts. With this competence, It must accepts and resolve all the dispute regarding sharia economic. Because that competence is a responsibility as legal government institution. This resposibility has stated in *Qur'an, Sura Al-Hujurat/*49:10.

[8]The Constitutional Court Decision No. 93/PUU-X/2012.

[9]Era Mulyani, Syafri Gunawan and Muhammad Arsyad Nasution, "Pelaksanaan Akad Jual Beli Tanah Perspektif Fiqh Muamalah", *Journal El-Thawalib,* Volune 1, No. 2, 2020, p. 4.

[10]Sri Sudiarti, *Fiqh Muamalah Kontemporer* (Medan: FEBI UIN-SU PRESS, 2018), p. 53.

إِنَّمَا الْمُؤْمِنُوْنَ اِخْوَةٌ فَاَصْلِحُوْا بَيْنَ اَخَوَيْكُمْ وَاتَّقُوا اللّٰهَ لَعَلَّكُمْ تُرْحَمُوْنَ

The believers are brethren, therefore make peace between your brethren and be careful of (your duty to) Allah that mercy may be had on you.

Beside of that, regarding the cancellation of contract proposed by the plaintiff to the Medan Religious Court must be accepted without no refused. But in accordance with the akad in case to resolve the dispute out of the court is allowed as long as not contradict with the law. Because the resolution through non litigation or out of the court system gives the win-win solution and resolve the dispute by kinship with the faster procedure. This separated competence is the implementation of *qawaid principle* that is *maslahah* that gives the values for the people to guarantee the certainty by the law.[11]

From the disputes which have happened in Indonesia, especially the sharia economic dispute resolution on the decision No. 1706/Pdt.G/2020/PA.Mdn. can observe that the implementation of *sharia* rules in the positive law is less. Although the islamic intellectuals have tried to make the *sharia* as the basic rule of Indonesia, not all of the society are Islamite.[12] So, the *sharia* rule just involved in the positive law and the implementation has followed for people that want to use the contract or agreement about it.

To answer the research promblems and get the conclussion, It needs further dicussion. Then, the researcher makes reviewed of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court decision No. 1706/Pdt.G/2020/PA.Mdn. by the pure theory of law that explains that

[11]Fatahuddin Aziz Siregar, "Langkah-Langkah Mengetahui Maqasid Asy-Syari'ah, *Journal Al-Maqashid*, Volume 4, No. 1, June 2018, p. 2.

[12]Adi Syahputra Sirait, "Problematika Penerapan Hukum Pidana Islam di Indonesia", *Journal El-Qanuniy*, Volume 8, No. 1, June 2022, p. 112.

law consists of a system of norms and has a hierarchy where lower norms must refer to higher norms and the highest norms are called basic norms and posotivism theory of law that explains that law is an order in the form of statute regulations made formally by an institution authorized by the state.[13] According to the pure theory of law, basic norm in the Indonesian legal system is UUD 1945.

After analyzing the judge's considerations on the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. related to the sharia economic dispute resolution that submitted by the plaintiff in the aim of cancelation sharia economic akad agreements with the defendant, the researcher found the fact that the decision was determined based on a review of the Constitutional Court decision No. 93/PUU-X/2012 is contradict with the basic norm, that is UUD 1945 as the highest hierarchy of the law according to the Law No. 12 of 2011 regarding the Establishment of Laws and Regulations.

On the Constitutional Court Decision No. 93/PUU-X/2012 states that the explanation of article 55 paragraph (2) law No. 21 of 2008 regarding the resolution through Basyarnas based on akad does not have binding legal force. Although it is not established as law form, the Constitutional Court Decision based on Article 10 paragraph (1) Law No. 24 of 2003 regarding the Constitutional are final and have permanent legal force from the time force from the time they are pronounced and no legal remedies can be taken.[14] So, this become one of the legal source to resolve the case related to the decision, and the

[13]Mukti Fajar Nur Dewata and Yulianto Achmad, Dualisme Penelitian Hukum Normatif & Empiris (Yogyakarta: Pustaka Pelajar, 2013), p. 137.

[14]Puji Kurniawan, "Pandangan Hukum Progresif dan Maslahah Mursalah Terhadap Putusan Mahkamah Konstitusi Nomor 46/PUU-VII/2010 Tentang Pengujian Undang-Undang Nomor 1 Tahun 1974", *Yurisprudentia,* Volume 7, No. 2, December 2022, p. 256.

main problem of the disputes there will come through must be considering by It.

The next reviewed by positivism theory of law. In accordance with the principles of positivism law theory, law is an order formed by the government and codified in writing in a hierarchical order so that the law can be realigned to avoid legal uncertainty. As it is known that the decision of the Constitutional Court is a final decision and can carry out a review of statute regulations against laws at the same level or higher laws, based on the UUD 1945.

When observed on the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., at first glance, it can be acknowledged that freedom of contract is one of the reasons for choosing a dispute resolution forum. However, This is not the case, because this freedom is permissible as long as it does not violate the law based on the Article 1320 KUHPerdata.[15] When it violates the law, so it must be null by the law and the institution that has competence to cancel the contract must resolve this dispute.

Based on the study of the positivism theory of Law, the regulation in this case the decisions of the Medan Religious Court, must refer to existing regulations and must not conflict with the above regulations. Among the Law No. 30 of 1999 with Constitutional Court Decision No. 93/PUU-X/2012 can be said to be at the same level, then in terms of the latest and specific regulations. In this case, more emphasis should be placed on the Constitutional Court Decision.

As for the settlement of disputes on the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., which has stated that It does not have authorized to try the lawsuit

[15]Syapar Alim Siregar, "EBA-SP Berdasarkan Prinsip Syariah", *Yurisprudentia,* Volume 7, No. 2, December 2021, p. 300.

submitted, legal efforts can still be made based on article 328 of the Civil Code concerning filing an appeal related to the authority to try even though the court says it has no authority, but in fact have authority. However, after researchers traced The PTA Medan decision through the website of the Direktori Putusan Mahkamah Agung, there is no appeal decision was found regarding the Case. Because the appeal time is expired, the plaintiff must follow the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. to settle the dispute through the Basyarnas.

Based on the consideration of the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., the lawsuit that submitted must resolve through the Basyarnas based on akad. That is according to the Law No. 30 of 1999 and the Constitutional Court Decision No. 93/PUU-X/2012 as well. Because that is the separated legal basis.[16] But in reality as the newer legal material, that Constitutional Court states that creating arbitration clause on the akad is contradict with the UUD 1945 as the highest hierarchy of Law in Indonesia.

D. Conclussion

After analazing the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. that is regarding the sharia economic dispute resolution that reviews by the Constitutional Court Decision No. 93/PUU-X/2012, the researcher have been found that the consideration of the Medan Religious Court Judges' on the decision No. 1706/Pdt.G/2020/PA.Mdn. who were declared that It was not authorized to try the lawsuit based on the provisions of Article 3 of Law No. 3 of 1999 which principally states that the Court, which in this case is the Religious Court, is not authorized to try between parties who have been bound in an Arbitration agreement on *akad* and

[16]The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

the Constitutional Court Decision No. 93/PUU-X/2012 does not make the arbitration clausul on the agreement does not has legal force. Because the two legal standing is separated.

Then, by reviewing of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. shows that the Medan Religious Court decision regarding the lawsuit filed to resolve the sharia economic dispute based on *akad* is contradict with the Constitutional Court Decision No. 93/PUU-X/2012. Because the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 has been stated that no binding legal force and contradict with the basic norm that is UUD 1945. So, based on the pure theory of law and positivism theory of law, that Religious Court Decision is contradict with the basic norm and another decision/law on the same hierarchy and the highest that is Constitutional Court Decision No. 93/PUU-X/2012.

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