

Reconstruction towards Model for Dispute Resolution of Islamic Business in Indonesia

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Abstract : *The presence of Act No. 3 of 2006 on the Amendment of Act No. 7 of 1989 for the Religious Courts, in principle, has brought great changes to the authority of the Religious Courts in Indonesia. One fundamental change is the expansion of the authority of religious courts to adjudicate disputes Islamic business. Indeed, the presence of Muslims religious courts competent to hear disputes based sharia, it should be welcomed since it is at once to accommodate the demands of the law for Indonesian Muslims in accordance with the demands of sound belief. Unfortunately, normative-procedural, Islamic business dispute resolution mechanisms in the religious court still adopts the model for dispute resolution that refers to the Dutch colonial law, such as BW, KUHD, HIR, and RBG. Of course, it contains philosophical values in the Dutch colonial products, it still adhered to secularism and liberalism which is contrary to the values of Islamic philosophy. It is necessary to do the reconstruction of Islamic business dispute resolution in Indonesia actually that relies purely on the basis of the mechanism of Islamic law. The Strategy that can be done to restructure the Islamic business paradigm of dispute resolution in Indonesia, namely the strengthening of institutions of non-litigation dispute resolution, such as the body of arbitration based on sharia. In order to regulation on body of sharia arbitration has the force in law, it is necessary to formalize the existence of religious courts decisions in the body of sharia arbitration, in the form of a court warrant. Thus, in order to the reconstruction on model for Islamic business of dispute resolution in Indonesia, is basically to restore the spirit of the relationship-based economy sharia law in Indonesia, which remains grounded to the pure Islamic faith.*

Key Words: *Dispute of Islamic Business, Islamic Court, and Sharia Arbitration*

I. Introduction

The presence of Act No. 3 of 2006 on the Indonesian Religious Courts as the amendment of Act No. 7 of 1989 has brought a fairly fundamental change for the authority to hear the religious courts in Indonesia. The fundamental change, is the expansion of the religious courts jurisdiction to try for Indonesia, which is not only given the authority to hear cases of family law but also prosecute legal cases in business that has the characteristics of sharia.

The expansion of the judge's authority on the religious court in Indonesia is regulated by Law No. 3 of 2006. the actual law is to accommodate the interests of the Muslim community in Indonesia, which until now in starting to realize the importance of sharia-based business transactions. The awareness of the Muslim majority Indonesia, to conduct various transactions sharia-based economy, it appears from the rise of economic institutions that carry out business and financial activities by the principles of sharia. For example, among others the establishment of Islamic banking, agencies of sharia pledge, and agencies of sharia insurance.

Based on that point of view, the rise of business institutions or the sharia finance, becomes an indicator for the rise of consciousness majority of Muslims in Indonesia to the application of Islamic law in their *muamalah* each others that life free from usury and to throw illicit business activities. Moreover, the presence of conventional banks are considered not able to accommodate the demands of the expected changes in the business system is still vulnerable use usury system. On the other hand, conventional banks are also obviously still does not care whether the screening of clients' money to invest in a business that has made lawful or unlawful according to the provisions of Islamic law. Indonesian Muslims began to realize that it needs for activity of business in accordance with the teachings of Islam and to give up common activities performed by loaded with usury and investment activities on the object the forbidden religion.

In the Islamic business in transactions practiced by the muslim community in Indonesia, also not yet rule out the model of legal disputes based on Dutch colonial law. Although, the religious court grants the authority to hear the case between the Muslims in the field of Islamic business. But the conflict or misunderstanding that takes place between the parties, for the settlement of the dispute, it still wields the the model for dispute resolution that refers to the Dutch colonial law, such as HIR, and RBG. However, the context of Islamic business dispute settlement developed on religious courts in Indonesia is currently still poses some problems, so it is suspected that the dispute settlement mechanism seems precisely ignore sharia principles that should be the basis for the character of the religious courts to adjudicate disputes Islamic business posed to him.

For this reason in this paper, the author want to offer idea of Islamic business dispute resolution mechanisms which adhere to the principles of sharia, especially towards religious court in Indonesia. In order to the Islamic business dispute resolution mechanisms that takes place in the Indonesia religious court is not to be artificial.

II. Problem Formulation And Writing Method Used

To sharpen the focus of this paper, the author limit the discussion to the two basic writing problem statements include: First, what is the basic characteristics of Islamic business settlement mechanism in the Indonesia religious court? Second, how is the reconstruction of Islamic business model of dispute resolution in Indonesia?

For a discussion of these two probles formulation, writing method in using as the basis of the analysis, is a method normative legal writing. In this paper, the analysis type used refers to the writing of the law (legal research), which is characteristic of writing coherence looking for the truth. That is the truth that is based on the correspondence between the studied with the rules set. Peter Mahmud Marzuki (2005:93) said that legal writing is a process of finding the rule of law, principles of law, and legal doctrine in order to answer the legal issues faced. Which according to him, that is where the writing process of law should be moved because it is in line with the prescriptive character of jurisprudence. The purpose of this writing, specifically is to provide an explanation of the Islamic business model of dispute resolution in the real Indonesia to remain grounded to the pure principles of sharia.

III. Conflict and Dispute In Indonesia Legal Theory

1. Term of Conflict and Dispute

The term of conflict or dispute according to the Dictionary Indonesian language, is anything that causes disagreement, dispute or disagreement (Dani K: 2002). Based on the terminology, the conflict or dispute is some thing that caused the disagreement between two or more parties about something matters (Wahyudi, 2008:35). Conflict or dispute in the opinion of Jimmy Joses Sembiring (2011:3-4), occurs because of a difference of opinion or perception or misunderstanding which is a depiction of a conscious environment based on one's understanding.

Similarly, the term dispute or conflict derived from the English term (John M Echols and Hasan Sadily, 2003), that of the word conflict or dispute. Both of these terms, basically contains the same sense that the difference in interest between the two parties or more, however, differ in terms Indonesian both in terms of absorption. Conflict in the Indonesian absorbed into conflict while the dispute is translated word by word dispute (Mahrudin, 2010:192).

Based on the explanation of the term, the most among Indonesian legal authors equate the use of the term conflict with the terms of dispute as the two terms have the same meaning. Thus, disputes or conflicts can be interpreted as a dispute between two or more parties who feel aggrieved with each other, and so that the parties resort to the courts or consultation to resolve disputes or differences that occur it (Sarjita, 2005:8).

2. The concept of Dispute Resolution in Indonesia

Almost in every area contained in the Indonesian legal dispute, the parties related to the settlement of disputes usually take the dispute with a variety of ways. How to resolve disputes that have been taken so far is through the court (litigation) and the settlement of dispute outside the court/non litigation (Bambang Sutiyoso, 2008: 232-234). The completion of the court, aiming to obtain justice and the certainty of law, while the out of court settlement, it is precisely the main priority to gain peace in dealing with a dispute between the parties. the out of court settlement in dispute, not looking for a right or wrong. When you need to find out who is right and wrong, it is not going to produce a favorable decision for the parties in the dispute. In Indonesia, non-litigation dispute resolution or alternative which better known as **Alternative Dispute Resolution (ADR)**, is set in Act No. 9 of 1999 on Arbitration and Alternative Dispute Resolution (Nevey Varida Arini, 2012: 280).

Dispute resolution mechanism in this way is classified in non-litigation model, it is a conflict or dispute resolution concept cooperative directed to an agreement of the solution to the conflict or dispute is a win-win solution. ADR developed by legal practitioners and academics as a means of dispute resolution that it have more access to justice (Rachmadi Usman, 2003:4).

3. Dispute Resolution Sharia

According to Abdul Manan (Based on his presentation at Seminar on Economic Islam on May, 29th-31th in Goodway Hotel, Jl. Imam Bonjol No. 1 Nagoya Batam Island), Islamic business dispute settlement in principle, it prefer the model of dispute resolution between the two parties which in the dispute amicably (AW Munawir, 1984: 843). The settlement of dispute that based peace to end a case, is highly recommended by Allah as mentioned in Surat an-Nisa 'verse 114, "*There is no good in most of their secret talks. Except those who enjoins charity or goodness or reconciliation between people; and whoever does thing seeking Allah's pleasure, we will*

give him a mighty reward ". There are three pillars that must be met in a peace treaty to be done by the person doing the peace, ie *ijab*, *qabul* and *lafazd* of the peace agreement. If these three things are met, then the agreement that has been going on as expected. Of the peace agreement will be born of a legal bond, which each party is obliged to carry it out. Keep in mind that the peace deal agreed it can not be canceled unilaterally. If there are those who do not approve the contents of the agreement, then the cancellation of the agreement must be approved by both parties.

The terms of validity of a peace treaty, it can be classified as follows:

- a. Matters relating to the subject. About the subject or the person who doing the peace should be competent to act according to the law. Aside from the people who carry peace to be people who have the power or authority to waive his right to have or things referred to in peace. Not necessarily, every person competent to act has the power or authority. People who is competent to act according to the law but do not have the authority to have such first: to property guardian who is a ward's person, both: the trustee in the property under its control, third: *nazir* (supervisor) *waqf* property rights *waqf* under his supervision.
- b. Matters relating to the object. About the object of peace must meet the provisions of the first: in the form of property, both tangible and intangible such as intellectual property rights, which can be valued or appreciated, can be handed over and rewarding, both: it can be seen clearly that bore no ambiguity and vagueness, which in the end can also give birth to new disputes on the same object.
- c. The issue may be reconciled. Muslim jurists agree that things can and should be reconciled only in the form of property disputes that can be assessed and limited only to the rights of sharia that can be replaced. In other words, the question of peace is only allowed in the field muamalah alone, while the things that deny God's rights can not be reconciled.
- d. Implementing in peace. Implementing a peace agreement could be implemented in two ways, ie, outside the trial court or through a court hearing. Beyond the trial court, dispute resolution can be implemented either by themselves (which do peace) without involving others, or ask for help from others to be a mediator (referee), is later referred to arbitration, or in the Shari'ah called *Hakam*.

According to Indonesia Legal System that implementation of the peace agreement by the trial court, it be held at the time of the trial court is being processed in court. In in Act No. 9 of 1999 on Arbitration and Alternative Dispute Resolution, is determined that before the case is processed, or can also be processed even during decided by the Court but does not have any binding legal force, the judge should encourage the parties to the dispute in order to make peace. If the judge managed to reconcile the parties to the dispute, the decision is made peace, both sides are doing the peace sentenced to comply with the peace that they have agreed (Asyur Abdul Jawad Abdul Hamid, 1996: 230).

IV. Problem on The Dispute Settlement Towards Conflict of Islamic Business In Indonesia

Observing the settlement characteristics of Islamic businesss in Indonesia, as embodied in the law of religious courts in Indonesia, also based on the fact of the trial court dispute settlement religion in Indonesia, seems still transplanting principles are subject to dispute settlement under the laws of the Dutch colonial heritage as set in HIR and RBG. Similarly, the dispute settlement mechanism of Islamic businesss in the religious courts are still grafted HIR models and RBG. It can be behold that dispute settlement procedures and the structure of the composition of judges who are not much different from what takes place in the general court in Indonesia (The results of observations the author on trial procedures that take place in some of the religious courts in Indonesia in 2014).

Based on research conducted by Cahyati in 2012 on dispute resolution religious courts and state courts, which took up studies in Mataram, it was indicated that the religious court in a formal examination of the cases submitted to characterized sharia, it still followed the rules of the game as it was run by a religious court subject to the principles of western law Dutch colonial heritage. It means that rules for settling disputes which are run by a religious court in Indonesia, it still remains subject to the rules in western law Dutch colonial heritage. It indicates that implementation For Dispute Resolution of Islamic Business In Indonesia no longer pure upright on the principles of sharia. Even though, the principle of religious courts in carrying out its role as one of sharia justice agencies in Indonesia, it should not be out of the corridors of sharia as the basic principle.

Normative rules in Islam, providing a fundamental limitation, that a muslim to arbitrate and resolve their cases must not conflict with Sharia principles as stated in the Qur'an and the Hadith of the Prophet Muhammad. The importance of safeguards purification of Islamic sharia law in resolving disputes between them, is one of the important obligation to maintain the quality of their faith against the rules of Allah. Care purification sharia as part of Aqeedah Muslim guard is also part of the commemoration of Prophet Muhammad to follow his people, as in the hadith: "*There is a Muslim believer of you before he makes his desires are subject to what I take*".

Characteristics of dispute resolution Islamic religious courts are still adopting legal norms which refers to court rules Dutch colonial, it becomes in fact which found in the religious court for dispute resolution in Indonesia. It makes the process of dispute resolution in a trial process cumbersome, costly, and takes a long time. These conditions led to the search for justice for the people of Indonesian Muslims who use religious courts to resolve their dispute became frustrated and no longer trust that is so great against religious courts. Results of research conducted by Cate Suner under the coordination of the Indonesia Supreme Court (Mahkamah Agung Indonesia) and AusAID in 2009, showed that the moslems are generally reluctant to use religious courts as a means to resolve business disputes among others. Of course, in the opinion of the author, their access to justice via the religious courts would be an obstacle which hit the high cost.

In the Shariah perspective, those seeking justice so not allowed to bear the cost of the case even if necessary seeking justice it should be exempt from any court fees will be charged to them. In the history of Islamic justice exemplified by the Prophet Muhammad and the reign of the companions, none of the Muslims who charge the case when they face a judge (*Qadhi*) to settle lawsuits between them.

A litigation settlement of religion in Indonesia, which still follows the multilevel judicial system, such as the court of first instance, appellate and cassation, also the characteristics that affect the existence of the religious courts. Thus the characteristics of course, cause sharia court dispute resolution tends convoluted and takes a long time. Characteristics of court dispute resolution in the Islamic perspective, not as it is known in our current justice system which adopts the Continental European model systems. Namely know multilevel judicial system. The judicial system in Islam is that adopts a single character justice. That is, if the judge (*Qadi*) in the Islamic court has issued a legal ruling against the prosecution of dispute, the decision of the judges is fixed and definite. So in the Islamic judicial system, no longer known mechanism appellate court or appeal. On this basis, the court in the judicial system of Islam, recognize very strict evidence system, careful, and cautious. It is intended that the judge's ruling issued truly a judge's ruling that provide legal certainty as well as satisfying the legal sense of justice seekers.

Accordingly, the trial procedures in the judicial system of religion in Indonesia, which is actually still costly and tend to be complicated. It is not surprising that the Muslim community seeking justice in this country, especially those who entrust his case against the religious court, in the end put to distrust their dispute on Islamic business under the auspices of the religious court.

The argument the author, about the distrust of the judiciary in general, has been revealed by research Gunawan Jatmiko in 1998, which given the conclusion that the Indonesian public perception both in rural and urban, consider the court as an institution is not appropriate to resolve their case . The reason, inspection procedures in court to face the bureaucratic procedures were very long.

V. Reconstruction of Islamic Business Model Dispute Resolution in Indonesia

To reconstruct the structure of the religious courts in Indonesia, based on the principles of sharia according to the author's opinion, namely by creating a religious justice agencies which not be hierarchical, simple, fast, no charge, is a thing impossible since it concerns the politics of law and foundation legal ideology in the Indonesia legal system that supported the structure of the judiciary in our constitutional system. Of course, it is politically and ideologically, when the idea of this author will be delivered offered to the holders of power authority in this country, it will lead to a variety of rejection and controversy. The idea of this author, also will not be associated with Indonesia's constitution.

To that end, the most logical idea, according to the conditions of Indonesia structure of the judiciary, to reconstruct the model for Islamic business dispute resolution in Indonesia, is to restructure the Islamic business dispute resolution institutions that use non-litigation institutions, namely the path of dispute resolution outside court. Because the path of dispute resolution outside the court mechanism (non-litigation), for the case of Islamic business in Indonesia, it can be reconstructed in accordance with the principles of Shariah. Moreover, the settlement of disputes outside the courts mechanism path, it can ensure legal certainty, not convoluted, saving, is not high cost, and lasts briefly, it dose not take quite a long time.

Non-litigation dispute resolution in the Islamic perspective is more priority aspects of peace. Here preferred not win or lose, but the main priority is a win-win solution. Emphasis on aspects of peace in the settlement of disputes between the parties to the dispute in the Islamic perspective, it is highly recommended as the Hadith of the Prophet Muhammad, "*Would I tell something greater than the degree of prayer, fasting and alms?*" *They replied: "true."* *He said: "reconcile people thinking about the relationship"*. For this reason, in order to Islamic business dispute resolution in Indonesia, can be run according to the principles of sharia in pure, it should be done with the mediation scheme which is based on deliberation. Through mediation, the most important is to remember that the mediator acting as dispute settlement in conflict of economic business, he should a scholars or jurists in *muamalah* who understands business issue. He very well understands *sharia* law especially *sharia* in business transaction. Obviously also, he in question must have the mentality of Islam with sincerity good.

Dispute resolution using mediation mechanism which is based on aspects of the peace, not simply intended as a peaceful way that ignores the realization of the right parties feel aggrieved. Settlement of this dispute, it remains to accommodate the interests of the injured party rights. Including the imposition of an obligation to those who are in default. In order to the resulting decision in mediation, it can be received by the parties to the dispute and legally enforceable, it should the verdict is recorded before a notary, which is authorized then made in the form of an authentic deed to bind both parties to the dispute. Loading decision deed, is intended to further bind the implementation of a promise that must be met by the parties to the dispute, as a logical consequence that a Muslim must fulfill their promises. As stated in the Qur'an Surah Al-Maidah verse (1) that a Muslim must fulfill its promises.

VI. Conclusion

Based on the explanation, author provides conclusions as follow: Basic characteristics of sharia business settlement mechanism in Indonesian religious court, still influenced by legal norms Dutch colonial heritage, which it is seen from the judicial procedure in the religious courts are still using HIR guidelines, RBG, and BW. As a result, the dispute settlement mechanism Islamic religious courts became convoluted, lengthy process, and the costs are quite high. Of course, the characteristics of sharia dispute resolution by the religious court in Indonesia, not yet pure upright on the principles of sharia.

To reconstruct For Dispute Resolution of Islamic Business In Indonesia, it most probably can be done by through the strengthening of the model dispute resolution outside the courts (non-litigation), using mediation mechanism involving the jurists field of Islamic businesss. Mediation is used it is relying on deliberation, so that the resulting decision is a win-win solution not win or lose. Through this model of dispute resolution at least to maintain the purity of sharia as a parameter Islamic business dispute resolution among Muslims in Indonesia. As a suggestion in this paper, the author recommend the need to be reorganized model of sharia arbitration existing with regard to aspects of the purity of the principles of sharia.

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