**Settlement of Sharia Banking Dispute Based on Legal Culture As The Islamic Moderation Of Indonesia**

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**Abstrak**: Keberadaan Perbankan Syariah dan Peradilan Agama memiliki keterkaitan yang sangat erat. Perbankan Syariah sebagai lembaga *intermediasi* keuangan syariah dan Peradilan Agama sebagai lembaga peradilan khusus yang mempunyai kewenangan ablosut menyelesaikan sengketa perbankan syariah sama-sama menekankan menerapkan prinsip-prinsip syariah dalam operasionalnya. Perbankan Syariah dan peradilan agama diharapkan dapat bersinergis dengan berpegang pada prinsip syariah. Dasar filosofis Kewenangan Peradilan Agama dalam Penyelesaian sengketa perbankan syari’ah adalah agar terciptanya keselarasan antara pelaksanaan akad dan hukum materiil yang berlandaskan prinsip-prinsip syariah dengan lembaga peradilan agama yang memang merupakan wadah bagi pencari keadilan yang beragama islam sehingga sengketa perbankan syariah dapat diselesaikan secara *kafaah dan istiqomah* melalui putusan pengadilan yang mengedepankan budaya hukum. pertemuan nilai syariah dan budaya yang hidup dalam masyarakat menghasilkan harmoni dalam penyelesaian sengketa perbankan syariah

**Abstract : Settlement of Sharia Banking Dispute Based on Legal Culture As The Islamic Moderation Of Indonesia**

The existence of Islamic banking and religious courts have a very closely knit network. Islamic banking as Islamic financial intermediation institutions and religious courts as special courts which have the authority to resolve the dispute absolute of Islamic banking that is similarly stressed on applying the sharia principles in its operation. The Islamic banking and religious courts are expected together with the hold on the sharia principles. The philosophical basis of the authority of the religious courts in dispute settlement of shariah banking is to create a harmony between the execution of the contract and the law of judicial review based on the principles of Sharia religious courts with indeed Association for Justice-seekers are Muslim so that the disputes can be resolved in the Sharia banking purely (kafaah) and continuously (istiqomah) through court rulings that uphold the culture of law. meeting the values ​​of sharia and culture that live in society produces harmony in terms of Islamic banking

**Kata Kunci:** Penyelesaian Sengketa, Perbankan Syariah, Budaya Hukum

**Introduction**

Pursuant to articles 24 and 25 of Law 1945, the administration of justice in order to enforce the law and justice established independent judicial power. The Supreme Court oversees the judiciary in general courts, religious courts, military courts, state administrative courts.[[1]](#footnote-1) In addition to the Judicial Power Law, the Law on the Supreme Court also contributed to the Justice system, namely: Act No. 3 the Year 2009 regarding the Second Amendment Act No. 14 the Year 1985 regarding the Supreme Court (hereinafter referred to as the Law of the Supreme Court)

When the Religious Courts have not been following the Supreme Court, Justice Religion first level is called the Religious Court, and appellate called High Religious Court. Neither the first nor the appellate level originally different name. "Mentioning different name is put together by the Minister of Religion No. 6 of 1980 dated January 28, 1980, by calling a Religious Court to the first level and the High Court of Religion for the level of appeal".[[2]](#footnote-2)

Prior to the enactment of the Religious Courts Law, the authority of the same religious courts throughout Indonesia is in the field of marriage law, as stated in Article 63 paragraph (1) of the Marriage Law. Religious courts based on the legislation that is competent in the areas of marriage to a Muslim. However, article 63 paragraph (1) are mitigated by passage (2) which states that any religious court decision must be confirmed by the court.

Religious courts in order to implement the decision must be sought prior legal force to the district court (*executoir verklaring*). One cause of this because in the religious court had not yet had a bailiff institutions as well as in court. This shows that the religious court before the entry into force of the Law of Religious Courts have not had a position aligned with the other judicial.

With the enactment of the Law of Religious Court has also created a governing entity within the framework of religious courts and national legal order. "Adherent of Islam which is part of Indonesia's population is given the opportunity to obey Islamic law pertaining to the absolute teachings of his religion".[[3]](#footnote-3)

 Islamic Court as one of four jurisdictions under the Supreme Court, in 2006 to get additional authority from its strategic Islamic economics to adjudicate disputes. It begins with the passing of the Religious Courts Law.

The existence of the amendment to the Act of religious courts based on the event by the emergence of the new legislation, namely Act No. 4 of the year 2004 about the powers of the Judiciary as the top organic legislation section 24 of the Constitution of the year 1945 The post-war Amendments with the one-stop system[[4]](#footnote-4)

Religious courts, in terms of its history, is a justice whose presence in Indonesia has been around since the days before the Dutch government into the archipelago and growing, proceeds in accordance with the color given by the Government that exists in each period. Important milestone development of religious courts is passed Act Religious Courts Law Islamic Banking and strengthened by the Constitutional Court Decision No. 93 / PUU-X / 2012 About Elucidation of Article 52 Paragraph (2) of the Law of Islamic Banking as the legal basis for judicial authorities in absolute religion for resolving disputes in the economic field of syari`ah.

The dispute resolution process in Court of religion in fact still found some constraints for example yet of the existence of legal religious courts so that the event is still applying the law applicable in the event of the Court General, this becomes interesting when Islamic banking dispute has many religious courts which go into business are not only done by Muslims then constraints would have not the existence of legal events religious courts into something very disturbing.[[5]](#footnote-5)

The development of the Religious Courts are also in line with the growth of Islamic Banking as part of an Islamic economic system began to emerge in the mid 20th century. That begins with the establishment of Local Mit Ghamr Savings Bank in Egypt. However, due to the political situation at the time, the Bank was taken over by the National Bank of Egypt and the Central Bank of Egypt in 1967, which then operates on the basis of usury. In 1972, the bank system without usury reintroduced with the establishment of Nasser Social Bank in Egypt. Another milestone for the development of Islamic banks, namely the Islamic established Development Bank (IDB) in 1975 in Jeddah initiated by the Member States of the Organization of the Islamic Conference (OIC). IDB is then played an important role in meeting the funding needs of Muslim countries for development. Finally, the establishment of the IDB motivating. In many other countries to establish Islamic financial institutions, so that the end of the 1970s and early 1980s, banks have sprung up in Egypt, Sudan, the Gulf countries, Pakistan, Iran, Malaysia, Bangladesh, and Turkey.[[6]](#footnote-6)

In Indonesia, Islamic banking can be said to be late compared to other countries are predominantly Muslim. the potential number of Indonesian Muslim population that is ± 85% of the 237 million people in Indonesia, providing the opportunity for rapid progress in Islamic banking sector in Indonesia. "By presenting alternative financial instruments and banking to customers of Indonesian Muslims, Since then, the government is getting serious in giving attention to the growth of Islamic banks in Indonesia".[[7]](#footnote-7)

After the rise of Sharia banks in other countries, at the beginning of the year 1980 discussion of bank Islam's Sharia as the pillars of the economy are starting to do. "more details in 1991 established a Statute of PT Bank Muamalat Indonesia as a result of the deliberations of the National Assembly of scholars of Indonesia in 1990 who wanted the presence of the establishment of the Islamic bank in Indonesia”.[[8]](#footnote-8)

Sharia Bank of Indonesia in juridical officially introduced in 1992 in line with the enactment of Act No. 7 of the year 1992 about banking (hereinafter referred to as the Banking Act). The inception of this Act indicates the existence of an agreement between the people and the nation of Indonesia to implement the dual banking system or a dual banking system in Indonesia. This stage is the stage of introduction against banking.[[9]](#footnote-9)

The banking law does not explicitly mention in the existence of what is called the Shari'ah bank. There are only two articles that can be the basis that Article 6 (m) with respect to the scope of the general banking and Article 13 (c) with respect to the scope of activities of Rural Bank with the same content states that "provide financing for customers based on the principle sharing according to the provisions stipulated in Government Regulation".[[10]](#footnote-10)

Islamic banking activity is a bank which is conducting conventional business or based on sharia principles in its activities providing services in payment traffic. "It is given in the law of Shariah banking given extensive opportunities to run business activities, including opportunities for a conventional commercial bank to open a branch office of a special conducting business based on the principles of Shari'ah”.[[11]](#footnote-11) The Shari'ah principle is the rule of Islamic law based agreement between the bank and other parties to deposit funds and or financing of business activities, or other activities stated in accordance with sharia. Here we see that in Indonesia there are two banking systems, namely conventional systems which use rate system and a system based on the provisions of Shariah Islam.

The Legal certainty is felt for the observer and the user community of Islamic banking services after the promulgation of Law No. 21 of 2008 concerning Islamic banking (hereinafter referred to as Islamic Banking Act). Islamic banking is one of the nation's economy in view of the economic solutions are the backbone driver of national stability. Repairing all problems faced by the nation today should be of national economic activity leading sharia-based economy.

Islamic banking activities expressly provided for in the Banking Law Jo Islamic Banking Act. The mention of the shari'a banking can be seen from the definition of a bank, Commercial Bank is a bank conducting conventional business or based on sharia principles in its activities providing services in payment traffic. It is given in the Act banks Shari'ah given extensive opportunities to run business activities, including opportunities for a conventional commercial bank to open a branch office of a special conducting business based on the principles of the Shari'a. Based on data from the OJK til 2015, there were 2,881 branches of Islamic banks.[[12]](#footnote-12)

Islamic banking grew and developed as an alternative to conventional banking practices. Critics of the concept of conventional banks to Islamic banking concept, not the bank refused in its function as a financial intermediary, but in other characteristics, for example, there are elements of usury, gambling (maysir), uncertainty (*gharar*), false. By banning *usury*, *maysir*, *gharar*, and falsehood in banking, so instead can apply traditional contract-contract Islamic banking practices in question. Philosophically, Islamic banks are banks whose activity leaves the problem of *usury*.[[13]](#footnote-13) this is in line with the word of God in Surah Al-Baqarah 275:

 . . .وَأَحَلَّ ٱللَّهُ ٱلۡبَيۡعَ وَحَرَّمَ ٱلرِّبَوٰاْۚ . . . ٢٧٥

*Meaning: ". , Allah has permitted trading and forbidden usury. ,.”* (QS. Al-Baqarah [2] : 275). [[14]](#footnote-14)

As for the statements of traditional Islam or commonly known as contract based on Islamic principles by Muhammad Syafii Antonio: "of principles deposit or deposits, profit sharing, leases (operating lease and financial lease), and services ( fee-based service) al-wakalah, al-kafalah, al-Hiwalah, ar-rahn, al-qardh ".[[15]](#footnote-15)

The enthusiasm of the Muslim community in tune with developments in the field of economic law of sharia with the birth of legislation such as Law No. 3 of 2004 on Bank Indonesia and the Act Number 10 of 1998 on the amendment of Law No. 7 of 1992. on banking, the Law No. , 19 the Year 2008 regarding state securities Shari'ah and Law 21 of 2008 on Shari'ah banking. The Shari'ah further strengthen economic activity for today's modern era.[[16]](#footnote-16)

With the development of Islamic business activities cannot be avoided any dispute (dispute / difference) among the parties involved. Conducted litigation settlement (through the courts) and Non-Litigation (alternative dispute resolution). Of course they all have advantages and disadvantages but the important thing is how the settlement of disputes with a quick, simple and light cost in accordance with Islamic principles. Therefore, the implementation of Sharia principles in Islamic banking business activities and role of the court is expected to oversee *kaffah* and *istiqamah* through court decisions, so as to promote justice, solidarity, and equity in economic activity.

Islamic banking arrangements is an awareness and government policy in the regulation will be enforced, which stipulates the setting in which the position of Islamic banking as other conventional banking, Islamic banking, especially in settings distinguished by conventional banking.[[17]](#footnote-17) Islamic and conventional banking is regulated within clear limits. Commercial banks can open a fully operational BUS based on Islamic principles. For Conventional Commercial Bank to open a Sharia required for separation (spin-off) of conventional aircraft within a certain time.[[18]](#footnote-18)

On the political principle of law has two dimensions. First, the basic policy (basic policy), law politics is the reason for holding the base of a legislation. Second, the purpose or reason appears behind the enactment of a legislation (reenactment policy). The second dimension is becoming an interesting case because the legislation is often used by the authorities as a political instrument for the government.

The existence of Islamic Banking and Religious Courts have a very close relationship. Islamic banking as a financial intermediary and Religious Courts sharia as a special judicial institution which has the authority about equally emphasize applying Islamic principles in operation. Islamic Banking and religious courts are expected to synergize by adhering to the overall Sharia (*kaffah*) and consistent (*istiqamah*).

The Juridical existence and religious courts of sharia banking in Indonesia already have a legitimacy that is so strong, but within certain limits still occupies the position of "alternative options". The most major issue in the developing of this mandate is, the first public stigma that still considers that the Bank has not fully implement Shari'ah appropriate guidance practice Sharia, and only meant for Muslims only in doing business transactions. Second, The Islamic banking dispute settlement that became the absolute competence of Religious Court. Yet stigma that is Islamic Court "trial divorce" are certainly not competent to resolve disputes of Shariah banking.

The Stigma above does not come from empty space. First, should realize that the existence of Sharia banking in Indonesia's business trajectory is relatively new when compared to the Conventional Banking General. Second, the existence of the Religious Court as the court has absolute competence in resolving disputes Sharia banking is basically still dominated other cases, such as divorce. While Islamic banking cases resolved in the Religious Courts are still limited.

**The Principles for the Settlement of Islamic Banking**

In Islamic law, the settlement of disputes between the litigants can be done in three ways 3 First, through Islah / Shulh (peace). *Islah* literally implies deciding quarrels or disputes. In the formulation of Islamic law is formulated as follows: "A type of contract (agreement) to end the fight (dispute) between two opposite". Peace in Islamic law is highly recommended, because the lack of peace between the parties, it will be spared the destruction of the relationship between the parties, and also hostility between the parties will be terminated. The suggested holding of peace between the disputing parties can be seen in the provisions of the Qur’an, the *sunna*, and Consensus (*Ijjma'*). [[19]](#footnote-19)

They were at loggerheads make peace in Islamic law termed *mushalih*, while the object in dispute by the parties referred to *Mushalih 'anhu*, and the act done by one party against the other party to terminate contention *Mushâlih'alayhi* called Peace in the Islamic sharia is highly recommended because the lack of peace between the parties, it will be spared from the destruction of the relationship (an affectionate relationship) between the parties, and also hostility between the parties will be terminated. The suggestion to hold the peace among the parties to the dispute can be seen in terms of the Glorious Qur'an, *Sunna*, and *Ijma*. Dispute of resolution has its own principles so that the existing problems can be resolved properly. Among these principles is the first fair in deciding matters of dispute, neither side felt disadvantaged in decision-making; the second family; third Win-Win solution, guaranteeing the confidentiality of disputes the parties; the fourth and solve the problem in a comprehensive manner in togetherness.[[20]](#footnote-20)

 There are some principles study of Sharia Economy Law in Islamic economic dispute resolution are taken from *fiqh muamalah* that Islamic economic system and the economic system of sharia law. Islamic economic system is defined as a *muamalah fiqh* rules governing the working mechanism to regulate any economic effort made by individuals or legal entities of the economy. While the Law of Islamic economics is *fiqh muamalah* which can be interpreted as a normative law that will govern the economic rules. [[21]](#footnote-21)

 The nature and the characteristics of the economic law of the sharia are not only when they can from the viewpoint of methodology only because in the knowledge of Islamic law in Indonesia known three forms of law, i.e. Islamic law, custom, and the West. Each is a stand-alone legal and have different methods for review.

 The difference in terms of substances between Customary and Islamic law, not only at the West in terms of source and material law, but also includes other components that fall into the area of legal research. Whenever Islamic law contains vertical and horizontal dimension because it is born from the revelation as well as the reality, then customary law and West almost completely sourced from the traditions and the ratio. The basic principles of Islamic banking dispute resolution include:

1. Eliminate the shortsightedness / not burdensome.

This principle is very clear in the process of the determination of the Islamic law. Generally, the laws required to show that the considerations behind is to provide convenience and relief. Human behavior is not like the burden that limits the rights of independence and willing to heed the law carefully. In adhering to the law, people are limited by the options when able to execute it.

On the basis of Economic Law, Sharia is enforced in accordance with the nature of human beings and not by the will of Allah itself. It thus attempted to let each man direct himself with full awareness leads to tolerance, parity, independence, and *amar ma'ruf nahi munkar*. The enactment of Islamic law is not stiff (rigid), but can adapt to the situations and conditions of flexibly. Therefore, there are rules of fiqh that read, "in the above-mentioned law affected by the situations and conditions, and the time and place".[[22]](#footnote-22)

1. The burden becomes less

The principle of reducing the burden of Islamic law was not only intended to meet the needs and events that require legal provisions. Islamic law is not just to address these issues at the time, but rather as guidance to address new problems in the future. Although the different human abilities in receiving the enactment of Islamic law, everything is based on the consideration to ease the burden of the law.

"Law deeds *muamalah* is allowed, unless there is proof that forbid" that is based on the rule there is no reason that Islamic Law burdensome, which really is the elasticity of Islamic law will relieve all the legal burden ".[[23]](#footnote-23)

1. The law establishes Gradually.

The law establishes gradually in Islamic law is the main principle that has ever happened and applies the prophetic period. Believed that any legislation has the historical background and specific causes to enactment as binding law. The wisdom of the legislation is to facilitate a gradual and knowing the contents of a legal matter as well as further strengthen the understanding perhaps legal decisions appropriate to the circumstances.

1. Taking into the human Interest.

Islamic law makes many legal provisions are accompanied by reasons and purpose of the law, mostly found in the arguments of law that is intended for human benefit. Generally, the argument was more contact between humans as a manifestation of human relationships and their creators. Determination of Islamic law is always based on three joint principal, namely: *First,* the laws are set to meet the needs of law; *Second*, the laws established by an authority entitled to establish law and subjecting the public as the law; *third*, the laws established in accordance with the human ability levels so as to obtain the benefit of the appropriate objectives of Islamic law (*maqasid al-shariah*).

1. Realizing on Equitable Justice.

The principle of real justice is the main foundation for efforts to uphold the rule of law (law enforcement). All people are equal before the law, and Islamic law provides strict sanctions for any offenders without providing any strict sanctions for offenders without exception. Among the legal principles that must be considered in applying the law are: First, realize that preserved the justice of human rights; Second, the law is aimed at the welfare and prosperity of society; Third, the law enacted in accordance with the proportionality and the level of ability to carry it out; Fourth, any violation of the law should be sanctioned in a fair and prudent; and Fifth, it must foster the belief that every unlawful means against all the provisions of Allah and His Messenger.[[24]](#footnote-24)

**The philosophy of resolving the dispute on Islamic banking**

 Islam also recognized the existence of legal justice or justice under law.[[25]](#footnote-25) Justice is a legal term which is a unity because justice is a legal substance that in its implementation should be adapted to the purposes of the law that has been set in the revelation of God. But one thing must be understood, according to the laws of justice is determined by the rules of a formal/procedural and social customs regulations. The more emphasis formal rules are set, it could be the real injustice will appear when the decision was contrary to the "spirit" of the law. "Justice in line with the spirit of the law that is called substantive justice”.[[26]](#footnote-26)

 The substantive justice is the internal aspect of the law and the elements of justice which underlie the statement something is right or wrong, which in Islam is known as *halal* [allowed] and *haram* [forbidden], as the basis for setting the general rules and special rules of Islamic law. What is required should reflect the fairness of the will of God and what is forbidden to be something that is not fair and it can be seen from what the purpose of the law, namely the common good (*maslahah*) and the public interest to be protected.

 The Subsequent developments under the influence of Greek philosophers, especially Plato and Aristotle, early Muslim thinkers like Ibn Hazm and Ghozali argued that "the ultimate goal of the law is happiness. Only happiness here does not mean merely the happiness in the world, but also happiness in the hereafter ".[[27]](#footnote-27) According to Islamic principles, "associated relationship among humans who cling to the principle of fairness should be based on the principles of freedom, equality, tolerance, and brotherhood”.[[28]](#footnote-28) The principle of brotherhood and equality is the foundation for the governance association of the most fundamental and more important than the principle of freedom, because the freedom itself is on each individual that should be implemented in an atmosphere of togetherness and brotherhood and the spirit of tolerance not only as a moral basis, but also a religious obligation. Based on this, the Islamic banking contract the parties must respect and uphold the rights of others. Related to this, the principle of fairness in the discussion also has implications for the demand for justice in the economic system in the real society.

 Furthermore, such a central value of justice in the society that Ibn Taymiyyah, for example, asserted: if the affairs of the world governed by justice, then the public will form healthy, even though there is a personal moral vice of the rulers. If the affairs of this world are ruled by tyranny, then the society will collapse, regardless of personal mistakes of rulers who would be rewarded in the hereafter. Then the world affairs will erect well as justice, even if there is no religious, and will collapse because of injustice, even if accompanied by Islam.[[29]](#footnote-29)

Based on the notions mentioned above, it is a justice according to Islam can be interpreted as the fairness that should be followed from the motif/ goodwill, processes and objectives. Justice also contains basic principles are universal. The justice is also itself a requirement of human social life in modern times. Although the universal of the real implementation of the basic principles of justice that would necessitate consideration of the demands of space and time. This suggests that, unlike in the modern era of agrarian era, failure to understand the terms of this difference will result in failure in efforts to administer justice itself.

The history recorded that wherever there are Muslims, there are definitely there is the judiciary. Since the days of the Prophet Muhammad where Islam began to grow and develop, the forerunner to the judicial system had started there even when the friend, the judiciary is already there even with the simple form.

 With Islamic banking needs of all elements of the community banking services without the need to "doubt" and more about allowed or not wearing banking services, especially when viewed from the glass eyes of religion Even the criticism of the Islamic banking system against conventional banking is not in terms of its function as a financial intermediary ( intermediary financial institution), but because in its operations contained elements prohibited.

Islamic Banking is the bank which is running their business based on Sharia principles and according to the type consisting of Islamic banks and bank financing of folk sharia. "Thus, Islamic banks are banks that in conducting its business activities based on Islamic principles. Principles of sharia banking activities by the statement [*fatwa*] issued by institutions that have authority in setting the statement [*fatwa*] in the field of sharia. From the understanding of Islamic principles it contains two meanings, that Islamic principles are the principles of Islamic law in banking activities and the principles of Islamic law here is not the principles of Islamic law as such *fiqh muamalah*, but the principles of Islamic law based on the fatwa issued by the institution that has the authority in setting of the statement *[fatwa]* in the field of sharia.

The context of the most recent modern times, placing humanity in the sphere of attraction between the two great ideologies, capitalist and socialist of east, Muslims seek their own identity with an ideology based on Islam. The similar view of it easily searchable support of the sources of Islamic teachings, especially the Al-Quran as a guide in this study on Islamic banking dispute resolution in religious courts.

**Conclussions**

The philosophical basis of the authority of the religious courts in dispute settlement banking Shariah is to create harmony between the execution of the contract and the law of judicial review based on the principles of Sharia religious courts with indeed Association for Justice-seekers are Muslim so that disputes can be settled Islamic banking as a purely [*kafaah*] and continuity [*istiqomah*]

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