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Islamic Bank Dispute Resolution and Socioeconomic Rights: Comparison between Indonesia and Malaysia

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Abstract

The purpose of this study is to identify dispute resolution mechanisms for Islamic banks in Indonesia and Malaysia and to analyze the role of courts in resolving Islamic banking disputes to protect the economic and social rights of communities. This study uses secondary data, such as data obtained from library research, Quran, Hadith, *fatwa*, Islamic banking law, regulations on solving Islamic banking disputes, articles and books. The study concludes that the principles of dispute resolution for Islamic banking in Indonesia and Malaysia are in principle almost the same, as they both use the *Ṣulḥ* and *Taḥkim* methods in resolving disputes other than through litigation. Although the process in Indonesia is more numerous and tiered, it can even be tested for the law to the constitutional court. The most powerful form of constitutional recognition is the recognition of socio-economic rights as rights, which can be enforced judicially in a fair manner, and civil and political rights are usually implemented in this way. The role of the court is to achieve the constitutionality of laws that support social and economic rights.

Keywords: Islamic bank, dispute, court

1. Introduction

As a Muslim-majority country, Indonesia seeks to achieve the Islamic economy by enacting a rule or law on Islamic banking (Law No. 21 2008). The purpose of the law is in line with the goal of Indonesia's national development contained in the fourth paragraph of the Constitution of Indonesia 1945, which protects all Indonesian islands, promotes public welfare, develops the intellectual life of the country, and participates in the implementation of world order, based on independence, lasting peace and social justice. Law No. 21 directly regulates all matters relating to Islamic banking, starting with licensing, legal entity forms, bylaws, ownership, governance, prudential principles, Islamic bank risk management, guidance and supervision, and dispute resolution.

Related to the settlement of disputes in Islamic banks, it has been proven that there are many restrictions, especially because of the contradiction or overlap of the principles of freedom of contract stipulated in the civil code, which stipulates that all contracts (agreements) are legally applicable to the law as a person. The existence of contractual freedom ultimately enables Islamic bank customers to sign agreements without complying with the standard rules of Islamic banking law. The Islamic bank disputes stipulated in Article 55 of the Islamic bank law covers, first, Islamic banking dispute resolution is carried out by a court in a religious court environment; second, if the parties agree to resolve disputes other than those mentioned in paragraph 1, the dispute resolution shall be based on the content of the agreement; and third, the dispute settlement referred to in paragraph 2 shall not contravene the principles of Islamic law.

The overlap of these rules will certainly lead to legal uncertainty and may harm users of Shariah banking services, including Islamic banks or Islamic window banks. Before allocating financing to clients, the Islamic

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window banks must sign a written agreement with other parties that include the rights and obligations of the parties by following accordance with Islamic law principles (hereinafter referred to as contracts).

On August 12, 2012, an Islamic bank client living in Bogor City applied to "Islamic Law", which specifically deals with the settlement of Islamic law disputes, namely Islamic Law Bank Article 55, Section 2 and paragraph 3. The petitioner stated in the petition that he had lost his constitutional right to legal protection and certainty, as well as the equal treatment before the law guaranteed by article 28D, paragraph 1, of the Constitution 1945. Specifically, the loss was caused by the applicant's client as a branch of Bank Muamalat Indonesia, Tbk Bogor, which signed the contract form on July 9, 2009, and has been renewed with *Musyarakah* financing agreement (on extension of time and collateral modification) No. 14 of March 8, 2010, followed by a dispute with Muamalat Bank, but the dispute resolution procedure did not clearly identify the jurisdiction designated to resolve contractual disputes. According to the petitioner, the existence of freedom of choice led to various interpretations, particularly as to whether the judiciary, by following article 55, paragraph 2, of the Islamic Law, whether the parties chose or promised to comply with Islamic law principle. According to the petitioner, this creates legal uncertainty because article 55, paragraph 1, of the Islamic Law, clearly states that in the event of a dispute, it must be carried out in a religious court environment.

On August 29, 2013, the Constitutional Court of the Republic of Indonesia responded to constitutional issues and approved a part number of petitions to review Article 55, paragraph 2, of the Islamic Law. The court explains that the Law on Islamic Banking No. 21 contradicts with the Constitution 1945 and states that it has no binding legal effect.

On the legal front, the Constitutional Court stated that the Islamic banking dispute between the client and the Islamic window bank was caused by a party who was dissatisfied or unfavorable. In principle, the parties to the dispute have the right to determine the preferred mechanism for dispute resolution by following the principles of Islamic law, namely the principle of Islamic law in the *fatwa*-based banking activities issued by the institutions that determine the *fatwa* of the Shariah.

The same as in Indonesia, although with different cases, in Malaysia there are several cases related to disputes between customers and Islamic banking. For instance, in 1987, Tinta Press Sdn Bhd signed a case with Bank Islam (Malaysia) Bhd. The case involved *ijarah* (leasing) and restructured *ijarah*. According to the lease agreement for its letter of credit financing instrument (abbreviated as *ijarah*), Bank Islam Bhd has leased its printing equipment to Tinta Press. Tinta Press defaulted on paying monthly rent. The Bank sued to recover the arrears of rent and own equipment. Tinta reported that the contract was an *ijarah* rather than a bank loan. The question facing the court is whether *ijarah* constitutes an interest-based loan agreement and whether the bank has the right to take back the goods that are the subject of *ijarah*. The court held that, according to the express terms of the contract, the disputed facility was a lease agreement and the bank had the right to recover the subject matter. Tinta Press appealed, but the Supreme Court confirmed the decision of the Lower Court. If it thinks the agreement is a loan, it means that the bank has no right to take back the printing equipment. The Supreme Court further held that Tinta Press explicitly violated the above lease agreement and therefore the bank has the right to take back the property immediately. Although the court used the common law approach to establish an agreement rather than applying the principles of Shariah in the interpretation, it supported Shariah by ruling that the agreement was a form of *ijarah*. The property's ownership is deposited with the bank and transferred to Tinta Press upon full payment. If the court uses the Shariah lens to view the transaction, it basically following Islamic law.

In 2009, Tan Sri Abdul Khalid bin Ibrahim vs Bank Islam Malaysia Bhd involved the reconstruction of the *Bai' Bithaman'Ajil* (BBA) case. The court faced the question of whether the BBA agreement was urgently supported by Islamic law. In deciding the case, the court acknowledged the challenges faced by civil courts in determining Islamic financial disputes. The court further elaborated on the challenges, including the application of the source of the law, as well as the substitution of views when there was a conflict between the relevant *mazhab* (juristic school of thoughts) views and the priority laws of the conflict between Islamic law and civil law. Therefore, the court requested the compilation of Shariah principles applicable to Islamic finance and the development of the necessary conflict of laws guidelines for Shariah.

Based on this background, the purpose of this study is to find out the dispute resolution mechanism of Islamic Banks in Indonesia and Malaysia and to analyze the role of courts in the settlement of disputes in Islamic Banks to protect the economic and social rights of the community.

2. Literature Review

The establishment of an Islamic Bank in Indonesia began in the 1990s. The definition of an Islamic Bank based on Article 1 No. (7) of the Islamic banking law is a bank that conducts business activities based on Shariah principles, and by type consists of Shariah commercial banks and Shariah rural financing banks. Whereas the understanding of Islamic banking is based on Article 1 No (1) of the law on Islamic Banking, which is all that concerns Islamic banks and Shariah business units, including institutions, business activities, as well as ways and processes in carrying out their business activities. The first Islamic bank to be established in Indonesia was Bank Muamalat Indonesia. In its development, there have been many Islamic banks that apply Shariah principles, including BNI Syariah, BRI Syariah, Bank Syariah Mandiri, BTN Syariah, Bukopin Syariah, Danamon Syariah, Bank Mega Syariah.

The legal relationship between banks and customers is part of *muamalah* (transaction) activities. In Islamic law, *muamalah* in a broad sense is the rules (law) of God to regulate human beings concerning worldly affairs in social relations (Munib, 2018). The main legal basis in the operations of Islamic banks is the Quran, Hadith, *Ijma*, and *Ijtihad* of the scholars; for instance (Al Baqarah verse 275; Ali Imran verse 130; An Nisa verse 29). In addition to some Quranic verses above, the basis in operating Islamic banks is Law No. 21 (2008) concerning Islamic Banking, Government Regulation No. 72 (1992) concerning banks based on the profit sharing principle, among others, regulates provisions concerning the process of establishing a commercial bank without interest. According to Article 28 and 29 of the Decree of the Board of Directors of Bank Indonesia No. 32/34/KEP/DIR (dated May 12, 1999), concerning banks based on revenue sharing principles, regulates several business activities that can be carried out by Islamic banks.

Other regulations specifically regulating contracts in business activities based on Shariah principles are Bank Indonesia Regulation No. 10/16/PBI/2008 concerning amendments to Bank Indonesia Regulation No. 9/19/PBI/2007 concerning application of Shariah principles in funds collection and activities distribution of funds and Islamic bank services. Another regulation that provides the basis for the operation and settlement of Islamic banking disputes is Law No. 3 (2006) concerning amendments to Law No. 7 (1989) concerning religious courts. In law, there is an understanding of Islamic economics and the absolute competence of the religious courts in resolving Islamic economic disputes. Act Law No. 3 (2006) was amended by Law No. 50 (2009) concerning the second amendment to Law No. 7 (1989) concerning religious courts.

In the legal relationship between the bank and the customer begins with the agreement that applies to them. The contract is a relationship between *ijab* (offer) and *qabul* (acceptance) which is justified by *Syara'* (Islamic law) which has a legal effect on the object (Dewi, 2005). The implementation of the contract was originally intended so that the objectives of the parties could be realized, but in its implementation, not all contracts were going well.

The legal relationship between the bank and the customer arises because of savings, financing, and investment. Problem financing is one of the five big problems facing national banking. Problematic financing is a credit that is in the classification of doubtful and non-performing loans. Based on Article 1 No. 25 of the Islamic Banking Law, financing is the provision of funds or claims that involves:

a. Profit-sharing transactions in the form of *muḍarabah* and *musyarakah*;
b. Leasing transactions in the form of *ijarah* or leasing in the form of *ijarah muntahiya bittamlik*;
c. Buying and selling transactions in the form of *murabahah*, *salam* and *istishna'* receivables;
d. Loan and loan transactions in the form of *qarḍ* receivables; and
e. Leasing transactions in the form of *ijarah* for multi-service transactions based on an agreement or agreement between an Islamic Bank and/or Shariah window Bank and other parties that require parties to be funded and/or given fund facilities to return these funds after a certain period in exchange for *ujrah* (fee), without compensation, or revenue share.

In the event of problematic financing, the bank maintains its liquidity by trying to resolve the problems it faces. Based on the principle of the contract, the *pacta sunt servanda* (agreements must be kept) principle can be applied, which means that the parties' agreement is legally binding on the parties as law. The power to resolve Islamic banking issues or disputes depends on the parties. However, it must remain in the corridors of Shariah, that is, regarding the Islamic law provisions of the Quran, Hadith and *Ijtihad*. The main principles that must be truly understood and considered in dealing with Shariah banking cases and the general Islamic

law economic issues in the process of resolving these cases should not conflict with the principles of Islamic law. This is a basic principle for handling and resolving Islamic banking cases in religious courts, as Islamic banking confirms the provisions of Article 1, paragraph 7. Article 2 of the Shariah Act carries out its business activities solely based on Shariah principles.

3. Research Methodology

This study uses secondary data, namely data obtained from library research such as the Quran, Hadith, *Fatwa*, Islamic banking laws, regulations relating to the resolution of disputes in Islamic banking, papers and books. Data collection techniques in this paper are literature studies and case studies. A literature study is carried out by studying the laws of Islamic banking, books, papers, journals relating to the problem study. Case studies conducted by looking at the facts that occur in the field. In this paper is a case about Islamic banking disputes in Indonesia and Malaysia. This research was conducted to record social facts in the economic field, especially in Islamic banking practices.

Existing data and legal materials related to the resolution of Islamic banking disputes are described, compared and analyzed completely and in detail based on the research objectives. This is done to facilitate the interpretation or to find the meaning of existing data and make it easier to formulate conclusions to answer the purpose of writing. Data analysis was carried out in the form of a qualitative analysis describing the mechanism of Islamic banking dispute resolution in Indonesia and Malaysia which were oriented to the principles of justice, legal certainty and benefits of the community.

4. Discussion

Regarding the capacity of the judiciary, as stated in Law No. 14 (1970), Law No. 35 (1999), Law No. 4 (2004), Law No. 48 (2009) on the jurisdiction, the judicial environment in Indonesia is divided into general justice (PU); religious courts (PA); military justice; and the state administrative court (PTUN). Each judicial environment has jurisdictions based on its laws. If the boundaries of these jurisdictions are violated, the claim will be flawed and the court will declare that he has no power to rule. Also, there is a constitutional court that has the authority to adjudicate at the first and last levels to examine the Law on the 1945 Constitution of the Republic of Indonesia. One of its products on August 29, 2013, was decision No. 93/PUU-X/2012. The decision was related to the review of Law No. 21 (2008) concerning Islamic banking, particularly in Article 55 paragraphs (2) and (3) in the field of dispute resolution on Islamic banking. Through the decision, the constitutional court returned competence to the religious courts.

In the article on the settlement of contractual disputes through Islamic banking, there are stages of settlement: First, efforts are sought by deliberation and consensus. Second, efforts are resolved through National Shariah Arbitration Board (Basyarnas). After the enactment of Law No. 50 (2009), staff of the legal department, when making a contract directs their resolution through the religious courts, but in its implementation, there are still obstacles including the readiness in the religious courts and Basyarnas. In the event the religious court is not ready, the recommendation of the National Shariah Council (DSN) for dispute resolution can be done through Basyarnas. This is based on the National Shariah Board *Fatwa* No. 47/DSN-MUI/II/2005 concerning the settlement of *murabahah* receivables for poor customers. In the case of dispute resolution through the religious courts there are still obstacles related to the system, which include: stages, mechanisms or flow and special procedural law to be applied, dispute resolution can be done through Basyarnas.

Dispute resolution through Basyarnas has not yet been regulated in separate statutory regulations. During this time the parties can agree regarding the Indonesian Ulama Council (MUI) Decree No. 09/MUI/ XII/2003 dated December 24, 2003, stipulated among others the change in the name of Bamui/Badan Arbitrase Muamalat (Muamalat Arbitration Board) to Basyarnas and to change the form of the legal entity which was originally a foundation into a "body" that was under the MUI and was a tool of the MUI organization.

Dispute resolution through Basyarnas is based on Law Number 30 (1999) concerning alternative dispute resolution (ADR). The settlement model is through arbitration, mediation, negotiation, and reconciliation. Problems with the legal system are needed after the enactment of Law No. 3 (2006) related to the contents of Article 3 and Article 11 of Law No. 30 (1999).

Article 3 of Law No. 30 (1999) contains: “The district court has no authority to adjudicate disputes of parties who have been bound in an arbitration agreement”. Article 11 paragraph 1 and 2 of Law No. 30 (1999) contains:

Article (1): The existence of a written arbitration agreement negates the right of the parties to submit a dispute resolution or dissent contained in the agreement to the district court.
Article (2): The district court must refuse and will not intervene in a dispute that has been determined through arbitration, except in certain cases stipulated in this law.

In addition to referring to the MUI *fatwa*, Islamic banking dispute resolution can refer to the dispute resolution guidelines that have been made by Basyarnas using analytical interpretation of Law No. 30 (1999). Understanding the district court in terms of Law No. 30 (1999) can be analogous to the religious court after the enactment of Law No. 3 (2006).

If in the implementation of the arbitration award the parties do not comply with the contents of the decision because of fraud, dishonesty and fraud from one of the parties, the party that feels disadvantaged can file a cancellation of the arbitration award to Basyarnas. However, if one party does not want to comply with the contents of the arbitration award and is detrimental to the other party, the effort that can be made is to apply to the application for the execution of the decision to the religious court.

The process of resolving Islamic banking disputes as regulated in Article 55 paragraph 1, paragraph 2, and paragraph 3 of the Islamic banking law has given duties and authorities to the courts in the religious court environment. This matter is also regulated further in Article 49 of Law Number 3 (2006) concerning religious courts in which dispute resolution is not only limited to Islamic banking but also in other Islamic economics.

According to the Constitutional Court, systematically, the choice of a legal forum for dispute resolution by the contract is the second choice if the parties do not agree to settle the dispute through the religious court. Thus the choice of a legal forum to resolve Islamic banking disputes must be clearly stated in the contract (agreement). The parties must agree to choose one of the legal forums in dispute resolution if the parties do not wish to resolve it through the religious court. The problem arises when there is no clearly stated legal forum in the contract. The issue of the unclear choice of legal forum was not only experienced by the petitioner, but several similar cases occurred until finally a legal conflict arose and there were several decisions at the arbitration or court level that tried the same case. A contract (agreement) is an act for those who make it according to the provisions of Article 1338 of the Civil Code, a contract must not conflict with the law, moreover the law which has established the absolute power of a binding judicial body the parties to the agreement. Therefore, clarity in the preparation of the agreement is a must. The parties should clearly state one of the chosen legal forums in the event of a dispute. The law regulates normatively by providing examples of legal forums that can be chosen by the parties making the agreement.

In addition, according to the constitutional court, the choice of a legal forum as stipulated in the elucidation of Article 55 paragraph (2) of the Islamic banking law in some concrete cases has opened the space for a settlement forum choice which also has raised the issue of constitutionality which in turn can lead to uncertainty laws that can cause harm not only to customers but also to Islamic banking. The choice of forum for resolving disputes in Islamic banking as explained in the elucidation of Article 55 Paragraph (2) of the *a quo law* (that law) will eventually lead to overlapping authority to adjudicate because there are two courts given the authority to settle Islamic banking disputes whereas in other Acts (law on religious courts) it is explicitly stated that religious courts are given the authority to settle Islamic banking disputes including Islamic economic disputes.

Referring to the disputes experienced by the petitioner and practices in solving Islamic economic disputes as described above, according to the constitutional court, the law should provide certainty for customers and also Islamic banks in solving Islamic banking disputes. If certainty in the settlement of Islamic banking disputes cannot be realized by an institution that is truly competent in handling Islamic banking disputes, then, in the end, the legal certainty as guaranteed in Article 28D paragraph (1) of the 1945 Constitution will also never be realized.

The constitutional court considered that the provisions in the elucidation of Article 55 paragraph (2) of *a quo law* (that law) did not provide legal certainty. Based on this fact, even though the court does not hear concrete cases, there is sufficient evidence that the provisions of the elucidation of a quo article have created legal uncertainty and the loss of the customer's constitutional right to obtain fair legal certainty in the settlement of Islamic banking disputes.

The existence of the decision of the constitutional court illustrates that the dispute of Islamic banking requires the synergy of all banking elements starting from Bank Indonesia (BI), Financial Services Authority (OJK), Islamic banks, Islamic Window Banks and the public as users of Islamic banking services.

Similar to other Commonwealth countries in the world, Malaysia legal system inherits the common law-based legal system left over from the age of empires and was later developed to meet the customs and needs of local people. The common law tradition will naturally use litigation as the main channel for resolving disputes. The court handles the disputes submitted to the judges and resolves them through litigation procedures, which are complex and subject to procedural requirements and litigation procedures, which are time-consuming and costly. Over time and long-term practice, litigation is seen and accepted as the main dispute resolution procedure mentioned by the parties to the dispute. In this case, this is considered necessary to obtain a settlement. However, litigation is not the only mechanism that can be used to resolve financial disputes. Other dispute resolution mechanisms can also be invoked. Such other dispute resolution mechanism may be better suited to meet the needs of the parties. In addition to litigation procedures, most other dispute resolution mechanism are now referred to as alternative dispute resolution (ADR) (Mohd Zain and Engku Ali, 2016).

The dispute resolution framework for addressing Islamic financial disputes in Malaysia has taken the lead in the modern world. Considering the different pace of industry development in different jurisdictions around the world, the main phase of the Islamic finance industry in Malaysia and the ongoing regulatory and legal reforms to improve the provision of Islamic financial services are enviable. The current institutional framework for resolving Islamic financial disputes is encouraging, but the extent to which Islamic financial practitioners and financial institutions have used the framework for further analysis (Oseni and Ahmad, 2011).

The current dispute resolution procedures commonly used in the Islamic financial industry include court decisions, mediation, and adjudication by the Malaysia Mediation Council (MMC), Shariah Advisory Council of the Central Bank of Malaysia (SAC), Financial Mediation Authority (FMB), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Securities Industry Dispute Resolution Centre (SIDREC), Small Debt Resolution Committee (SDRC) (Engku Ali et al., 2015).

MMC's services include mediation services, assistance and advice, and if one party expresses interest, how to get the other party to agree to mediation and provide mediation training for those interested in becoming mediators. These efforts of the Bar Association were consolidated when the mediation practice instructions were issued in August 2010 (Oseni and Ahmad, 2011).

As the main advisory body for top Islamic banking financial services, SAC plays an important role in dispute resolution and Islamic legal dispute avoidance. To put it simply, when a court or arbitral tribunal refers to the Shariah question, the SAC determines Islamic law on this issue and issues a ruling that is considered in the final judgment or ruling of the court or arbitral tribunal respectively (Oseni and Ahmad, 2011).

Established by the Central Bank of Malaysia, FMB operates as an independent agency that enforces dispute resolution procedures through mediation and rulings between its members and its financial services providers. The primary purpose of establishing FMB is to correct any discrepancies related to transactions between customers or the general public and their listed members (financial service providers) (Engku Ali et al., 2015).

The Kuala Lumpur Regional Arbitration Center (KLRCA) is a dispute resolution body established under the auspices of the Asian-African Legal Consultation Organization (AALCO) in 1978. The mediation process is done entirely privately and confidentially. Although KLCMC has performed well for many years since its inception, it has not been so successful in mediating Islamic financial disputes; some of the Islamic financial disputes mentioned have been properly mediated, but mediation has failed and the parties have returned to court for normal litigation (Engku Ali et al., 2015).

The Securities Industry Dispute Resolution Centre (SIDREC) is like the FMB, the latter is used for banking and takaful disputes, and the former is specifically intended for disputes involving investors and capital market intermediaries registered as its members (Engku Ali et al., 2015).

Recent legal disputes involve the constitutionality of the powers and functions of the SAC, which is related to the court's responsibility to determine all issues before it. The constitutionality of power in Tan Sri Khalid bin Ibrahim vs Bank Islam Malaysia Bhd, SAC was challenged. Undoubtedly, SAC has helped stabilize the Islamic financial industry in Malaysia, but when Shariah is in direct contact with the civil law

system based on English common law, there must be some incompatibility factors and procedure. Although the matter is currently being tried in federal courts, one might think that the way to get out of this legal dilemma is to combine litigation with other specialized forms of dispute resolution, the former being used as the last resort in the continuous process of dispute resolution procedures (Oseni et al., 2013).

The negative impact of the judicial precedent prevailing in Malaysian common law jurisdictions is now reflected in the Islamic finance industry. Following the precedent principle, higher court decisions are binding on lower courts. Lower courts must consider previous high court decisions when making decisions. If a High Court judge is allowed to hear and judge an appeal in the *Muamalat* court without the necessary guidance of an expert, then the appeal court's decision will be binding in subsequent lower court cases. This is a legal risk for Islamic financial transactions, as the court can, through its ruling, reorganize the commonly known Islamic financial product (Oseni and Ahmad, 2011).

Therefore, financial transaction issues can be better addressed through a friendly dispute resolution process. But with the legal transfer of British common law to Malaysia as part of the colonial heritage, Islamic financial disputes are civil courts. As evidenced by this research and other relevant literature, Islamic financial litigation does not conform to the essence of the Islamic financial services industry. This choice of dispute resolution process was made during the contract phase (Oseni et al., 2013).

4.1 The Role of Courts in the Settlement of Islamic Banking Disputes in Efforts to Resolve Disputes to Protect Economic and Social Rights

Since the early days of Islam, the theory and practice of dispute resolution in Islamic law have developed. It begins with some legal texts in the Quran that are proved by the Prophet (p.b.u.h). Islamic Dispute Resolution (IDR) refers only to any procedure or mechanism that promotes friendly settlement of disputes, including court decisions (*qaḍā*), whose procedures and final results are consistent with the Shariah principle (Azad, 1987). In Islamic law, IDR is not considered as an alternative to the court, but a complementary process to facilitate the dispute resolution process (Oseni, 2014). The common process of dispute resolution in Islamic law according to (Rashid, 2004):

1) *Nasihah* (counseling or advisory services)
2) *Sulh* (negotiation, mediation, compromise of action)
3) *Tahkim* (Arbitration)
4) *Med-Arb* (A process that begins with meditation and ends in arbitration)
5) *Muhtasib* (Ombudsman)
6) *Wali al-mazalim* (Chancellor or Ombudsman Judge)
7) *Fatwa of Mufti* (Expert Determination)
8) *Med-Ex* (A combination of mediation and expert determination) and
9) *Qada* (adjudication)

Although most of the dispute resolution procedures are related to the majority of contractual disputes, not all disputes are related to Islamic financial disputes. For example, the most common processes in Malaysia are *Sulh and Tahkim,* the SAC of the Central Bank of Malaysia has played this important role. The SAC was accorded the status of the sole authoritative body on Shariah matters pertaining to Islamic banking, takaful and Islamic finance. While the rulings of the SAC shall prevail over any contradictory ruling given by a Shariah body or committee constituted in Malaysia, the court and arbitrator are also required to refer to the rulings of the SAC for any proceedings relating to Islamic financial business, and such rulings shall be binding (BNM, 2020).

The concept of *Sulh* represents the most important method of IDR (Engku Ali et al., 2015). *Sulh* can be called a hybrid approach to the dispute resolution (Hak et al., 2013). In addition to *Sulh*, Islamic arbitration procedures or *Tahkim* are more suitable for Islamic financial disputes (Engku Ali et al., 2015). *Tahkim* occurs when disputing parties agree to appoint a qualified person (arbitrator) to resolve their dispute with reference to Islamic law through a formal process (Hak et al., 2013).

In Indonesia, there are two Islamic Shariah Bank Dispute Resolution Forums, namely, litigation forums brought by the judiciary in the religious court environment, and non-litigation forums consisting of multiple choices: deliberation, bank mediation, and national Shariah arbitration body. The deliberation or negotiation

between the parties to the dispute is the first way the Islamic banking community has always taken the solution. This deliberation is an intern between the bank and the client and does not involve an external third party. Both sides tried to reach an agreement through negotiations to solve the problem. If it cannot be resolved through deliberation, the next step is mediation. According to Article 6 of the Supreme Court Regulation No. 02/2003, the mediation is to resolve the dispute through a negotiation process of the parties assisted by the mediator. As can be seen from this definition, mediation is an informal process designed to enable parties to a dispute to discuss differences privately with the help of neutral and objective third parties (Ridwan and Ridwan, 2017). The next step is through Basyarnas, a permanent body established by the Indonesian Ulama Council to address the possibility of *muamalah* disputes arising in trade, industry, finance and service relations. Basyarnas is a free, autonomous and independent institution, not interfered with and not influenced by institutions of power and other parties. Basyarnas has the authority to fairly and quickly settle *muamalah* (civil) disputes that arise in the fields of trade, finance, industry, Islamic financial services (Rinanda et al., 2018).

In addition to the above efforts, the parties can also choose a litigation (court) path to resolve Islamic banking disputes. So the court is the last resort as a case breaker, namely the religious court. According to Article 49(i) of Law No. 3 (2006), the religious court has the responsibility and power to review and resolve the first-level cases among customers in the field of Islamic economics, including: Islamic bank, Islamic microfinance institutions, Islamic insurance (takaful), Islamic reinsurance, Islamic mutual funds, Islamic bonds (sukuk) and Islamic interim securities, Islamic securities, Islamic financing, Islamic pawn shops, Islamic financial institution pension funds and Islamic commercial pension funds. Constitutional Court No. 93 / PUU-X/2012 reinforces this power and strengthens the religious court as an institution with the power to receive, review and determine Islamic law economic cases.

These authorities are part of the efforts to protect the economic and social rights of the community. The Constitution of 1945 recognized and guaranteed human rights, including economic and social rights. One of the court institutions that functions to protect such rights is the constitutional court. If citizens, both individuals, and communities or legal entities that consider their constitutional rights impaired due to the enactment of the law, they can submit a test of the relevant law to the constitutional court. Specifically for individual citizens and the customary law community unit, the material testing mechanism also intended to guarantee the protection of human rights guaranteed by the 1945 Constitution (Isra, n.d.). As stated above, constitutional court decision No. 93/PUU-X/2012 can be used as evidence to test material testing conducted by the constitutional court to protect and promote economic and social rights.

For individuals and communities living in poverty, reshaping their lack of education, health care, housing or clean water is not a failure of government policy, but deprivation of their rights. When these rights are legally recognized, coupled with legal knowledge and empowerment programs, and supported by a vibrant civil society, they are an important force for change (Khan and Petrasek, n.d.).

5. Conclusion and Recommendation

Due to the complexity and scope of the work, disputes are common in Islamic banking. Therefore, the application of dispute resolution cannot be avoided. The dispute resolution mechanism in Indonesia and Malaysia have the same basic principles, which are carried out through litigation and alternative dispute resolution (eg. *Sulh and Tahkim*). Interestingly in Indonesia is that the emergence of a dispute between the client and an Islamic bank triggered the constitutional court to cancel Article 55, paragraph 2, of the Islamic Banking Act No. 21 (2008). The main reason given by the constitutional court is that it has no legal standing and is therefore considered incompatible with the Constitution 1945 because it is the main constitution of the Republic of Indonesia. Also, it is equally important that the article is considered to violate the socio-economic rights of Islamic banking clients.

Cancellation of the article, making the religious court the only court institution entitled to adjudicate disputes in Islamic banking in Indonesia. As a result, it has led to the number of cases in religious courts exceeding the number of judges. The broad scope of the Islamic economy will certainly cause religious court judges to focus on resolving Islamic economic disputes. Therefore, a special court is needed to handle Islamic economic matters including Islamic banking with judges who have special qualifications in the related fields. It is intended that the court institution can adjudicate more effectively, efficiently, professionally and constitutionally.

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