THE ANALYSIS OF THE MEDAN RELIGIOUS COURT DECISION NO. 1706/Pdt.G/2020/PA.Mdn. REGARDING THE SHARIA ECONOMIC DISPUTE RESOLUTION BASED ON THE CONSTITUTIONAL COURT DECISION NO. 93/PUU-X/2012

THESIS

Submitted to the State Islamic University of Syekh Ali Hasan Ahmad Addary Padangsidimpuan as a Partial Fulfillment of the Requirement for the Graduate Degree of Law (S.H.) in Sharia Economic Law

Written by
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2023

THE ANALYSIS OF THE MEDAN RELIGIOUS COURT DECISION NO. 1ˀ706/Pdt.G/2020/PA.Mdn. REGARDING THE SHARIA ECONOMIC DISPUTE RESOLUTION BASED ON THE CONSTITUTIONAL COURT DECISION NO. 93/PUU-X/2012

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In-

Padang Sidempuan

Assalamu'alaikum Wr. Wb.

After reading, studying, and giving advises about necessary revision on the thesis that has been written by **Muhaimin Nur Siregar,** entitled *"The Analysis of The Medan Religious Court Decision No.1706/Pdt.G/2020/PA.Mdn. Regarding The Sharia Economic Dispute Resolution Based on The Constitutional Court Decision No. 93/PUU-X/2012"*, we approved that the thesis has accepted as one of the requirements for obtaining the Bachelor of Law (S.H) in Sharia Economic Law at the Sharia and Law Faculty of UIN Syekh Ali Hasan Ahmad Addary Padangsidimpuan.

Therefore, we hope that the thesis will examine soon at Munaqasyah and call the brother to account the thesis in front of the examiners. We hereby to convey for the attention, thank you.

Wassalamu'alaikum Wr. Wb.

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DECLACRATION OF SELF THESIS COMPLETION

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I declare that the thesis has been written by me without asking for illegal helping from the other side. And the completion of the thesis just follows the guiding of the advisors and without doing plagiarism along the students' ethic code of UIN Syekh Ali Hasan Ahmad Addary Padangsidimpuan in article 19 subsection 4, about dispossession of academic degree disrespectfully and the other punishment according to the norms and accepting legal requirement.

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ABSTRACT

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The Medan Religious Court that has competence to resolve the sharia economic dispute based on Its autority stated that It did not have the authority to try the case No. 1706/Pdt.G/2020/PA.Mdn. Because the parties have chosen the dispute resolution process according to the contract, based on the explanation of Article 55 Paragraph (2) of Law no. 21 of 2008 concerning Islamic Banking. However, the explanation of the article was declared to have no binding legal force and contradict with the UUD 1945 based on the Constitutional Court Decision No. 93/PUU-X/2012. The sharia economic dispute in this case is that there is a dual function of collateral in fulfilling the *musyarakah mutanaqishah* contract so that the plaintiff submitted a contract cancellation to the Medan Religious Court.

Based on the background of the problem, the researcher seeks to analyze the consideration of the Medan Religious Court judges on the Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. which states that it does not have authorized to try the lawsuit submitted and review the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. based on the Constitutional Court decision No. 93/PUU-X/2012.

This research is empirical normative research that discuss the decision of the religious courts with a review of the Constitutional Court decision based on statute approach and case approach. To answer the formulation of the problem, uses pure theory of law and positivism theory of law. Data analysis uses content analysis with descriptive explanations to describe the findings of researcher based on legal sources in order to get the conclusions.

The results of this study explain that the main consideration that used by the Medan Religious Court judges on deciding disputes on the decision No. 1706/Pdt.G/2020/PA.Mdn. is Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution and Constitutional Court Decisions No. 93/PUU-X/2012. Although considering the Constitutional Court Decision No. 93/PUU-X/2012 as a legal basis, based on the review by the pure theory of law and positivism law theory, it was concluded that the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. who stated that It does not have authorized to try the lawsuit submitted is contradict with the Constitutional Court Decision No. 93/PUU-X/2012.

Keywords: Religious Court Competence, Sharia Economic Dispute, Contract

ABSTRAK

Nama : Muhaimin Nur Siregar
NIM : 18 102 00028
Jurusan : Hukum Ekonomi Syariah
Judul Skripsi : The Analysis of The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. Regarding The Sharia Economic Dispute Resolution Based on The Constitutional Court Decision No. 93/PUU-X/2012.

Pengadilan Agama Medan sebagai lembaga yang memiliki kompetensi absolut untuk memutus sengketa ekonomi syariah berdasarkan wilayah hukumnya menyatakan tidak memiliki kewenangan untuk mengadili perkara No. 1706/Pdt.G/2020/PA.Mdn. Karena para pihak telah memilih proses penyelesaian sengketa sesuai akad, berdasarkan penjelasan pasal 55 ayat (2) UU No. 21 tahun 2008 tentang Perbankan Syariah. Akan tetapi, penjelasan pasal tersebut dinyatakan tidak memiliki kekuatan hukum mengikat dan bertentangan dengan UUD 1945 berdasarkan putusan Mahkamah Konstitusi No. 93/PUU-X/2012. Adapun sengketa ekonomi syariah dalam perkara ini adalah adanya fungsi ganda barang jaminan dalam memenuhi akad *musyarakah mutanaqishah* sehingga penggugat mengajukan pembatalan kontrak ke Pengadilan Agama Medan.

Berdasarkan latar belakang masalah tersebut, peneliti berupaya menganalisis pertimbangan hakim Pengadilan Agama Medan atas putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn yang menyatakan tidak berwenang mengadili perkara yang diajukan serta meninjau putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn berdasarkan putusan mahkamah konstitusi No. 93/PUU-X/2012.

Penelitian ini merupakan penelitian normatif empiris yang mengkaji putusan pengadilan agama dengan tinjauan putusan Mahkamah konstitusi berdasarkan pendekatan perundang-undangan dan pendekatan kasus. Adapun teori yang digunakan untuk menjawab rumusan masalah berupa teori hukum murni dan teori positivisme hukum. Analisis data menggunakan kajian isi (content analysis) dengan penjelasan deskriptif untuk menjabarkan hasil temuan peneliti berdasarkan sumber hukum demi memperoleh kesimpulan.

Hasil penelitian ini menjelaskan bahwa pertimbangan utama yang digunakan oleh hakim Pengadilan Agama Medan dalam memutus sengketa pada putusan No. 1706/Pdt.G/2020/PA.Mdn. adalah UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa dan Putusan Mahkamah Konstitusi No. 93/PUU-X/2012. Meskipun mempertimbangkan Putusan Mahkamah Konstitusi No. 93/PUU-X/2012 sebagai dasar hukum, berdasarkan kajian teori hukum murni dan positivisme hukum, diperoleh kesimpulan bahwa Putusan Pengadilan Agama Medan No. 1706/Pdt.G/2020/PA.Mdn. yang menyatakan tidak berwenang mengadili perkara yang dijakukan bertentangan dengan Putusan Mahkamah Konstitusi No. 93/PUU-X/2012.

Kata Kunci: Kompetensi Pengadilan Agama, Sengketa Ekonomi Syariah, Kontrak

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The Researcher realizes that the thesis has the weakness on the topic and description cause of the less knowledge and literatures, mistakes in writing and spelling. For further correction, the suggestions and critics from readers are needed.

Wassalamu'alaikum Wr.Wb.

Sipirok, March 2023

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GUIDELINES FOR ARABIC-LATIN TRANSLITERATION

A. Consonants

Arabic consonants in the Arabic writing system are denoted by letters in this transliteration, some are denoted by letters, some are denoted by a sign and some others are denoted by letters and signs at the same time. The following is a list of Arabic letters and their transliterations with Latin letter which have adopted to the Bahasa:

Arabic	letters Latin	Letters	Name
أ	Alif	Not denoted	Not denoted
ب	Ba	B	Be
ت	Ta	T	Te
ث	Ṡa	ṡ	es (with dots above)
ج	Jim	J	Je
ح	Ḥa	ḥ	ha (with dots below)
خ	Kha	Kh	ka and ha
د	Dal	D	De
ذ	Żal	Ż	Zet (with dots above)
ر	Ra	R	Er
ز	Zai	Z	Zet
س	Sin	S	Ice
ش	Syin	Sy	Ice and ye
ص	Ṣad	ṣ	Ice (with dots below)

ض	Ḍad	ḍ	de (with dots below)
ط	Ṭa	ṭ	te (with dots below)
ظ	Ẓa	ẓ	zet (with dots below)
ع	`ain	`	Inverted comma above
غ	Gain	G	Ge
ف	Fa	F	Ef
ق	Qaf	Q	Ki
ك	Kaf	K	Ka
ل	Lam	L	El
م	Mim	M	Em
ن	Nun	N	En
و	Wau	W	We
ه	Ha	H	Ha
ء	Hamzah	‘	Apostrophe
ي	Yes	Y	Ye

B. Vowels

Arabic vowels such as Indonesian vowels, consist of a single vowel or monopthongs and double vowels or diphthongs.

1. Vocal Solo is a single vowel Arabic emblem a sign or a vowel transliteration as follows:

Signs	Name	Letter Latin	Name
ـَ	Fathah	A	A

ـِ	Kasrah	I	I
ـُ	Dammah	U	U

2. Duplicates are double vowel vowel Arabic emblem in the form of a combination of a vowel and letter, transliteration in the form of a combination of letters as follows:

Arabic	**Name**	**Latin Letters**	**Name**
...يْـَ	Fathah and ya	ai	a and u
...وْـَ	Fathah and wau	au	a and u

3. *Maddah* is a long vowel whose symbol is in the form of vowels and letters, the transliteration is in the form of letters and signs as follows:

Arabic Character	**Name**	**Letter and signs**	**Name**
...اَـ...ىَـ	Fathah and alif or ya	ā	a and a line above
...ىِـ	Kasrah and ya	ī	i and a line above
...وُـ	Dammah and wau	ū	u and a line above

C. *Ta Marbutah*

There are two transliterations for *Ta Marbutah*:

1. The living *Ta Marbutah* is the living *Ta Marbutah* or gets the *harakat fatḥah, kasrah and ḍommah*, the transliteration is / t /.
2. *Ta Marbutah* is dead *Ta Marbutah* which dies or gets breadfruit, the transliteration is / h /. If in a word that ends in *Ta Marbutah* followed by a word that uses the article al, and the reading of the two words is separate, then *Ta Marbutah* is transliterated as ha (h).

D. *Syaddah (Tasydid*)

Syaddah or *tasydid* which in the Arabic writing system is denoted by a sign, a sign of syaddah or a sign of *tasydid*. In this transliteration the *syaddah* sign is denoted by a letter, which is the same letter as the letter marked the *syaddah*.

Example:

- نَزَّلَ nazzala
- البِرُّ al-birr

E. Clothing

Words The article in the Arabic writing system is denoted by letters, namely: ال. However, in the transliteration of the article is distinguished between:

1. The article followed by *syamsiyah* letter

   An article followed by a *syamsiyah* letter is an article followed by a *syamsiyah* letter transliterated according to its sound, namely the letter / l / is replaced by the same letter as the letter immediately followed by the article.

2. The article followed by the *qamariyah* letter.

   The article that is followed by the letter *qamariyah* is the one that is followed by the letter *qamariyah* which is transliterated according to the rules outlined in front and according to the sound.

Example:

- الرَّجُلُ ar-rajulu
- الْقَلَمُ al-qalamu
- الشَّمْسُ asy-syamsu
- الْجَلاَلُ al-jalālu

F. *Hamzah*

It is stated in front of the Arabic-Latin Transliteration List that the *hamzah* is transliterated with an apostrophe. However, it lies only in the middle and at

the end of the word. If the *hamzah* is put at the beginning of the word, it is not represented, because in Arabic it is alif.

Example:

- تَأْخُذُ ta'khużu
- شَيئٌ syai'un
- النَّوْءُ an-nau'u
- إِنَّ inna

G. Word Writing

Basically, every word, whether *fi'il*, *isim*, or letter is written separately. For certain words that are written in Arabic letters which are commonly coupled with other words because there are letters or vowels that are removed, in this transliteration the writing of these words can be done in two ways: words can be separated and can also be chained.

Example:

- وَ إِنَّ اللهَ فَهُوَ خَيْرُ الرَّازِقِيْنَ Wa innallāha lahuwa khair ar-rāziqīn
- بِسْمِ اللهِ مَجْرَاهَا وَ مُرْسَاهَا Bismillāhi majrehā wa mursāhā

H. Capital Letters

Although in the article system the capital letters are followed in Arabic, they are not recognized, in this transliteration they are also used. The use of capital letters as what applies in EYD, including capital letters are used to write the first letter, the name itself and the beginning of the sentence. If that personal name is passed by the article, then what is written in capital letters remains the first letter of the self-name, not the initial letter of the article.

The use of the initial capital letter for Allah only applies in Arabic script, it is complete, and if the writing is put together with other words so that there is a letter or vowel that is omitted, the capital letter is not used.

- الْحَمْدُ للهِ رَبِّ الْعَالَمِيْنَ Alhamdu lillāhi rabbi al-`ālamīn
- الرَّحْمنِ الرَّحِيْمِ Ar-rahmānir rahīm/Ar-rahmān ar-rahīm

I. *Tajwid*

For those who want fluency in reading, this transliteration guide is an integral part of the science of recitation. Therefore, the formalization of this transliteration guideline needs to be accompanied by recitation guidelines.

Source: Religious Literature Research and Development Team. *Arabic-Latin Transliteration Guide.* Fifth Print. 2003. Jakarta: Project for the Study and Development of Religious Education Literature

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CHAPTER I

INTRODUCTION

A. Background of the Research

One of the absolute competences of the religious court is to hear and decide sharia economic dispute cases, which in this study discusses the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. In this decision, it is known that the dispute occurred in the Muamalat iB *Musyarakah mutanaqishah* House ownership financing contract related to a financing facility for asset ownership or the purchase of a plot of land covering an area of 269 m^2 and the building on it which is located at Jalan Bakti No. 43 Tanjung Gusta Village, Medan Helvetia District, Medan City between the plaintiff and the defendant on November 20, 2012.[1]

Musyarakah Muntanaqisah, namely cooperation between *Syarik* (in this case the bank and the customer) in order to buy an item and then the item is used as business capital by the customer to get profits which will be shared jointly between the bank and the customer accompanied by the purchase of capital goods owned by the bank carried out gradually so that bank ownership of capital goods decreases over time.[2]

The contract is called *Musyarakah mutanaqishah* because it takes into account the bank's ownership in *Syirkah*, namely the depreciation of *Syirkah* capital goods owned by the bank because they are purchased by the customer in installments, in this case it means the depreciation of the

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

[2]Maulana Hasanuddin and Jaih Mubarok, *Perkembangan Akad Musyarakah* (Jakarta: Kencana Prenada Media Group, 2012), p. 60.

bank's capital because it is paid for or purchased by the customer in installments.

The main dispute in this case is in collateral which is considered to have a dual function in the form of guarantor of compliance and guarantor of debt repayment. According to Muhammad Ridwan, there are several factors that cause sharia banking disputes, namely the factor of contractual agreement norms made by two parties, the fulfillment of rights and obligations in a customer agreement contract with the banking party, as well as consumptive sociocultural factors regarding financing.[3]

Under the provisions of Indonesian positive law, there are two guarantees in Islamic banking financing. That main collateral which are financed with a credit facility and being as collateral for credit repayment. Then, additional collateral which is the object belonging to the debtor in its entirety which is not financed by a related credit facility guarante.[4] Basically, this collateral is determined as a form of prudential principle so as not to harm the creditor as the providing the facility. So basically the determination of collateral is allowed. This is the Plaintif's reason for making the encumbrance of mortgage on additional collateral that is used as collateral for credit repayment and also as guarantee of obedience.

In Article 11 paragraph (1) of the Financing Agreement it states that in order to guarantee the Customer's obedience to all provisions in this

[3]Muhammad Ridwan, "Pola Penyelesaian Sengketa Perbankan Syariah Pada Pengadilan Agama di Indoneaia", *Journal Hukum Ekonomi Syariah*, Volume 4, No. 2, December 2020, p. 130.

[4]Faturrahman Djamil, *Penyelesaian Pembiayaan Bermasalah di Bank Syariah* (Jakarta: Sinar Grafika, 2014), p. 50-51.F

contract and to pay off all the Customer's obligations to the Bank that are due and must be paid, the Guarantor Gives Mortgage Rights (APHT) on Certificate of Ownership No. 1753, covering an area of 269 m^2 which is the main collateral. In this case it is known that the functions of the main guarantee and additional guarantees are combined. Thus causing a dispute, and became the basis for the plaintiff to register his lawsuit at the Medan Religious Court.

However, the plaintiff felt that he felt aggrieved over the encumbrance of the mortgage. Then he invited the Defendant as a creditor to mutually cancel the contract, but received no response. So that the Plaintiff filed a lawsuit with the Medan Religious Court for cancellation of the contract related to Article 11 paragraph (1) stated in the agreement.

The problems in this dispute have been clearly stated, but the lawsuit was declared unacceptable on the basis of the competence of the institution in the form of a religious court which had no authority to handle the case. The reason is that there is an agreement between the two parties at the time of the contract which states that if a dispute occurs at a later date, the method of resolution is through the National Sharia Arbitration Board (BASYARNAS). Therefore, the religious court stated that it had no authority to resolve disputes between the plaintiff and the defendant.

The decision of the Medan Religious Court seems to be inconsistent with the decision of the Constitutional Court No. 93/PUU-X/2012 regarding the review of Articles of Law no. 21 of 2008 concerning

Islamic Banking, namely testing Article 55 paragraphs (2) and (3) regarding dispute resolution. Constitutional Court Decision No. 93/PUU-X/2012 states that article 55 paragraph (2) of Law no. 21 of 2008 does not have binding legal force.[5]

According to it, in the event that the parties have agreed on a dispute resolution other than as referred to in paragraph (1), the dispute resolution is carried out in accordance with the contents of the contract". Meanwhile, Article 55 paragraph (3) reads "Dispute resolution as referred to in paragraph (2) may not contradict with sharia principles.

Sharia economic disputes resolution based on the written above, is a way of resolving disputes outside the court which is commonly called the non-litigation route. Meanwhile, the method of resolving sharia economic disputes through a court called the litigation route has been explained in article 55 paragraph (1) with the editor "Sharia banking dispute resolution is carried out by courts within the Religious Courts".

Based on it, sharia economic dispute resolution is the competence of religious courts. It is strengthened by Law No. 48 of 2009 regarding Judicial Power in Article 25 paragraph (3) with the following editorial. The religious court as referred to in paragraph (1) has the authority to examine, hear, decide, and settle cases between people who are Muslim in accordance with the provisions of the legislation.[6] Eventhoug the parties are not *muslim*, as long as they made the sharia contract and being dispute

[5]Constitutional Court Decision No. 93/PUU-X/2012.
[6]Law No. 48 of 2009 regarding Judicial Power.

from it, so the litigation form of resolution must solve through religious court.

From the researcher's observations, the plaintiff submitted a lawsuit to the Medan Religious Court based on the decision of the Constitutional Court No. 93/PUU-X/2012 which states that the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 doesn't have binding legal force because contradict to the UUD 1945. So, It is the religious court competence.

Based on the initial hypothesis, the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. and the Constitutional Court Decision No. 93/PUU-X/2012 has been shown to be inconsistent as the Medan religious court rejected the claim filed by the plaintiff. Even though the decision of the Constitutional Court has binding legal force over the review of articles of the law based on article 10 paragraph (1) of Law No. 24 of 2003 regarding the Constitutional Court. [7] So that it can be used as a legal basis to decide related disputes.

Basically, the court decisions have a goal to give the justice for the disputing parties. In this study, especially religious court decisions related to sharia economic disputes. So, the court's decision has the aim to reconcile and resolve the dispute. The decision that has been determined by the judges will be a reference material for resolving disputes in the future. Then, according to the pure theory and positivism theory of law,

[7]Law No. 24 of 2003 regarding Constitutional Court.

the decision or regulation must not contradict with the basic norm as the highest source of law.[8] In Indonesia, the basic norm is UUD 1945.

Even so, there are still decisions that seem inconsistent with the substance of previous decisions. This is the happened between the decisions of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. with Constitutional Court Decision No. 93/PUU-X/2020 regarding the authority of the religious court in resolving sharia economic disputes because the contradiction of the plaintiff reason regarding cancellation regarding the explanation of article 55 paragraph (2) Law No. 21 of 2008.

Based on the background of the problems mentioned above, the researcher is interested in formulating a research entitled **"The Analysis of The Medan Religious Court Decision No. 1706/Pdt.G/PA.Mdn Regarding The Sharia Economic Dispute Resolution Based on The Constitutional Court Decision No. 93/PUU-X/2012"**.

B. Focus of the Problem

The focus of the problem at the core of this research consists of:

1. Decision Consideration of the Medan Religious Court Judge No. 1706/Pdt.G/2020/PA.Mdn. which states that it does not have authorized to try the lawsuit submitted.
2. The Review of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn.

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

C. Definition of Terminologies

To avoid readers from misunderstanding and to limit the subject of the research, the researcher sets a term limit which placed in the form of definitions about words that have related to the research topics as follows:

1. Decision is the written determination of a court or administrative tribunal disposing of motions or claims in a case or matter before it.[9]
2. The Religious Court is one of the actors of judicial power for the people who seek justice who are Muslim regarding certain cases.[10]
3. Dispute is a disagreement or argument; a contradict.[11]
4. Sharia economics is a social science which studies the economics problems of a people imbued with values of islam.[12]
5. The Constitutional Court is one of the state institutions exercising independent judicial power to administer justice in upholding law and justice.[13]
6. Plaintiff is a person who files a complaint to start a lawsuit.[14]
7. Defendant is a person defending or denying; the party against whom relief or recovery is sought in an action or suit.[15]
8. Contract is a promissory agreement between two or more persons that creates, modifies, or destroys a legal relation.[16]

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[9]Susan Ellis Wild, *Law Dictionary* (Canada: Wiley Publishing, 2006), p. 118.

[10]Law No. 3 of 2006 regarding Religious Courts.

[11]Amy Hackney Blackwell, *The essential law Dictionary* (Canada: Source Books inc., 2008), p. 143.

[12]Muhammad Qustulani, *Modul Matakuliah Hukum Ekonomi Syariah* (Tangerang: PSP Nusantara Press, 2018), p. 2-3.

[13]Law No. 24 of 2003 regarding Constitutional Court.

[14]Amy Hackney Blackwell, *The Essential…,* p. 373.

[15]Henry Campbell Black, *Black's Law Dictionary* (St. Paul Minn: West Publishing Co., 1968), p. 507.

D. Research Problems

The problem in this research was formulated as follows:

1. How is the Consideration of the Medan Religious Court Judge on the Decision No. 1706/Pdt.G/2020/PA.Mdn. which states that it does not have authorized to try the lawsuit submitted?
2. How is the Review of the Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn?

E. Objectives of the Research

The objectives of this research as follows:

1. To find out the considerations of the Medan Religious Court Judge No. 1706/Pdt.G/2020/PA.Mdn. which states that it does not have authorized to try the lawsuit submitted.
2. To review the Constitutional Court Decision No. 93/PUU-X/2012 against the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

F. Significances of the Research

This research is expected to provide benefits to several parties like:

1. For Researcher

   This research is expected to add insight to researcher related to the competence of Religious Court in resolving sharia economic disputes. It is a requirement for the graduate degree of Law in Sharia Economic.

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[16]Henry Campbell Black, *Black's Law*..., p. 394.

2. For The University

This research is expected to increase the literature of thesis in law, especially for The Sharia Economic Law Departmen in The Sharia and Law Faculty, State Islamic University of Syekh Ali Hasan Ahmad Ad-Dary Padangsidimpuan.

3. For Next Researcher

This research is expected to be a reference material as well as a reference to complete further research that is related to this research problem about the absolute competence of Religious Court regarding the sharia economic dispute resolution.

G. Research Method

1. Type of Research

This research is library research in the form of empirical normative research. The study examines legal material in the form of Religious Court decisions with a review conducted based on the Constitutional Court decision about the explanation of Article 55 paragraphs (2) and (3) of Law No. 21 of 2008 regarding sharia banking which stated that it has no binding legal force.

2. Data Sources

Sources of data in this study consisted of primary and secondary legal materials as follows.

a. Primary legal materials are binding legal materials, so in this study in the form of the UUD 1945, KUH Perdata, Law No. 21 of 2008

regarding Sharia Banking, Law No. 48 of 2009 regarding Judicial Power, Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Law No. 3 of 2004 regarding Constitutional Court, Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. and Constitutional Court Decision No. 93/PUU-X/2012.

b. Secondary legal materials are primary legal explanations, and in this study in the form of legal journals, thesis and legal books related to the research problems to resolve sharia economic disputes.

3. Collecting Technique and Data Analysis

Based on the research type, researcher collects data in the form of legal sources from several decisions, related laws and regulations, books and journals that are related to the competence of religious courts in resolving sharia economic disputes. Then, the legal materials collected are analyzed and presented systematically with descriptive explanations to describe the research findings to obtain conclusions.

In conducting data analysis, researcher used descriptive analysis from document studies. Descriptive analysis present the interpretation to build law argument as a conclusion that important according the research problems from the law hierarchy and also clarrifying blurred

norms then sometimes need the law findings, in the form of a prescription (stated which should also serve as a recommendation).[17]

4. Research Approach

The researcher uses several approaches with the aim of obtaining information from various aspects regarding the issue under study. Therefore, in order to solve the problem which is the subject of this study, researcher use two approaches, namely the statute approach and the case approach.

The statute approach is carried out by examining all laws and regulations related to the legal issues being handled.[18] In this case, all laws and regulations that are considered by the judge in deciding case No. 1706/Pdt.G/2020/PA.Mdn. Then, the case approach is carried out by examining cases related to research problems and have become court decisions that have permanent legal force and found the truth of the decision.[19] In this case, the researcher examines the decision of the Medan religious court which has the same problem as decision No. 1706/Pdt.G/2020/PA.Mdn.

H. Outline of The Thesis

In presenting this research, the researcher divides the subject into five chapters. Each chapter has sub-chapters that explain different points. Chapter I is known as the introduction and contains the research problem

[17]Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), p. 68.

[18]Bachtiar, *Metode Penelitian Hukum* (Pamulang: UNPAM PRESS, 2018), p. 83.

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

that the researcher wants to discuss. So that it consists of the background of the problem, the focus of the problem, the definition of the term, the formulation of the problem, the purpose of the research, the usefulness of the research and previous research.

Chapter II is called the literatures review. This chapter contains the basic theory which is the main source in analyzing research problems. Consists of a general description of the Religious Courts, history of formation, competence, legal basis and sharia economic dispute. Then it is also explained about the legal power of the decision of the constitutional court.

Chapter III is called the theoretical study. In this chapter, the researcher proposes the theory used to analyze the research problem. This theory becomes a parameter to analyze the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. based on the decision of the Constitutional Court No. 93/PUU-X/2012 regarding the rejection of lawsuits in resolving sharia economic disputes.

Chapter IV is referred to as research results. This chapter contains the analysis conducted by the researcher on the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. based on the decision of the Constitutional Court No. 93/PUU-X/2012. The results of the analysis are arranged with a descriptive description to make it easier for readers to understand the results of the study.

Chapter V is called the conclusion because it is the last chapter. This chapter contains conclusions and suggestions. The conclusion section contains answers to the formulation of the problem put forward by the researcher. The suggestions section is made to ask for criticism and input from readers regarding the content of the research that has been carried out.

CHAPTER II

LITERATURES REVIEW

A. Religious Court

Court refers to the building/institution that carries out the judiciary. While the judiciary is a system used by the court to decide a case based on its competence. Courts in English terms are called courts and *rechtbank* in Dutch are bodies that carry out trials in the form of examining, adjudicating, and deciding cases. While the judiciary in English terms is called judiciary and *rechspraak* in Dutch which means everything related to the duty of the State in upholding law and justice.[20] So, can conclude that the religious court is an institution that examines, hears, and decides cases for the Muslim community and those who bind themselves to it based on the provisions of Islamic law.

1. Legal Basis

The legal basis for religious courts in the UUD 1945 is regulated by Article 24 which in paragraph (1) explains that judicial power is an independent power to administer justice to uphold law and justice. It makes to guarantee of law certainty. In paragraph (2) it is explained that judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment and state administrative court environment, and by a Constitutional Court.

[20]Aah Tsamrotul Fuadah, *Buku Daras Pengadilan Agama di Indonesia* (Bandung: PT. Liventurindo, 2021), p. 2.

Then, Paragraph (3) confirms that other bodies whose functions are related to judicial power are regulated in law. Law No. 7 of 1989 jo. Law No. 3 of 2006 regarding the Religious Courts and for the last amended by Law No. 50 of 2009, which in Article 2 confirms that the religious court is one of the executor (law instation) of judicial power for the people that want to seek justice who are Muslim regarding certain civil cases regulated in the law.[21]

Furthermore, Article 2 paragraph (1) explains that judicial power within the religious courts is exercised by the religious courts and the high religious courts. So, the competence is divided by the state jurisdiction each other.

2. Religious Court Competence

Based on Article 2 of the Law No. 3 of 2006 that amendments the Law No. 7 of 1989 regarding the Religious Courts *jo*. Law No. 7 of 1989, the Religious Courts are one of the actors of judicial power for the people of justice seekers who are Muslims regarding certain cases as referred in the Law on Religious Courts.[22]

For this reason, the religious court as the organizer of the judicial system has its own authority or competence. The word "authority" can be interpreted as "power" is often also called "competence" or in Dutch it is called "competentie" in Civil Procedure Law usually involves 2 things, namely absolute competence and relative competence.

[21]Law No. 50 of 2009 regarding Religious Courts.
[22]Aden Rosadi, *Peradilan Agama…,* p. 85.

a. Absolute Competence

The absolute competence of the Religious Courts is to examine, decide, and settle a case between people who are Muslim at the first level. Not only for Muslim, but all of the dispute that have occurred by sharia contract and contains sharia principle can resolve. Even the parties that involved in contract is not *muslim*, they must obey the rule. The object of the case is regulated in a limited manner in the Law on Religious Courts.

The absolute competence of the Religious Courts is stated in Article 49 of the Law No. 3 of 2006 regarding Religious Courts. Based on these provisions, the Religious Courts have the authority to examine, decide, and resolve cases at the first level between people who are Muslims in the fields of marriages carried out according to islamic sharia, inheritance, will, grant, *waqaf*, *zakat*, *infaq*, alms, sharia economics.[23]

b. Relative Competence

Relative competence is the division of authority or power to judge between courts. Another definition of relative authority is judicial power which is of one type and level, in contrast to judicial power of the same type and level.[24]

The power or authority granted to the court in a judicial environment of the same type and level related to the jurisdiction of

[23]Law No. 3 of 2006 regarding Religious Courts.

[24]A. Basiq Djalil, *Peradilan Agama di Indonesia* (Jakarta: Kencana Prenada Media Group, 2006), p. 146.

the court and the area of residence/residence or domicile of the litigating party. The religious court is located in the region/city as its jurisdiction. The relative competence that applies to each court is seen in the procedural law used, in this case the Religious Court in its procedural law is the Civil Procedure Code. Article 54 of Law No. 7 of 1989 regarding Religious Court explains that in the Religious Courts the Civil Procedure Law applies to the General Courts.

B. Sharia Economic Dispute

Sharia economic dispute are disputes arising from sharia business law actions. Contradict or contradict is a dispute between two or more people regarding a right and obligation due to a difference in understanding of something that was agreed upon in an engagement based on sharia.[25]

1. The Type of Sharia Economic Dispute

The type of sharia economic dispute which is a type of civil law can be divided into two parts based on the cause of the dispute. The two reasons for the emergence of disputes are dispute due to broken promises (default) and dispute due to unlawful act that will explain forward.

Default is a condition due to negligence and negligence of the debtor unable to fulfill the achievements specified in the agreement and

[25]Hendra Pertaminawati, "Bentuk Sengketa Ekonomi Syariah dan Penyelesaiannya", *Dirasat: Jurnal Studi Islam dan Peradaban*, Volume 14, No. 02, 2019, p. 64.

not in a state of coercion. As a result of default, sanctions are imposed in the form of compensation, contract cancellation, risk transfer, or paying court fees. Based on Article 1313 of the KUHPerdata, the forms of default are: (a) does not meet the achievement at all, (b) meet the achievements but not on time and (c) meet the achievements but not appropriate or wrong. [26]

Then, the next type of sharia economic dispute is the dispute due to unlawful acts. According to Article 1365 of the KUHPerdata for Unlawful Acts: Every act that violates the law, which brings harm to another person, obliges the person who, because of his fault, published the loss, compensates for the loss.[27] The elements that must be met in an unlawful act are the existence of an act, the act is against the law, an error on the part of the perpetrator, a loss for the victim, the existence of causal relationship between action and loss.

There are three types of unlawful acts that can be categorized, including: The act is intentional, the act was not intentional or negligent and the act was due to negligence. Default and unlawful acts are different. Where default cannot be used for unlawful acts and otherwise unlawful acts cannot be used for default.

2. Legal Basis of Sharia Economic Dispute Resolution

Islam is *rahmatan lil 'alamin.* It means that the purpose of Islam is peace for all of the things in all over the world, especially for the

[26]Soedaryo Soimin, *Kitab Undang-Undang Hukum Perdata (KUH Per)* (Jakarta: Sinar Grafika, 2017), p. 323.

[27]Soedaryo Soimin,..., p. 336.

humans. When the problem occurs between people and being a dispute that cannot solve by the parties, we must resolve it. Because all of muslim is sibling.

إِنَّمَا ٱلْمُؤْمِنُونَ إِخْوَة فَأَصْلِحُواْ بَيْنَ أَخَوَيْكُمْۚ وَٱتَّقُواْ ٱللَّهَ لَعَلَّكُمْ تُرْحَمُونَ

The believers are brethren, therefore make peace between your brethren and be careful of (your duty to) Allah that mercy may be had on you. (Al-Hujurat/49:10).[28]

In *hadits*, has been recited that a man which become a judge to resolve the dispute must be kind and has a big deal of justice. The decision of the dispute must be according to the truth.

حَدَّثَنَا مُحَمَّدُ بْنُ إِسْمَعِيلَ: حَدَّثَنِي الْحَسَنُ بْنُ بِشْرٍ: حَدَّثَنَا شَرِيكٌ عَنْ الْأَعْمَشِ، عَنْ سَعْدِ بْنِ عُبَيْدَةَ، عَنْ ابْنِ بُرَيْدَةَ، عَنْ أَبِيهِ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: الْقُضَاةُ ثَلَاثَةٌ: قَاضِيَانِ فِي النَّارِ وَقَاضٍ فِي الْجَنَّةِ رَجُلٌ قَضَى بِغَيْرِ الْحَقِّ فَعَلِمَ ذَاكَ فَذَاكَ فِي النَّارِ وَقَاضٍ لَا يَعْلَمُ فَأَهْلَكَ حُقُوقَ النَّاسِ فَهُوَ فِي النَّارِ وَقَاضٍ قَضَى بِالْحَقِّ فَذَلِكَ فِي الْجَنَّةِ (رواه الترمذي)

From Muhammad Ibn Ismail narrated from Husein Ibn Basyir: Narrated Syarik from A'misy from Sa'd Ibn 'Ubaidah from Ibn Ubaidah: Ibn Buraidah narrated from his father that the Prophet said: "The judges are three: Two judges that are in the Fire, and a judge that is in Paradise. A man who judges without the truth, and he knows that. This one is in the Fire. One who judges while not knowing, ruining the rights of the people. So he is in the Fire. A judge who judges with the truth, that is the one in Paradise."[29]

The resolution of sharia economic dispute between parties can be divided into two types, namely resolution through litigation and dispute resolution through non-litigation. Litigation form, namely the resolution

[28]Kementrian Agama RI, *Al-Qur'an Al-Karim dan Terjemahnya* (Surabaya: UD HALIM, 2013), p. 516.

[29]Imam Hafiz Abu 'Eisa Mohammad Ibn 'Eisa At-Tirmidhi, *Jami' At-Tirmidhi Volume 3*, Translated by Abu Khaliyl (Riyadh: Maktaba Dar-us-Salam, 2007), p. 121.

of disputes through a judicial body formed by the government to resolve disputes in society. Its legal basis is based on Law No. 3 of 2006 concerning amendments to Law No. 7 of 1989 concerning religious courts. Then Law No. 21 of 2008 concerning Islamic banking, and Constitutional Court Decision No. 93/PUU-X/2012.[30]

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

C. General Description of the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

In the main case it was stated that the plaintiff filed a lawsuit with the Medan Religious Court with the aim of determining the cancellation of the *Muamalat* iB House Ownership Financing Contract *Musyarakah mutanaqishah* No. 32 on the 20th November 2012. Because the contract is considered to be unjust towards the plaintiff, namely implementing a binding debt/credit guarantee by means of the plaintiff providing collateral to the bank in the form of: Granting of Mortgage Rights or Power of

[30]Lukman Santoso Az, *Aspek Hukum Perjanjian* (Yogyakarta: Penebar Media Pustaka, 2019), p. 144-145.

Attorney Imposing Mortgage Rights to guarantee the payment of debts. So make the dispute due the contract.

Therefore, the plaintiff demands to cancel the contract. However, it was found that in the contract it had been agreed that if a dispute occurred it would be resolved through BASYARNAS based on article 55 paragraph (2) of Law No. 21 of 2008 regarding Sharia Banking.[31] But, the plaintiff stated that the explanation of the paragraph had no binding legal force after the Constitutional Court decision No. 93/PUU-X/2012 and registered the case to the Medan Religious Court. However, in the end the Medan Religious Court declared itself not authorized to try the case/lawsuit by issuing decision No. 1706/Pdt.G/2020/PA.Mdn. this is the main problem to be analyzed by researcher.

D. *Akad* (Contract) in Two Prespectives

1. Contract in Positive Law of Indonesia

With the simple form, an agreement or contract can be understood as an agreement between two or more people that contains a promise or promises that have a reciprocal relationship that can be enforced based on law, or whose implementation is based on law to a certain degree so that it can be recognized as an obligation.[32]

The contract as an ongoing personal relationship, is basically governed by a set of norms. These norms can order, require or prohibit certain behaviors. In other words, a contract establishes a private entity

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

[32]Bayu Seto Hardjowahono, *Naskah Akademik Rancangan Hukum Kontrak* (Jakarta: Badan Pembinaan Hukum Nasional, 2013), p. 3.

between the parties making it where each party has the legal right to demand the implementation and compliance with the restrictions agreed upon by the other party voluntarily.

In carrying out a contractual agreement between related parties, there are principles that must be obeyed. There are at least three main principles in executing contracts, there are: (a) the consensuality principle, (b) the binding force principle, and (c) the freedom of contract principle.

The terms of the validity of the agreement are regulated in article 1320 of the KUHPerdata. Based on it, there are four conditions for an agreement to be valid, namely the existence of an agreement by both parties, the ability to act, the object of the agreement (a certain matter), the existence of a lawful cause according to law.

There are three causes for cancelling the contracts; agreements made by people who are immature and under guardianship, do not heed the form of agreement required by law and defects of will, namely deficiencies in the will of people (oversight, coercion and fraud).[33] In addition, contract can cancel by the parties because unilateral termination of the contract, the agreement of both parties or a court decision.

For contracts based on sharia principles at the beginning of their development in Indonesia, they were still based on the Civil Code.

[33]Lukman Santoso Az, *Aspek Hukum…*, p. 105-106.

With the development of the Islamic finance industry in the reform era, more and more people are interested in using sharia-based banking products. Therefore, many disputes arise regarding the contract used. In order to deal with these problems, KHES (Kompilasi Hukum Ekonomi Syariah) was formed based on PERMA (Peraturan Mahkamah Agung) No. 2 of 2008.[34]

KHES consists of 4 books like the KUHPerdata. Book I discusses the subject of law and amwal. Book II discusses contract provisions, contract principles, pillars, conditions, contract interpretation and contract forms including *bai', syirkah*, *wakalah*, *shulh*, *ta'min*, sharia bonds, sharia capital market, sharia mutual funds, Bank Indonesia Certificates (SBI) sharia, multi-service financing, *qardh*, *mudharabah*, *kafalah*, *rahn*, *hawalah* and wadiah. Book III describes *zakat* and grants and their provisions and Book IV discusses sharia accounting.

2. *Aqad* in *Fiqh Muamalah*

The word contract comes from the Arabic word عقد which means to bind, conclude and combine. And can also be interpreted as an agreement or contract. Sometimes people states that the agreement equals to the contract, but according to the Positive Law of Indonesia agreement is lower than contract becasue contract has a printed form. Contract is engagement between two engagements or something said

[34]Halimatus Sa'diyah, Siti Lailatul Hasanah, Abdul Mukti Thabrani and Erie Hariyanto, "Sejarah dan Kedudukan Kompilasi Hukum EKonomi Syariah dalam Peraturan Mahkamah Agung Nomor 2 Tahun 2008 di Indonesia", *Al-Huquq: Journal of Indonesian Islamic Economic Law*, Volume 3, No. 1, 2021, p. 100.

from someone binding effect on both parties between the will and the realization of what has been committed.[35]

Meanwhile, in terms of terminology, a contract is defined as anything that is done by someone based on their own wishes, such as waqf, divorce, exemption or something whose formation requires the wishes of two people, such as buying and selling, representation and mortgage.[36]

Basically, every transaction activity carried out by humans, especially the Islamic community, is generally permissible as long as it does not conflict with *sharia*. There are also various forms, such as *syirkah*, *mudharabah*, *murabahah*, *bai'*, *rahn*, *qardh*, *ijarah*, and others. This is based on the rules of *ushul fiqh*, namely**:**

الأصل فى المعاملات الإباحة إلا أن يدل دليل على تحريمها

Basically all of muamalah transaction can be done, unless there is an argument that forbids it.[37]

When someone agree to do the contract or agreement, the parties must obey the rule according to *akad*. The responsibility of them is same. So, they must do their part to respect each other. Allah SWT. says in the holy Qur'an, (Al-Maidah/5:1):

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِۚ...

O you who believe! fulfill the obligations (akad)[38]

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

[36]Rachmat Syafe'I, *Fiqih Muamalah* (Bandung: Pustaka Setia, 2001), p. 44.

[37]Fathurrahman Azhari, *Qawaid Fiqhiyyah Muamalah* (Banjarmasin: Lembaga Pemberdayaan Kualitas Ummat (LPKU) Banjarmasin, 2015), p. 135.

[38]Kementrian Agama RI, *Al-Qur'an Al-Karim...*, p. 106.

To make a contract or agreement, everyone have to know The requirements of it. So, the terms of the contract must include; those who are made the object of the contract can accept the law, the contract (*akad*) is permitted by *syara'*, the vows (*ijab*) go on, then *Ijab* and *qabul* must be continued

To be able to guarantee the rights of the parties to the contract, it is necessary to pay attention to the principles of contract in Islam. The sharia principles fo the contract/*akad* are in the form of; the freedom of contract, the agreement is binding, the mutual agreement principle, the principle of worship, the principle of fairness and balance of achievements and the principle of honesty (trust).

To do the contract, pillars (*rukun*) of akad are needed. *Rukun* is something important that must be fulfilled as long as the parties want to do it. If it is not fulfilled, then the contract will not occur however it be. Among the pillars of the akad are:

a. *Aqid* is a person who has a contract (subject to the *akad*). Sometimes fromeach party consists of one person, and sometimes it also consists from several people.
b. *Ma'qud alaih*, objects to be contracted (object of contract),
c. *Maudhu' Al-Aqid* is the purpose or intention of holding a contract
d. *Shighat Al-Aqid* namely consent *qabul*.

To end the *akad* (contract), must obey the rule that has been made by sharia. The end of the *akad* caused by finishing the responsibility of

the parties or contravention of *akad*. The contract (*akad*) was completed due to a number of things, including the following:[39]

a. Expiration of the validity period of the contract
b. The cancellation of the contract is carried out by the contract parties
c. In a binding contract, a contract can be considered completed if:
    1) Buying and selling is done on the facade, as there are elements deception one of the pillars or conditions are not met
    2) Applicability of conditional khiyar, disgrace, or rukyat
    3) The contract was not carried out by either party
    4) One of the parties working on the contract dies.

E. Constitutional Court Decision

1. Constitutional Court Authority

The legal basis of the Constitutional Court is contained in Article 24 C paragraph (1) of the UUD 1945 which states that the Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the Constitution. After the Constitutional Court judge makes a decision on a lawsuit through the regulation by examines the UUD 1945, the implementation of the decision in the form of legislation is under the authority of the legislature (Article 10 paragraph (2) of Law Number 12 of 2011).

[39]Akhmad Farroh Hasan, *Fiqih Muammalah dari Klasik Hingga Kontemporer* (Malang: UIN Maliki Press, 2018), p. 27-28.

More specifically, the substance of the powers and obligations of the Constitutional Court in adjudicating at the first and final levels, the decisions of which are final for the following matters.[40]

1) Testing the law against the constitution (judicial review)
2) Decide on disputes over the authority of state institutions whose authority is granted by the UUD 1945
3) Deciding on the dissolution of political parties
4) Deciding on Disputes about the results of the general election.

2. Binding Decision Authority

Through Article 24 C paragraph (1) of the UUD 1945, it can be understood that if there is a law product that sues, the Constitutional Court can cancel the legislation and the decision is final and binding. In line with the purpose of the establishment of the Constitutional Court is one of them to control legislation from legislative arbitrariness that deviates from the Constitution.[41]

The existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government and the final characteristic attached to the Constitutional Court decision is that the decision is an order or prohibition with a very high level of legal force and a very large influence. This can be seen from the authority of the Constitutional Court to examine all regulations in the Indonesian legal

[40]Marwan Mas, *Hukum Acara Mahkamah Konstitusi* (Bogor: Ghalia Indonesia, 2017), p. 44.

[41]Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Sinar Grafika, 2015), p. 12.

system so that they do not conflict with the UUD 1945 as basis of Constitution, whose decisions are final and no further legal remedies can be taken.

From the explanation, the Constitutional Court has a competence for the final and binding decision. This can be analyzed from the final and binding nature of the Constitutional Court's decision, of course it can influence other laws and regulations that come before and after it.[42] This nature requires that there be no legal action after the Constitutional Court decision and must also be followed by the next constitutional judge.

F. General Description of The Constitutional Court Decision No. 93/PUU-X/2012

The Constitutional Court Decision No. 93/PUU-X/2012 contains a review of Article 55 paragraphs (2) and (3) about the sharia economic dispute resolution in Law No. 21 of 2008 regarding Sharia Banking against article 28D paragraph (1) of the UUD 1945 which is considered contradict, because it does not guarantee legal certainty.[43] Whereas based on the provisions of Article 28 D paragraph (1) it is explained that the Law must guarantee legal certainty and justice.

For the freedom of contract for all the people in the Republic of Indonesia, the article 55 paragraph (2) of Law Number 21 of 2008 explains

[42]Eddy Purnama, Mukhlis dan Zahratul Idami, "Kekuatan Hukum Mengikat Mahkamah Konstitusi Terhadap Pencabutan Larangan Keterlibatan Mantan Narapidana Sebagai Pejabat Publik", *Syiah Kuala Law Journal*, Volume 3, No. 2, August 2019, p. 272.

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

that in the event that the parties have agreed to settle disputes other than those referred to in paragraph (1), the resolution of disputes is carried out in accordance with the contents of the contract. As for the contents of Article 55 paragraph (3) in the form of dispute resolution as referred to in paragraph (2) may not contradict with sharia principles.

In the explanation of paragraph (2) it is stated that what is meant by dispute resolution carried out in accordance with the contents of the contract is efforts through deliberations, banking mediation, Badan Arbitrase Syariah Nasional or other arbitration institutions and/or through courts within the public court jurisdiction.

So, that the parties may choose whether they want to be in the Religious Courts or in the General Courts. This is what causes contradictions and legal dualism. Therefore, the Constitutional Court issued a decision No. 93 /PUU-X/Pdt.G/PA.Mdn which states that Article 55 paragraph (2) of Law No. 21 of 2008 is contrary to the UUD 1945 and the explanation of this article is declared to have no binding legal force.

G. Previous Research

1. Ifa Latifa Fitriani's post graduate thesis with the title "Pilihan Forum Penyelesaian Sengketa Ekonomi Syariahantara Pengadilan Agama dan Badan Arbitrase Syariah Nasional: Preferensi Masyarakat dan Lembaga Keuangan Syariah di Daerah Istimewa Yogyakarta". This study explains the choice of the community and Islamic financial institutions in resolving sharia economic disputes between the

Religious Courts and the BASYARNAS due to the same competence. The difference is that previous research emphasizes the aspect of community selection of dispute resolution institutions, while current research emphasizes the competence of the Religious Courts in resolving sharia economic disputes through litigation.[44]

2. Gala Perdana Putra Lubis' post graduate thesis with the title "Analisis Putusan Mahkamah Konstitusi No. 93/PUU-X/2012 Terhadap Penyelesaian Sengketa Perbankan Syariah di Indonesia". This study describes the analysis of the consideration of the decision of the Constitutional Court No. 93/PUU-X/2012 regarding the authority of the Religious Courts as Sharia Economic Dispute Resolution Institutions in litigation and the cancellation of article 55 paragraphs (2) and (3) Law No. 21 of 2008.[45]. The difference is that previous research only analyzes the considerations of the Constitutional Court's decision, while the current study analyzes the decisions of the Religious Courts based on the considerations of the Constitutional Court's decisions.
3. Daffa Albari Naufal's thesis with the title "Kompetensi peradilan Agama Dalam Penyelesaian Sengketa Ekonomi Syariah (sebelum dan sesudah Putusan Mahkamah Konstitusi Nomor 93/PUU-X/2012)".

[44]Ifa Latifa Fitriani, "Pilihan Forum Penyelesaian Sengketa Ekonomi Syariah antara Pengadilan Agama dan Badan Arbitrase Syariah Nasional", *Postgraduate Thesis* (Yogyakarta: UIN Sunan Kalijaga, 2019), p. 19.

[45]Gala Perdana Putra Lubis, "Analisis Putusan Mahkamah Konstitusi No. 93/PUU-X/2012 Terhadap Penyelesaian Sengketa Perbankan Syariah di Indonesia", *Postgraduate Thesis* (Medan: Universitas Sumatera Utara, 2014), p. 14.

This study discusses the absolute authority of the Religious Courts in resolving sharia economic disputes through litigation before and after the issuance of the Constitutional Court's decision No. 93/PUU-X/2012. So it has similarities with current research. The difference is that previous studies only discussed the competence of the religious courts based on the decisions of the Constitutional Court, while the current study compared the competences of the Religious Courts with regard to the competence of arbitration institutions.[46]

4. Ahmad Indra's thesis with the title "Proses Penyelesaian Sengketa Ekonomi Syariah di Pengadilan Agama".

   This study discusses the competence of religious courts in resolving sharia economic disputes. The competence of the religious courts is based on Law No. 21 of 2008 regarding Sharia Banking, Law No. 48 of 2009 regarding Judicial Power and Constitutional Court Decision No. 93/PUU-X/2012.[47] So it has similarities with current research. The difference is that previous studies only discussed the competence of religious courts, while the current study analyzed the decisions of religious courts which stated that they were not authorized to resolve disputes.

5. Rahmah Sakinah Pane's thesis with the tittle "Analisis Terhadap Putusan Hakim dalam Perkara Gugatan Pembiayaan *Musyarakah*

[46]Daffa Albari Naufal, "Kompetensi Peradilan Agama Dalam Penyelesaian Sengketa Ekonomi Syariah (sebelum dan sesudah dikeluarkannya Putusan Mahkamah Konstitusi No. 93/PUU-X/2012)", *Thesis* (Jakarta: UIN Syarif Hidayatullah, 2018), p. 6.

[47]Ahmad Indra, "Proses Penyelesaian Sengketa Ekonomi Syariah di Pengadilan Agama", *Thesis* (Padangsidimpuan: IAIN Padangsidimpuan, 2014), p. 9.

(Studi Putusan Nomor 967/Pdt.G/2012/PA.Mdn". This study analyzed the Medan Religious Court's decision regarding the resolution of sharia economic disputes with the decision to release the defendants.[48] So it has similarities with current research. The difference is that previous research examines decisions based on aspects of contract cancellation, while current research discusses dispute resolution based on contracts agreed by the parties.

[48]Rahmah Sakinah Pane, "Analisis Terhadap Putusan Hakim dalam Perkara Gugatan Pembiayaan *Musyarakah* (Studi Putusan Nomor 967/Pdt.G/2012/PA.Mdn", *Thesis* (Padangsidimpuan: IAIN Padangsidimpuan, 2017), p. 11.

CHAPTER III

THEORETICAL REVIEW

A. The Review of The Pure Theory of Law

Pure theory of law, namely the theory explains that law consists of a system of norms and has a hierarchy where lower norms must refer to higher norms and the highest norms are called basic norms.[49] As for the Indonesian legal system, the highest legal hierarchy which is used as a basic norm is the UUD 1945, so that it can be said that all regulations made must refer to it and there must be no contradict.

The pure theory of law is a theory of positive law. It is a theory of positive law in general, not a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms, but it offers a theory of interpretation.[50]

As a legal theory, the pure theory of law is a positive legal theory, but it does not talk about positive law in a legal system, but a general law theory. Pure law theory aims to explain the nature of law (what is the law?) and how the law is made, and not to explain what the law ought to be (what the law ought to be) or how the law should be made. Pure Law Theory is a science of law (legal science) and not a matter of legal policy.

This theory concentrates solely on law and seeks to separate legal science from the interference of foreign sciences such as psychology and ethics. So that this legal theory separates the notion of law from all

[49]Mukti Fajar Nur Dewata and Yulianto Achmad M.H,..., p. 137.
[50]Hans Kelsen, *Pure Theory of Law* (Clark: The LawBook Exchage, Ltd., 2005), p. 1

elements that play a role in the formation of law such as elements of psychology, sociology, history, politics, and even ethics. All of these elements include the 'legal idea' or 'legal content'. The contents of law are never separated from political, psychological, socio-cultural and other elements.

The pioneers of this theory are Hans Kelsen and his student Hans Nawiasky. Hans Kelsen was a very famous jurisprudence in 1934. Kelsen is known as the most evocative writer of analytical jurisprudence of his time. There is no doubt that Kelsen is in jurisprudence, because one of Hans Kelsen's most influential works today is entitled Pure Theory of Law or pure teaching on law, which is classified into two editions according to the time of manufacture, Pure Theory of Law edition I which is known in language literacy. English entitled Introduction to The Problems of Legal Theory was made in 1934, then the second edition of Pure Theory of Law was made in 1967. [51]

In these two literacies, Kelsen has the unic agreement with the view that law must be viewed as objectively as good and clear as possible, so that law is avoided from the influences of human subjectivity which often misled legal science in the past that cause unjustice for the people. Lawyers are involved in the fields of psychology, sociology, ethics, and theology, which for Kelsen is something fatalistic and does not contain certainty.

[51]Jimly Asshiddiqie dan M. Ali Syafa'at, *Teori Hans Kelsen Tentang Hukum* (Jakarta: Setjen dan Kepanitraan MK-R.I: 2006) p. 5.

Pure theory of law actually wants to increase its scientific reputation by using a specific methodology, so the science of law must be pure from various ideologies, because Pure Theory of Law classifies itself as a pure theory of law because it directs legal cognition to the law itself, and because the theory eliminating all that is not the object of cognition, which is actually determined as the law.

In the construction of the teaching of legal purity, Kelsen tries to avoid the objects of legal cognition from various non-legal foreign elements, for example, morality and justice, with various forms of their own. By Kelsen's opinion, justice is an alien element that is different from legal cognition, so that law must be separated from it, because Kelsen believes that the science of law has its own logic. The law that Kelsen meant is a positive law that has its own specific characteristics.[52]

Kelsen regards law as a moral category similar to justice. However, Kelsen refused to regard law as part of justice, for example placing law as a branch of justice, so that law must be formulated in accordance with justice. Kelsen continued by explaining the essence of justice that comes from human psychology and justice is the human longing for happiness, which cannot be found as an individual and seeks it in society. It is in society that there is the greatest happiness for all individuals, by using general legal norms then happiness will be found, happiness is not for some private individuals which is purely subjective.

[52]Jimly Asshiddiqie dan M. Ali Syafa'at, *Teori Hans*…, p. 6.

By Hans Kelsen's opinion, norms are products of deliberative human thought. [53] Something becomes a norm if it is desired to become a norm, the determination of which is based on morality and good values. According to him, the considerations that underlie a norm are metajuridical in nature. Something that is metajuridical in nature is *das sollen* in nature, and has not yet become an applicable law that binds society. In short, for Hans Kelsen, legal norms are always created through will.

These norms will become binding on society, if these norms are desired to become law and must be set forth in written form, issued by an authorized institution and contain orders. His opinion indicates his thought that legal positivism considers moral deliberation, values are finished and final when it comes to the formation of positive law. That is why the very famous fragment of his words is that the law is obeyed not because it is considered good or fair, but because the law has been written and ratified by the authorities and introduced by him in Pure Law Theory.

Legal positivism is described in depth and detail from a philosophical point of view by Hans Kelsen. Hans Kelsen's explanation starts from Immanuel Kant's way of thinking, more precisely Hans Kelsen gives content to Immanuel Kant's way of thinking. He divides that life is divided into two areas: the field of fact and the field of should (ideal). In this case, it can be exemplified, if it happens that people are threatened to

[53]Putera Astomo, "Perbandingan Pemikiran Hans Kelsen Tentang Hukum Dengan Gagasan Satcipto Raharjo Tentang Hukum Progresif Berbasis Teori Hukum", *Journal Yustisia*, the 90th Edition, September-December 2014, p. 7.

hand over something, they will definitely give it. In this realm of fact it cannot be said that if someone is forced to give up something he should give. [54]

Hans Kelsen said that the most basic norms are not synonymous with natural law, or not something that originates from natural law. As an adherent of legal positivism, clearly Hans Kelsen rejects natural law. For Hans Kelsen, the basis of natural law is a causal relationship that is certain. So natural law is a law that exists within the system itself. The field should be, is the field outside the system itself, or outside the causal relationship.

However, something that is supposed to be can become a norm if it is desired jointly as a norm that is adhered to together, which is then set forth in the form of binding legal regulations (positive law). Thus, for Hans Kelsen, the only true law is positive law (which means what the law it is), not natural law. In this case, the consistency of Hans Kelsen's views which believes in legal positivism can be seen.

Based on this concept of pure theory of law, researcher seek to analyze the Medan Religious Court decision No. 1706/Pdt.G/2020/PA.Mdn who stated that he did not have the competence to try this case. eventhough based on the cancellation of Article 55 paragraph (2) of Law No. 21 of 2008 by the decision of the Constitutional Court, the authority to settle sharia economic disputes in litigation is the absolute competence of the Religious Courts.

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[54]FX. Adji Samekto, *Hukum Dalam Lintasan Sejarah* (Bandar Lampung: Indepth Publishing: 2013), p. 49-50.

For this reason, a study related to pure theory of law is needed as a reference for researcher to analyze the considerations of the Medan Religious Court judges on case No. 1706/Pdt.G/2020/PA.Mdn, is it in accordance with the basic legal considerations, namely the UUD 1945. Because according to the provisions of the UUD 1945 Article 28D paragraph (1), it is expressly stated that the law must guarantee certainty law and justice. In this case, the plaintiff as a seeker of justice must obtain his rights. So that the decision must be reviewed based on its considerations whether it has guaranteed legal certainty or not as mandated in the UUD 1945.

B. The Review of The Positivism Theory of Law

The positivism law theory or often called positive law theory is a theory that explains that law is an order in the form of statute regulations made formally by an institution authorized by the state.[55] It can be said that this theory considers orders in the form of rules as references and guidelines for regulating people's behavior in life.

Thoughts about legal positivism developed around the 1890s. This development is based on the influence of the philosophy of positivism whose spread is grouped into three waves. First the stronghold of early positivism with its great philosopher August Comte, then other philosophers of the same time as E. Littre, P. Laffitte, J.S. Mill, Bentham and Spencer. Second, the camp is different from the first because it is more

[55]Mukti Fajar Nur Dewata and Yulianto Achmad M.H,..., p. 137.

rationalist than the empiricists of the same period, such as Mach and Avenarius. Third, the most popular group among scientists is Wina M. Schlick, O Neurarth, R. Carnap and Frank.

This law positivism theory is a theory that is in line with pure theory of law. Because basically the formation of laws and regulations stipulated by the state and government institutions is the implementation of basic norms. As is well known, the essence of pure theory of law is the formation of rules based on norms which are the highest legal norms.

The legal flow of positivism argues that law is juridical positivism in the absolute sense and separates law from morals and religion and separates the law that applies and the law that should be, between *das sein* and *das sollen*.[56] Not even a little deliberation of legal positivism has come to the conclusion that in the eyes of positivism there is no other law except the order of the authorities (law is a command from the lawgivers), the law is synonymous with law. The existence of the law has guaranteed legal certainty, so that its application is easier, and outside the law there is no law.

Such an understanding of positivism is very different from the sociological law paradigm which departs from the assumption that law is a social phenomenon that lies within a social space and thus cannot be separated from the social context. Law is not an entirely separate entity and is not part of other social elements. Law will not be possible to work

[56]Islamiyati, "Kritik Filsafat Hukum Positivisme Sebagai Upaya Mewujudkan Hukum Yang Berkeadilan", *Law & Justice Journal*, Volume 1, No. 1, November 2018, p. 84.

by relying on its own ability even though it is equipped with a set of principles, norms and institutions.

Law is basically characterized by rationalistic, technocentric, and universal. In the eyes of positivism there is no law except the order of the authorities, even the positivist legalism school considers that law is synonymous with law. Law is understood in a rational and logical perspective. Legal justice is formal and procedural. In positivism, the spiritual dimension with all its perspectives such as religion, ethics and morality is placed as a separate part of a unified development of modern civilization.[57] Modern law in its development has lost an essential element, namely spiritual values.

The legal theory developed by the positivism school of thought shows that law is concrete, value-free, impartial, impersonal and objective. The goal is that law actors can uphold justice by making decisions or rules based on mutually agreed legal provisions. In addition, it also aims to view law as a reality that is independent of individual or group interests.

The theory of law with the nature of positivism will give birth to the concept of positive law, namely a set of written legal provisions issued by an authorized institution and containing orders. In addition, law is also conceptualized as statute regulations stipulated by the authorities or the state, which are in the form of orders that must be obeyed because they contain sanctions.

[57]Abd. Halim, "Teori-Teori Hukum Aliran Positivisme dan Perkembangan Kritik-Kritiknya", *Journal Asy-Syir'ah,* Volume 42, No. II, 2008, p. 406.

Positive law contains values that have been determined by agreement, then integrated into the norms contained in positive law. So that this legal concept is the basis for codifying law for the sake of legal uniformity which is a feature of the civil law system.

If positivism law is analyzed in the legal system in Indonesia, it explains that law in Indonesia has a cultural and humanist dimension, cannot be understood narrowly (only positivistic), not only seen as an instinctive biological reality like animals, but there is a psychological, spiritual reality. , and bodily. Therefore, the flow of positivism cannot be applied in Indonesia absolutely, because it is unable to uphold justice in accordance with the feelings of the people. However, the application of positivism can be seen in the formation and codification of legal laws for the sake of legal uniformity.

A theory of law must be distinguished from law itself. In the legal positivism school of thought, theory is used to explain facts. This can be seen in the use of theory in fact-based (reality) sciences such as sociology and the exact sciences. In simple language, theory is used to explain facts that have happened before, repeated the same wherever and whenever.[58]

According to the positivism law theory, the purpose of forming laws and regulations by state institutions is to guarantee the rights of the people in order to achieve mutual happiness, both of which are a unit that

[58]FX. Adji Samekto, "Menelusuri Akar Pemikiran Hans Kelsen Tentang *Stufenbeautheorie* Dalam Pendekatan Normatif-Filosofis", *Journal Hukum Progresif*, Volume 7, No. 1, April 2019, p. 6.

cannot be separated from one another. Because with the guarantee of community rights, it can be said that justice can be upheld.

To understand further about this theory of positivism law, a legal expert named Hart proposes several meanings of positivism, namely:[59]

1. The law is an order
2. An analysis of legal concepts is a worthwhile undertaking. Such an analysis is different from sociological and historical studies and also different from a critical assessment
3. Decisions can be deduced logically from pre-existing regulations, without the need to refer to social goals, policies and morality
4. Judgment morally cannot be upheld and defended by rational reasoning, proof or testing.

Based on the understanding put forward by Hart, it can be understood that law is a driving force and regulator of social life. The formation of this law can originate from laws that already exist in society and can be rationally accepted to be able to control people's behavior and even be coercive so that punishment for violating the law cannot promote emotional or moral feelings of compassion.

Because law is in the form of orders made by the state, the majority of positivist legal theorists consider that the only source of law is the highest authority in a state. Meanwhile, other sources are considered as lower sources and their formation must be based on the highest source of

[59]Arifin and Leonardo Sambas K, *Teori-Teori Hukum* (Bogor: Ghalia Indonesia, 2016), p. 86.

law and is under the auspices of the state institution that has the authority to form them.

This positivism law theory can be used as a reference for analysis of the Medan religious court decision No. 1706/Pdt.G/2020/PA.Mdn. Where the decision executes sharia economic cases. Because the consideration of the decision on the case is based on regulations made by state institutions as the highest authority over the law.

By using the theoretical basis of positive law, the judge's considerations in deciding case No. 1706/Pdt.G/2020/PA.Mdn. must be adjusted to the law relating to sharia economic dispute resolution. In this case there is Law No. 21 of 2008 Article 55 paragraph (1) and (2) and then reviewed based on the cancellation of the law based on the decision of the Constitutional Court No. 93/PUU-X/2012. And reviewed based on the dispute resolution agreement carried out by the parties based on Law No. 30 of 1999 to get a conclusion, and a review must be carried out in order to avoid overlapping laws that cause legal uncertainty for the plaintiff who filed the case.

CHAPTER IV

RESEARCH RESULTS

A. The Analysis of The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

In resolving a case, the judges will refer to the legal sources related to the case. The source of law used must use the UUD 1945 as a basic reference. The hierarchy order of laws and regulations on force in Indonesia is guided by Law No. 12 of 2011 regarding The Establishment of Laws and Regulations in Article 7 paragraph (1) states that the types and hierarchies of laws and regulations consist of:[60] (a) The UUD 1945 of Indonesian Republic, (b) Decree of the Majelis Permusyawaratan Rakyat (MPR), (c) Laws/Government Regulations in Lieu of Laws, (d) Government regulations, (e) Presidential decree, (f) Provincial Regulation and (g) District/City Regional Regulations.

Based on the pure theory of law initiated by Hans Kelsen, it can be concluded that the UUD 1945 is a basic norm as the highest source of law. So that all regulations issued by state institutions may not contradict with these basic norms. In addition to these sources of law, there are several other sources of law which are sources of law with binding force. So that the sources of law that can be used as a reference are increasingly diverse. This is explained in the next article, namely article 8 paragraph (1) and (2) of Law No. 12 of 2011.

[60]Law No. 12 of 2011 regarding The Establishment of Laws and Regulations

Paragraphs (1) and (2) explain that the types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Supreme Court, Constitutional Court, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Ministers, agencies, institutions, or commissions at the same level established by law or the Government by order of law, Dewan Perwakilan Rakyat Daerah Provinsi, Gubernur, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota, Bupati/Walikota, Kepala Desa atau yang setingkat, are recognized and have binding legal force as long as they are ordered by higher laws or regulations or formed based on authority.[61]

According to the explanation of the two paragraphs above, eventhough there are many sources of law used as a reference in resolving disputes in Indonesia, especially for economic dispute resolution, there are still other references in the consideration of judges' decisions. The judge's decision or often called jurisprudence is one of the material considerations for the judge to decide on a case or dispute whose main issues are still related and there are similarities in the offenses submitted by the litigating parties.

By reviewing the judge's decision beforehand, it will be easier to resolve disputes in future cases. Then, to find out the considerations used by the Medan Religious Court judges in deciding the lawsuit No.

[61]Law No. 12 of 2011 regarding The Establishment of Laws and Regulations

1706/Pdt.G/2020/Pa.Mdn., it requires an analysis using the right approach method. In this case, the researcher uses two types of approaches in understanding the judge's considerations. The method used is a statute approach and a case approach.

1. The Analysis by Statute Approach

The first approach used by researcher in analyzing the judge's consideration of decision No. 1706/Pdt.G/2020/Pa.Mdn. is the statute approach. This type of approach uses a review of the laws and regulations related to the case.[62] By reviewing the relevant regulations, a conclusion will be obtained to be able to resolve cases submitted by the parties to the dispute.

In case of case No. 1706/Pdt.G/2020/Pa.Mdn., the plaintiff filed a lawsuit against the plaintiff on the grounds that the religious court has the competence to settle cases regarding sharia economic disputes. This is in accordance with the contents of Article 49 of Law No. 3 of 2006 which explains that the Religious Courts have the duty and authority to examine, decide and settle cases at the first level between people who are Muslim in the areas of marriage, inheritance, wills, grants, endowments, *zakat, infaq, shadaqah* and Islamic economics.

Furthermore, the competence of the religious courts in resolving sharia economic disputes is also explained in the Banking Law No. 21 of 2008. This is explained in article 55 paragraph (1) and (2).

[62]Muhaimin, *Metode Penelitian…*, p. 56.

Paragraph (1) explains that the resolution of Sharia Banking disputes is carried out by courts within the scope of the religious courts. Then paragraph (2) explains that when the parties have promised a resolution of disputes other than those referred to in paragraph (1), the resolution of the dispute is carried out in accordance with the contents of the contract.[63]

For the specific observed, if the reseacher examined based on these two paragraphs, the consideration of the Medan Religious Court decision has violated the existing law. However, paragraph (2) has been annulled based on the decision of the constitutional court No. 93/PUU-X/2012 which states that this paragraph does not have binding legal force, this is because the provisions of this article contradict the UUD 1945 which is a basic norm in accordance with pure theory of law.

Because it has been deemed to have no binding legal force, the plaintiff in this case submits this argument as an additional reason to strengthen his claim. This is due to the agreement between the plaintiff and the defendant who have entered into a binding agreement for dispute resolution outside the court or non-litigation route. So that the plaintiff considers that the contract can be ignored.

The purpose of the plaintiff suing the defendant is to cancel the contract that has been agreed upon by both parties. Because the

[63]Law No. 21 of 2008 regarding Sharia Banking

plaintiff feels aggrieved over the agreement which stipulates collateral as a condition for repayment of the financing contract by placing a mortgage right.

This is of course detrimental to the plaintiff because they do not get justice. The legal basis used is the Fatwa of the Dewan Nasional Syariah No. 73/DSN-MUI/XI/2008 regarding *Musyarakah mutanaqishah* which explains that there is no *fatwa* stating the permissibility of applying collateral/guarantees in *Musyarakah mutanaqishah* financing.[64]

With this, it is clear that the main problem faced by the plaintiff is based on the agreement made with the plaintiff. For this reason, the plaintiff seeks to cancel the agreement by filing a case with the Medan religious court. So that the case has been registered as a case with No. 1706/Pdt.G/2020/PA.Mdn.

After making further observations of case No. 1706/Pdt.G/2020/PA.Mdn., the researcher found the fact that the plaintiff and the defendant had agreed that if a dispute occurred in the future, it would be resolved through a non-litigation route. Namely through the forum of the Badan Arbitrase Syariah Nasional (BASYARNAS).

These provisions are set forth in Article 19 paragraphs (1) and (2) of the Financing Agreement made by both parties which contain:

[64]Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 regarding *Musyarakah mutanaqishah*.

(1) "If at a later date there is a difference of opinion or interpretation of the matters listed in this akad or there is a dispute or dispute in the implementation of this akad, the parties agree to resolve it by deliberation and consensus."

(2) "In the event that deliberations for consensus as referred to in paragraph 1 are not reached, the Parties agree, and hereby promise and bind themselves to one another, to resolve it through the Badan Arbitrase Syariah Nasional (Basyarnas) according to the applicable Arbitration Rules and Procedures within the Arbitration Board..."[65]

With evidence of an agreement between the two parties to resolve the dispute through the kinship channel in the form of non-litigation efforts through BASYARNAS, it can be said that basically the formation of the contract initially started in a good way and is proof of trust in the good intentions of both parties.

Nevertheless, the plaintiff does not want to take the agreed path. Because the plaintiff considers that the resolution of disputes based on the above contract has been declared not legally binding based on the Constitutional Court decision No. 93/PUU-X/2012. So that the plaintiff considers that the resolution of the case is the absolute competence of the Medan Religious Court. And according to the provisions of Article 14 paragraph (1) of Law No. 14 of 1970, the court may not refuse to try a case submitted to him on the grounds that

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

it is incomplete or the law that governs it is unclear, but is obliged to try it.[66] But, finally The Medan Religious Court doesn't accept the lawsuit and states that It doesn't have authorized to try that lawsuit.

Based on the study conducted by the researcher, there is a specific reason that causes this case to be unacceptable. And the Medan Religious Court Judge stated that the Medan Religious Court did not have the authority to adjudicate the case. The reason obtained is the existence of an arbitration clause in the contract agreed upon by both parties.

In accordance with Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Article 3 states that the District Court, which in this case is equated with the Religious Court, is not authorized to adjudicate disputes between parties who have been bound in an Arbitration agreement. This is a provision made to carry out a separation of powers with the aim of alleviating the task of the religious courts in deciding various cases brought forward.[67]

Furthermore, Article 11 paragraphs (1) and (2) state that a written arbitration agreement negates the right of the parties to propose a dispute resolution or differences of opinion included in the agreement to the District Court which in this case is the same as the Religious Courts and must refuse and will not intervene in a dispute resolution that has been determined through arbitration. So according to this law,

[66]Law No. 14 of 1970 regarding Main Provisions of Judicial Power.
[67]Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution

the Religious Courts do not have the authority to decide disputes that have been bound by an arbitration agreement. This is a strong reason and becomes the basis for the defendant in the exception to the lawsuit filed by the plaintiff.

Then, in the decision of the related religious court, the researcher found facts recognized by the plaintiff himself that non-litigation dispute resolution had not been carried out. The plaintiff's reason is that if the dispute is registered with the Sharia Arbitration Board, then the case will not be examined because it is considered lacking requirements. With the consideration that there must be notification of the parties to the defendant and both agreed to be summoned to resolve the dispute.

Considering that reason, if the reasons put forward by the plaintiff are considerations in accordance with existing legal facts, then it can be said that the plaintiff is the party who is unilaterally harmed. Because the process required to cancel the agreed contractual contract cannot be carried out. So it can be considered that the plaintiff did not get justice. If the deliberation stops on the plaintiff's opinion, it is certain that the justice that should be achieved based on the law cannot be achieved. This is contrary to the nature of the purpose of law put forward by pure theory of law and legal theory of positivism. Because the purpose of the existence of law is to guarantee the rights of society in order to achieve happiness.

With further observation, the researcher found the fact that the plaintiff's assumption that the resolution of disputes based on the contract could not be carried out was a wrong assumption. This is in line with the objection put forward by the Defendant by stating that it was only the Plaintiff's own opinion and had no clear legal basis according the law.

Because, basically the parties to the Defendant are one party. So to complete it does not require complicated requirements. Plaintiffs II and III are not deemed necessary to cancel the contract and this is in accordance with the procedures of the Badan Arbitrase Syariah Nasional which provides legal certainty for the Plaintiff to obtain justice for their rights.[68]

After analyzing the principal case filed by the plaintiff, the researcher began to get an overview of the considerations used by the judge in deciding case No. 1706/Pdt.G/2020/PA.Mdn. even so, there are still problems regarding article 55 paragraph (1) and (2) of Law No. 21 of 2008 relates to the authority of the religious courts in resolving sharia economic disputes. Therefore, further analysis will be carried out based on the decision of the Constitutional Court No. 93/PUU-X/2012 to find out whether the decision is contrary to the basic norm, namely the UUD 1945 which is the highest hierarchy in the laws and regulations of the Republic of Indonesia.

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

2. The Analysis by Case Approach

The second approach method used by researcher to analyze the judge's considerations in deciding case No. 1706/Pdt.G/2020/PA.Mdn. is the case approach. The case approach is carried out by examining cases related to the main issues involved, so the reason of the consideration can conclude with the similar cause. Which in this case are sharia economic disputes and have been decided and have binding legal force.[69]

Although the Indonesian state is known as an adherent of the civil law system (continental Europe), in practice it also applies the common law system (Anglo Saxon). This can be seen based on the legal sources used. If adhering to the civil law system, then the source of law used comes from codified regulations to make the law uniform in the nations.

While the common law system uses the previous judge's decision/jurisprudence as a source of law. So it can be understood that Indonesia uses these two systems in deciding a case, because judges do not only refer to laws, but also to jurisprudence. And according to Prof. Mahfud MD’s opinion, Indonesia is not a country that adheres to a common law (Anglo Saxon) or civil law (continental European) system of law, but is a prismatic law state, where a state based on ideals (the idea of law) Indonesian law. So the existence of these two

[69]Muhaimin, *Metode Penelitian…*, p. 57.

systems is a "balancer" and their adoption is not absolute, there is still a filtering process in them.[70]

In analyzing the decision No. 1706/Pdt.G/2020/PA.Mdn., researcher used several cases that were within the scope of the Medan Religious Court regarding sharia economic disputes as reference material. Where until the time this research was conducted, there had been 39 decisions issued by the Medan Religious Court regarding sharia economic disputes and can be accessed through the website of the Supreme Court decisions of the Republic of Indonesia.

For this case approach, the researcher takes an approach based on decisions that have been published beforehand. As it is known that the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. determined on Friday 8 January 2021. So the decision used as a reference must be a previous decision with a similar subject matter so that it can be analyzed.

The first case is based on the Medan Religious Court Decision No. 2206/Pdt.G/2015/PA.Mdn. regarding the sharia economic dispute which was decided on October 6, 2016. In the principal of the decision it was determined that the Medan Religious Court accepted the defendant's exception and stated that the Medan Religious Court did not have the authority to decide on the case filed by the Plaintiff. So

[70]Muhammad Dzikrullah M. Noho, "Mendudukkan Common Law System dan Civil Law System Melalui Sudut Pandang Hukum Progresif di Indonesia", *Journal Recthsvinding Online*, September 2020, p. 1.

that the plaintiff is obliged to pay court costs incurred during the trial process.[71]

The Judge's consideration in deciding this case is article 55 of Law Number 21 of 2008 regarding Sharia Banking, whereby the resolution of civil disputes is generally possible through two options, litigation and non-litigation route. Resolution of disputes through non-litigation channels, namely resolution of disputes through peace efforts or through arbitration, while resolution of disputes through litigation channels, namely resolution of disputes through the judiciary, which in this case is the Religious Courts.

However, after a review, it was found that the plaintiff and the defendant had entered into a contractual agreement which contained an arbitration clause. So that if there is a dispute or dispute between the Plaintiff and the Defendant it will be resolved through the Badan Arbitrase Muamalat Indonesia (BAMUI). And now, that known as Badan Arbitrase Syariah Nasional (BASARNAS).

With this, it was found that the judge's considerations were similar between the two related cases which stated that with the existence of an arbitration clause, the court was obliged to declare that it did not have the authority to try the case. Because dispute resolution through an arbitration body is regulated under Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution.

[71]Medan Religious Court Decision No. 2206/Pdt.G/2015/PA.Mdn.

As for the second case that review, namely decision No. 2539/Pdt.G/2019/PA.Mdn. stipulated by the Medan Religious Court on the 30th of March 2020 regarding sharia economic disputes. In principle, the decision states that the Medan Religious Court does not have the authority to try cases filed by the plaintiff.[72]

These disputes have similarities in the subject matter which is the reason for the plaintiff in case No. 1706/Pdt.G/PA.Mdn. namely the cancellation of the contract with the *Musyarakah mutanaqishah* contract which is considered detrimental to the plaintiff. So that the plaintiff submitted the case to be tried by the Medan Religious Court which has the competence to resolve the sharia economic dispute.

Not only that, the determination of the mortgage on the guarantee of debt repayment is also determined by the parties who enter into the contract. And with this matter, it is known that the agreement made violates the rules and should be null and void under the law. However, the plaintiff continued to carry out the contract even though he already knew the intent of the agreement made. This makes the similarities between the two cases clearer.

Even in the resolution of disputes arising from the agreement it has been agreed by both parties to resolve related disputes through BASYARNAS. And as it is known that if an agreement contains an arbitration clause, the court is obliged to declare that it is not

[72]Medan Religious Court Decision No. 2539/Pdt.G/2019/PA.Mdn.

authorized to try the relevant case based on the provisions in Law No. 30 of 1999 regarding arbitration and alternative dispute resolution. Thus, the relationship between the two cases becomes clearer.

However, there are differences between these two cases. Because the judge's biggest consideration in deciding case No. 2539/Pdt.G/2019/PA.Mdn not because of an arbitration clause agreed by both parties to the agreement. However, it is related to the relative competence of the Medan Religious Court. Because this matter is not right on target. The case can be submitted to the Lubuk Pakam Religious Court. So that the judge can not try the case filed.

The third case studied by researcher is the dispute in decision No. 1516/Pdt.G/2020/PA.Mdn. which was determined by the Medan Religious Court regarding sharia economic disputes on December 7, 2020. The main problem in this case explains that the Plaintiff filed a case regarding the default committed by the defendant against the mutually agreed upon agreement. Even though it was decided in a *verstek* manner due to the absence of the defendant, this case still has similarities with case No. 1706/Pdt.G/2020/PA.Mdn.

The biggest difference between the two decisions is the acceptance of the lawsuit No. 1516/Pdt.G/2020/PA.Mdn. although in part, while in case No. 1706/Pdt.G/2020/PA.Mdn. can not be tried by the Medan Religious Court on the grounds that they do not have the authority to resolve economic disputes submitted in the principal of the

plaintiff's petition. Even though they proposed the same legal basis and considered that the Medan Religious Court had the competence to adjudicate the case.[73]

After reviewing the decision No. 1516/Pdt.G/2020/PA.Mdn., the researcher knows that there is no arbitration clause in the agreement made by the parties, so it did not make the problem for the dispute resolution. The possibility is that there was an agreement on dispute resolution made by the parties but could not be proven due to the absence of the defendant, or in the agreement it was agreed that the resolution of the dispute through the religious court.

Based on the case approach used by the researcher, it can be concluded that as long as the agreement agreed upon by both parties contains an arbitration clause, the Court, in this case the Religious Court, will declare that it has no authority to adjudicate the case filed, in accordance with the provisions of Article 3 of Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution.

B. The Analysis of The Sharia Economic Dispute on The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

Based on the dispute contained in the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn., it is known that the Plaintiff feels disadvantaged over the encumbrance of mortgage agreed by both parties regarding the guarantee in the *Musyarakah mutanaqishah*

[73]Medan Religious Court Decision No. 1516/Pdt.G/2020/PA.Mdn.

financing contract. Because the payment of encumbrance of mortgage. This gives rise to economic disputes that demand a resolution by an institution that has the authority to adjudicate cases.

After submitting the case to the Medan Religious Court and going through several stages of the trial until the verdict was read, the Medan Religious Court stated that it did not have the authority to try the proposed case. So that the case filed by the plaintiff cannot be accepted. In order to analyze the economic dispute in the decision and understand the judge's considerations in deciding the dispute, the researcher uses two aspects of analysis, namely based on the Legal Positive of Indonesia and *Fiqh Muamalah*.

1. The Analysis by Positive Law of Indonesia

On The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., the dispute occurred because the plaintiff felt aggrieved by the imposition of a mortgage right contained in the *musyarakah mutanaqishah* contract which is a guarantee for repayment of debt, so that the collateral has a dual function in the form of repayment of debt and guarantees for debtor obedience. In addition, the cost of making a letter of imposition of mortgage rights was borne by the plaintiff, so that the plaintiff considered that this was an injustice.[74]

Based on the Legal Positive of Indonesia, one of the conditions for carrying out a contract is a cause that is permissible under the Civil

[74]Medan Relgious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

Code. The plaintiff considers that in determining the guarantee, the creation of a mortgage right is an tyranny against the plaintiff. So that this raises a dispute between the plaintiff and the defendant.

The statement that the contract made must be based on permissible/halal reasons is also explained in the Compilation of Sharia Economic Law (KHES) which is a guideline in the practice of muamalah activities based on sharia principles in Indonesia. In Article 29 paragraph (2) letter d, it is stated that the agreed contract must contain the provisions of a cause that is lawful according to Islamic law.[75] Then, an agreement set forth in the form of a contract agreement must be an activity that is justified by law and may not violate it.

In carrying out banking practices, the musyarakah mutanaqishah contract between the bank and the customer must contain requirements for equity participation (partnership), lease requirements and at the same time binding collateral in the form of goods being traded and other additional guarantees.[76] So that the rights between the debtor, namely the customer and the bank as a creditor in a contract, can be guaranteed to each other without any aggrieved party.

In this dispute, the object of collateral that is subject to the imposition of mortgage rights is Certificate of Ownership Number 1753, covering an area of 269 m^2 which belongs to the plaintiff as a

[75]Mahkamah Agung Republik Indonesia, *Kompilasi Hukum Ekonomi Syariah Edisi Revisi* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2011), p. 18.

[76]Nadratuzzaman Hosen, "Musyarakah Mutanaqishah", *Journal Al-Iqtishad*, Volume 1, No. 2, July 2009, p. 54.

debtor. Based on the provisions of the *musyarakah mutanaqishah* contract described above, it can be seen that the certificate can be categorized as another additional guarantee. While the main collateral is the portion financed by the plaintiff in the *musyarakah mutanaqishah* contract. So that the assumption that the collateral function is dual is only the plaintiff's opinion.

It can observe on the provisions of Indonesian positive law, there are two guarantees in Islamic banking financing. Some are said to be the main collateral in the form of goods belonging to the debtor which are financed with a credit facility as well as being used as collateral for credit repayment. Then there is what is called an additional collateral which is the object belonging to the debtor in its entirety which is not financed by a related credit facility as additional collateral.[77]

At the provisions on the Law No. 21 of 2008 explains that additional guarantees in the form of movable or immovable objects are submitted by collateral owners to Islamic Banks and UUS, in order to guarantee payment of the obligations of customers who receive facilities. So, these provisions are similar to additional guarantees submitted by Debtor Customers to banks in the context of providing credit facilities or financing based on Sharia Principle.

As for the making of mortgage rights over land which is disputed by the plaintiff by stating that the making of mortgage rights in

[77]Faturrahman Djamil, *Penyelesaian Pembiayaan…*, p. 50-51.

musyarakah mutanaqishah contracts is tyranny is a mistake. Because in essence, the contract is not only a musyarakah contract, but a hybrid contract with accounts payable, because the plaintiff as the debtor buys the portion of the creditor's share in the full resolution of ownership, so it requires collateral.

The customer's obligation to make purchases of the bank's portion of ownership fulfills the element of becoming a receivable or bill for the bank. Referring to this argument, mortgage rights can be used to guarantee the fulfillment of the customer's obligations to the bank as stipulated in the *musyarakah mutanaqishah* contract in financing property ownership to ensure legal certainty for creditors as parties providing goods.[78]

Because to sell certified land, mortgage rights must be given to the creditor, so that if the creditor disobeys or is unable to carry out his obligations, the creditor will not be harmed. This is a precautionary measure that has been established under the law.

After discussing the dispute, the researcher proceeded to the dispute resolution process of the parties. Based on the positive law of Indonesia, dispute resolution is carried out in two ways, namely through litigation and non-litigation.[79] The litigation is a method of resolving disputes through courts that have this competence. In this research, it is

[78]Febrian Dwi Laksono, Thohir Luth and Siti Hamidah, "Status Hak Tanggungan Pada Pembiayaan Kepemilikan Rumah di Akad *Musyarakah mutanaqishah* (MMQ), *Journal Hukum dan Pembangunan*, Volume 50, No. 3, 2020, p. 658.

[79]Erie Hariyanto, "Penyelesaian Sengketa Ekonomi Syariah di Indonesia", *Journal Iqtishadia*, Volume 1, No. 1, June 2014, p. 46.

about sharia economic disputes submitted by the plaintiff to the Medan Religious Court based on their jurisdiction.

Meanwhile, non-litigation dispute resolution is a way of resolving disputes outside the courtroom which is based on the principles of deliberation and kinship so as to find a win-win solution between the disputing parties. So this method is the most frequently used dispute resolution method because it is fast and promotes the principle of kinship.

On the dispute No. 1706/Pdt.G/2020/PA.Mdn. it has been agreed that if a dispute occurs at a later date, it will be resolved through the National Sharia Arbitration Board (BASYARNAS). This is in accordance with the provisions of article 55 paragraph (2) law no. 21 of 2008 regarding Sharia Banking, namely the resolution of disputes is settled based on the contract. But, It has been declared to have no legal force based on the Constitutional Court Decision No. 93/PUU-X/2012.

Eventhough the decision of the constitutional court has been annulled which is final and acts as a source of law, The Medan Religious Court declares that it has no authority to resolve the dispute because the parties have agreed to resolve the dispute according the contract. Eventhough the authority to settle sharia economic disputes through litigation is the absolute competence of religious courts.

The statement is according to the Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, Article 3 states that the

District Court, which in this case is equated with the Religious Court, is not authorized to adjudicate disputes between parties who have been bound in an Arbitration agreement.[80]

This is a provision made to carry out a separation of powers with the aim of alleviating the task of the religious courts in deciding various cases brought forward. Because the alternative dispute resolution allow the parties to resolve the dispute by finding win-win solutio

After carrying out further studies, the researcher found on the disenting and concurring oppinion of Constitutional Court's decision stated that Article 55 paragraph (2) Law No. 21 of 2008 does not have binding legal force is to eliminate competence clashes between courts of the same level, in this case the Religious Courts and General Courts, then stated that if the resolution following non-litigation form, according to the Law No. 30 of 1999 is allowed.[81]

That is the reason for all of the research through the Sharia Economic Dispute Resolution after the Constitutional Court Decision No. 93/PUU-X/2012 has been stipulated. In fact, if one looks closely at the decision, it has been stated that the explanation of Article 55 paragraph (2) Law No. 21 of 2008 was declared contrary to the UUD 1945 and declared to have no binding legal force.

The explanation of paragraph (2) states that the resolution of disputes referred to other than paragraph (1) is through deliberations,

[80]Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution,
[81]Constitutional Court Decision No. 93/PUU-X/2012

banking mediation, arbitration bodies, through courts within the General Courts. So that if we pay close attention to the editorial decision based on Constitutional Courts No. 93/PUU-X/2012, the inclusion of an arbitration clause has been declared contrary to the 1945. So it has been declared to have no binding legal force.

However, because the explanation of paragraph (2) has been terminated in this way while the paragraph has not been terminated, it appears that there is a legal vacuum regarding dispute resolution based on an agreement made by the parties based on the contract. So that many legal experts and researchers make interpretations and return dispute resolution based on contracts which are justified as long as they refer to Law No. 30 of 1999.

For the example, this book states that the dispute resolution through arbitration is based on the agreement of the parties, either the agreement before the dispute occurred or after the dispute. Resolution of disputes based on agreements is the authority of arbitration and courts have the right to refuse and cannot intervene in disputes that have been delegated through arbitration. An agreement made in writing before an authorized official constitutes a law for those who make it.[82]

2. The Analysis by *Fiqh Muamalah*

Based on the provisions of *fiqh muamalah*, *syirkah* activities are a permissible collaboration system. Regarding the type of *syirkah*

[82]Rahman Ambo Masse and Muhammad Rusli, *Arbitrase Syariah* (Makassar: IAIN Parepare Nusantara Press, 2017), p. 150.

mutanaqishah which is a dispute in case no. 1706/Pdt.G/2020/PA.Mdn, Rafiq Yunus al-Mishri explained that *musyarakah mutanaqishah* is a contract that has different legal opinions among *fiqh* scholars. Because it belongs to hybrid contract.

Al-Mishri emphasized that the *musyarakah mutanaqishah* contract is formally a form of *syirkah*, while in essence it includes a business contract, namely a certain business with the aim of gaining profit.[83] Without mentioning the names of scholars with different opinions, al-Mishri explained that there are scholars who are of the opinion that a *musyarakah mutanaqishah* contract is a permissible contract, while other scholars are of the opposite opinion, namely a *musyarakah mutanaqishah* contract is a prohibited contract.

One of the reasons for the emergence of differences of opinion among scholars regarding the musyarakah mutanaqishah contract is the aspect of ownership of assets in the form of portions owned by both parties. In accordance with the understanding in language, mutanaqishah means reduced. What is meant by reduced here is that the portion of one party's assets will decrease because it has become part of the other party after repaying a certain amount of money within a certain period of time.

Cause of *musyarakah mutanaqishah* is a hybrid contract, there is a musyarakah aspect that can be seen in the portions of both parties and

[83]Maulana Hasanuddin and Jaih Mubarok, *Perkembangan Akad*..., p. 67-68.

then the *ijarah* aspect is to make a profit by leasing goods to other people. so that from this profit the debtor will later repay the creditor's share of his portion of the assets so that after the installment period is up, the entire portion of the assets will switch from the creditor to fully belonging to the debtor.

Then, from the guarantee aspect which is the main guarantee. the portion of assets owned by the debtor does not belong to him in full, because part of it belongs to the creditor as the provider of the object of the contract. even though the conditions for goods to be used as collateral must be in the form of goods whose ownership is fully owned by the debtor, the guarantor, and this ownership must be legally proven.[84] Because of this too, additional collateral is needed as collateral for debt repayment and It becomes the main dispute on the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

In the agreement between the parties based on Article 11 paragraph (1) Financing Agreement in dispute No. 1706/Pdt.G/2020/PA.Mdn. explained that the main collateral has a dual function in the form of debt repayment and guarantor of the debtor's compliance in repayment of the debt. Basically, the determination of collateral for debt is permissible based on Surah al-Baqarah/2:283:

وَاِنْ كُنْتُمْ عَلٰى سَفَرٍ وَّلَمْ تَجِدُوْا كَاتِبًا فَرِهٰنٌ مَّقْبُوْضَةٌ

If you are on a journey, and cannot find a scribe, a pledge (collateral) with possession (may serve the purpose).[85]

[84]Akhmad Farroh Hasan, *Fiqh Muammalah*…, p. 127.
[85]Kementrian Agama RI, *Al-Qur'an Al-Karim...*, p. 49.

Based on that firman, it can be seen that collateral is allowed in non-cash *muamalah* activities. So basically it does not violate the provisions of Islamic law, but to guarantee the certainty of the contract. As for the cancellation of the contract proposed by the plaintiff, if the contract violates the sharia, then the contract is not valid according to the sharia.

However, based on the Plaintiff's statement that the application of profit-sharing financing based on sharia principles does not require collateral, it is true if it is *musyarakah*. In the *musyarakah mutanaqishah* contract there is a debt-receivable relationship, so collateral is needed in accordance with the concept of pawn in the sharia. It can be said that the contract made by the Plaintiff and the Defendant is not against the sharia.

The purpose of establishing collateral in a musyarakah mutanaqishah contract is to guarantee legal certainty for the party carrying out the contract in an effort to preserve the objectives of the sharia. This is in line with the principles of fiqh, namely maslahah mursalah which means realizing benefits and safety and apart from the difficulties/prohibitions of the sharia.[86] This rule is a legal scope that is universal, not only guaranteeing certain interests or groups and It becomes a good agreement among the parties.

This manner is applied to the entire community. So, the rule of the goverment is very important to guarantee the interests of society in general. In accordance with the agreement that is being disputed on the

[86]Muhajirin and May Dedu, "Maslahah Mursalah dan Implementasinya Dalam Akad Muamalah", *Journal Hukum Islam dan Pranata Sosial Islam*, Volume 2, No. 9, April 2021, p. 175.

Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., the collateral object that is subject to the imposition of mortgage rights is the Property Rights Certificate Number 1753, covering an area of 269 m^2 which belongs to the plaintiff as a debtor. Because that reason, the plaintiff stated that the determination of mortgage rights and the imposition of costs for making them was a tyranny and it is forbidden. This is the basis for the plaintiff filing a case at The Medan Religious Court.

However, based on the explanation put forward above, it can be understood that the determination of the guarantee is an action to guarantee the legal certainty of the defendant as a creditor. Because this *musyarakah mutanaqishah* contract also contains the context of accounts payable in the form of a portion that will be repaid by the debtor.[87] So that in non-cash *muamalah* activities, guarantees are needed as explained earlier.

Thus, the stipulation of collateral, both the main guarantee and additional guarantees in the *musyarakah mutanaqishah* contract, is justified by the Shari'a. This is done to avoid losses to one party, especially the creditor as a service provider. So that the contract is protected from elements of fraud on the part of the debtor who is likely to run away and avoid paying off the debt. If a *musyarakah* contract goes well, then Allah SWT. will approve and bless the deal by joining

[87]Febrian Dwi Laksono, Thohir Luth and Siti Hamidah, "Status Hak…, p. 658.

it. However, if one party cheats, then Allah SWT. will leave the union. As explained in a *hadits*:

عَنْ أَبِي هُرَيْرَةَ رَفَعَهُ قَالَ إِنَّ اللَّهَ يَقُولُ أَنَا ثَالِثُ الشَّرِيكَيْنِ مَا لَمْ يَخُنْ أَحَدُهُمَا صَاحِبَهُ فَإِذَا خَانَهُ خَرَجْتُ مِنْ بَيْنِهِمَا

It was narrated from Abu Hurairah, who attributed it (to the Prophet): "Allah, Exalted is He, says: I am the third of two partners so long as one of them does not betrays the other; but if he betrays him then I depart from among them."[88]

Beside of that, regarding the cancellation of contract proposed by the plaintiff, it can be done because one of the causes of the termination of the contract is the cancellation agreed by both parties.[89] The cancellation procedure must be in accordance with the contract in case No. 1706/Pdt.G/2020/PA.Mdn. the resolution is carried out in a family manner through BASYARNAS. In fulfilling the contract, all of muslim must obey the promise on the aqad. As long as it not contradicts with the law and sharia rule.

Basically, all of contract is allowed as long as It doesn't contrary the law. In can find in hadits:

حَدَّثَنَا الْحَسَنُ بْنُ عَلِيٍّ الْخَلَّالُ حَدَّثَنَا أَبُو عَامِرٍ الْعَقَدِيُّ حَدَّثَنَا كَثِيرُ بْنُ عَبْدِ اللَّهِ بْنِ عَمْرِو بْنِ عَوْفٍ الْمُزَنِيُّ عَنْ أَبِيهِ عَنْ جَدِّهِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا

Kathir bin 'Amr bin 'Awf Al-Muzani narrated from his father, from his grandfather, that the Messenger of Allah said: "Reconcilation is

[88]Imam Hafiz Abu Dawud Sulaiman bin Ash'ath, *Sunan Abu Dawud Volume 4*, Translated by Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), p. 86

[89]Akhmad Farroh Hasan, *Fiqih Muammalah…,* p. 28.

allowed among the Muslims, except for reconcilation that makes the lawful unlawful, or the unlawful lawful. And the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful."[90]

Based on this verse, it can be understood that all of the contract, all of the agreement that has been written on the paper basically allowed by the constitution and sharia as long as it is not containing forbidden clausul. Because the forbidden clausul on the agreement can give the disadvantage to one of the parties. So, that rule can guarantee legal certainty for whole people to protect the rights to assets owned in *muamalah* activities. When the agreement contradict the law, it must cancel for the law.

Because the parties which bound by the *musyarakah mutanaqishah* agreement are within the jurisdiction of Indonesia, the implementation of sharia economic practices and the resolution of disputes must be based on the provisions set by the government as the leader as long as they do not violate the provisions of Islamic law.

C. The Review of the Constitutional Court Decision No. 93/PUU-X/2012 Toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn.

In conducting a review regarding Constitutional Court decision No. 93/PUU-X/2012 toward the Medan Religious Court decision No. 1706/Pdt.G/2020/PA.Mdn., the researcher used two theories based on the theoretical studies described in Chapter III of this study. The review was

[90]Imam Hafiz Abu 'Eisa Mohammad Ibn 'Eisa At-Tirmidhi, *Jami' At-Tirmidhi...*, p. 142.

carried out using the concept of The Pure Theory of Law which was popularized by Hans Kelsen and The Positivism Law Theory as a general accepted legal theory.

1. The Review by The Pure Theory of Law

As it is known that the basis of The Pure Theory of Law is the basic norm as the highest law. A norm the validity of which cannot be derived from a superior norm we call a "basic" norm. All norms whose validity may be traced hack to one and the same basic norms form a system of norms, or an order. This Basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norms constituting the order.[91]

The basic norm that is known in the Indonesian legal system is the 1945 Constitution (UUD 1945). So that all regulations, laws and judges' decisions in resolving a disputed case may not conflict with the existing provisions in the 1945 Constitution. To review the decision of the Religious Court, it starts from the statutory regulations which are the legal basis in deciding cases. Because the considerance to settle the dispute must obey the positive law of Indonesia.

After analyzing the judge's considerations in the decision of the Medan Religious Court No. 1706/Pdt.G/2020/PA.Mdn. related to the

[91]Hans Kelsen, *General Theory of Law* (New Jersey: Harvard University Press, 2005), p. 111.

sharia economic disputes resolution that submitted by the plaintiff, the researcher found the fact that the decision was determined based on a review of the Constitutional Court decision No. 93/PUU-X/2012 is deviate or contradict.

The lawsuit filed by the plaintiff in case No. 1706/Pdt.G/2020/PA.Mdn. made the Constitutional Court Decision No. 93/PUU-X/2012 as one of the arguments to strengthen the lawsuit. However, the defendant had a bit misunderstood the decision. Because in his claim, the plaintiff said that article 55 paragraph (2) was canceled by the decision of the Constitutional Court and stated that the authority of Basyarnas to examine and adjudicate sharia banking disputes had been declared contrary to the UUD 1945.

The Plaintiff's opinion is supported by Article 1338 of the KUHPerdata, which in essence all agreements made in accordance with the law apply as laws to those who make them according to the provisions, but a contract may not contradict with the law. So according to him, the Explanation of article 55 paragraph (2) regarding the authority of BASYARNAS does not have binding legal force.

The reality, on the Constitutional Court Decision No. 93/PUU-X/2012 state that the explanation of paragraph (2) does not have legal force. It means that if the parties made an agreement on the contract to resolve the dispute through the deliberation, mediation, arbitration board or General Courts, that act is contradict to the law. So, that act

must be declared null and void because the agreement contains reasons that are not justified by law.

In this case, the researcher interests with the opinion of Dr. Muhammad Syafii Antonio M.Ec. who was present because he was called for his opinion regarding case No. 93/PUU-X/2012 states that the explanation of Article 55 paragraph (2) creates legal uncertainty. [92] The problem comes cause of 3 forms of dispute resolution, namely the Religious Courts, the Arbitration Board and the General Courts. There should only be one based on the choice of the parties and it must be stated clearly in the contract.

In this verse, one can choose only arbitration or only religious courts. Because based on Article 49 letter (i) of Law No. 3 of 2006 regarding the Religious Courts, the resolution of disputes is not only limited to the field of Sharia Banking, but also to other fields of sharia economics. So that point d which states that the resolution through the public courts should be revoked. Because It contradict with the separating power principal.

From the considerations used by the constitutional judges in case No. 93/PUU-X/2012 it can be concluded that the principal cancellation of Article 55 paragraph (2) is in point d, so that the resolution of disputes based on a contract which in this case is an alternative dispute resolution is not limited to the 4 forms. Because the resolution of non-

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

litigation disputes has been regulated by Law No. 30 of 1999, including for sharia economic matters that came after.[93]

Then, hereby the problem of lawsuit on the Decision No. 1706/Pdt.G/2020/PA.Mdn. about the BASYARNAS. The authority of It as a dispute resolution institution through non-litigation channels has binding legal force. And if there is an arbitration clause in the agreement, then the court is obliged to declare that it does not have the authority to try cases submitted in accordance with article 3 of Law No. 30 of 1999.

Even though that is for the General Courts, these arbitral bodies and judicial bodies are equated with BASYARNAS (Badan Arbitrase Syariah Nasional) and Religious Courts because there is no specific legal basis related to alternative dispute resolution on the sharia economic dispute. So that the settlement refers to conventional economics based on related law.

In accordance with these considerations, the judge at the Medan Religious Court stated that the cancellation of the explanation of Article 55 paragraph (2) does not make BASYARNAS's authority non-binding. Therefore, the dispute resolution at BASYARNAS has binding legal force so that the plaintiff is guaranteed legal certainty. And in this decision stated that the Medan Religious Court does not have authorized to try the lawsuit submitted.

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

However, the Constitutional Court Decision No. 93/PUU-X/2012 states that sharia economic dispute resolution according to *aqad* through deliberation, mediation, arbitration board or General Court is contradict with the basic norm that is UUD 1945. The interpretation of this decision cannot be returned to the Law No. 30 of 1999 because the settlement of disputes based on the contract according to paragraph (2) has no further explanation, resulting in a legal vacuum.

The decision must be clearly interpreted for the editorial that has been stated in the decision. Then It caused the law dualism of interpretation the dispute and makes the chance about uncertainty of the law. Because the aim of the rule and regulation must guarantee the rights of all the people as a highest value in life to get the freedom of rights.

Furthermore, according to the article 1320 of the KUHPerdata states that there are four conditions for an agreement to be valid, namely the existence of an agreement by both parties, the ability to act, the object of the agreement (a certain matter), the existence of a lawful cause according to law.[94] The last requirement shows that the cause of the agreement must be allowed by the Law.

If it contraries the law, the agreement must be null and void by law. This is the basis for the plaintiff to file a lawsuit regarding the cancellation of the *musyarakah mutanaqishah* contract to the Medan

[94]Soedaryo Soimin, *Kitab Undang…*, p. 329.

Religious Court. But the result, on the decision states that It does not have the authority to try the lawsuit.

After analyzing the decision No. 1706/Pdt.G/2020/PA.Mdn. by taking the statute and case approach, as well as conducting a review of the judge's considerations based on the Constitutional Court decision No. 93/PUU-X/2012, researcher can conclude that the decision stipulated by the Medan religious court in case No. 1706/Pdt.G/2020/PA.Mdn is contradict with the decision of the Constitutional Court No. 93/PUU-X/2012.

2. The Review by The Positivism Law Theory

In accordance with the principles of positivism law theory, law is an order formed by the government and codified in writing in a hierarchical order so that the law can be realigned to avoid legal uncertainty.[95] Therefore, all forms of decisions determined by judges must refer to the regulatory hierarchy in Indonesia based on the provisions of Law no. 12 of 2011.

The main topic of this decision is the cancellation of Article 55 paragraph (2) of Law No. 21 of 2008. As it is known that the decision of the Constitutional Court is a final decision and can carry out a review of statute regulations against laws at the same level or higher laws, namely the UUD 1945 as the highest source of law in the hierarchy of laws and regulations in Indonesia.

[95]Haryono, "Eksistensi Aliran Positivisme Dalam Ilmu Hukum", *Journal Meta-Yuridis*, Volume 2, No. 1, 2019, p. 102.

The principal case in the decision of the Constitutional Court No. 93/PUU-X/2012 in the form of a request for review of Article 55 paragraph (2) and (3) of Law No. 21 of 2008 regarding Sharia Banking. Where paragraph (2) states that the resolution of sharia banking disputes is carried out by courts within the Religious Courts, while paragraph (3) reads that the resolution of disputes as referred to in paragraph (2) may not contradict with sharia principles.

The review of the article was reviewed based on the UUD 1945 at the request of the applicant who felt that his right to obtain justice in resolving sharia economic disputes did not obtain legal certainty. Because in the explanation of paragraph (2) Article 55 of Law No. 21 of 2008, there is legal dualism in the resolution of sharia economic disputes at an equal level of justice.

The explanation that states that dispute resolution is carried out in accordance with the contents of the contract, with the following efforts; (a) deliberation, (b) banking mediation, (c) through the Badan Arbitrase Syariah Nasional (Basyarnas), (d) other arbitration institutions; and/or through courts within the General Court environment. [96]

From the explanation of paragraph (2) it can be seen in point d which states that if it is carried out according to the contract, then the dispute resolution process can be carried out through a court within the General Court environment. Meanwhile, the provisions of paragraph (1)

[96]Law No. 21 of 2008 regarding Sharia Banking in explanation.

explain that the authority for sharia banking dispute cases belongs to the religious courts. And reinforced by Article 49 letter i Law No. 3 of 2006 which states that the absolute authority of the religious court includes sharia economic disputes.

With this legal dualism, it can be said that article 55 paragraph (2) of Law No. 21 of 2008 cannot guarantee justice for justice seekers. This is contrary to Article 28 D paragraph (1) of the UUD 1945 which states that everyone has the right to recognition of guarantees of protection and fair legal certainty and equal treatment before the law.

Because the position between the religious court and the district court is the same. The difference is that the religious courts have their own legal standing, so that the handling of related cases is an absolute competency for the religious courts. This accident is often occurred till now and always bring the uncertainty for the dispute resolution.

Then, in terms of the inclusion of litigation and non-litigation dispute settlement clauses it looks like competition. Because the resolution of sharia economic disputes is an absolute competence of Religious Courts. However, due to the separation of powers, if there is an arbitration clause in the contract, the dispute resolution cannot be submitted to the Religious Court. This shows the need for attention to the clauses in the contract.[97]

[97]Mahpudin and Akhmad Khisni, "Pelaksanaan Klausul Penyelesaian Sengketa Dalam Akad Perbankan Syariah Pasca Putusan Mahkamah Konstitusi Republik Indonesia Nomor: 93/PUU-X/2012 Pada Bank Syariah Mandiri KCP Indramayu", *Journal Akta*, Volume 5, No. 1, March 2018, p. 151.

In addition, the explanation of Article 5 paragraph (2) seems to limit alternative dispute resolution options to four ways which basically are not limited to the four ways. Apart from arbitration, there are several alternative dispute resolutions based on Law No. 30 of 1999 article 1 number 10 which states that alternative dispute resolution is a dispute resolution institution or difference of opinion through procedures agreed upon by the parties, namely out-of-court resolution by means of consultation, negotiation, mediation, conciliation, or expert judgment.[98]

Back to the research problem, the plaintiff used to cancel the agreement that consist of *akad musyarakah mutanaqishah* according to the lawsuit. It was submitted to the Medan Religious Court, but It stated that does not have authorized to try the case. Because the dispute resolutiom has chosen through BASYARNAS and it suitables to the freedom of contract principal as non-litigation manner to get the resolution based on the Law no. 30 of 1999.

At first glance, it can be acknowledged that freedom of contract is one of the reasons for choosing a dispute resolution forum. However, this is not the case, because this freedom is permissible as long as it does not violate the law. When it violates the law, so it must be null by the law and the institution that has competence to cancel the contract must resolve this dispute. Where based on Constitutional Court

[98]Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution.

Decision No. 93/PUU-X/2012, the settlement of disputes based on contracts through BASYARNAS has been declared contrary to the Law, it must be null and void by law. And the Medan Religious Court which has the competence to resolve related disputes must accept the case submitted.

Based on the study of the Positivism Theory of Law, the regulations, in this case the decisions of the Medan Religious Court, must refer to existing regulations and must not conflict with the above regulations. The Law No. 30 of 1999 with Constitutional Court Decision No. 93/PUU-X/2012 can be said to be at the same level, then in terms of the latest and specific regulations. In this case, more emphasis should be placed on the Constitutional Court Decision.This reason can prove on the Article 10 paragraph (1) of Law No. 24 of 2003 regarding the Constitutional Court which states that the Constitutional Court has the authority to try at the first and last levels whose decisions are final and have permanent legal force from the time they are pronounced and no legal remedies can be taken.[99]

According to the Law No. 12 of 2011 regarding The Establishment of Laws and Regulations Article 7 paragraph (1) include regulations stipulated by the Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Supreme Court, Constitutional Court, etc. So, the legal force of the Constitutional Court decisiom

[99]Law No. 24 of 2003 regarding Constitutional Court.

basen on the two Laws above can peove that It must be considerable by the judge for resolving sharia economic dispute.

Based on this description, it can know that the Constitutional Court Decision is one of the hierarchies in Indonesian law resource and regulations in Indonesia. So that the rules and considerations for decisions on related cases must refer to this hierarchy. This is in accordance with the concept of positivism theory of law which wants regulatory order for legal harmony.

As for the settlement of disputes on the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn., which has stated that It does not have authorized to try the lawsuit submitted, legal efforts can still be made based on article 328 KUHP concerning filing an appeal related to the authority to try even though the court says it has no authority, but in fact have authority. However, after researchers traced the Medan PTA decision through the website of the *Direktori Putusan Mahkamah Agung*, there is no appeal decision was found regarding the case.

Based on this study, the researcher concluded that the constitutional court as a state institution had annulled the explanation of Article 55 paragraph (2) of Law No. 21 of 2008. So that this decision has binding legal force and is final. This shows that based on a study of positivism theory of law, the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. is contrary to the Constitutional Court Decision No. 93/PUU-X/2012.

CHAPTER V

CONCLUSSION AND SUGGESTION

A. Conclussion

Based on the results of research conducted by researcher, the following conclusions are obtained:

1. Consideration of the Medan Religious Court Judges on the decision No. 1706/Pdt.G/2020/PA.Mdn. who declared that he was not authorized to try the lawsuit based on the provisions of Article 3 of Law No. 3 of 1999 which principally states that the Court, which in this case is the Religious Court, is not authorized to try between parties who have been bound in an Arbitration agreement an the Constitutional Court Decision No. 93/PUU-X/2012 does not make the arbitration clausul on the agreement does not has legal force. Because the two legal standing is separated.
2. Review of Constitutional Court Decision No. 93/PUU-X/2012 toward the Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn shows that the Medan Religious Court's decision regarding the lawsuit filed is contradict with the Constitutional Court Decision No. 93/PUU-X/2012. Because the explanation of Article 55 paragraph (2) of Law No. 21 of 2008 has been stated that no binding legal force and contradict with the basic norm that is UUD 1945. So, based on the pure theory of law and positivism theory of law, the decision of the

Religious Court Decision is contradict with the basic norms and another decision/law on the same hierarchy and the highest.

B. Suggestion

After obtaining the results of the research, the researcher would like to submit several suggestions for improving the system in the procedure for resolving sharia economic disputes in Indonesia as follows:

1. The government and state institutions that have the authority to form laws are expected to codify laws related to sharia economic dispute resolution procedures in Indonesia so that legal dualism does not occur so as to guarantee justice for society.
2. Efforts are needed to provide understanding to attorneys and parties who carry out contracts so they can understand the regulations related to sharia economic dispute resolution procedures both litigation and non-litigation so that incidents like this do not happen again.
3. Researcher hope that the resolution of sharia economic disputes can be pursued through non-litigation channels so that they can resolve disputes with the best solution and with the principle of kinship. So that no party is declared to have lost or won, neither the plaintiff nor the defendant.

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CURRICULUM VITAE

A. Personal Identity

Name	: Muhaimin Nur Siregar
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Gender	: Male
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   - a. Name : Surya Muslim Siregar
   - b. Occupation : Farmer
2. Mother
   - a. Name : Enni Cahaya
   - b. Occupation : Teacher
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Nomor : B- 354 /In.14/D.1/PP.00.9/03/2022 30 Maret 2022
Lamp : -
Perihal : Pengesahan Judul dan Pembimbing Skripsi
Yth. Bapak/Ibu :

1. Dr. H. Fatahuddin Aziz Siregar, M.Ag
2. Dr. Ikhwanuddin Harahap, M.Ag

Assalamu'alaikum Wr. Wb.

Dengan hormat, disampaikan kepada Bapak/Ibu bahwa berdasarkan hasil sidang Tim Pengkaji Kelayakan Judul Skripsi, telah ditetapkan Judul Skripsi Mahasiswa tersebut di bawah ini sebagai berikut:

Nama : Muhaimin Nur Siregar
NIM : 1810200028
Sem/T.A : VIII (Delapan) 2021/2022
Prodi : Hukum Ekonomi Syariah (HES)
Judul Skripsi : The Analysis of The Medan Religious Court Decision No. 1706/Pdt.G/2020/PA.Mdn. Regarding The Sharia Economic Dispute Resolution Based on The Constitutional Court Decision No. 93/PUU-XX/2012.

Seiring dengan hal tersebut, kami mengharapkan kesediaan Bapak/Ibu menjadi Pembimbing I dan Pembimbing II penelitian penulisan skripsi mahasiswa dimaksud.

Demikian kami sampaikan, atas kesediaan dan kerjasama yang baik, kami ucapkan terimakasih.

Wassalamu'alaikum Wr. Wb.

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PUTUSAN

Nomor 1706/Pdt.G/2020/PA.Mdn

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

Pengadilan Agama Medan yang memeriksa dan mengadili perkara perdata pada tingkat pertama dalam persidangan Hakim Majelis telah menjatuhkan putusan dalam perkara Gugatan Ekonomi Syariah antara pihak-pihak:

Penggugat, lahir di Medan tanggal 17 Oktober 1979, laki-laki, warga Negara Indonesia, agama Islam, pendidikan S.2, Pekerjaan Pegawai Negeri Sipil, tempat tinggal di Medan sebagai Penggugat;

melawan

1. **Tergugat I**, berkedudukan di Jalan Balai Kota No. 10-D Kota Medan, sebagai Tergugat I;
2. **Tergugat II**, berkedudukan di Kota Medan, sebagai Tergugat II;
3. **Tergugat III**, berkedudukan di Jalan STM Kelurahan Siti Rejo II Kecamatan Medan Amplas Kota Medan, sebagai Tergugat III;

Pengadilan Agama tersebut;

Telah mempelajari surat-surat yang berkaitan dengan perkara ini;

DUDUK PERKARA

Bahwa Penggugat dalam surat gugatan yang didaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1706/Pdt.G/2020/PA.Mdn, tanggal 3 Agustus 2020, telah mengajukan Gugatan Ekonomi Syariah dengan dalil-dalil sebagai berikut:

1. Bahwa Penggugat dengan Tergugat I telah terikat dalam suatu pembiayaan musyarakah atau syirkah yang kepemilikan asset (barang) atau modal salah satu pihak (syarik) berkurang disebabkan pembelian secara bertahap oleh pihak lainnya, sesuai dengan Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32

tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II dalam kapasitasnya selaku notaris;

2. Bahwa yang bertindak sebagai pemberi fasilitas pembiayaan adalah Tergugat I, sedangkan yang menerima fasilitas pembiayaan adalah Penggugat, yaitu fasilitas pembiayaan untuk kepemilikan asset atau pembelian sebidang tanah seluas 269 m^2 berikut bangunan di atasnya yang terletak di Jalan Bakti No. 43 Kelurahan Tanjung Gusta Kecamatan Medan Helvetia Kota Medan, sesuai dengan Sertifikat Hak Milik No. 1753/Tanjung Gusta a.n. Cut Frieda Arinni yang diterbitkan oleh Tergugat III, yang sedang berstatus sebagai agunan utang/kredit dengan jenis Hak Tanggungan di Bank BRI Cabang Iskandar Muda;

3. Bahwa harga pembelian objek atau asset musyarakah mutanaqisah tersebut, adalah sebesar Rp 600.000.000,- (enam ratus juta rupiah) dengan pembagian syirkah:

a. syirkah dari Tergugat I sebesar Rp 525.000.000,- (lima ratus dua puluh lima juta rupiah) atau 87,50%;

b. syirkah dari Penggugat sebesar Rp 75.000.000,- (tujuh puluh lima juta rupiah) atau 12,50%;

4. Bahwa selanjutnya, asset musyarakah mutanaqisah disewakan (di-ijarah-kan) kepada Penggugat, dengan nisbah keuntungan 19,35% untuk Penggugat dan 80,65% untuk Tergugat I, sesuai dengan Akad Ijarah No. 33 tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II dalam kapasitasnya selaku notaris;

5. Bahwa setelah penandatanganan kedua akad tersebut, Tergugat I menerangkan statusnya sebagai suatu Perseroan Terbatas tidak dibenarkan membeli kebendaan yang berstatus hak milik i.c. SHM No. 1753/Tanjung Gusta, sehingga disepakati Penggugat yang bertindak sebagai pembeli dalam Akta Jual Beli yang dibuat oleh Tergugat II dalam kapasitasnya selaku PPAT di Kota Medan, yang kini telah dilakukan peralihan nama pemilik (perubahan nama/balik nama) dari a.n. Cut Frieda Arinni menjadi a.n. Dokter Teuku Yose Mahmuddin Akbar i.c. Penggugat;

6. Bahwa tenggang waktu kewajiban Penggugat kepada Tergugat I untuk membeli syirkah secara bertahap (pembelian syirkah) dan pembayaran uang sewa-menyewa, ditetapkan selama 180 bulan (15 tahun) terhitung mulai bulan November 2012 s/d Oktober 2027 dengan

total sebesar Rp 1.074.083.400,- atau sebesar Rp 5.967.130,- setiap bulan, dengan perincian:

a. Pembelian syirkah secara bertahap terhadap uang modal pembiayaan dengan persentase 87,50% sebesar Rp 525.000.000,- pada bulan pertama sebesar Rp 1.154.630,- dan mengalami kenaikan setiap bulan sekitar 0,9166666667% atau 11% setiap tahun, sehingga pembayaran untuk pembelian syirkah pada bulan kedua sebesar Rp 1.165.210,- dan begitu seterusnya sehingga pada bulan yang ke-180 berjumlah genap sebesar Rp 525.000.000,-;
b. Pembagian keuntungan sewa-menyewa dengan nisbah 80,65% adalah Rp 549.083.400,- dari total harga sewa sebesar Rp 680.822.566,- yang pada bulan pertama sebesar Rp 4.812.500,- dan mengalami penurunan setiap bulan sekitar 0,219844156% sehingga pembayaran nisbah pada bulan kedua sebesar Rp 4.801.920,- dan begitu seterusnya sehingga pada bulan yang ke-180 berjumlah genap sebesar Rp 549.085.450,-;

7. Bahwa perikatan atau perbuatan hukum antara Penggugat dengan Tergugat I dibuat dengan berpedoman kepada Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 tentang Musyarakah Mutanaqisah, antara lain:

a. Dalam Konsideran Menetapkan: Ketiga tentang Ketentuan Akad, difatwakan akad musyarakah mutanaqisah terdiri dari akad musyarakah/syirkah dan Bai' (jual-beli). Dalam hal ini, Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 Nopember 2012 berisikan akad tentang kepemilikan asset (barang), berupa: tanah seluas 269 m^2 berikut bangunan di atasnya, sesuai dengan Sertifikat Hak Milik No. 1753/Tanjung Gusta a.n. Cut Frieda Arinni yang diterbitkan oleh Tergugat III yang disepakati dalam dokumen Akta Jual Beli dibuat atas nama Penggugat;
b. Dalam Konsideran Menetapkan: Keempat tentang Ketentuan Khusus, difatwakan asset musyarakah mutanaqisah dapat di-ijarah-kan kepada syarik atau pihak lain dan apabila asset musyarakah menjadi obyek ijarah, maka syarik (nasabah) dapat menyewa asset tersebut dengan nilai ujrah yang disepakati. Dalam hal ini, Akad Ijarah No. 33 tanggal 20

Nopember 2012 berisikan akad tentang Penggugat sebagai syarik (mitra atau nasabah) bertindak sebagai penyewa dari asset musyarakah;

8. Bahwa oleh karena dari jenis, karakter dan dokumen yuridis pengikatannya terbukti perikatan antara Penggugat dengan Tergugat I merupakan akad musyarakah mutanaqisah yang assetnya di-ijarah-kan kepada Penggugat, sehingga dengan berdasar Pasal 22 KHES yang menentukan: "*rukun akad terdiri atas: pihak-pihak yang berakad, obyek akad, tujuan pokok akad dan kesepakatan*", dikaitkan dengan Pasal 51 ayat (1) KHES yang menentukan: "*pada prinsipnya akad harus diartikan dengan pengertian aslinya, bukan dengan pengertian kiasannya*" dan ayat (2) yang menegaskan "*apabila teks suatu akad sudah jelas maka tidak perlu ada penafsiran*" maka perikatan atau perbuatan hukum antara Penggugat dengan Tergugat I tidak dapat dimaknai sebagai perbuatan hukum dengan jenis pembiayaan yang lain;

9. Bahwa akan tetapi, Pasal 11 ayat (1) Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II memuat klausul yang bertentangan dengan syariat Islam karena mengandung sebab yang terlarang (bukan sebab yang halal) sebagaimana dimaksud dalam Pasal 26 KHES jo Pasal 29 ayat (2) huruf (d) KHES, yaitu menerapkan pengikatan jaminan utang/kredit yang disusun dengan kalimat sebagai berikut: "Untuk menjamin ketaatan Nasabah terhadap segala ketentuan dalam Akad ini dan untuk melunasi segala kewajiban Nasabah pada Bank yang sudah jatuh tempo dan harus dilunasi maka Nasabah dan/atau Penjamin memberikan Jaminan/Agunan kepada Bank berupa: Pemberian Hak Tanggungan atau Surat Kuasa Membebankan Hak Tanggungan (SKMHT)/Akta Pembebanan Hak Tanggungan (APHT) atas Sertipikat Hak Milik Nomor 1753, seluas 269 M^2 (dua ratus enam puluh sembilan meter persegi);

10. Bahwa klausul dalam Pasal 11 ayat (1) tersebut, telah ditindaklanjuti dengan adanya Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 yang dibuat oleh Tergugat II, yang selanjutnya dipergunakan sebagai dasar penerbitan Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 yang dikeluarkan oleh

Tergugat III yang biaya administrasinya dibayar Penggugat kepada Tergugat II sebesar Rp 7.000.000,- dengan cara Tergugat I mendebet rekening Penggugat;

11. Bahwa menurut sistem hukum yang berlaku, pengikatan jaminan wajib bersifat *accessoir* (ikutan) dengan perjanjian pokok sehingga Akta Pemberian Hak Tanggungan No. 08/2014 jo Sertifikat Hak Tanggungan No. 982/2015 sebagai jaminan utang/kredit yang bersifat tidak *accessoir* (tidak ikutan) dengan Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II sebagai pembiayaan dengan akad musyarakah mutanaqisah (perjanjian pokok), bersifat zalim yang mengakibatkan ketidakadilan bagi Penggugat sehingga bertentangan dengan Penjelasan Pasal 2 huruf (e) UU No. 21 Tahun 2008;

12. Bahwa selain bersifat zalim, Pasal 11 ayat (1) yang menekankan fungsi pengikatan hak tanggungan bersifat ganda, yaitu: untuk menjamin ketaatan syarik dan melunasi segala kewajiban syarik juga bersifat gharar yang bertentangan dengan syariat Islam sebagai berikut:

a. Bahwa pada asasnya, fungsi jaminan dalam pembiayaan berdasarkan prinsip bagi hasil adalah untuk menjamin ketaatan syarik melaksanakan kewajibannya, sehingga pencairan hanya dapat dilakukan apabila syarik melakukan kesalahan yang disengaja;
b. Bahwa sedangkan fungsi jaminan dalam hak tanggungan, adalah untuk menjamin pelunasan utang kreditur yang pembuktiannya cukup dengan lewatnya waktu atau ingkar dalam melaksanakan kewajibannya, tanpa mempertimbangkan kreditur melakukan kesalahan yang disengaja atau kesalahan yang tidak disengaja;
c. Bahwa akan tetapi, fungsi jaminan dalam Pasal 11 ayat (1) telah menggabungkan (kumulatif) fungsi jaminan dalam pembiayaan berdasarkan prinsip bagi hasil dan fungsi jaminan hak tanggungan berdasarkan UU No. 4 Tahun 1996 sehingga fungsi jaminan aquo lebih zalim dari fungsi jaminan hak tanggungan yang diterapkan pada bank konvensional;

13. Bahwa Penggugat telah berulang kali mengingatkan agar Penggugat dan Tergugat I secara bersama-sama untuk membatalkan klausul dalam Pasal 11 ayat (1) tersebut, berikut Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 yang dibuat oleh Tergugat II

jo Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 yang dikeluarkan oleh Tergugat III, tetapi diabaikan oleh Tergugat I;

14. Bahwa permintaan dari Penggugat kepada Tergugat I untuk membatalkannya, juga didasarkan kepada alasan tiada fatwa yang memfatwakan norma hukum yang bersifat kebolehan tentang penerapan agunan/jaminan dalam pembiayaan musyarakah mutanaqisah, sebagai berikut:

a. Bahwa Penjelasan Pasal 3 UU No. 21 Tahun 2008 menentukan dalam mencapai tujuan menunjang pelaksanaan pembangunan nasional, perbankan syariah tetap berpegang pada prinsip syariah secara menyeluruh (*kaffah*) dan konsisten (*istiqomah*);

b. Bahwa Pasal 1 angka (12) UU No. 21 Tahun 2008 menentukan prinsip syariah adalah prinsip hukum Islam dalam kegiatan perbankan syariah berdasarkan fatwa yang dikeluarkan oleh lembaga yang memilliki kewenangan dalam penetapan fatwa di bidang syariah;

c. Bahwa lembaga yang memilliki kewenangan dalam penetapan fatwa di bidang syariah, adalah Majelis Ulama Indonesia;

d. Bahwa Majelis Ulama Indonesia telah mengeluarkan fatwa mengenai pembiayaan musyarakah mutanaqisah, yaitu: Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 tentang Musyarakah Mutanaqisah, tetapi fatwanya tidak memfatwakan norma hukum yang bersifat kebolehan tentang penerapan agunan/jaminan dalam pembiayaan musyarakah mutanaqisah;

15. Bahwa memang pada konsideran Menetapkan: Ketiga tentang Ketentuan Akad dalam Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 tentang Musyarakah Mutanaqisah difatwakan dalam musyarakah mutanaqisah berlaku hukum sebagaimana yang diatur dalam Fatwa DSN No. 08/DSN-MUI/IV/2000 tentang Pembiayaan Musyarakah, tetapi hanya terkait tentang Ketentuan Akad, dan bukan berkaitan dengan penerapan agunan/jaminan;

16. Bahwa kalau seandainya “dipaksakan” mengenai norma hukum kebolehan tentang penerapan jaminan dalam pembiayaan musyarakah mutanaqisah dengan berdasar kepada Fatwa DSN No. 08/DSN-MUI/IV/2000 tentang Pembiayaan Musyarakah, tetapi pengikatan jaminannya tidak dapat diterapkan hak tanggungan yang fungsinya untuk menjamin

pelunasan utang, sedangkan akad aquo merupakan pembiayaan musyarakah mutanaqisah dengan argumentasi yuridis sebagai berikut:

a. Bahwa Fatwa Dewan Syariah Nasional No. 08/DSN-MUI/IV/2000 tentang Pembiayaan Musyarakah dalam konsideran: Menetapkan angka (3) huruf (a) ke-3 hanya memfatwakan mengenai norma hukum kebolehan tentang penerapan jaminan;
b. Bahwa akan tetapi, Majelis Ulama Indonesia belum mengeluarkan fatwa mengenai sistem hukum jaminan berdasarkan prinsip syariah yang dapat diterapkan dalam pembiayaan musyarakah mutanaqisah di perbankan syariah;
c. Bahwa selain itu, tiada terdapat fatwa dari Majelis Ulama Indonesia yang substansinya memfatwakan hak tanggungan dapat diterapkan pada pembiayaan musyarakah mutanaqisah;

17. Bahwa oleh karena Majelis Ulama Indonesia sebagai lembaga yang memilliki kewenangan dalam penetapan fatwa di bidang syariah vide Pasal 1 angka (12) UU No. 21 Tahun 2008 ternyata belum dan tiada memfatwakan sistem hukum jaminan berdasarkan prinsip syariah yang dapat diterapkan dalam pembiayaan musyarakah mutanaqisah, serta tiadanya peraturan perundang-undangan yang mengatur secara khusus mengenai penerapan jaminan dalam pembiayaan musyarakah mutanaqisah maka terjadi ketiadaan dan atau kekosongan hukum (l*egal vacuum*) terhadap sistem hukum jaminan berdasarkan prinsip syariah dalam pembiayaan musyarakah mutanaqisah;
18. Bahwa ketiadaan dan atau kekosongan hukum (*legal vacuum*) mengenai sistem hukum jaminan dalam pembiayaan musyarakah mutanaqisah membuktikan Pasal 11 ayat (1) dalam Akad No. 32 tidak memiliki sandaran hukum/payung hukum (*umbrella act*), sehingga klausul yang memuat dan atau menerapkan hak tanggungan sebagai jaminan pelunasan utang/kredit dalam pembiayaan musyarakah mutanaqisah yang menghendaki jaminan berfungsi untuk menjamin ketaatan syarik, ibarat pepatah: *tiada rotan, akar pun jadi* sangat bertentangan dengan Penjelasan Pasal 3 UU No. 21 Tahun 2008 yang mewajibkan perbankan syariah tetap berpegang pada prinsip syariah secara menyeluruh (*kaffah*) dan konsisten (*istiqomah*);
19. Bahwa lagi pula, tiada kaedah ushul fiqh yang menyatakan penerapan hak tanggungan sebagai jaminan pelunasan utang/kredit

dalam pembiayaan musyarakah mutanaqisah yang menghendaki jaminan berfungsi untuk menjamin ketaatan syarik bersesuaian dengan prinsip syariah secara menyeluruh (*kaffah*) dan konsisten (*istiqomah*);

20. Bahwa oleh karena klausul dalam Pasal 11 (ayat) 1 Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II bersifat zalim dan gharar yang bertentangan dengan prinsip syariah sebagaimana dimaksud dalam Penjelasan Pasal 2 jo Penjelasan Pasal 3 UU No. 21 Tahun 2008, maka dengan sendirinya klausulnya mengandung sebab yang terlarang (bukan sebab yang halal) sebagaimana dimaksud dalam Pasal 26 KHES jo Pasal 29 ayat (2) huruf (d) KHES sehingga harus dinyatakan batal demi hukum;

21. Bahwa sangat beralasan pula untuk menyatakan batal atau tidak sah atau tidak berkekuatan hukum Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 yang dibuat oleh Tergugat II dan Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 yang dikeluarkan oleh Tergugat III yang didasarkan oleh klausul yang telah dinyatakan batal demi hukum;

22. Bahwa Sertifikat Hak Milik No. 1753/Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar berada dalam penguasaan atau di tangan Tergugat I, sedangkan pengikatan jaminannya telah dinyatakan batal demi hukum sehingga beralasan apabila Tergugat I dihukum untuk menyerahkan Sertifikat Hak Milik No. 1753/Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar kepada Penggugat;

23. Bahwa sangat beralasan pula jika Tergugat II dihukum untuk mengembalikan biaya pembuatan Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 dan biaya pengurusan/penerbitan Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 kepada Penggugat, sebesar Rp 7.000.000,-;

24. Bahwa dalam Sertifikat Hak Milik No. 1753/Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar telah terdapat catatan sebagai hak tanggungan sehingga tepat dan beralasan apabila Tergugat III dihukum untuk menghapus atau mencoret catatan status sebagai agunan yang diikat dengan hak tanggungan dalam Sertifikat Hak Milik No. 1753/ Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar;

Bahwa berdasar kepada dalil dan fakta tersebut, dimohon ke hadapan Ketua untuk memanggil para pihak yang berperkara pada suatu hari dan tempat sidang yang ditentukan untuk itu, serta selanjutnya memutus perkara ini dengan amar yang berbunyi sebagai berikut:

1. Mengabulkan gugatan dari Penggugat untuk seluruhnya;
2. Menyatakan batal demi hukum Pasal 11 ayat (1) Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 Nopember 2012 yang dibuat oleh Tergugat II;
3. Menyatakan oleh karena itu, batal atau tidak sah atau tidak berkekuatan hukum 2 (dua) perbuatan hukum sebagai berikut:
   a. Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 yang dibuat oleh Tergugat II;
   b. Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 yang dikeluarkan oleh Tergugat III;
4. Menghukum Tergugat I untuk menyerahkan Sertifikat Hak Milik No. 1753/Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar kepada Penggugat;
5. Menghukum Tergugat II untuk mengembalikan biaya pembuatan Akta Pemberian Hak Tanggungan No. 08/2014 tanggal 29-01-2014 dan biaya pengurusan/penerbitan Sertifikat Hak Tanggungan No. 982/2015 tanggal 26-01-2015 sebesar Rp 7.000.000,- kepada Penggugat;
6. Menghukum Tergugat III untuk menghapus atau mencoret catatan status sebagai agunan yang diikat dengan hak tanggungan dalam Sertifikat Hak Milik Nomor 1753/Tanjung Gusta, terdaftar a.n. Dokter Teuku Yose Mahmuddin Akbar;
7. Menghukum Para Tergugat untuk membayar biaya perkara;
8. ex Aequo et Bono;

Bahwa pada hari persidangan yang telah ditetapkan para Penggugat diwakili oleh kuasanya bernama M. Jamil Siagian, SH., Linny Syahvitri Kusuma, SH., dan Avrizal Hamdhy Kusuma, SH., MH., para advokat pada Jamil Siagian and Colleagues Advocate Office Jalan Kirana I No. 35 Medan berdasarkan Surat Kuasa Khusus yang terdaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1015/HK.05/SK/IX/2020/PA.Mdn tanggal 14 Agustus 2020 dengan melampirkan fotokopi identitas advokat dan fotokopi Berita Acara Pengambilan Sumpah.

Bahwa pada persidangan itu, Tergugat I datang menghadap diwakili oleh kuasanya bernama Junaidi dan kawan-kawan berdasarkan Surat Kuasa

Khusus yang terdaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1158/HK.05/SK/IX/2020/PA.Mdn tanggal 16 September 2020 dengan melampirkan fotokopi Surat Tugas dan fotokopi Kartu Identitas, sedangkan Tergugat II tidak pernah datang walaupun telah dipanggil berulang kali dengan Relaas yang sah serta ketidakhadiran Tergugat II tersebut tidak mempunyai alasan yang sah menurut hukum;

Bahwa Tergugat III datang menghadap diwakili oleh kuasanya bernama Hendra dan kawan-kawan berdasarkan Surat Kuasa Khusus yang terdaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1198/HK.05/SK/IX/2020/PA.Mdn tanggal 23 September 2020 dengan melampirkan fotokopi Surat Tugas dan fotokopi Kartu Identitas,

Bahwa Majelis Hakim memberi nasihat kepada Penggugat dan Tergugat I melalui kuasa hukumnya supaya menyelesaikan perkara ini secara damai dan kekeluargaan, namun tidak berhasil. Penggugat dan Tergugat I juga telah melakukan mediasi dengan mediator professional bernama Drs. H. Hasan Basri Harahap, SH., MH, namun mediasi tersebut tidak berhasil mencapai kesepakatan;

Bahwa selanjutnya Penggugat membacakan surat gugatannya yang terdaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1706/Pdt.G/2020/PA.Mdn tanggal 3 Agustus 2020, tanpa mengajukan perbaikan surat gugatan;

Bahwa para pihak yang berperkara telah mengajukan jawaban, replik dan duplik, selengkapnya sebagaimana tercatat dalam Berita Acara Sidang perkara ini;

Bahwa dalam jawabannya, Tergugat I mengajukan eksepsi tentang Pengadilan Agama Medan tidak berwenang memeriksa dan mengadili perkara ini dengan mengajukan dalil-dalil sebagai berikut:

1. Bahwa Gugatan perkara *a quo* Penggugat adalah berkaitan dengan hubungan hukum antara Penggugat dengan Tergugat berupa pemberian fasilitas pembiayaan oleh Tergugat kepada Penggugat yang dituangkan dalam akta Akad pembiayaan Musyarakah Mutanaqisah No 32 tanggal 20 November 2012, yang dibuat oleh dan dihadapan Risna Rahmi Arifah, S.H., Notaris di Medan.
2. Bahwa di dalam Akad Pembiayaan tersebut di atas, telah diatur mengenai penyelesaian perselisihan telah diatur dan disepakati akan

diselesaikan melalui forum Badan Arbitrase Syariah Nasional (Basyarnas), sebagaimana ketentuan Pasal 19 ayat (1) dan (2) Akad Pembiayaan yang berbunyi :

(1) *"Apabila di kemudian hari terjadi perbedaan pendapat atau penafsiran atas hal-hal yang tercantum di dalam Akad ini atau terjadi perselisihan atau sengketa dalam pelaksanaan Akad ini, para pihak sepakat untuk menyelesaikannya secara musyawarah dan mufakat."*

(2) *"Dalam hal musyawarah untuk mufakat sebagaimana dimaksud ayat 1 tidak tercapai, maka Para Pihak bersepakat, dan dengan ini berjanji serta mengikatkan diri satu terhadap yang lain, untuk menyelesaikannya melalui Badan Arbitrase Syariah Nasional (Basyarnas) menurut Peraturan dan Prosedur Arbitrase yang berlaku di dalam Badan Arbitrase tersebut ..."*

3. Bahwa tidak berwenangnya Pengadilan Agama Medan atas dasar adanya pilihan penyelesaian sengketa melalui badan arbitrase oleh para pihak adalah sesuai dan berdasarkan ketentuan-ketentuan sebagai berikut:

1. Undang-undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa ("UUAPS")

Pasal 3 UUAPS:

"Pengadilan Agama tidak berwenang untuk mengadili sengketa para pihak yang telah terikat dalam perjanjian Arbitrase"

Pasal 11 ayat (1) dan (2) UUAPS :

(1) *Adanya suatu perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termasuk dalam perjanjian ke Pengadilan Agama;*

(2) *Pengadilan Agama wajib menolak dan tidak akan campur tangan di dalam suatu penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali dalam hal-hal tertentu yang ditetapkan dalam Undang-Undang ini;*

2. Undang-undang No.8 tahun 1999 tentang Perlindungan Konsumen ("UUPK") pasal 45 ayat (4):

"apabila telah dipilih upaya penyelesaian sengketa konsumen di luar pengadilan, gugatan melalui pengadilan hanya dapat ditempuh apabila upaya tersebut dinyatakan tidak berhasil oleh salah satu pihak atau oleh para pihak yang bersengketa."

3. Pasal 134 HIR, menyatakan:
"Jika perselisihan itu adalah suatu perkara yang tidak masuk dalam kewenangan Pengadilan Agama, maka pada setiap saat dalam pemeriksaan perkara itu dapat diminta agar hakim menyatakan dirinya tidak berwenang dan wajib pula karena jabatannya mengakui bahwa ia tidak berwenang".

4. Pasal 136 HIR, menyatakan:
"Perlawanan yang sekiranya hendak dikemukakan oleh Tergugat (Ekceptie), kecuali tentang hal hakim tidak berkuasa, tidak akan dikemukakan dan ditimbang masing-masing, tetapi harus dibicarakan dan diputuskan bersama-sama dengan pokok perkara".

5. Putusan MARI No. 225 K/SIP/1976, tertanggal 30 September 1983.
"Setiap perjanjian yang mengandung klausula arbitrase, dengan sendirinya terkait kompetensi absolut badan arbitrase untuk menyelesaikan perselisihan yang timbul dari perjanjian yang bersangkutan".

6. Putusan MARI No. 3179 K/Pdt/1988, tertanggal 4 Mei 1988
"Apabila dalam perjanjian terdapat klausula arbitrase, Pengadilan Agama tidak berwenang memeriksa dan mengadili gugatan baik dalam konvensi dan rekonvensi".

7. Petunjuk Mahkamah Agung Rl Tentang Tehnis Yudisial dan Manajemen Peradilan tahun 2005, pada Bagian I. Umum, poin 1 tentang Kompetensi Absolut, menegaskan:
"Pengadilan Agama/Umum tidak bewenang untuk mengadili suatu perkara yang para pihaknya terikat dalam suatu perjanjian arbitrase, walaupun hal tersebut didasarkan pada gugatan perbuatan melawan hukum."

8. Pedoman Teknis Administrasi dan Teknis peradilan, Buku II Edisi 2009 Mahkamah Agung RI, pada Bagian II Teknis Peradilan, poin E 3 sebagai berikut:

"Hakim karena jabatannya harus menyatakan dirinya tidak berwenang untuk memeriksa perkara yang bersangkutan meskipun tidak ada eksepsi dari Tergugat, dalam hal ini dapat dilakukan pada semua taraf pemeriksaan, termasuk dalam taraf banding dan kasasi (lihat pasal 134 HIR)";

9. Doktrin hukum sebagaimana disampaikan M. Yahya Harahap,SH., ("Arbitrase", Penerbit Sinar Grafika, Edisi ke-2 Tahun 2006, halaman 89) menyatakan:

"Kemutlakan keterikatan kepada perjanjian arbitrase, dengan sendirinya mewujudkan kewenangan absolut badan arbitrase untuk menyelesaikan atau memutus sengketa yang timbul dari perjanjian. Gugurnya kewenangan mutlak arbitrase untuk menyelesaikan dan memutus sengketa yang timbul dari perjanjian, hanya dibenarkan apabila para pihak sepakat dan setuju menarik kembali secara tegas perjanjian arbitrase. Kalau begitu, sejak para pihak mengikat diri dalam perjanjian arbitrase, sejak itu dengan sendirinya telah lahir kompetensi absolut arbitrase untuk menyelesaikan persengketaan yang timbul dari perjanjian. OIeh karena itu ada atau tidak ada diajukan eksepsi, pengadilan harus tunduk kepada ketentuan Pasal 134 HIR dan menyatakan diri tidak berwenang mengadili."

4. Bahwa Penggugat telah salah dan keliru dalam memahami pertimbangan Majelis Hakim Pengadilan Tinggi Agama Sumatera Utara dalam putusan banding hal 7 Perkara No.80/Pdt.G/2020/PTA. Mdn tanggal 30 Juni 2020 (selanjutnya disebut "Perkara 80") karena di dalam pertimbangan hukumnya Majelis Hakim Pengadilan Tinggi Sumatera Utara pada pokoknya menyatakan bahwa "tidak mempunyai hukum mengikat bila terjadi sengketa antara pihak-pihak dalam perbankan untuk mengikuti urutan saran penyelesaian sengketa seperti tersebut dalam penjelasan pasal 55 ayat 2 Undang-Undang Perbankan Syariah, manakala pihak-pihak secara langsung mengajukan ke Pengadilan Agama". Pengertian pihak-pihak dalam pertimbangan hukum Majelis

Hakim Pengadilan Tinggi Sumatera Utara adalah plural atau lebih dari satu atau bukan sendiri, ic dalam perkara a quo tentunya Penggugat dan Tergugat I. Dalam perkara a quo, pemilihan penyelesaian melalui Pengadilan Agama bukanlah kehendak bersama antara Penggugat dan Tergugat I, melainkan kehendak dari Penggugat sendiri, sehingga tidak sesuai dengan pertimbangan hukum Majelis Hakim dalam Perkara 80.

5. Bahwa berdasarkan uraian dan dasar hukum tersebut di atas, maka Majelis Hakim dalam perkara *a quo* harus mempertimbangkan dan memutuskan terlebih dahulu tentang eksepsi kewenangan mengadili sebelum masuk pada pemeriksaan pokok perkara dan oleh karenanya Pengadilan Agama Medan harus menolak gugatan *a quo* karena tidak berwenang secara absolut untuk mengadili perkara a quo.

Menimbang, bahwa terhadap eksepsi tersebut Tergugat I memberikan jawaban menerangkan gugatan tersebut merupakan kewenangan absolut dari Pengadilan Agama Medan dengan mengajukan dalil-dalil sebagai berikut:

1. Bahwa melalui penafsiran secara a contrario terhadap Pasal 5 UU No. 30 Tahun 1999, maka sengketa yang tidak dapat diselesaikan di Basyarnas, adalah:
   a. sengketa yang bukan di bidang perdagangan;
   b. sengketa hak yang dikuasai atau melibatkan pihak ketiga atau pihak di luar akad;
   c. sengketa yang tidak dapat diadakan perdamaian;
2. Bahwa dengan berdasar kepada Pasal 5 tersebut, maka meskipun terdapat klausul arbitrase tetapi tidak serta merta menjadi kewenangan Basyarnas untuk memeriksa dan mengadilinya;
3. Bahwa kaedah tersebut, dipertegas lagi dalam Penjelasan Atas UU No. 30 Tahun 1999 pada Konsideran Umum, yang menyatakan: "*arbitrase yang diatur dalam undang-undang ini merupakan cara penyelesaian suatu sengketa di luar peradilan umum (dalam hal ini, Peradilan Agama) yang didasarkan atas perjanjian tertulis dari pihak yang bersengketa. Tetapi, tidak semua sengketa dapat diselesaikan melalui arbitrase, melainkan hanya sengketa mengenai hak yang menurut hukum dikuasai sepenuhnya oleh para pihak yang bersengketa atas dasar kata sepakat dari mereka*";
4. Bahwa oleh karena itu, meskipun terdapat klausul arbitrase tetapi hakim wajib mempertimbangkan setiap jenis perkara yang diadili sebagai

perkara yang termasuk atau tidak termasuk dalam pengecualian perkara yang diatur dalam Pasal 5 UU No. 30 Tahun 1999 jo Penjelasan Atas UU No. 30 Tahun 1999 pada Konsideran Umum;

5. Bahwa apabila perkaranya termasuk dalam pengecualian perkara berdasarkan penafsiran a contrario terhadap Pasal 5 UU No. 30 Tahun 1999 tersebut, maka hakim wajib memutus pengadilan agama berwenang secara absolut sebagaimana dimaksud dalam Pasal 11 ayat (2) yang menentukan: "*Pengadilan Negeri (dalam hal ini, Pengadilan Agama) wajib menolak dan tidak akan campur tangan di dalam suatu penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali dalam hal-hal tertentu yang ditetapkan dalam undang-undang ini*";

6. Bahwa gugatan aquo merupakan perkara yang termasuk dalam pengecualian perkara berdasarkan penafsiran a contrario terhadap Pasal 5 UU No. 30 Tahun 1999 sebab gugatan aquo sebagai perkara pembatalan akad disertai dengan turunannya sangat jelas dan nyata telah melibatkan pihak ketiga atau pihak di luar akad i.c. Tergugat II dan Tergugat III;

7. Bahwa apabila gugatan aquo dinyatakan bukan kewenangan absolut dari Pengadilan Agama, maka Penggugat tidak memiliki saluran lembaga untuk mempertahankan hak yang mengakibatkan hilangnya kepastian hukum dan keadilan. Sebab pengajuan gugatan aquo ke Basyarnas justru tidak memenuhi syarat formal untuk diregistrasi sebagai suatu sengketa dengan kaedah dan fakta hukum sebagai berikut:

a. Bahwa prosedur berperkara di Basyarnas wajib didahului dengan pemberitahuan dari Pemohon kepada pihak lain yang tersebut di dalam akad yang nantinya ditarik sebagai Termohon tentang pemberitahuan pemberlakuan syarat atau klausul arbitrase sebagai tempat penyelesaian sengketa, sebagaimana dimaksud dalam Pasal 8 ayat (1) UU No. 30 Tahun 1999, yang menentukan: "dalam hal timbul sengketa, Pemohon harus memberitahukan dengan surat tercatat, telegram, teleks, faksimili, e-mail atau dengan buku ekspedisi kepada termohon bahwa syarat yang diadakan oleh pemohon atau termohon berlaku";

b. Bahwa pengaturan hukum tersebut, sesuai dan sejalan dengan Pasal 3 angka (1) Peraturan Prosedur Badan Arbitrase Syariah Nasional (Basyarnas) yang menentukan: *"Prosedur Arbitrase dimulai*

dengan mendaftarkan Permohonan Arbitrase oleh pihak yang memulai proses arbitrase (Pemohon) pada Sekretariat Basyarnas. Sebelum permohonan arbitrase didaftarkan ke sekretariat Basyarnas, pemohon harus sudah memberitahukan secara tertulis kepada termohon, bahwa syarat arbitrase berlaku";

c. Bahwa oleh karena itu, apabila Penggugat mendaftarkan gugatan aquo ke Basyarnas maka permohonan tidak dapat diregistrasi di sekretariat Basyarnas, karena syarat mendaftarkan sengketa di antaranya adalah wajib melampirkan pemberitahuan mengenai pemberlakuan syarat aritrase kepada pihak Termohon, sedangkan memberitahukan pemberlakuan klausul arbitrase kepada Tergugat II dan Tergugat III sebagai pihak ketiga atau pihak di luar akad merupakan suatu kemustahilan;

8. Bahwa lagi pula, Penjelasan Pasal 55 ayat (2) UU No. 21 Tahun 2008 yang mengatur kewenangan Basyarnas dalam memeriksa dan mengadili sengketa perbankan syariah telah dinyatakan bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 serta dinyatakan tidak mempunyai kekuatan hukum mengikat, sesuai dengan Putusan Mahkamah Konstitusi No. 93/PUU-X/2012;

Bahwa di persidangan Tergugat I mengajukan alat bukti untuk meneguhkan eksepsi kewenangannya berupa fotokopi Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah, Akta Notaris Risma Rahmi Arifa, SH., Nomor 32 tanggal 20 November 2012, yang diberi meterai cukup dan telah disesuaikan dengan aslinya (bukti T1.1.);

Bahwa Kuasa Penggugat juga mengajukan 2 (dua) alat bukti sebagai berikut:

1. Fotokopi Buku berjudul Basyarnas; Badan Arbitrase Syariah Nasional Majelis Ulama Indonesia, yang diberi yang diberi meterai cukup dan telah disesuaikan dengan aslinya (bukti P.1);
2. Fotokopi Putusan Mahkamah Konstitusi Nomor 93/PUU-X/2012 tanggal 29 Agustus 2013 yang diberi yang diberi meterai cukup dan telah disesuaikan dengan aslinya (bukti P.2);

Bahwa selanjutnya Majelis Hakim melakukan permusyawaratan untuk menjawab eksepsi kewenangan yang diajukan oleh Tergugat I;

Bahwa untuk mempersingkat uraian putusan ini, ditunjuk hal ihwal yang tercantum dalam Berita Acara Sidang yang merupakan bagian yang tak terpisahkan dari putusan ini;

PERTIMBANGAN HUKUM

Menimbang, bahwa maksud dan tujuan dari gugatan Penggugat adalah sebagaimana terurai di atas;

Menimbang, bahwa pada hari persidangan yang telah ditetapkan Penggugat, Tergugat I dan Tergugat III diwakili oleh kuasanya masing-masing datang menghadap di persidangan. Majelis Hakim telah memeriksa surat kuasa masing-masing pihak berserta fotokopi Kartu Identias Advokat, fotokopi Surat Tugas dan Fotokopi Berita Acara Pengambilan Sumpah. Para kuasa tersebut dinyatakan telah memenuhi syarat formil dan diterima mewakili para pihak tersebut dalam perkara ini;

Menimbang, bahwa sedangkan Tergugat II tidak pernah datang menghadap, tidak mengajukan wakil atau kuasanya menghadiri persidangan, padahal kepadanya telah disampaikan Relaas Panggilan secara sah, dan ketidakhadirannya itu tidak disebabkan suatu alasan yang sah menurut peraturan perundang-undangan. Dengan demikian Majelis Hakim menyatakan Tergugat II tidak peduli terhadap hak-haknya di persidangan dan oleh karena itu perkara ini diperiksa tanpa kehadiran Tergugat II;

Menimbang, bahwa pada persidangan kedua tanggal 9 September 2020, dimana Penggugat dan Tergugat I hadir di persidangan, sementara Tergugat II dan Tergugat III tidak datang menghadiri persidangan, Majelis Hakim telah memberi nasihat kepada Penggugat dan Tergugat I supaya menyelesaikan perkara ini secara damai dan kekeluargaan, namun tidak berhasil. Penggugat dan Tergugat I telah melakukan mediasi dengan mediator professional bernama Drs. H. Hasan Basri Harahap, SH., MH, namun mediasi tersebut tidak berhasil mencapai kesepakatan. Dengan demikian Majelis Hakim berpendapat, bahwa upaya damai sebagaimana dimaksud pasal 154 ayat (1) RBg dan pasal 4 ayat (1) Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan patut dinyatakan tidak berhasil;

Menimbang, bahwa yang menjadi posita dari gugatan Penggugat dalam perkara ini adalah bahwa pasal 11 ayat 1 Akad Pembiayaan

Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No. 32 tanggal 20 November 2012 mengandung sebab yang terlarang yaitu bersifat zalim, gharar dan bertentangan dengan prinsip syariah, oleh karena itu harus dinyatakan batal demi hukum. Dalam jawabannya, Tergugat I mengajukan eksepsi tentang kewenangan, karena dalam akad aquo pasal 19 ayat (1) dan ayat (2) disepakati bersama Penggugat dan Tergugat I apabila di kemudian hari terjadi perbedaan pendapat, penafsiran atau sengketa dalam pelaksanaan akad ini akan ditempuh secara musyawarah mufakat. Dalam hal tidak tercapai kesepakatan maka para pihak bersepakat dan mengikatkan diri untuk menyelesaikan melalui Badan Arbitrase Syariah Nasional, sehingga seharusnya perkara ini diajukan ke Badan Arbitrase Syariah Nasional (klausula Arbitrase). Bahwa terhadap eksepsi Tergugat I tersebut Penggugat telah mengajukan jawaban dalam replik yang pada pokoknya menurut Penggugat, Badan Arbitrase Syariah Nasional tidak dapat menyelesaikan perkara aquo karena gugatan aquo melibatkan pihak ketiga atau pihak di luar akad incasu Tergugat II dan Tergugat III. Untuk itu Majelis Hakim akan memberikan pertimbangan sebagaimana tersebut di bawah ini;

Dalam Eksepsi Kewenangan

Menimbang, bahwa eksepsi dalam konteks hukum acara bermakna tangkisan atau bantahan yang ditujukan kepada hal-hal yang menyangkut syarat-syarat atau formalitas gugatan yang mengakibatkan gugatan tidak dapat diterima. Tujuan pokok pengajuan eksepsi yaitu agar proses pemeriksaan dapat berakhir tanpa lebih lanjut memeriksa pokok perkara. Eksepsi yang diajukan oleh Tergugat I adalah mengenai Pengadilan Agama Medan tidak berwenang memeriksa dan mengadili perkara ini;

Menimbang, bahwa mengenai eksepsi tersebut, pasal 160 RBg mengatur: *"Tetapi dalam hal sengketa yang bersangkutan mengenai persoalan yang tidak menjadi wewenang mutlak pengadilan negeri, maka dalam taraf pemeriksaan mana pun kepada hakim dapat diadakan tuntutan untuk menyatakan dirinya tidak berwenang, bahkan hakim berkewajiban menyatakan hal itu karena jabatan".* Pasal 162 RBg juga mengatur: *"Sanggahan-sanggahan yang dikemukakan oleh pihak Tergugat, terkecuali yang mengenai wewenang hakim, tidak boleh dikemukakan dan dipertimbangkan sendiri-sendiri secara terpisah melainkan harus dibicarakan*

dan diputuskan bersama-sama dengan pokok perkaranya". Berdasarkan pasal-pasal tersebut, maka Majelis Hakim berpendapat akan mempertimbang-kan terlebih dahulu eksepsi kewenangan yang diajukan Tergugat I tersebut sebelum memeriksa pokok perkara lebih lanjut;

Menimbang, bahwa berdasarkan jawab-menjawab di persidangan, Penggugat mengakui, dalam akad nomor 32 benar ada klausula sebagaimana didalilkan Tergugat I, namun menurut Penggugat dalam hal ini tidak terpenuhi syarat untuk diajukan kepada Badan Arbitrase Syariah Nasional karena ada pihak ketiga yaitu Tergugat II dan Tergugat III yang dijadikan pihak yang tidak termasuk sebagai pihak dalam akad. Pengakuan Penggugat tersebut merupakan bukti yang kuat sehingga mengenai hal itu tidak perlu dibuktikan lebih lanjut, sedangkan sanggahan Penggugat setelah itu akan dipertimbang kan selanjutnya dalam putusan ini;

Menimbang, bahwa pihak Tergugat I mengajukan bukti T1.1. berupa fotokopi Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah, Akta Notaris Risma Rahmi Arifa, SH., Nomor 32 tanggal 20 November 2012 dan pihak Pengugat telah mengajukan bukti P.1 dan bukti P.2 berupa fotokopi Buku berjudul Basyarnas; Badan Arbitrase Syariah Nasional Majelis Ulama Indonesia dan fotokopi Putusan Mahkamah Konstitusi Nomor 93/PUU-X/2012 tanggal 29 Agustus 2013, yang dinilai memenuhi syarat formil dan materil sebagai alat bukti. Oleh karena itu Majelis Hakim menyatakan menerima seluruh alat bukti tersebut dan akan dipertimbangkan dalam putusan ini;

Menimbang, bahwa berdasarkan alat bukti T1.1 bilamana dihubungkan dengan pengakuan Penggugat di atas dapat dinyatakan terbukti bahwa dalam akad aquo ada klausula arbitrase, namun oleh Penggugat dinilai bahwa perkara aquo tidak memenuhi syarat untuk diajukan kepada Badan Arbitrase Syariah Nasional. Tergugat I menyatakan bahwa pernyataan Penggugat tersebut sebagai interpretasi sendiri bukan fakta hukum;

Menimbang, bahwa berdasarkan pemeriksaan dalam persidangan ditemukan fakta sebagai berikut:

1. Bahwa antara Penggugat dengan Tergugat I telah terikat dalam satu Akad Pembiayaan Kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah;

2. Bahwa dalam akad aquo pasal 19 ada klausula arbitrase, yang memperjanjikan, jika ada perbedaan pendapat, penafsiran atau sengketa tentang pelaksanaan akad akan diselesaikan melalui musyawarah mufakat dan jika tidak tercapai kesepakatan akan diselesaikan melalui Badan Arbitrase Syariah Nasional;

3. Bahwa dalam gugatan aquo Tergugat tidak hanya satu pihak tetapi ada pihak Tergugat yang tidak terikat dalam akad yaitu Tergugat II dan Tergugat III;

Menimbang, bahwa berdasarkan fakta dimana antara Penggugat dengan Tergugat I terikat dalam suatu akad yang di dalamnya ada klausula arbitrase, maka sesuai ketentuan pasal 3 Undang Undang Nomor 30 tahun 1999 tentang Arbitrase dan Alternatif penyelesaian Sengketa, yang menyata kan bahwa pengadilan tidak berwenang mengadili perkara para pihak yang telah terikat dalam perjanjian arbitrase, jo pasal 11 yang menentukan bahwa Pengadilan wajib menolak untuk menyelesaikan sengketa yang didalamnya ada perjanjian arbitrase, maka majelis hakim berpendapat Pengadilan Agama Medan tidak berwenang untuk mengadili perkara aquo;

Menimbang, bahwa klausula Penggugat bahwa dalam perkara ada pihak lain yang tidak terikat dalam akad sebagai pihak, maka majelis hakim berpendapat sesuai ketentuan pasal 4 ayat (5) Peraturan Prosedur Badan Arbitrase Syariah Nasional tanggal 16 Rabiul Awal 1439 H bertepatan dengan tanggal 5 Desember 2017 para Tergugat dianggap satu pihak, sehingga tidak menghilangkan hak Penggugat untuk mendapat keadilan;

Menimbang, bahwa selain itu apabila dianalisis gugatan Penggugat adalah pembatalan pasal 11 ayat (1) akad pembiayaan kepemilikan Rumah Muamalat iB Musyarakah Mutanaqisah No 32 tanggal 20 November 2012, dalam perkara aquo Tergugat II dan Tergugat III tidak menjadi pihak yang harus diikutkan sebagai pihak, karena Tergugat II hanyalah pihak yang menuliskan (notaris) atas akad yang dibuat oleh Penggugat dan Tergugat I yang mana akta tersebut telah disetujui oleh Penggugat dan Tergugat I. Demikian juga Tergugat III hanya mendaftar pada register yang disediakan untuk itu atas permintaan Penggugat dan Tergugat I.

Menimbang, bahwa selain itu majelis hakim berpendapat bahwa Keputusan Mahkamah Konstitusi Nomor 93/PUU-X/2012 tanggal 28 Maret

2013 yang telah menyatakan penjelasan pasal 55 ayat 2 dan ayat 3 Undang Nomor 21 tahun 2008 tidak mempunyai kekuatan hukum mengikat, tidaklah menyebabkan batalnya perjanjian arbitrase, karena perjanjian arbitrase didasarkan pada ketentuan Undang-Undang Nomo 30 tahun 1999 yang didalamnya menyatakan jika suatu perjanjian arbitrase maka Pengadilan harus menyatakan diri tidak berwenang dan tidak boleh ikut campur dalam perkara tersebut (vide pasal 3 dan pasal 11 UU Nomor 30 tahun 1999), sedangkan ketentuan tersebut tidak dibatalkan, sehingga putusan Mahkamah Konstitusi harus ditafsirkan sejauh perjanjian arbitrase tidak diperjanjikan;

Menimbang, bahwa berdasarkan pertimbangan tersebut di atas, eksepsi Tergugat I harus dinyatakan beralasan dan dikabulkan, sehingga Pengadilan Agama Medan tidak berwenang untuk mengadili perkara ini;

Dalam Pokok Perkara

Menimbang, bahwa telah dipertimbangkan di atas, dimana eksepsi Tergugat I dikabulkan, maka pokok perkara yang diajukan oleh Penggugat beserta dalil-dalilnya tidak akan dipertimbangkan lagi dan dinyatakan tidak dapat diterima.

Menimbang, bahwa sebagaimana telah di pertimbangkan sebelum ini, dimana eksepsi Tergugat I telah diterima dan telah dinyatakan bahwa Pengadilan Agama Medan tidak berwenang untuk mengadili perkara ini, maka putusan ini pun menjadi putusan akhir untuk perkara ini;

Menimbang, bahwa Penggugat adalah pihak yang mengajukan gugatan dan ternyata eksepsi Tergugat I dikabulkan, maka semua biaya yang timbul akibat perkara ini dihukum kepada Penggugat untuk membayarnya sebesar sebagaimana tersebut dalam amar putusan ini;

Mengingat, semua pasal dalam peraturan perundang–undangan dan hukum Islam yang berkaitan dengan perkara ini;

MENGADILI

Dalam Eksepsi

1. Menerima eksepsi Tergugat I.
2. Menyatakan Pengadilan Agama Medan tidak berwenang mengadili perkara ini;

Dalam Pokok Perkara

1. Menyatakan gugatan Penggugat yang terdaftar di Kepaniteraan Pengadilan Agama Medan Nomor 1706/Pdt.G/2020/PA.Mdn tanggal 3 Agustus 2020 tidak dapat diterima.
2. Menghukum Penggugat untuk membayar biaya perkara ini sejumlah Rp1.502.000,00 (satu juta lima ratus dua ribu rupiah).

Demikian diputuskan dalam rapat permusyawaratan Majelis Hakim yang dilangsungkan pada hari Jumat tanggal 8 Januari 2021 Masehi, bertepatan dengan tanggal 24 Jumadil Awal 1442 Hijriyah, oleh kami Drs. Muslim, SH., MA sebagai Ketua Majelis, Drs. H. Ahmad Musa Hasibuan, MH., dan Drs. H. Mhd. Dongan masing-masing sebagai Hakim Anggota, putusan tersebut diucapkan dalam sidang terbuka untuk umum pada hari ini Rabu tanggal 27 Januari 2021 Masehi bertepatan dengan 14 Jumadil Akhir 1442 Hijriyah oleh Ketua Majelis tersebut dengan didampingi oleh Hakim Anggota dan dibantu oleh Husna Ulfa, SH sebagai Panitera Pengganti serta dihadiri oleh Kuasa Penggugat dan Kuasa Tergugat I, di luar hadirnya Tergugat II dan Tergugat III.

Ketua Majelis,

Drs. Muslim, SH., MA

Hakim Anggota,	Hakim Anggota,
Drs. H. Ahmad Musa Hasibuan, MH.	**Drs. H. Mhd. Dongan**

Panitera,

Husna Ulfa, SH.

Perincian Biaya:

1.	Pendaftaran	:	Rp	30.000,00
2.	Proses	:	Rp	50.000,00

3.	Panggilan	:	Rp	1.350.000,00
4.	PNBP	:	Rp	40.000,00
5.	Redaksi	:	Rp	10.000,00
6.	Meterai	:	Rp	12.000,00
	Jumlah	**:**	**Rp**	**1.502.000,00**

(satu juta lima ratus dua ribu rupiah)