

Verdict Execution of National Sharia Arbitration Board in Indonesia Positive Law

Nur Mohamad Kasim and Fadmila

State University of Gorontalo

ABSTRACT: Generally, the research of Execution Verdict of National Sharia Arbitration Board (BASYARNAS) in Indonesia is aimed to know and analyze the Execution Verdict of National Sharia Arbitration Board in Indonesia positive law and to know and analyze the competence of National Sharia Arbitration Board to resolve disputes. The method used is a normative legal research also called doctrinal legal research. The approach used in this study is statue approach and conceptual approach. The research results can be explained as follows. Verdict Execution of BASYARNAS in Indonesia positive law can be explained as follows: first, in terms of Act that can be implemented, it is supported by Law No. 30 of 1999 on arbitration and alternative dispute resolution. Second, Islamic law could be implemented because BASYARNAS execution has occurred at Prophet era called tahkim and or syiqaq. BASYARNAS authority to resolve disputes in trade relations, industry, finance, services and provide a binding opinion in relation with agreement at request of parties. It is hoped that National Sharia Arbitration Board or BASYARNAS became one institution outside court to resolve the sharia dispute, would be able to enhance the role in order to resolve the sharia dispute and to disseminate to public to become more familiar through electronic, social and mass media.

Keywords: BASYARNAS, Verdict Execution, Positive Law.

I. INTRODUCTION

The legal position of National Sharia Arbitration Board (BASYARNAS) becomes stronger under enactment of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. This law describes the litigation procedure through arbitration. Litigation procedure in National Sharia Arbitration Board (BASYARNAS) has been set up systematically since established by Indonesia Muamalat Arbitration Board (BAMUI). Broadly speaking, these rules set forth in rule procedure of Indonesia Muamalat Arbitration Board (BAMUI) since 21 October 1993. Several technical additional was done to enhance predefined rules. These rules do not conflict with Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

National Sharia Arbitration Board (BASYARNAS) which was formerly known as BAMUI (Indonesia Muamalat Arbitration Board) is an alternative institution outside court (non litigation) to solve disputes or cases in Islamic banking and Islamic Financial Institutions. BASYARNAS existence is needed by Indonesia Muslims, especially with the growth of Islamic banking and finance in Indonesia. Therefore, economic growth and rapid Islamic business and complex can create various forms of cooperation or business transactions. Higher business cooperation would promote higher business disputes between the parties involved.

Conventional dispute settlement is usually done in litigation or dispute resolution in court. The position of rated parties is oppose one another so the completion of business through the courts is not very effective and efficient, especially for banks and their customers, supposing the settlement must the courts, solely as a last resort after other alternative is useless.

Law Number 48 Year 2009 regarding Judicial Power explained that "the Court help the justice seekers and strive to overcome all barriers and obstacles in order to achieve the justice that simple, fast, and low cost". (Article 4 paragraph 2 of Law No. 48 year 2009 on Judicial Power).

Dispute resolution can be done through two processes, namely inside court and outside of court. The oldest settlement process is through litigation in courts. The court becomes the first and last resort to resolve the disputes. Any dispute in society are resolved through the courts, because they can give a fair judgment but apparently not satisfy many parties, especially the parties who dispute, because it only produces agreements that are adverse that have not been able to embrace the common interest, tend to cause problems new, slow in their resolution, expensive, unresponsive, and cause enmity between the parties, as well as many violations in its implementation.

In connection with implementation phase of judgment, in any decision to be handed down by judge in end and settle a problem. There are three elements that are essential elements namely fairness, expediency and legal certainty elements. If the judge has examined a case submitted to him, he must make decision properly. During the implementation phase will be obtained a decision *in kracht van gewijsde* (legally binding).

The binding legal decision can be resumed at execution stage when the losing party does not want to makes the decision voluntarily. Execution or implementation of this decision can be executed if there is a request execution

of winning party. Basically verdict can ask for execution because the nature is *condemtoir* or judgment. Execution essentially is a legal effort to realize the obligation of losing side in a case to meet the achievements listed in court judgment.

However, there are times when execution may not run smoothly. Many obstacles, in form of physical resistance on losing party that reached the non-fulfillment of orders granting bail, decided by judge under *uitvoerbaar bij voorraad* decision (decision to run first). It can create disputes and claims of other parties. The decision of BASYARNAS should be accepted by all parties.

Departing from the above description, authors will examine the Verdict Execution of National Sharia Arbitration Board (BASYARNAS) in Indonesia Positive Law and BASYARNAS Competence to resolve the disputes between Islamic banking with parties involved in agreement.

From the background of above problems and the title, author raises the issue as follows: How Execution Verdict of National Sharia Arbitration Board In Indonesia Positive law? And How Authority of National Sharia Arbitration Board (BASYARNAS) to resolve the disputes?

II. RESEARCH METHODS

This research uses normative legal research method. Normative legal research also called the doctrinal legal research. (Amirudin, 2010: 118). This study will use statue approach and conceptual approach. Statue approach is done by examining the legislation and regulations relevant to legal the issues (Peter Mahmud Marzuki, 2005: 133). A conceptual approach is done by examining the views and doctrines that developed in jurisprudence in relation with legal issues and problem formulation of this study.

III. RESEARCH RESULTS AND DISCUSSION

1. Verdict Execution of BASYARNAS in Indonesia positive law.

There are many moslem in Indonesia. Many norms prevailing in society is closely associated with Islam. This is an indicator of how the struggle of Indonesian Muslim community to impose Islamic law consistent with commands of Allah and His apostles. It will relate to process of how the elements of Islamic law can become a positive law or part of national law.

The process to make contract (*akad*) is a nature that has been ordained by God. Therefore it is a social necessity since humans began to recognize the meaning of property rights. Islam as a universal religion is comprehensive and provides clear rules in contract to be implemented in each period.

National Sharia Arbitration Board (BASYARNAS) is one of dispute resolution body to uses Islamic law. Development of Indonesia economy increases the uses of Islamic law system. Based on the matter, concept of Islamic law becomes positive law in Indonesia.

a. Based on legislation.

Status of National Sharia Arbitration Board in law aspect of Indonesia becomes stronger. The existence received recognition from the President of Republic of Indonesia, Minister of Justice, Minister of State for Economy and Bappenas. Therefore, the public are obliged to apply the rules of Regulations Act. Legislation for Arbitration is No. 30 year 1999.

The Religious Court has competence to execute a sharia arbitration decision and appropriate authority granted by Supreme Court. The authority given to Religious Court is based on Law No. 3 year 2006 states that Religious Court has duty and authority to examine, decide and resolve the case in economics sharia. In addition, appointment of Religious Courts is also based on Supreme Court Circular (SEMA) No. 8 year 2008 on Verdict Execution of Sharia Arbitration Board. Besides ensuring the verdict execution by BASYARNAS, the authority in hands of Religious Court, SEMA No. 8 year 2008 is also confirmed that ruling of Sharia Arbitration Board is final and has permanent legal force and binding on the parties.

Authors support Ateng Syafrudin in theory authority where the Authority is called formal power, power that comes from the powers granted by law. Religious Courts and appropriate authority granted by Supreme Court. The authority given to Religious Court is based on Law No. 3 year 2006 that Religious Court has duty and authority to examine, decide and resolve the case in economics sharia in SEMA. No. 8 year 2008 on Verdict Execution of Sharia Arbitration Board. It ensures the execution of verdict BASYARNAS authority in hands of Religious Court. Therefore, the parties should implement the decision voluntarily and if the decision is not executed voluntarily, Chairman of Religious execution order at request of either party to dispute. This is consistent with Article 60 of Law No. 30 year 1999 that arbitration decision is final and has permanent legal force and binding on parties.

Supreme Court in 2008 answered the public complaint related to verdict execution by BASYARNAS with SEMA No. 8 year 2008, contents related to BASYARNAS authority to execute verdict on Religious Courts. But in 2009, legislator makes Act No. 48 year 2009. Article 59 Paragraph (1) of Law No. 48 year 2009 stated that arbitration is the settlement way of civil disputes outside court based on arbitration agreement made written by

parties to dispute. Paragraph (3) provides that if the parties did not execute the arbitration decision voluntarily, forced implementation is done by command Chairman of Court at request of either party.

Elucidation of Article 59 Paragraph (1) states that arbitration in this provision includes sharia arbitration. This confirms that execution of arbitral sharia is based command of District Court chairman. This highlights the legal lesson for us not to accept raw product of law, but needs to be corrected.

The cornerstone of positive law that became the legal basis for sharia arbitration has been born related to status of arbitration sharia, namely: Act No. 30 year 1999 on Arbitration and Alternative Dispute Resolution, Article 60 of Law No. 41 year 2004 on Endowments, Article 55, paragraph 2 (Part explanation) Act No. 21 year 2008 on Islamic Banking, explanation of Article 3 of Law No. 48 Year 2009 on Judicial Power.

Existence of BASYARNAS in this law is considered as an alternative settlement of civil disputes outside the court (non litigation) based on arbitration agreement made in writing by parties to dispute for contract agreement. (Abdul Ghofur Anshori, 2006: 148).

b. Islamic law Basis

Islam as a value system is a complete and comprehensive to regulate human life in this world, not only about Islamic economy. Muhammad Shafi'i Antonio in his Bank of sharia, from Theory to Practice has outlined (Muhammad Shafi'i Antonio, 2005: 10). Consistent with word of Allah in Qur'an Surah Al-Anfal verse 24 below.

يَا أَيُّهَا الَّذِينَ آمَنُوا اسْتَجِيبُوا لِلَّهِ وَلِلرَّسُولِ إِذَا دَعَاكُمْ لِمَا
مَحْيِيكُمْ وَاعْلَمُوا أَنَّ اللَّهَ يَحُولُ بَيْنَ الْمَرْءِ وَقَلْبِهِ وَأَنَّهُ
إِلَيْهِ تُحْشَرُونَ

"O you, who have believed, respond to Allah and to the Messenger when he calls you to that which gives you life. And know that Allah intervenes between a man and his heart and that to Him you will be gathered"

Islamic law as a law of life in Indonesia is experiencing significant growth in this period. These developments can be seen from the authority possessed by Religious Courts (PA) as the Islamic Courts in Indonesia. Formerly, PA decision purely based jurisprudence of jurists, execution must be confirmed by general court, judges only educated and uneducated of traditional sharia law, this organization did not culminate to Supreme Court, and others. Now the situation has changed fundamentally, the addition of PA authority in Law courts is new, including economics sharia. (Rifyal Ka'bah, 2006: 12). Matching arbitration in Islamic jurisprudence called *tahkim* and verb is *hakkama*, literally means to make someone as a mediator for dispute. (Abdullah Amrin, 2006: 234).

Resolving disputes peacefully in a civil case but can be achieved through the initiative of parties can also be achieved through the involvement of a third party as a referee (mediator). These efforts usually will be taken if the litigants themselves were not able to reach a peace deal. Formal institutions specifically established to handle disputes / disputes is arbitration, settlement of civil disputes outside the public courts based on arbitration agreement made in writing by parties to dispute.

Related to Islamic economic dispute resolution process, Religious Courts should be courageous and able to explore the values and norms of Islamic law, whether contained in Al-Qur'an, Sunnah and books of jurisprudence or *fiqh* and *usul majlis* of fatwa scholars in this regard through the National Sharia Council (DSN) related to issues surrounding sharia economy.

c. Aspects of Legal Status

Act No. 30 In 1999 on Decisions Registration and Implementation of arbitral verdict only be done by the authorities of District Court, does not contain within its jurisdiction. Therefore, there are two opinions on these issues. First, authority is belong to District Court, under Article 59, Article 61, Article 62, Article 63 and Article 64 of Law No. 30 year 1999, the decision of National Sharia Arbitration Board is under authority of District Court. Secondly, all issues relate to completion of sharia economy under Article 49 letter (i) jurisdiction, this opinion is based on legal principle of *lex posteriori derogat legi priori* dan *lex specialis derogat legi generali*. Based on *lex posteriori derogat legi priori* dan *lex specialis derogat legi generali* principle, legislation takes precedence newer than the enactment of legislation that longer / History. Meanwhile, according to principle of *lex specialis*, namely the legislation of particular importance precedence than the enactment of legislation of a general nature. Its jurisdiction to implement the verdict by BASYARNAS is appropriate. It is consistent with legal principle of *lex posteriori derogat legi priori* dan *lex specialis derogat legi generali*. Therefore, basic authority as expansion of Religious Courts authority is consistent with needs of society.

2. The authority BASYARNAS in resolving the dispute.

a. Under law

According to Indonesia legislation, sharia arbitration (BASYARNAS) received legal recognition. Article 1338 of Civil Code states, "all treaties made consistent with applicable laws for those who make it. The treaty cannot be withdrawn in addition to agreement of both parties or for reasons specified by Act. Agreement must be implemented with kindness."

Provisions of Article 1338 of Civil Code makes legal experts agree that law of treaties adopt the system "open" and "free", which means everyone is open and free to make arrangements and also about how to resolve disputes that occur or may occur that not contrary to applicable law of "formal defects and material defects".

Article 56 paragraph (2) of Law No. 30 year 1999 confirmed that parties' right to choose the law that will apply to settlement of disputes which may or has arisen between the parties. This explanation asserted that parties to dispute are given the discretion to determine which law will be applied in arbitration process.

Article 55 of Law No. 21 year 2008 on Islamic Banking stated as follows.

- a. Islamic Banking dispute settlement is conducted by court within Religious Courts.
- b. In event that parties have foretell the settlement of disputes other than those referred to in paragraph (1), settlement of disputes is consistent with *Akad* contents.
- c. Settlement of disputes referred to in paragraph (2) must not conflict with Sharia principles.

Based on Article 49 letter (i) Law No. 3 year 2006, Religious Courts absolute has duty and authority to examine, hear and resolve the cases at first level among people who are Muslims in economic Sharia which include: Sharia Bank, microfinance institutions sharia, Islamic sharia Insurance, Reinsurance sharia, Islamic sharia Mutual funds, bonds and securities Sharia, medium-term Sharia, securities Sharia, finance Sharia, Pawn sharia, pension funds Sharia of financial institutions and Business Sharia.

BASYARNAS duty in accordance with rules of procedure and jurisdiction (authority) consists of two things, namely:

- a. Resolve disputes in trade relations industry, finance, services and others in which the parties agree in writing to submit the settlement to BASYARNAS.
- b. Give a binding opinion on an issue with respect to agreement at request of parties.

b. Based on Agreement

The arbitration agreement according to Article 1 point 3 is as follows:

"Arbitration agreement is an agreement in form of arbitration clause contained in a written agreement made by parties before a dispute arises, or a separate arbitration agreement made by parties after a dispute arises"

Based on this definition there are two forms of arbitration agreement namely arbitration agreement that had been made before the occurrence of dispute and arbitration agreement made after the occurrence of dispute. Arbitration agreement before dispute (*de compromittendo*) is an agreement which is not attached into a unity with its subject matter. Arbitration agreement, commonly called "arbitration clause" is an additional agreement attached to main treaty. (Asep Saepudin Jahar, 13-47).

The existence of arbitration agreement to resolve disputes by BASYARNAS in new Islamic banking can be implemented because BASYARNAS have the absolute authority to resolve problems occurred. BASYARNAS must do consistently with procedures set forth in Rules of Procedure. After a petition in check and arbitration clause, BASYARNAS will appoint the arbitrator or arbitration panel that will examine and rule on dispute between the two sides.

BASYARNAS also have a role in effort for peace for both parties to dispute. Peace was highly recommended by Allah. as contained in Al-Anfal (8) paragraph 61:

وَاِنْ جَنَحُوا لِلسَّلَامِ فَاجْنَحْ لَهَا وَتَوَكَّلْ عَلَى اللَّهِ إِنَّهُ هُوَ السَّمِيعُ الْعَلِيمُ

It means "And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing".

Peace (*sulh*) means a type of contract or agreement to end the dispute between the two parties peacefully. (Abdul Manan, 2012: 427). If peace is reached then the arbitrator or panel of arbitrators will make a deed of peace that final and binding upon parties to comply with provisions of peace. When peace does not be reached by both parties, arbitrator or panel of arbitrators shall continue the examination of subject matter.

Opinions Mohammad Daud Ali about the notion of law principle, truth which is used as a pedestal to think and reason for opinion, especially in enforcement and implementation of law. The principle of Islamic common law is principles of fairness, legal liability, and expediency (Ummi Uzma, 2014: 395). Sharia arbitration is based on basic foundation of justice in resolving disputes of parties, legal liability of arbitration decision and usefulness of arbitration is given to the parties.

This jurisdiction has been expressly stipulated in legislation, but there are still certain effort, consciously or unconsciously, like Article paragraph (2) of Law Number 21 year 2008 on Sharia Banking that:

1. Settlement of sharia banking disputes is done by a religious court.
2. In event that parties have foretell dispute resolution other than prescribed in paragraph (1), settlement of disputes is done consistently with contract.
3. Dispute settlement referred to paragraph (2) must not conflict with sharia principles.

It Expressly authorizes the Court of religion to process Islamic banking dispute, but the explanation of paragraph (2) of article on letter d determine, "which referred to court in general courts". The provision is really castrate the authority of Religious Courts. Associated with it, elucidation of Article 55 paragraph (2) of Law Number 21 Year 2008 on Islamic Banking by Constitutional Court in its Decision No. 93 / PUU-X / 2012 dated August 29, 2013 declared contrary to Constitution of Republic of Indonesia Year 1945, namely Article 28D (1) which states: "everyone has the right to recognition, security, protection, and legal certainty and equal treatment before the law, and therefore not legally binding".

According to author, the rules have been clearly stated that verdict execution is by Board of Arbitration authority of District Court, but the National Arbitration Sharia Board is a special agency within Indonesian Scholar Council. Therefore, parties have chosen National Sharia Arbitration Board as a settlement of dispute, has become a duty to abide by judicial system law. National Sharia Arbitration Board deals the judge actions of sharia economy as absolute authority within its jurisdiction. Article 1 (3) of 1945 Constitution, Republic of Indonesia is a constitutional state in which there are two terms of law supreme and equality before the law. Interpretation of law supreme is the rule of law. Article 61 Law No. 30 years 1999 is a legal certainty for parties to dispute in arbitration.

The notion of equality before the law is same position in front of law. The position of district courts and religious courts are equal before the parties to dispute arbitration, but because of religious court was justified by law that court religion has the absolute authority on matters of sharia economy disputed, National Sharia Arbitration Board is used in all economic field and appropriate, when implementing or executing the verdict of National Sharia Arbitration Board switch to Religious Court.

IV. CONCLUSION

Verdict execution by BASYARNAS in Indonesia positive law: first, in terms of Act can already be implemented, it is supported with Law No. 30 year 1999 on arbitration and alternative dispute resolution. Second, from a legal perspective of Islam, BASYARNAS execution can be carried out in terms of Islamic law have occurred at time of Prophet Muhammad who is called by *tahkim* or *syiqaq*. BASYARNAS Competence is very helpful to resolve the sharia dispute. BASYARNAS itself is one institution that could be the choice of parties in resolving disputes without go to court.

It is hoped that National Sharia Arbitration Board or BASYARNAS can became one institution outside court to resolve the sharia dispute, would be able to enhance its role in order to resolve the sharia dispute. BASYARNAS is expected to be able to disseminate to public through electronic media, mass media and social media to makes public know them.

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