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THE EXISTENCE OF BASYARNAS IN THE JUSTICE SYSTEM IN INDONESIA

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ABSTRACT

In legal matters, there are two attempts to resolve disputes between parties, one of which is by using a sharia-based dispute resolution system. Settlement of sharia-based disputes includes non-litigation (outside court) and/or litigation in court). Sharia disputes in court (Litigation) are requested through religious courts, and dispute resolution outside the court (Non Litigation) through sharia Arbitration bodies. In Indonesia, the institution that resolves sharia arbitration disputes is called BASYARNAS (National Sharia Arbitration Board), and the procedures for settlement are not much different from arbitration procedures in general. The legal basis for the settlement of sharia arbitration disputes is regulated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and furthermore regarding the execution of sharia arbitral awards is regulated in Supreme Court Circular Letter No. 08 of 2008. This research uses a qualitative method with a normative approach and uses a library research collection method, as well as analyzing documents, data, information related to BASYARNAS. The results of research on the existence of BASYARNAS still depend on the district court.

***Keywords**: Eksistence, Sharia Arbitration, UUAPS*

ABSTRAK

Didalam persoalan hukum ada dua upaya untuk menyelesaian sengketa antara para pihak diantaranya dengan cara menggunakan sistim penyelesaian perselisihan berbasis syariah. Penyelesaian perselisihan berbasis syariah tersebut meliputi Non Litigasi (diluar Pengadilan)

dan/atau Litigasi didalam Pengadilan). Perselisihan syariah di dalam pengadilan (Litigasi) dimohonkan melalui pengadilan agama, dan penyelesaian perselisihan di luar pengadilan (Non Litigasi) melalui badan Arbitrase syariah. Di indonesian sendiri lembaga yang menyelesaikan perselisihan arbitrase syariah bernama BASYARNAS (Badan Arbitrase Syariah Nasional), dan tata cara penyelesaiannya tidak beda jauh dengan tata cara arbitrase pada umumnya. Dasar hukum penyelesaian perselisihan arbitrase syariah yakni diatur dalam Undang-Undang No 30 Tahun 1999 mengenai Arbitrase dan Alternatif Penyelesaian Sengketa dan selanjutnya mengenai eksekusi putusan arbitrase syariah diatur dalam Surat Edaran Mahkamah Agung Nomor 08 Tahun 2008. Namun eberadaan BASYARNAS dalam menyelsaikan sengeketa ekonomi syari'ah di Indonesia menjadi semacam mobil tua yang berwujud tapi tidak bertenaga dikarenakan untuk eksekusi perkara yang tidak dapat diselesaikan sukarela bagi para pihak harus melalui persetujuan kepala pengadilan negeri. Hasl tersbeut, mendikasikan keberadaan BASYARNAS berada jauh dibawah pengadilan neger. Oleh karena itu pengdilan bertujuan untuk mengalisis eksistensi BASYARNAS dalam sistem peradilan di indonesia.Penelitian ini menggunakan metode kualitatif dengan pedenkatan normatif dan menggunakan metode pengumpulan studi Pustaka (library research), serta menganalisis dokumen, data, informasi yang berkaitan dengan BASYARNAS. Hasil penelitian eksistensi BASYARNAS masih bergantung pada pengadilan negeri.

Kata Kunci: Eksistensi, Arbitrase, Arbitrase syariah, UUAPS

INTRODUCTION

The development of Islamic banking in Indonesia has implications for potential problems that can lead to banking disputes. Disputes arise for various reasons and problems, mainly due to conflicts of interest between the parties. This condition certainly requires regulations to resolve disputes. Regarding Sharia banking transactions, disputes between customers and banks are divided into three categories: differences in the interpretation of the agreed contract, disputes when the transaction has taken place, and non-payment due to a loss by one of the parties.

Amran Suadi stated that there are factors that can cause Sharia economic disputes, namely, first, the factor of disagreement between the parties in the contract due to being trapped in a profit orientation, the character of trial and error, or because of the inability to recognize their business partners and maybe there is no legal cover. Often a contract or contract dispute between the parties cannot be avoided, so a dispute settlement is required. Dispute resolution is a case that is resolved between one party and another. There are two ways to resolve this dispute: litigation (court) and non-litigation (outside court). The National Sharia Arbitration Board or BASYARNAS is an institution that has a role and authority in overcoming or resolving Sharia economic and Sharia business disputes that occur in Indonesia in a non-litigation manner when deliberations do not result in consensus[1].

BASYARNAS, as a permanent institution established by the Indonesian Ulema Council, resolves muamalat disputes that may arise in trade, industrial, financial, and service relations. The establishment of this institution was initially associated with the establishment of Bank Muamalat Indonesia and the Sharia People's Credit Bank. The Sharia Arbitration Institution is a

[1] Achmad Sani, *Alhusain* (Bandung: Gramedia Pustaka Utama, 2020).

dispute resolution between the two parties in the control channel to reach an agreement on a problem when consensus efforts are not reached. Besides that, this body can provide a recommendation or legal opinion, namely an opinion binding on the existence of a particular issue relating to the implementation of the agreement at the request of the parties who agreed to resolve it. If the arbitration route cannot resolve the dispute, the judiciary is the last resort as a decision-maker. The judge must pay attention to references from arbitrators who have previously handled the case as material for consideration to avoid lengthy settlement processes[2].

In resolving Sharia disputes, there are 2 (two) ways of settlement: through litigation (court) or methods of resolving disputes/disputes in court. There are alternative non-litigation methods that resolve disputes outside of court. Furthermore, when there is a legal dispute, it would be better if the dispute is resolved through an alternative method or out of court; this is by what has been ordered by Article 6 paragraph (1) of the AAPS Law, which in its classification "civil understanding disputes can be resolved by the parties through alternative dispute resolution based on good faith and set aside dispute resolution through district courts. As for alternative dispute resolution, according to article 1 number 10 of the AAPS Law, "dispute settlement institutions or differences of opinion use procedures agreed upon by the parties, namely dispute resolution outside the court by way of consultation, negotiation, mediation, conciliation, or expert judgment. The following is a more detailed explanation of alternative dispute resolution institutions[3].

The existence of BASYARNAS in resolving Sharia economic disputes in Indonesia is an old car that is tangible but not powerful because the execution of cases that cannot be resolved voluntarily for the parties must go through the approval of the head of the district court. This intervention indicates that BASYARNAS' position seems to be under the auspices of the court. Unlike previous research, this study aims to analyze the existence of BASYARNAS in the Indonesian justice system.

RESEARCH METHODS

This study uses qualitative methods with the type of library research (library research). The researcher used library research because the research object, namely BASYARNAS, has much literature related to its role in resolving Islamic banking disputes and the existence of BASYARNAS in the scope of Indonesian justice[4]. Therefore, researchers collected regulations, literature, documents, books, notes, websites, and references related to BASYARNAS in Sharia banking dispute resolution. Some secondary data that can be used as data and information in this study, such as Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and regarding the execution of sharia arbitral awards, is regulated in the Supreme Court Circular Letter Number 08 of 2008[5].

[2] Sani.
[3] Edo Febriansyah, "Arbitrase Dan Alternatif-Penyelesaian-Sengketa," Manado Poss, 2021, Arbitrase-Dan-Alternatif-Penyelesaian-Sengketa.
[4] Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif, R&D*, 2019.
[5] A. Manzilati, *Metodologi Penelitian Kualitatif Paradigma, Metode, Dan Aplikasi* (Malang: UB Press, 2017).

RESULT AND DISCUSSION

History of BASYARNAS

The history of the formation of the National Sharia Arbitration Board, namely at the Indonesian Ulema Council meeting in 1992, at which time one of the papers presented by H. Hartono Mardjono, S.H., regarding arbitration based on Islamic law, was displayed. Furthermore, on April 22, 1992, the MUI Leadership Council invited experts, law enforcers, Muslim scholars, and scientists from universities and scholars to hold deliberations to discuss and exchange ideas regarding whether or not Islamic arbitration was necessary. Then, in short, on the 5th of Jumadil Awal 1414 H or October 21, 1993, the National Sharia Arbitration Board was signed and ratified. This arbitral body is in the form of a foundation and an independent legal form. For more than 20 years carrying out its functions and duties, BASYARNAS has handled, examined, and decided on disputes submitted to this institution[6].

The main objective of the establishment of this institution, as stated in the articles of association of article 4 paragraph 1, namely, is "to provide a fair and fast settlement in Ramallah/civil disputes that arise in the fields of trade, industry, finance, services, and others". Paragraph 2 (two) also states, "accepting the request of the parties in an agreement, without any dispute to provide a binding opinion on an issue related to the agreement"[7].

As the specific goal, namely, if the parties have taken the efforts of family deliberation and no results have been agreed for peace, then the next effort is to designate the BASYARNAS institution so that the hope that disputes that occur with these parties can be resolved. This effort was chosen after considering that this arbitration settlement has certain advantages, such as guaranteed confidentiality and relatively inexpensive costs compared to court proceedings. Judging from the existing provisions, it can be said that BASYARNAS is clear and has legal standing. Although in its implementation, BASYARNAS must adapt to various existing regulations, this is, of course, so that the interests of the parties are guaranteed and can obtain apparent legal certainty in the judicial power system that exists in Indonesia and is recognized in a formal juridical manner. However, this BASYARNAS must not depart from the provisions of Islamic law because most of those who use BASYARNAS services are predominantly Muslim. In their journey, Muslims are increasingly advancing; therefore, the law to be chosen is Islamic Sharia law; BASYARNAS is a tool that can complement the existing legal system in Indonesia. BASYARNAS is the second choice used by Muslims in resolving disputes after such because Muslim arbiters are more versed in Islamic law in resolving disputes between these parties which, in the end, the decisions taken in solving the parties' problems are by Islamic law[8].

Definition of Arbitration and History of Islamic Arbitration

Al-Qur'an is a source of law for all Muslims, both in Indonesia and throughout the world, which aims to guide all human beings, especially Muslims worldwide, in the event of a dispute

[6] Achmad Djauhari, *Badan Arbitrase Syariah Nasional* (Jakarta: Basyarnas Press, 2004).
[7] Djauhari.
[8] M. Zein, *Arbitrase Dalam Perspektif Islam Dalam Arbitrase Islam Indonesia* (Jakarta: Bamui dan BMI, 1994).

between humans. Settlement of disputes after the death of Rasulullah / Prophet Muhammad S.A.W. many are carried out using the method of deliberation to reach a consensus to reconcile the conflicting parties, and this has become legal jurisprudence in several cases, especially cases in Indonesia and cases of all other Muslim countries. The scholars agree with this take; it is just that there are differences in the technical implementation[9].

In the view of Muslims, arbitration is synonymous with the term Tahkim. The origin of this taken is Hakama. Etymologically it means "to make someone who prevents the occurrence of a dispute". However, overall, taken has the same meaning as arbitration as we know it today, namely, "the appointment of a person or more to be a referee (peacemaker) by two people who are in dispute to be able to help resolve the dispute of the parties peacefully", then the person who is resolving the dispute is referred to as Hakam[10].

The taken in the Islamic court system (Religious Court) is a relic of the pre-Islamic Arab tradition. This tradition was Islamized by the Prophet Muhammad S.A.W., and the Islamic tradition managed to eliminate some deviations then. Nevertheless, the Prophet Muhammad S.A.W. does not erase all pre-Islamic Arab traditions running correctly. Several traditions were continued by the Prophet Muhammad S.A.W. but in content adapted to the mission of Islam[11].

The Arabic tradition continued by the Prophet Muhammad S.A.W. after pre-Islamic among them as follows:[12]

1. Generous, they are very proud to be called generous. If someone has guests, while he does not have any property except a camel, because of his generous nature. he is willing to slaughter his camel to honor his guest;
2. Like to keep promises, for them, a promise is a debt that must be paid;
3. Have a strong determination; when they do something, they are very persistent in trying to achieve the determination they aspire to;
4. Maintaining self-respect, they are willing to sacrifice to defend their self-honor, family, and took. This trait causes them to be brave;
5. Stand firm; they are substantial in their convictions and are not easily influenced by others;
6. Can be trusted; generally, the Arabs are honest and like to tell the truth.

In history, it has been recorded that before the Prophet Muhammad became a Messenger, he was once a peacemaker when at that time, there was a dispute that occurred in Mecca. The dispute is about the position of laying the Hajar Aswad stone in its place of origin. The dispute occurs when who is most entitled to complete this noble task.

The scope of arbitration is very closely related to issues concerning huquq al-ibad (individual rights), which means that these individual rights are individual rights regulated in laws and regulations related to property[13].

[9] Jamal Al-din Al-suyuti, *Syah Al-Hafiz Sunan Al-Nasa'* (Beirut: Al-Maktabah Al-Imarah, 2017).
[10] Luwis Ma'luf, *Al-Munjid Fi Al-Laughah Wa Al-'Alam* (Beirut: Al-masyriq, 2017).
[11] Bernand Lewis, *Encyclopedia Of Islam* (Leiden: Dar Al-Fikr, 2015).
[12] Fathurrahman Djamil, *Arbitrase Dalam Perspektif Sejarah Islam Dalam Arbitrase Islam Indonesia* (Jakarta: Bamui dan BMI, 2018).
[13] Ahmad Syalabi, *Sejarah Dan Kebudayaan Islam* (Jakarta: Pustaka Al-Husna, 1990).

Furthermore, suppose this is related to the scope of Hakam's duties. In that case, matters related to his authority are only disputes relating to individual rights, in which a person has full authority to sue or not, to forgive or not for a right that has harmed him. The main goal of arbitration is to be able to resolve disputes between the parties amicably. Therefore, disputes accepted by the judge are only disputes that can be resolved peacefully. Disputes that can be resolved peacefully are disputes involving property and which have the exact nature[14].

Settlement Using the Sharia Arbitration Method

An arbitral institution has existed for a long time and has been practiced by the Greek people before Christ. This arbitral institution has existed since the Dutch era, even when the Dutch Government established three arbitrations, namely the first Arbitration Board of the Indonesian Agricultural Products Export Agency. The second is the Arbitration Board on Fire, and the third is the Accident Insurance Arbitration Board. During the Japanese Government, the arbitral institution used was an arbitration institution that the Netherlands had established, but the Raad van Justitie and Residentiegerecht courts were abolished. Japan forms a judiciary that can apply to everyone. The trial was named Tihoo Hooin. This judiciary is a continuation of the Landraad judiciary. Arbitration institutions in Indonesia are well known by the public as an alternative to dispute resolution through non-litigation channels because arbitration institutions are the most preferred institutions by business actors. After all, they are considered the most suitable method for the needs of the business world [15].

The role of BASYARNAS in resolving disputes has not been optimal because it has encountered several obstacles. One of them is that the settlement of disputes through an arbitration institution must be preceded by an agreement of the parties in writing to make a settlement using an arbitration institution. This means that if the parties do not agree on the clause of the agreement regarding dispute resolution by the National Sharia Arbitration Board, there will be no dispute resolution at BASYARNAS. The absolute competence of the arbitral institution is determined by whether there is an agreement containing the arbitration clause before the dispute occurs (practicum de compromittendo). or after a dispute occurs (act compromise). 22 Also, there are difficulties in executing decisions due to overlapping authorities between the Religious and District Courts.

Regarding the procedure for resolving disputes at BASYARNAS, they are as follows;[16]

1. Settlement of disputes that arise in trade, financial, service, industrial, and other relations, and the parties agree in writing to submit the settlement to BASYARNAS by BASYARNAS procedure rules.
2. The application for filing an arbitration procedure begins when the letter to hold arbitration is registered by the secretary in the BASYARNAS register. All receipts regarding receipt of correspondence notices shall be deemed to have taken place upon receipt of the request for arbitration procedure. The application letter must contain the parties' full name, place of

[14] Zein, *Arbitrase Dalam Perspektif Islam Dalam Arbitrase Islam Indonesia*.
[15] Djauhari, *Badan Arbitrase Syariah Nasional*.
[16] Djauhari.

residence, a brief description of the location of the dispute, and all the things demanded. Moreover, the application must also be attached a copy of the agreement document, which explicitly submits the decision of the dispute to BASYARNAS. Finally, the registration of the application also includes the payment of the registration fee;

3. The chairperson of BASYARNAS shall appoint a single arbiter or arbitrator for the assembly, and also, the chairperson of BASYARNAS shall have the right to select experts in specific fields if required to become arbitrators. In addition, the disputing parties can submit objections to the appointment of an arbitrator, and the submission of objections must be accompanied by reasons based on law;
4. During the trial stage, the single arbiter or arbiter assembly must provide equal opportunities for the disputing parties to defend and defend their interests. Apart from giving each document to the sole arbitrator or arbitrator assembly, this document must also be given to the opponent. In the examination stage, expert witnesses may be presented; the trial also consists of an answer-response stage. This trial was held at the seat of BASYARNAS; the language used in documents and trials must be Indonesian. The arbitrator will also try to make peace first; if the peace is not prosperous, then the arbitrator will continue the trial of the dispute being requested;
5. At the end of the trial, when the arbiter considers that the trial has been sufficient, the arbitrator will close the proceedings and set a day for delivering the decision to be taken. Moreover, the decision will also be delivered on the appointed day, but if parties are absent, this decision will still be delivered as long as a proper summons has been given. Each initial decision begins with Bismillahirrohmanirrohim, then continues with the sake of justice based on one almighty God. All trial proceedings until the arbitrator delivers a decision will be completed no later than the six-month period expires, counting from the time the parties attend the first hearing;
6. Decision-making, the BASYARNAS decision that the arbitrator has signed is considered final and binding for the disputing parties; the parties must comply with the decision that has been submitted by the arbitrator.

The Existence of Basyarnas in the Justice System in Indonesia

In general, the main rules regarding arbitration are contained in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (UUAAPS). The law was born based on Law Number 14 of 1970 concerning Provisions for the Main Provisions of Judicial Power, later amended by Law Number 35 of 1999. Article 3 of the Judicial Power Act of 1970 states, “Settlement of cases out of court, based on amicable settlement or through a referee (arbitration), it is still permissible.” Furthermore, the traditional form of the provisions of that article is realized through UUAAPS. The development of laws on judicial powers to date through Law Number 48 of 2009 on Judicial Powers 15 still recognizes that dispute settlement institutions outside the court (one of which is arbitration) are even more detailed than previous judicial

power laws. UUAAPS is essential as an umbrella act for arbitration in Indonesia, including sharia arbitration[17].

As a dispute resolution institution, arbitration can be equated with a judicial institution because the resulting decision is final and binding. However, one of the fundamental weaknesses of arbitration is that it does not have the equipment to execute the resulting decision, so executing the arbitral award requires the intervention of a district court. The Arbitration Award is final and binding, meaning that the decision cannot be requested for legal remedies such as appeals and cassation, and the decision is binding for the parties to comply voluntarily in good faith because before the decision is made, they have also agreed to settle it through arbitration with all the consequences. However, in subsequent developments, the nature of the decision, which was initially made voluntarily, often needed to be complied with voluntarily by the losing party. This is an obstacle in the implementation of arbitration, so a way out is sought, namely by involving the state through the courts in the execution process. In the deed of registration at the district court clerk's office within a period of no later than 30 days after the decision is pronounced, and if after this period, it results in the decision not being able to apply for a stipulation of execution[18].

Furthermore, according to the provisions of Article 61, jo. Article 61 paragraph (1) 20 Rahmadi Usman, Op. Cit, p. 185 explains that the deposit's action is in the form of submitting the original sheet or an authentic copy of the decision, then recording and singing together at the end or on the sidelines of the decision by the clerk of the district court and the arbiter or their attorney then the record is valid as a deed of registration of the arbitral award national. The provisions of Article 59 paragraphs (1) and (4) UUAAPS UUAAPS are explained if, within 30 days after recording in the deed of registration at the district court clerkship, it turns out that the parties still need to implement it voluntarily. One of the parties can apply to the Chairperson District Court to issue an order to carry out forced execution by the provisions of the implementation of decisions in civil cases that have legal force remains. As it is known that arbitral awards are independent, final, and binding, the Chairperson of the District Court is not authorized to examine the reasons for considering the national arbitration award. However, the authority of the Chairperson of the District Court is limited to formal and limited examinations in the provisions of Article 62 paragraph (2) UUAAPS. Then against the decision of the Chief Justice of the District Court who refused issue the execution order above; then there is no opening of any legal remedy[19].

In this regard, the researcher believes that the existence of BASYARNAS in Indonesia still depends on other law enforcement agencies, namely the district court. In the opinion of

[17] Anik Entriani, "Arbitrase Dalam Sistem Hukum Di Indonesia," *An-Nisbah: Jurnal Ekonomi Syariah* 3, no. 2 (2017), https://doi.org/10.21274/an.2017.3.2.277-293.
[18] Situmorang, "PELAKSANAAN PUTUSAN ARBITRASE NASIONAL DI INDONESIA (Enforcement of National Arbitration Award in Indonesia)," *Jurnal Penelitian Hukum De Jure* 17, no. 4 (2017): 24–35, https://iccwbo.
[19] Nadia Fatima, Ipah Ema Jumiati, and Rina Yulianti, "Implementasi Undang-Undang Nomor 33 Tahun 2014 Tentang Jaminan Produk Halal," *JDKP Jurnal Desentralisasi Dan Kebijakan Publik* 4, no. 1 (2023): 40–51, https://doi.org/10.30656/jdkp.v4i1.6267.

researchers, arbitration decisions should be carried out without the approval of the head of the court if the parties already have volunteers because BASYARNAS is not a judicial institution.

CONCLUSION

The existence of BASYARNAS within the scope of justice in Indonesia is very dependent on the district court due to the execution of decisions either when the party feels voluntary or forced to go through the permission of the head of the district court. In the writer's opinion, as an institution separate from the judiciary, it should not be under a district court, especially if the parties feel voluntary. In this way, the researcher analogizes BASYARNAS to an old car that does not have a strong existence within the judiciary's scope in Indonesia.

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