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Settlement of Islamic Banking Disputes in Indonesia: Opportunities and Challenges[1]

by
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A. Introduction

Islamic banking in Indonesia started to operate from 1992 by virtue of the enactment of the Banking Act No. 7/1992; and when Bank Muamalat was established as the first bank which operates in accordance with Islamic principles. The Banking Act No. 7/1992 was amended by Act No. 10/1998, to provide an opportunity to conventional banks to open an Islamic window. Since that time, the growth of Islamic banking in Indonesia has been progressing steady and fast. Presently there are 3 full-fledged Islamic banks, 19 Shariah Business Units and 92 Shariah Rural Banks. This tremendous growth deserves to be supported by a strong legislation. One allied aspect that deserves attention relates to settlement of disputes in Islamic banking.

In the past, there was confusion on the question which forum was competent to settle Islamic banking disputes: civil court or religious court. Both regarded themselves to be competent to settle such disputes. But the problem was that the jurisdiction of the civil courts did not extend to *Shari'ah* matters, within which Islamic banking disputes apparently came. On the other hand, the jurisdiction of the religious courts was limited to Personal law matters which did not cover banking disputes, and was confined to a) marriage, b) inheritance, testamentary succession, *hiba* and waqf. There was no possibility of any deviation as the matter was clearly spelled out in section 49 of the Act No. 7 of 1989

In the absence of an appropriate body to take charge of the settlement of Islamic banking disputes, an initiative was taken by the Indonesia Council of Religious Scholars to set up BAMUI (Indonesian Muamalat Arbitration Body) in 1993. The name of this body was changed in 2003 to Basyarnas (National Shari'ah Arbitration Body). However

[1] I would like to gratefully acknowledge the valuable contribution and reversion provided by Prof. Dr. Syed Khalid Rashid in preparing this paper.

due to very poor knowledge of the Islamic law of arbitration possessed by the banks and their banking costumer complainants, the National Shari'ah Arbitration Body could not function effectively. The very fact that a dispute cannot be arbitrated unless there is an arbitration agreement between the parties (i.e., the bank and customer) was not fully appreciated by the parties. Consequently, disputes brought for arbitration by both of them were lacking necessary legal foundation and could not thus be legally arbitrated. Any award made in such an arbitration was not enforceable.

As a result of this problem, most of the cases involving Islamic banking disputes continued to be taken to the civil courts, notwithstanding the questionable knowledge of the judges of such courts of matters relating to Islamic banking and finance.[2]

This anomaly was rectified in February 2006 through Law No. 3 of 2006 which amended Law No. 7 of 1989 and expanded the jurisdiction of the Religious courts to cover adjudication of disputes belonging to Islamic economic matters, including Islamic banking.

This expansion arguably enhanced the status and authority of Religious courts as a dispute settlement institution within the judiciary system in Indonesia. Its jurisdiction is now no more confined to the settlement of disputes in the Islamic family law matters, but extended also to the field of Islamic business and economic matters. However, this turns out as another challenge for Religious courts due to the fact of the complexity of Islamic economics matter, and needed more time to be properly absorbed and understood.

With this in mind, this paper tries to analyze the challenge faced by Basyarnas as a non-litigation forum and Religious courts as litigation institutions both of which have been conferred with the competency to settle of disputes in the area of Islamic banking.
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B. Dispute Settlement in Islamic Banking through Arbitration

B1. Basyarnas (National Shariah Arbitration Body)

In Islam, settlement of disputes, especially in the property and private matters through amicable, means (*islah*) is strongly recommended and is regarded as a praiseworthy deed. The Quran, in *Surah Al Nisa ayat* 128 clearly states:

> "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practice self-restraint, Allah is well-acquainted with all that ye do".

Furthermore, Allah also commands Muslims to bring peace when the dispute arises among them. It is stated in the Quran, *Surah Al-Hujurat, ayat 9*:

> "If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just)".

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[2] Gemala Dewi, *Aspek-Aspek Hukum dalam Perbankan dan Perasuransian Syariah di Indonesia*, (Jakarta, Kencana, 2004), p. 104

Arbitration in Islamic law is known as *tahkim* which literally means to make someone as arbiter (*hakam*) in a dispute. The role of arbitrator is similar to that of a *qadi* (judge). His power of giving an award, and requiring him to have the same qualifications as that of a *qadi,* bring him very near to a judge (*qadi*). Non-Muslims are allowed under Islamic law to have an arbitrator of their own choice and qualifications.[3]

In Indonesia, BAMUI (Indonesian Muamalat Arbitration Body), which has been changed to Basyarnas (National Shariah Arbitration Body),[4] was initiated by MUI (Majelis Ulama Indonesia) Indonesian Council of Religious Scholars, started working from 1 October 1993. The establishment of this Islamic arbitration body is closely related to the growth of Islamic banking and other institutions which operate on Islamic principles. According to HS. Prodjokusumo the idea to establish BAMUI could not be detached from the context of socio-economic life of Muslims in Indonesia.[5] However, the main objectives behind the establishment of BAMUI are[6] -

1. To provide justice and speedy settlement of *muamalah*/civil disputes which emerge in the area of commerce, industry, finance, service and others;
2. To accept a request which is submitted by the parties in giving a binding opinion in a matter base on their underlying agreement, even where no dispute has arisen.

. When the disputing parties agree to take their dispute to Basyarnas, they commit themselves to follow the system and procedure applied by it. Basyarnas has procedural regulations which encompass *inter alia*: the request to perform arbitration, appointment of the arbitrator, procedure for investigation, reconciliation, authentication and giving of the evidence by witnesses, concluding the investigation, decision making, setting aside of award, registration of the award, enforcement of award and determination of the cost of arbitration.

B.2. The Role and Competency of Basyarnas in Indonesian Legal System

The role of Basyarnas in a formal sense has strong legitimation in the Indonesian legal system. The law which prevails in Indonesia provides the opportunity and possibility for an independent tribunal outside the court to resolve a dispute among the parties. According to the explanatory note Sec. 3 (1) of the Act No. 14/1970 on Judicial Powers:

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[3] Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia,* (Ahmad Ibrahim Kulliyyah of Law, IIUM, Kuala Lumpur, 2006), p. 34.

[4] Basyarnas was established in 2003 and is located in Jakarta. It has some branches in other provinces.. Previously, Basyarnas was known as BAMUI (Indonesian Muamalat Arbitration Body) which was established on 21 October 1993 and had a legal status as Foundation (*Yayasan*). Its founding official document was signed by Chairman of MUI (Indonesian Council of Religious Scholars) KH. Hasan Basri and Secretary General HS. Prodjokusumo. BAMUI was set up by MUI based on the decision of Rekernas of MUI (National Working Meeting) in 1992. The changing of name from BAMUI to Basyarnas was decided in MUI National Working Meeting in 2002. In that meeting the legal body status of BAMUI as Foundation (*Yayasan*) was also changed and it became a body under MUI and had become as one of the arms of MUI organization. However, Basyarnas enjoys independent and autonomous status in discharge of its duties and functions.

[5] Saleh, Abdul Rahman, Dkk, *Arbitrase Islam di Indonesia,* BAMUI & BMI, Jakarta, 1994. p. 192

[6] Section 4 Anggaran Dasar Yayasan Badan Badan Arbitrase Muamalah Indonesia

> "The settlement of a dispute outside the court, based on reconciliation or arbitration is permissible however, the award of the arbiter only could only be enforced after receiving permission or order of enforcement from the court"

Until 1999, the legal basis to be used for investigation of cases in arbitration in Indonesia were section 615 up to 651 civil procedurel law (*Reglement op de Rechtvordering*) and Section 377 which is revised (Het Herziene Indonesian Reglement, Staatsblad 1941: 44) and Section 705 Reglemen Acara for the state outside Java and Madura (*Rechtsreglement Buitengewesten, Staatsblad* 1971:227). However after Law No. 30/1999 on Arbitration and Alternative Dispute Resolution was enacted, section 81 of this Act, firmly states that those regulations will not be valid anymore. This means all stipulations pertaining to arbitration, including foreign arbitrations should abide by the Law No. 30 of 1999. However in *lex specialist* the provision related to the implementation of foreign arbitration regulated in Act No. 5/1968 which officially ratify the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States i.e., ICSID Convention, the Decree of President No. 34/1981 on Ratification of New York Convention 1958 and Regulation of Supreme Court No. 1/1990.[7]

According to H. M Tahir Azhari, the existence of Islamic Arbitration (Basyarnas) in Indonesia is *condition sine qua non*, and it has strong foundation in Indonesian legal structure.[8] The competency of Basyarnas encompasses all disputes which arise in commerce, industry, finance, service etc. Apart from that, it is able to bestow the binding opinion about the matter before dispute emerges. This binding opinion will be given by the arbiter based on the request of both the parties. In Sec. 5 (1) and (2) Act No. 30 of 1999, it is stated that"

> "The dispute that can be resolved through arbitration is restricted to commercial disputes only and only to the extent that the rights concerned fall within the full legal authority of the disputing parties to determine"

> "The dispute that can not be resolved through arbitration is a dispute that according to regulation could not be reconciled"

If in the agreement the disputing parties agreed to settle their disputes through arbitration, the court has no jurisdiction to investigate and try such cases. Sec. 1 (3) Act No. 30 of 1999 defines an agreement to arbitrate as follows:

> "Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises."

If the case could not be settled through arbitration, it can be settled through the court as the last resort. In this case the judge should give attention to the decision given by the arbiter while considering the settlement of the disputes.

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[7] Gunawan Widjaja and Ahmad Yani, *Hukum Arbitrase*, (Jakarta: PT. Raja Grafindo Persada, 2000), 1st Edition, pp. v-vi

[8] A. Rahmat Rosyadi and Ngatino, *Arbitrase dalam dalam Perpektif Islam dan Hukum Postif*, (Bandung, PT. Citra Aditya Bakti, 2002), p. 117.

B.3 The Opportunities and Challenges of Basyarnas

The dispute settlement of Islamic banking in the mode of alternative dispute resolution, through Basyarnas, has some advantages, which may be identified as follows:[9]

1. It reposes trust in the parties by placing the dispute settlement in their hands so that they may use this trust in a respectful and responsible manner.
2. The parties place their trust in the arbiter with full confidence that the dispute will be resolved by a person who has the expertise in the field.
3. The process of taking decision through Basyarnas is expeditious, less complicated and inexpensive.
4. As the parties entrust their dispute in voluntary manner for settlement to the trusted person, it naturally implies they have agreed to implement the decision given by the arbiter, as it is the natural outcome of their own agreement in appointing the arbiter. An agreement implies a promise and promises are to be fulfilled.
5. Islamic arbitration process contains reconciliation as its integral component; hence it becomes part of the Basyarnas process.
6. A clear inference which may be drawn from Basyarnas process is that Islamic law to be used as the basic principle in settling disputes in the area of Islamic banking.

Contrary to the points of strength stated above, there are some weaknesses in Basyarnas that should be improved. *First* of such weakness is the lack of professionalism in Basyarnas personnels. Having known that the Islamic banking in Indonesia has been fast developing and it will play significant role in Indonesian national banking industry in the future, not much has been done in the area of human resource development. As the institution which has authority in dispute settlement of Islamic banking, it should be managed in a professional manner and be supported by the professionals. However, the board members of Basyarnas consist of the busy persons who could not bestow full attention to it. This creates a bad influence on its activity and it could not work in maximal manner. The restructuring of Baysarnas with the professional persons is possible.[10] *Secondly*, Baysranas must have its own building, a good administration, and its own secretariat which is always ready to serve the parties at any time, and have to have the qualified arbiters who have the capability to help the disputing parties to resolve their banking disputes in a good manner. *Thirdly,* the Basyarnas has only 4 branch offices in the whole of Indonesia. These are in Provinces of Surabaya, Riau, Lampung and Yogyajarta. Indonesia consists of 31 provinces and Islamic banks have been widespread and exist in all provinces. These limited number of branch offices of course could not accommodate the demands and facilitate good services to the society. In order to solve this problem, the enlargement of networking of Basyarnas office to other provinces is necessary. *Fourth*, Islamic bank and customers are apparently have less understanding about the Basyarnas as the institution which has jurisdiction in resolving Islamic banking

[9] Rachmadi Usman, *Aspek-Aspek Hukum Perbankan Islam di Indonesia*, (Bandung: PT. Citra Bakit, 2002), p. 105.
[10] Mengurangi Benang Kusut Badan Arbitrase Syari'ah Nasional, www.hukumonline.com

disputes. The mutual familiarization of Basynarnas and Bankers, customers, *ulama*, academicians, entrepreneurs and others should be carried out by conducting seminars, training camps, etc. It is hoped this could agenda can improve their understanding of the role of Basyarnas.

C. Dispute Settlement of Islamic Banking in Indonesia Through litigation

C.1. Jurisdiction of Religious Courts

Religious court is one of the judicature bodies in Indonesia. According to section 49 Act No. 7/1989 on Religious Judiciary, Religious Court only has limited powers which is confined to investigate, and to decide cases only in the field of marriage, inheritance, will, bequest, *waqf* and *zakat* among Muslims. However, once the Act No. 7 of 1989 was amended by Act. No. 3 of 2006, the jurisdiction of Religious Court has been expanded to cover the settlement of disputes in Islamic economic matters between Muslims. The meaning of Islamic economic as given in this new Act is: any act or business activity which is undertaken in accordance with Islamic principles which consists of Syariah banks, Syariah micro financing institutions, Syariah insurance, Syariah reinsurance, Syariah portfolio management, Syariah bonds and Medium-term security, Syariah security market, Syariah finance, Syariah pawn broking, Syariah retired fund institutions and Syariah business.[11] In explanation to that section it is mentioned: "what is meant by 'between the Muslims' is persons or legal institutions who under this section voluntarily agreed to be governed by Islamic law rules pertaining to everything which they agreed to do under the jurisdiction of Religious court".

According to Bagir Manan, the competency of Religious court in settling disputes in Islamic economics extends to:[12]

a. A dispute in the field of Islamic economics between any Islamic finance institution (or fund institution) and their costumers.
b. Dispute in the field of Islamic economics between any finance institution and fund institution
c. Dispute between two Muslim parties in the field of Islamic economics in which the contract firmly states that the activity is carried out based on Islamic principles.

The jurisdiction of Religious court is not limited to Islamic banking only. However its power encompasses all kinds of institutions which base their activities on Islamic principles. The expansion of this jurisdiction has arguably enhanced the status of religious court as judicial body in Indonesia. But on the other hand, since Religious courts do not have much experience in the settlement of Islamic banking disputes, it has become a big challenge for it too.

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[11] Sec. 49 (i) Act No. 3/2006

[12] Abdul Bagir Manan, "Beberapa Masalah Hukum dalam Praktek Ekonomi Syariah" (Some Lega Problems in the Practice of Islamic Economics) , *Makalah Diklat Calon Hakim Angkatan-2 di Banten*, 2007, p. 8

C.2. Opportunities and Challenges: Dispute Settlement of Islamic Banking in Religious Court

The amendment of Act No. 7 of 1989 by Act No. 3 of 2006 on Religious Judiciary has conferred on the Religious courts a new jurisdiction in which it settles disputes regarding Islamic economic including Islamic banking. This expansion has arguably enhanced the status and the authority of Religious Court as a dispute settlement institution and is considered as wise and appropriate decision because it achieves harmonization between the material law which is based on Islamic principles and Religious court as the representative of Islamic judiciary in Indonesia. The status of religious court is Islamic and its apparatus have good knowledge of Islamic law. However, the dispute settlement of Islamic banking in Religious court still faces some challenges such as the absence of any regulation or compilation[13] for the guidance of the judges to resolve the Islamic banking disputes of Islamic banking. Furthermore there are many in Religious courts such as its judges who still have no knowledge of Islamic economic or Islamic business. There is also no special investigation institution available now which has competency and skill in Islamic banking law.[14]

According to Bagir Manan, the decision that was given to the religious courts in settling disputes in Islamic economics matter has been regarded as an appropriate option as well as a wisdom resolution. This will achieve the harmonization between material law in accordance with Islamic principles and Religious court as the representative of Islamic institution. And that also will synchronize by its apparatus that are Muslims which have good knowledge in Islamic law. In addition, the emergence of anxiety on the exclusive delegation of the cases of Islamic economic to Religious court is overly exaggerated. There is wisdom in the government's decision to recognize the Religious court as competent body to settle disputes of Islamic economic among Muslim and also non-Muslims.[15] This wisdom needs a healthy environment to flourish and prosper.

D. Brief Conclusion

Looking to the impressive improvement of the Islamic banks in Indonesia, the existence of Basyanas and Religious court as the institution which has authority to settle the dispute of Islamic banking is very impressive. Basyarnas as non-litigation institution can play important role in resolving disputes of Islamic banking expeditiously, inexpensively, and simply. Its process of reconciliation is indeed attractive to the disputing parties. However, it remains to be seen how it is managed in a professional, manner. Its office should not be centralized in Jakarta, but must have branch offices in every province of Indonesia.

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[13] Compilation of Syari'ah Economic Law is still in process. The team formed by the Supreme Court which is headed by the Bagir Manar which currently is the chief of Supreme Court. This compilation will contain all aspects of Islamic economic practices, Zakat and Waqf. This compilation will be released at the end of this year as the regulation of the Supreme Court, and would become the guideline for the judges of Religious court in dispute settlement of Islamic economic matters. See "Menguntit Jejak Kompilasi Hukum Syari'ah Ekonomi", www. hukumonline.com.

[14] Abdul Bagir Manan, "Beberapa Masalah Hukum dalam Praktek Ekonomi Syariah" p. 26.

[15] *Ibid*

Furthermore, the enforcement of exclusive jurisdiction on the religious courts in the field of Islamic economics including Islamic banking, by virtue of the Act No. 3 of 2006, constitutes a huge trust reposed in these courts which was impossible to conceive in the Dutch colonial era. The Religious courts should carry out this trust in as good a manner as possible. It will also enhance the status of Religious courts in Indonesia that it has power and ability to settle disputes not only in the traditional area of marriage, divorce, inheritance, etc. but in the new area of banking and finance also.