Research Article

Jurisdiction on the Implementation of the Decision of the National Sharia Arbitration Board

Arief Rachman Hakim* and Sisca Novalia

Universitas Islam Negeri Raden Intan Lampung, Indonesia

ORCID

Arief Rachman Hakim: https://orcid.org/0009-0001-5892-464X

Abstract.

Sharia economy is an economic business or activity carried out by individuals, groups of people, and business entities in order to meet commercial needs according to sharia principles. In the last three decades, Sharia economy has increased the potential for disputes. The disputing parties tend to choose a non-litigation path through Alternative Dispute Resolution (APS), one of which is with the National Sharia Arbitration Board. This judicial institution has the authority to resolve sharia economic disputes. The results of this study show that the authority of the National Sharia Arbitration Board in resolving sharia economic disputes is determined by the existence of an Arbitration Agreement, either made before the dispute arises (Pactum Compromittendo) or made after the dispute occurs (Acta Compromis). Thus, the legitimacy of the authority of the National Sharia Arbitration Board in resolving sharia economic disputes is based on the Pacta Sunt Servanda principle and the Consensual Principle regulated in the Civil Code. Furthermore, the registration and execution of the Decision of the National Sharia Arbitration Board should be carried out by the Religious Court, including in legal efforts to cancel the Decision. This is based on two factors, namely the legal basis of the absolute competence of the Religious Court in resolving sharia economic disputes as regulated in Article 49 of Law Number 3 of 2006 concerning Religious Courts and the basis of the relevance of the substance of Islamic law used by the National Sharia Arbitration Board.

Keywords: jurisdiction, implementation, arbitration

Corresponding Author: Arief Rachman Hakim; email: Ariefrachman323@gmail.com

Published: 17 April 2025

Publishing services provided by Knowledge E

Selection and Peer-review under the responsibility of the RIICSHAW 2024 Conference Committee.

1. Introduction

Sharia economy is an economic business or activity carried out by individuals, groups, and business entities in order to meet commercial needs according to sharia principles. The judicial institution authorized to resolve sharia economic disputes is a judicial institution that in resolving the dispute applies law based on Islamic sharia principles. The provisions of Article 49 letter (i) of Law Number 3 of 2006 concerning the first amendment to Law Number 7 of 1989 concerning Religious Courts. Firmly states that the Religious Courts are tasked and authorized to receive, examine, decide, and resolve cases at the first level between people who are Muslim in the field of sharia

economics.[2] Polemics regarding this matter often occur both among legal observers and legal practitioners regarding who is authorized to execute the decision of the National Sharia Arbitration Board. The cases handled by Basyarnas itself are sharia economic dispute cases and the settlement process is based on sharia principles and its decisions are final and binding.[3]

The problem that occurs is because Basyarnas is not a judicial institution, so it cannot execute the decision. Litigation institutions are a necessity, where the institution is given authority by law. After the emergence of SEMA Number 8 of 2008 concerning the Execution of Sharia Arbitration Board Decisions, the institution that gives the authority to execute Basyarnas decisions is an institution within the scope of the Religious Court. Related to the absolute authority of the Religious Court over sharia economic cases based on the SEMA, however, there are still laws that have been born that actually create legal uncertainty. Law No. 48 of 2009 concerning Judicial Power, especially in Article 59 paragraph (3) concerning the implementation of the execution of the Arbitration Board decision,[4] which states that in the event that the parties do not voluntarily implement the arbitration decision, the decision is executed based on the order of the Head of the District Court at the request of one of the disputing parties. When viewed editorially, this article contains the legal meaning that the Religious Court does not have authority over the settlement of the execution of the decision.[5]

The idea of establishing an Islamic arbitration institution in Indonesia began with a meeting of Islamic economic experts, Muslim scholars, legal practitioners, kyai and ulama to exchange ideas about the need to establish an Islamic arbitration institution in Indonesia. This meeting was initiated by the MUI Leadership Council on April 22, 1992. After holding several meetings and after several improvements were made to the draft organizational structure and procedural procedures of the arbitration institution, finally on October 23, 1993, the Indonesian Muamalat Arbitration Board (BAMUI) was inaugurated, which has now changed its name to the National Sharia Arbitration Board (Basyarnas) based on the decision in the 2002 MUI National Working Meeting. The change in the form and management of BAMUI was stated in the MUI Decree Number: Kep-09/MUI/XII/2003 dated December 24, 2003, which confirmed the position of Basyarnas as an arbitration institution that handles the resolution of disputes in the field of sharia economics. Initially, the legal obstacle in resolving disputes in sharia banking and sharia economics in general was related to the choice of the settlement forum, because the District Court did not use sharia as a legal basis for resolving cases. In this case, the District Court uses more positive law as its legal basis, whereas agreements

in Islamic banking or other Islamic economic businesses always use contracts based on Islamic principles.

Meanwhile, the Religious Court, which is assumed to be more appropriate to handle this Islamic economic dispute, is normatively not entitled to handle it because it is not included in its absolute competence. Basically, the rules implemented by Basyarnas, both conceptually and implementation, still refers to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as the main law implementation of arbitration in Indonesia.

Basyarnas which implements the sharia concept in resolving sharia-based matters, philosophically different with the existing regulations in Law Number 30 of 1999 which do not accommodate these philosophical values perfectly. As a result, there are the issues that arise include the obligation of Basyarnas to register the decision to the District Court. This problem illustrates the tug-of-war of authority between the two judicial institutions under the Supreme Court. For the Religious Court, the existence of this provision gives rise to a reduction in authority, thus forming public opinion to handle sharia economic cases. The Religious Court is not ready and not yet capable, this shows that there is an unclear formulation of legislation which gives rise to many interpretations in the implementation because authority should be something that is clear and certain.[6] Unfortunately, the discussion of the execution of sharia arbitration decisions has not been discussed, even Article 59 paragraph (3) of the Judicial Power Law still exists until now, while the cases handled by Basyarnas are not only sharia banking but also cover all areas of sharia economic cases. With the existence of Article 59 paragraph (3), it has an influence on the Religious Court. The emergence of PERMA Number 14 of 2016 concerning Procedures for Settling Sharia Economic Cases, in one of its provisions, has strengthened the position and authority of the Religious Court to resolve sharia economic disputes. So the author is interested in studying the problems as stated in the background.

2. Methods

In order to obtain the data needed to complete this scientific work, the author uses normative legal methods and library research. The author will analyze the " Jurisdiction of the Implementation of the Decision of the National Sharia Arbitration Board ", using applicable laws and regulations, namely using statutory procedures, then viewing law as

a norm in society and using secondary data in the form of books, journals, and related legislation

3. Results and Discussion

3.1. Authority and Dynamics of the Position of Religious Courts

In its development, Law Number 4 of 2004 concerning Judicial Power is no longer in accordance with legal developments and the needs of society. Triggering the House of Representatives (DPR) to amend Law Number 4 of 2004 concerning Judicial Power to Law Number 48 of 2009 concerning Judicial Power. This is in accordance with the Letter of the Chairman of the DPR to the President with letter Number LG01.01/4/338/DPR RI/VII/2009 dated July 10, 2009 which requires the four draft Laws to be discussed in order to obtain joint approval in accordance with constitutional provisions. Law Number 4 of 2004 has not yet comprehensively regulated the implementation of judicial power. The implementation of judicial power referred to in Law Number 4 of 2004 is an independent power carried out by the Supreme Court and the judicial bodies under it.[7] The scope of the judicial body is in the general court environment, military courts, religious courts, and state administrative courts, as well as by a Constitutional Court for the sake of organizing the judiciary to uphold law and justice.

Based on the Minutes of the Session for the Formation of the Draft Law in the Judicial Sector dated 28 August 2009, one of the rights that is something new to be regulated in the Draft Law on Judicial Power is Arbitration and Alternative Dispute Resolution. The authority of the Court to implement the decision of the National Sharia Arbitration Board (Basyarnas) in Article 59 paragraph (3) of this Judicial Power Law, in general, has been discussed during the session for the formation of 4 (four) Draft Laws in the Judicial Sector dated 28 September 2009. Basically, the authority for the implementation of Basyarnas execution by the District Court contained in Article 61 of Law Number 30 of 1999 is in conflict with Article 49 of Law Number 3 of 2006. This is because the authority to resolve sharia economic disputes has been becomes the authority of the Religious Court. The Supreme Court on August 8, 2008 issued SEMA Number 08 of 2008 which was addressed to the Head of the District Court and Religious Court throughout Indonesia. SEMA Number 08 of 2008 emphasized that the court that has the authority to implement the Basyarnas decision is the Religious Court. The issue of authority is a widely discussed issue, even becoming the object of disputes

submitted to the Constitutional Court. The emergence of disputes is caused because each state institution considers itself to have the authority granted by law to it, while other institutions also consider themselves to have the authority for that. Each state institution does not want to give in to one another, so the theory that studies this is the theory of authority.[2] HD Stoud, as quoted by Ridwan HB, presents an understanding of authority, namely "all the rules relating to the acquisition and use of government authority by public law subjects in public law". In this concept there are two elements of the understanding of the concept of authority presented by HD Stoud, namely: The existence of Legal Rules; and the Nature of Legal Relations. Authority has the same meaning as competence. Competence comes from the word " competente " which comes from Dutch which means authority or power.[8] Absolute competence is the authority of the court in examining certain types of cases that absolutely cannot be examined by other courts, either in different judicial environments.

While the relative competence of the court is the division of judicial power between similar courts based on the defendant's residence. This relative competence is related to the jurisdiction of a court, so this competence is not a crucial problem in the judicial institution. The occurrence of a conflict of laws and regulations in Article 59 paragraph (3)The Judicial Power Law with Article 49 of the Religious Courts Law can be resolved using the principle of Lex Specialis DerogatLex Generalis.[9] The meaning of The principle of Lex Specialis Derogat Lex Generalis is If there is a legal conflict between special laws and general laws, the general laws will be set aside.[10] The principle of Lex Specialis Derogat Lex Generalis can be used if the two conflicting laws and regulations have the same degree, such as the Judicial Power Law and the Religious Court Law, so that the resolution of the conflict of laws regarding the authority to implement Basyarnas decisions can be applied using this principle. According to Faturrahman Djamil, the Religious Court Law is a law that is specific in resolving sharia economic disputes, which were previously part of the authority of the District/Commercial Court within the General Court environment.[11] The Power Law is a law that generally regulates dispute resolution, especially matters governing arbitration. The absolute competence of the Religious Court itself is based on Law No. 3 of 2006 concerning the First Amendment to Law No. 7 of 1989 concerning Religious Courts. In this context, Article 49 of Law No. 3 of 2006 states that the Religious Court has the duty and authority to examine, decide, and settle cases at first instance between Muslims in the fields of: Marriage, Inheritance, Wills, Grants, Waqf, Zakat, Infak, Alms, and Sharia Economics.

Talking about position, then we will talk about status, role and recognition. In history during the last 40 years, the Religious Courts have experienced various significant changes. These changes include those related to the legal basis for the administration of justice, its position, structure and authority. It even experienced a leap when the Religious Courts were authorized to receive, decide and resolve cases in the field of Islamic economics without controversy.[5] Meanwhile, Islamic economics is a new entity in Indonesian Islamic society. When Law No. 14 of 1970 concerning the Main Provisions of Judicial Power was enacted, the Religious Courts had a strong position and were equal to other courts, as the organizers of judicial power. However, within the Religious Court environment, they did not have the independence to implement their decisions before being confirmed by the District Court,[6] as regulated in the provisions of Article 63 paragraph (2) of Law No. 1 of 1974 concerning Marriage. The institution of confirmation was only abolished when Law No. 7 of 1989 concerning Religious Courts.[9] Based on the concept of Islamic economics, according to Hasbi Hasan, religious courts have the authority to carry out executions against collateral used by Islamic banks, because basically the collateral agreement is an accessory that is attached to the main agreement. Based on this, the Religious Court has the authority to resolve every request for execution, both execution of decisions that have permanent legal force and execution of collateral in Islamic banking. Based on the explanation above, according to the author, the authority to carry out the execution of Basyarnas is the absolute authority of the Religious Court. This is because Law Number 3 of 2006 concerning Religious Courts is a special law (lex specialis) regulating the settlement of sharia economic disputes and will override Law Number 48 of 2009 concerning Judicial Power, because this law is general (lex generalis). In addition to this, sharia economic disputes, one of which is banking. What is stated above shows a dynamic in the Religious Courts in the midst of the life of the diverse Indonesian people. Law No. 7 of 1989 contains several important changes, even several new provisions that characterize the shift in the paradigm, including: First, the legal basis for the administration of justice; Second, the position of the court; Third, the authority of the court; Fourth, the administration of justice; Fifth, protection of women.

3.2. The influence of Article 59 paragraph (3) of Law No. 48 of 2009 on Religious Courts

Based on what has been described above, the author concludes that there are at least 2 (two) influences caused by the provisions of Article 59 paragraph (3) of Law No. 48 of 2009 concerning Judicial Power on Religious Court institutions.[12] The influence of the position referred to here is the status, role, and recognition of the Religious Court which is a manifestation of Islamic Courts in Indonesia and as one of the independent judicial power institutions in Indonesia. The existence of the Religious Court institution as one of the judicial power actors, of course, has the same position or standing as other judicial institutions under the Supreme Court of the Republic of Indonesia.[13]

The difference between judicial institutions only exists in terms of their absolute competence, because as long as it is the authority of a particular judicial institution that is given based on legislation, the courts do not have the right to try a case. Religious Courts themselves are a manifestation of Islamic judicial institutions that are competent to resolve disputes between Muslims or legal entities that submit themselves to Islamic law as a manifestation of the principle of Islamic personality, while in resolving cases.

3.3. Authority of Religious Courts in the Adoption of Children

Religious Courts are inseparable from the principles of Islamic sharia and such competence is not possessed by other judicial institutions. The legal implications of the legal rules that regulate actions can interpreted as the impact (in the form of) legal problems from a regulation law that is not directly or not stated explicitly or not formulated explicitly in the legal rules that regulate it, but rather implied or related. as an accompanying impact. So in this study, legal implications are legal problems that arise as an indirect result of overlapping regulations or authorities to implement the decisions of the National Sharia Arbitration Board.[14]

Following the Constitutional Court Decision Number 93/PUU-X/2012, the authority to resolve Islamic banking disputes through both litigation and non-litigation has become the authority of the Religious Courts in accordance with Article 49 letter (i) of the Religious Courts Law, while Article 59 paragraph (3) of the Judicial Power Law states that the authority to implement the decisions of the Sharia Arbitration Board (Basyarnas) is the authority of the general courts. Based on the provisions of Article 49 of Law No. 7 of 1989 as amended and supplemented by Law No. 3 of 2006, the Religious Courts

have the duty and authority to receive, examine, try, and resolve cases at the first level. The understanding of the phrase "resolving" is a process of completion in court or the final process of a decision or verdict, and completion in a case process. According to Aad Rusyad Nurdin, a lecturer at the University of Indonesia, related to the lack of public trust in the Religious Court to resolve Islamic banking disputes, Islamic Banking disputes are often resolved through the District Court.[15] Meanwhile, the District Court does not necessarily understand matters related to the provisions of sharia that are used as guidelines for Islamic Banking in carrying out its operations. Overlapping authority of a judicial body can cause errors to file a lawsuit with an unauthorized judicial environment or court. This error can cause the lawsuit to be invalid and declared inadmissible because the lawsuit filed is not included in the absolute authority of the court concerned.

By granting the right of execution to another court, the Religious Court as an independent institution whose position is no different from other judicial institutions is indirectly considered weak to use its. authority to carry out executions, even though from the aspect of procedural law between the Religious Court as a civil court and the civil procedural law of the general court are no different, as in the provisions of Article 54 of Law No. 7 of 1989 which states: "*The procedural law applicable to courts within the Religious Court environment is the civil procedural law applicable to courts within the General Court environment, except as specifically regulated in this law*." Based on these provisions, the Religious Court has the authority and power of an executive nature to execute a decision as is usually done by courts in the general judicial environment.[3] By giving total authority to the religious court, it will actually make a good assessment of the legal system in Indonesia through the harmony between laws and regulations, especially in relation to the authority of the state judiciary within the framework of the national legal system and system. In addition to having an impact on the position and independence, another impact is that it has an influence on the authority of the institution (authority of the institution) as well as the authority of the Religious Court Judge as a subject (person) of the judicial power that has an equal position with other courts under the Supreme Court. The birth of PERMA Number 14 of 2016, further strengthens the existence or position of the Religious Court institution to carry out the execution of Basyarnas decisions, but not only execution but also making sharia arbitration decisions.[7] From these provisions, it is quite clear that the Religious Court has the power to execute and even cancel the Basyarnas decision with the note that it must go through the mechanism or procedure as stated in Law Number 30 of 1999.

Before the issuance of PERMA Number 14 of 2016, the regulation on certification of sharia economic judges had been issued with the issuance of PERMA number 5 of 2016 concerning Certification of Sharia Economic Judges. Along with the issuance of PERMA, the Directorate General of the Religious Courts held a valon test for participants in the Sharia Economic Judge Certification training.

4. Closing

From the description above, several important things can be concluded, namely as follows: The existence of Article 59 paragraph (3) of Law Number 48 of 2009 concerning Judicial Power has an impact on Religious Courts, namely an impact on their position and also an impact on their image. There needs to be an effort to synchronize regulations, especially those related to the execution and cancellation of Basyarnas decisions. With the birth of PERMA Number 14 of 2016, it further strengthens the competence of the Religious Courts to carry out executions, even canceling Basyarnas decisions.

References

[1] Dosen Fakultas Syari'ah UIN Raden Intan Lampung n.d. n.d.

[2] Salim HS and ESN. Application of Legal Theory in Thesis and Dissertation Research. Jakarta: Rajawali Pres; 2013.

[3] Ansori AG. Settlement of Islamic Banking Disputes: Concept Analysis and Law Number 21 of 2008. Yogyakarta: UGM Press; 2010.

[4] Rahman I. Analysis of Article 59 Paragraph (1) of Law Number 48 of 2009 Concerning Judicial Power in the Field of Sharia Arbitration. Student J Fac Law, August 2014. Malang Brawijaya Univ; 2014.

[5] Mukti A. Religious Courts in the State System in Indonesia Historical, Philosophical, Ideological, Political, Legal, Futuristic and Pragmatic Studies. Yogyakarta: Pustaka Pelajar; 2012.

[6] Fred RD. Strategic Management (Englewood) Cliffs. New Jersey: Prentice-Hall; 1995.

[7] Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power. n.d.

[8] A. Basiq J. Religious Courts in Indonesia. The Rumbling of Legal Politics (Islamic Law, Western Law, Customary Law) in the Span of History with the Rise and Fall

of Religious Court Institutions Until the Birth of Islamic Law in Aceh. Second Edi. Jakarta: Kencana; 2006.

[9] Muchinun. Relative and Absolute Competence of Religious Courts in Selected Chapters on Religious Civil Law and its Application. Bogor: Technical Education and Training Center of the MARI Legal Research and Development Training Center; 2008.

[10] Bakri M. Introduction to Indonesian Law (Indonesian Legal System in the Reform Era). Malang: UB Press; n.d.

[11] Faturahman D. Resolution of Problematic Financing in Islamic Banks. Jakarta: Sinar Grafika; 2012.

[12] Constitution Republic of Indonesia Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. n.d.

[13] Basir C. Settlement of Islamic Banking Disputes: In the Religious Court & Sharia Court. 1st ed. Jakarta: Kencana; 2009.

[14] Hidayanto MF. Islamic Financial Institutions and Indonesian Muamalat Arbitration. Journal of Islamic Law “Al-Mawarid” No. 10. Yogyakarta: Islamic University of Indonesia; 2003.

[15] Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. n.d.