CONCEPT OF TAHKIM IN INDONESIA FOR ISLAMIC BUSINESS DISPUTE SETTLEMENT

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Abstract
In pre-Islamic Arabian, the Concept of Tahkim (arbitration) was known practiced to settle various types of civil commercial disputes. In Islamic law, the concept of Tahkim has not yet become the rule of Islamic law. But concept of Tahkim is still the ideology that can be developed into a basic validity of Arbitration. In the past period, the practice of Tahkim was often done by the prophet’s friends. The concept of Tahkim in Indonesia is applied for Islamic business dispute settlement, for example Islamic Banking. Indonesia applies the concept of Tahkim which is called “Basyarnas” (Arbitration Institutions). Basyarnas is an institution that resolving disputes based on Islamic principles and run the settlement of disputes in Islamic business sector.

Keywords: Concept, Tahkim in Indonesia
INTRODUCTION

The economic activities nowadays are growing so rapidly and continuing to explore several areas of life either in relation to financial, goods and services. The rapid and complex economic growth spawns various forms of business cooperation which run in the variety of business activities, including the economic practices based on religious principles such as the Islamic economic system as an alternative.

One of the proof that Islamic economic system has been running firmly in Indonesia can be seen from the development of Islamic Banking as part of an Islamic economic system since 1998 until now. As a consequence of this significant development, it is possible that there will be a dispute among the parties involved in the Islamic business activities. Dispute arises due to various reasons and problems behind them, mainly because of the conflict of interest between the parties.

Essentially, Dispute or conflict is a form of actualization from a difference or disagreement between two or more parties. Principally, disputes in Islamic business, including Islamic Banking dispute, the conflicting parties are given the freedom to determine the mechanism to solve the dispute among them.

In Islamic law, Tahkim is one of the mean to solve the dispute. According to al-munjib dictionary, tahkim means appointing a referee or arbitrator. While al-Salam Madkur Qadha Fil al-Islam; states that the terminological meaning of tahkim is the appointment of one or more people as a referee or arbitrator by two or more disputants; to resolve the case peacefully. In today’s terms, tahkim is translated as arbitration and the person acting as the referee is an arbiter.\footnote{Fathurrahman Djamali, Arbitrase dalam persepektif Sejarah Islam, (Jakarta: BAMUI, 1994), hlm, 31.} The concept of Islamic
rule on *tahkim* is presented in family problems, described in the holy book (*Al-Quuran*) surah an-Nisa (*ayat*) verse 35:

“And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware”.

The verse (*ayat*) was revealed because of an event that happened to a friend named Sa’id bin Al-Rabr and his wife Habibah bint Sa’id, from Ansar. His wife did *nusyuz* and was struck by her husband. The father of Habibah binti Sa’id was not happy with the treatment of her husband. Then, he complained to the Prophet and said: “He sleeps with my daughter and struck her”. Hearing the complaint, Prophet immediately agreed and sued the husband who did the beating. After the verdict from the Prophet, both of them immediately went to carry out instructions of the Prophet. However, the Prophet immediately called back and said: “Wait! Gabriel has come to bring a verse for your problems”. Prophet further said: “Our decision is different, and the judgment of God is different from what we have decided. Know that the verdict of God is the Supreme Good and Wise.”

This verse (*ayat*) is understood as giving an opportunity from God to resolve certain issues, to be resolved amicably and should not always be sued appointed to the court. This principle by the scholars are not understood as a rigid legal provisions which means cannot be compared. If Koran (*Al-Quran*) gives an opportunity to resolve disputes through the *tahkim* concept for the husband and wife, certainly the concept of *Tahkim* is applicable to the other disputes. Thus, the validity of the arbitration in the form of the individual rights besides conjugal disputes founded from the instructions of Koran (*Al-Quran*). Therefore, commercial arbitration is also jus-
tified by Islam, and as an obvious example was the event experienced by Umar bin Khattab who was bidding horse. Umar wanted to restore the horse (not buying), but the owner refused. As a result, the dispute arose and finally resolved with tahkim, as described earlier. Thus, the arbitration cases experienced by Umar was occurred in the trade sector.

In a further development, especially at the end of the leadership of al-Khulaf al-Rasyidin, arbitration (tahkim) was applied not only related to family and business law, but also in the political field. It can be concluded that the concept of tahkim is not only in the resolution of family disputes, but also can be used in the settlement of disputes in trade.

The Definition of arbitration in Indonesian language is refereeing, which means a settlement or termination of the dispute by a person or judges based on the agreement that they would obey the decision given by the judge or judges who they have been selected or appointed. Until now, there has not been found the definitions of arbitration which can be used as a benchmark. Therefore, according to Adolf Huala setting the definition of arbitrage is not easy.

In Indonesia, there are several arbitrage institutions, one of them is Indonesian National Arbitrage Board (BANI) which was established on the 3 December 1977 as the initiative of Indonesian Chamber of Trade and Industry (KADIN) as the mean to fulfill the need for dispute settlement for Indonesian entrepreneurs, including dispute settlement in the form of trade industry, for keeping the easiness of the business.

Along with the times, Islamic economic system in Indonesia experienced de-

Development is very rapid. With the development of Islamic economic in Indonesia, the problem of dispute may arise. Therefore, Badan Arbitrase Muamalat Indonesia (BAMUI, Muamalat Indonesia Arbitration Institution) which was established on October 21, 1993 was initiated by MUI (Indonesian Council of Ulama). Subsequently, on December 24, 2003 BAMUI changed the name to be Badan Arbitrase Syariah Nasional (Basyarnas National Sharia Arbitration Institution). However, with the establishment of an Islamic arbitration institution in Indonesia raised a question, how is the application of *tahkim* concept in Indonesia to resolve the disputes on Islamic business? How is the competency of Basyarnas to resolve the disputes on Islamic business?

**CONCEPT OF TAHKIM IN INDONESIA**

*Arbitration In Islamic Perspective*

Islamic law of arbitration is not a concept that is not a firm of the rule of law, but it is still an ideology which can be developed to become the basic validity of the arbitration. This is because the arbitration was never discussed in *fiqh*-Islamic Jurisprudence, besides concept of *hakam* in family issues.

In practice, arbitral had been done by the companions of the Prophet, like the story of an event experienced by Umar bin Khattab, which was bargaining on a horse. Then, Umar rode the horse to test the condition of the horse. At the time of the trial, the horse’s leg was broken, so Umar intended to return the horse to its owner. Horse owners objected and refused to take back his horse who had suffered the broken leg. Then Umar said: “Point one who you believe to be *Hakam* (arbitrators) between us”. The owner of the horse said: “I want Shuraih to be the *Hakam*” Then they both
submit the dispute to Shuraih, who then decided that Umar had to pay the price of the horse. In its decision, Shuraih said to Umar: “Take what you have purchased and pay the price, or return it to the owner of the horse as usual without any blemish.”

The story provides an understanding that Shuraih is not actually the official judges appointed by Prophet, but he is believed or appointed by both involved parties, to resolve the dispute between them, and both parties accept the arbitrator’s decision.

In a *sunnah* narrated by *An-Nasa’i*, the Prophet said to Abu Shuraih, which often called as Abul-Hakam: “Verily Hakam was God and to Him prompted a legal decision. Why are you called Abul-Hakam”? Abu Shuraih replied: “Behold, when my people are in fight, they will prompt completion and both parties will be happy with my decision.” Hearing the Abu Shuraih’s answer, the Prophet commented: “It is better to account for it.” Do you have children? Abu Shuraih replied: “Yes, I have children, namely Shuraih, Abdu and Musallam.” Who is the oldest? “The oldest is the Shuraih. Prophet said:” If so, you are Abu Shuraih”

The mentioned *sunnah* contains the act Abu Shuraih, which although not an official judge appointed by the government, he was often trusted by the community to resolve disputes in their society. Prophet Muhammad did not forbid the act of *Abu Shuraih*, even the Prophet praised the Abu Shuraih’s action. This means that the Prophet recognizes the existence of Abu Shuraih as an *Hakam* (arbitrators), recognition given by the Prophet Muhammad was able to establish the proposition for eligibility of the *tahkim* as dispute resolution.

Thus, the practice of *tahkim* has already been done by the companions of the

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5 *Ibid*.
6 *Ibid*.
Prophet, even though up to now in Islam there is no arbitration institution or tahkim that resolve trade issues. Nonetheless, if the agency was established, it will not be contrary to Islamic law, because Islamic law itself recognizes the validity of arbitration as a dispute resolution. The practice of tahkim in Indonesia has been done for a long time have long done, the tahkim practice in Indonesia is called Basyarnas.

**Development of the National Sharia Arbitration Institution**

The development of Sharia arbitration in Indonesia was started from the National Working Meeting of Basyarnas with the change of BAMUI name which was established on October 21, 1993 as the initiative of the MUI (Indonesia Council of Ulama). Banking Law No.7 of 1992 creates a new era in the history of economic law in Indonesia. The Act introduces a profit sharing system that was not known in the Law on Basic Banking No. 14 of 1967. With the profit sharing system, the banks can break away from businesses that use the system of “interest”. On 22 April 1992 Executive Board meeting of MUI invited the experts or legal practitioner or Muslim scholars, including from the universities to exchange ideas whether the establishment of Islamic Arbitration was necessary or not. After several meetings; BAMUI was founded by MUI on 21 October 1993. Legal entities was established in the form of a foundation, as confirmed in a notarial deed Yudo Paripurno, SH. No. 175 dated October 21, 1993.

For approximately 10 years of BAMUI’s role, with the consideration that there were many coaches and board members of BAMUI that have passed away, and also because of the form of arbitration, as stipulated in Law No. 16 Year 2001 concerning
the Foundation, is not in accordance with the position *BAMUI*, then the decision of the board meeting as stated in the *MUI* Leadership Council Decision No. Kep-09 / MUI / XII / 2003 dated December 24, 2003 changed the name of *BAMUI* to be *Basyarnas*.

**Basic Law of Sharia Arbitration**

The following is the legal basis for the establishment of *Basyarnas*:

a. In the Koran (*Al-Quran*), the legal basis of arbitration is in *surah Al-Hujarat* verse (ayat) 9 and *surah An-Nisa* verse (ayat) 35.

b. *Sunnah* An-Nasa’i history

c. Constitution No. 30 of 1999 on Arbitration and Alternative Dispute Resolution

Before the Arbitration and Alternative Dispute Completion Law is enacted, the legal basis for the enactment of arbitration, which contains:


b. The jurisprudence of the Supreme Court of the Republic of Indonesia

c. Law No. 48 of 2009 on Judicial Power Article 58 and Article 59.

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d. Decree of MUI (Indonesia Council of Ulama) (SK MUI)

e. National Sharia Board fatwa of Indonesian Council of Ulama (DSN-MUI)

The purpose and function of Sharia Arbitration

The following are the purpose of the establishment and the scope of Basyarnas:⁸

1. Provide a fair settlement and fast in muamalah or civil disputes arising in trade, industry, finance, services and others.

2. Receive a request submitted by the involved parties in an agreement, or in the absence of a dispute to give a binding opinion on a matter with respect to the agreement.

The existence of Basyarnas as a permanent institution has a function to resolve the possibility of civil disputes among Shari’ah banks with customers or the users of their services in particular, and among Muslims who perform civil relationships that make sharia Islam as the basis, becomes the real need in general.

The Role of Sharia Arbitration In Resolving Disputes

The role of Sharia arbitration in dispute resolution similar to the role of judges in the courts, which examine, hear and decide the case or dispute submitted to him.

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⁸ Muhammad Syakir Sula, Asuransi Syariah (Life and General) Konsep dan Sistem Operasional, (Jakarta: Gema Insani, 2004), hlm. 553.
In the inspection process, the arbitrator has the authorization to ask the parties to present evidence or witnesses, as stipulated in Article 49 Paragraph (1) of the Act. No 30 of 1999 which reads: “On the order of the arbitrator or the arbitral tribunal or at the request of the parties, a witness can be called or expert witness, or more, to be heard.

Because the authority of the arbitration institution is equal to authorize the District Court, the decision is also binding and has a strong legal position, and the District Court is not entitled to hear the case which has been tied up in the arbitration agreement. However, its authority is confined to the trade disputes sector and to the rights completely controlled by the parties.

CONCEPT OF TAHKIM (ARBITRATION) IN INDONESIA FOR ISLAMIC BUSINESS DISPUTE SETTLEMENT

Application Concept of Tahkim (Arbitration) in Indonesia for Islamic Business Dispute Settlement.

There are three essence of Islam and Islamic law included in three principals doctrine namely, Tauhid, Hablum-minallah wa Hablumminannas, Al-Amru bil ma’ruf wan naha ‘anil mungkar. All of these principles are taught holistically and universally to human. The teaching of Islam and Islamic law is bidimensional, containing the values of divinity and the human values which leads human to the eternal happiness in the world as well as in the afterlife.

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9 Muhammad Irianto, et. al., Lima Undang-Undang Republik Indonesia Tahun 1999, (Jakarta: Pasca Usaha, 1999), hlm. 23.
Islamic scholars have agreement in three core components, namely *Aqidah, Sharia, Ahlaq*. *Aqidah* is a belief system in *Islam* which teaches human to believe that God is a single, all-independent, childless. With human *Aqidah* also teaches to recognize, understand, and believe the religion. While, *Sharia* is the Islamic legal system which consists of two main areas, worship and *Muamalah* or community. Worship includes prayer, fasting, charity, pilgrimage and various other pure worship in accordance with the commands of God and the Messenger of the Gods (Muhammad SAW).

On the other hand, *Muamalah* concerns with various aspects of the legal aspects of community life, social, political, economic and others. In the field of law, Islam regulates various aspects of life, ranging from civil issues to the public issues. Civil issues involve individual, family, inheritance, engagement, labor, and so forth. On the contrary, public issues concern with criminal laws, the State governance, international affairs, taxes, and so forth.

The Republic of Indonesia is a country that is based on *Pancasila*, with divine Almighty and recognizes six religions. The Republic Indonesia does not only concern with the development of six religions, but also provides facilities for its followers to carry out their worship according to their religion.

The Preamble of the 1945 Constitution explicitly confirms the existence of five principals known as *Pancasila*. Article 29 paragraph (1) and (2) of the 1945 Constitution as the foundation norm for Indonesian nation that their freedom in religion is fully guaranteed by the Republic of Indonesia. The Republic of Indonesia shall enforce *Sharia* Law for Muslims, *Sharia* Christians for Christians, and *Hindu* law for *Hindus*. 
Indonesia’s development is development that aims to improve the lives of the Indonesian nation, both material and spiritual. Indonesia is not a secular state and not a *theocratic* state but the state of *Pancasila*. For this reason, the development does not only focus on the worldly interests but also includes the development of spiritual field.

At this time the Indonesian people is in the phase of entering the legal development. The law builds on the philosophical foundations of *Pancasila* with reference to the three aspects of the legal system in Indonesia as a “living law”, namely, customary law, the law of Islam, and the law of the West.

The presence of Islamic arbitration in Indonesia is a *conditio sine qua non*. As it is known that in Indonesia *BAMUI*, now known as Basyarnas (National Sharia Arbitration Institution) under coordination *MUI* (Indonesia Council of Ulama) has been established. The existence of Basyarnas has a solid legal basis. The first parts of this research presented the ground norm outlined in Article 29 of the 1945 Constitution is the framework and perspectives of *Islam* in Indonesia arbitration occupies the position. The presence of *Islam* in Indonesia arbitration is a means which can be used by *Muslims* in Indonesia to connect with the development of the economy, especially the banking institutions regulated under the Banking Act No. 7 of 1992 on Banking.\(^\text{10}\)

The establishment of Law No. 7 of 1992 on Banking, which organize Islamic banking has legalized the existence of banks that operate in *sharia*. The new banks that operated by *sharia* was born. With the new banks, there is a possibility of disputes happened between the Islamic bank with the client. Therefore, the National

Islamic Council issues a *fatwa* needed by Islamic financial institutions, to obtain legal certainty regarding any contracts in Islamic banking. It is included in every contract arbitration clause which reads: “If one party does not fulfill its obligations or if there is a dispute between the parties to the settlement with *Basyarnas* after no agreement was reached by consensus”.

The *Fatwa* of National *Sharia* Board brings a consequence in which any Islamic banks or Islamic financial institutions in each product must include the clause of arbitration, all disputes that occur between Islamic banking or Islamic financial institution and its customer’s settlement must go through *Basyarnas*.

There is another thing that is also interesting in relation with the birth of *Basyarnas*, Through *Basyarnas* disputes the business operations use the law of *Islam*. If agreement based on Islamic law in our country according to the provisions declared invalid, then look for a way out if there is a dispute concerning the agreement. It should be considered the law needed to be taken in the event of a dispute. If Islamic law under the provisions of Islamic law is chosen, it is necessary to prepare the institution that is competent to resolve the dispute.

Such circumstances will be helped by the existence of *Basyarnas*. It is because basically in the form of arbitration of dispute settlement, the parties is given an opportunity to make a decision. In addition, the parties can choose which law is used or applied to the dispute. Therefore, it will protect the disputing parties from being fear or lack of confidence on the substantive law of a particular jurisdiction. Thus, it allows Islamic law applied in the settlement of disputes between customers and Islamic banks. Besides, the existence of *Basyarnas* is also within the framework of the struggle for the enforcement of Islamic law under the framework of the constitution.
of the State of the Republic of Indonesia.\textsuperscript{11}

\textit{Competence of Basyarnas (Arbitration institution) For Islamic Business Dispute Settlement}

The existence of \textit{BAMUI} as an Islamic arbitration institution cannot be released by their \textit{BMI} (Indonesia Muamalat Bank) and \textit{BPRS} and Takaful as a financial institution that is based on Islamic principles. The principles of \textit{sharia} bank developments, nominally has gained legitimacy. After the enactment of Law No. 7 of 1992 on banking, conventional banks in Indonesia are allowed to open Islamic Window to offer in the banking business, in addition to the conventional system. It is also permissible under Islamic system.\textsuperscript{12}

\textit{Basyarnas} formerly known as the Board of BAMUI referred to an effort to anticipate the possibility of disputes in the field \textit{muamalat} among Muslims caused by the growing levels of Indonesian society. In addition it also has an important meaning for Muslims because it is meaningful and consciously been worshiping God by applying and enforcing the law or the law of God, especially in the field of \textit{Muamalat}.\textsuperscript{13}

The presence of Basyarnas is expected by Muslims in Indonesia, because it is motivated by the awareness and interest of the people to implement Islamic law. In addition, it is becoming the real needs in line with economic and financial develop-


\textsuperscript{12} Satuan Remy Syahdeni, \textit{Perbankan Islam dan Kedudukan Dalam Tata Hukum Perbankan Indonesia, cet. I}, (Jakarta: PT Pustaka Utama Grafiti, 1999), hlm. 34.

\textsuperscript{13} Ahmad Djauhari, \textit{Arbitrase Syariah dan Eksistensinya Cet}, I, Jakarta : Basyarnas, 2004, hlm. 34.
ments among Muslims. Therefore, the objective of the establishment of Basyarnas as permanent and independent institution resolves the possibility of a dispute arising in muamalat in trade relations, the financial industry, services and others among the Muslims.\footnote{www.mui.or.id}

Disputes settled through Basyarnas which includes disputes in trade and the rights under the laws and regulations are fully controlled by the parties to the dispute. While the dispute cannot be resolved through Basyarnas is disputed by the legislation cannot be held peace.

Basyarnas as an institution of Islamic Arbitration, is the body under MUI and is the organization of the MUI, which has authority to mediate in the business of the parties in accordance with the regulatory procedure of Basyarnas.

In any fatwa issued by DSN-MUI regarding the economic activities of sharia, then most of the Fatwa include dispute resolution provisions of Basyarnas. In principle, incorporated the provisions of Basyarnas in Fatwa is a good idea. Perpetrators of Islamic business will gain legal protection of the arbitrators who understand sharia economy. Thus the position of Basyarnas further is strengthened by the suggestion in DSN-MUI.

In terms of the Indonesian legal system, Basyarnas as other institutions has a strong position because of the positive law in force today is Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, has set up the possibility of an institution other than the institution general courts can resolve a dispute. This is set out in Article 7 of Law No. 7 of 1999 on Arbitration and Alternative Dispute Resolution, which states the parties may agree to a dispute that has occurred or that will occur
between them to be resolved through arbitration.

Inclusion of arbitration clause is of significant importance with regard to the authority of the court, because under Article 3 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution stated that the District Court, in this case, including the Religious Court has no authority to adjudicate disputes the parties have bound in the arbitration agreement. Disputes related to Islamic Banking, Basyarnas has a position which is getting stronger enactment of Law No. 21 of 2008 concerning Islamic Banking.

Clause of Basyarnas as well as an absolute competence to receive, examine and rule on the dispute which has been submitted. The authority of Basyarnas stipulated in the rules of procedure of Basyarnas, namely:

a. Resolve in a fair and speedy dispute (civil) arising in trade, finance, industry, services, and others are under the laws and regulations fully occupied by the parties, and the parties agree in writing to submit the settlement to Basyarnas in accordance with the procedures of Basyarnas.

b. Give opinions binding on the parties demanders absence of a dispute regarding the issues with respect to an agreement.

Related to the absolute competence Basyarnas based on an agreement or clause of settling disputes through Basyarnas which has been agreed by the parties, then it is possible for the non-Muslims or financial institution non-sharia to be completed by Basyarnas as long as it has made an agreement by the parties concerned.
CONCLUSION

Based on the information above about the concept of *tahkim* in Indonesia in handling business disputes Islam, it can be concluded that:

1. Application of the concept of *tahkim* in Indonesia in resolving business disputes Islam refers to the philosophical foundation of *Pancasila* by considering three legal systems in Indonesia as a positive law, one of which Islamic law, as outlined in the constitution in article 29 UUD 1945 as ground norm. Within the framework of this arbitration and perspectives of Islam in Indonesia occupies the position. The presence of the arbitration Islam in Indonesia in resolving business disputes Islam can be used as a mean by Muslims in Indonesia in connection with the development of the economy, especially the banking institutions regulated in Law No. 7 of 1992 on Banking.

2. Competence of *Basyarnas* (Arbitration institution) in resolving business disputes of Islam, such as a permanent and independent body that serves *mualamat* resolve disputes arising in trade relations, the financial industry. *Basyarnas* (Arbitration institutions) have the competence which is getting stronger after the enactment of Law No. 21 of 2008 concerning Islamic Banking.
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