

## **ANALYSIS OF THE NATURE OF FINAL AND BINDING DECISIONS OF THE NATIONAL SHARIA ARBITRATION BOARD (BASYARNAS) IN SHARIA ECONOMIC DISPUTES**

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### **Abstract**

The national sharia arbitration body (Basyarnas) is a non-litigation sharia economic dispute resolution institution that is considered capable of resolving disputes quickly, fairly and providing a win-win solution for the disputing parties. In addition, the decision is final and binding, meaning that the decision is a final decision that must be obeyed, the decision is binding on the parties to the dispute and there are no legal remedies for appeal, cassation or review as contained in litigation dispute resolution in court. However, at the practical level, the Basyarnas decision can be pursued by legal remedies to cancel the decision by submitting it to the court as also stated in Law Number 30 of 1999 concerning arbitration and alternative dispute resolution in article 70. This raises an indication of legal uncertainty or unclear nature of the final and binding contained in the Basyarnas decision. This study uses a normative juridical approach with a juridical descriptive analysis. This means that the approach taken is by examining the approaches to theories, concepts, studying the laws and regulations concerned with this research or the statutory approach. The results of this study conclude that the decision of the National Sharia Arbitration Board cannot be said to be final and binding because legal remedies can still be made through cancellation of the decision to the Court. The existence of the elements contained in Article 70 of Law Number 30 of 1999 the request for annulment causes uncertainty or unclear meaning of the final and binding nature and is contrary to the basic purpose of law, namely to provide justice, benefit and legal certainty.

**Keywords:** *Basyarnas, dispute resolution, final, binding*

### **INTRODUCTION**

Settlement of sharia economic or business disputes in practice can be carried out in two ways, namely through litigation and non-litigation (Abdul Ghofur Anshori, 2010). Settlement by way of litigation is a settlement through the judiciary both at the General Court and at the Religious Court. While non-litigation settlements are settlements carried out outside the court, which can be carried out by way of consultation, negotiation, mediation, conciliation, or expert judgment or through arbitration or alternative dispute resolution. (Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Powers Article 60 and also contained in the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution Article 1 point 10).

Non-litigation settlement through arbitration in addition to the settlement process prioritizes family characteristics by reconciling the two parties to the dispute, the settlement process is fast, confidential, relatively low cost, the decision is considered

capable of providing a sense of justice, benefit, is final and binding by being able to provide fast legal certainty for the parties to the dispute (Ahmad Faizun, 2021).

Against these reasons, non-litigation settlement through arbitration including sharia arbitration is more of an option for business people. Because it produces an agreement that is "*win-win solution*" both parties to the dispute (Khotibul Umam, 2010).

In Indonesia the arbitral institutions consist of the Indonesian National Arbitration Board (BANI), the National Sharia Arbitration Board (Basyarnas) and the Indonesian Capital Market Arbitration Board (BAPMI). Basyarnas is one of the non-litigation sharia economic dispute settlement institutions which refers to legislation Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and refers to the 2005 National Sharia Arbitration Board Procedure Regulations.

Basyarnas, as stated in the law, is required to resolve sharia economic disputes quickly, fairly and the decision is final and binding for the parties to the dispute (Law No. 30 of 1999 Article 60). Final means that the arbitral award is the final decision or the final stage of a legal process and binding means that the decision is binding on the parties to the dispute. So the arbitral award is final and binding, meaning the final decision of all series of legal processes, binding on the parties to the dispute and there are no legal remedies/legal resistance whether appeal, cassation or review. However, at the implementation level, there are still many Basyarnas decisions that do not appear to be final and binding. Where the Basyarnas decision can be made legal efforts to request an annulment of the decision to the Court when one party feels disadvantaged against the decision of the judge or judge at Basyarnas. This is also regulated in the 1999 arbitration law article 70 by stating that the parties or one of the parties can take legal action to cancel the Basyarnas decision if they feel aggrieved against the Basyarnas decision by showing evidence of fraud to the Religious Court or to the District Court.

Seeing from the existence of legal remedies to cancel the Basyarnas decision to the Court, at first glance it appears that the Basyarnas decision is not final and binding, that is, it is not a final decision and is binding on the parties, efforts to annul the decision can still be made. There are indications of legal uncertainty as if it contradicts the basic concept of the purpose of law or legislation being made, namely to provide justice, benefit and legal certainty for the community (Sonny Pungus: 2022).

Based on the problems above, it is necessary to examine in more depth the meaning of the final and binding nature of the national sharia arbitration award (Basyarnas), whether the final decision is truly final with no legal remedies and is binding, meaning that it is binding on all parties to comply with the decision or can it still be appeals and so on.

## **RESEARCH METHODS**

This scientific work uses qualitative research methods using a normative juridical approach. The word "juridical" which means law is seen as a norm or *that should*, because in discussing the problem this research uses legal materials (both written law and unwritten law or both primary legal material and secondary legal material) (Puspita Devi, 2016). or scientific research using conceptual or library

materials (Indah Rahmawati, 2020). The normative juridical approach is an approach that is carried out by examining the approaches of theories, concepts, studying the laws and regulations concerned with this research or the statutory approach. (Bambang Sunggono, 2016) This type of research is a literature study by analyzing laws and regulations and norms regulated in resolving sharia economic disputes at the National Sharia Arbitration Board.

## DISCUSSION

### The Concept of Sharia Arbitration

Sharia arbitration is a way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. The sharia arbitration institution is a body chosen by the disputing parties to provide a decision regarding a particular dispute, the institution can also provide a binding opinion regarding a certain legal relationship in the event that a dispute has not arisen.

The concept of sharia arbitration in the view of Islam is called *arbitration* and comes from the word *as well* which literally means making someone a mediator, a deterrent to a dispute (Luwis Ma'luf in Nurul Hak, 2011). Other terms are also referred to as *Shulhu* (Sayid Sabiq in Abdul Ghafur Anshori, 2010) which means breaking up fights or disputes. What he meant was a contract/agreement to end the resistance/quarrel between two people in dispute (Ahmad Djauhari, 2006). So, in the Islamic tradition it has been known *referee* which is the same meaning as a sharia arbitrator, it's just an institution *referee* it isto *this*.

In Indonesia, the institution that handles dispute resolution through sharia arbitration is called Basyarnas (National Sharia Arbitration Board). The legal legality of Basyarnas based on Decision Letter Number: Kep-09/MUI XII/2003 dated December 24, 2003, is a sharia business dispute resolution institution in the form of non-litigation which aims to provide fairness and decency based on sharia principles and applicable legal procedures. the only autonomous and independent legal entity belonging to the Indonesian Ulema Council (MUI).

Legally, the authority of the National Sharia Arbitration Board in resolving sharia economic disputes cannot just be functioned, this is because dispute resolution through Basyarnas can be done if a clause is made in the contract regarding dispute resolution through sharia arbitrators, in accordance with the provisions of Law Article 4 Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution. Based on this, the process of resolving disputes in the field of trade and regarding rights which according to law can be resolved through arbitration (Basyarnas) (Syams Elias Bahri, 2017). Thus the absolute competence of Basyarnas is determined by the presence or absence of an agreement containing an arbitration clause. If the parties have agreed that if there is a dispute between them, it will be resolved through BASYARNAS (*compromise agreement*) or the conclusion of an arbitration agreement after a dispute occurs (*compromise deed*).

## **The Concept of Final Properties and Bindings**

The definitions of final and binding in statutory regulations have a meaning that cannot be separated from one another. According to the Big Indonesian Dictionary, the phrase "final" means the last stage (round) of a series of examinations (work, competition). Meanwhile, the phrase "bind" means to strengthen (grip), something that must be kept or an agreement that requires both parties to fulfill it seriously (Ministry of Education and Culture, 2017). Ahsan Yunus defines final and binding as having interrelated meanings, which means the end of an examination process, then has the power to tighten or unite all wills and cannot be denied anymore (Ahsan Yunus, 2011).

Seeing from several meanings or final and binding intentions, it can be interpreted that a final decision or final process of all series, processes or stages of examination in an act or event has binding power over the will of the parties and can no longer be disputed. Meanwhile, if it is related to the meaning of a judge's decision in determining a law that is final and binding, it is a final decision that is binding on the parties and there is no longer any legal remedy, either ordinary legal remedies or extraordinary legal remedies. The application of the final and binding nature also applies to decisions on peace deed (dading), arbitration (BASYARNAS), and decisions at the Constitutional Court which are final and binding. In order to further this discussion, we will explain the meaning of the final and binding nature of the arbitration award, the deed of reconciliation and the Constitutional Court.

## **The nature of the final and binding on the arbitral award**

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in article 6 states that a dispute or difference of opinion in a civil dispute can be resolved on the basis of good faith by setting aside litigation in court, by holding a direct meeting by the parties and the results stated in a written agreement. If the agreement between the parties is not successful, then based on the written agreement of the parties it is resolved through the assistance of an expert advisor or through a mediator. If the expert advisor or designated mediator cannot bring the two parties to the dispute together, the expert advisor or mediator may contact an arbitral institution to appoint a mediator, who within 30 days attempts to reach an agreement. If an agreement is reached, a written agreement is made, if there is no agreement, the case is submitted to an official arbitration institution *orto this*.

One of the differences between arbitration institutions and court institutions is the legal force of the decisions of each of these institutions. Arbitration awards are in principle final and binding. Final means that the arbitral award is final and in legal language is often referred to as (*power of teaching*) or has permanent legal force, while binding means that the award is binding on all parties to an arbitration and because they may not violate the award.

The final and binding principles of arbitral awards are contained in Law no. 30 of 1999 this provision can be seen in several articles such as Article 17 Paragraph (2), Article 45 Paragraph (2), Article 53 and Article 60. honestly, fairly and in accordance with the applicable provisions and the parties will accept the final and binding decision

as mutually agreed upon. "In the event that the settlement effort as referred to in paragraph (1) is reached, the arbitrator or arbitral tribunal makes a final and binding deed of settlement and orders the parties to comply with the settlement provisions." "Against the binding opinion as referred to in Article 52 cannot be resisted through any legal remedy". "The arbitral award is final and has permanent legal force and is binding on the parties". However, the arbitral award is final and binding, in fact, at the application level, efforts to annul the decision can be made, both ordinary and extraordinary legal remedies.

The definition of a legal remedy is an effort given by law to a person or legal entity in certain cases against a judge's decision (Retnowulan Sutanto; 1997). Sudikno Martokusumo, defines legal remedies as efforts or tools to prevent or correct mistakes in a decision, because a judge's decision is not free from mistakes or oversights, so for the sake of truth and justice every judge's decision needs to be made possible to be re-examined so that the mistakes that occur in the decision can be resolved. repaired (Sudikno Martokusumo, 2013). From this definition legal action is an effort to fight one of the parties (the defendant and the plaintiff as well as a third party) against the judge's decision because it is considered that there was an error in a decision. Legal remedies are divided into two, namely ordinary legal remedies and extraordinary legal remedies. Ordinary legal remedies consist of *verzet*, appeal and cassation. Meanwhile, extraordinary legal remedies consist of judicial review and third party resistance (*deden verzet*) (Chatib Rasyid, 2009).

The same thing is also found in the decisions of the national sharia arbitration body (Basyarnas) which are final and binding because the Basyarnas institution is a sharia business dispute resolution institution at the first and last levels that stands alone, in contrast to litigation courts (District Court and Religious Courts), namely which is vertical, meaning that there are levels in the form of District/Religious Courts domiciled in districts/cities, District/Religious High Courts located in provinces and Courts of Cassation (Supreme Court) located in the center of the nation's capital (Jakarta). So if a court decision is issued as a decision, then legal action can still be taken at a higher court institution, namely by way of appeal, cassation or up to review. This is very different from institutions within the scope of arbitration including Basyarnas, without any levels, so that the decision is final and binding and there are no further legal remedies, be it appeals, cassation or judicial review.

The final and binding nature of the Basyarnas decision turns out that in practice it can be annulled by filing an annulment of the decision to the Court as stipulated in Law Number 30 of 1999 Articles 70, 71 and 72. From these articles it is stated that:

1. The parties can apply for annulment if the arbitration award contains a letter or document that is found to be false or declared to be false.
2. After the decision was made, decisive documents were discovered, which were hidden by the opposing party
3. The decision is taken from the result of a ruse carried out by one of the parties in the examination of the dispute

An application for annulment of an arbitration award must be submitted to the Chief Justice of the District Court no later than 30 (thirty) days from the date of submission and registration of the award. If the request for annulment of the decision is granted, the Head of the District Court/Religious Court shall further determine the consequences of the cancellation of the whole or part of the arbitral award and an appeal may be filed against the decision to the Supreme Court which decides at the first and final levels.

Abdul Ghofur Anshori said that although the arbitral award is final and binding, legal remedies are still possible in the form of filing objections to the judiciary, this is because the decision has material defects, meaning that there has been an oversight regarding the subject or an oversight in the subject matter of the dispute (Anshori, 2010). The same thing was said by Dadan Muttaqien, according to him that the Basyarnas decision was a final and binding decision, but extraordinary legal remedies could still be made in this decision when it happened as contained in Article 70 of Law Number 30 of 1999.

Looking at these statutory regulations, it is very clear that an arbitral award which is final and binding in nature can be attempted to annul the decision if one of the parties (the parties) does not accept or feels disadvantaged over the decision by submitting the reasons contained in Article 70.

The existence of the elements contained in Article 70 as stated in the provision is a form of legal protection and seeking justice for the parties involved in the arbitration process who have suspicions that the decision handed down by the arbitrator or arbitral tribunal contains elements of falsification, concealment facts or documents and the existence of an element of deception.

Upon submission of the request for annulment, the court is authorized to examine the request for annulment of the arbitral award with reasons and evidence suspected of containing elements of fraud, concealment of evidence and forged documents. If the court states that these reasons are proven or not proven, then this court's decision can be used as a basis for consideration for the judge to grant or reject the request. Because the reasons for the cancellation request must be proven by a court decision.

On the one hand, we see that the Basyarnas decision is final and binding, while on the other hand, the Basyarnas decision can be annulled by the District Court. It is as if the Basyarnas decision has no legal certainty, on the one hand it is final and on the other hand it is not final and binding, legal remedies can still be made, namely the cancellation of the decision to the court. Meanwhile, if we look at the definition of final and binding a decision, it is precisely that the Basyarnas decision is a truly final decision or the end of all series of examinations that have been determined by the arbiter (*referee*) in the event of a dispute which has the power to bind the parties and is covered by legal remedies or cannot be refuted.

According to Cicut Sutiarmo, (Director General of General Courts of the Supreme Court) stated "Arbitration decisions that are final and binding in fact are not in accordance with the predicate of a decision, the ratio of a decision that has nature and is

binding and has permanent legal force should be implemented immediately, because the decision is not legal remedies for appeal, cassation or judicial review can again be filed, but it turns out that in practice the losing party is given the right to file an annulment of the arbitral award based on legal reasons” (Sutiarso, 2011). The secretary of the Basyarnas Representative Office of Yogyakarta conveyed the same thing, that the Basyarnas decision is a final and quasi-binding decision, because the Basyarnas decision cannot be executed directly by the Basyarnas institution itself and still requires approval from the litigation court institution to execute it. In addition, the Basyarnas decision can still be annulled by the District Court by one of the parties who does not accept the decision rendered by the arbiter (*referee*) Basyarnas (Bagya Agung Prabowo, 2013)

Judging from the reasons for the annulment of the arbitral award, namely the existence of elements containing letters or documents which were admitted to be fake or declared fake, documents that had been hidden by the opposing party and from the results of deception, those reasons were the same as the reasons for extraordinary legal remedies (judicial review). Where in Law Number 14 of 1985 concerning the Supreme Court article 67, Law Number 48 of 2009 concerning Judicial Powers article 2 and in conjunction with Perma Number 1 of 1982 states the reason for the review (Sarwono, 2012) is because:

1. If the decision is based on a lie or deception by the opposing party which is known after the case has been decided, or based on evidence which is later declared false by the criminal judge.
2. If after the case has been decided, decisive evidence is found which were not found at the time the case was examined.
3. When a matter that is not claimed or more than what is claimed has been granted.
4. If between the same parties regarding the same matter on the same basis, by the same court or at the same level, a decision has been given that is contrary to one another.
5. If a part of the claim has not been decided without considering the reasons.
6. When in a decision there is a mistake by the judge or a clear mistake.

In addition to the reasons above, Hari Widya Pramono (Judge at the Mojokerto District Court) said that the cancellation of the arbitral award contained in the Explanation of Article 70 of Law Number 30 of 1999, that an application for annulment can only be filed against an arbitral award that has been registered in court and the reasons -The reason for the request for annulment mentioned in this article must be proven by a court decision. Then the decision on the request for annulment is determined by the Chief Justice within a maximum period of 30 (thirty) days after the application as referred to in paragraph (1) is received. This means that if you calculate the time provided by law is 30 (thirty) days and if you still have to wait for a court decision to prove the presence of elements of forgery or deception then something that is difficult to fulfill or even becomes impossible to obtain. filed an application for

annulment of the said arbitration award, because it has become a reality of our judiciary where for a criminal case process, for example, from the stages of investigation, prosecution and trial until the issuance of a court decision requires quite a long time (www.pn-mojokerto.go.id uploaded on Wednesday , April 11, 2022 08:40)

Based on the judge's opinion, it means that it is very unlikely that the annulment of the arbitral award will be resolved in the District Court in a short period of time, because to prove to the court that a decision contains elements contained in Article 70 requires time or a long examination process. Such as examining the evidence submitted, summoning the parties for questioning and summoning witnesses[1]witness if necessary to substantiate existing information and evidence. After the data is considered sufficient, then the court issues a decision. Not to mention the issue of readiness or competence of the District Court in resolving sharia business disputes.

Referring to the nature of final and binding decisions in sharia arbitration, final and binding decisions are also found in decisions of the Constitutional Court. However, the nature of the final and binding decision on the Constitutional Court is different from the final and binding decision on arbitration. Final and binding on the Constitutional Court is truly final and binding, there is no term for cancellation of a decision. The binding power of the Constitutional Court's decision from the moment the decision is pronounced by the Constitutional Justice immediately obtains permanent legal force and there are no legal remedies that can be taken.

The final and binding nature of the decision of the Constitutional Court means that it is closed to all possibilities for taking legal action afterwards, whether it is appeal, cassation or review. When the decision is pronounced in a plenary session, then at that time a legally binding force is born (Ahsan Yunus, 2011). Abdul Latif also expressed the same thing, namely "The binding power of the Constitutional Court has the authority to adjudicate constitutional cases in the first and final levels whose decisions are final, meaning that the decisions of the Constitutional Court immediately acquire permanent legal force since they are pronounced and there are no legal remedies that can be taken (Latif, 2009).

Judging from the purpose of law, Gustav Radbruch put forward three basic values of legal objectives which are called "priority principles", this theory states that the purpose of law first prioritizes justice, then benefits and legal certainty (Rusli Efendi, 1992). When the purpose of this law is not achieved, it will lead to the fading of public trust in the law and a further impact where people will not obey or comply with the rule of law. If this is related to the final and binding nature of sharia arbitral awards, it can lead to ambiguity or uncertainty in the rule of law itself. While the basic objective of law is to provide justice, benefits and legal certainty to the community. When a legal regulation or article creates ambiguity or legal certainty, it is contrary to the 1945 Constitution article 28 D.

## CONCLUSION

Based on the study of the meaning of final and binding, the notion of legal remedies, the purpose of law, and the opinions of experts as well as the reasons above, that the arbitral award in this case the National Sharia Arbitration Board (Basyarnas) cannot be said to be final and binding because it can still be carried out legal remedies through cancellation of the decision to the Court. The existence of the elements contained in Article 70 of Law Number 30 of 1999 the request for annulment causes uncertainty or unclear meaning of the final and binding nature and is contrary to the basic objective of law, namely to provide justice, benefit and legal certainty.

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