Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.51, 2016

The Norm Reconstruction of Verdict Execution of the National Sharia Arbitration Board to Sharia Economic Dispute in Indonesia

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Abstract
Within the growth of sharia economic in Indonesia, a dualism of the sharia economic dispute settlement occurred along with the emergence of the disputes. According to Law No. 3 of 2006 on the Amendment of Law No. 7 of 1989 on the Religious Court, Law No. 21 of 2008 on Sharia Banking, and The Constitutional Court Decision No. 93/Puu-X/2012 declares that sharia economic dispute settlement is within the authority of the Religious Court. Meanwhile, according to Law No. 50 of 2009 on the Judicial Power, The execution of the National Sharia Arbitration Board (Basyarnas) verdict as part of sharia economic dispute settlement in Indonesia is the General Court's authority. The Law that is overlapped indicates a conflict of norms on the Basyarnas verdict execution in which the philosophical, juridical, and sociological weakness, and the vague legal purposes occurred. Therefore, a reconstruction of norm on the Basyarnas verdict execution is needed.This paper examines three issues. **First**, why did the Article 59 Law No. 48 of 2009 is used as a reference for the Basyarnas verdict execution but the Article 49 Law No. 3 of 2006 and Article 55 Law No. 21 of 2008 are neglected. **Second**, was the norm of the Basyarnas verdict execution in accordance with the legal purposes. **Third,** how did the principles of the Basyarnas verdict execution influence sharia economic disputes in Indonesia.The method used in this study is a normative legal research using legislational, conceptual, philosophical, and comparative law approach. So, several findings are found. **First**, the use of Article 59 Law No. 48 of 2009 on the Judicial Power and the neglect of Article 49 Law No. 3 of 2006 on the Amendment of Law No. 7 of 1989 on the Religious Court and Article 55 Law No. 21 of 2008 on Sharia Banking as a reference for the Basyarnas verdict execution is based on philosophical, historical, political, and juridical argument. **Second**, the norm of the Basyarnas verdict execution relevance with the legal purpose is vague, as associated with justice, legal certainty and benefits aspects. **Third**, there are two legal principles to resolve conflicts on norms of the Basyarnas verdict execution, namely (a) the principle of consistency, and (b) the principle of the obligatory to avoid authoritarianism of the elite positive norm.
Keywords: Basyarnas Verdict Execution, Conflict of Norm, Reconstruction

Introduction

Everyone has freedoms and limitations. The principle of *hurriyat al-mar'i mahdudatun bihurriyat al-ukhra* (individual freedoms is limited by the freedom of other individuals) is relevant for this case. Excessive freedom will infringe and trigger economic dispute. Thus, a legal regulation is needed.[1] The Republic of Indonesia Constitution of 1945 Article 28 D affirms, "every person has the right to recognition, guarantees, protection and legal certainty of fair and equal treatment before the law. The legal order is made to accomplish the country's objectives as set forth in the preamble of the Republic of Indonesia Constitutional of 1945 that is to regulate the life of the nation and develop the general welfare. The law No. 21 of 2008 on Islamic Banking states:

> That in line with national development goals of Indonesia to achieve the creation of a fair and prosperous society based on economic democracy, a developed economic system based on the values of Justice, solidarity, equity, and benefit in accordance with Sharia principles.

Up to the year of 2008, there were 287 Sharia financial institutions,[2] and over 5.3 million customers. The sharia economic activity is not always appropriately done based on the contract which triggers the occurrence of dispute.[3] The sharia economic dispute settlement are based on Sharia law,[1] and some are based on

[1] Johnny Ibrahim, *Pendekatan Ekonomi Terhadap Hukum, Teori dan Aplikasi Penerapannya dalam Penegakan Hukum* (Surabaya, Putra Media Nusantara-ITSPress, 2009), p. 27 and 30
[2] http://www.mui.or.id/mui, downloaded on March 20, 2011
[3]Agustianto, *Peradilan Agama dan Sengketa Ekonomi Syariah*. http:// agustianto. niriah.com. Up to March, 2010, there were 20 sharia economic dispute handled by Religion Court. Three of the cases went up to *kasasi* level in Supreme Court,

Burgerlijk Wetbook (Civil Code).[2] Article 49 Law No. 3 of 2006 about the Amendment of Law No. 7 of 1989 on Religious Courts, mentions:

> Religion court has a duty andaauthority to check, decide, and resolve the matter in the first level between moslem people within the areas of: a. marriage; b. the heritage; c. testament; d. grant; e. endowments; f. zakah; g. infaq; h. charity; and i. Sharia economic.

Based on Article 49 Law No. 3 of 2006, the Supreme Court (*Mahkamah Agung/MA*) published a Supreme Court Circulars (SEMA) No. 8 of 2008 on The Authority of the Basyarnas verdict execution by the Religious Courts (PA). Article 49 Law No. 3 of 2006 was weakened by Article 55 Law No. 21 of 2008 on Sharia Banking which stated:

> (1) Dispute settlement of sharia banking done by the court in religion court environment. (2) In term of the parties have betoken dispute settlement other than aforesaid in the subsection (1) dispute settlement done according to content of agreement. (3) The dispute settlement is done as referred to in subsection (2) shall not contravene with the sharia principles.

Furthermore, the explanation of article 55 Paragraph (2) Law No. 21 of 2008 on Sharia Banking mentioned:

> What is meant by "dispute setlement in accordance with the contents of the Contract" is conducted as follows: a. deliberation; b. banking mediation; c. through the National Sharia Arbitration Board (Basyarnas) or other arbitration institutions; and/or d. through court environment in General Court.

Based on the verdict No. 93/Puu-X/2012, the Constitutional Court (*Mahkamah Konstitusi/MK*) of the Republic of Indonesia, decided that the explanation of article 55 paragraph (2) and paragraph (3) Law No. 21 of 2008 on Sharia Banking above is in contrast with the Constitution NRI 1945, so it does not have a legal power.

Non-litigate settlement of sharia economic dispute has been accomplished by Basyarnas. According to article 60 law No. 30 of 1999 on arbitrage and alternative dispute settlements, "arbitration verdict shall be final, has a legal power, and bind the parties". Article 61 Law No. 30 of 1999 mentioned:

> "In case the parties do not execute arbitral awards voluntarily, conducted based on the order of the head of district court upon request of other party involved in the dispute.

This provision was strengthened by article 59 paragraph 3 law No. 48 of 2009 on judicial power that mentioned:

> If the parties do not execute the arbitration judgment voluntarily, the judgment is carried out on the orders of the petition of district court's chairman on the request of one of the parties in dispute.

The explanation of article 59 Law No. 48 of 2009 mentioned, "what is meant with "arbitration" in this provision also includes Sharia arbitration". Refers to Article 59, paragraph 3 Law No. 48 of 2009, MÃ published *SEMA* No. 8 of 2010 which asserts that *SEMA* No. 8 of 2008 is not applicable. It says:

> " .... *SEMA* No. 08 of 2008 on Execution of The Verdict of Arbitration Sharia Board are based on Article 59 paragraph (3) Law No. 48 of 2009 on Judicial Power and its explanation, is decided as not valid".

Several overlapping articles indicate legal issues namely the conflict of norms of the Basyarnas verdict execution. Various weaknesses are also emerged, such as (1) philosophical weakness, (2) juridical weakness, (3) sociological weakness and legal uncertainty,[3] (4) the vague of political law,[4] (5) legal purpose uncertainty, and (6) the vagueness of principle. Hence, a reconstruction of norm on the Basyarnas verdict execution is crucial since sharia economic disputes are growing in Indonesia.[5] The State's responsibility to uphold justice, ensure prosperity, and protect the citizens as stated in the fourth paragraph of the Preamble of the 1945 Constitution must be realized.

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downloaded on March 20, 2011. According to the Report of Supreme Court, 2011, 8 cases of sharia economic were completely handled by Religious Court and 1 case went to *kasasi* level in Supreme Court. Http: /// pembaruanperadilan.net /, downloaded on November 2, 2012

[1] M. Syafii Antonio, *Bank Syariah, Bagi Bankir dan Praktisi Keuangan (*Jakarta: Bank Indonesia dan Tazkiyah Institute, 1999), p. 30 and 214

[2]Sutan Remi Syahdeini, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia* (Jakarta: Pustaka Utama Grafiti, 1999), p. 134

[3] *Bank Syariah Mandiri Terbelit Akad Mudharabah Muqayyadah* (Friday, May 1, 2009), http://www.hukumonline.com, downloaded on March 22, 2011. In 2010, Dadan Muttaqin, a lecturer in *Universitas Islam Indonesia* (UII), Yogyakarta, Indonesia filed a judicial review of Law No. 21 of 2008 and Act No. 48 of 2009. In 2012, there is another customer of Bank Muamalah who filed judicial review against the two laws.

[4] Notes of National Seminar "Sharia Economic Law" by The Great Judge Ahmed Muhtar Zamzawi, UIN Syarif Hidayatullah, Jakarta, Friday, January 21, 2011

[5] Since its establishment in 1993 until February 2011, Basyarnas has handled 17 cases. From 17 cases, 12 cases are directly solved based on Basyarnas verdict and 5 cases are not finished because the parties do not want to implement the Basyarnas verdict voluntary. From 17 cases, mudharabah and murabahah contract using the profit and loss sharing system are mostly happened, document of Basyarnas, Wednesday, February 24, 2011

Based on the description above, this paper examines three fundamental issues. *First*, why is Article 59 Law No. 48 of 2009 on Judicial Power was used as a reference for the Basyarnas verdict execution, whereas Article 49 Law No. 3 of 2006 on the Amendment of Law No. 7 of 1989 on Religious Courts and Article 55 Law No. 21 of 2008 on Sharia Banking are excluded as the reference? *Second*, is the norm of the Basyarnas verdict execution in sharia economic disputes in Indonesia in accordance with the legal purpose? *Third*, how is the conflict of norms of the Basyarnas verdict execution settlement principle in sharia economic disputes in Indonesia?

Methods of Research

The methods used in this study include approach, legal materials, techniques of legal materials collection, and analysis of legal materials. ***First*,** the four approaches used in this normative legal research are statute, conceptual,[1] philosophical, and comparative law approach.[2] The countries being compared are Sudan, Pakistan, and Malaysia. ***Second***, the legal materials include primary, secondary and tertiary legal materials.[3] The primary one covers law materials that are not codified.[4] It comprises al-Quran and Hadith, the 1945 Constitution of the Republic of Indonesia, Code Civil, Law No. 30 of 1999, Law No. 3 of 2006, Law No. 21 of 2008, Law No. 48 of 2009, SEMA No. 8 of 2008, SEMA No. 8 of 2010, and Memory Treatise of the House of Representatives of the Republic of Indonesia.

Third, the techniques of legal materials collection comprise investigation, collection, and document study of the primary, secondary, and tertiary legal materials which are done conventionally or through the information technology (IT) [5]. ***Fourth***, the techniques of legal materials analysis covers systematization, descriptions, structurization, logical legal reasoning, systemic, coherent, principal interpretations, systematic, and grammatical techniques. [6] The legal materials analysis is done by using normative method in prescriptive optical, [7] qualification of fact, qualification of law, create heading,[8] and use hermeneutics analysis.[9]

Results and Discussions

1. Review of Theory and the Concept of Norm Reconstruction

First, this study uses four theories for the analysis, i.e. *maqashid al-sharia*, which means that the purpose of God's law is creating *maslahah* (benefits),[10] which consists of five elements, i.e. uphold the religion, soul, lineage, intellectual, and property.[11] Maqashid al-sharia in the meaning of "the enacment of policy has to be based on prosperity." It is quite similar with the politics of law, namely the will of the sovereign's statement on law,[12] either the State of law, State of power, and the law of Pancasila.[13] Maqashid al-sharia in the form of "justice, benefits, and legal certainty" is similar to the Radbruch model which confirms that the purpose of law is fairness, benefits, and legal certainty. [14] Maqashid al-sharia in the form of "critical loyality to ulil amri (goverment) as the holder of the state authority" is similar in some ways with Andi Hamzah's authority theory model, that authority must be based on the law in order to be valid. According to Stroink, those authorities are attribution, delegation, or a mandate.[15] Maqashid al-sharia in form of "egalitarian" has the same spirit with William Shrode's theory of legislation model which suggests that the formation of law must be accomplished using systemic approach.[16]

Second, this study discusses the concept of norm reconstruction. Based on Islamic law perspective, law-makers are called Asy-Syari'. Instead of created, the law is found. The function of mujtahid is not *musbit*

[1] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media, Sixthy edition, February 2010), p. 137-138
[2] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2006), p. 315 and 320
[3] Marzuki, *Penelitian Hukum* ..., p. 141
[4] Soerjono Soekanto dan Sri Mamudji, *Peneltian Hukum Normatif, Suatu Tinjauan Singkat* (Jakarta: CV Rajawali, 1995), p. 13
[5] Suwoto, "Kekuasaan dan Tanggung Jawab Presiden RI" *Dissertation*, Fakultas Pascasarjana Universitas Airlangga, 1990), p. 35
[6] Suwoto, "Kekuasaan dan Tanggung Jawab Presiden RI" *Dissertation*, Fakultas Pascasarjana Universitas Airlangga, 1990), p. 35
[7] *Arief Sidharta*, *Refleksi tentang Struktur Ilmu Hukum* (Bandung: Mandar Maju, 1999), p. 218
[8] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2006), p. 102
[9] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2006), p. 102
[10] Khudhari Biek, *Ushul al-Fiqh* (Beirut: Dar al-Fikr, 1988), p. 10.
[11] Abu Ishak asy-Syatibi, *al-Muwafaqat, Jilid II* (Beirut: Dar al-Fikr, 1341 H), p. 5
[12] Teuku Muhammad Radhie dalam *PRISMA* (No. 6 *Th* II, December 1973), p. 4
[13] Surya Prakash Sinha, *Jurisprudence legal philoshopy in a Nutshell* (Santa Paul: West Publishing Co, 1993), p. 199-201
[14] Achmad Ali, *Menguak Tabir Hukum*, *Suatu Kajian Filosofis dan Sosiologis* (Jakarta: Candra Pratama, 1996), p. 97
[15] Andi Hamzah, *Hukum Acara Perdata* (Yogyakarta : Liberty, 1986), p. 485
[16] Lauddin Masruni, *Hukum dan Kebijakan Perpajakan di Indonesia* (Yogyakarta: UII Press, 2006), p. 21

(establish the law) but it is *muzhir* (issue and declare the law).[1] Interpretation serves as a reconstruction of law ideal.[2] According to Hasan Hanafi, reconstruction must be preceded by deconstruction, the reconstruction is carried out later with logic of renewal (*tajdid*).[3] This is confirmed by HLA Hart's concept of legal transition model as associated with primary and secondary rules.[4] The concept of Hart is the same with the concept of Rudolf Von Jhering.[5] The idea of Jhering is elaborated by Paul Scholten, that the construction of law must be comprehensive, logic, and neat.[6] According to George W. Patton, the principle is the thought that is formulated broadly and becomes the basis of legal norms.[7] There is a resemblance of meaning between norms and rules. In Jimly Ashshidiqie's opinion, norm is the realization of the good and bad values within the rule that contains capacity, suggestion, or commands.[8]

2. The Using of the Law of Judicial Power, Exclusion of Law of Religious Court, and Law of Sharia Banking as the Reference of the Basyarnas Verdict Execution.

Philosophical Argumentation

First, since many scientists put religious thinking aside, their works are lack of religious values.[9] New awareness creates a new law based on religion. This is the Postmodernism law that asserts the existence of religion. Within the paradigm of Sharia, the norms of Sharia economic dispute settlement, particularly the norms of the Basyarnas verdict execution found its true identity.

Second, the norms of the Basyarnas verdict execution in sharia economic disputes in Indonesia incorporate *maslahah* (benefits) in the process of formulation as a consideration. However, the substance of the norms of the Basyarnas verdict execution is not able to realize *maslahah* because, on contrary, it triggers injustice, legal uncertainty, and no benefits.

Third, the State based on law essentially means that the law is supreme and the obligation of each State's official to subject to the law.[10] By only considering the norm of the Basyarnas verdict execution, it can be understood that not only the parties who should be subject to the law, but also judicial power. However, the fact is different.

Fourth, the ideals of State of power (*machtstaate*) within the norm of the norms of Basyarnas verdict execution has been integrated with the norms of Basyarnas verdict execution itself. It is obvious since the process of the formulation of the norms of Basyarnas verdict execution includes the draft which has been crossed out by Supreme Court. It can also be seen from government intervention in involving General Court as the problem solver of sharia economic dispute.

Fifth, Pancasila is moral, political, and state ideals which becomes the major reference for every legal issue in Indonesia.[11] Religion law is accommodated in Indonesia. However, the ideals of the law of Pancasila law are not elaborated and applied optimally on the norms of Basyarnas verdict execution.

Historical Argumentation

First, the inconsistencies of absolute competence of religion court emerged since the Religion Court is established in the era of Islamic Kingdom in Indonesia until 2011. ***Second***, the absolute competence between religion court and general court is not clear. ***Third***, the ideal of one roof judicial system is not in accordance with the norms of Basyarnas verdict execution because the existing norms tends to cover about the tug between Religion and General Court.

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[1] Syamsul Anwar, "*Kerangka Epistemologi Hukum Islam",* Paper of Sharia Faculty of UIN Sunan Kalijaga Yogyakarta, unpublished, p. 1

[2] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Prenada Media Kencana, 2008), p. 344

[3] Moh. Nurhakim, *Islam, Tradisi, dan Reformasi, Pragmatisme Agama dalam Pemikiran Hassan Hanafi* (Malang: Bayu Media, 2003), p. 54

[4] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford at the Clarendon Press, 1988), p. 78-95. See, Rifyal Ka'bah, "Legal Justice ...

[5] Bernard L. Tanya, Yoan N Simanjutak, Markus Y. Hage, *Teori Hukum, Strategi Tertib Manusia Lintas Ruang dan Generasi* (Surabaya: CV Kita, 2007), p. 120-122

[6] Sadjipto Rahardjo, *Ilmu Hukum* (Bandung: PT Citra Aditya, 1991), p. 103

[7] George W. Patton, *A Text Book of Jurisprudence*, (London: Oxford University Press, 1969), p. 178

[8] Jimly Ashshidiqi, *Perihal Undang-Undang* (Jakarta: Konstitusi Press, 2006), p. 9

[9] Thohir Luth, *Religiousitas Sains: Why Not*, Pengantar dalam Sutoyo, dkk, *Religiousitas Sains, Meretas Jalan Menuju Peradaban Zaman, Diskursus Filsafat Ilmu* (Malang: LPP SDM "Solusi" dan UB Press, 2010), p. vi

[10] Jimly Asshiddiqie, *Pokok-pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta: Bhuana Ilmu Populer, 2007), p. 53

[11] Ilhami Bisri, *Sistem Hukum Indonesia, Prinsip-prinsip dan Implementasi Hukum di Indonesia* (Jakarta: Raja Grafindo Persada, 2010), p. 7

Political Argumentation

First, the politics of law formulation of Article 49 Law No. 3 of 2006, includes (a) the establishment of national law paradigm,[1] (b) the strengthening of the judicial jrole, (c) Integrated Justice System, and (d) the absolute competence of sharia economic. ***Second,*** the politics of law formulation of Article 55 Law No. 21 of 2008 on Sharia Banking includes (a) religion is the basis for legal formulation, (c) application of profit and loss sharing principles,[2] (d) contribution of sharia banking, and (e) realization of legal certainty of economy. ***Third,*** the law of politic formulation of Article 59 law No. 48 of 2009. The committee of bill of judicial power offers two options, (a) revise the law No. 4 of 2004 on Judicial Power, and (b) repeal the law. At last, the House of Representatives passed a bill on the repeal of law of Judicial Power.[3] ***Fourth***, the politics of legal publishing of SEMA No. 8 of 2010 was very destructive on the process and substance of the norms of Basyarnas verdict execution.

Juridical Argumentation

First, the construction of the norm of Basyarnas verdict execution on the politic of law theory's perspective includes (a) the development of law which is essentially comprises creation and update of legal materials to fit the requirements. Three norms of Basyarnas verdict execution are intended as parts of the establishment of economic law, (b) the implementation of the existing law provisions includes an affirmation of institutional functions and the assistance for law enforcers. Affirmation attempts on the authority of Religion and General court have been made, (c) the manufacturing of process and the implementation of laws which may indicate direction of the law. The norm of Basyarnas verdict execution has been made through crucial process as handled by the House Of Representatives, (d) the official line is made as the foundation to rely and how to create and enforce the law in order to achieve the nation's and State's goals.

Second, this argumentation is about the construction of norm of Basyarnas verdict execution in the legislation theory's perspective. The establishment of regulations, including article 49 Law No. 3 of 2006 on the Amendment of Law No. 7 of 1989 on Religious Courts, article 55 Law No. 21 of 2008 on Sharia Banking, and article 59 Law No 48 of 2009 on judicial powers has been decided through a systemic approach, namely a set of interconnected parts, work together and independently in the pursuit of a common goal.

3. Relevance of Norm of Basyarnas Verdict Execution to Sharia Economic Dispute with Legal Purpose

The analysis is accomplished using the Friederich Carl von Savigny's legal purpose theory which mentions that, that law purpose is justice, benefits, and legal certainty.[4] Gustav Radbruch and Rusli Effendi support the idea proposed by Savigny.[5]

a. The Principle of Justice in the Norm of Basyarnas Verdict Execution

Justice has two meanings and each has a different juridical implications. ***First,*** it means equal. The norm of Basyarnas verdict execution should treat the seekers of Justice equally, that is the freedom to determine the choice for the Basyarnas verdict execution. For the law enforcers, the same justice means Religious and General court has the auhorito execute the ruling of the Basyarnas. The principles of Sharia or conventional, religion principle and General Court have the subject of having of opportunities.

Second, it means proportional. Norm of Basyarnas verdict execution should give justice proportionately, i.e. no choice of law. Anyone should be subject to sharia principles if one does sharia transaction. The norms of Basyarnas verdict execution should be subject to sharia principles and institutions. It means that religious court has the authority to execute Basyarnas verdict, not general court does not have absolute competence of sharia economy. Only sharia principles and institutions which have absolute competence of Sharia economic authorities to execute Basyarnas verdict. But, in fact, norm of Basyarnas verdict execution does not accommodate the concept of justice means proportional.

Moral, Social, and Legal Justice

First, according to Ibn Taymiyyah, justice means all of the contents of the Quran and *Sunnah*.[6] Rifyal Ka'bah affirms that moral justice has to be based on morality as the standard of good and bad value from a

[1] The Opinian of Fraction of Partai Golkar to Bill on the Amendment of Law No 7 of 1989 on The Religious Court, ***Memory of Risalah,*** May 17, 2005
[2] Draft of Explanation on Bill on Sharia Bangking
[3] *MA Tanggapi Dingin ....,* September 5, 2008
[4] Bernard L. Tanya, Yoan N Simanjutak, Markus Y. Hage, *Teori Hukum, Strategi Tertib Manusia Lintas Ruang dan Generasi* (Surabaya: CV Kita, 2007), p. 120-122
[5] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT. Citra Aditya Bakti, 1991), p. 19
[6] Ibnu Taimiyah, *As-Siyasah as-Syar'iyah* (t.tp: tp, tt), p. 15

variety of sources, especially the authenticity of religion,[1] all required, either legal or creed, integrals,[2] and blends.[3] So, moral justice that primarily came from religious. ***Second***, according to Hans Kelsen, social justice is the quality of society order to reach happiness. It refers to the greatest happiness that can be achieved by an individual.[4] So, social justice is justice in accordance with the public order. ***Third,*** Rifyal Ka'bah confirms, that legal justice is justice-based legislation and verdict of judge who reflects the State official. Material law is inspiring for material justice and formal law is inspiring for formal justice.[5]

Based on the exposure above, that the core idea of moral justice are core values of religion, social justice is the public order, and legal justice is the formal provisions of the State.

First, religious values as the core idea of moral justice. The norm of Basyarnas verdict execution should be imbued by religious values, i.e. sharia principles. The fact shows that the formulation process of norms of Basyarnas verdict execution incorporates sharia principles. However, the substance of the norms are not imbued by sharia principles, because there is a conflict of norms and it is not appropriate with religious values. ***Second,*** the social order as core ideas of social justice. The norm of Basyarnas verdict execution should be aligned with the social order of Indonesian society who are subject to sharia principles. However, the fact shows that social order is not reflected in the norms of Basyarnas verdict execution characterized by the use of Article 59 Law No. 48 of 2009 and exclusion of article 49 Law No. 3 of 2006 and article 55 Law No. 21 of 2008 as the reference of Basyarnas verdict execution.

Third, state formal law as legal justice. The norm of Basyarnas verdict execution shall be consistent with the state formal law. Although it leads to conflict, Law No 48 of 2009 as a symbol of state law formal has set General Court to do Basyarnas verdict execution. Thus, excluding the article 49 Law No. 3 of 2006 and article 55 Law No 21 of 2008 as the reference of Basyarnas verdict execution has been in accordance with Law No 48 of 2009 as a symbol of state formal law.

Refers to the description above, it can be explained that the norm of Basyarnas verdict execution is irrelevant to moral justice and social justice, and it is only in accordance with legal justice.

Procedural and Substantive Justice

First, procedural justice according to Ahmad Ali, is a justice based on the accuracy of procedure, honest, and without regard for social status.[6] According to John Rawls, legal order, neutral institutions, consistency, regardless of its substantive principle can be called as formal justice.[7] So, formal justice is the justice which based on the accuracy of the existing formal procedures.

Second, substantive justice, according to Lawrence M. Friedman, is a particular justice based on the concept of value that the individual subjective, group, tribe, or nation subjective. The highest assessment of legal system is what is done.[8] Thus, substantive justice is a justice based on a specific value.

Based on the exposure above, that core idea of formal justice is an accuracy of formal procedure and the core idea of substantive justice is a specific value. ***First,*** the accuracy of formal procedure underlying the norm of Basyarnas verdict execution has to be an accurate basis. However, a formal procedure for Basyarnas verdict execution is not accurate since a conflict of norms between article 59 Law No. 48 of 2009, Law No. 3 of 2006, and Article 55 of Law No. 21 of 2008 emerged. Hence, it strengthens inaccuracies of norm of Basyarnas verdict execution. ***Second***, a specific value as the core idea of substantive justice. In this case is nationality subjective, i.e. Pancasila that comprises religious matter, humanism, unity, democracy, and social justice. As measured using Pancasila, the explanation can be seen as follows:

1. The formulation process of norms of Basyarnas verdict execution is in accordance with nation's religious matter. However, the substance of Law No. 48 of 2009 does irrelevant with nation's religious matter because Law No. 3 of 2006 and Law No. 21 of 2008 that empowered absolute competence of sharia economic of Sharia to Religious Courts thus ruled out.
2. The formulation process of norms of Basyarnas verdict execution have been accomplished as in accordance with humanism but the substance of Law No. 48 of 2009 on Judicial Power is not appropriate because no tribute for the public holder of sharia principles.

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[1] Rifyal Ka'bah, "Legal Justice dan Moral Justice", Paper of Training of *Justisial* Judge of Supreme Court of RI in Wisata Hotel, Jakarta, January 29, 2002

[2] Al-Qurthubi, *Al-Jami' li Ahkam* ...., p. 165

[3] M. Ahmad Abdul Ghani, *Mafhum al-'Adalah al-Ijtima'iyah fi Dhaw` al-Fikr al-Islami Al-Mu'ashir,* I, (t.tp. : tp, 2004), p. 75

[4] Hans Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science* (Barkeley and Los Angeles: University of California Press, 1957), p. 1-2

[5] Ka'bah, Legal Justice ..., January 29, 2002

[6] Ahmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence* (Jakarta: Kencana Prenada Media, 2009),p. 231

[7] Rawls, *A Theory of Justice ...,* p. 70

[8] Ali, *Menguak Teori Hukum ...,* p. 233, 235-236

3. The formulation process of norm of Basyarnas verdict execution has been made as align with to unity of the nation but the substance of Law No. 48 of 2009 is not appropriate because the Law has risen a conflict of norms and dualism of sharia economic dispute settlement.
4. The formulation process of norm of Basyarnas verdict execution fits the nation's democracy because it is reflected in the crucial discussion of Article 55 Law No 21 of 2008 on Sharia Banking. Both the disagreed (Partai Damai Sejahtera Fraction) or agreed parties (besides FPDS), acquired the rights to argue. However, the substance of norm which is precisely written as Law No. 48 of 2009 on Judicial Power does not fit the value of the national democracy because the Law defects the principle of consensus discussion. An agreement on legal basis level in the form of sharia principles written in Law No. 2 of 2006 and Law No. 21 of 2008 is made. In fact, within the norms and institutions level, it is ruled out by Law No. 48 of 2009.
5. The formulation process of norm of Basyarnas verdict execution were in accordance with social justice. This is proved by the framers' motivation in the norm's formulation that are reflected in the well-known sentence "as part of the development of national legal justice". However, the substance of Law No. 48 of 2009 on Judicial power was incompatible with the values of social justice since Law No. 48 of 2008 on Judicial power does not provide constitutional right enshrined in Law No. 3 of 2006 and Law No. 21 of 2008 to the public holders of sharia principles and institutions that are competent in sharia economic dispute.

Distributive and Commutative Justice

First, distributive Justice, according to Sudikno Mertokusumo, is a justice in which every person achieves the right as expected (suum cuique tribuere, to each his own). Aristoteles stated that the duty of law is to give everyone their right.[1] The core of distributive justice is the proportionality of rights.[2] Justice means giving the property and right to the person.[3] The meaning of justice was developed from the Greece term "jus" which means law and right,[4] conveys the rights to their owners,[5] puts something in the right place in which it belongs, and gives the same treatment to others or achieves a balanced within the transactions with others.[6] One feature of Justice is the balance of rights and obligations.[7] So, distributive justice gives rights to the proper person proportionately.

Second, commutative justice, according to Sudikno Mertokusumo, gives the same treatment to any person. This justice is proper for the procedural context that everyone is the same before the law.[8] Plato interprets commutative justice as a fairness which equates to everyone.[9] Justice does not differentiate something with another so there is no different and no one-sided matter.[10] Thus, commutative justice grants rights to everyone equally.

Based on the exposure above, that core idea of distributive justice is proportionality and the core idea of commutative justice is rights equality.

First, proportionality of right as the core idea of distributive justice underlying norm of Basyarnas verdict execution is to give rights to the seekers and institutions of justice enforcement proportionately. The granting of authority to Religious and General Court to carry out the Basyarnas verdict execution at the same time does not indicate that the two are indeed eligible. So, religious court is the most appropriate institution that has the authority for Basyarnas verdict execution.

Second, equal rights as the core idea of commutative justice inspires norm of Basyarnas verdict execution to give rights to the Religious and General court equally. In fact, the norm of verdict execution entitles the rights to Religious and General court. Article 49 Law No. 3 of 2006 concerning on the Amendment of Law No. 7 of 1989 concerning Religious Courts and article 55 Law No. 21 of 2008 on Sharia Banking designating Religious Court to settle sharia economic dispute, including Basyarnas verdict execution. Meanhile, article 59 Law No 48 of 2009 concerning on Judicial Power pointed General Court.

b. The Principle of Benefit in the Norm of Basyarnas Verdict Execution

Here we can found the main idea of Bentham. He stated that benefit has three variants, namely pleasure,

[1] Sudikno Mertokusumo, *Mengenal Ilmu Hukum, Sebuah Pengantar* (Yogyakarta: Liberty, 1991), p. 59
[2] Mertokusumo, *Mengenal Ilmu Hukum ...,* p. 60
[3] Majma' al-Lughah al-'Arabiyyah, Jamhûriyyah Mishr al-'Arabiyyah, *al-Mu'jam al-Wasîth* (Cairo: Dâr al-Ma'arif, 1980), p. 588
[4] Hendry Campbell Black, *Black's Law Dictionary* (St. Paul, Minnesota: West Publishing, 1997), p. 657
[5] Ahmad Musthofa Maraghi, *Tafsir al-Maraghy* (Beirut: Darul Fikr, 1971), p. 33
[6] Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam* (Kuala Lumpur: Ilmiah Publishers, 1999), p. 140
[7] Baharuddin Lopa, *Al-Qur'an dan Hak-hak Asasi Manusia*, p. 157
[8] Mertokusumo, *Mengenal Ilmu Hukum ...,* p. 60
[9] Muslehuddin, *Filsafat hukum Islam ...,* p. 79
[10] Tim Penyusun, *Ensklopedi Hukum Islam* (Jakarta: PT Ikhtiar Baru, 2000), p.25

goodness, and happiness.[1] The first benefit is pleasure. The struggling between above norms provides pleasure on the one hand and displeasure on the other hand. The second benefit is goodness. Its concept has an opposite meaning of inhumanity and its domain of ethics law consists of consistency, prevalence, and reasonableness aspect. Legal norm is considered consistent, common, and reasonable when it has no reduction. The reduced and inconsistency norm is unfair, unethical, and unpleasant. Again, the struggling between the two norms provides pleasure on the one hand and displeasure on the other hand. The third benefit is happiness. The struggling of norm of Basyarnas verdict execution between Religious Court and General Court gives happiness on the one hand and its opposite on the other hand.

c. The Principle of Legal Certainty in the Norms of the Basyarnas Verdict Execution

According to Bagir Manan, there are five kinds of certainty. They are certainty of rules, institutional, mechanism, time, and predictive certainty.[2] In this description, the norm of Basyarnas verdict execution is analyzed in the frame of five legal certainties.

The Certainty of Rules

Based on positivistic paradigm, law is conceptualized as" law as what is written in the books or *ius constitum*". The law is what is stated in the valid legislation and beyond it will not be considered as law.[3] The certainty of rules is associated with relations of norm of Basyarnas verdict execution in article 49 of Law No. 3 of 2006 and article 55 of Law No. 21 of 2008 which gives authority to the religious court, while article 59 paragraph (1) of law No. 48 of 2009 which gives authority to the general court. In addition, the purpose of law may preclude justice being achieved in legal certainty due to the rational positivism

Institutional Certainty

Institutional certainty of religious court in providing legal services for the justice seekers may not necessarily be placed upon its authority, especially regarding the Basyarnas verdict execution that based on the Article 49 of Law No. 3 of 2006 and article 55 of Law No. 21 of 2008 it is the religious court authority. It is due to the anomalies with the existence of general court authority both in article 55 paragraph 3 of Law No. 9 of 2008 on Sharia Banking as well as in the explanation of article 59 paragraph 1 of Law No. 48 of 2009 on Judicial Power. The authority of religious court should be horizontally equal with that of general court to reflect the independence and freedom of the judicial power which is the mission of integrated justice system.

Mechanism Certainty

Norm of Basyarnas verdict execution between Religious Court and General Court in article 59 and its explanation in subsection (1) Law No 48 of 2009 concerning certainty of mechanism do not reflect justice value.

Time and Predictive Certainty

To achieve justice, we need to consider time and predictive certainty. It is related to the management of the court, since management system is important to achieve the objectives of organization in an efficient, effective, and productive way.[4]

First, management of court in the field of material. Religious court management grows rapidly. According to JND Anderson, in the 1960s, Religious Court was considered had a poor performance (unsatisfied justice system). It is due to the lack of unification and codification of legal materials.[5]

In contrast with Anderson, in his analysis Daniel S. Lev confirms that the existence of the religious court is a definite community needs and may not be changed by political changes. Lev's prediction became reality when in 1974 Law No. 1 of 1974 concerning marriage was established. It became evidence that religious court is getting sturdy.[6] A research conducted by Cate Summer and Tim Lindsey's states that the Religious Court which was originally an underestimated judicial, became successful and led to judicial reform in Indonesia.[7] It became juridical source which confirms that religious court is the most appropriate institution to hold authority of Basyarnas verdict execution.

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[1] Ahmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence),* (Jakarta: Kencana Prenada Media, 2009), p. 273

[2] Bagir Manan, *Sistem Peradilan Berwibawa, Suatu Pencarian* (Yogyakarta: UII Press, 2005), p. 12

[3] Ibnu Elmi AS Pelu, "Titik Taut Kewenangan Peradilan Agama dan Peradilan Umum Dalam Perundang-Undangan di Indonesia", Dissertasion, Faculty of Law University of Brawijaya, 2010, p. 301

[4] Manan, *Sistem Peradilan Berwibawa ...,* p. 22

[5] JND Anderson, *Islamic Law in The Modern Word* (New York: New York University Press, 1970), p. 85

[6] A. Qadri Azizy, *Hukum Nasional, Eklestisisme Hukum Islam dan Hukum Umum* (Bandung: Teraju, 2004), p. 167

[7] Cate Summer and Tim Lindsey, *Courting Reform, Indonesia's Islamic Courts and Justice for the Poor* (New South Wale: Lowy Institute for International Policy, 2010), p. 17

Second, the management of formal court. Management of Religious Court from the authority perspective has not shown a good performance for there are reactualization efforts by a number of nation components of the stigma and anomalies of past historical of Religious Court into juridical reality present, namely (a) reactualization of conflict of previous norms. Attempts have been done to put conflict of previous norms into Article 55 and explanation of article 55 of Law No. 21 of 2008 concerning Sharia Banking and into Article 59 and the Explanation of article 59 Law No. 48 of 2009 concerning the Power of Justice, and (b) the reactualization of reception theory implementation.

The implementation of reception theory in the history of in Indonesia legislation appears in three terms. First, Stbl 1937 No. 116 and 610 jo Stbl 1937 No. 638 and 639. Stbl triggers revocation of authority settlement of inheritance cases and verdict execution of the Religious Court which is given to Landraad (District Court). Second, Article 63, paragraph 2 of Law No. 1 of 1974 concerning Marriage. It stated that "Every decision of Religious Court is confirmed by General Court". This article clearly puts the Religious Courts in inferior and dependent position. ***Third***, on the general explanation of Law No. 7 of 1989 on The Religious Courts, number 2 paragraph 6 referred "With regard to the material, before starting the litigation the parties may consider to choose which laws they will use to distributing inheritance".

According to Ichtiyanto, the law choice is a form of enacment of the reception theory, which is called by Hazairin as "Satan's theory".[1] Ismail Sunny confirms that giving freedom in the law choice is similar to providing an opportunity for Moslems to be hypocrites.[2] Sunny also states that there is no use of society categorization based on religion and the courts based on law if there is a legal option for them.[3] David Ali strictly calls person who choose laws as an apostasy (person who abandons the religion of Islam).[4]

According to Achmad Gunaryo, the choice of law to settle inheritance cases is a continuation of the enactment of the Staatsblad 1937 in smoother form. This controversial Staatsblad had been critized by Moslems. The staatsblad made by Religious Courts lost its competencies over the inheritance issues. It is a symbol of rivalry between Religious Court and District Court.[5]

The Norm Reconstruction of Basyarnas Verdict Execution in Sharia Economic Dispute

Every law of God always has a purpose (*maqashid al-sharia*).[6] Maqashid al-Sharia utilizes maslahah as an essential element of law purpose.[7] The analysis of this section focuses on three things, namely (a) the validity of the norms of the Basyarnas verdict execution, (b) the principle of conflict resolution of norm of Basyarnas verdict execution, (c) the steps of norm reconstruction..

a. The Validity of Norms of Basyarnas Verdict Execution

To find the validity of norms, the analysis focuses on philosophycal, historical, political, and juridical validity.[8]

The Philosophical Validity

Based on the analysis in Chapter III, there are five philosophical strengths and weaknesses within the norms of Basyarnas verdict execution. ***First***, the process of formulation is in harmony with the spirit of posmodernism and the divine law theory of Aquinas model, but not on the norm substance. ***Second***, maslahah (benefits) is often mentioned by Commission XI of House of Representatives, but it has no substance norm. ***Third,*** the concept of State law means the law is supreme. However, it is not for judicial authority. ***Fourth***, judicial authority carelessly formulates an explanation of article 55 of Law No. 21 of 2008 and article 59 of Law No. 48 of 2009. ***Fifth***, legal economic thought led to the building of nation, Pancasila. However, the substance of the norm has not been filled with Pancasila values.

The Historical Validity

The analysis of this chapter indicates three historical weakness of norm of Basyarnas verdict execution. ***First,*** since the publication of the Stbl 1835 No. 58 to Law No 9 of 2008, authority inconsistencies occured in Religious Court. ***Second***, there was an absolute competence tug between Religious Court and General Court.

[1] Ichtiyanto, "UU Peradilan Agama masih Mengandung Teori Iblis" dalam *10 Tahun Undang-Undang Peradilan Agama* (Jakarta: Departemen Agama, 1999), p. 22
[2] Kompas, July 1, 1999
[3] Tempo, July 8, 1989
[4] Depag, *Peradilan Agama di Indonesia, Sejarah Perkembangan Lembaga dan proses Pembentukan Undang-Undangnya* (Jakarta: Dirbinabapera, 2001), p. 73
[5] Gunaryo, *Pergumulan Politik ....,* p. 218
[6] Abu Ishak asy-Syatibi, *al-Muwafaqat, Jilid I* (Beirut: Dar al-Fikr, 1341 H), p. 150
[7] M. Khalid Mas'ud, *Filsafat Hukum Islam dan Perubahan Sosial,* alih bahasa Yudian W. Aswin (Surabaya: al-Ikhlas, 1995), p. 241
[8] Sudikno Mertokusumo, *Mengenal Hukum: Sebuah Pengantar* (Yogyakarta: liberty, 1991), p. 74

Third, the one roof judicial system is a one-stop place for four judicial environments independently. However, the spirit of independence has not been accommodated in norms.

The Political Validity

In the analysis of Chapter III, there are political strengths and weaknesses within norms of the Basyarnas verdict execution. ***First***, the legal politics in the formulation of article 49 of Law No. 3 of 2006. The strengths are law construction, one roof justice, judicial strengthening, sharia economic for Religious Court, and the elimination of inheritance option. Its weakness is the suspicion to the Religious Court. ***Second***, the legal politics in the formulation of Article 55 of Law No 21 of 2008. The strengths are legal awareness of The House of Representatives, development optimization, the mobilization of funds, the development of economic law, and the process that is in accordance with *maslahah*. The weaknesses are the efforts to defeat the draft of law and the Government intervention. ***Third***, the legal politics in the formulation of article 59 of Law No. 48 of 2009. The strength is the completion of the law of justice. The weaknesses are the revocation of old law and authority of Religious Court, conflicts broadening and reactualization of *receptie* theory.

The Juridical Validity

First, theoretical review of legal politic. From the perspective of legal politics, norms of Basyarnas verdict execution has some strengths and weaknesses, namely (a) Article 49 Law No. 3 of 2006 lays the basis norms of sharia economic dispute resolution, (b) article 55 of Law No. 21 of 2008 details and weakens the norm, (c) article 59 of Law No. 48 of 2009 broadens and triggers conflicts of norms, the term "Sharia Economic" in article 49 of Law No. 3 of 2006 is comprehensive, (d) article 59, paragraph 3 of Law No. 48 of 2009 gives freedom to resolve disputes. Third norm as the development of economic law, the assertion of Religious Court and General Court authority.

Second, Theoretical review of legislation. From the perspective of the legislation theory, the construction of norms of Basyarnas verdict execution has strengths and weaknesses, namely the establishment of three norms through a systemic approach, a better understanding to three norms within material and formal meaning. Article 49 of Law No. 3 of 2006 is formulated in the spirit of dispute resolution, article 55 of Law No. 21 of 2008 is energized with the benefit (*maslahah*), article 59 of Law 48 of 2009 is energized with old law replacement. The three norms is the institutionalization of good and bad values, the formulation of article 59 of Law No 48 of 2009 is the creation of new law, and norms of the Basyarnas verdict execution are not in harmony with legal certainty.

b. Principles of Conflict Resolution in Norms of Basyarnas Verdict Execution

Legal rules is the regulation of life which determine how to behave in order to protect all interests.[1] The rule is the synonym of norm.[2] There are four norm, namely norms of decency, civility, religion and legal norms.[3] According to Radbruch, the rules of decency is included in the ideal rule, while the rule of law is included in the rule of culture.[4] Sometimes the rule of law is created by law-makers and sometimes it is derived from another rule. Paul Bohannan called the later form as double legitimacy.[5] The followings are the explanation of two new principles.

Principle of Consistence

There is a significant relevance between principle of consistency and norm of Basyarnas verdict execution. It can be affirmed, that there has been a conflict between the norms of Article 49 of Law No. 3 of 2006 concerning amendment of Law No. 7 of 1983 concerning The Religious Courts and Article 55 Law No. 21 of 2008 concerning Sharia Banking. According to Abdul Gani Abdullah, principle of *lex posteriori derogat legi priori*, cannot be apply to Law No. 3 of 2006, because Law No. 21 of 2008 which gives opportunity to the General Judicial to resolve the sharia economic dispute based on the contents of the contract, is not in the same position. Religious court is in the position of litigation, while the General Court is in With the principle of *argumentum a contrario*, Abdul Gani's interpretation deriving from the principle of *lex posteriori derogat legi priori* emerges a different understanding when it is associated with Article 59 and the explanation of Article 59 Law No. 48 of 2009 concerning the Judicial power, which clearly mentions "which called by arbitrase in this provision also include sharia arbitration". Article 59 Law No. 48 of 2009 makes, the General Court positions are not only as non-litigative resolution, but also being litigative one. Therefore, the interpretation of Abdul Gani that Sharia economic dispute resolution by General Court is non-litigative as referring to Article 55 Law No. 21 Th 2008

[1]Sudino Mertokusumo, *Penemuan Hukum, Sebuah Pengantar* (Yogyakarta: Liberty, 2004), p. 11
[2] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2006), p. 51 and 53
[3] Van Apeldoorn, *Inleiding tot de Studie van Het Nederlandse Recht*, translated by Oetarid Sadino, *Pengantar Ilmu Hukum* (Jakarta: Noordhoff-Koff, 1958), p. 13
[4] Ahmad Ali, *Menyimak Tabir Hukum* (Jakarta: Gunung Agung, 2002), p. 43
[5] Ali, *Menyimak Tabir Hukum* ..., p. 49

becomes weak and disputable by due to the publication of the Article 59 and the explanation of article 59 Law No. 48 of 2009 concerning the judicial powers. Thus, the principle of *lex posteriori derogat legi priori* cannot not resolve this norm conflicts.

According to Abdul Gani Abdullah, with the same argument, the principle of *lex speciales derogat lex generalis* cannot be applied to Law No. 3 of 2006, because the principle is only applicable to the same and equal legal regime. Law No. 3 of 2006 is Law on amendment of Law No. 7 of 1989 concerning the Religious Courts. While Law No. 21 of 2008 is the Law of Sharia Banking. So, the two laws have different legal regimes. Law No. 3 of 2006 is a specialist Law of Judicial Powers Law. On the other hand, the Law of Sharia Banking is a specialist of Banking Law. It concerns two different legal materials, so the principle of *lex speciales derogat lex generalis* cannot be applied. Thus, Law No. 21 of 2008 cannot override Law No. 3 of 2006, or move absolute competence of Religious Court to General Court.[1]

Based on the description above, it can be affirmed that, the sentence "The judicial in general court environment" in non-litigation group can be ruled out by the judge, because the way is beyond litigation. Based on this juridical interpretation, sharia economic dispute for litigation is in the Religious Court.[2]

Juridically, the provision of Article 55 Paragraph (2) Law No. 9 of 2008 indicates that there has been a reduction of Religious Court competencies in the field of sharia economic. A different forum is not necessary and it should be freely chosen (choice of forum) by the litigants. Litigation and non-litigation choice of forum does not raise problem of law. But when a choice of litigation occurs, then it can be concluded that there has been a distribution of competency and opportunistic choice, which not only emerge verdicts disparity and legal uncertainty, but also legal confusion (legal disorder).[3]

The use of *argumentum a contrario* model interpretation compared to Abdul Gani's interpretation which departs from the principle of *lex speciales derogat lex generalis* raises different understanding when it is related with Article 59 and Explanation of Article 59 of Law No. 48 of 2009 concerning Judicial Powers, which clearly mention "which means by "arbitrase" also includes sharia arbitration". The article 59 of Law No. 48 of 2009 concerning Judicial Powers has the same regime with Article 49 of Law No. 3 of 2006, even Article 59 of Law No. 48 of 2009 which contains provisions for the Basyarnas verdict execution is specialists from Article 49 Law No. 3 of 2006 which contains the provisions of sharia economic dispute in general. Therefore, the interpretation of Abdul Gani which states that Law No. 3 of 2006 is the specialists of Judicial Powers Law becomes less valid and disputable by the publication of Article 59 Law No. 48 of 2009 concerning Judicial Power. So, the principle of *lex speciales derogat lex generalis* also has not been able to resolve this dispute.

Principle of Compulsory Avoid Otoriterianism of Elitist Positive Norm

In accordance with the context of the reconstruction analysis of Basyarnas verdict execution, the author offers a principle of "Being Compulsory to Avoid Authoritarianism of Elites Positive Norm".

According to Jazim, in the past, the elite positive jurists claim themselves as the only center of academic authority and professional to give legal meaning.[4] In Islamic law, we also know authoritarianism of elite jurist. There is a tendency from religious elite that they consider themselves as the sole interpreter, condemn different opinions as wrong even kafirs (infidel).[5] Intellectual authoritarianism is the action of person or group who restricts the desire of God.[6] Each text is explicit and it requires everyone to make an interpretation. To prevent interpretation is despotism.[7] A text is always open to interpretation.[8] To prevent authoritarianism, an interpreter must be honest, serious, thorough, rational, and self controlled.[9]

This principle has significant relevance to the norms of the Basyarnas verdict execution. It can be explain that Intellectual authoritarianism is the action of a person or group who shuts close or limits the meaning of Article 49 Law No. 3 of 2006, Article 55 Law No. 21 of 2008, and Article 59 Law No 48 of 2009 within the

[1] Hasan, Menyoal Kompetensi …, p. 138
[2] Hasan, Menyoal Kompetensi …, p. 138
[3] Hasan, Menyoal Kompetensi..., p. 139
[4] Jazim Hamidi, *Hermeneutika Hukum, Sejarah, Filsafat, dan Metode Tafsir* (Malang: UB Press, 2011), p. 35-36
[5] Chandra Muzaffar, "Reformation of Sharia or Contesting the Historical Role of the Ulama, " in Nourani Uthman (ed), *Shari'a Law*, p. 23.
[6] Nasr Hamid Abu Zaid, *Tekstualitas al-Quran, Kritik Terhadap Ulumul Quran*, translate by Khoiron Nahdliyin (Yogyakarta: LkiS, 2002), p. 1
[7] M. Amin Abdullah, *Pendekatan Hermeneutika dalam Studi Fatwa-fatwa Keagamaan*, Kata Pengantar dalam Khaled Abou el-Fadhl, *Atas Nama Tuhan, dari Fikih Otoriter ke Fikih Otoritatif*, translated by R. Cecep Lukman Yasin (Jakarta: Serambi Ilmu Semesta, 2004), p. xii-xiii
[8] Mutawalli, "Membebaskan Hukum Islam dari Otoritarianisme Intelektual", dalam *Istinbath* (Jurnal Fakultas Syariah IAIN Mataram), No. 2 Vol 1 January-June 2004, p. 22
[9] Khaled Abou el-Fadhl, *Cita dan Fakta Islam, Puritanisme vs Pluralisme*, translated by Heru Prasetia (Bandung: Mizan, 2003), p. 206

boundaries of certain provisions and serves these provisions as a legal norm which cannot be avoided, final, and cannot be disputed. When an interpretation opportunity is closed, then arbitrariness occurs. Any text within the norms of the Basyarnas verdict execution is always open. The openness of the texts requires everyone to do interpretation. To prevent the process of interpretation is a form of despotism.

There are two things that must be agreed upon in the reconstruction of the norms. ***First***, the norms of Basyarnas verdict execution is a product of the Indonesian people rationality. Its truth is relative and not sacred. So, the truth of Basyarnas verdict execution norms can be tested and re-examined (*qabilun li al-taghyir wa al-niqasy wa al-tajdid*). According to Jurgen Habermas, everything must be ready for debate process to seek a deal.[1] What is true according to norms maker of Basyarnas verdict execution a few years ago is not necessarily right for the moment.

According to Ali Harbi, every text is a symbol and each symbol cannot conceptualize reality perfectly, so a text always emits minimal truth.[2] Refers to a conception of Harbi, Basyarnas verdict execution norm is a normative text in the form of legislation and it becomes a symbol which cannot represent the legal reality perfectly. Therefore, the truth is minimal. ***Second***, to do the interpretation, a person should put distance with the norm of Basyarnas verdict execution to ensure the originality and the objectivity of interpretation. When a tendency to existing norms occurs, in the language of Mazheruddin Siddiqi, existing legal norms may be considered as sacred (*taqdis al-afkar al-diniyyah*).[3] Thus, the element of subjectivity is very prominent and it is difficult to obtain objectivity. However, according to Farid Esack, subjectivity of interpretation still needs to be appreciated.[4]

Thus, this principle will be nullifying subjectivism in interpreting the norms of Basyarnas verdict execution. As it is known before, the authoritarianism of elite positive norms can be seen from the attitude of Supreme Court that put the Article 49 Law No. 3 of 2006 and Article 55 Law No. 21 of 2008 in the inferior position and place Article 59 Law No 48 of 2009 in superior position. The relation of the same laws should be horizontal, instead of vertical.

Based on the description above, it can be concluded that Supreme Court gets infected with intellectual authoritarianism for shutting up the meaning of Article 49 Law No. 3 of 2006 and serving SEMA No 8 of 2010 as norm of Basyarnas verdict execution. When SEMA No. 8 of 2010 SEMA closes the interpretation opportunities to the norms of the Basyarnas verdict execution, arbitrariness, hegemony, and tyranny occurs against higher norm, that is Article 49 Law No. 3 of 2006. It is due to the nature of text within the norms of Basyarnas verdict execution which is open. According to Ilyas Supena, the door of *ijtihad* is always open and no one can close it.[5]

According to Amin Abdullah and Chandra Muzaffar, clogging up the process of interpretation is despotism. It reinforces the assumption of Elizabeth Mayer, that the basic problems of codification of Islamic law in Moslem countries is the emergence of conflicts of traditional legal sources with codification of the laws enacted, because traditional practices is not accommodated into the legal codification.[6]

Finally, it can be affirmed that this principle will eliminate authoritarianism that plaguing some of the parties. ***First***, Article 59 and Explanation of Article 59 Law No 48 of 2009. ***Second***, SEMA No. 8 Th 2010. ***Third***, the institution that issued the SEMA No 8 of 2010 in this is Supreme Court. ***Fourth***, the party which make the Article 59 Law No. 48 of 2009. This principle is in accordance with the statement of Hans Kelsen, that from the perspective of positive law, there is no method that can be used to determine that there is only a single norm considered as "true".[7]

Consistent with the principle of equality and alignment of the Law, as well as in accordance with the principle of consistency and principle of being compulsory to avoid authoritarianism of elite positive norm, ideal steps of to resolve norms conflict is by reconstructing those norms.

1. The first step (short term)

   The removal of SEMA No. 08 of 2010 and the enactment of the SEMA No. 08 of 2008. It is a practical, quick, and fair step conducted by Chairman of Supreme Court.

2. The second step (medium-term)

   The next step is carrying out Judicial Review of Paragraph 2 and 3 of Article 55 of Law No. 21 of 2008 concerning Sharia Banking. It involves sharia economic actors and the Court of Constitution.

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[1] Jurgen Habermas, *Theory of Comunicative Action* (Boston: Boston University Press, 1979), p. 15
[2] Hamidi, *Hermeneutika Hukum* ..., p. 131
[3] Mazheruddin Siddiqi, *Modern Reformst Thought in the Moslem World* (Islamabad: Islamic Research Institute, 1982), p. 230
[4] Hamidi, *Hermeneutika Hukum* ..., p. 130
[5] Ilyas Supena dan M. Fauzi, *Dekonstruksi dan Rekonstruksi Hukum Islam* (Yogyakarta: Gama Media, 2002), p. 214
[6] Ann Elizabeth Mayer, "The Syariah: a Methodology or a Body of Substantive Rules", in Nicholas Heer, *Islamic Law and Jurisprudence* (Seattle and London: University of Washington Press, 1990), p. 198
[7] Hans Kelsen, *Teori Hukum Murni, Dasar-dasar Ilmu Hukum Normatif*, translate by Raisul Muttaqien (Bandung: Nusa Media, 2008), p. 388

3. The third step (long term)
   The last step is improving Law No. 9 of 2008 and Law No. 48 of 2009. These improvements should be done in order to consistently give authority to Religious Court based on mandate of Law No. 3 of 2006.

Conclusion

Based on the description, conclusions that can be drawn are:

1. The using of Article 59 Law No. 48 of 2009 concerning Judicial Power and the waiver of Article 49 Law No. 3 of 2006 concerning amendment of Law No. 7 of 1983 concerning Religious Court and Article 55 Law No. 21 of 2008 on Sharia Banking as a reference for Basyarnas verdict execution are based on philosophical, historical, political, and juridical argument. ***First***, philosophical argument. The substance of Article 59 Law No. 48 of 2009 concerning Judicial Power is not imbued with (a) spiritual values of postmodernism spirit and Divine law, (b) the principles of *maslahah* (benefits), (c) in compliance with the law, and (d) the spirit of nation building of Pancasila in the field of sharia economic law.
   Second, the historical argument. Norm of Basyarnas verdict execution is energized by (a) a historical inconsistency of the absolute competence of religious court, (b) a tug of absolute competence separation between Religious Court and General Court, (c) disharmony with independence principle of one roof justice system. ***Third,*** political argument. Norm of Basyarnas verdict execution is filled with (a) dualism of sharia economic dispute resolution, (b) government intervention, (c) the enactment of the *receptie* theory, (d) preservation of norm conflicts. ***Fourth***, the juridical argument. The granting of authority to the religious court and the General Court describes an incomprehensible accommodation of religious values. As a result, it fails to convince the public due to the choice of law.
2. The relevance of the norm of the Basyarnas verdict execution and the law objective is blur. It can be seen from the three principles of law objective. ***First,*** justice. The process of norms formulation is relevant to moral, social, legal, procedural, substantive, distributive, and commutative justice. However, the substance of the norms is only relevant to legal and commutative justice. ***Second***, legal certainty. Norm of Basyarnas verdict execution is irrelevant with (a) the certainty of rules, because of it's exaggeration on putting forward rational laws positivism, (b) institutional certainty, because the conflict of legal regimes, (c) the mechanism certainty, due to the interdependence among the same level courts, (d) time and predictive certainty, because of norm conflict shackles. ***Third***, the benefits. The substance of the norms of Basyarnas verdict execution is irrelevant with (a) pleasure, because it gives pleasure on one side and not the other, (b) goodness, because it has norm reduction, and (c) happiness, because it elicits the doubt of sharia economic law development.
3. There are two legal principles of conflict resolution for norms of Basyarnas verdict execution. ***First***, the principle of consistency, which result on (a) the amendment of Article 55 and Explanation of Article 55 Law No. 21 of 2008 concerning Sharia Banking, (b) the amendment of Article 59 and Explanation of Article 59 Law No. 48 of 2009 on Judicial Power, and (c) the revocation of SEMA No. 08 of 2010 as well as the enactment of SEMA No. 08 of 2008. ***Second***, the principle of being compulsory to avoid authoritarianism of elites positive norm. The essence of this principle is to control the desire to have power to prevent authoritarianism, hegemony and tyranny in the substance of the norms of the Basyarnas verdict execution with Law No. 48 of 2009 concerning Judicial Power to Law No. 3 of 2006 concerrning amendment of Law No. 7 of 1989 concerning Religious Court and Law No. 21 of 2008 concerning Sharia Banking.

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