

# Synchronization Court Involvement on Sharia Arbitration in Order to Enforce Islamic Law in the Sharia Economy Dispute Resolution

Khoirul Anwar<sup>1</sup> Jamal Wiwoho<sup>2</sup> Burhanudin Harahap<sup>2</sup>

1. A Student in Doctoral Degree of Sebelas Maret University of Surakarta, Faculty of law, Ir Sutami Street 36 A, Surakarta, Central of Java 57126, Indonesia

2. of law Sebelas Maret University of Surakarta, Ir Sutami Street 36 A, Surakarta, Central of Java 57126, Indonesia

## Abstrack

Evaluating the court involvement on sharia arbitration in Indonesia, the purpose of this research is to know the causes of court involvement on sharia arbitration has not been able to fully enforce Islamic law in the sharia economy dispute resolution and to find the new design of court involvement on sharia arbitration that can fully enforce Islamic law in the sharia economy dispute resolution. This research uses normative legal research/doctrinal and non doctrinal legal research. To validate the elaboration of the work, this research will apply the Friedman theory of legal system, that include substance, structure and culture of law. To support this theory, this research will also use the Mashlahah theory, that include maqasid sharia.

## A. Introduction

Everyone has the right to conduct economic activities in order to make ends meet and achieve their welfare. Economic and social rights is categorized as the human rights, and second generation of human rights. These economic rights have been a concern and listed in both the national and international instruments. Therefore, economic activity is a fundamental right. Every person has the freedom to undertake economic activity. These freedoms have been guaranteed formally by the Constitution of the Year 1945 (UUD 1945) of Article 33 paragraph (4). Economic activities (as guaranteed by the Constitution) can be done with the economic activity based on the conventional economic system or the principles of Islam (sharia economics).

Conventional economic system, for most people felt not liking the basis of their human rights, so they chose to engage in economic activities with Sharia economic system that is suitable for them to carry out economic activities. It caused, sharia economy is an attempt to avoid economic practices that are prohibited by Islam. Sharia economic activity has special characters which also distinguishes the ways of conventional economic activity. They are the prohibition of any additional required in business transactions without their equivalents/iwad that justified sharia (riba), uncertainty (gharar) and gambling (maysir).

The main concern for economic actors is the implementation of the rights and obligations under the agreement of each party. The main concern for business Sharia is not only the implementation of the rights and obligations under the agreement of each party, but also keeping the principles of Islam still underlies every economic activity. So it is actually a major concern both conventional and Islamic finance business is not the conflict or the dispute. however in reality, conflicts and disputes can arise.

In the settlement of private disputes, particularly in business disputes, the parties have the freedom to determine the ways for settling their disputes. They may take the way of settling disputes through the courts or out of the court. The alternatives of dispute resolution outside the court may be arbitration and alternative dispute resolution which includes consultation, negotiation, mediation, conciliation or expert assessment. The way out of court settlement of disputes through arbitration began in great demand by economic actors. The parties prefer to choose arbitration because it is faster, more effective and more efficient than the settlement of disputes through the courts. For businesses of sharia, they use sharia arbitration to resolve their dispute. in fact, sharia arbitration requires the involvement of sharia arbitration court. There are some court forum in the judicial system in Indonesia, namely the general court, religion court, military court and administrative court. Relegion court authorized to settle economic sharia disputes.

Further problems arise when it becomes normative provisions in the legislation stipulates that the court involvement on sharia Arbitration relying on the judiciary in general courts. General courts did not formally have the absolute competence of sharia economy. It shows that the arbitration court against the sharia is not appropriate. The philosophy of the sharia arbitration is base on Sharia principles. It is different from the court which based on conventional law. This condition is used by the parties to win his case. In principle, in the arbitration, the court involvement is limited. The parties prefer to use the court involvement is a negative thing for law enforcement. If this condition left and did not immediately get a solution, certainly will not give a positive contribution, both for the parties themselves and to the formal legal institutions. The massive cases accumulated in the judicial field is caused by this condition. This is the reason to know in depth why the court

involvement on sharia arbitration not in sync so it can not fully support the enforcement of Islamic law in the sharia economic dispute resolution. If the causes can be recognized, then will be obtained the new design of court involvement on sharia arbitration that really can support the enforcement of Islamic law in the sharia economic dispute resolution.

## B. Research Method

This research is empirical law research and normative research. It is done to answer the question why the court system has not been able to enforce the Islamic principles in the disputes resolution in sharia arbitration fully, and possibility to think out of new norms to create the court involvement on sharia arbitration that can fully enforce the Islamic principles in the disputes resolution through the sharia arbitration.

The primary data was collected from field study with from of words or action which were gained through in-depth interview. It was done directly for the built relationships through the interview process that was not structured. Primary data in this study were obtained by interview, by the Judges of the Supreme Court in Indonesia, Management of the National Sharia Arbitration Board (BASYARNAS), Director of Indonesia Islamic Banking Association (ASBISINDO), and few lawyer of law firm in Indonesia and the doers of activities of sharia economy in person. Secondary data is the data obtained from the literature, which include the primary legal materials and tertiary. In accordance with the method used, the analysis of the research in conducted with one phase that the analysis conducted using qualitative analysis that uses interactive models of analysis.

## C. Discussion

### 1. *Enforcing Islamic Principles In the Settlement of Disputes through sharia Arbitration In Justice System in Indonesia*

The commitments in the welfare state (economic rights and social) that stated in the preamble of the Constitution of 1945 (1945) in the fourth paragraph is "protect the entire Indonesian nation and the entire homeland of Indonesia, and to promote the general welfare, educating the nation, and participate in implementing world order based on freedom, lasting peace and social justice". Thus the constitution also contains the principles and provisions relating to economic and social rights.

For the Muslim community, the conventional economic activity (not run by the tenets of the Shari'ah) has not fulfilled economic rights are fundamental for him. Thus, the state (in the perspective of the state is obliged to fulfill the rights of every citizen) giving wide space in the development of the economic system based on values of justice, solidarity, equity, and benefit in accordance with Sharia principles that also in line with the face of Indonesia's economic system. It shows that the state has to give economic rights to the people who want to run the economy with the principles of sharia.

In the context of the country assume the obligations and responsibilities of the welfare (economic rights and social), the state must be obliged to provide a dispute settlement mechanism for the community, not only formal mechanism (court), but also obligated to some extent participate in the dispute settlement mechanism outside the court including sharia arbitration. It is merely the State guarantees the public can obtain equitable dispute resolution and still maintained the principles of Islam in economic activity.

The state is obliged to provide sharia economic dispute resolution forum. It is caused that sharia economy has specificity compared to conventional economics as previously described. Characteristics that immediately apparent from its specificity is in its activities prohibits the practice, gharar, riba, maisyir and tadtis. These concepts can actually minimize the conflict between economic actors Shari'ah. However, sharia economic activities which are well developed, the transactions have also been carried out by the community, as well as the competitive nature of the complex and increasingly sharp, it can also bring conflicts and disputes.

Therefore in sharia economy disputes, the settlement of disputes arising also choose a special character handling. Conventional economic cases is the absolute authority of domestic courts, but sharia economic is given authority to the Religious Courts. It is then poured into the normative provisions in the legislation. The provision is contained in Article 49 of Law No. 3 of 2009 on the Amendment of Act No. 7 of 1989 About the Religious Court.<sup>1</sup>

In the resolution of such disputes, the parties have the freedom to choose the dispute settlement mechanism. Thus court is not the only dispute settlement mechanism. There is an alternative dispute resolution outside the court. The normative provisions concerning the freedom of the parties to choose a court settlement mechanism is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. It is in line with the theory as presented by Marc Galanter.<sup>2</sup> He wrote:

*"Just as health is not found in hospitals or knowledge in schools, so justice is not primarily to*

---

(c) made in the course of business with a view to discrediting the undertaking, products or commercial activities of a competi

*be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity-home, neighborhood, workplace, business deal and so on (including a variety of specialized remedial settings embedded in this location)."*

In case the mechanism of dispute resolution outside the court, the parties can choose arbitration as a dispute resolution forum. If economic activities are run with the principles of Sharia, the arbitration is referred to sharia arbitration.

## 2. Court involvement on sharia arbitration in Indonesia.

As described in the foregoing discussion that formally, the state has provided the courts as a forum for dispute resolution of sharia economic. Religious Courts are formally given a mandate by law in any particular case in order to uphold the principles of Islam. Thus It shows that the state has given clear legal frame of reference for Islamic economic dispute resolution if the mechanism chosen is litigation (court).

Terms of reference as mentioned above can not be given, especially in the dispute settlement mechanism outside the court. Sharia arbitration is a private institution that within certain limits still requires the intervention of the state. Ideally, the state can guarantee mechanisms for dispute resolution through sharia arbitration that really be able to deliver the parties to justice. It also assured that the principles of Islam in economic activity prinsp upheld. The state within certain limits, can influence sharia arbitration through the Court, because the Court is a representation of the state.

Norms regulating the shari'a arbitrage refers to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. The linkage between the court and sharia arbitration, was stipulated that Court involvement both with "arbitration" or "sharia arbitration" refers to the general courts.

The general Court had the authority in the field of conventional economics. Formally the District Court was not given the mandate by law to uphold the values / principles of the Sharia. General court handles the case it refers to the general provisions applicable. Thus there is no legal guarantee that general court can uphold the principles of Islamic through sharia arbitration. this condition is used as a loophole for certain parties out of the sharia principles. The parties did that due to intent by provit and benefits. In some studies show that most people still feel protected by the laws of the west compared with Islamic law despite the economic activities they are doing is sharia economy.

## 3. The Causes of court involvement on sharia arbitration that not been able to fully enforce Islamic law in the sharia economy dispute resolution.

In The implementation of court involvement on sharia arbitration as described in the foregoing discussion, it turns that court involvement has not fully support the Islamic law enforcement in the sharia economy dispute resolution. Some causes can be described bellow :

### a. Sharia Arbitration terminology has not been recognized in legislation.

Sharia arbitration in Indonesia is subject to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. Chapter I General Provisions Article 1 (1)<sup>1</sup> Relation to the court, the provisions of Article 1 (4) of the law No. 30 of 1999 states: "District Court is the District Court whose jurisdiction covers the residence the defendant." Of these provisions can be seen that the Act does not recognize sharia arbitration terminology. It is seen from the other clauses in the Act does not at all refer to arbitration the sharia.

Furthermore if the Act No. 30 of 1999, compared with Law Number 48 Year 2009 concerning Judicial Authority that enacted next decade, the Law on Judicial Power tends to equate between arbitration and the arbitration Shari'ah. The provision is obtained on Article 59 paragraph (3) of Law 48 of 2009 on Judicial Power.<sup>2</sup> Provisions that explicitly equate between arbitration and the sharia arbitration is contained in the elucidation of Article 59 Paragraph (1) of Law 48 of 2009 on Judicial Power. It states "referred to arbitration under this provision also includes arbitration Shari'ah."

The vagueness of terminology led to confusion in the Act which resulted in confusion in the interpretation and implementation. Such circumstances could potentially cause interference to law enforcement. As stated by Soerjono Soekanto that the disruption of law enforcement comes from Act may be due to (1) not followed the principles of the enactment of legislation, (2) absence of implementing regulations that are needed to implement the law , (3) lack of clarity of the words in the legislation that resulted in confusion in the interpretation and application.

Therefore, the law does not recognize sharia arbitration terminology that has specificity (the principles

(d) tor.")

See also the Civil Code, *supra* note 76, Art. 2057. (This provision, captioned as "Unfair competition" provides that "[a] person commits an offence where, through false publications, or by other means contrary to good faith, he compromises the reputation of a product or the credit of a commercial establishment.")

<sup>2</sup> Ibid, Art. 134 (1) (a).

<sup>2</sup> The Civil Code of the Empire of Ethiopia, Art. 2163.

of Shari'ah), then the mechanism of dispute settlement through sharia arbitration must follow the applicable provisions for arbitration in general. The consequence of the mechanism of dispute settlement through sharia arbitration must follow the applicable provisions for arbitration in general, so if there is a point of contact between sharia arbitration and court, the court in question is the general court.

b. Structure of court has not adjusted to the court's absolute authority in the sharia economic dispute resolution (judicial structures obsolete).

The authority to resolve the dispute in economics Shari'ah is the authority of a court under the Religious Court based on Law No. 3 of 2006 on the Amendment of Act No. 7 of 1989 on Religious Courts. Article 49 of the Act affirmed the Religious Courts jurisdiction over sharia economic disputes.

Jurisdiction over the sharia economy dispute is not immediately followed by changes in the existing structure on the Court. As consequences, the sharia economy's derivative (court involvement on sharia arbitration) has not become authority of the Religious Courts. However the chronology of case handling sharia economy through sharia arbitration and then intersect with the court can be described below

Such grooves caused economic matters handled sharia sharia arbitration likened to arbitration in conventional economics. On the other hand, the Religious Courts authorized to settle disputes sharia economics, the structure has not been adjusted. The current structure is based on the authority of religious courts in the field of family law. The structural adjustment inaction if traced far backward in history, due to the National Law Political factors not yet fully sided with the Religious Courts as a representative of the Islamic court. Politics National Law on Religious courts that exist today can not be separated from the reality of history as a result of Dutch colonial legal politics. Judicial authority which made fuzzy by the Dutch government. Negative way of looking at the Dutch government to the Religious still affect the perception of the Religious Courts. The Dutch colonial law politics has negative implications not only to the institution of the Religious Courts institutions but also form a negative perception of the public to the Religious that can be felt to this day.

Religious Courts institutional structure that does not change also affects the justice system in upholding the principles of Islam in the settlement of disputes. Part of the public perception that the religious court only competent in the field of family law can still be felt to this day, so the adjustment of institutional structures to conform to the authority of sharia economic field too slow.

The court is the legal representation by the state. Thus the discussion of the justice system, the court structure element is important. Friedman<sup>1</sup> called it as a framework (skeletal frame work). He also referred to it as the rigid bones that keep the process flowing within bounds. The structure is sturdy character restrictions that keep the process can not flow out of the limits specified. The structure can be understood also as a container so that the process can run well. Associated with the judiciary that handles disputes sharia economics, the structure is a container that dispute resolution processes can run in and the restrictions are appropriate. Restrictions in question are the principles of Islam in the economic field.

Judiciary power structure at this time, based on the provisions of Law No. 48 Year 2009 on Judicial Power. Court Structure religion and religious structure of the High Court under the provisions of the latest SEMA No. 7 of 2015, changes in the existing structure is a consequence of the development of the existing law, but these changes have not been accommodating the development of a new form of authority over disputes sharia economy. The structure of the Judicial Power in Indonesia at this time base on Law No. 48 of 2009.

With the current structure of this can be seen that the structure of the court of first instance, there are no structures that are prepared to support the authority to handle the economic disputes Shari'ah. In handling family law cases, the judiciary religious structures that exist today it can be said to be adequate, but the authority in the field of Islamic economic, fixed structure becomes lagging. Family law character in contrast to the legal character of economics, especially sharia economy.

On appeal, the flow of economic dispute settlement Shari'ah also not right. This was due to structural factors. Implementation of the system room to appreciate. Judge actions completed in accordance with the appropriate expertise part of the room. cases of religious courts include shari'a economic case on appeal examined in the Chamber of Religion. However, with the existing structure, there are loopholes that allow escape syariah economic case investigation of the Chamber of Religion that is related to the cases previously examined the Islamic economic arbitration institution which then intersect with the judiciary. Against these cases examined by the Supreme Court / via civil Room is a special civil. The judge in the civil rooms that checks instead of judges Religion Room. From the secretariat of the Supreme Court the case was examined by the administration of the case carried out by a special civil secretariat instead of Deputy Registrar of civil religion.

From the description of the existing structure it is known that the presence of the existing structure as that underlying the judicial system is not yet fully able to maintain the principles of Islam in the settlement of disputes through arbitration Sharia.

c. Culturally, people do not have full legal awareness of the economic Sharia.

---

<sup>1</sup> Lawrence M. Friedman, *The Legal System A Social Science Prespective*, Russel Sage Foundation, New York, 1975, p. 14

The business culture community even though the majority of the business community syariah today have not had full legal awareness of the economic Shari'ah. It can be seen from the banking sector. Of total bank customers sharia as stated by Benny Witjaksono Executive Director of the Central Board of the Indonesian Sharia Banking Association (Asbisindo) that 90 percent of banking customers Sharia are rational customers and the remaining 10 percent are customers emotionally. Customer rational is that they are becoming Islamic bank customers because it expects profit and benefit larger. While customers who are emotionally Islamic bank customers who opt for religious reasons. The economic activity carried out is intended to worship. they choose sharia economic activity to avoid practices gharar, maisyir, usury (riba) and tadtis.

Data from ASBISINDO above show that customers with profit motivation and greater benefit. Apart from that, some studies also show that not infrequently the provisions referred to in the contract business agreement refers to Western law although in sharia economic activity. Implicit in the rational costumers consider that the provisions and principles of Islam in the economic field only hamper economic activity. They are more comfortable with the provisions of the law of western law. Characters like these brought to the dispute settlement patterns. Negative implications can arise. they do not care about the religious aspects, so that they also do not pay attention to a formal forum dispute resolution (court). Even as far as possible they avoid the settlement of disputes which holds the principles of Islam because it was inhibiting for them.

Data on the field as described above showed that 90 percent of those rational customers are generally unaware that sharia banking dispute resolution in formal (court) must be made in the Religious Courts. In addition, according to Tri Widiyono, there is a tendency that advocates prefer to resolve the sharia banking dispute to another court (general) than to the Religious Courts. He also explained that he himself was not sure why. The first possibility according to him is because the Advocates gave different interpretations of the Sharia Banking Act or perhaps they are more familiar to general courts.

The presumption of most people are Religious Courts only familiar in the areas of family law, so it is considered not capable of handling disputes over areas of business especially with respect to formal law. Many people do not know that the Islamic court has had deep historical roots with islamic principle include the shariah economy activity.

In Islam the provisions of formal (procedural law) in dealing with the case has been exemplified by the Prophet Muhammad and then practiced by his companions (sahabat). A formal law that is practiced by the Prophet's Companions and later became a milestone in Islam history are known as Dustur Umar (Umar Jurisprudence). Islam building concept is based on the belief (faith) underlying everything, but in terms of dealing with a dispute (case), the Prophet has given a warning. as stated that the prophet decide on the basis of fact, the case while the terms of his own mind, God will give you justice. The Prophet also asserted if the parties actually know if something is postulated as the right in the court, while in fact he himself knows that in fact is not right. it mean that although they won in the case, It essentially take a "hunk of burning coals of hell to him.

Business community culture that does not have full legal awareness of the economics of Shariah as described above also resulted court involvement on sharia arbitration that not been able to fully enforce Islamic law in the sharia economy dispute resolution. Culture of people who are not yet fully conscious that the Islamic economic activity not only profit and benefit, but there is a religious aspect that must be fulfilled, make correlation with sharia principle not be a ultimate point of consideration. they do not care whether the judicial representation of Islam or do not even tend to shy away from Islamic court.

4. Synchronizing of court involvement on sharia arbitration in order to enforce Islamic law in the economy of sharia dispute resolution

a. The Urgency of synchronizing of court involvement on sharia arbitration in order to enforce Islamic law in the economy of sharia dispute resolution.

The court involvement on sharia arbitration has yet to be fully support to enforce Islamic law in the economy of sharia dispute resolution. It is the reason in an attempt to realize court involvement on sharia arbitration that fully support. thus It is very necessary due to a variety of considerations :

*First*, to get a fair settlement of a dispute, the dispute arising between on the one hand with a dispute resolution forum on the other hand should be in harmony. Arbitration Shari'ah is completing certain things in economics Shari'ah. Correlation with the judiciary should also with judicial representation of Islamic judicial authorities are also in the economic field sharia. The theory of compatibility between the forum to settle the dispute has been presented by Marc Galanter. First, to get a fair settlement of a dispute. the dispute and a dispute resolution forum should be in harmony. Sharia arbitration is completing certain case in sharia economics. Correlation with the judiciary should also with the representation of Islamic judicial authorities. The theory of compatibility between the forum to settle the dispute has been presented by Marc Galanter. He mentioned the term "Macth" between the dispute with the dispute resolution forum.<sup>1</sup>

Secondly, the issue of the economy, especially in matters of business done on the sharia principle is a

---

<sup>1</sup> Marc Galanter, *Op Cit*, p. 63.

dynamic part of human life that has developed and relatively rapid change. It thus potentially arise contemporary disputes that needs solving contemporary anyway. Completion of the contemporary nature still must be guided by the principles mashlahah with achieving something desired Maqasid al-Shari'ah. It can be realized if the five basic elements can be realized and maintained they are to maintaining religion (hifzh al-Din) , nourishes the soul (al-nafs hifzh), maintaining brain (Hifzh al-'aql), and the breeding (Hifzh al-Nasl), as well as maintaining the property (Hifzh al-Mal).

Third, realize the court involvement on sharia arbitration to uphold the principles of Islam carried out due to many cases that solved in sharia arbitration then handled by court through court involvement mekanism. The negative factors arising from the lack of cases is is false, meaning that disputes / conflicts "not really show up," but in fact it appears to be but obscured. From a principled dispute resolution forum Shari'ah can not be caught because of conflict or dispute is managed in such a manner by the parties out of the Shari'ah principles. Overview of the conflict will be resolved, but from the perspective of Shariah, are often not appropriate because the Shari'ah principle is not solely for the benefit materially. Economic principles of Shariah not only allow businesses of material gain, but also carries the principle that protects the property of something illicit in principle will be detrimental to the economic actors themselves. This negative factor currently visible are from the forum for dispute resolution based Shari'ah seen minimal for handling the case. It looks apparent that seen passing in economic activity, especially in a business dispute does not appear, when disputes do not arise, even has penetrated the business crime. Crime emerging business today has meaning philosophical, juridical, and sociological.<sup>1</sup>

When there is a business interaction between individuals, the responsibility to uphold the principles of Islam in the economic field can not be simply charged to the community individually. Even individuals are not able to enforce those principles. in addition to the individual, such as the institutions that are swastapun a certain extent helpless when forced to uphold these principles. in this stage, turn to the state that appears to be able to uphold these principles. In economics dispute is resolved through arbitration Shari'ah in certain stages also are in need of state institutions in maintaining these principles. State institutions in this regard is the country's judicial institutions. Mechanisms in the current justice system does not guarantee that the judiciary can maintain those principles that build a judicial system to enforce Islamic principles became very urgent.

b. Synchronizing of court involvement on sharia arbitration

1) Vertical synchronization

Vertical synchronization is a compatibility assessment legislation from the point of strata or hierarchies of existing legislation. It refers to the principle *lex superior derogat inferiori*.<sup>2</sup> Types and hierarchy of legislation referred to in Article 7 of Law No. 12 Year 2011 on the Establishment Regulation Legislation.

Pancasila is at the peak of strata. Pancasila is as *Staatsfundamentalnorm*.<sup>3</sup> It was also often called *Philosophische Grondslag* or *Weltanschauung*. It is the deepest thoughts or deepest desires of its citizens of a country founded on it. Pancasila contains a number of doctrines, beliefs and symbols of a people or a nation into the handle and guide the work (or struggle) to achieve the purpose of the community or nation.<sup>4</sup> The second stratum is the Constitution of 1945 (UUD 1945). It is the constitution of the Republic of Indonesia which is a translation of the values contained in Pancasila. The proclamation of the ideals and objectives of RI stated in the preamble of the 1945 Constitution is conceived to build Indonesia's future as state welfare laws.<sup>5</sup> The third stratum is the law. Furthermore, this study examines some of the legislation governing arbitration of Sharia, particularly the engagement between sharia arbitration judiciary. they are are Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, Act No. 48 of 2009 on Judicial Power Law No. 2 of 1986 on the General Courts and Law No. 3 of 2006 on the Amendment of Act No. 7 1989. Suitability of the legislation with the philosophy of regulation higher will be clasificated to criteria "satisfies", "satisfies in part", and "does not meet".

In Law No. 30 Of 1999 concerning on Arbitration and Alternative Dispute Resolution, definition of Arbitration described in Chapter I General Provisions Article 1 (1). This definition is not accommodate the specificities that exist in sharia arbitration. This article, then will be analysed with the higher strata (Constitution of the Year 1945/UUD 1945). In the Article 28D (1) of the Constitution of 1945, states: "Everyone has the right to recognition, security, protection, and legal certainty and equal treatment before the law". Article 29 of the Constitution of 1945 States: (1) the State based on the Almighty God. (2) The State guarantees the freedom of each citizen to profess his own religion and to worship according to their religion or belief was. Muslim society

<sup>1</sup> Romli Atmasasmita, *Pengantar Hukum Kejahatan Bisnis*, (Introduction to Business Crime Law), Kencana, second edition, Jakarta, p. 23-26.

<sup>2</sup> Ahmad Rifa'i, *Invention Law Judge in a Legal Perspective Progressive*, Sinar Grafika, Jakarta, 2010, p.89

<sup>3</sup> Notonagoro, *The Preamble Of The 1945 Constitution (Fundamental Rule Principal points Negara Indonesia) in the Basic Philosophy Pancasila State*, fourth printing, Pantjuran seven, year,

<sup>4</sup> Mubyarto, *Ideology Pancasila In Economic Life*, the book As ideology Pancasila, BP-7, Jakarta, 1991, p. 239.

<sup>5</sup> A Mukti Arto, *Conception Ideal Supreme Court*, Library Student, Yogyakarta, 2001, p. 42-43

as Indonesian citizens have the right to undertake economic activities. For the moslem, doing the economic activities is also a worship category, so in this context, the Muslim community has the right constitutionally. The definition of arbitration in Article 1 (1) of Law No. 30 of 1999 does not recognize arbitration Shari'ah, it cause the constitutional rights of citizens (moslem) has been reduced. Thus, in this context, Law No. 30 of 1999 most of this article do not comply with a higher norm. So in this legislation can be found few article not comply with some provisions of higher norms. In the elucidation of Article 59 of Law Number 48 Year 2009 regarding Judicial Power mentions that "what is meant by" arbitration "in this provision includes "sharia arbitration". in this context also, certain articles of Law No. 48 of 2009 does not comply with the norm that is generally categorized also meet most of the higher norms. Thus Act No. 30 of 1999 and Act No. 48 of 2009 meets the provisions with higher norm in "satisfies in part" category.

Law No. 2 Year 1986 concerning the General Court, in which there are regulations governing general courts are the absolute authority in the field of conventional economic disputes. Law No. 3 of 2006 on the Amendment of Act No. 7 of 1989, there are regulations that govern the absolute authority of religious courts in the field of sharia economic disputes. Throughout seen from the provisions governing the absolute authority of each judiciary then this provision has to guarantee the rights of citizens in gaining access to justice that is tailored to its culture. Thus both these laws comply with a higher norm. So synchronization in this case can actually be done with the teleological interpretation. All sharia economic activities then referred to arbitration is sharia arbitration.

#### 2) Horizontal synchronization

Horizontal Sync is a rule synchronization that examines the compatibility of a rule of positive law written with other regulations, in the equal position and governing the same field. In this research, legislations studied are Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, Law Number 48 Year 2009 regarding Judicial Power and Law No. 2 of 1986 on the General Courts and Law No. 3 of 2006 on the Amendment of Act No. 7 of 1989. Strata of legislation are the same or parallel so that the synchronization is done horizontally.

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution does not expressly distinguish between the "arbitrage" and "sharia arbitrage. This law can not be found to accommodate the specificity provisions contained in the sharia arbitration. It resulted in the settlement of disputes through sharia arbitration mechanisms follow the applicable provisions for arbitration in general Furthermore, Law No. 48 Year 2009 concerning Judicial Authority. The law tends to equate between arbitration and the sharia arbitration. The provision is contained in Article 59 paragraph (3) which states : "In the case that the parties do not voluntarily implement the arbitration decision, the decision is implemented based on the command chair of the general court at the request of either party to the dispute". Then provisions that explicitly equate between arbitration and the arbitration Shari'ah is contained in the elucidation of Article 59 Paragraph (1) of the Act 48 of 2009. It states "referred to arbitration under this provision also includes sharia arbitration.

Law No. 30 of 1999 and Act No. 48 of 2009 also does not differentiate between "sharia economic " and "conventional economy". The consequence of this statement is court involvement on the arbitration or sharia arbitration refers to the general court. This description shows the contradiction between Law No. 30 of 1999 with Law No. 3 of 2006 on the Amendment of Act No. 7 of 1989 that confirms the religious courts competence in sharia economic. From the above description, it can be seen that the horizontally between Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, Law Number 48 Year 2009 regarding Judicial Power and Law No. 2 of 1986 on the General Courts and the Law of No. 3 of 2006 on the Amendment of Act No. 7 of 1989 are not in sync. This situation resulted in overlapping of norms, conflict norms and Contestation norm.

Further conflict norm interpreted as an act of "mutual strike". Conflict norms or norms disputes can occur within two (2) aspects, internal conflict and external conflict. Internal conflicts refer to controversy the norm in the same legislation. External conflict refers to the dispute between the norms of the legislation with the other legislation. Legislation are not synchronous that described above showed conflicts externally norm. Further, distortion norm refers to any substance that deviate norms so it makes other norms being crushed. Legal norms that distorts other legal norms contained in the norms that stated the court involvement on sharia arbitration by the general courts.

#### c. Renewal of legislation on Arbitration of Sharia.

The first step that must be done to find the new design of court involvement to uphold the principles of Islam in the settlement of disputes through arbitration reform in the field of Shariah is the renewal the norm.

Legal norms on the one hand with the development of society on the other hand intertwined. The development of society can influence the formation of the rule of law or otherwise legal norms may affect the development of society. The development of social influence on the law has been put forward by Lawrence M. Freedman as the Social change impact on the law. The development of society requires the existence of a norm especially legal norms of the state. Social development and more advanced technology, demonstrating the interdependence between social groups. It is marked the emerging in the modern society with the domination of technology. Interdependence is visible in the form of a typical strong group has a dominant position in life. This

situation makes it impossible for weaker social community to exert social control. They require collateral in the form of norms of the state to be able to interact and confront the powerful groups. It has been put forward by Lawrence M. Freadman.<sup>1</sup> He wrote:

Technological and social changes in society, of course, lie behind rising demand... all society are interdependent, but in modern industrial society there is a new, peculiar form of interdependence. Strangers are in charge of important parts of our lives- people we do not know, and cannot control... Hence we demand norm from the state, from collectivity, to guarantee the work of those strangers whose is vital to our lives, which we cannot guarantee by ourselves.

According Freadman,<sup>2</sup> to built a modern state such legal establishment is implicated in regulation that turned into increasingly crowded and increasingly formal. Informal norms is only effective in regulating relationships between small groups such as families, individual contact face to face, in a village, or in a tribe. Informal norms were not good enough in regulating the relationship between powerful groups such as confronted to form a product that is one of the group as the product manufacturer (producer) and the other as a consumer, or exposed in the event of a vehicle accident.

Legal norms from the state is very important in law and can not be separated from the legal establishment through legislation that is characteristic of the positivist ideology. it also stated Friedrich Carl von Savigny Legal experts from Germany, although he disagreed with the positivist ideology.<sup>3</sup>

From the description above, It can be further elaborated that in order to reform in the field of norms, especially regarding to find the new design of court involvement on sharia arbitration in order to fully support the settlement of disputes through sharia arbitration as well as to materialize the norm (legal norm) which comprehensively with respect to those elements, the relationship between norms, as well as the unity of those norms in the Indonesian legal system, and then realizing the need to obtain ideas, aspirations of the competent authority and the actions that need to be done, the events and relationships of existing law, requires the new norms.

Realizing the comprehensive definition for arbitration Shari'ah and stipulated in the normative provisions in the legislation must be conducted. The definition is meant to give sense and represent special characters that exist in arbitration Shari'ah which can simultaneously distinguish them from conventional arbitration. coverage should be included in this definition is the inclusion of two basic elements are interrelated, namely "arbitrage" itself and "shari'a economy".

The definition of arbitrage currently refers to the definition given by Law No. 30 of 1999. It did not provide specificity that exist in arbitration Shari'ah. according to this law, The arbitrage is "a way of solving civil disputes out of court based on the arbitration agreement made in writing by the parties to the dispute".

That definition is not yet meet the philosophy of sharia arbitration . The philosophy of sharia arbitration has a special character that does not come from the general definition. The special thing is the form of the relationship between "sharia arbitrage" with "sharia economic."

According to Ahmad Kamil, sharia arbitration is a linkage of the principal form of economic activity Shari'ah. This means that if there is no sharia economic activity, will not appear is sharia arbitration. Further he states that the dispute in the category of Sharia arbitration originated from agreements between the parties specify arbitration forum Shari'ah as its dispute settlement mechanism. The important thing according to him is seen from the economic system is run (sharia economy). Sharia economic activity is the benchmark to qualify as sharia arbitration. The arbitration sharia can be classified as derivates from sharia economic. Determining the institutional arbitration institutions are not the only measure to declare whether the arbitration is classified as a arbitration (conventional) or a sharia arbitration. Parties may designate an institutional arbitration with the name of the institution that is not specifically named arbitration sharia, but if the economic substance of Shariah economy is run then automatically referred to sharia arbitration. Such an issue may also occur if the parties choose ad hoc arbitration institution that sometimes the agency does not specifically call himself arbitration sharia, but the economic substance is the sharia economy, then the arbitration in question is sharia arbitration.

From the description above can be seen clearly that a comprehensive definition of Shariah and criteria for arbitration any dispute resolved by arbitration classified as Sharia arbitration must be stated in the normative provisions in the legislation. The consequences of the specific definition norm of sharia arbitration are necessary other norms. They are the norm provide the Court Involvement on sharia arbitration, norms of Electoral Arbiter authority, Norm of the authority of the Interim measure in the sharia Arbitration Process, Norms of authority

<sup>1</sup> Stewart Macaulay, Lawrence M. Friedman dan Elisabeth Mertz, *Law In Action a Socio-Legal Reader*, Foundation Press, New York, 2007, p. 260.

<sup>2</sup> *Ibid*, p. 261.

<sup>3</sup> Roger Cotterrell, *The sociology of Law : An Introduction*, Butterworth, 1992, London, p. 22. According Savigny law is not primarily a product of political authority as understood legal positivism. He was not created artificially as a command such as the Austin school, but must be dived and found in the soul of the people who have it. Law is rooted in the soul of the people (volksgeist)

"Cancellation Decision Sharia arbitration", Norms of Execution sharia Arbitral, and Norm on the Authority Decision Implementation/Execution of sharia Foreign Arbitral. All norms point the Religion Court that has absolute competence in such matters.

d. Updates on Judicial Structure

To find the new design of the court involvement on sharia arbitration to Uphold the Principles of Islam in the settlement of disputes through arbitration Shari'ah is not enough to stop at the level of legal substance. However the law is one part of the other sub-systems that govern orderly working of the law of life can not be separated from the legal structure (legal structure).<sup>1</sup>

As mentioned in the foregoing discussion that the authority to adjudicate disputes Economic Syari'ah by the Religious Courts have not been accompanied by adjustments to the institutional structure in anticipation of the new authority. No doubt that a variety of efforts to strengthen and improve both facilities and infrastructure have been done as well as human resources. But it is still constrained in terms of the structure of a stagnant over these developments. The existing structure can be seen that the presence of the existing structure as that underlying the judicial system is not yet fully able to maintain the principles of Islam in the settlement of disputes through arbitration Sharia.

Religious Courts need structure in accordance with the authority to examine dispute sharia economics. The structure as a framework . It gives a limits that are solid that can ensure the process can not flow out of the specified limits. In other words structur is a frame work that needed in order to handle the disputes can be concentrated / focus accordance with sharia economic field which has a special character. This is intended to avoid confusion with the authority of religious courts in the area of family law. Renewal the structure of the judiciary should be held to adapt the new authority in shariah economy. The structure of the judiciary is an important component of the role that the justice system can work well. Updates in this case is the renewal of a container so that the process of dispute resolution can walk in and the appropriate restrictions. These restrictions are the principles of Islam in the economic field.

In the structure of the court of first instance, there are no structures that are prepared to support the authority to handle the sharia economic disputes. In handling cases of family law, the structures of religious courts that exist today can be said to be adequate, but the authority in sharia economic, its structure becomes lagging. Family law character in contrast to the legal character of economics, especially sharia economy. A form of renewal of such structures is the addition of a structure in Religious Courts and the supreme court. The addition of this structure is intended for the handling of disputes sharia economics more focused.

In the Supreme Court, the sharia economy cases that previously handled by sharia arbitration institution, and then intersect with the judiciary, the case is handled by the special secretariat on shariah economy. Consequently, the cases examined by the Special Judge in the religion room of the Supreme Court. Renewal of the structure is done by add the "Civil Registrar of sharia Economics" in the structure of the Supreme Court.

e. Awareness Sharia Economy Law

Realizing new design court involvement on sharia arbitration to uphold the principles of Islam in the settlement of disputes through sharia arbitration is not enough to stop at the level of the substance of the law and the legal structure alone, but must also in the legal culture. legal culture is absolutely necessary. In the realm of legal substances means, that it can not be separated from the legislation governing arbitration Shari'ah. In the realm of the legal structure, it will not escape from the law executors institution of sharia arbitration. There is a close link between the substance of the law, the legal structure and the legal culture of society.

People who carry out economic activities in the sharia banking is not completely done on the basis of purely emotional, whose main aim is to avoid the practice of usury, gharar and maisyir, but more on rational considerations. the aim is based of considerations in profit and benefit. Parties who did sharia economic activity in the banking Sharia emotionally, most of them are who engage in economic activities for Muslim in person. It means that personal / individual he embraced Islam. In reality In the business world it is not possible perpetrators is limited only by individuals alone. The variety of business agents can conduct business activities. The business can not only be conducted activities between individuals but also many legal entities as corporations.<sup>2</sup> The business entity which conduct sharia economic activities, mean subject themselves to the laws of Islam. It thus includes the category of "Moslem." In addition, non-Moslems who also conduct sharia economic (eg in sharia banking) voluntere, is subjecting himself to the law of Islam also included in the definition of "Muslim". Most of the groups which subjecting himself to join in sharia economic activity usually more motivated by profit and benefit. Most of this group are categorized as rational customers. Data from the Association of Indonesian Sharia Banking (ASBISINDO) shows that 90 per cent of sharia banking customers is rational customers and the remaining 10 percent are emotional customers. From these data it can be seen that the motivation on the basis in

<sup>1</sup> Lawrence M. Friedman, *Op Cit*, p. 14

<sup>2</sup> Muladi, Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability)*, Kencana, Jakarta, Second Edition, 2012, p. 23.

profit and benefit more dominant. It thus has implications for the ways which they use to gain in profit and benefits as well as their attitude in case of conflicts and disputes. Thus it can be predicted that for the sake of profit and benefit, They can potentially perform actions that the main orientation is profit and benefit. He can do everything to win in litigation even though he knows that he himself is in default.

The outlined condition above can also occur in the process of dispute resolution through sharia arbitration. Ideally sharia arbitration's verdict obeyed by the parties as of the beginning they agreed to choose the sharia arbitration institution. sharia arbitration's decision is final and binding, but the defeated party by sharia arbitration decision still felt unsatisfied and take the court involvement as a way to win their case. The parties use loopholes as a way to fight the sharia arbitration's decision. Intentionally or not, It is misnomer because out of their commitments in sharia economy at the beginning. After they were disputing, it impressed that they are more comfortable with the general laws not the islamic law (shariah). It thus can be seen from the arguments of the parties. If they have arrived at such condition, as the parties, they have forgotten the initial commitment in economic activities that he had to perform these activities with the principles of Sharia. The motive in profit and benefit make they did that. Therefore, no matter how well the legislation of sharia arbitration and good supporting in legal structure, but the legal awareness of the sharia is not good, It has implications for justice that has not realized.

Lawrence M. Friedman stated that legal behavior is a behavior that is influenced by the rules, decisions, orders or laws issued by the official legal authority. Legal behavior is not just a law-abiding behavior, but all the behaviors that are reacting to something, going on the legal system. The reaction may be complying with the law or include reaction is lawlessness.<sup>1</sup>

With regard to the sharia arbitration as illustrated above also appeared in practice. The parties agreed to submit the settlement of disputes to sharia arbitration, ideally the parties will accept and implement the decision handed down by the Sharia arbitral institution. Against the decision, the party who is not satisfied took him to the judiciary with the court involvement. The condition as described above can be found in practice. The case decided by the Supreme Court No. No. 56 PK / AG / 2011 dated December 1st, 2011 with the parties PT. Syaria'ah Bank Mandiri, Company Limited against PT. Atriumasta..

To realize the court involvement on sharia arbitration to uphold the principles of Islam is also includes the improvement of public awareness with regard to sharia economic. Sharia economic is a moral. The efforts is how to re-propagate morality as the foundation of economic activity. This effort is expected to bring to positive legal culture.<sup>2</sup> Making moral as the starting point, is not escape from discussing the correlation between moral and legal. Although it recognized that moral and law relationship is not devoid of debate.<sup>3</sup>

in sharia economic activities, mean regard to return to the Islamic morality. The Republic of Indonesia admitted that God as the prime cause of the basic philosophy of the state. The provisions of the law is not only just a must heed the norms of religion, but also base on the religious view of life embraced by all the people of Indonesia.<sup>4</sup>

As at the beginning of the discussion that the economic activity of Shariah is based on the awareness of the perpetrators to make a selection to the activity. This means that there is no compulsion from the beginning of the public to join in economic activity. Apart from the emotional and rational aspects, They should not be separated from Islamic moral aspect. Rational aspect should not reduce Islamic moral values because although the motivation is rational, it is within the framework of the economy that stands on sharia principles. To bring to the Islamic moral. It is not brought to the realm of basic a priori, but the existence of the state of society that is constantly evolving, guided by the theory of mashlahah to address challenges such developments.

Islamic moral in the economic field has been exemplified by Prophet Muhammad SAW in running economic activity. In economic activity, It is emphasized that fairly competition in the market of Medina conducted. The forms which can lead to inequities in economic practice is prohibited.

#### D. Conclusion

The results of this study were 1). Causes court involvement on sharia arbitration that was not fully able to uphold the principles of Islam In the settlement by Sharia Arbitration are covering the following matters: (a) Arbitration

---

<sup>1</sup> Achmad Ali, *Menguak Teori Hukum (legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-undang (Legisprudence)*, (Revealing Theory of Law (Legal Theory) and Theory of Justice (Judicialprudence) Including the Interpretation Act (Legisprudence)), third edition, Kencana, Jakarta, 2010, p.143-144.

<sup>2</sup> Hilman Hadikusuma, *Antropologi Hukum Indonesia (Legal Anthropology Indonesia)*, Alumni, Bandung, 1986, p. 51.

<sup>3</sup> Adi Sulistiyono, *Negara Hukum, Kekuasaan, Konsep dan Pradigma Moral (State of Law, Power, Concepts and Moral Paradigm)*. LPP UNS and UNS Press, Surakarta, 2008, p. 98-99.

<sup>4</sup> Abdurrahman, *Aneka Permasalahan Hukum dalam Pembangunan Di Indonesia (Various Legal Issues in Construction In Indonesia)*, Alumni, Bandung, 1978, p. 49-50.

of Sharia terminology is not recognized in legislation. (b) Structure of Justice has not adjusted to the absolute authority of the judiciary in the Islamic economic dispute resolution (judicial structures obsolete). (c) Culturally, people do not have full legal awareness of the economic Shari'ah. 2). Synchronizing of court involvement on sharia arbitration in order to enforce Islamic law in the economy of sharia dispute resolution, necessary steps as follows: (a) Renewal of legislation on Arbitration of Sharia by giving the specific definition norm of sharia arbitration. The consequences of the specific definition norm of sharia arbitration are necessary other norms. They are the norm provide the court involvement on sharia arbitration, norms of electoral arbiter authority, norm of the authority of the interim measure in the sharia arbitration process, norms of authority "cancellation decision sharia arbitration", norms of execution sharia arbitral, and norm on the authority decision implementation/execution of sharia foreign arbitral. All of that norm point in to the Religion Courts. (b) Updates on Judicial Structure. (c) Increase the Awareness Sharia Economy Law.

### Acknowledge

The authors greatly acknowledge support and professional input received from Faculty of law, Sebelas Maret University, Surakarta. The authors also thankful to Prof. Dr. Hartiwiningsih, SH., M.Hum, chairman of the Doctoral Program of Legal Studies of law, Sebelas Maret University Surakarta, Prof. Dr. Abdul Manan, SH., S.IP, Chairman of the chamber of Religion/Judge of Supreme Court, Republic of Indonesia, and Prof. Dr. Adi Sulistiyono, SH., MH. Lecturer in law Doctoral Program of law Sebelas Maret University, Surakarta.

### References

- Achmad Ali. (2010) *Menguak Teori Hukum (legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-undang (Legisprudence), (Revealing Theory of Law (Legal Theory) and Theory of Justice (Judicialprudence) Including the Interpretation Act (Legisprudence))*, Jakarta: Kencana.
- Abdul Manan. (2006) *Reformasi Hukum Islam di Indonesia. (Reform of Islamic Law in Indonesia)* Jakarta: Rajawali Press
- Abdurrahman. *Aneka Permasalahan Hukum dalam Pembangunan Di Indonesia (Various Legal Issues in Construction In Indonesia)*. Bandung: Alumnii
- Adi Sulistiyono. (2008) *Negara Hukum, Kekuasaan, Konsep dan Pradigma Moral (State of Law, Power, Concepts and Moral Paradigm)*. Surakarta: LPP UNS and UNS Press
- Ahmad Rifa'i. (2010) *Invention Law Judge in a Legal Perspective Progressive (Penemuan Hukum oleh Hakim dalam Perspektif Hukum Progresif)*, Jakarta: Sinar Grafika.
- A Mukti Arto. (2001) *Conception Ideal Supreme Court (Konsepsi Ideal Mahkamah Agung)*. Yogyakarta: Library Student
- Hilman Hadikusuma. (1986) *Antropologi Hukum Indonesia (Legal Anthropology Indonesia)*. Bandung: Alumni
- Lawrence M. Friedman. (1975) *The Legal System A Social Science Prespective*. New York: Russel Sage Foundation
- Marc Galanter. (1981) *Justice In Many Rooms: Court, Privat Ordering and Indigenous Law*. Journal Of Legal Pluralism
- Mubyarto. (1991) *Ideology Pancasila In Economic Life (Ideologi Pancasila dalam Kehidupan Ekonomi)*, the book As ideology Pancasila. Jakarta: BP-7
- Muladi, Dwidja Priyatno. (2012) *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability)*. Jakarta: Kencana
- Notonagoro. *The Preamble Of The 1945 Constitution (Fundamental Rule Principal points Negara Indonesia/ Pembukaan Undang-Undang Dasar 1945 (pokok-Pokok Kaedah Fondamentalil Negara Indonesia) in the Basic Philosophy Pancasila State*. Pantjuran seven
- Roger Cotterrell. (1992) *The sociology of Law : An Introdution*. London: Butterworth
- Romli Atmasasmita. (2003) *Pengantar Hukum Kejahatan Bisnis, (Introduction to Business Crime Law)*. Jakarta: Kencana
- Sharyn L Roach Anleu. (2010) *Law and Social Change*. London: Sage Publications Ltd
- Soerjono Soekanto. (2013) *Faktor-Faktor yang Mempengaruhi Penegakan Hukum, (Factors Affecting Law Enforcement)*. Jakarta: Rajawali Press
- Stewart Macaulay, Lawrence M. Friedman dan Elisabeth Mertz. (2007) *Law In Action a Socio-Legal Reader*. New York: Foundation Press