

Consumers Spiritual Rights in the Islamic Banking Dispute Out of Court Settlement in Indonesia

Ro'fah Setyowati¹, Indah Purbasari², Encik Muhammad Fauzan³

Abstract

From the perspective of consumer protection, consumer of Islamic Financial Institution has spiritual rights, in which their religious rights are guaranteed in the form of sharia principles. The problem is that the provisions in Indonesia, Financial Services Authority Regulation Number 1/POJK.07/ 2014 concerning Alternative Disputes Settlement Institutions do not contain clauses related to these spiritual rights. Using a doctrinal approach, especially philosophical, juridical, and practical, this study aims to analyse the Financial Services Authority Regulation using the perspective of consumer protection, specifically spiritual rights. The results of the study found the disharmony of law in the alternative disputes settlement. If the problem does not receive adequate attention, it means that it does not encourage the legal certainty that is needed for Indonesia Islamic economic law development.

Keywords: *Consumers Protection, Spiritual Right, Islamic Banking Dispute, Settlement Out of Court.*

Introduction

Spiritual aspects are inherent in everyone. From a consumer protection perspective, every consumer has a spiritual right that needs legal protection for every business transaction carried out. Therefore, if a business dispute occurs, then in the dispute resolution process, it is important to pay attention to the fulfilment of the consumer's spiritual rights, as intended.

In a paper about Islamic banking (Setyowati, 2012a), stated that for the past five decades, the Islamic financial system has grown and developed universally. Various countries in all continents have responded well to the implementation of the Islamic economic system, such as in Asia, Europe, Australia, America, and Africa. Recognition of the advantages of the Islamic economic system by the community, marked by the establishment of sharia-based business institutions that are growing, both in variety and in number. Related to this

¹ Lecturer, Faculty of Law, Diponegoro University of Semarang, rofah@live.undip.ac.id

² Lecturer, Faculty of Law, Trunojoyo University of Madura, indah.purbasari@trunojoyo.ac.id

³ Lecturer, Faculty of Law, Trunojoyo University of Madura, encik.fauzan@trunojoyo.ac.id

phenomenon, (Margono,2011) stated that the business activities development would likely lead to disputes between parties involved, either disputes between companies or the ones between companies and their consumers.

Basyarnas is an institution which offers business dispute settlement outside the court, which is established to handle disputes that may arise, related to Islamic business institutions. Its main objective is to resolve disputes against Islamic business institutions, in accordance with sharia principles. This is crucial as Islamic business institutions are philosophically based on the spirit of running Islam in a *kaffaah* way, and the Islamic business operation is also based on sharia principles. Derived from such principles, therefore, in case of any disputable issues, the Islamic law should be recommended in its settlement. However, during Basyarnas's establishment, there were no competent law enforcement institutions to carry out these functions in Indonesian legal system, both through the court and outside the court.

In the consumer protection perspective, the application of sharia principles to Islamic business institutions is a consumer's spiritual right. The spiritual nature itself has been explained in the principles of consumer protection in Law No. 8 of 1999 concerning Consumer Protection. In addition, compliance with sharia principles in all Islamic business institutions activities has also been regulated in various laws related to their respective fields, such as banking, insurance, capital markets, and the others. The business field referred to shows that in practice, Islamic financial institutions are widely operated type of Islamic business institution in Indonesia. This was also reinforced by the study (Sufriadi, 2007) which showed the scope of dispute settlements at Basyarnas currently revolves around Islamic financial institutions disputes.

Being the highest Muslim population nation in the world, Indonesia, consequently, also has a growing Islamic banking. This can be seen from the 2017 Indonesian Sharia Financial Progress Report issued by the Indonesian Financial Services Authority. Islamic showed that banking assets which remained steady in as much as IDR 435.02 trillion in the end of 2017 gained an increase of IDR. 69.36 trillion from the previous year. The increase in the assets of sharia banking industry was mainly contributed by an increase in the value of assets of the Sharia Business Unit which was almost the same as the increase in the assets of Islamic Commercial Banks value. From its developments, Islamic finance can be seen as one of the most potential industries and it is expected to support the Indonesian welfare, as what was stated in the preamble of Law No. 21 of 2008 concerning Sharia Banking.

This study is originated from the Financial Services Authority Regulation Number 1/POJK.07/ 2014 concerning Alternative Dispute Settlement Institutions. The regulations organize the establishment of an off-court dispute resolution institution for each financial business sector. Based on the regulations, each financial institution must be a member of one of the Alternative Dispute Settlement Institutions. The Financial Services Authority Regulation is also accompanied by Financial Services Authority circular letter which contains a list of alternative dispute resolution institutions. Meanwhile, in Alternative Dispute Settlement Institutions regulations, there are no written clauses relating to spiritual aspects. However, there are only six institutions in the list recognized by the Financial Services Authority, excluding the Basyarnas. Consequently, in terms of legal issues, there is less attention paid to the spiritual rights protection in matters of resolving disputes. Moreover, these legal issues also indirectly affect the position of Basyarnas, as the alternative dispute settlement institution particularly established for the sake of protecting customers' spiritual rights.

Method

The research was conducted by the using the legal research methodology (Yaqin, 2007). This research focused on doctrinal study in term of philosophical, juridical and practical approach (Hutchinson, 2006). This approach is used because it is needed for discussion of new theories and concepts to show the gap between theory, concept, and practice with practical and fundamental reasons. This approach is used because it is needed for discussion of new theories and concepts to show the gap between theory, concept, and practice with practical and fundamental reasons. Therefore, this study aims to explore the relationship between spiritual rights and the settlement of Islamic financial disputes, as well as the position of Islamic arbitration in resolving Islamic financial disputes, and to evaluate the regulations of financial services authorities on ADR with a spiritual rights perspective.

As a doctrinal research, the research was basically conducted by library study. However, it is not a pure library study. Field research supported to obtain qualitative data. The key informants were the officer of Indonesian Financial Services Authority and the Director of Alternative Dispute Settlement Body for Banking of Indonesia. The interviews were conducted during October 2017 and 19 April 2018.

This study uses a deductive analysis pattern. The concepts, theories and norms that underlie this research consist of financial service authority regulations on ADR, the philosophy of spiritual rights and the character of dispute resolution in Islamic banking. Underlying norms are the basic norm for finding gaps between norms, theories and practices in Alternative Dispute

Resolution after the issuance of the said Regulation. Therefore, analysis can make prescriptive conclusions and recommendations.

Spiritual Rights Relations with Islamic Financial Dispute Settlement

It is crucial to describe specific spiritual rights and Basyarnas's position in resolving Islamic economic disputes in order to obtain a better in-depth understanding of the relationship between the two. It is an important preliminary stage to move on to the next discussion. The analysis in this description emphasizes on philosophical and historical approaches.

The "spiritual rights" concept is based on the fact that "spirituality" is an aspect that is always present in human beings. Spirituality is one of the human characteristics; it distinguishes human beings from other beings. A higher degree of spirituality is owned by the Indonesian people whose country is claimed to be a religious one. The country also puts a higher concern on religious matters. Notably, it is understood why there is a close relationship between spirituality and religiosity. The linear statement (Miller & Thoresen, 2003) explained that there is a strong relationship between spirituality, religiosity, and health. A study (Nadesan, 1999) linked the spiritual and economic aspects, especially the company. It can be inferred that in the context of a company as a business institution, a spiritual aspect exists in human beings. This spirituality is closely related to religiosity.

In the context of this study, the term "spiritual rights" is basically intended to enhance the parties' awareness, both customers as users of Islamic financial services and Islamic financial institutions. It needs to be socialized continuously as in reality there are fewer people who become aware of the needs of spiritual rights (Setyowati 2012b). For Islamic financial institutions, attention to "spiritual rights" is a manifestation of corporate identity which has been stated in legal documents, in the form of the company's Articles of Association.

"Spiritual Rights" has a specific concept which is different from any common consumer rights. In the context of consumer protection, "spiritual rights" is a new term. However, "spiritual rights" is basically the crystallization of the concept of "rights" of consumers as stated in Article 4 the Consumer Protections Laws. Furthermore, "spiritual" is a term used in the Elucidation of Article 3 of the Consumer Protections Laws mainly on the principle of balance. The incorporation of the two terms into one entity is based on the understanding that the consumer protection principles are at the basis of the formation of rights in consumer protection.

In other words, the values carried in the principles should be represented in other clauses, especially those related to "rights".

The "spiritual" issue is not only strictly related to the business field and the interests of consumers. In the context of statehood, as stipulated in the Indonesian constitution, the spiritual aspect has been regulated from the beginning in Chapter XI, Article 29. In addition, rights related to freedom of religion: to manifest the teaching, practice and worship of religion is also strengthened through Article 28E, which states that every person is free to manifest a religion in practice and worship. Article 28I, Paragraph (I) in specific, states that practicing religion is a part of human rights; it is meant to sustain under any circumstances. Paragraph (4) affirmed that the protection, promotion, enforcement of human rights is the state's responsibility, especially the government. From the aforementioned constitution, it can be said that the rights related to the fulfilment of sharia principles in all stages and fields related to Islamic financial institutions are the rights to practice Islam. Hence, "religious rights" are similar to spiritual rights, or spiritual rights are a reflection of religious rights vice versa.

The explanation above is a way to accommodate religious law in national law. It Same with the view of Mahfud M.D. (2011), states that in the Indonesian constitution it is explained that Indonesia is not a country based on religion, but a country based on Pancasila. The Pancasila-based State is a "religious state" or a country run in the spirit of religion or godliness. That is, religious law is justified and protected by the state in its application in Indonesia. In a study conducted by Lewis (2007), it was stated that the right to realize religious beliefs made it easier for people to do general good. And conversely, the general good will provide an opportunity for people to carry out their religious beliefs. Furthermore, according to Lewis, this also allows the right holder to use his choice to do what he sincerely believes to be his duty determined by God or divinely.

Examples of spiritual rights in the field of marriage are contained in Article 2 Paragraph (I) of Law No. 1 of 1974 concerning Marriage, which states the legality of a marriage, if done according to the law of each religion. Another example in child protection in Article 43 of Law No. 35 of 2014 Child Protection, stated in Paragraph (1) that the State, Government, Regional Government, Community, Family, Parents, Guardians, and social institutions guarantee the Protection of Children in embracing their religion, and Paragraph (2) that the Protection of Children in embracing their religion as intended in paragraph (1) includes coaching and practicing the teachings of religion for children. In addition, for Muslims, the halal guarantee

of a product is an example of “spiritual rights”. However, the term “halal” is usually interpreted in the context of food that is allowed to be consumed. In the context of this study, in relation to Islamic financial institutions, especially in terms of dispute resolution, it is clearly stipulated in Article 55 Paragraph (3) that the settlement of disputes conducted outside the Religious Courts must be in accordance with sharia principles.

Spiritual rights can also be analysed using agency theory. This is because the unit of analysis in agency theory is a contract that underlies the relationship between the principal and agent (Jensen and Mackling, 1976). Therefore, this theory focuses on determining the most efficient contract that underlies the relationship between principal and agent. In addition, the application of agency theory to work contracts is a way of understanding the role and position between agents and principals philosophically. The ideal employment contract is a work contract capable of optimizing the utility of each party with the aim of achieving optimal pareto (Anggraeni, 2011).

Related to the agency theory linked to the context of Islamic banking, agency problems can be endured by companies that operationalize conventional concepts or based on sharia (Suryanto, 2015). The difference is, in conventional companies only either materially or purely oriented approaches are used, whereas, sharia-based companies, use a broader approach. In practice, contracts that are prone to agency issues are modaraba. This is because the meeting point of agent theory with sharia principles lies in the issue of trust. Moreover, the spiritual rights basically demonstrate a company trust, in this case the bank, which has declared itself as an Islamic bank.

By observing the above description, it is understood that the spiritual right in the context of this study is a reflection of religious rights, or in other words the right to practice religious laws. The legal basis and the existence of spiritual rights in Indonesia are very strong, both in the sense of the constitution and legislation, which are spread out in various fields. As for the spiritual rights related to the settlement of disputes on sharia financial institutions, it has a clear footing through the Islamic Banking Laws, in which the Islamic financial dispute settlement must be in accordance with Islamic principles.

Sharia Arbitration's as Financial Dispute Settlement

A practical approach is used in this discussion, by seeing sharia arbitration institutions used in resolving Islamic financial disputes. This is related to the rapid Islamic finance industry

which has an impact on the increasing potential for conflict; it is likely to be avoided. Hence, giving attention to this matter is essential in order to restore and maintain the credibility of Islamic banking and finance (Abozaid, 2016). This is reinforced by a study conducted (Helfand 2011) on multiculturalism making the argument that Islamic arbitration plays an important role in protecting the value of diversity by allowing certain religious communities to resolve disputes according to their own religious values and obligations.

According to (Farhana, 2018) basically, law is created by society, and at the same time, society is formed by law. The statement means that the law is in accordance with the society development. In the context of resolving Islamic banking disputes, Islamic banking law is made by the community, because it is needed. But other than that, the law seeks to create a society that complies with sharia principles. Related to the development of Islamic banking law, Wisdom & Oseni (2016) hold that Malaysia and Indonesia represent the best practices of the Islamic banking business, including in matters concerning dispute resolution.

Basyarnas is a dispute settlement institution outside the court, which prioritizes arbitration mechanisms. This can be seen from institution name. At first, it was established under the name of BAMUI (Indonesian Muamalat Arbitration Board), and later changed its name to Basyarnas in 2014. The change of name by perpetuating the word “arbitration”, highlights the priority focus. While “arbitration” is the consensus agreed upon in a business contract and at the same time becomes part of all topics agreed upon by the parties (Manan, 2007). From this name, it can be inferred that Basyarnas is the sole institution providing special services for dispute settlement with the mechanism of sharia-based arbitration.

The spirit of establishing Basyarnas in Indonesia is in line with the establishment of Islamic arbitration in the United States (Revkin, 2015), Revkin further stated that basically, the establishment of the ADR institution was in accordance with a universal tendency, the occurrence of privatization in resolving disputes. Related to dispute resolution, from an Islamic perspective and Islamic law, prioritizes the peace mechanism. The spirit of compromise or peace is emphasized in commercial transactions (Wisdom & Oseni, 2016).

In Indonesia, Basyarnas has strong legal basis, both from a positive legal review written in the laws and regulations, as well as those that are not written yet contained in the Qur'an, *Sunnah*, and *Ijma 'Ulama*. The main legislation that is the legal basis is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. While the main sources of Islamic

law have literally regulated the problem, considering the settlement of any disputes that occur in the community, it is something that must receive attention to be resolved immediately.

Historically, Basyarnas was established by the Indonesian Ulama Council, 21 October 1993. BAMUI was established in the form of a foundation legal entity, and confirmed by a notary deed of Yudo Paripurno, SH. No. 175 dated October 21, 1993. Subsequently, based on the results of a meeting between the Indonesian Ulama Council Leadership Council and BAMUI Management on August 26, 2003, and observing the letter of the Indonesian Muamalat Arbitration Board Management No.82 / BAMUI / 07 / X / 2003, dated October 7, 2003, the Indonesian Ulama Council Decree Number Kep-09 / MULXII / 2003, dated 24 December 2003, stipulates that:

- a. the name of the BAMUI to be changed to Basyarnas;
- b. the form of the Indonesian Muamalat Arbitration Board legal entity to be changed from the Foundation to an entity under the Indonesian Ulama Council, and it serves as Indonesian Ulama Council organic device; and
- c. Basyarnas is an autonomous and independent institution to carry out its duties and functions.

In the context of law enforcement, Basyarnas is an alternative dispute resolution institution. The word 'alternative' is intended as an institution outside the court. In various literature, such institutions are often referred to as alternative Dispute Resolution (ADR). The emergence of ADR is basically due to the many weaknesses encountered in resolving disputes through the judiciary. The history study, "ADR", emerged and developed only in the early 1970s (Barrett & Barrett, 2004). However, there are also studies that state that ADR was reported to have begun as early as ancient Greek times. The occurrence of privatization in resolving disputes has directly diminished the burden of the court, which has been short of manpower in handling disputes. With the existence of the ADR institution, there is a significant transfer of workload (Revkin, 2015).

There are several advantages of ADR, yet a weakness of the justice mechanism (Khairandy et al, 1999):

- 1) The proceeding in the trial of the civil case settlement takes a long time;
- 2) The length of time to settle a dispute can also be caused by the length of the stage of the dispute resolution, namely the process of proceeding in the first rank court, which allows

to file a lawsuit to the appellate court, so that the business submits an appeal and reconsideration to the highest court, namely the Supreme Court.

- 3) The length and length of the dispute resolution process through the court certainly has consequences related to the legal high cost;
- 4) Court proceedings are conducted openly, yet confidentiality is prioritized in commercial activities;
- 5) Court judges do not master the legal substance of the dispute in question (considered less professional);
- 6) There is a poor assessment of the world of justice.

Some of these advantages can be seen below:

Table 1

ADR Mechanism Advantages

Advantages	Explanation
Win-win situation	ADR seeks to increase the likelihood of achieving a win situation for all parties involved.
Cheaper cost	In order to reach a faster resolution by cutting costs.
Privacy	To maintain the confidentiality of both parties, because the ADR is always carried out in a closed manner.
More innovative techniques	Dispute resolution and deliberation are not limited to the basis of legislation, but also consider the issue of motives and trade ethics.
Maintaining the relationship between the parties	The communication room, the parties to the dispute are always open.
Access to higher experts	Opportunities for experts who are proficient and recognized.
Better Decision Quality	In handling cases, the quality of the decision is more guaranteed, because the suitability between expertise and the case handled increases.
The parties are free in their activities	At the time of settlement of the dispute, the parties may resume their respective activities without being disturbed by the process of examining the case.
Faster	The dispute inspection procedure can be determined by the parties involved with the help of a third party.
Neutral	There is a guarantee that third parties who will decide or mediate disputes are those who are free and do not take sides.

Source: the authors

Based on the explanation above, it is natural that Basyarnas at the beginning of its establishment received a positive response from the community, although in real terms institutional performance, there were still shortcomings (Setyowati, et. al., 2011). Furthermore, Aulawi (2004) stated that in the settlement with the ADR, there are constructive values namely:

- a. Both parties are fully aware of the need for a respectable and responsible dispute resolution.
- b. They voluntarily surrender the settlement of the dispute to a person or institution that is agreed to be trusted.
- c. Voluntarily they will settle the arbitrator's decision as a consequence of their agreement to appoint the arbitrator.
- d. The agreement contains promises that must be agreed upon.
- e. They respect the rights of their opponents.
- f. They avoid being self-justified and ignore the truth that may be present in others
- g. They have legal awareness and at the same time, state consciousness or society in order that vigilantism is avoided
- h. Implementation of the *tahkim* (deliberation and peace)

Djauhari A. Executive Board of Central Basyarnas (personal communication, October 9, 2017) said that public interest in using Basyarnas as an Islamic financial dispute settlement institution can be seen from Basyarnas's performance in resolving 19 cases by the end of 2013 (Barlinti 2013). While Musytari, D.N. Executive Board of Basyarnas in Yogyakarta, (personal communication, April 29, 2018) said that from 2003-2018, completed 13 cases. Out of the resolved 19 cases, there were five decisions that were determined before the existence National Sharia Council (DSN) fatwa's, namely:

1. Decision Number 01/Year 1997/BAMUI/Put/Ka. Jak
2. Decision Number 02/Year 1998/BAMUI/Put/Ka. Jak
3. Decision Number 03/Year 1998/BAMUI/Put/Ka. Jak
4. Decision Number 04/Year 1999/BAMUI/Put/Ka. Jak
5. Decision Number 05/Year 1999/BAMUI/Put/Ka. Jak

The following eight outlined decisions are the ones reached after the National Sharia Council fatwa's first implementation in 2000 as the description will be linked to the National Sharia Council fatwa's.

1. Decision Number 06/Year 2000/BAMUI/Put/Ka. Jak
2. Decision Number 07/Year 2001/BAMUI/Put/Ka. Jak
3. Decision Number 08/Year 2001/BAMUI/Put Ka. Jak
4. Decision Number 09/Year 2002/BAMUI/Put/Ka. Jak

5. Decision Number 10/Year 2002/BAMUI/Put/Ka. Jak
6. Decision Number 11/Year 2001/BAMUI/Put/Ka. Jak
7. Decision Number 12/Year 2002/BAMUI/Put/Ka. Jak
8. Decision Number 13/Year 2007/BASYARNAS/Put/Ka. Jak

From the description above, it can be inferred that in practice sharia arbitration institutions have long been used to resolve Islamic financial disputes in Indonesia. This reality is derived from the idea that Islamic law prioritizes peace efforts in resolving disputes. Furthermore, Basyarnas is an ADR institution with many conceptual advantages.

Consumers Spiritual Rights of Regulations of Alternative Disputes Settlement Institutions

The need for Muslims to lead good life under Islamic principles requires the Government attentions. The implementation of the two laws in finance, namely religious law with national law is likely to occur in a country. Thus, if it is associated to the context of this study, the focus of consumer spiritual rights is on the application of Islamic law principles in the national law. In this case, the national law in question is the regulation of the financial services authority. In this discussion, the juridical approach is preferred because the main study object is in the form of regulations.

The discussion above has described the position of Basyarnas in resolving Islamic economic disputes. As an ADR institution, Basyarnas has long been practiced. However, the OJK made new regulations regarding the ADR institution.

Financial Services Authority Regulations Number 1/ POJK.07/ 2014 concerning Alternative Dispute Settlement Institutions is a policy in an effort to protect the interests of consumers and society (Billah, 2018). Thus, this is related to POJK Number 1 / POJK.07 / 2013 concerning Consumer Protection in the Financial Services Sector. Both regulations are part of the authority of the Financial Services Authority as an institution that holds the regulation and supervision of the financial services industry, i.e. Islamic financial institutions.

In the context of the study of sharia economic dispute settlement related to Basyarnas, the problem related to regulations of Alternative Disputes Settlement Institutions is mainly due to the lack of concern for spiritual rights in the settlement of disputes. This can be seen from the results of the analysis of the element of sharia compliance for Regulations of Alternative Disputes Settlement Institutions (Setyowati, 2018). First, there is no content that is directly

related to sharia compliance in Regulations of Alternative Disputes Settlement Institutions. In fact, the term "sharia" is only found in one article in the description of "Islamic banking". The definition in other financial services industries is not mentioned at all by the sharia financial institution, although in practice there is already a real one. It can be interpreted that the regulations of Alternative Disputes Settlement Institutions do not recognize the existence of Islamic financial institutions as a whole. As a result, there is no recognition toward the specific mechanisms needed in resolving disputes.

Secondly, in Regulations of Alternative Disputes Settlement Institutions there is also no regulation on settlement standardization or certification for arbitrators or parties who take part in resolving the dispute over Islamic finance cases. This has led to the potential misleading decisions which are not in accordance with sharia principles previously intended to protect spiritual rights. Thirdly, Regulations of Alternative Disputes Settlement Institutions do not contain arrangements for making decisions, using material law as a reference in accordance with sharia principles. Fourthly, Regulations of Alternative Disputes Settlement Institutions also do not regulate the registration and implementation of Alternative Disputes Settlement Institutions decisions. It means that according to Arbitration and Alternative Disputes Settlement Laws, the registration and execution of the decision of Alternative Disputes Settlement Institutions in all arbitral awards that are not carried out voluntarily are given to the District Court. Such problem causes legal uncertainty, while at the same time dismissing protection for the spiritual rights owned by the involved parties.

Another problem is the reduction of the Basyarnas's role as an institution for the settlement of sharia economic disputes. This fact is based on several provisions of the Regulations of Alternative Disputes Settlement Institutions, namely: a) every Financial Services Institution is required to become a member of the relevant Alternative Disputes Settlement Institutions, including the obligation to pay contributions for the Alternative Disputes Settlement Institutions operation concerned; b) Alternative Disputes Settlement Institutions can only be established by the Islamic Financial Institution and supported by the Islamic Financial Institution associations; c) Alternative Disputes Settlement Institutions that can carry out its functions is only Alternative Disputes Settlement Institutions that has been included in the list approved by the Financial Services Authority. Meanwhile, in the Financial Services Authority Circular regarding to the Alternative Disputes Settlement Institutions list that is recognized, there are only six Alternative Disputes Settlement Institutions that are related to different financial industry fields. Thus, it can be said that with the existence of Regulations

of Alternative Disputes Settlement Institutions, Basyarnas has lost its main consumers in resolving disputes for Islamic financial institutions in Indonesia.

Some obstacles for Basyarnas according to Regulations of Alternative Disputes Settlement Institutions can be listed as follows:

1) Terms of being Alternative Disputes Settlement Institutions

To be included in the Alternative Disputes Settlement Institutions list in the Financial Services Sector, there are assessment stages that become a reference for eligibility, before being announced as registered Alternative Disputes Settlement Institutions. The assessment includes:

a. Preliminary analysis carried out with the following stages:

- 1) Request for documents and/ or information to the Alternative Disputes Settlement Institutions;
- 2) Verification to the Alternative Disputes Settlement Institutions (if needed);
- 3) Processing documents and or information on the Alternative Disputes Settlement Institutions;
- 4) Results formulations of the analysis of Alternative Disputes Settlement Institutions documents and/ or information;
- 5) Testing the fulfilment of the Alternative Disputes Settlement Institutions requirements.

Testing of fulfilment of Alternative Disputes Settlement Institutions requirements is carried out by the Alternative Disputes Settlement Institutions Testing Team consisting of seven people from internal and external Financial Services Authority, based on weighting and rating scale as stipulated in the Financial Services Authority Circular concerning Guidelines for Assessment of Alternative Disputes Settlement Institutions in the Financial Services Sector.

b. Determination Alternative Disputes Settlement Institutions assessment results are classified into two (Education and Consumer Protection Department of OJK, 2015), namely:

- 1) Fulfil the requirements when obtaining a value of at least 75 and there is no zero value in the Alternative Disputes Settlement Institutions requirements component; or
- 2) Has not fulfilled the requirements when obtaining a score of less than 75 or there is a zero value in the alternative dispute settlement institutions requirements component.

Associated with the concept of a good alternative dispute settlement, (Education and Consumer Protection Department of OJK, 2015) at least ADR institutions must fulfil the following principles:

1. It must be time-efficient and cost effective;
2. Must be accessible to the parties, for example the place is not too far away;
3. Must protect the rights of the parties to the dispute;
4. Must be able to produce fair and honest decisions;
5. The body or person who resolves the dispute must be trusted in the eyes of the community and in the eyes of the parties in dispute;
6. The decision must be final and binding;
7. The decision must be easily executable; and
8. The decision must be in accordance with the feeling of authenticity of the community in which the alternative dispute is resolved.

From the previous description, especially if related to point 3 above, it is stated that a good ADR institution must protect the rights of the parties to the dispute. One of the rights related to the settlement of disputes is a spiritual right, which is not found at all in the Financial Services Authority Regulations. Thus, it is clear that Alternative Disputes Settlement Institutions based on Financial Services Authority Regulations does not classify as an appropriate ADR institution. This has not been widely realized, considering that there is no study that specifically looks at Alternative Disputes Settlement Institutions from spiritual rights protection perspective. On the other hand, looking back at various sharia compliance views which were associated with trust and strong user decisions in dealing with Islamic banking, this problem can trigger the decline of the Islamic financial industry in Indonesia, as what Capra stated (Chapra, et. al, 2002) that failure in applying sharia principles will make customers moving to conventional banks by 85%.

The requirements written in forms of provision state that the Alternative Disputes Settlement Institutions can only be established by the Islamic Financial Institution and supported by the association of Islamic Financial Institution and Alternative Disputes Settlement Institutions; such institutions must be acknowledged, listed and approved by the Financial Services Authority. As a result, Basyarnas becomes a loss of function. Basyarnas was established long before the Financial Services Authority Regulations was created, so it was not included in the Alternative Disputes Settlement Institutions list. This was compounded by the

existence of provisions regarding to the obligation of the Islamic Financial Institution to become a member of Alternative Disputes Settlement Institutions. Thus, the policy directs Alternative Disputes Settlement Institutions to no longer use Basyarnas services in settling disputes, since there is no institutional or administrative relationship between Basyarnas and Islamic financial services institutions. There is an obligation to become an associated member with monthly payments, so that directly becomes the main driving force of Alternative Disputes Settlement Institutions in all industries. As a result, Basyarnas no longer holds a significant role, as it does not have an adequate regular funding source economically.

From the description above, it is inferred that the Financial Services Authority's regulation of ADR institutions had not yet received sufficient attention about the spiritual rights of consumers. In addition, based on these regulations, Basyarnas could not function in resolving Islamic financial disputes in Indonesia.

Conclusion and Suggestion

From the descriptions above, Consumers Spiritual Rights in the Islamic Banking Dispute Out of Court Settlement in Indonesia can be concluded as follows:

Spiritual rights are one of the main rights related to the settlement of disputes in Islamic financial institutions. The spiritual rights form referred to is the fulfilment of sharia principles in the process of solving sharia economic disputes. Conformity with sharia principles is indicated by four things, namely: 1) the existence of arrangements that are clearly related to spiritual rights; 2) there is an obligation to use material law in accordance with the principle or not contradictory to sharia; 3) settlement of disputes is carried out by personnel who have the competence as arbitrators who control *muamalat*; 4. ADR decisions are carried out by religious judicial institutions.

Alternative Disputes Settlement Institutions based on the Financial Services Authority Regulations cannot classify as an alternative form of dispute resolution, because they are incapable of fulfilling the customer's spiritual rights. Thus, it can be said that after the issuance of Financial Services Authority Regulations above, Basyarnas has failed to function as the institution to reinforce the Islamic economic law. This condition is worsened by a negative assessment of Basyarnas, since there is no visible institutional or administrative relationship between Basyarnas and Islamic financial services institutions or the public. This condition is exacerbated by the absence of government support, related to funding for operational needs. As

a result, the role of Basyarnas becomes increasingly insignificant, as there is the absence of adequate regular funds source for Basyarnas.

Based on these conclusions, it is important for Financial Services Authority to review the process of regulation issuance, especially in the form of Financial Services Authority Regulations, to ensure that provisions are balanced in accommodating material and spiritual aspects. Financial Services Authority also should pay more attention to various institutions related to the contents of the policy in forming and implementing its policies. It must be able to prevent itself from unintentionally putting other institutions in jeopardy, including those in the ADR cases.

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