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The Urgency of the Implementation of Sharia Bankruptcy (Taflis) in Bankruptcy Cases in Indonesia

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Abstract

Sharia economic activities are vital for promoting community economic growth within the national development framework. For Muslims, these activities not only fulfill worldly obligations but also serve as acts of worship to Allah SWT, thus necessitating adherence to the Al Qur'an and Hadith. However, conflicts in sharia economic practices, particularly those arising from business failures leading to bankruptcy or postponement of debt payment obligations (PKPU), highlight the need for a sharia-compliant bankruptcy framework. This study employs a normative juridical approach, focusing on secondary data collection techniques supported by interviews. The research is analytical descriptive, with literature and field studies forming the research stages, and qualitative data analysis. The findings indicate that: (1) Current bankruptcy practices in Indonesia do not incorporate sharia principles. (2) There is no legal certainty for sharia economic actors in bankruptcy due to the absence of regulations that integrate general business agreements with sharia principles. (3) A sharia bankruptcy framework should be established, proposing the formation of a special Sharia Commercial Court within the Religious Courts system. The establishment of a Sharia Commercial Court can significantly enhance the legal certainty for sharia economic activities, encouraging the growth of the sharia economy in Indonesia. This aligns the bankruptcy resolution process with sharia principles, addressing the current legal inadequacies. Incorporating sharia principles into Indonesia's bankruptcy framework is essential for ensuring legal certainty for sharia economic actors. The proposed Sharia Commercial Court can provide the necessary legal infrastructure to support the growth and development of the sharia economy in Indonesia.

Keywords: *Sharia Bankruptcy, Legal Certainty, Commercial Court, Sharia Economic Development.*

INTRODUCTION

Historically-sociologically, Islamic law as an inseparable part of Islamic teachings has permeated and become part of the norms of Indonesian society since the entry of Islam into the archipelago in the first century H / 7 AD (Wahyuni, 2023). In fact, the demand for the existence of Islamic law in Indonesia has proven to be an important part of the struggle for national legal thought and development during the colonial period. During the arrival of the Verenigde Oostindiche Compadnie (VOC), the colonial government introduced Dutch law and established a judicial institution that also applies to the Indonesian nation (Pebrianto et al., 2022). However, these efforts did not yield satisfactory results, even encountered stalemates and failures, so that finally institutions that live in society are allowed to run as they were (Djamil, 2013; Hasan, 2020).

The current population of Muslims in Indonesia is based on data from the Central Statistics Agency (BPS) with the component of assuming births, deaths and migration over the next 30 years between 2015 and 2045, the projection of Indonesia's population in June 2015 is 255.6 million, in 2030 it is projected to reach 294.1 million, and in 2045 the population of Indonesia will reach 318.9 million (Central Statistics Agency, 2018). Currently, in 2020, Indonesia's population is projected to be 271,066,400 people, (Central Statistics Agency, 2014), and the majority of Indonesia's population embraces Islam (Robert & Nasution, 2020). Currently, there are more than 207 million Muslims in Indonesia or as many as 87.2% of the Indonesian population is Muslim (Ministry of Communication and Information, 2023).

According to Amran Suadi and Mardi Candra, a modern legal system must be a good law in the sense that the law must reflect the sense of justice of all parties and in accordance with the conditions of society. Furthermore, it is said that the community has an important role in the formation of the law and it is hoped that its

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participation will be so that the applicable law is really a living law in society, so that in the end the community's legal awareness is higher (Suadi & Candra, 2016).

The Indonesian Muslim community has influenced economic activities recognized by the state through the dual banking system or dual economic system (Syarifuddin, 2020). The national banking system consists of conventional banking and Islamic banking as new business entities in Indonesia (Basir, 2023). The logical consequence from the legal side is the increase in the number of legislative products on sharia economic activities that color positive law in Indonesia and the increasingly complicated disputes that arise due to differences in the interpretation of the implementation of sharia economic activities. These disputes will be handled by judicial institutions in Indonesia. If the complexity in resolving sharia economic disputes cannot be properly examined and adjudicated by judges as representatives of the state, then citizens' access to justice and legal certainty will be lost.

The settlement of sharia economic disputes which is currently guided by the main regulations, namely (1) Article 49 letter (i) of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts (UUPA), which increases the authority of the Religious Court to examine, decide and settle sharia economic cases; (2) The Decision of the Constitutional Court of the Republic of Indonesia No. 93/PUU-X/2012 dated August 29, 2013, has decided that the Explanation of Article 55 Paragraph (2) of the Law of the Republic of Indonesia No. 21 of 2008 concerning Sharia Banking does not have binding legal force; (3) Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2008 concerning the Compilation of Sharia Economic Law; (4) Regulation of the Supreme Court of the Republic of Indonesia Number 14 of 2016 concerning Procedures for Resolving Sharia Economic Cases. Therefore, the process of resolving sharia economic disputes through litigation is the absolute competence of the court in the religious justice environment. However, there are still aspects of justice that have not been obtained optimally by sharia economic actors, especially related to the sharia bankruptcy process known as Al-Tafliis (Az-Zuhaili, 2007).

Bankruptcy cases in Indonesia are still guided by Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as "UUK-PKPU") and Regulation of the Supreme Court of the Republic of Indonesia Number 109/KMA/SK/IV/2020 concerning the Enforcement of the Handbook for the Settlement of Bankruptcy Cases and Postponement of Debt Payment Obligations, where the two positive laws only regulate bankruptcy to be examined, even if it is tried and decided by the Commercial Court in a general court, the bankruptcy is part of sharia economic activities.

This paper will provide a comparative analysis between the concept of sharia bankruptcy and the concept of bankruptcy in Indonesian positive law. In addition, the application of the concept of bankruptcy according to Indonesia's positive law to Islamic financial institutions and the expectations of Islamic economic actors in court will be discussed. From 2014 to 2023, there were at least 45 bankruptcy cases involving Islamic financial institutions in Indonesia. Furthermore, the urgency of resolving bankruptcy cases of Islamic financial institutions will be outlined in accordance with the concept of sharia bankruptcy (Al-Taflis).

According to the author, the concept of bankruptcy in Indonesia's positive law has not provided adequate legal certainty. This is due to three main factors: first, there is a legal void or legal loophole in the Indonesian legal system that does not regulate the bankruptcy process based on sharia principles; second, there are still disputes related to judicial authority; and third, the legal consequences of bankruptcy cases based on sharia contracts that are resolved through the Commercial Court.

METHOD

This research employs a qualitative approach with a descriptive-analytical method to deeply understand the concept of sharia bankruptcy and bankruptcy in Indonesian positive law, as well as its application to Islamic financial institutions. The study utilizes both primary and secondary data sources. Primary data is obtained through in-depth interviews with sharia law experts, Islamic banking practitioners, and judges from religious and commercial courts. Secondary data is gathered from legal documents, academic literature, scholarly journals, and relevant official reports.

Data collection techniques include in-depth interviews to gain comprehensive insights from experts and practitioners, document analysis involving the review of legal documents such as laws, Supreme Court regulations, and court decisions related to both sharia and conventional bankruptcy, and literature review to analyze academic works related to the history, theory, and practice of sharia and positive law bankruptcy.

The collected data is analyzed using descriptive and comparative methods. Descriptive analysis is employed to detail the concepts of sharia bankruptcy and positive law bankruptcy and their implementation. Comparative analysis is used to assess and contrast the strengths and weaknesses of both concepts. To ensure the validity and reliability of the research, data triangulation is conducted by comparing information from interviews, document analysis, and literature review. Member checking is also utilized, involving respondents in the verification process of the data obtained from interviews.

FINDINGS AND DISCUSSION

Fundamental Comparison of Bankruptcy in Indonesian Positive Law and Sharia Bankruptcy (*Taflis*)

The concept of bankruptcy that is currently in force in Indonesia is different in principle from sharia bankruptcy (*Al-taflis*), the difference in principles between the concept of bankruptcy that applies in Indonesia and the concept of sharia bankruptcy (*At-taflis*) there are at least 2 (two) basic principles identified by the author, including the following:

Differences In Basic Principles

Bankruptcy is known in Indonesia initially regulated in two rules, namely Wetbook van Koophandel (WvK), the third book entitled *Van de voorzieningen in geval van onvormogern van kooplienden or regulations on merchant incapacity* (This regulation is for the bankruptcy of traders), bankruptcy regulations for non-traders are regulated in *Reglement op de Rechtvordering* (RV) Stb. 1847-52 jo. 1849-63, Third Book Chapter Seventh in Articles 899 to 915, with the title *van de staat Kenneljk Onvermorgen* (on the state of real incapacity). However, the implementation of these two rules has caused many difficulties, including because of the many formalities that make it difficult to implement, too few creditors can interfere with the course of the bankruptcy process, in addition to high costs and a long time. (Nugroho, 2018).

To overcome the various existing obstacles, in 1905 the *Verordening Failliessements* (Staatsblad 1905:217) were issued as a replacement for the two previous regulations. This regulation was applied to the Europeans, the Chinese, and the Foreign Orient (Stb.1924-556). Verordening's Failliessements (Staatsblad 1905:217) were valid for 93 years, from 1905 to 1998. During the Japanese colonial period, special regulations were applied to solve bankruptcy problems. However, in 1947, the Dutch occupation government in Jakarta issued the Emergency Bankruptcy Regulation (*Noodsregeling Faillismenten*) Staatblaats Number 214 of 1947 with the aim of abolishing the bankruptcy regulations that were in force before the end of the Japanese colonial period.

On September 9, 1998, Government Regulation in Lieu of Law Number 1 of 1998 (Perpu) was issued. This Perpu was then approved by the House of Representatives and promulgated into Law Number 4 of 1998. This law is not a new bankruptcy law, but only changes and adds to the Failliessements Verordening (Staatsblad 1905:217 Jo. Stb 1906 No.348). Initially, Verordening's Failliessements consisted of 279 articles. With Law No. 4 of 1998, six articles (Articles 14A, 19, 218, 219, 221, and 272) and one paragraph (Article 149 paragraph 3) were revoked. In addition, there are 93 articles that have been amended and 10 new articles have been added, bringing the number of articles in Law No. 4 of 1998 to 282 articles (Nugroho, 2018)

The source of reference for bankruptcy law in Indonesia mentioned above, is different from the reference used as a guideline by Muslims who refer to the Quran, As-sunnah, Ijma', and Qiyas in carrying out *muamalah* worship activities. According to Busro, the determination of Islamic law must be inspired by a full understanding that every determination of Islamic law must consider the *maslahah* to be realized. The *maslahah* in question does not only refer to the interests of *mukalaf*, but what is more important than that is how a legal provision is estimated to convincingly fulfill the will of Allah SWT (qasd al-syari). (Busro, 2019). Thus, in the context of sharia economic activities, it must be carried out based on *maqashid al-sharia* from the beginning of the activity, carrying

out the business, to the termination process either voluntarily or when a dispute occurs either in the form of a breach of promise (default), an unlawful act or a bankruptcy dispute as a result of the sharia economic activity.

Bankruptcy in Islamic law is called *At-Tafliis* which etymologically means referring to a person as bankrupt (a person who experiences bankruptcy) and broadcasting to people that he is a person who experiences *al-iflaas* (bankruptcy). This word comes from the word *al-Fulus* (change) which is the most trivial treasure. Meanwhile, according to the terminology of sharia, *At-Tafliis* is a judge's decision that states that the person who owns the debt is bankrupt, by issuing a prohibition on him to carry out *pentasharufan* (distribution) of his property, or confiscate and freeze his assets for the parties who are in debt (Az-Zuhaili, 2007). According to Imam Ash-Shafi'i, the word bankrupt linguistically means a person who does not have goods and property. Meanwhile, according to sharia, a bankrupt is a person who is wrapped in debt while the assets in his hands are not enough for the debts he bears, then the people who receiv ask to take the assets in his hands (Imam Ash-Shafi'i, 2017).

The *At-Taflis* reference (hereinafter referred to as "Sharia Bankruptcy") refers to the Quran, As-Sunnah, Ijma', and Qiyas, each of which is based on the following sources:

Source From the Quran

In the Qur'an Surah Al-Furqan: 22 reads "And they are kara: *Hijran Mahjuuraa*", some scholars explain that what is meant by "*Hijran Mahjuuraa*" is an expression that is commonly mentioned by Arabs when they encounter an unavoidable enemy or be struck by an unavoidable disaster. This phrase means: "*May Allah spare this danger from me*" (Suadi, n.d.).

Furthermore, the word "*al-hajr*" is found in the word of Allah which reads: "*In such a thing that is an oath there is another oath of those who are wise*" (QS. Al-Fajr:5). Ibn Katsir in his book of tafsir "*Tafsir Al-Quran Al-Azhim*" explained that "*al-hajr*" is a judge's decision to limit a person's legal actions in the form of restricting the use of money or being a child or the like.

Source From As-Sunnah

Ka'ab bin Malik (r.a.) narrated, "*That the Messenger of Allah (peace and blessings of Allaah be upon him) limited the authority of Mu'adz and sold his property*". Abadurrahman bin Ka'ab bin Malik narrated a hadith by saying, "*Mu'adz bin Jabal was one of the noblest young men among the youth of his people, and he did not hold anything at that time, but he continued to be given debts until all his wealth was used to pay off debts. The Prophet (peace and blessings of Allaah be upon him) spoke to those who owed him (in a narration, they left nothing for him), so that if there were people who were left (without paying their debts) for the sake of one (another), they would have allowed Mu'adz for the sake of the Prophet (saw).*"

In another narration, "*He restricted the authority of Mu'adz, and sold his wealth in relation to debts, and divided it among those who owed him*". He imposes on them a five-sevenths share of their rights. Then, the Prophet (peace be upon him). Say to them, "*Laisa lakum illa dzalika*" (you do not get anything else). Abu Sa'id al-Khudri r.a. narrated a hadith by saying: "In the time of the Prophet (peace and blessings of Allaah be upon him), there was a person who experienced a calamity related to the fruits he bought, and he owed a lot of money, he said, "Give him a blessing". However, this is not enough to pay off the debt. He said, "Take whatever you find, and there is nothing for you except that" (Abdul 'Al, 2014).

Source From Ijma

Umar bin Khaththab r.a. with Usaifi' Juhainah. Umar (r.a.) said of him, "*He was so burdened with debt that he could not pay it, and he felt inferior (in another narration, he was powerless to bear his debt). Therefore, whoever owes him should be present because we will take his treasure, and we will distribute among those who owe him, you should avoid debt because that is the beginning of unrest and finally fear*". The act of Umar r.a. was carried out in the presence of the companions, without anyone refuting it. Thus, this is ijma' (Abdul 'Al, 2014)..

Source From Qiyas

Qiyas against the restriction of authority caused by debt with the restriction of authority due to illness for the benefit of inheritance. Mawardi r.a. said. "Because the restriction of authority by sick cause is allowed for the

benefit of the inheritance, because the property will be transferred to them even if they do not immediately own it at that time, the restriction because the debt that is the right of the person who owes it is more feasible to be allowed. Since the treasure is reserved for them, their funds have the right to have it at that very moment." As the limitation of authority is also related to the interests of the parties who owe, as well as the interests of the debtor (Abdul 'Al, 2014).

It could be that among the parties who owe money, there are those who are given special repayment to the detriment of the other party, and it can also be that the debtor uses his property to the extent that it results in the loss of all of their rights (so there needs to be a reduction in authority).

Differences In Operational Concepts

Definition Of the Meaning of Debts and Receivables Based on Sharia Principles with Conventional Debts

The concept of debt in the Bankruptcy Law Number 37 of 2004 (UUK) is an obligation that is stated or can be stated in the amount of money either in Indonesian currency or foreign currency, either directly or that will arise in the future or contingent, which arises due to an agreement or law and which must be fulfilled by the Debtor and if not fulfilled gives the right to the Creditor to obtain its fulfillment from the Debtor's assets.

Meanwhile, in the sharia concept, in principle, financing activities refer to a partnership relationship, so that they do not recognize the relationship between creditors and debtors. So that not all obligations that cannot be fulfilled by the debtor and give the creditor the right to get fulfillment from the debtor's assets can be categorized as debts that must be paid by the debtor. The concept of debt does not arise from a borrowing relationship, but is based on the implementation of a partnership relationship whose risk completely depends on the type of cooperation contract (*Al-Musyarakah*, *Al-Murabahah*, *Al-Ijarah, Al-Wadiah, Al-Mudharabah, Al-Qardh* and others).

Differences In the Condition of Customers (Debtors) Related to Solvens or Insolvents

Aco Nur said that the difference between bankruptcy in Indonesia and Islamic economics is that insolvency is not the main requirement for bankruptcy. The insolvency phase only exists after the bankruptcy judgment is issued, while in the Islamic perspective, insolvency is the main condition and must be detected before the bankruptcy is imposed. (Nur, 2020).

The Debtor (Bankruptcy) before being decided by the judge in a state of insolvency, can file a claim that the Debtor (Bankruptcy) is really in trouble and has no property, or that his property has been completely divided among the creditors and he has no other property.

Imam Ash-Shafi'i said that the situation of the Debtor (Bankrupt) having no property is acceptable, even though this evidence is related to the denial because this evidence is needed at that time. It is required of the witness that he must have mental expertise related to the person who owes the debt through long enough interactions, associations, *muamalah* and so on, and it is not enough to rely only on the external side.

If difficulties are proven, the debtor who is in difficulty should not be detained, nor should he be intensively supervised, nor should he be forced to earn a living, and he must even be given a grace period and a postponement until he is free, according to Surah al-Baqarah:280 "If (the debtor) is in difficulty, then give him a grace period until he has a free time" (az-Zuhaili, 2018).

So regarding solvency or insolvency that will be imposed by the judge, there is a difference where based on Indonesian bankruptcy law, if it is proven that a debtor does not have the power to return because the property no longer exists, then the judge will immediately be declared bankrupt and in the insolvency period, while on the other hand, based on Islamic law, the debtor who really proves that he does not have the ability because his property no longer exists, Therefore, it must be given a suspension or cannot be decided bankruptcy or in an insolvent condition. However, if it is later proven that he has assets or has the ability to repay his debts, then sanctions can be given that he can be detained and supervised intensively because he is categorized as a tyrannical and sinful debtor.

Results of the Application of the Concept of Bankruptcy Based on Indonesia's Positive Law on Sharia Financial Institutions

The actors of sharia economic activities who are directly involved as parties to bankruptcy and PKPU cases in the Commercial Court throughout the period 2014 to 2023 are 45 cases, this case does not include the position of sharia economic actors who act as Other Creditors (KL) which the author predicts will be much more.

Based on 45 cases faced by sharia economic actors, the author conducted a sampling by describing as many as 8 cases of bankruptcy and PKPU applications, it is enough to conclude that settlement practices in Indonesia are not in accordance with the concept of sharia bankruptcy, this is because sharia contracts are damaged due to being treated the same as conventional debt and receivables agreements, and Commercial Judges do not delve into sharia principles in adjudicating so that bankruptcy is not running in accordance with Maqashid al-sharia or the purpose of the sharia economic activity.

Based on the results of the research, the author finds that the sharia economic actors involved in the bankruptcy process in the Commercial Court have submitted an absolute competency exception to the competence to examine and adjudicate sharia economic cases, and both sharia financial institutions and customers want the bankruptcy examination to be carried out in the Court within the Religious Court.

The state has stipulated to guarantee the freedom of each resident to embrace their religion and worship according to their religion and beliefs in accordance with Article 29 paragraph (2) of the Constitution of the Republic of Indonesia of 1945 (1945 Constitution), this includes Muslims who carry out muamalat worship activities in the form of sharia economics should be guaranteed that the series of worship from the beginning to the end is in accordance with sharia principles. Thus, when submitting to sharia economic activities, it should be based on maqashid al-sharia, namely through a special court to examine and adjudicate sharia economic cases, so that the process of examining bankruptcy applications can be examined in accordance with sharia principles. Thus, based on the author's conclusion, the settlement of bankruptcy in Indonesia has not guaranteed legal certainty for people who carry out sharia economic activities in Indonesia.

The concept of resolving sharia bankruptcy disputes with legal certainty based on sharia principles (sharia compliance) in the context of developing the sharia economy in Indonesia, can be done by revising the UUK-PKPU by accommodating the aspirations of people who carry out sharia economic activities and carried out in accordance with Islamic law. These PKPU laws need to be reconstructed in the following ways, among others:

Abolishing The Authority of The Commercial Court in The District Court Related to Bankruptcy Cases due to sharia economic activities, and establishing a Sharia Commercial Court in the Religious Court that specializes in resolving bankruptcy disputes resulting from sharia economic activities. This separation of bankruptcy needs to be carried out in a bankruptcy legal system because these two forms of bankruptcy have different impacts. Bankruptcy in the Commercial Court in the District Court regulates and provides certainty for business activities carried out based on conventional debts and receivables, while bankruptcy examined by the Sharia Commercial Court in the Religious Court has an impact on the certainty of business activities with sharia principles, as well as providing guarantees to Muslims to carry out muamalat worship.

The factors of competence, background and understanding of the judge will greatly determine the final result of a legal issue to be decided, the concept of bankruptcy in the Sharia Commercial Court in the Religious Court must be guided by Islamic legal sources, while bankruptcy in the Commercial Court in the District Court is guided by civil laws that are adopted into positive laws such as the civil code (Burgelijk Wetboek).

Placing debtors as parties who suffer from bankruptcy decisions by the courts, and protecting the rights of creditors from bankrupt debtors is an important part of the concept of sharia bankruptcy, this especially the obligation arising from taxation should be the last obligation because in fact the state still has other sources of income compared to creditors who only hope that their debts will return to normal.

The involvement of social institutions such as Baitul Mal is one of the steps not to let bankrupt debtors fall further into a slump, Baitul Mal institutions can be a solution so that debtors who still have good faith to rise can be provided with capital and assistance by social institutions (Baitul Mal).

CONCLUSION

The conclusion of this study highlights the urgency of implementing sharia bankruptcy (*taflis*) in handling bankruptcy cases in Indonesia. The author finds that there is legal uncertainty in sharia economic activities which is currently still regulated by bankruptcy law based on Western civil law, which is not in accordance with the Qur'an and Hadith. The practice of resolving bankruptcy disputes in Indonesia has not accommodated sharia principles, where commercial courts do not delve into the concept of sharia bankruptcy, so that the bankruptcy process does not run in accordance with *Maqasid al-Syariah* or the purpose of sharia economic activities.

The author also notes that sharia economic actors involved in bankruptcy proceedings in the Commercial Court often apply for absolute competency exceptions to the authority of the commercial courts, and want the bankruptcy proceedings to be examined in the Religious Court. Therefore, the author recommends the need to revise the Bankruptcy Law and the Postponement of Debt Payment Obligations (UUK-PKPU) to accommodate the aspirations of people who carry out sharia economic activities.

In addition, the author recommends the establishment of a Sharia Commercial Court within the scope of the Religious Court which specifically handles bankruptcy disputes arising from sharia economic activities. In bankruptcy cases, it is important to pay attention to the factors of competence, background, and understanding of judges in adjudicating sharia economic cases. The author also emphasizes the need for the involvement of social institutions such as Baitul Mal as a solution to help debtors who have good faith to rise from bankruptcy conditions.

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