



The Urgency Expansion of Authority Religious Court Regarding Bankruptcy Cases and Suspension of Sharia Economic Debt Payment Obligations

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Abstract

Indonesia is a country with Pancasila ideology and 1945 Constitution Republic of Indonesia is highest law. The goal national development based on Pancasila and 1945 Constitution Republic of Indonesia is creation a just and prosperous society, based on economic democracy, by developing an economic system that is based on a fair market mechanism. In order to realize this goal, the implementation of national economic development is directed at an economy that is in favor of the people's economy, equitable, independent, reliable, just and able to compete in economic arena. One of forms potential courts and manifestation community's contribution to national economy is development of an economic system based on Islamic values (sharia) by elevating its principles into national legal system. Sharia principles are based on values of justice, benefit, balance and universality.

Keywords: *Bankruptcy; Religious; Sharia*

Introduction

Indonesia is a country with Pancasila ideology and 1945 Constitution Republic of Indonesia is highest law. The goal national development based on Pancasila and 1945 Constitution Republic of Indonesia is creation a just and prosperous society, based on economic democracy, by developing an economic system that is based on a fair market mechanism. In order to realize this goal, the implementation of national economic development is directed at an economy that is in favor of the people's economy, equitable, independent, reliable, just and able to compete in economic arena. One of forms potential courts and manifestation community's contribution to national economy is development of an economic system based on Islamic values (sharia) by elevating its principles into national legal system. Sharia principles are based on values of justice, benefit, balance and universality.[1]

Indonesia as a country with largest Muslim population in the world has a growing tendency to create a socio-economic system based on Islamic values. The government have set acceleration of sharia economic development as a national agenda and promised a legal basis to support sharia economic growth. Disputes in the field of Islamic economics are predicted to occur a lot and Islamic economics is always seen as different from conventional economics, but both are always related to contracts or agreements. The parties involved have the possibility of injuring what they have agreed. Settlement of disputes that may arise in the field of sharia economics will be carried out through religious courts.

Birth of Law No.3 Year 2006 concerning Amendments to Law no.7 of 1989 concerning Religious Courts has brought about a major change in the existence of the current religious courts. Based on Article 49 letter (i) Law no. 3 of 1989 concerning the Religious Courts, it is emphasized that the religious courts have the duty and authority to investigate, adjudicate and resolve cases of "sharia economy". 3 of 2006 and Perma No.2 of 2008 concerning compilation of Sharia Economic Law stipulated by Supreme Court. For this reason, the commercial court is not authorized to examine, decide and resolve bankruptcy cases in which legal relations parties use legal basis of sharia economic principles, because this is *absolute* authority of Religious Courts.

Method

This type of research is normative legal research with legislation approach and conceptual approach.[2]

Discussion

The Constitutional Court Decision Number 93/PUU-X/2012 emphasized that the settlement of sharia economic cases cannot be resolved in general courts or special courts under auspices of general courts. This decision emphasized that authority to examine, decide and resolve sharia economic disputes is the absolute authority of the religious court and cannot be resolved in other courts, because it would conflict with *absolute* jurisdiction.[3] The Constitutional Court's decision which strengthens resolution of sharia economic disputes including sharia bankruptcy seems to answer discussions about whether or not Islamic law can be fully enforced in Indonesia. Putting forward the Religious Courts is application of theory *receptio in complexu* so that what is said in the book Calestia Management which states the unwritten Islamic law gradually disappears.[4]

The Constitutional Court's decision explains that elucidation of Article 55 paragraph (2) letter d regarding the non-binding explanation of Article 52 paragraph (2) Law no.21 Year 2008 concerning Islamic Banking, namely "dispute resolution through courts within a general court environment". So based on this MK decision, it can be used as an excuse that commercial court does not have the authority to resolve sharia economic bankruptcy cases which are a category of sharia economic cases. Based on these reasons, theoretically settlement bankruptcy cases for sharia companies is absolute jurisdiction religious courts.[5]

Firman Wahyudi explained that resolution of sharia economic disputes, including bankruptcy based on sharia contracts, and should be filed and resolved in religious court as the only legal litigation institution based on law and legislation. If not, there will be various violations the principle of law enforcement, effectiveness and efficiency of law enforcement which we popularly know as the principle of "simple, fast and low cost". In fact, it will lead to negative excesses and legal implications/consequences for handling bankruptcy cases based on sharia contracts by the Commercial Court which are described as follows:[6]

1. Will have a systemic impact on material law application used. Viewed from the perspective of sharia bankruptcy in Indonesia, there is a tendency to change the essence of sharia debt into conventional debts. This creates the impression of forcing the substance of sharia economic law to become conventional economic law. The change in essence of such a legal relationship can be seen from the elements of requirements for filing a bankruptcy application in Article 2 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment Debt namely existence of creditors and debtors. Every bankruptcy dispute based on a sharia contract that occurs always creates forced efforts to bring up the terms creditor and debtor, even though these parties (creditors and debtors) do not exist in any sharia financing, in sharia financing only known partnership relationships, namely one party helps the other party others, those who are financed help those who finance it and vice versa, there is no unfair profit taking in any sharia financing. As a result of filing bankruptcy cases based on sharia contracts to Commercial Court, potential for legal concept of sharia financing to be mixed up with the concept of conventional debt will definitely occur[7], and will lead to legal distortions and injustice/tyranny.
2. Another consequence handling of sharia contract-based bankruptcy cases by Commercial Court is that there will be an inconsistency between the contract and settlement of disputes. Philosophically, Islamic finance and banking practices are dominated by Islamic business terms/Fiqh mu'amalat, such as murabaha, deliberation, mudharabah, qardh, hiwalah, ijarah, kafalah and so on. This is right and proper thing if the settlement of sharia banking cases is carried out in a judicial environment that is substantively in charge of matters related to Islamic sharia values. If it is handed over to a justice system that does not apply sharia rules, plus the law is enforced by non-Islamic judges or Muslim judges who do not understand Islamic economic values, then what will emerge is a discrepancy between contract practices and dispute resolution. The contract is carried out in the sharia system, while the settlement is carried out in a judicial environment that does not use sharia rules and principles.[8]
3. Bankruptcy law regulated in UUK-PKPU does not adhere to the principle of business continuity where this law does not pay attention at all to the financial health of the debtor whether it is *solvent* or *insolvent*, as long as it fulfills several requirements, namely the debtor has two or more creditors and does not pay off at least one debt has matured and can be collected, then the situation can cumulatively be declared bankrupt by the Commercial Judge. This provision is very contradictory to the concept of bankruptcy in Islam.[9] The meaning of health in the context of modern Islamic finance has expanded in meaning not only to the extent that individuals are physically and mentally healthy, but also to the level of financial health of the fiscal institution itself as a debtor, which in this case is called a solvent. Islamic bankruptcy is very tolerant to provide a time period for extending debt repayment if the debtor is *insolvent* (not financially sound). This is ethics of learning Islamic economics which always equates the position between debtors and creditors as a cooperative partner relationship that helps each other as Q.S. Al-Baqarah verse 280 which means: *And if (the person who owes it) is in trouble, then give respite until he is spacious and give alms (part or all of the debt), it is better for you, if you know.*

There is a *contradictio interminis* in authority to settle bankruptcy cases and PKPU Syariah Economics. A tug-of-war of authority occurs between the commercial court which specifically has the authority to resolve bankruptcy cases within the general court environment and the religious court which has the authority to resolve cases arising from sharia economic cases. According to Sinaga[10], based on Article 3A of Law no.3 Year 2006 and these provisions were also not changed in the second amendment to the Religious Courts Law, namely Law no.50 of 2009 concerning the Religious Courts, a specialization of justice can be established which is regulated by law. That means that in the religious courts a special court can be established, namely a commercial court based on a law, as is case with commercial courts that exist within the general court environment, which will be served by judges and clerks who have

special expertise in the field of sharia economics. In addition to being able to resolve bankruptcy and PKPU cases, the commercial court under religious court also has the same authority as commercial court under general court, namely to resolve all cases in the field of commerce which are included in sharia economic cases.

Sharia banking in practice to debtors who have debts in sharia economic transactions, the bank as a creditor always chooses file for bankruptcy the commercial court rather than to religious court, such as: filing for bankruptcy PT.Lintas Means of Communication and guarantors (*borgtocht*) from CIMB Niaga Bank, Tbk as defenders in commercial court at Central Jakarta District Court who are registered in list of cases number: 07/Bankrupt/2011/PN.NIAGA. JKT. PST. Even though this economic transaction is a sharia economic transaction in the form of deliberation to reach a consensus, the bankruptcy filing is filed through a commercial court, even though transaction is a sharia economic transaction in a deliberation contract, bankruptcy request is resolved by the Commercial Court

If you look at it from the side of justice, which according to *Sayyid Qutb*[11] is divided into three fields, namely economics, law and politics. *Qutb's* theory of justice in the field of law conceptually actually uses *al adlu* with the meaning of *al musawah* as in the economic field. The theory of Islamic justice according to *Sayyid Qutb* emphasizes the meaning of *al musawah* or *equality* and *al qist* and the importance of putting things in their place. If initial agreement uses a musyarakah contract like example above, then the settlement must use Islamic economic principles instead of conventional economics, that is the true value of justice.[12]

Economic justice according to Qutb, Islam does not separate religion and muamalah as the West is secularistic, but instead considers Islam as a religion that has provided tools of justice in pursuing the economy. The principles used in sharia economic bankruptcy are sharia principles that are sourced from the Koran and Al Hadith so that sharia economic bankruptcy dispute resolution should also be based on the same thing, in order to create justice itself.

Legal justice according to Qutb is equality before the law and government and there is no discrimination. The application of sharia economic principles to bankruptcy issues that use sharia contracts cannot be discriminated against by continuing to bring them to commercial courts that use conventional economic law principles, so that decision later will not reflect the principle of justice because the principles used to examine and decide are not the same. The issue of sharia economic bankruptcy disputes uses a sharia contract while the commercial court examines it using conventional economic principles,so the resulting decision does not reflect justice because it does not put something in its place.[13]

According to Qutb, the latter is Justice in politics, which is an order to act appropriately according to the levels, dose, the scales are exactly same and no party is harmed. This is what the government and DPR as legislators should do to immediately amend the rules related for sharia economic bankruptcy system and give authority to adjudicate the religious courts to try them, because all sharia economic cases including sharia economic bankruptcy disputes are the absolute authority of religious courts.

As in example above, the contract used is a musyarakah contract. A musyarakah contract is a cooperation agreement between two or more parties for a particular business in which each party provides their respective portion of funds. This musyarakah contract is one of the contracts in sharia economics and even if a dispute occurs, it must use sharia principles, including sharia bankruptcy disputes, which must go to a religious court and not to a religious court. Conventional economic principles and sharia economic principles are very different,so that if a sharia economic bankruptcy dispute is forced into a commercial court, it actually violates the value of justice from basic principles of sharia economics itself, because the musyarakah contract is settled according to conventional economic principles so that commercial court's decision raises injustice to litigants.

The existence of what contract was used when making agreement, it will determine which economic law system is used later if a dispute occurs. The existence of a contract in this bankruptcy case will determine which court has the authority to adjudicate the case. If a contract is used in the sharia economy, the one who has the authority to adjudicate if there is a dispute is the religious court based on the authority it has, namely adjudicating sharia economic disputes in accordance with the mandate of Article 49 of Law no.3 year 2006 concerning Amendments to Law no.7 Year 1989 concerning the Religious Courts. Reconstruction regarding the existence of a contract in making an agreement is very important so that a legal system that is organized and applied to parties to the case will produce fairest possible decision because it uses the appropriate principle of dispute resolution.[14]

The existence of Law that regulates Taflis/Bankruptcy in the sharia economy is very important and urgent, because that its very likely the UUK-PKPU has not yet accommodated sharia bankruptcy disputes as well as the existence of Law which regulates the establishment of courts that specifically handle sharia economic bankruptcy disputes/Taflis as well considered important and urgent. The establishment of a special court under the religious court is made possible by Law the Republic of Indonesia Number 50 of 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning Religious Courts, in Article 3A it says:

1. Within the religious courts, special courts can be established which are regulated by law.
2. The Islamic Sharia Court in the Province of Nanggroe Aceh Darussalam is a special court within the scope of the religious court as long as its authority concerns the authority of the religious court, and is a special court within the general court as long as its authority concerns the authority of the general court.
3. In special courts, ad hoc judges may be appointed to examine, try and decide cases, which requires expertise and experience in a certain field and within a certain period of time.
4. Provisions regarding the requirements, procedures for appointment and dismissal as well as allowances for ad hoc judges are regulated in statutory regulations.

Conclusion

Based on what has been explained above, the urgency of authority religious court in resolving sharia economic bankruptcy disputes is a must when viewed from the type of contract used, the authority possessed, and competence of judges as judges and case deciders. For this reason, the government and the DPR as legislators must review the regulations relating to bankruptcy system in Indonesia, especially regarding the authority to adjudicate sharia economic bankruptcy disputes. This is in order to realize the basic idea of applying sharia economic principles to make a unified bankruptcy law system in Indonesia a means of constructing a national legal system that contains the concept of unifying pluralism in Indonesia which guarantees equal protection and treatment before the law.

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