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THE QUO VADIS OF BANCKRUPTY SETTLEMENT AND PKPU LAWS ON SHARIA BANKING

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Abstract

Normatively, based on the decision of the Constitutional Court No. 93/PUU/X/2012 the settlement of Islamic economic disputes becomes the absolute competence of the Religious Courts. However, at the empirical level, there are still sharia economic disputes which are still decided by the Commercial Court (general), namely bankruptcy cases and PKPU on the sharia bank. This paper focuses on three things, first, what causes these cases to remain under the authority of the Commercial Court, secondly, what are the legal consequences if the case is resolved through the Commercial Court and how the legal arguments about the competence of the Religious Courts in bankruptcy cases and PKPU on sharia bank. This research method is normative law by examining a set of legal materials related to bankruptcy and PKPU. The analysis used is synchronization of the norms of Law No. 37 of 2008 and PERMA No. 2 of 2008. The results of the study found that the cause of the case is still handled by the Commercial Court because of a conflict of norms between the Bankruptcy Act and PERMA regarding KHES which still has not been finalized, the conditions legal vacuum regarding bankruptcy based on the sharia contract and the existence of the KMA letter regarding the instruction for the implementation of book II. Legal consequences if the case is dealt with by the Commercial Court there will be coercion on the substance of sharia economic law into conventional economic law, not in sync between the settlement of the dispute with the contract and the concept of solving the case prioritizing business principles and business competition rather than substantive justice. Based on the theory of authority and the principle of the *lex specialis*, it was found the conclusion that bankruptcy cases and PKPU based on the absolute sharia contract became the absolute competence of the Religious Courts.

Secara normatif, berdasarkan putusan MK No 93/PUU/X/2012 penyelesaian sengketa ekonomi syari'ah menjadi kompetensi absolut Pengadilan Agama. Namun dalam tataran empiris masih ditemukan adanya sengketa ekonomi syari'ah yang masih diputus oleh Pengadilan Niaga (umum) yaitu perkara kepailitan dan PKPU pada perbankan syari'ah. Tulisan ini difokuskan pada tiga hal, pertama, apa penyebab perkara tersebut masih menjadi kewenangan Pengadilan Niaga, kedua, apa akibat hukum jika perkara tersebut diselesaikan melalui Pengadilan Niaga dan bagaimana argumentasi hukum tentang kompetensi Pengadilan Agama dalam perkara kepailitan dan PKPU pada perbankan syari'ah. Metode penelitian ini bersifat normativ law dengan mengkaji sekumpulan bahan hukum yang berhubungan dengan kepailitan dan PKPU. Adapun analisis yang digunakan adalah sinkronisasi terhadap norma UU No 37 tahun 2008 dan PERMA No 2 tahun 2008. Dari hasil penelitian ditemukan penyebab perkara tersebut masih ditangani Pengadilan Niaga karena adanya konflik norma antara UU Kepailitan dengan PERMA tentang KHES yang masih belum selesai pengaturannya, adanya kondisi kekosongan hukum tentang kepailitan berdasarkan akad syari'ah dan eksistensi surat KMA tentang intruksi pelaksanaan buku II. Akibat hukum jika perkara tersebut ditangani oleh Pengadian Niaga akan terjadi pemaksaan terhadap substansi hukum ekonomi syari'ah menjadi hukum ekonomi konvensional, tidak sinkronnya antara penyelesaian sengketa dengan akad dan konsep penyelesaian perkara lebih mengutamakan prinsip bisnis dan persaingan usaha dari pada keadilan substantif. Berdasarkan teori kewenangan dan azas lex specialis ditemukan kesimpulan bahwa perkara kepailitan dan PKPU berdasarkan akad syari'ah mutlak menjadi kompetensi absolut Pengadilan Agama.

Keywords: competency, authority theory, *lex specialis*, synchronization.

Introduction

Banks are business entities that collect funds from the public in the form of deposits and distribute them to the public in the form of loans or other forms to improve the lives of the people at large.[1] In order to achieve these objectives, the implementation of development must always pay attention to harmony and balance of various elements of

[1] Magda Ismail Abdel Mohsin, "Financing through cash-waqf: a revitalization to finance different needs", *International journal of Islamic and Middle Eastern finance and management*, vol. 6, no. 4 (2013), p. 304.

development, including in the economic and financial fields. The banking sector has a strategic position as an intermediary (financial intermediary) to support the smooth running of the economy.[2]

Islamic banks as a sub-section of the banking system in Indonesia under the auspices of BI are juridical and hierarchically certainly subject to general banking rules including all rules relating to monetary policy (Macro) that intersect with banks as a whole. The main difference with conventional banks lies in the lost profit and sharing system, the existence of the Sharia Supervisory Board (DSN) and dispute resolution institutions through Basyarnas and the Religious Courts.[3]

Disputes usually occur because of a difference and or conflict between two or more parties. In the banking industry there are often disputes between banks and customers related to bank products, especially in the financing/credit (lending) sector the customer as a debtor is not always able to maintain a commitment in making debt payments to the bank as a creditor.[4] Actually, the agreement between the customer and the bank has been stated in an agreement or notarial agreement signed by both parties, so that the customer as a debtor is often bankrupt by the bank for failing to pay the debt. As with conventional banks, disputes between customers and banks related to bankruptcy and delays in debt obligations are also likely to occur in Islamic banking.[5]

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[2] Johannes Ibrahim, *Pengimpasan Pinjaman (Kompensasi) dan Asas Kebebasan Berkontrak dalam Perjanjian Kredit Bank* (Bandung: PT. Bandung Utomo, 2003), p. 56. See also, Franklin Allen and Anthony M. Santomero, "What do financial intermediaries do?.", *Journal of Banking & Finance*, vol. 25, no. 2 (2001), p. 271.

[3] Ali Hasan, *Menjawab Keraguan Umat Islam Terhadap Bank Syariah* (Jakarta: Pusat Komunikasi Ekonomi Syariah, 2007), p. 57.

[4] Steven A. Sharpe, "Asymmetric information, bank lending, and implicit contracts: A stylized model of customer relationships", *The journal of finance*, vol. 45, no. 4 (1990), p. 1069.

[5] Saiful Azhar Rosly, "Shariah parameters reconsidered", *International Journal of Islamic and Middle Eastern Finance and Management*, vol 3, no. 2 (2010), p. 132. See also, Abbas Mirakhor and Iqbal Zaidi, "Profit-and-loss sharing contracts in Islamic finance", in *Handbook of Islamic banking*, ed. by Kabir Hassan and Mervyn Lewis, vol. 49 (2007), p. 25; Edward Elgar Publishing, Umar A. Oseni, and Abu Umar Faruq Ahmad, "Dispute resolution in Islamic finance: A case analysis of Malaysia", *Ethics, Governance and Regulation in Islamic Finance*, vol. 125 (2015); Ruzian Markom and Noor Inayah Yaakub, "Litigation as dispute resolution mechanism in Islamic finance: Malaysian experience", *European Journal of Law and Economics*, vol. 40, no. 3 (2015), p. 565.

After the decision of the Constitutional Court Decision Number 093/PUU-X/2012, the *quo vadis* about the dualism of the authority to settle sharia economic disputes have ended. Religious Courts legally constitutional become the only institution authorized to resolve sharia economic disputes through litigation.[6] However, this authority is not fully implemented, there are still other sharia economic disputes whose settlement was decided by the Commercial Court in the scope of General Court, namely bankruptcy disputes and PKPU (Delaying Obligations of Debt Payments) in Islamic banking.

Normatively, it should post the Constitutional Court Decision No. 93/PUU-X/2012 dated August 29, 2013, is a no longer possible settlement of disputes in litigation Islamic banking through the Commercial Court within the scope of the General Court. All types of Islamic banking dispute should have been the absolute authority of the Religious Court to prosecute including bankruptcy dispute and PKPU born based on the principles of sharia.[7] Accordingly, this paper attempts to describe the causes of bankruptcy and PKPU cases in Islamic banking still handled by the Commercial Court, the legal consequences if a quo case is handled by the Commercial Court, and the legal reasoning regarding the competence of the Religious Courts in bankruptcy and PKPU cases in Islamic banking.

Research Methodology

Research on the competence of Religious Court in the case of bankruptcy and PKPU on Islamic banking is normative legal research. Normative legal research is legal research on the rules, norms, and principles of law, including the legal doctrines that develop and are relevant to the theme of research. According to Soejono Soekonto, normative legal research is directed at research that draws legal

[6] Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah Teori dan Ekonomi* (Jakarta: Penerbit Kencana, 2017), p. 329.

[7] Based on the data the author traces from the SIPP Supreme Court application on Monday, July 26, 2018, to date, there have been as many as 8 Bankruptcy and PKPU cases based on sharia contracts that filed Cassation and PK to the Supreme Court, 20 cases that entered the Central Jakarta District Court (siip.pn-jakartapusat.go.id/list_perkara/search), 7 cases in Semarang District Court (siip.pn semarangkota.go.id/list_perkara/search) and 2 cases in Medan PN (siip.pn medankota.go.id/ list_perkara/search)

principles, legal systematics, synchronization of laws and regulations, comparative law, and legal history.[8]

The approach used in this research is the statute approach and conceptual approach. The legislative approach is to prescriptively examine the principles of a statutory arrangement, while the conceptual approach is to build a complete concept of this research both by perfecting existing concepts and those that do not yet exist. The technical analysis used is synchronization and harmonization using the authority theory and *lex specialis* principle.

Bankruptcy and PKPU in the Perspective of Civil Law in Indonesia

In July 1997 there was a monetary crisis in Indonesia which began with the weakening of the rupiah exchange rate against the US dollar.[9] It resulted in the debts of the Indonesian businessmen in foreign currencies mainly against foreign creditors to become swollen, causing many debtors were unable to pay its debts. Besides that, bad credit in domestic banks is also increasing tremendously. Considering that debt restructuring efforts are still not expected to be successful, while efforts through bankruptcy using *Faillissements Verordening* which are very slow in the process, creditors, especially foreign creditors, want the Indonesian bankruptcy regulation, *Faillissements Verordening*, to be replaced or changed immediately. The IMF, as the lender, believes that in addition to efforts to settle Indonesian banking bad loans, efforts to overcome the Indonesian monetary crisis are also inseparable from the necessity of resolving foreign debts from Indonesian businessmen. Therefore, the IMF urged the government, to immediately change the applicable bankruptcy regulations, namely *Verordening Faillissements*.[10]

As a result of the IMF's insistence, the government finally issued Perpu Number 1 of 1998 concerning amendments to the Bankruptcy Law which added and changed the previous bankruptcy regulations,

[8] Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 2007), p. 51.

[9] Guglielmo Maria Caporale, Andrea Cipollini, and Panicos O. Demetriades, Monetary policy and the exchange rate during the Asian crisis: identification through heteroscedasticity." *Journal of International Money and Finance*, vol. 24, no. 1 (2005), p. 39. See also, J. Soedradjad Djiwandono, "Bank Indonesia and the recent crisis", *Bulletin of Indonesian economic studies*, vol. 36, no. 1 (2000), p. 47.

[10] Sutan Remy Syahdeni, *Hukum Kepailitan* (Jakarta: PT. Pustaka Utama Grafiti, 2004), p. 30.

namely *Verordening Faillissements*. After the issuance of the bankruptcy Perpu on April 22, 1998, then 5 months later the Bankruptcy Regulation was submitted to the DPR and on September 9, 1998 the Perpu was passed into Law No. 4 of 1998 and has now changed to Law No. 37 of 2004.

Specific arrangements regarding bankruptcy in Indonesia, regulated in Law Number 37 of 2004 concerning Bankruptcy and Delay of Obligation to Pay Debt (PKPU). In the Bankruptcy Law mentioned in article 1 paragraph (1), bankruptcy is a general seizure of the assets of a bankrupt debtor whose management and settlement is carried out by the curator under the supervision of a supervisory judge as stipulated in the law. The definition of bankruptcy mentioned in Article 1 Number 1 UUK provides a formula that a bankruptcy statement is a court decision, this indicates that before the decision of a bankruptcy statement by the court, a debtor cannot be declared bankrupt. After the announcement of the bankruptcy decision, the provisions of article 1131 of the Civil Code apply.[11]

Bankruptcy law regulated by Law No. 37 of 2004 adheres to the principle of business competition whereby the law does not see the condition of the debtor as solvent or insolvent, provided that it fulfills a number of requirements, namely debtors who have two or more creditors and do not pay off at least one debt maturity and can be billed, the condition can cumulatively be declared bankrupt by Commercial court. Because this bankruptcy and PKPU case is voluntary, the target for settlement of cases is minimized in time,[12] this aims to expedite the principle of business competition and ongoing business.

Whereas the Postponement of Debt Payment Obligations (PKPU) is a debt settlement alternative to avoid bankruptcy. According to Munir Fuady,[13] whereas the postponement of Debt Payment Obligations (PKPU) is an alternative debt settlement to avoid bankruptcy. According to Munir Fuady, the postponement of Debt Payment Obligations (PKPU) is a certain period of time given by law through the decision of the Commercial Court, which in that period of time to

[11] Ahmad Yani and Gunawan Widjaja, *Seni Hukum Bisnis Kepailitan* (Jakarta: PT. Raja Grafindo Persada, 2002), p. 12.

[12] The deadline for completing Bankruptcy applications is 60 days and PKPU is 45 days (temporary time) and 240 days (permanent time).

[13] Munir Fuady, *Hukum Pailit* (Bandung: Citra Aditya Bhakti, 2002), p. 8.

creditors and debtors is given an agreement to discuss ways of repaying its debts by providing a peace plan (composition plan) on all or part of the debt, including the need to restructure the debt. Thus the Delay of Debt Payment Obligations (PKPU) is a kind of moratorium or known as the legal moratorium.

PKPU requisitions can be submitted by creditors or debtors to the Commercial Court. PKPU applications can be submitted before a bankruptcy application is filed by the debtor or creditor or it can also be submitted after the bankruptcy application is submitted no later than at the first session of the examination of the application for bankruptcy statement. But if the bankruptcy and PKPU application is submitted at the same time, the PKPU application that will be examined first.

Based on the above understanding, it can be distinguished that in bankruptcy, debtor's assets will be used to pay all his debts that have been matched, while in PKPU, debtors assets will be managed so as to produce and can be used to pay the debts of the debtor.

Tangency Point Authority to Trial between Commercial Courts and Religious Courts in Bankruptcy and PKPU Cases in Islamic Banking

Regarding the intersection of authority between the Commercial Court and the Religious Court in examining and adjudicating bankruptcy and PKPU cases in Islamic financial institutions, actually lies in the realm of mixed public (conventional) civil law areas to the realm of special civil law that uses the principles of sharia economic law, as a result, the expansion of the application of general civil law to sharia economic jurisdiction creates an element of legal uncertainty.[14] During this time, the bankruptcy applied was in a general perspective, namely all individuals or corporations experiencing bankruptcy so as not to distinguish whether bankruptcy was conventional or tied to in their contracts. While in the perspective of sharia economic law itself, sharia economic contracts bankruptcy that occurs in sharia financial institutions or individuals who make agreements with sharia economic contracts is seen as part of the form of 'dispute' which is the jurisdiction of the Religious Courts in the general sense of article 49 letter (i) Law

[14] Habib Ahmed, "Financial crisis, risks and lessons for Islamic finance." *ISRA International Journal of Islamic Finance*, vol. 1, no. 1 (2009), p. 7. See also, Mahmoud A. El-Gamal, *Islamic finance: Law, economics, and practice* (Cambridge: Cambridge University Press, 2006), p. 24.

Number 3 of 2006 concerning the Religious Courts. Citing his opinion Natsir Asnawi that all the details or the details are not described the meaning of the word 'dispute' must remain in the general meaning that encompasses all forms of dispute that have been and may occur in the field of Islamic economics.[15]

On the other hand, the intersection of authority also occurs due to the expansion of the competence of the Religious Courts into the realm of public law in the context of sharia economic law. The principle of Islamic personality is no longer understood as an individual Muslim, but has been interpreted as a non-Muslim personality or conventional legal entity that voluntarily subjugates itself and binds its contractual agreements based on Islamic economic contracts. The expansion of the competency of the Religious Courts into the realm of Islamic economic law has penetrated the boundaries of the general civil law which is still a role model law for the Indonesian people so that the potential for mixed public civil law areas with sharia economic law is increasingly apparent.

Thus, the tangent point of judging in bankruptcy and PKPU cases in sharia banking lies in the occurrence of a conflict of authority between the Commercial Court and the Religious Court, where in Law Number 37 of 2004 the settlement of bankruptcy and PKPU cases are decided by the Commercial Court without distinguishing between bankruptcy at conventional financial institutions and sharia financial institutions, while under Law No. 3 of 2006 mandating the settlement of sharia economic disputes to the Religious Courts and the said phrase sharia economic disputes in the Act referred to are all types of other civil disputes in the field of sharia economy, including in this case bankruptcy disputes and PKPU based on sharia contracts.

The Causes of Bankruptcy and PKPU Cases Based on Sharia Contracts Still Become Competence of Commercial Courts

There are several factors that cause bankruptcy and PKPU cases to remain under the authority of the Commercial Court, including the following: The existence of a conflict between the norms of Act No. 37 of 2004 and PERMA number 2 of 2008.

[15] M. Natsir Asnawi, *Hukum Acara Perdata, Teori, Praktik dan Permasalahannya di Peradilan Umum dan Peradilan Agama* (Yogyakarta: UII Press, 2016), p. 54.

In the provisions of article 300 paragraph, 1 of Law Number 37 of 2004 Bankruptcy and PKPU mentioning:

> Pengadilan sebagaimana yang dimaksud dalam Undang-Undang ini, selain memeriksa dan memutus permohonan pernyataan Pailit dan Penundaan Kewajiban Pembayaran Utang, berwenang pula memeriksa dan memutus perkara lain di bidang perniagaan yang penetapannya dilakukan dengan Undang-Undang.
> (*The Court as referred to in this Act, in addition to examining and deciding the application for a bankruptcy statement and delaying the obligation to pay the debt, is also authorized to examine and decide on other cases in the field of commerce whose determination is made by law.*)

The court in the article above is the Commercial Court in the General Court environment as stated earlier in article 1 paragraph 7 of this Law. The word of the Court in the aforementioned article, implicitly refers to the Commercial Court, because historically, the establishment of the Commercial Court is in order to speed up the process of settlement of payments in debts debtors who require simple and quick process and foster the confidence of foreign investors.

Bankruptcy Law Number 37 of 2004 does not distinguish between bankruptcy that occurs in conventional financial institutions and Islamic financial institutions because at the time the law was born, the growth of financial institutions that use sharia principles has not yet experienced a significant increase. This situation is still maintained even though sharia financial institutions each year experience additional assets annually.[16]

This contradiction is evident when we read the provisions of PERMA Number 2 of 2008 concerning KHES. In article 5 verse 2 reads:

> Dalam hal badan hukum terbukti tidak mampu lagi berprestasi sehingga menghadapi kepailitan atau tidak mampu membayar utang dan meminta permohonan penundaan kewajiban pembayaran utang, maka pengadilan dapat menetapkan kurator

[16] Based on OJK data as of January 2018, the total assets of Islamic banks reached IDR 285,397 trillion. The number of Islamic banks is 13 banks and 1,824 offices. In addition there are 2,586 ATMs. While the total assets of Islamic bank business units are IDR 128, 789 trillion, consisting of conventional commercial banks that have a Sharia Business Unit (UUS). 346 UUS offices and 144 ATMs served plus 167 banks for sharia people financing. Accessed from www.ojk.go.id on Monday July 26, 2018.

> atau pengurus bagi badan hukum tersebut atas permohonan pihak yang berkepentingan.
> (*In the event that a legal entity is proven to be unable to achieve so that it faces bankruptcy or is unable to repay debt and requests for a delay in debt payment obligations, the court may designate a curator or management for the legal entity at the request of interested parties.)*

All court words in the PERMA must be read by the Sharia Court/Court in the Religion Court, as referred to in the provisions of article 1 paragraph 8 of this PERMA provision.[17]

PERMA Number 2 of 2008 was born in order to respond to the birth of the mandate of Law Number 3 of 2006 concerning the Religious Courts which gave a mandate to the Religious Court to resolve sharia economic disputes. Because the material law which is the guideline in handling sharia economy is still not available at that time, then PERMA serves as a filler of legal void. All provisions contained in PERMA Number 2 of 2008 concerning KHES are related to the subject matter of Islamic economic material law. As for the judiciary to handle it entirely be read the Religious Court/Sharia Court.

The existence of A "Legal Loophole" Condition Regarding Islamic Bankruptcy Law

Since the issuance of Law No. 3 of 2006 concerning the Religious Courts, arrangements regarding bankruptcy based on sharia contracts have not been designed until now. Possibly the main factor is because bankruptcy cases and PKPU are cases that rarely appear on the surface and not as much as general civil cases.

When discussing Law Number 3 of 2006 concerning the Religious Courts, all standing committee members of the formulation of the Law in the House of Representatives accepted by acclamation the existence of the law. Unfortunately in article 49 letter (i) about the explanation section the word sharia economy only mentions up to point (k) and does not include Sharia Bankruptcy points as part of sharia economic disputes.[18]

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[17] The sound of the original text, "Courts are Sharia Courts/Courts within the Religious Courts." See, *Book of Compilation of Sharia Economic Law*, p. 1.

[18] What is meant by " sharia economy" is an act or business activity carried out according to sharia principles, including but not limited to: a. sharia bank, b. syari'ah microfinance institutions, c. sharia insurance, d. sharia reinsurance, e. sharia mutual

According to Amran Suadi, Chair of the Religion Chamber,[19] when the conditions for discussing the Religious Courts law at that time, stakeholders and officials of the Religious Courts deliberately did not include bankruptcy points based on sharia contracts as part of sharia economic disputes. It is a legal political effort so that the positivistic tendencies of Islamic economic law into the realm of national law does not look repressive and radical and needs a mature process to be accepted by the public. The entry point at that time was to overturn the authority of the Religious Courts in dealing with sharia economic disputes so as not to overtake political interests.

There is a legal loophole in the legal system in Indonesia where there is no definite regulation regarding the process or bankrupt procedure for Islamic financial institutions so that bankruptcy disputes based on sharia contracts are settled by conventional bankruptcy regulations. Bankruptcy regulations based on sharia contracts in Indonesian regulations only exist in PERMA Number 2 of 2008 concerning KHES and even then only a few articles discuss them. According to the author, the absence of a law-level regulation governing bankruptcy based on sharia contracts has caused the authority to try in bankruptcy cases and PKPU in sharia financial institutions still within the scope of the Commercial Court.

The Existence of KMA Decree Number 32/SK/IV/2006 Concerning Bankruptcy is settled through the Commercial Court

The KMA decree is basically a decree aimed at all the judicial apparatus under it both concerning judicial and non-technical technical judiciary to carry out a legal action. This letter is in the form of imperative instructions and must be obeyed by all judicial officials. The Decree of the Chief of the Supreme Court (KMA) is usually born based

funds, f. sharia bonds and sharia medium term securities, g. sharia securities, h. Islamic finance, i. sharia mortgage, j. pension funds for sharia financial institutions, and k. sharia business.

[19] Author's question to the Chair of the Religious Room at the event "Seminar Kebijakan Pengembangan Ekonomi Syariah dan Sosialisasi Peraturan Mahkamah Agung R.I. Nomor 14 Tahun 2016 tentang Tata Cara Penyelesaian Perkara Ekonomi Syariah" held at the Swiss Belhotel Palangkaraya Danum on 5 October 2017.

on working group meetings conducted previously by room at the Supreme Court and producing several formulas.[20]

KMA Letter Number 32/SK/IV/2006 is a decree that contains instructions and guidelines for the enforcement of the judicial administration (the book I) whose content contains all technical instructions for the application of formal and material laws in the four court environments. Since 2006 until now, the book I have always undergone changes in each of its material by adjusting changes in time and has now changed to book II. As for the connection with bankruptcy cases and PKPU, this KMA letter contains instructions to guide the entire contents of book II which in the beginning mentioned that, "*Permohonan Pernyataan Pailit dan PKPU serta HKI diperiksa dan diputus oleh Pengadilan Niaga*" (Requests for Statements of Bankruptcy and PKPU and IPR are examined and decided by the Commercial Court).[21]

Legal Effects of Bankruptcy Cases on Islamic Banking Resolved through the Commercial Court

Among the legal consequences of handling bankruptcy cases in Islamic banking by the Commercial Court are the first to have a systemic impact on the material legal applications used. Viewed from the perspective of bankruptcy sharia in Indonesia there is a tendency to change the essence of the debt by sharia into conventional debts.[22]

Changes in the essence of the legal relationship can be seen from the element of the requirement to file a bankruptcy application in Article 2 Paragraph (1) of Law Number 37 the Year 2004 concerning Bankruptcy and Delay of Obligation to Pay Debt, namely the existence of creditors and debtors. Every bankruptcy dispute based on a sharia

[20] Since 2011 through Decree No. 142/KMA/SK/IX/2011 year 2011, The Chief Justice of the Supreme Court has enacted a policy of imposing a room system on the Supreme Court. With this room system, the Chief Justice is grouped into five rooms, namely civil, criminal, religious, State and military rooms and each room is chaired by a Chair of the Room called TUAKA.

[21] Mahkamah Agung, *Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan Dalam Empat Lingkungan Peradilan* (Book II), 2009, p. 111.

[22] The concept of Debt in the Bankruptcy Law leads to the practice of interest that must be paid after maturity (see, article 1 paragraph 6 UUK-PKPU), this is contrary to the concept of "Dayn" debt in Islam which forbids the practice of taking interest in every transaction and providing concessions in each debt payment (see, MUI fatwa No. 04/DSN-MUI/IV/2000) concerning *Murabahah*.

contract that occurs always leads to forced efforts to bring up the term creditor and debtor, even though the parties (creditors and debtors) do not exist in any Islamic financing, while in Islamic finance only known partnership relationships, namely, one party helps the other party, which is funded to help the finance person and vice versa, there is no unfair profit taking in every Islamic finance. As a result of the filing of bankruptcy cases in Islamic banking to the Commercial Court, the potential of the mixed legal concepts of Islamic finance with conventional debt concepts will definitely occur.[23]

Secondly, another result of the handling of bankruptcy cases in Islamic banking by the Commercial Court is that there will be synchronization between the contract and settlement of the dispute. Philosophically, the sub and division of Islamic banking are dominated by Islamic business terms, such as *murabahah*, *musyawarah*, *mudharabah*, *qardh*, *hiwalah*, *ijarah*, *kafalah* and so on. Therefore, it is the true and right thing if the settlement of sharia banking cases is carried out in a judicial environment which substantively deals with matters relating to Islamic sharia values. If submitted to the justice system that does not implement sharia rules, what will emerge is the inconsistency between the practice of the contract and the settlement of the dispute. Contracts are carried out in the sharia system, while the settlement is carried out in a judicial environment that does not use sharia rules and principles.[24]

The third legal impact, namely, the bankruptcy law stipulated in Law Number 37 of 2004 adheres to the principle of business competition in which this law does not pay attention to the financial health of the debtor who is solvent or insolvent, provided that it meets a number of requirements, namely debtors who have two or more creditors and do not pay off at least one debt that has matured and can be billed, then the condition can be declared bankrupt by commercial court. This provision is very contradictory to the concept of bankruptcy in Islam.

The term solvent or insolvent in the framework of the study of Islamic bankruptcy law is known as for whether or not the debtor is

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[23] Ghansam Anam, et al., "Problematika Aplikasi Ekonomi Syariah Dalam Rezim Hukum Kepailitan Di Indonesia," *Jurnal Bina Mulia Hukum*, vol. 2, (2017), p. 209.

[24] Tim, "Babak Baru Penyelesaian Sengketa Ekonomi Syariah," *Majalah Peradilan Agama*, 3nd edition, Dec 2013-Feb 2014, p. 40.

healthy. This health certainly can be understood physically or financially. In Bidayatul Mujtahid, Ibn Rusyd interpreted this healthy word as physical and mental health, because the debtor who has debt and is ill (not made) does not have to be billed but is given a time/extension tolerance limit to pay off his debt so he is healthy and can return to activity.[25]

In the context of modern Islamic finance, the healthy meaning above experiences an expansion of meaning not only limited to physical health and individual soul but also the financial health level of the fiscal institution itself as a debtor in this case called solvency. Islamic bankruptcy is very tolerant to give the time limit for extending debt repayments if the debtor is in an insolvency condition. It is an Islamic economics learning ethics that always equalizes the debtor and creditor as a cooperative partner relationship that helps each other as much as Q.S. al-Baqarah (2): 280.

Building Legal Reasoning with the *Lex specialis* Approach and Authority Theory

To determine how the competence of the Religious Courts in adjudicating bankruptcy and PKPU cases in Islamic banking, the writer will synchronize based on the principle of *lex specialis derogate legi generali* and harmonization based on the theory of authority.

Synchronization based on the principle Lex specialis derogate legi generali

The principle of *lex specialis derogate legi generali* is the principle of legal interpretation which states that specific provisions override general provisions. Regarding its relationship with PERMA Number 2 of 2008 in terms of its function as a special regulation for all general regulations regarding sharia economics and all matters relating to financial institutions that use sharia contracts. The existence of PERMA was born to respond to the mandate of Law Number 3 of 2006 concerning the Religious Courts which gave absolute authority to the Religious Courts to try and resolve sharia economic disputes because the practice of sharia economics is a new thing in the practices of financial

[25] Dian Asriani Lubis, "Kepailitan Menurut Ibnu Rusyd dan Perbandingannya Dengan Hukum Kepailitan di Indonesia", *Jurnal Hukum Islam*, vol. 8, no. 2 (2013), p. 272.

institutions in Indonesia.[26] Therefore, a legal instrument is needed that can accommodate all problems related to sharia contracts including procedures for resolving disputes.

To end the norm conflict between Law No. 37 of 2004 and PERMA No. 2 of 2008, synchronization efforts are needed. According to the author, the bankruptcy term and PKPU in Article 300 paragraph 1 of the Bankruptcy Law Number 37 of 2004 have general meaning or contain general meanings that refer to any conventional financial institutions that experience bankruptcy such as corporate institutions, general banking and others that occur during the period when the law was made. The generality of the term bankruptcy and PKPU in conventional financial institutions in the article cannot always be accepted until now, because the nature of the generality is limited by the existence of *lex specialis* (specialization) with the birth of several Islamic financial institutions. The birth of sharia financial institutions reduces the existence of conventional financial institutions that have separate legal procedures and dispute resolution content with conventional ones, in which the settlement of resolutions is settled based on the sharia principles.

Here it is clear that the existence of PERMA Number 2 of 2008 stated in Article 7 paragraph 2 as *lex specialis* (special rule) which implicitly overrides the general rule of Article 300 paragraph 1 of the Bankruptcy Act in resolving bankruptcy and PKPU disputes in Islamic financial institutions with give competence to the Religious Courts to try it according to the mandate of Law Number 3 of 2006. The next problem is whether the position of PERMA can be a *lex specialis* from the law? The author agrees with Jimly Asshidqie,[27] who put the MA regulation (PERMA) as a special regulation so that it is subject to the *lex specialis derogate legi generali* principle and according to the author insofar as there are no laws governing bankruptcy and PKPU in

[26] Islamic economic thinking and activities in Indonesia in the late 20th century were more oriented towards the establishment of Islamic financial and banking institutions. This idea and thought can only be realized later, starting from its foundation Bank Muamalat Indonesia (BMI) which was operated since May 1, 1992 which was then followed by the establishment of PT. Takaful Insurance Indonesia dated February 24, 1994, then one by one other Islamic financial institutions, both in the same sector and other economic sectors continued to emerge.

[27] Jimly Asshidqie, Konstitusi dan Konstitualisme, *Jurnal Fakultas Hukum Tata Negara.*

financial institutions that use sharia principles, then PERMA Number 2 of 2008 functions as a filler of legal void to determine the absolute competence of the Religious Courts in bankruptcy cases and PKPU based on sharia contracts.[28]

The granting of authority to the Commercial Court in bankruptcy and PKPU material examinations to financial institutions that use sharia principles is an unconstitutional attitude and contradicts the mandate of the 1945 Constitution which guarantees freedom to all religious followers to practice their respective religious teachings.[29] Submission of Islamic economic law for Muslims or financial institutions that use sharia principles is a basic right and freedom that must be respected. An anomaly, if bankruptcy and PKPU cases in Islamic financial institutions are decided based on conventional economic law, not sharia economic law.

Harmonization based on the theory of authority

In Law Number 3 of 2006, the Religious Courts were given additional powers to settle sharia economic cases. In the explanation of article 49 letter (i), what is meant by sharia economy is an act or business activity carried out according to sharia principles.

According to Cik Basi,[30] in Penyelesaian Sengketa Perbankan Sharia (2009), the term "among other things" in the explanation of the article means that not only the types mentioned are only the authority of the Religious Courts, but include other types of business activities in the field of Islamic economics other than those mentioned.

Publication of the decision of the Constitutional Court Number 93/PUU-X/2012 raised some new norms and also ensuring legal certainty as mandated by Article 28 paragraph (1) of the Constitution (Constitution) 1945, especially in terms of Islamic banking dispute

[28] In addition to the above arguments, it is judicially based on the provisions of the Supreme Court Law which stated that, "The Supreme Court can further regulate matters needed for the smooth operation of the judiciary if there are things that are not sufficiently regulated in this Act. "See, Law Number 14 of 1985 ammanded by Law Number 5 of 2004 and ammended by Law Number 3 of 2009 Article 79."

[29] See, Article Article 28D paragraph (1) of the 1945 Constitution, "The State guarantees the freedom of its people to carry out worship in accordance with the teachings of their respective religions and beliefs."

[30] Tim, "Babak Baru….," p. 20.

settlement itself. Sharia banking dispute resolution is the absolute (absolute) authority of the Court in the Religion Court, as mandated by Article 49 letter (i) of Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning the Religious Courts and Article 55 paragraph (1) Law Number 21 of 2008 concerning Islamic Banking. Sharia banking dispute resolution and sharia financial institutions, in litigation, including bankruptcy disputes and PKPU, must be read as the absolute authority of the Court/Sharia Court in the Religion Court as mandated by Article 49 letter (i) of Law Number 3 of 2006.

The Commercial Court based on Law Number 37 of 2004 is only competent in prosecuting bankruptcy and PKPU cases in the scope of conventional financial institutions, and its legal norms have not been able to reach bankruptcy and PKPU disputes in Islamic financial institutions, because constitutionally all sharia economic disputes include bankruptcy disputes and PKPU in sharia financial institutions is the absolute jurisdiction of the Religious Courts. The law contained in Law No. 37 of 2004 contains the contents of procedures and technical bankruptcy checks and PKPU in conventional financial institutions that refer to general civil law so as not to reach the material and substance of bankruptcy law and PKPU in financial institutions that use the principles of sharia economic law.

With the issuance of Law Number 3 of 2006 and the Decision of the Constitutional Court Number 93/PU-X/2012, it has provided a new limit of authority between the General Commercial Court and the Religious Court in resolving sharia economic disputes. All disputes in sharia economic contracts and their resolutions must be decided and resolved linearly by the Religious Courts based on sharia principles, including bankruptcy and PKPU disputes on sharia financial institutions.

Based on the authority limit theory above, the Commercial Court should not be authorized to decide and adjudicate bankruptcy and PKPU cases in sharia financial institutions, because the legal basis used as a guideline in judging is Law Number 37 of 2004 which is normatively limited to the legal institutions of financial institutions conventional, and has not reached the legal domain of sharia financial institutions. The birth of Law Number 3 of 2006 and strengthened by the Constitutional Court Decision Number 93/PUU-X/2012 has provided

a solution for the settlement of conventional economic disputes with Islamic economics.[31]

Conclusion

Bankruptcy and PKPU cases that are born based on sharia contracts are absolutely the competence of the Religious Courts. This is based on two arguments, namely the *lex specialis* and the theory of authority. The existence of PERMA No. 2 of 2008 overrides the provisions of the Bankruptcy Law whose legal norms have not reached the substance of sharia economic law. Based on the theory of authority, it is clear that there is a limit to the authority to try. The Bankruptcy Act only competes in judging bankruptcy and PKPU cases in conventional financial institutions while the Religious Courts Act adjudicates all sharia economic disputes including bankruptcy and PKPU in Islamic financial institutions.

The author recommends that the Bankruptcy Law is now revised to include the content of Islamic bankruptcy and establish a special Commercial Court within the Religious Courts as *judex facti*. For the short term, the Supreme Court established a Connectivity Court where the Religious Court judges who have sharia economic certification are placed in the assembly that handles bankruptcy cases and PKPU based on sharia economic agreements

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[31] The sound of the original text, "Kecuali ditentukan lain dalam Undang-Undang ini maka hukum acara yang berlaku adalah Hukum Acara Perdata". See, article 299 Undang-Undang No 37 Tahun 2004 tentang Kepailitan dan PKPU."

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