

NORM INCONSISTENCY TO EXAMINE THE BANKRUPTCY CASE IN SHARIA ECONOMIC FIELD IN THE PERSPECTIVE OF LEGAL POLICY OF ISLAMIC AND COMMERCIAL COURT ESTABLISHMENT

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Abstract

This research aimed to find out the correlation between the norm inconsistency of authority to examine the bankruptcy case in sharia economic field and the legal policy of Islamic and Commercial Court establishment. The research method was normative method with statute and historical approaches. The result of research showed that the difference of legal policy in the establishment of Islamic and Commercial Courts cause norm inconsistency of absolute authority. Legal policy of Islamic Court establishment aims to create an official institution to Muslim community to settle the dispute in litigation way, it is because Islamic court has been existent non-formally before Indonesia was born. Meanwhile, the establishment of Commercial Court is intended to meet the need for the fair, quick, transparent, and effective resolution of debt-loan conflict related to bankruptcy and newly created as the response to monetary crisis in 1997. The norm inconsistency should be removed by expanding the absolute competency of Islamic Court to examine the bankruptcy case in sharia-economic field and to establish Islamic Commercial Court institution as the court that specifically authorized to examine the bankruptcy case in Sharia-economic field.

Keywords: Norm Inconsistency, Islamic Court, Bankruptcy.

I. INTRODUCTION

Bankruptcy is one of way to resolve the business dispute in Indonesia with Commercial Court being the court institution authorized to exam and to settle it. Institutionally, commercial court is the special court established in general court domain with an authority of examining the commercial cases. The existence of commercial court institutionally in general court domain bring the author with a big question because of Republic of Indonesia applies not only one legal system, but in his study, Esin Oruchu mentioned that Indonesia also adheres to mix legal system with mapping : complex mixes 5 consisting of the combination (hybrid) of civil law, Islamic law, and customary law (Esin Orucu, 2008:17).

On the other hand, the implication of Islamic law existence in Indonesia is that the law is institutionalized as positive law, with either legislation or litigation institution that in this case is established and founded to resolve civil disputes between people adhering to Islam Religion and those submissive to Islamic law in doing their legal action, i.e. Islamic Court, the position of which is under Islamic Justice (Oyo Sunarto Mukhlas, 2015:213).

The existence of sharia contracts in Indonesia, particularly through Islamic banking in Indonesia, impacts on the expansion of Islamic Court's authority. Law Number 3 of 2006 about the Amendment to Law Number 7 of 1989 about Islamic Court (thereafter called Law 3/2006) expands the scope of cases belonging to Islamic Court's absolute authority from formerly including marriage, inheritance, dying exhortation, bequest given based on Islamic law, wakaf and sadaqah (donation) to including marriage, inheritance, bequest, wakaf, zakat (tithe), infaq, sadaqah and Islamic economy (sharia).

The expansion of Islamic court's authority to examine sharia-based economic case should have implication to the resolution of bankruptcy case in sharia-economic field by Islamic Court. However, in fact, bankruptcy case in sharia-economic field is investigated and examined in Commercial Court belonging to General Court domain. It is called norm inconsistency by the author, then being institutional inconsistency. With the authority given to Islamic Court belonging to Islamic justice domain to examine and to resolve the cases in sharia-economic field, Commercial Court belonging to General court domain should no longer have an authority of examining bankruptcy cases in sharia-economic field, resulting from the contracts based on sharia principles.

Bankruptcy case, as the consequence of non-performing sharia contracts examined later in the commercial court belonging to general court domain initiates the author's attention to the phenomenon of norm inconsistency concerning the authority of examining the cases in sharia-economic field between Islamic court and commercial court. The trial of bankruptcy with sharia-based economic agreement in commercial court has ever occurred, one of which is the case Register Number 3/Pailit/2014/PN.SMG. between PT. Bank Syariah Bukopin as the petitioner of bankruptcy and Mrs. Hajjah Yudianto as the petitionee of bankruptcy. The petition for bankruptcy is based on Line Facility Murabahah contract between PT. Bank Syariah Bukopin as creditor and Mrs. Hajjah Yudianti as debtor. In addition to the bankruptcy case number 3/Pailit/2014/PN.SMG, there is also bankruptcy case based on other sharia contracts, e.g. number 2/Pailit/2014/PN.SMG, case number 12/Pdt.Sus-Pailit/2017/PN.Niaga Semarang, case number 03/Pailit/2012/PN.Niaga/Medan., case number 10/Pdt.Sus/PKPU/2013/PN.NIAGA.JKT.PUSAT, and case number 04/Pdt.Sus-PKPU.PAILIT/2018/PN.Niaga.Mks.

Using historical and systematical thinking system, the author found that the condition in which Islamic Court belonging to Islamic justice domain and Commercial Court belonging to General Court domain in fact and in principle having authority to decide and to examine the cases in sharia-based economic field closely related to legal policy of legislation that giving authority to the two corresponding judicative institutions.

II. METHOD

The research method in this study was normative method with statute and historical approaches and deductive analysis technique.

III. DISCUSSION

The difference of legal policy of Islamic Court and Commercial Court Establishment in Indonesia Legal Policy of Islamic Court Establishment in Indonesia

a. Legal Policy of Islamic Court Establishment in Law Number 19 of 1964 about the Basic Provisions of Judicial Power

Although Law Number 19/1964 is the first Law to mention Islamic Court, but this Law has put Islamic Court to be a special court without explaining the specialty of Islamic Court. In principle, the Explanation of Law about Basic Provisions of Justice Power aims to put the bases for judicial organization, to organize the relationship between the court and the justice seekers. Legal policy of Islamic Court establishment in Law No.19/1964 is to implement the provisions mentioned in Article 24 of Constitution (before the amendment) reading:

- (1) The judicial power shall be implemented by a Supreme Court and other judicial bodies according to Law.
- (2) The structure and the power of those judicial bodies are governed by law

b. Legal Policy of Islamic Court Establishment in Law Number 14 of 1970 about the Basic Provisions of Judicial Power

Particularly, legal policy of Islamic Court Establishment in Law Number 14 of 1970 about the Basic Provisions of Judicial Power (thereafter called Law 14/1970) does not appear recalling that the background of Law 14/1970 development is Law No.19/1964 is not the pure implementation of Article 24 of 1945 Constitution (UUD 1945), as it contains the provisions contradictory with the 1945 Constitution.

Overall, the legal policy of Islamic Court Establishment as mentioned in the Law Number 14 of 1970 is intended to fill in the vacuum of court institution in Indonesia including Islamic Court constituting the effect of the revocation of Law No.19/1964 because it cannot implement the 1945 constitution purely. The difference between Islamic court institution as mentioned in the Law Number 14 of 1970 and the Islamic court mandated by Law No. 19/1964 is that the Islamic court mandated by Law No.14/1970 is more impartial because the preexisting executive institution has been removed.

c. Legal Policy of the development of Law Number 7 of 1989 about Islamic Court

Although it has been known that the legal policy of Islamic Court is to fill in the vacuum of court institution, particularly Islamic Court and should maintain the purification of 1945 Constitution implementation, to deepen the analysis, the author will conduct an analysis to find out the Legal Policy of the development of Law Number 7 of 1989 about Islamic Court (Law No.7/1989), the establishment of which is the mandate of Law No.14/1970. Based on the consideration and general explanation of Law No.7/1989, the author found that the legal policy of the development of Law No. 7 of 1989 is as follows.

- 1) To enforce justice, truth, orderliness, and law certainty, the diversity of regulation about structure, power, and procedural law of court in Islamic Court domain existing so far should be ended, for example Regulation about Islamic Court in Java and Madura (Staatsblad of 1889 Number 152 connected to Staatsblad of 1937 Nos. 116 and 610), Regulation about Kerapatan Qadi and Kerapatan Qadi Besar for some residences in South and East Borneo (Staatsblad of 1937 Number 638 and 639), Government Regulation Number 45 of 1957 about the Establishment of Islamic Court/Shar'iah Court Out of Java and Madura (Government Gazette of 1957 Number 99), aiming to create a legal unity governing Islamic Court in the frame of national legal system and order based on Pancasila and 1945 Constitution.
- 2) To achieve a simple, fast, and low-cost court as mandated by Law Number 14 of 1970.

d. Legal Policy of the Development of Law Number 3 of 2006 about the Amendment to Law Number 7 of 1989 about Islamic court

Based on the consideration and general explanation of Law Number 3/2006, the author found that Legal Policy of the Development of Law No. 3 of 2006 is in the attempt of confirming and expanding the court's authority in Islamic Court domain; it is consistent with the development of law and the need of community (people), particularly Muslim community, for the law. Such expansion includes sharia economy. Regarding the expansion of authority and the development of sharia-based economy, Abd Somad said that the development of sharia or Islamic law runs very rapidly in the world's new economy era entering into global culture with informatics technology advance on the one hand and nationalism and spiritual revival on the other hand (Abd Shomad, 2012:1).

e. Legal policy of the Development of Law Number 50 of 2009 about the second amendment to the Law Number 7 of 1989 about Islamic Court

Based on the consideration and general explanation of Law Number, the author concludes that the legal policy of the development of Law No.50/2009 are as follows:

- 1) The response to Constitution Court's Verdict Number 005/PUU-IV/2006 on August 23, 2006, in which the verdict states that Article 3 clause (3) of Law Number 4 of 2004 about Judicial Power

and provision of articles concerning the judge's supervision in Law Number 22 of 2004 about Judicial Commission is in contradiction with the Republic of Indonesia's 1945 Constitution (UUD 1945) and therefore does not have binding legal power.

- 2) Achieving the organization of independent judicial power and clean and prestigious court, conducted through the arrangement of integrated justice system, moreover Islamic court is constitutionally a judicial body under Supreme Court.

Legal Policy of Commercial Court Establishment in Indonesia

- a. Legal Policy of Commercial Court Establishment in the Government Regulation Substituting the Law No.1 of 1998 about the Amendment to Bankruptcy Law.

Based on the consideration and general explanation of Government Regulation (Perpu) No.1/1998, the author found that legal policy of Commercial Court Establishment in Perpu No.1/1998 is intended to fulfill the need for the fair, fast, transparent, and effective resolution of debt-loan and bankruptcy dispute through a special court in General Court domain created and in charge of dealing with, examining, and deciding various certain disputes in commercial field including bankruptcy and payment postponement, and is very desirable in organizing business activity and economic life in general.

Sutan Remy Sjahdeni stated that this release of Perpu No.1/1999 is also a response or urge of International Monetary Fund (IMF) wishing the presence of rule of law that can protect the foreign creditors who distribute loan to the debtor in Indonesia in the form of foreign exchange. The weaker value of rupiah's exchange rate against dollar in 1997. Such condition resulted in chain problems that will impact more widely on, among others, the lost job opportunity and other social problems when it is not solved immediately. Meanwhile, to solve the debt-loan problem fairly, quickly, transparently, and effectively, the business world highly needs a supporting legal set (Sutan Remy Sjahdeni, 2010:24).

Before the establishment of Commercial Court with the authority to examine, to decide and to resolve the bankruptcy cases in Indonesia, the bankruptcy cases were examined and decided by District Court. Thus, procedural or formal procedural law used will automatically follow the enacted procedure in District Court, in which the settlement of dispute in the institution takes a sufficiently long time.

- b. Legal policy of the Development of Law Number 4 of 1998 about the Enactment of Government Regulation Substituting the Law No.1 of 1998 about the Change of Bankruptcy Law into the Law.

Legal policy of the Development of Law No.4/1998 is inseparable from the characteristics of Perpu No.1 of 1998 developed in critical and urgent conditions by the republic of Indonesia's President at that time, so that soon after the enactment of Government Regulation Substituting the Law by the president, it should be ratified by Legislative Assembly in order to be Law.

The consideration and the general explanation of the Law No.4 of 1998 have similar content. The legal policy of the development of Law No.4 of 1998 to stipulate the Government Regulation No.1/1998 to be the Law is the mandate of Article 22 clause (2) of 1945 Constitution.

- c. Legal policy of the Development of Law Number 37 of 2004 about Bankruptcy and Loan Payment Obligation Postponement

Referring to the consideration and the general explanation of Law No. 37/2004, the legal policy of the development of Law No.37/2004 is because of economic and trading development growth rapidly, leading to more debt-loan problems occurring within society and Perpu No.1/1998 established to be Law later based on the Law No.4/1998 having not fulfilled the community's growth and need for law.

It also highlights the implementation of Law No.4/1998 and the establishment of Commercial Court at that time, considered as an institution not functioning well. This problem is due to, among others, IMF's urge, the process of making Perpu No.1/1998 jo. Law No.4/1998 in hurry, thereby not producing an law, and the weak human resource, particularly law enforcers dealing with the bankruptcy case including judge, advocate and curator; it is because commercial court institution is something new (Andi Muhammad Asrun, 2000: 14-15).

The Different Legal Policy of the Establishment of Commercial and Islamic Courts impacts on the Limitation of Authority to Examine, Bankruptcy Case in Commercial Court.

Referring to the findings of legal policy using historical approach method, it can be seen that there is a difference of legal policy between the establishments of Islamic court and commercial court. Legal policy of the Islamic Court establishment is to create an official institution to Muslim communities living in Republic of Indonesia to resolve the dispute in litigation with one formal law. It is because Islamic Court has been existing non-formally in Indonesia since the existence of Islam in Indonesia.

In Islamic sultanate and kingdom and ruling era, Islamic Court has been present formally. It was called Peradilan Penghulu (Muslim Leader Court) in Jawa, Mahkamah Syariah (Sharia Court) in Sumatran Islamic Sultanat (Deli, Langkat, Asahan, Indragiri), and Peradilan Qadi in Banjar and Pontianak Sultanate (Syafuddin Zuhri, 1979: 204) and Makassar/ Gowa Tallo Kingdom (Ahmad R., 2005: 316). Religious institutions such as qadhi and mufti were also enacted in Samudera Pasai Kingdom (Ayang Utriza Yakin, 2014: 281-288). In Cirebon or Priangan Kingdom, there were 3 forms of court operating: Peradilan Agama, Peradilan Drigama, Peradilan Cilaga (Ahmad R, 2015: 315). In Banten Kingdom, qadhi has an important role in Banten Sultanate government. In addition to being responsible for resolving the people's dispute in Islamic court, he also contributed to the Islamic law enforcement such as hudud (Ahmad R., 2015: 316). Similarly, in Mataram Kingdom (1588-1681 M), Sultan Agung has enacted civil law and criminal law (qishas) in Islam Mataram Kingdom (Amran Suadi, Mardi Candra, 2016: 347-348).

Furthermore, after Islamic Court having been established officially by Republic of Indonesia's Government, the analysis on legal policy conducted by the author focused on the legal policy of the development of Law about Islamic Court governing the stipulations about Islamic Court. Legal policy of legislations about Islamic court includes: 1) to remove the diverse regulation about structure, power, and procedural law of court in Islamic Court domain at that time (before the enactment of Law No.7/1989), 2) to confirm and to expand the authority of court in Islamic Court domain, in sharia-economic field, 3) to respond to the Constitution Court's Verdict Number 005/PUU-IV/2006 on August 23, 2006, and 4) to arrange an integrated justice system.

In contrast to the legal policy of Islamic Court establishment, that of commercial court establishment is to fulfill the need for the fair, fast, transparent, and effective resolution of debt-loan dispute concerning bankruptcy. Legal policy of commercial court establishment in fact is in line with monetary crisis and bankruptcy mechanism in Indonesia. Therefore, the establishment of Commercial Court is governed in the Law about Bankruptcy, rather than governed distinctively like Islamic Court.

The difference view from legal politic perspective, in the establishment of Islamic Court shows that the institution has been existing even before Indonesia has been established, despite no legal uniformity as it is still informal and regional in nature. On the other hand, Commercial court is established in line with Perpu No.1/1998 about Bankruptcy as the response to monetary crisis occurring at that time in which the state needs a court institution resolving debt-loan affairs a fairly, fast, transparently, and effectively. The stipulation governing the bankruptcy has been existent first, Law about Bankruptcy (Faillissements-verordenend Staatsblad 1905:217 juncto Staatsblad 1906:348), and then Commercial Court is established as the response to monetary crisis beginning in 1997.

The different legal policy impacts on the Islamic court and Commercial court's authority. Therefore legal policy of the Islamic court establishment aims to create an official institution to Muslim communities to resolve the dispute through litigation, while the legal policy of Commercial Court establishment to fulfill the need for the fair, fast, transparent, and effective debt-loan (bankruptcy) dispute resolution as the response to monetary crisis in 1997. Therefore, although in Law No.3/2006, the authority of Islamic Court has been expanded to examine sharia-economic case, the bankruptcy case in sharia-economic field belong to the Commercial Court's authority corresponding to the objective of Commercial Court establishment based on Perpu No.1/1998, to resolve the bankruptcy cases. As a result, although Islamic Court has been authorized to examine the cases in sharia-economic field, bankruptcy cases, including the one based on non-performance of sharia contracts are examined by Commercial Court until today. Thus, it can be seen clearly that the difference of legal policy of Islamic and Commercial court establishment results in norm inconsistency of authority to examine the bankruptcy cases in sharia-economic field.

IV. CONCLUSION

The different of legal policy between Islamic court and commercial court establishment impacts on the Islamic court and Commercial court's authority to examine bankruptcy case in the field of sharia-economic. Therefore legal policy of the Islamic court establishment aims to create an official institution to Muslim communities to resolve the dispute through litigation, while the legal policy of Commercial Court establishment to fulfill the need for the fair, fast, transparent, and effective debt-loan (bankruptcy) dispute resolution as the response to monetary crisis in 1997. Therefore, although in Law No.3/2006, the authority of Islamic Court has been expanded to examine sharia-economic case, the bankruptcy case in sharia-economic field belong to the Commercial Court's authority corresponding to the objective of Commercial Court establishment based on Perpu No.1/1998, to resolve the bankruptcy cases. As a result, although Islamic Court has been authorized to examine the cases in sharia-economic field, bankruptcy cases, including the one based on non-performance of sharia contracts are examined by Commercial Court until today.

Norm inconsistency should be eliminated through amending the Law about Islamic Court, Law Number 50 of 2009 about the second Amendment to Law Number 7 of 1989 about Islamic Court, the changing material of which contains the expansion of Islamic Court's authority to examine and to resolve bankruptcy cases in sharia-economic field and to establish the Islamic Commercial Court as the court institution specifically authorized to examine and to resolve bankruptcy cases in sharia-economic field.

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