

Juridical Analysis Of The Absolute Competence Of Religious Courts And Commercial Courts In *Adjudicating* Bankruptcy And PKPU Based On Sharia Contracts

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Abstrak

The Constitutional Court's decision No. 93/PUU/X/2012 states that the settlement of sharia economic disputes is the absolute competence of the Religious Courts. However, at the practical level, bankruptcy cases and PKPU based on sharia contracts are still decided by the Commercial Court (general). This paper focuses on two things, first, taflis/bankruptcy law in Islam and its applicability to Islamic banking in Indonesia, and second, the absolute competence of religious courts and commercial courts in bankruptcy cases and PKPU based on sharia contracts. The research method used is normative law, namely examining a collection of legal materials related to bankruptcy and PKPU. The analysis used is the synchronization of the norms of Law No. 37 of 2004 and PERMA No. 2 of 2008. The legal consequences if the Commercial Court handles the bankruptcy case will be coercion on the substance of sharia economic law into conventional economic law with the concept of settlement of cases prioritizing business principles and business continuity rather than substantive justice, which ultimately leads to disharmony between dispute resolution and sharia contracts. From the results of the study, it can be concluded that based on the theory of authority and the lex specialist principle used, it can be concluded that bankruptcy cases and PKPU based on sharia contracts are absolute competencies of the Religious Court.

Keyword : Competence, Bankruptcy, Sharia Contract

A. Introduction

As the largest Muslim country in the world with a population that adheres to Islam in Indonesia recorded at around 84% or 229 million people (katadata.co.id), the need for the application of sharia is important, one of which is in the economic sector. The initiative to establish an Indonesian Islamic bank began in 1980 through discussion on the theme of Islamic banks as a pillar of the Islamic economy (DosenEkonomi.com). As a trial, the idea of Islamic banking was practiced on a relatively limited scale, including in Bandung through Bait At-Tamwil Salman ITB and in Jakarta with Koperasi Ridho Gusti (Nur Yasin, 2009) .

Following up on the results of the above initiation, in 1990, the Indonesian Ulema Council (MUI) formed a working group to establish an Islamic Bank in Indonesia. On August 18-20, 1990, MUI held a workshop on bank interest and banking in Cisarua, Bogor, West Java which resulted in a mandate for the establishment of a working group to establish an Islamic bank in Indonesia. As a result of the work of the MUI Banking Team is the establishment of the first Islamic bank in Indonesia, PT Bank Muamalat Indonesia (BMI), which since May 1, 1992, Bank Muamalat officially operates (<https://manajemen.uma.ac.id/2021/10>). The legal basis for the operation of banks that used the sharia system at that time was only accommodated in one paragraph about "banks with profit-sharing systems" in Law No. 7 of 1992. Unfortunately, without details of the legal basis of sharia and the types of businesses

that are allowed.

The ratification of Law 21 of 2008 on Islamic Banking on July 16, 2008, provided legal certainty and increased Islamic financial market activity, encouraging an increase in the number of Islamic Business Enterprises (BUS) from 5 BUSs to 11 BUSs in less than two years (2009- 2010) (Halim Alamsyah, Jakarta, 2012).

Institutional Development and Performance of Indonesian Islamic Banking

Indicators	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012*
BUS	2	2	2	2	3	3	3	3	5	6	11	11	11
UUS	3	3	6	8	15	19	20	26	27	25	23	24	24
BPRS	79	81	83	84	88	92	105	114	131	138	150	155	155
Office Network	146	182	229	337	443	550	693	802	1,069	1,258	1,763	2,101	2,380
Asset (billion Rp.)	1,790	2,719	4,045	8,152	15,803	21,502	27,618	37,754	51,249	68,212	100,258	148,987	149,321
DPK (billion Rp.)	1,029	1,806	2,918	5,910	12,129	15,933	21,193	28,730	37,828	53,522	77,640	117,510	116,871
PYD (billion Rp.)	1,271	2,050	3,277	5,723	11,821	15,688	21,060	28,837	39,455	48,473	70,190	105,331	106,532

* position in February 2012

Table 1.

Since the development of the Islamic banking system in Indonesia, there has been more progress and development in two decades, both from the aspect of institutional and supporting infrastructure, regulatory tools and supervisory systems, as well as public awareness and literacy towards Islamic financial services (As of February 2012, the Islamic banking industry had a network of 11 Islamic Commercial Banks (BUS), 24 Islamic Business Units (UUS), and 155 BPRS, with a total office network of 2,380 offices spread across almost the entire archipelago (Table 1) .

The development of Islamic business entities needs a Sharia dispute resolution forum in the end. Law Number 21 of 2008 concerning Islamic Banking, has regulated the settlement of Islamic banking disputes which is regulated in Article 55:

- (1) *Settlement of Sharia Banking disputes shall be conducted by a court within the Religious Courts.*
- (2) *In the event that the parties have agreed on a dispute settlement other than as referred to in paragraph (1), the dispute settlement shall be conducted in accordance with the contents of the Deed.*
- (3) *Dispute settlement as referred to in paragraph (2) must not be contrary to Sharia Principles.*

Explanation of Article 55 of the Law which has reopened the opportunity for *choice of forum* in resolving Islamic banking disputes through litigation. The opportunity referred to is the selection of dispute resolution other than through the Religious Courts, which can also be done in accordance with the contents of the contract, which consists of:

- a) Deliberation,
- b) Banking mediation,
- c) Through Basyarnas or other arbitration institutions and/or,
- d) Through a court within the general judicial system, provided that the dispute resolution mechanism is in accordance with sharia principles.

Against the provisions of Article 55 paragraph (2) including its explanation and paragraph (3) of the Syariah Banking Law against Article 28 paragraph (1) of the 1945 Constitution a Judicial Review was conducted, the Constitutional Court through its decision Number 93/PUU/X/2012 stated that the Explanation of Article

55 paragraph (2) of Law Number 21 of 2008 concerning Syariah Banking is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force. The Constitutional Court does not hear cases concretely and only assesses the material content or norms contained in a law whether or not it is contrary to the constitution, but there are several legal conclusions that can be drawn from Decision Number 93/PUU/X/2012:

- 1) *Litigation* settlement of Islamic banking disputes, including bankruptcy disputes and postponement of debt payment obligations for Islamic banking, is the absolute authority of the Court within the Religious Courts as mandated by Article 49 letter (i) of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts and Article 55 paragraph (1) of Law Number 21 of 2008 concerning Islamic Banking, including bankruptcy disputes and postponement of debt payment obligations for Islamic banking.
- 2) Islamic banks and customers may not agree otherwise (in the contract) on a clause regarding *litigation* settlement of Islamic banking disputes, because they are bound by the law that has established the absolute authority for a judicial body to resolve disputes.

In the case of *non-litigation* settlement of Islamic Banking disputes, the Islamic Bank and the Customer are free to make a *choice of the forum* if the parties agree not to resolve the dispute through the Religious Court. The *choice of forum* chosen in the event of a dispute must be clearly stated in the contract including resolving disputes through the National Sharia Arbitration Board whose decisions are final and binding.

The decision of the Constitutional Court Number 093/PUU-X/2012, is the answer to the dualism of authority to resolve sharia economic disputes. The Religious Courts are *legally constitutionally* the only institution authorized to resolve sharia economic disputes through litigation. However, this authority is not fully implemented, there are still other sharia economic disputes whose resolution is decided by the Commercial Court within the scope of the General Court, namely Taflis / Bankruptcy and PKPU (Postponement of Debt Payment Obligations) in Islamic financial institutions.

Normatively, after the Constitutional Court Decision Number 93/PUU-X/2012 dated August 29, 2013, it should no longer be possible to resolve disputes over Islamic financial institutions through *litigation* through the Commercial Court within the scope of the General Court. All types of disputes over Islamic financial institutions should have become the absolute authority of the Religious Court to hear them, including bankruptcy and PKPU disputes in Islamic financial institutions (Amran Suadi, 2017).

B. Research Methodology

Research on the competence of the Religious Court in bankruptcy and PKPU cases based on sharia contracts is *normative law research*. *Normative law* research is legal research on legal rules, norms, and principles, including legal doctrines that develop and are relevant to the research theme. According to Soejono Soekonto, normative legal research is directed at research that draws on legal principles, legal systematics, synchronization of laws and regulations, comparative law, and legal history. (Soerjono Soekanto, 2007).

The legal materials used in this research are divided into three, namely primary, secondary and tertiary legal materials. Primary legal materials are Law No.37 of 2004 concerning Bankruptcy, Law No. 3 of 2006 concerning Religious Courts, Constitutional Court Decision No. 93/PUU/X/2012 and PERMA No. 2 of 2008 concerning KHES. Secondary legal materials are all legal references that are not included in official state documents such as books, dissertations, theses and so on that intersect with the research theme. In

addition, to complement the two legal materials above, some legal and foreign terms contained in several dictionaries, encyclopedias and expert opinions on research topics are needed as part of tertiary legal materials.

The approaches used in this research are *statute approach* and *conceptual approach*. The statutory approach is to examine *prescriptively* the principle of a statutory arrangement, while the conceptual approach is to build a complete concept of this research both by refining existing and non-existing concepts. The technical analysis used is synchronization and harmonization using the theory of authority and the principle of *lex specialist*.

C. Result And Discussion

1. Analysis of the Law of Taflis / Bankruptcy in Islam and its applicability to Sharia Agreements in Indonesia

The Syariah Banking Law, as stipulated in Article 1 point 12, has emphasized that "Sharia Principles are the principles of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia." Law Number 21 of 2008, which was enacted on July 16, 2008, has several general provisions that are interesting to observe. The general provision (Article 1) is something new and will have certain implications, one of which is the definition of Sharia Principles. The definition has two important messages, namely (http://www.bi.go.id/id/perbankan/syariah/Documents/Iktisar_uu_21_2008) :

1. Sharia principles are the principles of Islamic law and;
2. Determination of the party/institution authorized to issue a fatwa that becomes the basis of sharia principles.

The concept of bankruptcy as regulated in Article 1 number 1 of Law Number 37 of 2004 stipulates that bankruptcy is a general confiscation of all assets of the Bankrupt Debtor whose management and management is carried out by the Curator under the supervision of the Supervisory Judge. Meanwhile, from the perspective of Islamic law, in Fiqh the term bankruptcy is called at-taflis. etymologically at-taflis means bankrupt, bankrupt or poor. A bankrupt person is called muflis, which is a person who is in debt, where his debts are greater than his assets, in Law Number 37 of 2004 article 1 number 4 is known as the Bankrupt Debtor. In the Compilation of Sharia Economic Law, muflis is identified with incompetence in carrying out legal acts referred to in article 1 number 6 as Muwalla. In the terminology of fiqh experts, At-taflis (determination of bankruptcy) is defined by scholars with: "A judge's decision that prohibits a person from acting legally on his property" (<http://alhushein.blogspot.com/2012/01/hukum-kepailitan-taflis-dalam-islam.html>) . The prohibition is imposed because he is involved in debts that cover or even exceed all his assets. If a person is in a state of bankruptcy or taflis, the result is the prohibition or freezing of his assets and actions (al-hajr).

In terminology al-hajr is the prohibition of someone spending his property. The prohibition of spending the assets of the muflis is because in his property there are other people's rights, namely the rights of those who give him debts. First, the existence of the Compilation of Sharia Economic Law does not exclude

conventional bankruptcy regulations that already exist in Indonesia, namely Law 37 of 2004. It should be noted that bankruptcy law basically a procedural law because the majority of the rules in Bankruptcy Law regulate the procedures for bankrupting a person or legal entity, as well as the procedures for postponing debt payment obligations. In addition, the Bankruptcy Law also provides a mechanism for the postponement of debt payment obligations which provides an opportunity for debtors (who are not insolvent) to restructure their debts.

In the practice of Islamic banking, the opportunity to resolve problematic financing is also known as First Way Out and Second Way Out, where in the First Way Out settlement, the settlement is carried out by revitalization, namely (Chrisanty Amalia USU Law Journal, Vol. 1 No. 1 Year 2013):

1. Rescheduling, namely rescheduling related to payment time in the form of repayment of the principal debt as well as profit sharing, profit margins, and fees which are the obligations of debtor customers.
2. Restructuring, which is an improvement effort made by the Bank in providing funds to customers who have difficulty fulfilling their obligations by following the applicable provisions, namely the Fatwa of the National Sharia Council and financial accounting standards applicable to Islamic banks.
3. Reconditioning, which is an improvement effort made by the bank in the form of changing the terms in the contract, for example regarding margins, profit sharing ratio, collateral, and so on.
4. Akad Conversion, which is the handling of problematic financing by changing the form of the contract, for example, from the initial murabahah contract, because it is experiencing congestion, it is changed to a mudharabah contract, so that the goods that are the object in murabahah change their position to capital participation from the bank.

Second, the Compilation of Sharia Economic Law Article 5 paragraph (2) mentions the management of curators and administrators in the taflis or bankruptcy process. Third, the concept of *Second Way Out*, is a settlement that is "*ultimum remedium*" if the *First Way Out* fails, namely by executing the guarantee (Chrisanty Amalia (USU Law Journal, Vol. 1 No. 1 Year 2013) .

The interesting thing if it is related to bankruptcy is that basically in Islamic economic practice, it is not possible to have the position of creditors and debtors with the argument that such a position is certainly contrary to the principles of Islamic law because basically credit is closely related to interest or usury (Law Number 10 of 1998). The argument is based on the term credit in the Banking Law Article 1 number 11, which is "the provision of money or bills that can be equated with it, based on an agreement or loan and borrowing agreement between a bank and another party that requires the borrower to repay his debt after a certain period of time with the provision of interest"

2. Absolute Competence of Religious Courts and Commercial Courts in bankruptcy and PKPU cases based on sharia contracts.

The intersection of authority that occurs between the Commercial Court and the Religious Court in examining and adjudicating bankruptcy and PKPU cases in Islamic financial institutions arises from the mixing of the general civil law area (conventional) into the realm of special civil law that uses the principles of sharia economic law, as a result of the expansion of the application of general civil law to the area of sharia

economic law creates an element of legal uncertainty. So far, bankruptcy has been applied in a general perspective, namely all individuals or corporations that experience bankruptcy so it does not distinguish whether the bankruptcy is conventional or tied to sharia economic contracts in the contract. While in the perspective of Islamic economic law itself, bankruptcy that occurs in Islamic financial institutions or individuals who make agreements with Islamic economic contracts is seen as part of a form of "dispute" which is the jurisdiction of the Religious Court in the general sense of article 49 letter (i) of Law Number 3 of 2006 concerning Religious Courts. Quoting his opinion M. Natsir Asnawi that as long as the details are not explained, the meaning of the word "dispute" must remain in its general meaning, which covers all forms of disputes that have and may occur in the field of Islamic economics (M. Natsir Asnawi, 2016).

On the other hand, the intersection of authority also occurs due to the expansion of the competence of the Religious Court to 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 also means the personality of non-Muslims or conventional legal entities who voluntarily submit themselves and bind their contract agreements based on Islamic economic contracts. The expansion of the competence of the Religious Court to the realm of sharia economic law has penetrated the boundaries of general civil law which has been the model law for the people of Indonesia so there is the potential for mixing the general civil law area with sharia economic law.

Therefore, the intersection of adjudication in bankruptcy and PKPU cases in Islamic financial institutions lies in the intersection of authority between the Commercial Court and the Religious Court, where Law Number 37 of 2004 requires the settlement of bankruptcy and PKPU cases to be decided by the Commercial Court which does not distinguish between bankruptcy in conventional financial institutions and Islamic financial institutions, whereas based on Article 49 of Law Number 3 of 2006 concerning Religious Courts mandates the resolution of sharia economic disputes to the Religious Courts and the phrase sharia economic disputes in the Law referred to is all types of other civil disputes in the field of sharia economics, including in this case bankruptcy and PKPU disputes based on sharia contracts.

2. The factor of bankruptcy and PKPU based on sharia contracts is still an issue competence of the Commercial Court

a. There is a conflict of norms in Law No. 37/2004 and PERMA number 2 of 2008

In the provisions of Article 300 paragraph 1 of Law Number 37 of 2004 concerning Bankruptcy and PKPU states:

The court as referred to in this Law, in addition to examining and deciding on applications for declaration of bankruptcy and postponement of debt payment obligations, is also authorized to examine and decide on other cases in the field of commerce which are determined by law.

The court in the above article is the Commercial Court within the General Court as previously stated in Article 1 paragraph 7 of this Law, because historically, the establishment of the Commercial Court was in order to accelerate the process of settling debtors' debts that require a simple and fast process and foster the confidence of foreign investors. There is no distinction between bankruptcies that occur in conventional

financial institutions and Islamic financial institutions, because at the time of Bankruptcy Law Number 37 of 2004, the growth of financial institutions that use sharia principles had not yet experienced a significant increase (OJK data as of January 2018).

Bankruptcy Law Number 37 of 2004 creates contradictions with the provisions of PERMA number 2 of 2008 concerning KHES. Article 5 paragraph 2 reads:

"In the event that a legal entity proves to be incapable of performing so that it faces bankruptcy or is unable to pay debts and requests a postponement of debt payment obligations, the court may appoint a curator or manager for the legality at the request of an interested party".

The entire wording of the court in the PERMA should read Court/Sharia Court within the Religious Courts, as follows referring to article 1 paragraph 8 of this PERMA provision (Compilation of Sharia Economic Law) . The issuance of PERMA No. 2 of 2008 concerning the Compilation of Sharia Economic Law is a response to Law No. 3 of 2006 concerning Religious Courts which mandates Religious Courts to resolve sharia economic disputes. Because the material law that guides the handling of sharia economics still did not exist at that time, this PERMA functioned as a legal vacuum filler. All provisions contained in PERMA Number 2 of 2008 concerning KHES are related to the material law of sharia economics and the judicial institution that handles all of them must be read by the Religious Court / Sharia Court.

b. The existence of a legal vacuum regarding sharia bankruptcy law

Since the enactment of Law No. 3/2006 on Religious Courts, a regulation on bankruptcy based on sharia contracts has not been drafted until now. The main factor may be that bankruptcy and PKPU cases are cases that rarely surface and are not as numerous as general civil cases (Compilation of Sharia Economic Law) .

¹ When discussing Law Number 3 of 2006 concerning Religious Courts, article 49 letter (i) regarding the explanation of the word "*sharia economy*" only mentions up to point (k) and does not include the point of Sharia Bankruptcy as part of the sharia economic dispute. So that it creates a legal vacuum of sharia bankruptcy.

c. The existence of KMA Decree No. 32/SK/IV/2006 regarding the settlement of bankruptcy resolved through the Commercial Court

The KMA decree is basically a decree addressed to all judicial apparatus under it, both judicial technical and non-judicial technical, to perform a legal action. This letter is in the form of an imperative instruction that must be obeyed by all judicial officers. The decree of the Chief Justice of the Supreme Court (KMA) is usually born based on a working group meeting conducted previously by the chambers in the Supreme Court and produces several formulations (2011 through Decree No. 142/KMA/SK/IX/2011 of 2011).

KMA Letter No. 32/SK/IV/2006 is a decree containing instructions and guidelines for the implementation of judicial administration (book I) which contains all technical instructions for the application of formal and

¹ The original text reads " Pengadilan adalah Pengadilan/Mahkamah Syariah dalam lingkungan Peradilan Agama". See Compilation of Sharia Economic Law, p. 1.

material law in the four judicial circles. Since 2006 until now, Book I has always undergone changes in each of its materials by adjusting to changes in time and has now changed to Book II. In relation to bankruptcy and PKPU cases, this KMA letter contains instructions to guide the entire contents of this book II which in the initial part states that "*Applications for Bankruptcy and PKPU Statements as well as IPR are examined and decided by the Commercial Court (Supreme Court, 2009)*"

2.b. Legal consequences of bankruptcy cases based on sharia contracts are resolved through the Commercial Court

Among the legal consequences of handling bankruptcy cases based on sharia contracts by the Commercial Court is that the first will have a systemic impact on the application of the material law used. From the perspective of sharia bankruptcy in Indonesia, there is a tendency to change the essence of sharia debts into conventional debts. This creates an impression of coercion of the substance of sharia economic law to become conventional economic law. The change in the essence of the legal relationship can be seen from the elements of the requirements for filing a bankruptcy petition in Article 2 Paragraph

(1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, namely the existence of creditors and debtors. Every bankruptcy dispute based on sharia contracts that occurs always causes forced efforts to bring up the terms creditors and debtors, even though these parties (creditors and debtors) do not exist in every sharia financing, in sharia financing only known partnership relationships, namely one party helps the other party, the financed helps the financier and vice versa, there is no unfair profit taking in every sharia financing (MUI fatwa No. 04/DSN- MUI/IV/2000). As a result of the filing of bankruptcy cases based on sharia contracts to the Commercial Court, the potential for mixing the legal concept of sharia financing with the concept of conventional debt and credit will definitely occur (Ghansam Anam, 2017).

Second, another consequence of the handling of bankruptcy cases in Islamic financial institutions by the Commercial Court is that there will be an unsynchronized contract and dispute resolution. Philosophically, the substance and disbursement of Islamic banking are dominated by Islamic business terms, such as *murabahah*, *musyawarah*, *mudharabah*, *qardh*, *hiwalah*, *ijarah*, *kafalah* and so on. Therefore, it is right and appropriate if the settlement of Islamic banking cases is carried out in a judicial environment that is substantively in charge of matters related to Islamic sharia values. If left to a judicial system that does not apply sharia rules, what will emerge is the unsynchronization between the practice of the contract and the resolution of the dispute. The contract is carried out in the sharia system, while the settlement is carried out in a judicial environment that does not use the rules and principles of sharia (Tim, 2014)

The third legal impact is that the bankruptcy law stipulated in Law Number 37 of 2004 adheres to the principle of business continuity where this law does not pay attention at all to the financial health of the debtor being *solvent* or *insolvent*, as long as it fulfills several requirements, namely debtors who have two or more creditors and do not pay in full at least one debt that has fallen due and collectible, then the situation can cumulatively be declared bankrupt by the Commercial Judge. This provision is very contradictory to the concept of bankruptcy in Islam.

The term *solvent* or *insolvent* in the framework of Islamic bankruptcy law studies is known as whether or not the debtor is healthy. This health can certainly be understood in terms of physical or financial aspects. In the book *Bidayatul Mujtahid*, Ibn Rushd interprets this healthy word as physical and mental health, because debtors who have debts and are in a state of illness (not made up) do not have to collect their debts but are given a time limit / extension to pay off their debts so that they are healthy and can return to their activities.

In the context of modern Islamic finance, the meaning of healthy above has expanded meaning not only limited to individual physical and mental health but also 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 an extended period of debt repayment if the debtor is *insolvent* (not financially healthy). This is an Islamic economic learning ethic that always equalizes the position between debtors and creditors as a cooperative partner relationship that helps each other as

Q.S. Al-Baqarah verse 280 as follows:

Meaning: And if (the debtor) is in difficulty, then give him a respite until he is able and giving in charity (some or all of the debt) is better for you, if you know

2.c. Analysis of the Competence of the Religious Courts in bankruptcy cases and PKPU based on sharia contract

To determine how the competence of the Religious Court in adjudicating bankruptcy and PKPU cases in Islamic financial institutions, the author will synchronize based on the principle of *Lex specialist derogate legi generalis* and harmonization based on the theory of authority. a. Synchronization based on the principle of *Lex specialist derogate legi generalis* (Dian Asriani Lubis, (2013).

The principle of *lex specialist derogate legi generalis* is the principle of legal interpretation which states that special provisions override general provisions. The relation with PERMA No. 2/2008 in terms of its function is as a special regulation against all general regulations regarding the sharia economy and all matters relating to financial institutions that use sharia contracts. The existence of this PERMA was born to respond to the mandate of Law Number 3 of 2006 concerning Religious Courts which gives absolute authority to Religious Courts to hear and resolve sharia economic disputes because the practice of sharia economics is a new thing in the practices of financial institutions in Indonesia, therefore a legal instrument is needed that can accommodate all problems related to sharia contracts including procedures for resolving disputes.

To end the conflict of norms between Law No. 37 of 2004 and PERMA No.2 of 2008, synchronization efforts need to be made. According to the author, the words bankruptcy and PKPU in Article 300 paragraph 1 of Bankruptcy Law No. 37 of 2004 have a *generalist* or general meaning that refers to every conventional financial institution that experienced bankruptcy such as corporate institutions, commercial banks, etc. that occurred during the period when the law was made. The generality of the words bankruptcy and PKPU in conventional financial institutions in the article cannot always be perceived until now because the generality is limited by the existence of *lex specialis* (specialization) with the birth of several Islamic financial institutions. The birth of Islamic financial institutions reduces the existence of conventional financial institutions that have the content of their own legal procedures for dispute resolution that are

different from conventional ones, where dispute resolution is resolved based on sharia principles (Jimly Asshidqie, *Konstitusi dan Konstitualisme*, p. 278-279) .

Here it is clear that the existence of PERMA number 2 of 2008 listed in article 7 paragraph 2 as a *lex specialis* (special rule) which implicitly overrides the general rule of article 300 paragraph 1 of the Bankruptcy Law in resolving bankruptcy and PKPU disputes in Islamic financial institutions by giving competence to the Religious Courts to hear them as mandated by Law Number 3 of 2006. As for the next problem, can the position of PERMA be a *lex specialist* from the rules of law? The author agrees with Jimly Asshidqie who includes Supreme Court regulations (PERMA) as special regulations so that they are subject to the principle of *lex specialist derogate legi generalis* and according to the author as long as there is no law governing bankruptcy and PKPU in financial institutions that use sharia principles, then PERMA Number 2 of 2008 functions as a legal vacuum filler to determine the absolute competence of the Religious Court in bankruptcy and PKPU cases based on sharia contracts.

The granting of authority to the Commercial Court in examining bankruptcy and PKPU materials on financial institutions that use sharia principles is an unconstitutional attitude and contradicts the mandate of the 1945 Constitution which guarantees freedom to every religious believer to practice their respective religious teachings. Submission to sharia economic law for Muslims or financial institutions that use sharia principles is a basic right and freedom that must be respected. It is an anomaly if bankruptcy and PKPU disputes in Islamic financial institutions are decided based on conventional economic law, not sharia economic law.

The issuance of the decision of Constitutional Court Number 93/PUU-X/2012 raises several new norms and also guarantees legal certainty as mandated by Article 28 paragraph (1) of the 1945 Constitution, especially in terms of Islamic banking dispute resolution itself. The settlement of Islamic banking disputes is the absolute authority of the Court within the Religious Courts as mandated by Article 49 letter (i) of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts and Article 55 paragraph (1) of Law Number 21 of 2008 concerning Islamic Banking. Litigation settlement of Islamic banking disputes and Islamic financial institutions, including bankruptcy and PKPU disputes, must be read as the absolute authority of the Sharia Court / Court within the Religious Courts 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 to hear bankruptcy and PKPU cases within 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 including bankruptcy and PKPU disputes in sharia financial institutions are the absolute jurisdiction of the Religious Courts. The law contained in Law Number 37 of 2004 contains the content of procedures and technicalities of bankruptcy and PKPU examinations in conventional financial institutions that refer to general civil law so that it has not reached the material and substance of bankruptcy law and PKPU in financial institutions that use the principles of sharia economic law.

The issuance of Law No. 3/2006 and Constitutional Court Decision No. 93/PU-X/2012 has provided a

new boundary of authority between the General Court(Commercial) and the Religious Court in resolving sharia economic disputes. All disputes over sharia economic contracts and all settlements must be decided and resolved linearly (read; Religious Courts) based on sharia principles, including bankruptcy and PKPU disputes in sharia financial institutions.

Based on the theory of the limit of authority above, the Commercial Court should not have the authority to decide and hear bankruptcy and PKPU cases in Islamic financial institutions, because the legal basis used as a guide in adjudicating is Law Number 37 of 2004 which is substantively limited to the legal context of conventional financial institutions (civil law) and has not yet reached the legal realm of Islamic financial institutions. The enactment of Law No. 3/2006 and strengthened by the Constitutional Court Decision No. 93/PUU-X/2012 has provided a settlement boundary between conventional economic disputes and Islamic economics.

D. Conclusions

Indonesia's predicate as the largest Muslim country in the world requires the existence of written legal instruments that contain sharia principles, including the sharia bankruptcy dispute resolution process. The existence of PERMA No. 2 of 2008 overrides the provisions of the Bankruptcy Law whose legal norms have not yet reached the substance of sharia economic law so that bankruptcy and PKPU cases born based on sharia contracts should be the competence of the Religious Court. This is based on two arguments, namely lex specialist and the theory of authority. Based on the theory of authority, it is clear that there are limits to judicial authority. The Bankruptcy Law is only competent to hear bankruptcy and PKPU cases in conventional financial institutions while the Religious Courts Law hears all sharia economic disputes including bankruptcy and PKPU in sharia financial institutions.

E. Recommendation

1. The government and the House of Representatives should immediately amend the Bankruptcy Law to include sharia bankruptcy content and appoint the Religious Court as the *judex pactie*. For the short term,
2. The Supreme Court can form a chamber of the Religious Courts, namely a special panel that handles bankruptcy and PKPU cases based on sharia economic contracts.
3. Training of Religious Court judges to be certified in sharia economics to be assigned to the tribunal

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