

Comparison of *At Taflis Wal Hajr* in Islamic Law and Bankruptcy in Positive Law

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Abstract—Bankruptcy can not be separated from business interactions. The bankruptcy concept arises from the background of debtors who no longer pay their debts due to their inability so that the state provides a means to resolve such disputes in the form of bankruptcy institutions. The bankruptcy institution is legal protection form for debtors, creditors and the public where creditors rights can be fulfilled proportionally. The bankruptcy institution is also known in Islamic law which is referred to as *At Taflis Wal Hajr*. Research on concept of *At Taflis Wal Hajr* which is known in Islamic law is motivated by the development of sharia business which is quite significant and massive today. Therefore, it is necessary to study to understand the concept of *At Taflis Wal Hajr* and bankruptcy to find the similarities and differences for the two legal concepts. To answer these problems legal research methods are used using conceptual and comparative approach. In Islam, there are several terms known as *taflis*, *iflas*, *muflis*, and *hajr*. The four concepts are the translation of *At Taflis Wal Hajr* or in positive law is called bankruptcy. *Al - Taflis* means the condition of person who runs out of assets until there is nothing left for him that can be used to pay his debts. *Iflas*, which means no money at all. People who are bankrupt in Islam are called *muflis*. *Al-Hajr* is forbidding someone to convert their property. From sunnah of the Prophet, Abu Sa'id al Khudri, and Caliph Umar bin Khatab it can be concluded that in resolving civil disputes related to debts that have not been paid by the debtor, it is necessary to intervene directly from the state or authorities by the judge to determine the state of *taflis* for the debtor and the application of *Hajr* to him through the judge decision. This is similar to the arrangement bankruptcy in law - bankruptcy law and suspension of debt payment where there are debtors that unable to pay debts, it can be filed bankruptcy petition to the commercial court and decided by judge that prohibits debtors to spend their treasure and debtor treasure will be ordered to be distributed to the creditors.

Keywords—*comparison, taflis, Islam, Bankruptcy, Law.*

I. INTRODUCTION

Bankruptcy is a means of dispute resolution can not be separated from business interaction because bankruptcy is concept that known in business. According to Rahayu Hartini, “bankruptcy is a common confiscation of all the wealth of bankrupt debtors whose management and ordering is done by the Curator under the supervision of the Supervisory Judge”. [1] In implementing the bankruptcy a legal basis is required. Bankruptcy is a means of resolving debtors obligations to their creditors. Debtor obligation be resolved relating to the unpaid debt due to the inability of debtors. This shows that bankruptcy is form of legal protection for creditors,

debtors, and other parties. This is in line with Sunarmi opinion that the philosophy of bankruptcy is "to overcome the problem if all debtors assets are insufficient to repay all debts to all creditors". [2] Agree with Al Araf stating that “In the bankruptcy system creditor and debtor are well protected because creditor has access and choice to utilize the best way to acquire creditor’s right of payment from debtor”. [3] Because that bankruptcy is means and institutions to solve the financial problems of debtors with formal law character, then it is called as bankruptcy institution.

This bankruptcy institution has functional and special character in its formal law. The functional character of bankruptcy institution is shown by its function as one way out from financial severity which bears by debtor. In Indonesia, the bankruptcy institution is regulated in positive law in the provisions of law number 37 Year 2004 concerning bankruptcy and post ponement of debt repayment obligations.

Bankruptcy institutions are also known in Islam. The bankruptcy institution in Islam is referred to as *Al-Taflis*. *Al-Taflis* is derived from the word *Al-Fals* plural money. *Fulus* means the least amount of money (coins) made of copper. *Fulus* is usually suggested as someone worst asset and the smallest currency. [4] Etymologically, *Taflis* has the meaning of bankruptcy or falling into poverty. [5] In the language of *fiqh* it is called *iflas*, meaning that it has no money at all. [5] When viewed from its terminology, *Al - Taflis* means the condition of a person who runs out of assets until there is nothing left for him that can be used to pay his debts. [5] People who are bankrupt in Islam are called *muflis*, people who have more debt than they have. [5] If a person has lost his wealth and cannot pay debts - the debt is called bankrupt. Dropping the law on people as being unable to pay debts is called *taflis* (bankrupt statements). [4]

In essence, the bankruptcy of the west and the bankruptcy of Islam (*Al-Taflis*) are intertwined with one another. This is evident from the meaning of the bankruptcy in which both emphasize the inability of the debtor to pay his debts due to the assets he has less than the existing debt. The inability of the debtor is the similarity between Western bankruptcy and Islamic bankruptcy.

Based on the background above, there are two problem formulations that need to be investigated namely:

1. Characteristics of *At Taflis Wal Hajr*
2. Comparison of *At Taflis Wal Hajr* and bankruptcy in positive law

II. RESEARCH METHODS

To answer the problem in this study, using legal research method with conceptual and comparative approach. This conceptual approach is used based on the theory and doctrine conveyed by legal experts. Theories and doctrines can be traced from the book sources and court decisions. This approach is very useful to be used as a basis for building legal arguments so as to clarify the understanding, legal concepts, and legal principles that are relevant to the issue. Comparative approach is used in this research to compare legal concepts in Islam and positive law related to bankruptcy institutions.

III. RESULT AND DISCUSSION

A. *The Character Of Bankruptcy In Islamic Law*

When interpreted grammatically, the term bankruptcy is a verb. When traced etymologically in English it is known as *Insolvency*, in Dutch it is called *Failissement*, in America it is known as *Bankruptcy*, and in Islam it is known as *at-Taflis*. All of these terms all refer to verbs that state a process. Therefore, bankruptcy is more directed to formal law in the form of an procedural law in order to resolve the debtor problem that cannot pay his debts due to the amount of his assets is smaller than the amount of his debt. This was confirmed by Subekti that "bankruptcy is a joint effort to get payment for all people fairly".[6] The same thought was conveyed by Munir Fuady that "bankruptcy is general confiscation of all debtor assets in order to achieve peace between the debtor and the creditors or so that the assets can be divided equally among the creditors".[7]

The bankruptcy concept in Islam is known as *at-Taflis* taken from the word *al-fals* plural *fulus*. [7] When viewed etymologically, *phallic* (verb) or *fuluus* (masdar or infinitive form) which means someone is said to be bankrupt if previously he had a lot of money (dirhams) then the money runs out. [8] *Al - Fals* is the smallest type of money (coins) made of copper. *WahbahAz - Zuhaili* illustrates that money is usually suggested as someone's worst asset and the smallest currency. [8] Generally poor people only have *fals* or *fulus* currency and do not have *dinars* and *dirhams*. When viewed in the context of *fiqh* known *Iflas* that *mengandung* meaning no possessions. [9] So, *Iflas* that is the same concept with the Indonesian *bankrupt*, *insolvent* in English, and *faillitie* in Dutch. *Iflas* refers to a situation of debtors who do not have enough assets to pay their debts. *Ibn Quadamah* in his book *Al Mughni* states that *iflas* is a person whose debt is greater than his wealth and needs are greater than his income. [10] From this description, the bankruptcy concept in Islam is called *iflas*. *Iflas* is state of debtors who no longer own assets.

The term bankrupt person in Islam is called *mufлис*. The term *mufليس* in *sharia* is used for two meanings. First, for those who are *ukhrawi*. Secondly, it is worldly. The second meaning of the *mufليس* is much talked about by *fiqh* experts, that is, those whose debts exceed the amount of assets (in their hands). Many are described that a *mufليس* only has money. The

money is correlated with the situation of someone who is not capable in the financial context because he only has fractions or coins. While it can be called in a good financial situation when someone has a *dirham* and / or *dinar*. Thus, the *mufليس* can be said to only have the lowest value, so that they cannot afford to fulfill their daily needs. In the time of the Prophet, the money was used only to make payments for things that were of no value.

The essence of bankruptcy is the distribution of the bankrupt debtors assets to creditors as form of debts payment they have. In the bankruptcy process after the judge handed down the bankruptcy decision to the debtor, his status became a *mufليس*. Since the bankruptcy verdict was handed down to the debtor, the *mufليس* have not been free to take care of their assets. After the judge decides the next bankruptcy there will be the imposition of *al-hajr* on the *mufليس*.

Al-Hajr etymologically means *al-Man'u* (forbidding, blocking) and *at-tadhyiq* (narrowing down). It is said, "*hajara 'alaihijran*, means to forbid and prevent it from taking any action. Therefore, a *mufليس* who acts on his property when he is subjected to *al-Hajr*, then his actions are *haram*. When viewed from the terminology of *Sharia*, *al-Hajr* is forbidding someone to make sale of his property. The opposite of word from *al-Hajr* is *al-Idzn* (permit) which means to release and revoke *al-Hajr* and abort the right to prohibit it.

The existence of *al-Hajr* is not violation but form of compassion, benefit, protection, and mutual assistance. [11] According to *Wahbah Az-Zuhaili*, *al-Hajr* is "a form of compassion for *al-mahjuur'alaih* (people who undergo *al-Hajr*) so that his wealth can be maintained and his safety guaranteed so that later he can get his property as a whole at a time when he has a lot of burden of responsibility and obligations". What is intended to safeguard and secure property is to protect the *mufليس* property from misuse of irresponsible parties and take advantage of the narrowness so that the use of *mufليس* property is used in the right way.

Al-Hajr contains benefits and goodness for individuals and society as well as protecting them from harmful things. With the existence of *al-Hajr*, the existence of the *mufليس* will not become burden on society and its wealth will not be lost in vain. *Mufليس* will always be monitored by the guardian in the trade process as a form of supervision and direction for the effective use of his property. In addition, *al-Hajr* is form of help for the *mufليس* which will prevent each other from fighting over the property of *al-mahjuur* from the creditors.

The existence of *al-Hajr* in the context of bankruptcy is useful to protect the interests of creditors so that benefits can be realized for the parties. In addition, if there is a third party who wants to provide debt guarantees to save the debtors from the financial crisis, there will be no fear and fear.

Based on the description above, *al-Hajr* can guarantee the benefit of debtors, creditors and third parties by safeguarding their property and rights. *Wahbah Az-Zuhaili* explained that "*al-Hajr* also guarantees the benefit of society in general by closing the gaps in conditions of need and economic hardship. [11] When an economic crisis occurs, as happened in

1998, with the presence of al-Hajr there will be no public concern about the non-payment of debts - due to the existence of al-Hajr community rights - certainly guaranteed and maintained so as to maintain stability the economy.

B. Comparison At Taflis Wal Hajr And The Bankruptcy Concept In Positive Law

If debtor is no longer able to repay debts due to the debt amount that is greater than his assets amount, then the state must be present to resolve the civil disputes problem. There is history of the hadith which states, that the Prophet Muhammad, set Mu'adz bin Jabal as person who is in debt and unable to pay it (bankrupt), then Rasulullah paid off Mu'adz bin Jabal debt with the rest of his assets, but the debtor does not receive all his loan, so he protested against the Prophet. The protest was answered by the Prophet by saying: "Nothing can be given to you other than that" (HR. Daru-Quthni and Al-Hakim).

Other hadiths are as follows Abu Sa'id al Khudri Radhiyallahu 'anhu narrated: "During the time of the Prophet sallallahu 'alaihiwasallam there was someone who was struck down by damage (damage) to the crops he bought, so he owed a lot. Then the Prophet sallallahu 'alaihiwasallam said, "Give alms to him," then the people also gave alms to him, but could not pay off all of his debts. Finally the Prophet sallallahu 'alaihiwasallam said to the debt collectors: "Take what you find (from his wealth), and there is no more that jam" (HR. Muslim 5/30).

Another narration shows that Umar bin Khatab had held debtor assets to be distributed to creditors. The summary of the narration is: Usaifi' from the people of Juhainah has a debt, but he does not want to pay it, so Umar withholds his property and tells who has a debt to him to come to him to share his wealth (pay the debt) (Extracted from the history of Malik and Daraquthni). From the sunnah of the Prophet, Abu Sa'id al Khudri, and Caliph Umar bin Khatab it can be concluded that in resolving civil disputes related to debt debts that have not been paid by the debtor, it is necessary to intervene directly from the state or authorities by the judge to determine the state of mind for the debtor and the application of Hajr to him through the judge decision.

Bankruptcy verdict is handed down by the judge for the benefit of debtor, creditor, and the public. This is confirmed by Abd As - Salam which express that " bankruptcy petition against muflis not violate the rights of the debtor".[11] At-Taflis ultimately provides protection for the interests of creditors and other parties more than those of the debtor. Further conditions for the condition of this taflis is the prohibition or freezing of assets and actions called al-hajr. Etymologically al-Hajr (freezing) is forbidding and narrowing down.

When compared with the bankruptcy concept based on positive law, it must refer to the provisions in the bankruptcy law and delay the debt payment obligations. Bankruptcy applications based on the provisions of Article 2 paragraph (1)

of the Bankruptcy And Suspension Of Payment Law are as follows "Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt by a court decision, both at their own request and at the request of one or more of its creditors". From this provision, the requirement to file for bankruptcy is that the debtor has at least two creditors and the debts that are due and collectible. These requirements are material requirements that must be fulfilled by the bankrupt applicant. Requests for bankruptcy statements that have fulfilled the material requirements based on article 8 paragraph (4) of the Bankruptcy and Suspension Of Payment Law must be granted if there is fact or condition that is proven simply.

After simple verification of the filing of the bankruptcy request is submitted, the commercial court judge will pass the bankruptcy decision to the debtor. The existence of the commercial court bankruptcy decision has implications for the position of the debtor, his assets, and his freedom to manage assets. Based on the provisions of Article 24 paragraph (1) of the Bankruptcy And Suspension Of Payment Law that bankrupt debtors by law lose their right to administer and carry out acts of ownership. M. Hadi Shubhan stated that "debtors who are in bankruptcy status do not lose other civil rights and other rights as citizens such as political rights and other private rights. With the bankruptcy legis ratio is not a criminal verdict and not a verdict that makes bankrupt debtors incapable and has no authority over everything.[11]

Bankruptcy statements in Islam made by judge can be dropped at the request of a debtor who is unable to pay his debts and can also be submitted by a creditor or more.[11] The material requirement for a bankruptcy application in Islam is the existence of debts that are no longer able to be paid by the debtor. These material conditions illustrate that the debtor is no longer in possession of assets to pay off all his debts. To find out the state of the debtor in bankruptcy, an evaluation of the debtor's balance sheet must be made before the bankruptcy statement is issued. In a contrario, if the debtor submits himself or is filed for a bankruptcy statement and after an assessment of his financial balance turns out the debtor is still able to pay all his debts, then the court cannot impose the bankruptcy decision on him.

At-Taflis can only be used to distribute the assets of debtors who are indeed in a state of inadequacy and not in a state of not wanting to pay their debts. At-Taflis is not a means to punish debtors who deliberately do not fulfill their obligations to creditors. At-Taflis is means to help debtors from financial difficulties that befall them.

These requests can be made by themselves or authorized by others on their behalf.[10] Debtors here can be people (Natuurlijkpersoon as SjahsijatulHaqiqijah) or legal entities (Rechtspersoon as SjahsijatulMa'nawijah). Islamic jurisprudence recognizes legal subjects in the form of legal entities such as Baitul Mal, Waqf Board, and others. Acting as representatives is the management (nadzir) on behalf of the legal entity concerned. Requests for bankruptcy statements submitted by debtors or by one or more creditors or their

authorized representatives must be immediately examined by judge, and if there is enough reason, a statement of bankruptcy can be given.[12]

Requests for bankruptcy must be submitted to the judge because in Islam there is no act of vigilanteism. As expressed by A. Waris Aulawi that "bankruptcy is a matter of civil disputes and becomes the authority of judges".[13] Accordingly, debtors, creditors and other related parties may only file bankruptcy requests and then an examination is conducted by a judge to determine whether or not the debtor has been declared bankrupt.

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