

Building the Law of Indonesian Business Competition Based on Islamic Economic Principles

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ABSTRACT

Indonesian business competition law is contained in Act Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. One of the backgrounds of the birth of this Act was the pressure of the IMF (International Monetary Fund) as part of Letter of Intent (LOI) at that time. As a result, the embodiment of Islamic values in the drafting of the Law has not been carried out at all. This can be seen from the provisions of the exception of Article 50 especially exceptions to small businessman. This research is juridical normative research by qualitative analytical method, and the data that the author use is secondary data consisting of primary and secondary legal materials. Ideal law is a law that is created in accordance with the noble values of its people, and should be accommodating the religious values embraced by the people. There is a need for the renewal of Indonesian business competition law by incorporating Islamic values in order to achieve Indonesian business competition law that reflects the values of Godliness, and at the same time can reflect the values of Pancasila Economic System.

Keywords: *the law of Indonesian business competition, Islamic economic principles, ideal law*

1. INTRODUCTION

As a constitutional state with a democratic system, the Indonesian Economic System is structured based on the principle of kinship with the principles of economic democracy. That was stated in Article 33 of the 1945 Constitution which carries the principle of kinship in the national economy. Apart from that, the economic system that is family and populist that are also widely practiced in Indonesia, is actually a legal system that does not merely rely on the rule of law, but rather pays attention to the rule of moral values and the rule of justice. This legal system was then integrated reciprocally in the Pancasila economic system. Abdul Manan said, with a revolutionary approach, it is expected that the achievement of the Vision of Indonesia 2030 is based on and guided by an economic legal system that accommodates the social norms, namely customary and Islamic law [1].

Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, was established as a tool to create a conducive business climate, so that there is a guarantee of equal business opportunities for all business actors at various levels (large, medium and small) based on the principles of economic democracy. However, many people argue that the embodiment of the body of Law No. 5 Year 1999 represents more regulation of business competition law in other countries than the actual economic democracy. This suggests that Law Number 5 Year 1999 was immature to fulfill IMF demands as part of the Letter of Intent [2]. As a result, the provisions in the body of Law Number 5 Year 1999 do not fully reflect the values of the nationwide of Indonesian, and the Islamic values within Muslim-majority populationas the. In fact, the ideal law is a law that reflects the nature and personality of the people. Speaking of Indonesian religious people, the provisions of religious law (in this case the Islamic religion) are crucial to consider in the establishment and the

development of national law. is the reason is because the religious law or Islamic law is a law that carries the principle of *al-maslahat, al-mursalah* (avoiding damages and ugliness) [3].

The prohibition of all acts that cause monopolistic practices and unfair business competition such as, oligopoly, price fixing agreements, territorial distribution agreements, cartels, monopolies, conspiracy, dominant positions and other dishonest acts by Law Number 5 Year 1999, is as an evidence that this law seeks to create a healthy business climate. It is just that the prohibition on monopolistic practices and unfair business competition is followed by the existence of exclusion provisions, as regulated in Article 50. The excluded points are as follows:

- a. acts and or agreements aimed at implementing the applicable laws and regulations;
- b. agreements relating to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial designs, integrated electronic circuits, and trade secrets, as well as agreements relating to franchising;
- c. agreement on the determination of technical standards of goods and or services that do not curb and or hinder competition;
- d. agreement in the framework of an agency whose contents do not contain provisions to re-supply goods and or services at a price lower than the price agreed upon;
- e. research collaboration agreements to improve or improve the living standards of the wider community;
- f. international agreements ratified by the government of the Republic of Indonesia;
- g. agreements and actions aimed at exports that do not interfere with the needs and or supply of the domestic market;

- h. business actors classified as small businesses;
- i. cooperative business activities specifically aimed at serving its members".

One interesting point to highlight here is the provision of Article 50 letter "h" which excludes small business actors from the enactment of the law. This is because the exception raises the pros and the cons. There are people who agree with the exception since the small business actors need to be protected and the fraud committed by the business actors does not have a big impact [4]. Those who do not agree with the exception, for the reason that exclusion will have an impact on misuse or exploitation by unscrupulous small business actors [5], and can harm consumers [6].

From this description, the authors are interested to further discuss the issue from an Islamic perspective in order to establish Indonesian business competition law based on Islamic economic principles. This is because the implementation of the Pancasila Economic system as an Indonesian ideology cannot be separated from Islamic values. Mubyarto said that the Pancasila economy whose economic activities are regulated in the 1945 Constitution needs to be based on a morality, humanity, nationalism, and democracy in achieving economic justice [7].

2. RESEARCH METHOD

This research is a juridical normative research conducted by qualitative analysis. Specification of the research is a Descriptive Analytic, that provides data about the human meticulous, circumstances or other symptoms. The aim of this approach is to celebrate the hypothesis-hypothesis in order to assist strengthening old theories within the framework of resulting new theories [8]. The data that the author use is secondary data consisting of primary and secondary legal materials, which include: first, the primary legal materials are the material that binds, consist of norms and rules (Quran, Hadith, Laws and regulations related to the fundamental issues that the author has examined in this research) like Law Number 5 Year 1999 on Prohibition of monopolistic practice and unfair business competition. Second, the secondary legal materials such as any other relevant literature.

3. DISCUSSION

3.1. Law of Business Competition in Indonesia

The business competition law in Indonesia is regulated under Law Number 5 Year 1999. This act prohibits monopolistic practices and unfair business competition. Many people are familiar with this law as the "anti-monopoly" law, in which the author considers this as a result of a narrow understanding. Monopoly is one of the acts that is prohibited in Article 17 of the Act. In addition to monopoly, there are several other business activities that are prohibited, whereas businesses that can be resulting in monopolistic practices and or any unfair business competition that cause harm to public interest.

According to Law Number 5 Year 1999, monopoly is a control over production and or marketing of goods, and or the use of certain services by one businessman or a group of businessmen. Meanwhile, based on Article 1 letter b, monopolistic practices is a concentration of economic power by one or more businesses resulting in the control of production and or marketing of goods and or services, and

creates an unfair competition that can harm public interest. Concentration of economic power itself means a real mastery over a relevant market by one or more businesses so that they can determine the price of the goods and or the services.

As for the unfair business competition, which often recognized as an unfair competition, is a competition among businessmen in conducting activities for the production, and or marketing goods, and or providing services in an unfair manner or an unlawful of anti-competition. Unfair business competition is often referred to as an unfair competition. Unfair competition can be understood as a condition of competition between businesses that runs their business unfairly. Dishonest competition can be seen from the way businesses compete with each other. For example, a conspiracy is occurred in determining the winner of bidding process, price fixing, or a certain business may obtain special facilities that disturb the competition.

The purpose of the enactment of Act Number 5 Year 1999 about Prohibition of monopolistic practices and unfair business competition can be seen in Article 3 that states:

"The purposes of the enactment of this Act are to:

- a. *maintain public interest and improve the efficiency of the national economy as one of the efforts to improve the prosperity of the people;*
- b. *realize the conducive business climate through the setting of fair competition so it can guarantee the certainty of the same business opportunity for large, medium and small businesses;*
- c. *prevent monopolistic practices and or unfair competition that are posed by businesses; and*
- d. *Create the effectiveness and the efficiency in business activity"*

In connection with the objectives above, the Act Number 5 Year 1999 on Prohibition of monopolistic practices and unfair competition, prohibits any action that indicates monopolistic practices and unfair business competition. The act of business that indicates the occurrence of those practices can be seen in form of an agreement, an activity or a dominant position, such as oligopoly (Article 4), price-fixing agreement (article 5), area distribution agreement (article 9), boycott (article 10), closed agreement (article 15), monopoly (article 17), monopsony (article 18), conspiracy (article 22, 23, 24), abuse of dominant position (article 25), and etc.

3.2. Islam In Relation To The State Goals And Indonesian Business Competition Law Goals

The presence of the people and their welfare are as an essential goal in the establishment of a country. Likewise, an independent and sovereign state of Indonesia was marked by the Proclamation of Independence Day on August 17th, 1945. In the Preamble of the 1945 Constitution of the Republic of Indonesia was ratified the day after the proclamation, the 4th paragraph affirmed that:

"Then rather than that to form an Indonesian Government that protects all Indonesian people and all of Indonesia's blood spilled and to promote public welfare, educate the nation's life, and participate in carrying out world order based on eternal peace and social justice, the Indonesian National Independence was compiled in a The Constitution of the Republic of Indonesia, which is formed in an arrangement of the Republic of Indonesia which is

sovereign of the people based on the Almighty God, humanity that is just and civilized, the Indonesian Unity and Popularity which is led by wisdom of wisdom in deliberation / representation, and by realizing a wisdom social justice for all the people of Indonesia".

From the preamble of the 4th paragraph of 1945 Constitution, it is clearly seen that public welfare in the sense of the welfare of all people and social justice, is the main goal to be achieved by the state. This indeed should be the goal of the highest organization of all people. The establishment of the state to protect the entire Indonesian people must be based on the Godhead (the first principle of *Pancasila*). It can be understood that the Almighty precepts of the Word of God as the core of monotheism in Islam, and it becomes the foundation for the establishment of the state in order to achieve the goals.

In line with this, Jeremy Bentham (1748-1832) considers that the government has the responsibility to guarantee the greatest happiness (welfare) of the greatest number of their citizens. This means that the government is obliged to make all citizens happy [9]. This is in line with the opinion of Moh. Hatta that all laws must rely on the sense of justice and truth, must be spoken by the hearts of many people, and must be able to fulfill the need for livelihood of the people, a then it will be recognized as sovereignty [10]. In line with that, the purpose of business competition law in Indonesia is the main objective of the establishment of the law that prohibits monopolistic practices and unfair business competition. Additionally, the law is to safeguard the public interest and increase national economic efficiency as an effort to improve people's welfare, specifically the consumers. The achievement of the objectives of this law is of course, closely related to the values contained in the law and its enforcement.

3.3. Principles of Islamic Economics

From the objectives and principles or economic motives, there is no difference between the Islamic economic systems with other economic systems. All economic systems, including the Islamic economic systems work on (1) the same goal; to meet the basic needs of humans, either individual or social needs. Furthermore, every economic system works according to (2) the same economic principle, that every people or society attempt to produce desired goods at the lowest possible cost in a certain period of time. However, in Islam, the implementation of the practice is different, it has limitations due to its philosophy and life principles based on Islamic jurisprudence [11]. The Islamic economic systems that based on Holy Quran and Hadith, from the beginning, has acknowledged there is profit in economic activity. But that motive was bound and controlled by the rules of modesty (self-control), moral and social requirements. Islam restricts such economic activity, as mentioned in Quran, Surah 6:152 "the economy should not be done by cheating, vanity, or fraud.

In Surah Al-Mai'dah [148], God said:

"For each of you (religious people) we give rules and paths (behavior). If God wills, he will make you a people (based on the rules and the way), but, (he does not do so). God wants to test you against His gift to you. Therefore, competing in doing good. Because of Allah you will all return, then He will tell you (the truth) about what you disputed. "

It is obvious that the Qur'an recognizes the objective of the character and the universality of justice is equated with good deeds (moral virtues).

The basic principles that Islam has set regarding trade and commerce reflect the values of honesty, trust and sincerity. Honesty in business is a supreme value of ethics. A hadith of the Prophet states that an honest trader will be together with the Prophets, *shiddiqin*, and *shaheed* (martyrs).

The honesty in the business world is something that must be practiced and prioritized by every business actor. This is the reason why in business, all elements of deception are rejected, such as competition that is conducted in a dishonest way (cheating). Apparently, the principle is not only virtuous according to Islam, but is also agreed by some people that this principle is an ideal image that must reflect the human business activities. However, the problem is, not all legal systems have judicial anticipation of being dishonest and business behaviors are frequently practiced in relatively sophisticated and modified ways [12].

Every individual's rights in economic activities must be guaranteed, and the person must be freed from exploitation of others [13]. Islam firmly forbids every Muslim from harming other individuals, "and do not do commit abuse on earth..." (*Asy-Syu'araa*: 183). In addition to that the Prophet Muhammad has also reminded us "*O! people fear of injustice because in fact it will become a darkness on the day of resurrection.*"

In Islamic economics, business and ethics should be seen as a single entity. This is because business is worldly affairs, and is also considered an integral part of future investment. This means that if the business orientation and investment efforts in this life and the hereafter are intended as worship that symbolizes an obedience to God., Then business itself must be in line with moral principles based on Islamic faith. Business actors are demanded to be punctual, able to recognize weaknesses and shortcomings, constantly improve the quality of goods or services on a regular basis, and must not cheat or lie. Business people are required to have an awareness of moral ethics. Business people who are careless and do not maintain ethics will not be able to run their business well, as it can threaten social relationship, deceive consumers, and even themselves [14]. If this continue to hap pen, it means that there has been damage on earth. Damage on earth due to human arbitrariness, and by acts that are not good and transcends borders [15].

For Muslims, moral issue takes an important role and has been persistently become a guideline in life. The guideline that is derived from the holy Quran, Hadith, and Ijtihad, which needs a common sense to in order to be able to be applied into human life. The purpose of this is enable human to do their best in their economic activity and not stray away from non-Islamic teaching [16]. We must not forget that the main purpose of law is order and justice which is also a means of renewal in society [17]. Therefore in this case, it is also necessary to present the concept of justice according to Islam. In the Arabic dictionary it states that: "the thing that is in the mind in an honest state is justice, every dishonest or dishonest or unworthy is considered as unjust". The idea of right and wrong is implied in the term *adl* or just. This term is often used in a broad sense including values and religion [18]. This means that business competition conducted in an unfair, dishonest manner, inhibiting business competition is a violation of religious provisions. It can be understood that Islam does not discriminate against business actors. The obligation to conduct business activities in an honest manner and prohibit business actors from competing fraudulently applies to every business actor. This is because businessmen are human, and every human being that is created by God must be accountable for their own actions, regardless their social and economic status in the society.

The basic principles that has been set in Islam about trading are honesty, trustworthy, and sincere. Lately, there are many fault practices in markets that would be otherwise embrace the Islamic principles and can be accepted by the business community in this world. Thus, in Islamic economy, the most important thing is the desire to achieve social benefits as much as possible. Therefore, there has been ever an opinion related to the practice of the economic activity, anyone that could obstruct the achievements of the social benefits can be declared non-Islamic [19].

3.4. Building Indonesian Business Competition Law based on Islamic Economic Principles within the Framework of Economic Democracy

When referring to the principle of justice according to Islamic law, Islam identifies justice with honesty. So a person is said to be fair when he or she keep him or herself in the right path [20]. This means, dishonest or unrighteous actions are actions that are unfair or contrary to the sense of justice. within correlation with unfair business competition, which is prohibited by Law Number 5 Year 1999, it is an act by business actors in competing with unlawful manner that inhibits business competition. Therefore, from the Islamic perspective, justice in an, unfair business competition that is equal to an unfair act.

Indonesian economic democracy as stated in Article 33 of the 1945 Constitution is the main characteristic of Pancasila economic system [7]. Indonesia does not adopt capitalist economic system, since it limits the role of government in regulating markets. Indonesia does not also adopt socialist economic system, in which all market traffic is strictly intervened by the government. This means, in the Pancasila economic system that carries out the principle of economic democracy, equal opportunity between business people is highly emphasized. Business competition carried out by small business actors will indeed not have an impact on large business actors, but will have an impact on other small business actors, especially the public as consumers. Based on that, the writer argues that in order to realize an Indonesian economy that reflects the values of Pancasila and economic democracy, ideally, unfair business competition carried out by small business actors must be categorized as unlawful acts.

Law and economics are not a one-way relationships, but have reciprocal and mutual influences [21]. In my opinion, the ideal concept of protection for small business actors in relation to business competition law is to emphasize the concept of behavior, not discriminate against the perpetrators. A "fraud" in a business activity must be seen as an act that violates the rules even though the culprit is a small business actor. This provision does not mean that impartiality is directed towards small businesses, but rather as an effort to develop the ability of small businesses themselves, so that they can appear to be a formidable business in the midst of global trade flows while still upholding fair business competition. The progress of micro/ small and medium enterprises can be stimulated by conducting business activities in a healthy manner. The business record can be maintained by upholding fair business competition that can only be realized when it is guarded by the law. The exclusion of small business actors from the enactment of laws

prohibiting monopolistic practices will not harm or even kill small businesses, instead it will make small businesses becoming more resilient and independent to face any business competition. This will support the achievement of the objectives of the law, namely the people's welfare and economic efficiency.

The Politics of Law Business competition in Indonesia must be arranged in such way according to the state of society and the development of the legal needs themselves [22]. The law should be able to regulate and determine how humans should behave in society so that their interests and the interests of others are met [23]. Similarly to business competition law. The law of business competition in Indonesia should really appear as a law that supports the development of the country and the development of Indonesian people.

The functioning of the law as outlined above must be supported by the content or material of the law itself. The law will not be able to manipulate the social in an ideal direction if the laws that are formed do not reflect ideal values. The law will not be able to be a means of public education if the applicable law does not prohibit dishonesty (in this case the law of business competition). Unfair business competition will become a culture among small business actors (the majority of which are sought by native Indonesians called *pribumi*) if it is not prohibited by the law. This is certainly far from the original values of the Indonesian nation.

Therefore, the renewal of business competition law in the future should be more focused on the function and role of the law in order to achieve the goals of benefits for all people. Jimly Asshiddiqie said that the law would not be able to develop without the support of a growing economy. But the economy will not grow and develop if the law is unable to guarantee certain justice and fair certainty [24].

Furthermore, the writer can point out that the renewal of business competition law in the future must be more responsive, in the sense of accommodating the interests of the wider community (consumers). Sabian Uthman said that a democratic law must always gush from the earth. This means that it is an embodiment of community values, then wisely organizes and synergizes the crossing of interests which must also be maintained, which in fact happens in people's lives. In that sense, the law can become a tool of social engineering that is creating a society that becomes the ideals of a nation that names itself a state of law [25]. Budi Untung said that the defense of the public interest (in this case the people as consumers) should be an ethical basis in government policy [26].

4. CONCLUSION

In order to realize the state's goal of welfare for all people, the government as the organizer of the state, must make all forms of concrete efforts such as physical development, national moral development and legal development. Laws that reflect the purpose of the state in order to realize the welfare of the people are laws that are just in accordance with the noble values of society and religion (Islam). Therefore, the development of Indonesian business competition law in the future must integrate Islamic values, especially the values of honesty and justice. Monopolistic practices and unfair business competition must be seen as an act or condition that is contrary to the values of

honesty and fairness, so that it is prohibited for any business actor, large or small. This means that Islamic Principles, namely honesty, in carrying out business activities must be really accommodated in such a way in the law of business competition in the country.

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