

THE EXISTENCE OF SHARIA INSURANCE BUSINESS ARRANGEMENT BY POSITIVE LAW

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ABSTRACT

The existence of sharia insurance as part of dual insurance system, in insurance business has important meaning as supporting business activity in Indonesia, but in its implementation not yet supporting by clarity the rule of law managing it; it can have implication to existence of sharia insurance according to positive law. The purpose of this study is to analyze the existence of sharia insurance business according to positive law, using normative legal research using conceptual and statute approach that comes from primary, secondary and tertiary law material through literature study, then analyzed descriptively and prescriptively to get a deductive conclusion. The results show the existence of sharia insurance business in the insurance legal system before the release of the Act on Insurance Business in 2014 is not the same as conventional insurance, but with the Law no. 40 of 2014 on Insurance, the juridical position of sharia insurance equal or equal to conventional insurance because the Indonesian legal system has embraced dual insurance system.

Keywords: Existence, Sharia Insurance, Positive Law.

INTRODUCTION

The current insurance legal system uses dual insurance system, namely conventional insurance and sharia insurance. This fact shows that the insurance system in Indonesia is not only conventional insurance but also sharia insurance as a result of the need for the importance of participation of all components of society in national economic development, especially in the field of insurance. The existence of sharia insurance business is still not regulated comprehensively and systematically in positive law and there are still legal problems that occur this can have legal implication to existence of business of Sharia Insurance in running its business. Viewed the insufficient of legal regulation managing Shariah insurance, it is deemed necessary to have a law that regulates it comprehensively, so that in practice does not cause legal problems. The clarity of the existence of the law that regulates and supports the activities of Sharia insurance is absolutely necessary, so that the sharia insurance business gets assurance of legal certainty in running its business, so that its implementation can be in accordance with positive law and the principle of Islamic Law.

The clarity of the regulation of every business becomes the basis and indicator of the establishment of the legal state (rechstaats) and the realization of legal certainty and justice, because the existence of law makes the business run in the line and legal norms ensuring that the rights and obligations of the community are protected by the state. The existence of the law will make the position of the parties to be equal in the law, as well as the business that runs in the law

corridor and is not done illegally. Thus, this research is important to do with the purpose to examine the existence of sharia insurance business according to positive law.

METHOD

This research is a doctrinal or normative legal research (Soekanto & Mamudji, 1995), using statute approach and conceptual approach (Marzuki, 2004). The legal material used comes from primary, secondary and tertiary legal materials, including: legislation and Fatwa of the National Sharia Council MUI (Law, 2003), research results, scientific articles, literature books, dictionaries and encyclopedias related to sharia insurance. Subsequently collected through library research and document studies conducted by inventory legislation, books and literature. Then do the classification and collection for subsequent sorting and validation and harmonization of legal norms. For further analysis using descriptive and prescriptive analysis method, to deductively earn conclusion.

RESULT AND DISCUSSION

1.1. The Existence of the Business Arrangement of Syariah Insurance by Positive Law

The existence of sharia insurance as part of the legal system of national insurance, inspired by the application of dual banking system in Law No. 10 of 1998. The insurance law system that is run in Indonesia today using dual insurance system, namely conventional insurance and sharia insurance. This fact shows that the insurance system that is run not only conventional insurance but also sharia insurance. The application of Islamic law including sharia insurance in the life of Moeslems is recognized and guaranteed by the constitution namely the 1945 Constitution (Yasin, 2018), especially in Article 29 which gives freedom to implement religious teachings for its adherents, based on the principle of First Pancasila as the basic philosophy of the State “*Belief in the One*”. In its relation, according to Hartono Mardjono, “although in the national legal system is not regulated on national law; Islamic law may apply on the basis of recognition by differentiation or by choice of law on the will of the parties at the time of transaction” (Mardjono, 2000). This is in line with the opinion of Abdul Gani Abdullah who explained, there are two things that underlie the validity of Islamic Law, namely: “*The first basic is aqidah, the belief that forced its implementation in transactions and the second is Shari’ah, as long as the norms or rules of law have two dimensions, ie transcendental or vertical dimensions (Kadir, 2013). This transcendental dimension is judged by hablum-minallah which is individual or collective responsibility to God. The other dimension is the horizontal dimension known as hablum-minannas that regulates social interaction among humans*” (Dewi & Yeni, 2004).

The position of Islamic law in the national legal system is: “... *The Republic of Indonesia (RI) is obliged to regulate problems in accordance with Islamic Law as long as the law is only applicable to Moeslems.*” And Islamic Law (Djakfar, 2016) is also the source of the establishment of the National Law besides Customary Law, Western Law and other Laws that grow and develop within the State (Dewi & Yeni, 2004). Meanwhile, Mutamimul Ula explains

that Islamic law can become mainstream, whereas western law and customary law can be complementary, it is based on strong reasons, one reason is the agreement of legal expert that the ideal law is to be philosophical, juridical and sociological (Ula, 2000).

Based on the opinion of the experts above, shows that the regulation of Islamic law in the national law is legally constitutional and positive law, one of which arrangement of Takaful in the form of sharia insurance law. The existence of sharia insurance in the national insurance system, before the enactment of Law No. 40 of 2014 has not the same and equal with conventional insurance (Law, 2014). However, after the enactment of Law No. 40 of 2014, then the formal juridical has recognized the arrangement of dual insurance system in a law, although there has been no special arrangement, but has progressed compared with Law No. 2 of 1992 and KUHD.

To anticipate the development of syariah insurance bussines in the future is nedded clear regulation in order to conduct and dispute resolution about the problem of syariah insurance. Regarding to the problem, it requires specific regulation (*lex specialis*) of syariah insurance in Indonesia Positive Law.

1.2. Harmonization of Regulatory Law of Syariah Insurance in Positive Law

It is important that the harmonization of regulatory law especially in a legislation regulating sharia insurance, because in sharia insurance there are several characteristics different from conventional insurance, so it is not possible to follow all the rules applicable in conventional insurance. They are; in the aqad of sharia insurance that the premium paid is in *tabarru'* (Ismaniyati & Dan-Adam, 2017) basis which will be used to help other insurance participants who are experiencing the disaster. Therefore, each insures participant have the social function (help each other) to ease the burden of each other, so that the insurer and the insured personally run the mission of protection and non-profit oriented motives as part of the implementation of the principle of *ta'awun* (Burhanuddin, 2010).

The Indonesian nation will be happy if the applicable law is Islamic shari'ah or at least a law that is not contrary to the religious syariah. Related to this, it has also been practiced in Sharia Banking Laws that have specifically regulated it. In examining the implementation of Islamic Shari'ah, it is necessary to consider four issues namely the implementation of Islamic Shari'ah, the feasibility of Islamic Shari'ah to be implemented, the preparation of the implementation of Islamic Shari'ah and the enforcement of Islamic Shari'ah (Law, 2010). Implementation of Islamic law according to Mutammimul Ula is: "*Implementing Islamic shari'ah is to integrate Islamic values into the framework of national legal system (positive law), current law (ius constitutum)*" (Ula, 2001).

Integrating and harmonizing the value of Islamic Law in national law is the best option in the current regulation on sharia insurance. The contents of insurance arrangements in Law No. 40 of 2014 and implementing regulations have not been able to accommodate all matters relating to syariah insurance. This difference is a principle matter, because the emergence is caused by the attachment of sharia insurance companies with the principles of sharia, so that the differentiating elements should appear in the system and operational procedures of Sharia insurance. Thus there are many things that need to be regulated about Syariah business activities

that are not regulated in Law No. 40 of 2014, KUHD and the implementation regulation that need to be regulated in a special legislation, although it has progressed, but still can not accommodate or regulate comprehensively about syariah insurance.

Islamic Shari'ah is very worthy to be enforced, when viewed from five aspects: the philosophical, juridical, sociological, scientific and political aspects. To enforce the shari'a there are two models that need to be done first, the struggle through legislation, and secondly, through the constitution. Through the legislative movement the intention is to incorporate Islamic values in legislation (Ula, 2000). So the struggle to realize a special law on syariah insurance becomes something that is relevant to the opinion of lawyers who deserve to be considered by policy makers.

The existence of the Law regulating sharia insurance as part of the national insurance legal system is a necessity, as it has previously publish various legal products such as; Religious Court Law, Zakat Law, Sharia Banking Law, State Sharia Securities Law, Hajj Law, and others (Muaimin, 2016) that legitimize the presence of laws regulating Sharia insurance as part of the national insurance legal system within the framework of the Unitary State of the Republic of Indonesia. Moreover, the system of sharia insurance has formally entered into 22 years of doing business according to sharia at the same time with conventional insurance. Therefore, the role of the government in providing legal protection to the business of Sharia insurance is very important to be done in the form of Legislation which specifically regulates Shariah insurance as part of the existence of the realization of the legal certainty balance for the parties.

The existence of the Law on Insurance Business in 2014 as a model of harmonization of dual insurance system law, not a system separate from the national legal system is something that must be appreciated (Muhaimin, 2008). This law is an integral part (inherent) with the national insurance law system, as the model of Islamic Banking Law. According to the authors not only dual economic system and dual banking system is urged to be applied, but also must immediately implement dual insurance system by making a law that specifically regulates sharia insurance business.

Therefore, it is time for the government to be responsible in the legal state to immediately think of the Legislation which specifically regulates the Sharia Insurance as part of the legal system of national insurance, in order to create justice and legal certainty in sharia insurance business in Indonesia. So all citizens have the same status in law including the Moeslem people who are the largest part of the inhabitants of this country. The existence of the Law that regulates the sharia insurance is also part of the togetherness of Moeslems people to life harmoniously with other people as part of the practice of Pancasila, the 1945 Constitution of the Republic of Indonesia and the diversity of Indonesia in the framework of the Unitary State of the Republic of Indonesia.

The existence of harmonization of law in the field of insurance will accelerate the process of achieving national development goals in the field of insurance. The existence of this Act also indirectly affects the process of accelerating the development of sharia insurance business. In addition, the realization of legal certainty for the insurance business, so that any problems that will emerge can be resolved with clear and concrete legal mechanisms. This is where the importance of regulation of sharia insurance in a separate legislation as a model of harmonization

of the law can carry out its function to realize a sense of security (protection) and justice and legal certainty for all parties. Harmonization of this law is an effort to realize the integration of sharia insurance law principles in the Legislation as part of the national legal system based on Pancasila and the 1945 Constitution.

Based on the description above, the position of sharia insurance in the national insurance law system before the issuance of Law No. 40 of 2014 has not equaled to conventional insurance. But after the release of Law No. 40 of 2014, the juridical position of sharia insurance is equal to conventional insurance in positive law, because the Indonesian legal system has embraced dual insurance system, although not yet reached the ideal arrangement in the *lex specialis* that is legislation on syaria insurance as *ius constituendum*.

CONCLUSION

The existence of Sharia insurance business arrangements in the positive legal system before the issuance of Law No. 40 of 2014 regarding Syaria Insurance has not been equal to the conventional insurance, and now the juridical position of sharia insurance is the same as the conventional insurance in the insurance legal system, because the legal system of Indonesia has embraced dual insurance system that is arranged simultaneously in a Law of Insurance. However, it has not been specifically regulated in special laws (*lex specialis*), but has phenomenal progressed compared to the arrangement by KUHD, Legislation No. 2 of 1992 and it's implementing regulations. As a recommendation in this research; the government should immediately formulate the Implementation Regulation on Law No. 40 of 2014 on Insurance and Government, Parliament, MUI, academics and Sharia Insurance practitioners to immediately sit together in arranging the agenda of Syaria insurance arrangement in legislation.

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