THE DEFAULT CONCEPT IN THE SHARIA CONTRACT LAW IN INDONESIA

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ABSTRACT

Default concept in the sharia contract law in Indonesia is regulated in The Compilation of the sharia Economic Law and Legislation Fatwa National the Sharia Board of Indonesian Ulama Council (DSN-MUI) Number 129 of 2019. Standard concepts related to the default in the sharia contract law in Indonesia are required as a form of legal certainty in the sharia principles-based business transactions. The approach in this research was based on normative juridical approach. The data were collected through literature review. This research was a descriptive analysis research. The results showed that, firstly, the default concept in the sharia contracts law in Indonesia was closely related to ta'adî, tafrîth, taqshîr and mukhâlafat al-syurûth terms. It was said as a default if it fulfilled three elements, when there was an error; there was a loss and there was a causal relationship between the error and the loss; secondly, the claim for rights in the form of compensation or commonly referred to as ta'wîdh was occurred as a result of legal consequences occurring due to the default in the sharia contract law in Indonesia.

Keywords: The Default, The Sharia Contract, The Compilation of the Sharia Economic Law

INTRODUCTION

The sharia business practices in Indonesia were originally based on a fatwa issued by the DSN-MUI. The previously stated fatwa is one of the institutions in Islamic law to provide answers and solutions to the problems faced by the people. In fact, Muslims in general use fatwas as a reference in attitude and behavior (Imaniyati & Adam 2017).

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Besides being based on the fatwa of the National The sharia Board of Indonesian Ulama Council, the business practices and the sharia contracts in Indonesia are based on the Compilation of the sharia Economic Law (KHES)—a material law sources for judges in resolving the sharia economic disputes in Indonesia. The existence of KHES in the hierarchy of laws and regulations in Indonesia is regulated in the Regulation of the Supreme Court of Indonesia (PERMA) Number 2 of 2008 in which if the regulation of the Supreme Court of Indonesia is considered as a judicial institution product functioned as the judicial function administrator (Sa'diyah, 2021).

If economic and business practices are based on the sharia contract law, accordingly, Islamic judiciary of Indonesia are institutions that are given absolute authority in resolving

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the sharia economic disputes for parties underlying their contracts on the sharia principles. Thus, the Islamic judiciary of Indonesia requires judges who are qualified and have competence in examining and resolving the sharia business and economic disputes based on the sharia principles (Fatchurohman, 2018).

Similar to civil contract in general, one of the causes of disputes in the sharia contract law in Indonesia is as a result of the default. The concept of the default in the sharia contracts in Indonesia is generally regulated in the Compilation of the sharia Economic Law which is the Regulation of the Supreme Court of Indonesia Number 2 of 2008 and Legislation Fatwa National the Sharia Board of Indonesian Ulama Council Number 129 of 2019.

Therefore, research related to the construction of the concept of the default in the sharia contract law in Indonesia was needed to be conducted to provide legal certainty in terms of the sharia contracts in Indonesia.

RESEARCH METHOD

The approach applied in this research was normative juridical approach. The normative juridical approach was conducted through philosophical, systematic and critical analysis approaches. As this research was based on the normative juridical approach, the technical data collection was through a literature review which included examining and reviewing primary and secondary legal materials. The primary sources in this research were the Compilation of the sharia Economic Law—the Regulation of the Supreme Court of Indonesia Number 2 of 2008 and Legislation Fatwa National the Sharia Board of Indonesian Ulama Council Number 129 of 2019. Moreover, the secondary sources in this research were literatures that were in relevance to the focus of the research. Further, this research was descriptive because this research was conducted to find data as accurate and complete as possible about the characteristics of a situation or symptoms that may help strengthen the old theory to develop a new theory regarding the sharia contract law in the sharia.

LITERATURE REVIEW

Default is derived from the original Dutch term, wanprestie. The word “wan” has the meaning of bad or ugly, while the word "prestie" means obligation. In relation with this, default etymologically means obligation or bad performance (Khairandy, 2013). Yahya Harahap explained that default is the implementation of obligations that are not timely or carried out improperly (Harahap, 2005).

Specifically, Imron Rosyadi stated that default is an act that does not carry out the obligations occurring from the agreement or contract. The default is the concept of an obligation due to a contract, accordingly, in the practice in the Netherlands, a default claim must be based on the non-fulfillment of an agreement or contract (Rosyadi, 2019). Based on the definition according to these experts, it can be concluded that default is the result of not fulfilling obligations occurring from contractual relationships.

According to Sedyo Prayogo, there are 3 (three) forms of non-fulfillment of the obligation, namely (1) the debtors does not fulfill the obligation at all; (2) the debtor is late in fulfilling the obligation; and (3) the debtor is wrong or inappropriate in fulfilling the obligation (Prayogo, 2016).

The construction of default in the sharia contract law is not generally much different from default in the civil law, the only difference is that the activity occurs in the field of the sharia business contracts. Article 36 of the Compilation of the sharia Economic Law informs that the parties to the contract are deemed to have breach their promises (default) if it is because of their faults (1) not doing what is promised; (2) doing what is promised but not as

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promised; (3) doing what is promised but is too late; and (4) doing something that according to the contract that should not be done.

In the theory of the sharia contract law in Indonesia, there are 4 (four) terms related to the concept of the default. This is stated in the general provisions of Legislation Fatwa National The sharia Board of Indonesian Ulama Council (DSN-MUI) Number 129 of 2019 about Real Cost as Ta'wîdh due to default (al-Taklîf al-Fi'liyyah al-Nâsyi'ah al-Nukûl). The four terms are as follows: firstly, Ta'adî, which linguistically means zhalm (tyranny). In addition, the term ta'dî is to do an act that should not be done, both according to the sharia and habits (Iyadh Ibn Issaf Ibn Maqbal al-'Inzi 2009). According to Legislation Fatwa National the Sharia Board of Indonesian Ulama Council, ta'adî is to do something that should not be done.

Secondly, Tafrîth, linguistically means al-taqashîr (summarizing), and al-tadhyî (wasting). The definition of tafrîth in terms as stated by Ibn Taimiyyah is to leave something that is his obligation without any cause/obstacle (Taimiyyah 1995).

Thirdly, the next term, taqshîr means not doing what it's supposed to do; and fourthly, mukhâlafat al-syurûth, means contravening what has been agreed in the contract.

RESULTS AND DISCUSSIONS

The Elements (Principles) of Default in the sharia Contracts Law in Indonesia

In terms of the sharia contracts law in Indonesia, in order to categorized an act as default, at least it has to meet 3 (three) elements. The elements of the default in the sharia contracts law are as follows:

There is a Fault

According to Syahrul Anwar, the faults are meant by an attitude (either in the form of action or inaction) that is not justified according to Islamic law. The form of the faults can be in 2 (two) manners, such as the form of intentional or negligence (not doing what should be done) (Anwar, 2007). More specifically, 'Abd al-Razzaq al-Sanhuri explains that the faults in terms of the context of the default is when the debtor is unable to fulfill what is the object of the obligation, whether this happened due to the debtors' actions in the form of intentional (not implementing the contract), negligence or due to the consequences of their actions (indirectly) (Al-Sanhuri, (n.d.)

According to Wahbah al-Zuhaili, it can be said as the faults in the context of the default if something is against the habit. In accordance with this, the meaning of habit is something that is done by the majority of people in general and not a personal habit (Wahbah al-Zuhaili 2012). Zuhaili's opinion is in line with the fiqh rules which read:

الـ عرف إلـ ى ف يه يـ رجع الـ لـغة، ف ي و لا ف يه، لـ ه ضاب ط و لا مط لـ قا، لـ شرعا ب ـ ه ورد ما كـ ل

Everything that comes from the sharia in general / without any restrictions, both from the sharia itself and from the linguistic aspect, then the provisions are returned to habit ('urf)" (Putra, 2021)

As stated by the Compilation of the sharia Economic Law (KHES) that is the source of the material law for the sharia contracts law in Indonesia, article 36 describes in detail the various types of the faults as follows: (1) not doing what is promised; (2) doing what is promised but not as promised; (3) doing what is promised but is too late; and (4) doing something that according to the contract that should not be done.

The topics and discussions of the faults can be distinguished from the purpose of the existing contract. Al-Sanhuri describes that there are basically two types of objectives in the

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implementation of a contract/agreement, which are, to realize the results (tahqîq al-ghâyah) and to make an effort (badzl al-'inâyah) (Abd al-Razaq Ahmad al-Sanhuri n.d.).

The obligation to objectify the results are contracts/agreements that can only be said as implemented when it has produced certain results or achieved certain goals, both in terms of transfer of ownership rights (intiqâl al-milkiyyah) as in the sales and purchase contract (bai'), the act of doing something such as making building renovations, and also not doing something, for example is not to build any buildings within a certain distance (Suadi, 2020).

The obligation not to do efforts is the obligation that can be said as implemented when the client has made a certain level of effort, whether the effort has paid off or not. The main point of this obligation is an effort in a certain degree. In particular, the relationship between the doctors and all the efforts in accordance with the rules of their profession, however, they must strive to cure the patients. Another example is the effort to keep the goods entrusted to us (in a wadî'ah contract) as much as possible based on that is common when people guard goods (Suadi, 2020).

There is a Loss

In addition to the proven faults, the second element that must be fulfilled in the concept of default according to the sharia contract law is the existence of losses. The existence of this element of the loss is basically the essence of compensation due to the default or unlawful acts. This means that even if a fault occurs, if there is no loss, then the perpetrator cannot be called a breach of the contract.

This regulation is in line with the theme of "loss" (read: dharrar) which etymologically has the opposite meaning of benefit (Hasanudin, 2017). In terms of etymology, dharar is meant by damage/loss for others, whether the loss occurs in property, physical, honor, or feelings (Wahbah al-Zuhaili, 2012).

The compensation concept in Legislation Fatwa National the Sharia Board of Indonesian Ulama Council Number 43/DSN-MUI/VIII/2004 is conducted with the provisions that the amount of compensation is in accordance with the real loss, not on the potential loss and the determination of compensation must be based on a contract between the bank and the customer which is clearly stipulated in the contract clause.

There are Causality between the Fault and The Loss

The existence of causality is a logical thing as it is impossible for the debtor to be responsible for the losses that occur due to the mistakes of others or because they are in an obliged situation. Therefore, it can be concluded that with this causality the customers have no obligation to compensate if the loss occurs not because of a fault that is made. The sharia Financial Institutions are not charged with proving causality. For this reason, it is the customers who are obliged to find causality as a form of defense (Suadi, 2020).

Claim Rights Due to Default in the Sharia Contract Law in Indonesia

In the sharia contract law, in principle, the parties who carry out the contract are obliged to implement the contents of the contract. Consequently, the parties who do not apply the contents of the contract can be legally blamed. With this intention, the parties in the contract who feel aggrieved due to non-fulfillment of achievements can make claims. Syamsul Anwar explains that compensation claims can occur from 2 (two) things, first, because of the breach of the contract called the dhamân al-'aqd or commonly called dhamân al-'udwân (Anwar, 2007).

The concept of compensation in the sharia contract law is commonly known as ta'wîdh. In the book of Mu'jam al-Wasîth, it is explained that the word ta'wîdh is linguistically derived from the word al-'iwadh which means compensation (substitute value)

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(Anis Ibrahim et al 1961). Terminologically, the meaning of ta'wîdh (compensation) is the obligation to make payments as a substitute for the costs incurred to overcome certain difficulties (Adam 2019). In other words, the compensation (ta'wîdh) has the meaning of real loss for the faults that occurred. According to Bagya Agung Prabowo, ta'wîdh is a compensation, a fine imposed for breach of contract. The breach of the contract is that one of the parties intentionally does not fulfill its agreed obligations, causing losses to the other party (Prabowo, 2012).

More specifically, the regulation regarding ta'wîd (compensation) is regulated in a fatwa issued by Legislation Fatwa National The sharia Board of Indonesian Ulama Council (DSN-MUI) Number 129/DSN-MUI/VII/2019 (Rachman, 2020). In the fatwa is explained that what is meant by compensation (ta'wîdh) is an amount of money or goods that can be valued with money charged to a person (person/ syakhshiyyah) or an institution (recht person/syakhshiyyah hukmiyyah) who defaults.

According to the Compilation of the Sharia Economic Law (KHES), Article 20 paragraph 37 states that compensation (ta'wîdh) is the compensation for real losses paid by the party who defaults. However, it seems that the definition used in the Compilation of the sharia Economic Law looks less comprehensive as it only limits in terms of default. This is probably because the Sharia Economic Law Compilation (KHES) regulation does not yet cover the problem of unlawful acts in the sharia contract law and has only accommodated the problem of default (breach of promises in Article 36 of the KHES).

Article 38 of the Sharia Economic Law Compilation (KHES) describes that, a party who breaches a promise (default) can be required to: (a) pay compensation; (b) cancel the contract; (c) risk transfer; (d) fines; or (e) pay court fees.

Although based on the regulation of Article 1246 of the Civil Code (which is applied in Indonesia), the compensation can be made for costs, losses, interest, but in the context of the sharia contract, it is not allowed to apply interest liability to the perpetrator. The interest is included in the category of usury which is prohibited by the sharia. This is based on the fatwa of Legislation Fatwa National the Sharia Board of Indonesian Ulama Council, Number 1 of 2004 concerning Interest/Interest (Saputra & Selviani, 2021).

In the concept of the sharia contract law, according to Amran Suadi, compensation is divided into 2 (two) types, namely: (Suadi, 2020)

Al-Dharar al-Mâddi (Material Loss)

Material loss (mâddiyyah) in Islamic civil law, is the loss that befalls a person's property. The loss of property is a loss that befell humans in terms of property which makes the property reduced / loses its value. Classical Islamic jurists discuss this type of loss in the discussion of itlâf (damage) and ghasab (plunder) and require the perpetrator to replace it either by being replaced (mitsli) or by replacing it with a similar price (qîmi).

In short, material loss in the sharia contract law includes 2 (two) types of losses, namely the costs incurred and the loss that befalls the creditor's assets. The costs and losses that befall property are basically real goods and have prices (mutaqawwam). In the sharia contract law, there is no compensation for the expected interest/profit. Also, in the sharia contract law, this is referred to as dharar ihtimâlî (possible loss) tawfît al-furshah (loss of opportunity). Islamic jurists basically forbid this because interest is not included in the category of real losses and has prices.

Dharar Ma'nawy (Immaterial Loss)

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In terms of Dharar Ma'nawy (immaterial loss) in the sharia contract law, there are difference's opinion among experts whether the immaterial losses can be valued or not. For those who say that the benefits have no value (not considered as assets) such as Islamic jurists from the Hanafiyyah, then the loss of benefits cannot be replaced. In contrast, Islamic jurists from the Hanafiyyah, the majority of scholars such as Islamic jurists from the Malikiyyah, Shafi'iyyah and Hanabilah circles allow compensation for the loss of benefits. However, according to the Malikiyyah, it is limited to compensation for goods that have been used by people who take them without permission. As for if the goods are not used, then there is no compensation. The argument used is that the goods are judged by their benefits, then the benefits themselves are assets that can be valued.

CONCLUSION

The concept of defaults in the sharia contract law is closely related to the terms ta'dî, tafrîth, taqshîr and mukhâlafat al-syurûth. It is said to be a of default according to sharia contract law if it fulfills 3 (three) elements—there is a fault; there is a loss and there is a causal relationship between the fault and the loss. Further regulation regarding the concept of default in sharia contract law in Indonesia, is regulated in the Sharia Economic Law Compilation and the Legislation Fatwa National the Sharia Board of Indonesian Ulama (DSN-MUI) Number 129 of 2019. There will be a claim for rights in the form of compensation or commonly referred to as ta'wîdh or compensation for real losses paid by the party who defaults as a result of the legal consequences of the default in the sharia contract law in Indonesia.

REFERENCES

Abd al-Razaq Ahmad al-Sanhuri. Nadzariyyah Al-'Aqd. Beirut: al-Majma' al-'Alamî al-'Arabî al-Islâmî.

Rahman, A. (2020). "Ta'widh (Compensation) for defaulting customers on KPR Platinum IB Perspective of DSN-MUI Fatwa NO.129/DSNMUI/VII/2019 AT Bank BTN KCPS Karawaci." *Sharia Journal, 8*(2).

Panji, A. (2019). Fiqh Muamalah Adabiyah. Bandung: Refika Aditama.

Al-Sanhuri, 'Abd al-Razzaq. Mashadhir Al-Haq Fî Al-Fiqh Al-Islam. Beirut: Dâr Ihyâ al-Turâts al-'Arabî.

Ibrahim, A. (1961). Al-Mu'jam Al-Wasîth. Cairo: Mathba'ah.

For the great Prabowo. (2012). Legal Aspects of Murabahah Financing in Islamic Banking. Yogyakarta: UII Press.

Fatchurohman. (2018). "Syariah economic default customer dispute resolution at the magelang religious court." *INDONESIAN JOURNAL of Islamic Literature and Muslim Society*, *3*(1).

Sa'diyah, H. (2021). "History and position of the compilation of sharia economic law in the regulation of the supreme court number 2 of 2008 in Indonesia." Al-Huquq: *Journal of Indonesian Islamic Economic Law, 3*(1).

Mubarok, H. (2017). Fiqh Mu'amalah Maliyyah: Principles of Agreement. Bandung: Symbiosis.

Maqbal al-'Inzi, I. (2009). Al-Syurûth Al-Ta'wîdhiyyah Fî Al-Mu'âmalât Al-Mâliyyah. Riyadh: Dar Kunûz Isybilyâ.

Ridwan, K. (2013). Indonesian contract law in comparative perspective. Yogyakarta: FH UII.

Imaniyati, N., Nu'man, A., & Jamilah, L. (2019). "analysis of the role and responsibility of sharia supervisory board (DPS) On sharia compliance supervision in Islamic banks In Indonesia." *Journal of Legal, Ethical and Regulatory Issues, 22*(3), 1.

Imaniyati, N., & Adam, P. (2017). "The fatwa position of DSN-MUI in the national banking system." *Pulpit, 33*(1).

Agus, S. (2021). "Concept of unlawful acts from the perspective of Sharia economic law." *Gorontalo Law Review, 4*(1).

Imron, R. (2019). Sharia Nominaat contract: Implementation and dispute resolution. Jakarta: Prenada Media Group.

Saputra, S., & Selviani, S. (2021). "Fatwa of the Indonesian Ulema Council Number 1 of 2004 concerning Bank Interest." Al-Muqayyad, *4*(1).

Prayogo, S. (2016). "Implementation of default limits and unlawful acts in the agreement." *Journal of Legal Reform, 3*(2).

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Amran, S. (2020). Default and unlawful acts in the settlement of Sharia economic disputes. Jakarta: Kencana Prenada Media.

Anwar, S. (2007). Sharia agreement law: A study on contract theory in Muamalat Fiqh. Jakarta: PT RajaGrafindo Persada.

Taimiyyah, I. (1995). Majmû Al-Fatâwâ. Medina: Majma al-Malik Fahd.

al-Zuhaili, W. (2012). Mausû'ah Al-Fiqh Al-Islâmî Wa Al-Qadhâyâ Al-Mu'âshirah. Beirut: Dar al-Fikr.

Harahap, Y. (2005). Civil procedure law. Jakarta: Sinar Graphic.

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