

## Sharia Economic Bankruptcy Law (*al-Taflis*) and the Dualism of Court Competency in Indonesia

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**Abstract:** Since Religious Court Law was amended by Law No. 3 of 2006, every sharia economic case is stipulated as the competency of the Religious Court. Conversely, Bankruptcy Law No. 37 of 2004 has never been synchronized with the amended Religious Courts Law. Therefore, the competent court does not handle sharia economic bankruptcy (*al-taflis*) cases. This study aims to ensure that *al-taflis* can be examined based on sharia economic principles by the most appropriate judicial forum. It is normative legal research using primary and secondary legal materials such as court decisions, statutory, books, journals, reports, and internet sources, then analyzing and synchronizing to get an ideal formula regarding how *al-taflis* cases are settled in court. The result shows that *al-taflis* is appropriately stipulated as the absolute competence of Religious Courts. Case studies of *al-taflis* court decisions settled by the Commercial Court so far, also indicate that sharia principles are not sufficiently considered in the decisions, even ignored. Therefore, it is urgent to make synchronization efforts by amending the Bankruptcy Law until it can accommodate the settlement of *al-taflis* case through Religious Courts. Otherwise, it will be only a utopian sharia economic bankruptcy law.

**Keywords:** Court's Competency; *al-Taflis*; Sharia Economy; Bankruptcy; Synchronization.

### Introduction

The relationship between law and society have been elaborated in a progressive perspective that the law always keeps the status of law in the making (Harun, 2019; Rahardjo, 2011). There is a reciprocal relationship and mutual influence between law and society (Watif et al., 2024). It is already clarified also that the law system in society is a complex organism in which structure, substance, and culture interact (Friedman, 2019). Furthermore, the development of the sharia economy is a logical consequence of the country with a Muslim majority population. Even though Indonesia is not officially mentioned as a religious state, sharia principles have been accommodated in the legal system (Zada et al., 2022). That is why, the development of sharia economy must be considered as an important factor influencing the state's policy in realizing social justice. At least, social benefit (*maṣlahah*) is the most important factor in developing an economy (Al-Daghistani, 2023).

Sharia economy began to develop at least since the mid-1990s (Kuran, 2018). Islamic finance in the scope of sharia economy has become an important issue for financial markets worldwide (El-Masry et al., 2016). Islamic financing has grown significantly and is widely accepted as an alternative to conventional loans (Abd Hafiz et al., 2017). Its rapid development has made sharia economic actors seem negligent in anticipating bankruptcy issues when they first started doing business (McMillen, 2012). From the beginning, the bankruptcy issue should get proportional attention as well as calculating profitability. It is known that the genuine characteristic of the sharia economy can be seen in the form of cooperation and social interaction which is guided as profit loss sharing business according to fundamentals (Bani Ata,

2019). Even though sharia economy has developed worldwide due to its resilience to a crisis in the past (El-Masry et al., 2016), it has potential issues like bankruptcy also. Indeed, one of the popular patterns (*akad*) in the economic empowerment community called *qiradhi* (financing) like *musyarakah* and *murabahah* (Abdul-Rahman et al., 2014; Arianti, 2019; Hayati & Mujib, 2022), it may also go bankrupt. It is also necessary to anticipate how to solve the problems.

From a legal perspective, bankruptcy is identified as a branch of commercial law with economic significance (Friedman, 2019). From another perspective, even though the concept of sharia economy is not fundamentally different from the existing one (Kusumaningtyas et al., 2022), the basic principles distinguishing the sharia economy are already clear, trading is allowed and usury (*riba*) are prohibited (Saputera, 2019). It means that bankruptcy as a legal issue also could occur in sharia business and it should be different treatment to settle a sharia economic bankruptcy or *al-taflis* (Hamoudi, 2011; Suadi, 2021). Interestingly, *al-taflis* case has already been found and discussed in the USA's court since 2011 or in the UK around 2004 (Herijanto, 2020; McMillen, 2012). It was also found in the Indonesian commercial courts since at least 2011 (Widjajati, 2019).

It is different with the USA or UK as a secular country that does not recognize a Religious Court, *al-taflis* cases in Indonesia are found in the Commercial Court. It is still examined and decided there, even though since 2006 the Religious Court has already held jurisdiction to settle such sharia economic cases. So, the court system has a dualistic problem to settle *al-taflis* cases today, whether must be the Commercial Court or the Religious Court. Even more, there is also a risk of collateral fraud in sharia financial (Sriani et al., 2023). So far, Indonesian scholars have criticized the handling of the Commercial Court that neglects sharia compliance (Kholid, 2020; L. D. Nugroho, 2022; Suadi, 2021; Wahyudi, 2019).

Factually, *al-taflis* has become a real case and settled by the Commercial Court. It has not been treated properly by the Commercial Court. Its judicial process is only based on the Bankruptcy Law and ignores sharia economic compliance principles. Sharia compliance is not considered and contained in the Commercial Court's decisions. Substantially, *al-taflis* case should be in the scope of sharia economic disputes and settled by the Religious Court. All commercial court decisions on *al-taflis*, from the first case decision No. 7/Bankrupt/2011/PN.NIAGA. JKT.PST (2011) and *al-taflis* decisions that could be found in the 5 Commercial Courts as mentioned in Table 1. (2017-2022), do not contain discussions of sharia economic compliance principles as legal considerations of those decisions. Pros-cons of the bankruptcy law regime so far are only related to tending in favor of creditors or favoring debtor, but there is no support already for the enforcement of sharia principles in bankruptcy law, especially in the case of *al-taflis*.

Therefore, it is necessary to reorganize the distribution court system based on jurisdiction between the Commercial Court and the Religious Court, especially for the settlement of *al-taflis*. This article will provide a specific study on sharia economic dispute settlement which is urgent to be published nowadays (Elvia et al., 2023; Hariyanto & Hamzah, 2022), specifically a discussion of how the next court's decisions on *al-taflis* could have legal certainty, social benefits, and justice for all stakeholders under sharia economic principles compliance. The issue will be analyzed to answer this problem regarding how the jurisdiction of *al-taflis* case was identified, how settled in the court today, and how should be in the future. Hopefully, *al-taflis* case could be settled properly by the most appropriate court forum. Otherwise, *al-taflis* is still only a utopian sharia economic bankruptcy law.

## Literature Review

Bankruptcy refers to the litigation process in the form of a court decision which is followed by general confiscation of all the assets of the bankrupt debtor, both existing and future assets, to pay all debts to his creditors in proportion according to the position of each creditor (Butt & Lindsey, 2018). This needs to be regulated by law, especially if there is more than one creditor. The law regulates all parties for the distribution of debt payments from the sale of the debtor's assets to pay off his debts will not compete (Ginting, 2018). Bankruptcy law is created to deal with a special problem - multiple and competing debt repayment claims among creditors when the debtor unpay its debts (Zhao, 2020). From a theoretical

perspective, it governs the debtor-creditor relationship during business insolvency (Nsubuga, 2018). The terms bankruptcy or *al-taflis* (Arabic) are synonyms that cannot be separated from business interactions (L. Nugroho, 2019). It is regulated in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt (Bankruptcy Law).

If a bankruptcy case occurs in the scope of sharia business transaction, it will be said a Sharia economic bankruptcy or *al-taflis* case. The term of *al-taflis* comes from the root of *fallasa* – *yufallisu* – *taflisan* (فَلَسَ – يُفَلِّسُ – تَفْلِيسٌ) or *aflasa* – *yuflisu* – *iflasan* (أَفْلَسَ – يُفَلِّسُ – إِفْلَاسٌ) which means to fall poor (Saprudin & Satiri, 2018). Bankruptcy according to sharia economy (*al-taflis*) has two meanings: first, the debt consumes the debtor's assets, so his property becomes impossible to pay off the debt, and second, the person concerned does not have any assets (Rusyd, 2004). Contemporary, it can be explained that bankruptcy is related to a judge's decision against the debtor to be declared bankrupt by preventing him from carrying out transaction activities on his assets for the benefit of all parties who have receivables (creditors) (Al-Asqalani, 2015; Az-Zuhaili, 2005). Seemingly, many similarities are seen between *al-taflis* and bankruptcy, unless it is a settlement in a court, it must be a different treatment (Suadi, 2021). The concept of sharia economy has a characteristic that always focuses on the dialog between materialism and spiritualism (Batubara, 2017).

It is known that the Islamic financial system has different financial concepts, especially regarding the prohibition of interest and usury (*riba*) as usually applied in the conventional system. Basic principles distinguishing sharia economy are already clear "Trading is allowed and *riba* is prohibited" as mentioned in al-Baqarah: 275 (Saputera, 2019). The ideal understanding of sharia finance gains to any sharia economy business should be distributed among its parties in a manner agreed upon among them, and losses shared in an equal proportion, so the parties could gain or lose, even bankrupt together (Hamoudi, 2011). Furthermore, bankruptcy also rules a loss-sharing calculation by liquidating the debtor's assets or restructuring his debts to creditors and distributing them fairly.

The bankruptcy case occurred within the scope of sharia economy involving East Cameron Oil and Gas Sukuk instruments in the US Federal Bankruptcy Court. It was the first kind of *al-taflis* settled by US bankruptcy law, especially based on Chapter 11 of the US Bankruptcy Code (McMillen, 2012). Chapter 11 of the US Bankruptcy Code regulates a debt restructuring mechanism called "reorganization." In Indonesia, it is known as PKPU (means Suspension of Debt Payment Obligation) as stipulated in Chapter II Article 222 to Article 294 of the Bankruptcy Law. Reorganization in the US Bankruptcy Code or PKPU in Indonesia has a function for financially distressed firms (Zywicki & Rajagopalan, 2017) and it has basic sharia principles as written in al-Baqarah: 280. It is regulated that if a debtor is in trouble, then give a grace period until he gets relief and if the creditor gives to charity in part or in whole, it is better. This shows that the provisions regarding the settlement of *al-taflis* cases based on al-Quran tend to be more favorable to debtor.

From the modern law theory, the sharia principle as written in al-Baqarah: 280 is in line with the communitarian theory (Al-Barashdi & Yeung, 2018), that bankruptcy is not focused on the interests of the creditors only, but also on other stakeholders such as employees, suppliers, customers, governments, and community in which an enterprise operates. The objective should not be merely to maximize the collective returns to creditors, so it is recommended to implement sustainable business principles (Irianto, 2015). It is explained that bankruptcy law content universally regulates the settlement of debtors' debts to their creditors through two patterns, namely (i) the liquidation proceedings, and (ii) the restructuring proceedings (Cerón, 2012). The debt settlement based on al-Baqarah: 280 refers to the second pattern.

Regarding how sharia economic cases are examined in non-Muslim countries, it can be noticed also the judge's statement in the case of Syamil Bank vs Beximco Pharmaceuticals Ltd. in England (2004). It is stated that courts do not recognize sharia principles which are not the law of a country, so judges only examine the *murabahah* contracts between the parties and interpret them based on English Law (Herijanto, 2020). Such a reason is most probably occurred in Indonesia, a country still developing a sharia economy

system. The Bankruptcy Law does not have direction regarding how to settle *al-taflis* yet. It is reasonable if *al-taflis* is only examined based on a related contract and interpreted according to written textually.

In the Indonesian court system, bankruptcy cases that qualified as *al-taflis* have been settled by the Commercial Court, even though the Religious Courts have an absolute competency, at least after the enactment of Law No. 3 of 2006. It is reported that judges made their decisions based on Bankruptcy Law only and ignored sharia principles (Kholid, 2020). In principle, it has already mapped out the construction of *al-taflis* in Indonesia. It is said that *al-taflis* is an elaboration of Islamic law, sharia economics, and generally accepted principles of conventional bankruptcy law, and its implementation cannot be separated from the existence of the Religious Courts. Unfortunately, it is not immediately followed up with the formal law to establish it (L. D. Nugroho, 2022).

Nugroho's perspective contrasts with Kholid's who saw that *al-taflis* already existed in courts, but according to Kholid, it has not been properly enforced yet. From another perspective, Nugroho said it from a legal positivistic aspect who saw the law as embodied in statutory and regulation. He argues that *al-taflis* must be materially embodied into laws as procedure law or reconstruct the systems for law enforcement. Furthermore, other scholar presents that it is urgent to make regulations to accommodate the bankruptcy process of sharia-operating companies. It is suggested to form a Sharia Commercial Court, so financial institutions/companies in the scope of sharia economics have certain laws and procedures in the case of bankruptcy (Nadira, 2021). However, although Sharia Commercial Courts have not been formed yet, basically Religious Courts have had the competency to settle sharia economic bankruptcy or *al-taflis* based on the applicable Bankruptcy Law (Djamil, 2013; Prihasmoro, 2023; Wahyudi, 2019).

The sharia economic development is a logical consequence of a nation with a predominantly Muslim population like Indonesia. Its Muslim population is even larger than all Muslims in Arab countries if they are all combined (Al Anshori, 2016). It is not amazing if the sharia economy has been increasing and growing firmly (Supriatna et al., 2022). So, if Islamic thought influences the development of law and economy, basically it is reasonable and fair from the democratic perspective. Implementation of sharia economy must not be interpreted as fundamentally replacing the established economic system, but rather as providing space for most Muslim citizens to express their economic activities under sharia economic system that prohibits trading of currencies as a commodity, no bank interest, but using profit-loss sharing system (Yunita, 2020). This is freedom of social and sharia economic expression and the 1945 Constitution guarantees this freedom.

## Method

This study is normative legal research with a statute approach, it is made based on Indonesian law and the judiciary system. Data collection was carried out through library research and enriched by primary data collection through interviews with Amran Suadi (2022) as Chairman of the Religious Chamber and I Gusti Agung Sumanatha as Chairman of the Civil Chamber, both are relevant top leaders at the Supreme Court of the Republic of Indonesia. It is analyzed and synchronized to obtain the most appropriate law procedure of how *al-taflis* settled in the court.

## Results and Discussion

### *Al-Taflis Case as a Competency of Religious Court, but It is Still Dualism*

Basic Montesquieu's theory said that the state authority must be shared in three organs namely executive, judicative, and legislative power (Armia, 2015). Furthermore, judicative power must be free and independent in the judicial process (Lamijan & Tohari, 2022). The judicial power is regulated in Article 24 (2) of the 1945 Constitution of Indonesia and further regulated in Law No. 48 of 2009. The 1945 Constitution has stipulated that judicial power is conducted by the Supreme Court and the subordinated judicial bodies in the realm of the general judiciary, religious judiciary, military judiciary, state administrative judiciary,

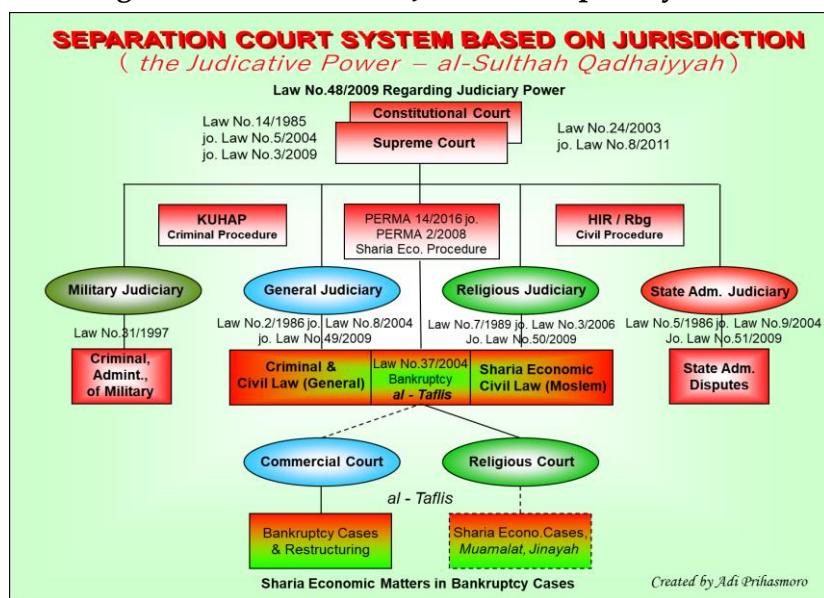
and the Constitutional Court (Rahmi, 2017). Those provisions are the foundation of the state court system in Indonesia which is separated based on jurisdiction (Harahap, 2017).

Procedurally, bankruptcy law regulates the mechanism to pay off unsettled debt that involves a court, by confiscating all the debtor's assets, both existing and future assets to pay off all unsettled debts to creditors (Ginting, 2018). Bankruptcy involves many creditors or at least two creditors, including the state especially as a tax collector (Sunarmi et al., 2021), and its procedure is intended to maximize enterprise value and minimize the "hold up value" of insolvent business (Seider et al., 2016). Therefore, the settlement of debts through bankruptcy proceedings is a public matter that needs to be regulated by law, including the appointment of a competent court to settle it lawfully. Finally, the bankruptcy court must solve when the question of repayments arises: maximizing and sharing the debt value (Blazy & Stef, 2020).

Bankruptcy Law regulated the establishment of the Commercial Court which was formed in the realm of the general judiciary. Under this law, bankruptcy constitutes the seizure of a debtor's asset for management by a curator, a receiver acting under the supervision of a judge (Butt & Lindsey, 2018). Bankruptcy law is basically about the matter of finance and economic significance (Friedman, 2019). It could be included in the matter of Islamic finance and sharia economics. That is why, the beginning of the issue of *al-taflis* existed when the Religious Court's competency was expanded (2006) by adding the new competency to settle the sharia economy disputes. Consequently, *al-taflis* as a type of bankruptcy includes sharia economic disputes that are stipulated as the competency of the Religious Court (Suadi, 2021).

Regarding substantive matters of *al-taflis*, it may become a competency of two courts in the different judiciary because ruled by two different laws. According to the separation court system as mentioned above, it shows that the development of the sharia economy and its law instrument has created a conflict of competency between two special courts. The dualism already existed between the Commercial Court carrying out the mandate of the Bankruptcy Law as explained by (Sumanatha, 2022), and the other side, the Religious Courts carrying out the mandate of the Religious Court Law as explained by (Suadi, 2022). It has raised the issue of the dualism of absolute competency in the separation court system based on the jurisdiction in Indonesia, especially for the settlement of *al-taflis*. Article 300 of the Bankruptcy Law stipulates that the Commercial Court is competent to settle a bankruptcy. On the other hand, article 49 of the Religious Court Law stipulates that the Religious Court is also competent to settle a sharia economic dispute, including all variant disputes in the scope of sharia economy (Faizah & Azzahra, 2022; Kartika & Harahap, 2023). It is still not clear whether the settlement of *al-taflis* becomes a competency of the Commercial Court or the Religious Court and raises dualistic interpretation.

Figure 1. The Dualism of Judicial Competency Issue



Source: (Author, 2023)

Based on the description above, there are at least two arguments. The first argument said that the Commercial Court is competent for every bankruptcy case, including bankruptcy within the scope of sharia economy, because the text of the Bankruptcy Law only states that the Commercial Court within the realm of the general judiciary has the competency, not the Religious Court. Since the beginning, the Commercial Court is competent, tested, and experienced in handling every bankruptcy case. Meanwhile, the second argument said that the Religious Court is competent in every case containing sharia economic material, including bankruptcy or *al-taflis*. Compliance with sharia principles in the settlement of *al-taflis* case is urgent to be enforced.

It is said that a system of the law is complete, its shortcomings are complemented by the system itself and include mechanisms for resolving conflicts between laws within the system itself (Mertokusumo, 2019). Like other judicial powers, the Religious Court is also regulated by law (Zulkarnain, 2021) or formally the position of the Religious Court is the same as other courts (Sulistiani, 2021). It must be considered, that the Religious Court Law (2006) which determines the competence of the Religious Court is newer than the competency of the Commercial Court as stipulated in the Bankruptcy Law (2004). It is said, that *lex posteriori derogate legi lex priori*, the newer provision of law rules out the older one. Besides that, Religious Courts have more specific competency regarding the enforcement of sharia compliance than Commercial Courts. The rule is *lex specialist derogate legi lex generalist*, the more specific provision of law rules out the general one. However, a relevant Supreme Court officer (Suadi, 2022) said that until now *al-taflis* is still settled at the Commercial Court, and has not been handled at the Religious Court due to statutory constraints.

If bankruptcy law and procedure continue to serve valuable purposes, the bankruptcy process must change to adapt to the times (Coordes, 2019). The law must be progressive (Rahardjo, 2011), adapting to the sharia economic development. Synchronization of laws and regulations needs to be directed to harmonize empirical facts, characteristics of law, and the practice of economic activity that lives in society (living law). Legislation and existing institutional functions also need to be synchronized. Therefore, Indonesian people could have a sharia economic system facilitated by formal provisions that functioned properly in the life of the national state. If disputes occur, so a compatible dispute resolution system will be available and implemented by the appropriate judiciary according to its competency (Abdulahanaa, 2021).

Implementation of the sharia economy, its laws, and the justice system has already started massively since the 1990s (Antonio, 2001). However, the influence of sharia economic integration into the Bankruptcy Law seems to be left behind. The Bankruptcy Law which is already implemented for two decades has not yet been synchronized with developments in the financial and banking system, which previously reformed the economic sector according to sharia principles. The momentum for adjusting Bankruptcy Law to Sharia economic principles actualized when the scope of absolute competence of Religious Courts was expanded based on Law No. 3 of 2006 (Huda & Ahyani, 2024). Furthermore, the legal basis for the operation of sharia banks is also strengthened by the Law No. 21 of 2008 (Sharia Banking Law) (Hidayah et al., 2023).

Ideally, after the issuance of the Religious Court Law (2006) and the Sharia Banking Law (2008), every sharia banking dispute and sharia economic case in general including *al-taflis* become the absolute competency of the Religious Courts (Saprudin & Satiri, 2018; Suadi, 2021; Wahyudi, 2019). However, in practice, all bankruptcy cases and settlement of debts within the scope of sharia economy, including bankruptcy cases filed by sharia banking are still resolved through the Commercial Court. It is said by Sumanatha (2022) that the main reason is the text of the Bankruptcy Law (2004) has not been changed by the legislature. The courts mentioned in the text of the Bankruptcy Law are still defined and only refer to Commercial Courts, not Religious Courts.

The Bankruptcy Law was issued in 2004 which regulates procedural law to solve bankruptcy cases and debt settlement in general through the judiciary, certainly, it does not accommodate the expansion of the absolute competence of the Religious Courts that was issued two years later in 2006. This condition

raises the dualism of judicial competency as discussed above. This condition must be synchronized with all legal aspects and the justice system in resolving *al-taflis* cases. Bankruptcy Law must be reformulated to accommodate *al-taflis* settlement. So, legal certainty, justice, and benefits for most Indonesian Muslims get their proportions fairly.

#### Legal Consideration without Sharia Compliance Principles on *al-Taflis* Cases

Each judge's decision in a court must contain legal considerations to be authoritative and accountable (Mertokusumo, 2019). Without proper legal considerations, the decision will be identified as insufficient judgment (Harahap, 2017). Even though *al-taflis* case can be handled with conventional procedures as stipulated in Bankruptcy Law, this is not enough. There are specific treatments that cannot be handled uniformly, specifically related to financial calculations and compliance with sharia principles.

Learning from the first case of *al-taflis* at Commercial Court, it was found in decision No.7/Bankrupt/2011/PN.NIAGA.JKT.PST at Jakarta Commercial Court between Bank CIMB against PT LSK which was bound by *Musyarakah*. It is contrary that judges of the Commercial Court and the Supreme Court as if they were not aware of the existence of Religious Courts Law which also rules sharia economic disputes settlement. They failed to consider that there was an absolute competency for Religious Courts in settling *al-taflis* cases. Factually, the decision also does not contain legal reasoning related to enforcing the sharia principles relating to debt calculations, *musyarakah*, *riba*, *gharar*, *maysir*, and other sharia compliance. It is an insufficient judgment decision.

It makes sense if the first case of *al-taflis* above could be tolerated because the *musyarakah* contract between the disputed parties was made in 2009 (Widjajati, 2019), and its court's decision was made during the Religious Court Law (2006) and the Sharia Banking Law (2008) were still being socialized at that time. Unfortunately, it could not be tolerated anymore if recently known *al-taflis* cases were settled by the Commercial Court with insufficient judgment due to a lack of consideration of sharia compliance.

Other similar case studies have also been conducted as follows; i. Decision No. 3/Pailit/2014/PN.Smg. at the Commercial Court in Semarang (Syarifudin, 2017); ii. Decision No. 12/Pailit/2017/PN.Smg. at the Commercial Court in Semarang (Suadi, 2021); iii. Decision No. 25/Pdt.Sus-Pailit/2020/PN.Jkt.Pst at the Commercial Court in Jakarta (Prihasmoro, 2023); iv. Decision No. 210/Pdt.Sus-Pailit/2020/PN.Jkt.Pst. at the Commercial Court in Jakarta (Kartika & Harahap, 2023). All those Commercial Court's decisions have been criticized by scholars as insufficient judgment in the matter of sharia principles enforcement. Furthermore, based on SIPP (Case Tracing Information System) at the 5 big cities where Commercial Courts are held in Indonesia, it is found a comparison data of *al-taflis* cases between conventional bankruptcy cases at the Commercial Court and sharia economic cases at the Religious Courts from 2017 to 2022 can be shown in the following table:

Table 1. Sharia Economic and Bankruptcy Cases 2017-2022

Kind of Case	Number of Incoming Cases Per Year						Information
	2017	2018	2019	2020	2021	2022	
Bankruptcy at Commercial Courts ("The CC")	450	521	669	484	923	676	The CC in Jakarta, Surabaya, Semarang, Makassar, and Medan
Sharia Economic in Religious Courts	184	289	389	463	491	496	Throughout ± 359 Religious Courts in each city/district area
<i>Al-Taflis</i> at Commercial Courts	2	1	2	4	2	5	Bankruptcy cases published by SIPP of the CC.

Source: (Author, 2023)

Furthermore, an official source in the Supreme Court, it is said by Suadi (2022) that Religious Courts do not have the authority to resolve *al-taflis* cases because based on Bankruptcy Law currently, the "Court"

is defined only refers to a Commercial Court. However, *al-taflis* remains different because it has specificity and cannot be generalized to conventional bankruptcy. He has a legal opinion that *al-taflis* should be the Religious Court competency. It is also revealed that there have been efforts made by the Supreme Court so that Religious Courts could adjudicate *al-taflis* cases. Besides that, the Religion Chamber has proposed to the top leadership of the Supreme Court to input *al-taflis* in the Supreme Court Regulation (PERMA) No. 2 of 2008 regarding the Compilation of Sharia Economic Law and PERMA No. 14 of 2016 regarding the procedure for sharia economic dispute resolution. However, in the end, it had to be removed from PERMA because if *al-taflis* was still inputted, there would be a conflict between PERMA and Bankruptcy Law.

The Chairman of the Civil Chamber of the Supreme Court has a different opinion. It is said diplomatically by Sumanatha (2022) that the Commercial Court has not encountered any difficulties in handling *al-taflis* cases so far. Now, the Bankruptcy Law has not changed yet. Certainly, judicial power will follow what the legislative state organ decides whether it needs to be changed or not regarding the existence of *al-taflis* cases. He said that there are not many bankruptcy cases identified as *al-taflis* and the Commercial Court still could handle it.

However, the Supreme Court has begun to perform synchronization efforts related to the implementation of sharia economics, especially relating policies to fulfill the legal vacuum regarding the expansion competency of Religious Courts. Actual products of the Supreme Court's policies are the stipulation of *al-Quran* and *al-Hadis* as sources of law for courts and judges in deciding cases by enacted Decree of the Chief of Supreme Court No: KMA/32/SK/IV/2006 concerning Enforcement of Book II Guidelines for Implementation of Duties and Court Administration, PERMA No. 2 of 2008 concerning KHES, SEMA No. 8 of 2008 concerning Execution of Decisions of Sharia Arbitration Boards, PERMA No. 5 of 2016 concerning Certification of Sharia Economic Judges, PERMA No. 14 of 2016 concerning Procedures for Settlement of Sharia Economic Cases.

### If only *al-Taflis* could be settled by the Religious Court

The dualism of the *al-taflis* settlement needs to be synchronized. It could be achieved through judicial, executive, and legislative policy simultaneously, but the legislative policy seems to require more time, costs, and effort. It is a sociological and political constraint of sharia economic enforcement in Indonesia (Faisal et al., 2023). Furthermore, the dualism issue also illustrates the non-fulfillment of formal justice, meaning an order that reflects the implementation of public rules properly and impartially in a legal system. This means that integration of Islamic Law, or in this case, a sharia economic system still faces challenges, especially incompatibility between Islamic Law and the national legal system in Indonesia (Suryani et al., 2023). Certainly, comprehensive socialization and implementation of the sharia economic system still need to be developed sustainably.

The other judicial policy to synchronize the dualism is a judicial review application to harmonize Bankruptcy Law and Religious Courts Law regarding judicial competency to handle *al-taflis* against the 1945 Constitution, especially Article 24 (2) jo. Article 29 (2). This synchronization was inspired by the decision of Constitutional Court No. 93/PUU-X/2012 which eliminated the dualism of sharia banking dispute resolution and confirmed Religious Courts as the only state judiciary organ for sharia banking dispute settlement. The judicial review restored the absolute competency of Religious Courts in resolving sharia banking disputes.

However, at least two technical problems must be solved to file a judicial review. First, who is the party whose constitutional rights are harmed by Bankruptcy Law, and who will act as the applicant for judicial review? The bankrupt debtor has lost his ability to take legal action as soon as the debtor is declared bankrupt by the Commercial Court. Second, which provisions of Bankruptcy Law are contrary to the 1945 Constitution? Hopefully, these two things can also be followed up by scholars or justice seekers.

Another law synchronization as the ultimate solution to unite dualism of judicial competency for *al-taflis* is through legislative power. Law synchronization that can be implemented is to reform the Bankruptcy Law or make amendments. The synchronization is projected so that the settlement of *al-taflis* by Religious Courts can be accommodated in the amendment of the Bankruptcy Law. The court's

definition refers not only to the Commercial Court but also to the Religious Court, especially if the bankruptcy occurs within the scope of the sharia economy.

In general, Bankruptcy Law must be adapted to recent developments in society. The government as the holder of executive power, in this case through the National Legal Development Agency (BPHN) in 2018 has completed the Academic Draft of the Bill on Amendments to the Bankruptcy Law No. 37 of 2004. Unfortunately, the Academic Draft has not yet contained the issue of *al-taflis*. The importance of including this issue in the Academic Draft is intended to change the Bankruptcy Law and bring this issue to socialization and public discussion.

## Conclusion

Expansion of the Religious Court's competency to settle sharia economic disputes (2006) that was unfollowed by adjustment to Bankruptcy Law (2004) has created a dualism in the judicial competency for settlement of *al-taflis* cases. It is ambiguous whose competency lies in bankruptcy cases within the scope of sharia economics, the Religious Court, or the Commercial Court. In current judicial practice, *al-taflis* cases are settled by the Commercial Court. Based on a case study of the Commercial Court's decisions, it is known that judges did not provide sufficient legal consideration regarding compliance with sharia economic principles (insufficient judgment). Even though, there is a great potential for sharia financial fraud in settling *al-taflis* cases. It is urgent to reform the Bankruptcy Law. The dualism could have been corrected by efforts to synchronize all relevant laws and regulations. It is carried out to emphasize that the Religious Court has absolute competency for settling *al-taflis* case. The Religious Court is the most appropriate forum for settling *al-taflis* or bankruptcy cases within the scope of sharia economics.

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## Conflict of Interest

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## References

Abd Hafiz, R., Abu Samah, Z., & Hassan, R. (2017). Challenges of Islamic Debt Restructuring in a Multi Creditor Environment. *Journal of Islamic Finance*, 6(Special Issue), 54-72. <https://doi.org/10.12816/0047340>

Abdul-Rahman, A., Abdul Latif, R., Muda, R., & Abdullah, M. A. (2014). Failure and potential of profit-loss sharing contracts: A perspective of New Institutional, Economic (NIE) Theory. *Pacific-Basin Finance Journal*, 28, 136-151. <https://doi.org/10.1016/j.pacfin.2014.01.004>

Abdulahanaa, A. (2021). A Review of Islamic Economic Law on Religious Tourism Arrangements in South Sulawesi. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 5(1), 450. <https://doi.org/10.22373/sjhk.v5i1.9088>

Al-Asqalani, A.-H. I. H. (2015). *Bulughul Maram*. Pustaka Al-Kautsar.

Al-Barashdi, S., & Yeung, H. (2018). An Assessment of Various Theoretical Approaches to Bankruptcy Law. *Journal of Arts and Social Sciences [JASS]*, 9(1), 23-36. <https://doi.org/10.53542/jass.v9i1.2624>

Al-Daghistani, S. (2023). Beyond Maṣlahah: Adab and Islamic Economic Thought. *American Journal of Islam and Society*, 39(3-4), 57-86. <https://doi.org/10.35632/ajis.v39i3-4.2988>

Al Anshori, M. Z. (2016). *The role of Islam in Indonesia's contemporary foreign policy* [Victoria University of Wellington]. <https://doi.org/10.26686/wgtn.17014601.v1>

Antonio, M. S. (2001). *Bank Syari'ah: Dari Teori ke Praktik*. Gema Insani Press.

Arianti, M. L. dan F. (2019). pola akad dalam pemberdayaan ekonomi masyarakat perantau atar. *Juris Jurnal Ilmiah Syari'ah*, 18, 2.

Armia, M. S. (2015). *Constitutional courts and law reform: a case study of Indonesia* [Anglia Ruskin University]. <https://hdl.handle.net/10779/aru.23765400.v1>

Az-Zuhaili, W. (2005). *Al-Fiqh al-Islam wa Adillatuhu*. Daar al-Fikr.

Bani Ata, H. M. A. (2019). Addressing financial bankruptcy from the Islamic perspective. *Banks and Bank Systems*, 14(3), 9–19. [https://doi.org/10.21511/bbs.14\(3\).2019.02](https://doi.org/10.21511/bbs.14(3).2019.02)

Batubara, S. (2017). Kepemilikan Relatif (Al-Milkiyah Al-Muqayyadah) Privat dan Publik dalam Ekonomi Islam. *JURIS (Jurnal Ilmiah Syariah)*, 16(2), 173. <https://doi.org/10.31958/juris.v16i2.971>

Blazy, R., & Stef, N. (2020). Bankruptcy procedures in the post-transition economies. *European Journal of Law and Economics*, 50(1), 7–64. <https://doi.org/10.1007/s10657-019-09634-5>

Butt, S., & Lindsey, T. (2018). *Indonesian law*. Oxford University Press.

Cerón, J. M. (2012). *Going "Distress" on the WACC: Theoretical and Empirical Analysis*. Universidad Autónoma de Madrid.

Coordes, L. (2019). Reorganizing Health Care Bankruptcy. *Boston College Law Review*, 419, 52. <https://ssrn.com/abstract=3346145>

Djamil, F. (2013). *Hukum Ekonomi Islam: Sejarah, Teori dan Konsep*. Sinar Grafika.

El-Masry, A. A., de Mingo-López, D. V., Matallín-Sáez, J. C., & Tortosa-Ausina, E. (2016). Environmental conditions, fund characteristics, and Islamic orientation: An analysis of mutual fund performance for the MENA region. *Journal of Economic Behavior & Organization*, 132, 174–197. <https://doi.org/10.1016/j.jebo.2016.10.015>

Elvia, E. E., Mujib, A., Nor, A., & Akbar, M. I. (2023). BASYARNAS as a Place for Dispute Resolution of Musyarakah Financing in Sharia Banking in the Disruption Era. *El-Mashlahah*, 13(1), 39–56. <https://doi.org/10.23971/el-mashlahah.v13i1.5345>

Faisal, A., Saidah, S., Mukrimin, M., Zakirah, Z., & Darwis, R. (2023). Sociological and Political Constraints of Islamic Sharia Enforcement in South Sulawesi Indonesia. *JURIS (Jurnal Ilmiah Syariah)*, 22(1), 159. <https://doi.org/10.31958/juris.v22i1.8604>

Faizah, N., & Azzahra, D. (2022). Kompetensi Pengadilan Niaga Terhadap Kepailitan Debitor Berdasarkan Wanprestasi Akad Pembiayaan Syariah. *Al-Mizan : Jurnal Hukum Dan Ekonomi Islam*, 6(2), 126–139. <https://doi.org/https://ejurnal.iiq.ac.id/index.php/almizan/article/view/761>

Friedman, L. M. (2019). *A History of American Law*. Oxford University PressNew York. <https://doi.org/10.1093/oso/9780190070885.001.0001>

Ginting, E. R. (2018). *Hukum Kepailitan: Teori Kepailitan*. Bumi Aksara.

Hamoudi, H. A. (2011). Legal Studies Research Paper Series The Surprising Irrelevance of Islamic Bankruptcy University of Pittsburgh School of Law. *American Bankruptcy Institute Law Review*, 19(November), 505. [http://ssrn.com/abstract=1957825](https://ssrn.com/abstract=1957825)

Harahap, M. Y. (2017). *Hukum acara perdata: tentang gugatan, persidangan, penyitaan, pembuktian, dan putusan pengadilan*. Sinar Grafika.

Hariyanto, E., & Hamzah, M. (2022). Bibliometric Analysis of the Development of Islamic Economic Dispute Resolution Research in Indonesia. *Juris: Jurnal Ilmiah Syariah*, 21(2), 221–233. <https://doi.org/10.31958/juris.v21i2.6997>

Harun, M. (2019). Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law. *Walisongo Law Review (Walrev)*, 1(2), 195. <https://doi.org/10.21580/walrev.2019.1.2.4815>

Hayati, R. F., & Mujib, A. (2022). Dispute Resolution on Muḍārabah Musytarakah Contract on Sharia Insurance in Indonesia: Between Regulation and Practice. *El-Mashlahah*, 12(1), 14–36. <https://doi.org/10.23971/elma.v12i1.3795>

Herijanto, H. (2020). *Pertimbangan hakim dalam penyelesaian sengketa akad pembiayaan syariah di Indonesia, Malaysia, dan Inggris* [Sekolah Pascasarjana UIN Syarif Hidayatullah Jakarta]. <https://repository.uinjkt.ac.id/dspace/handle/123456789/51311>

Hidayah, N., Azis, A., Mutiara, T., & Larasati, D. (2023). Sharia Banking Disputes Settlement: Analysis of Religious Court Decisions in Indonesia. *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 23(1), 75–92. <https://doi.org/10.30631/alrisalah.v23i1.1347>

Huda, M., & Ahyani, H. (2024). Normative Justice and Implementation Related to Sharia Economic Law Disputes in Realizing Legal Certainty and Justice in Indonesia. *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 24(1), 103–119. <https://doi.org/10.30631/alrisalah.v24i1.1467>

Irianto, C. (2015). Penerapan Asas Kelangsungan Usaha dalam Penyelesaian Perkara Kepailitan dan Penundaan Kewajiban Pembayaran Utang. *Jurnal Hukum Dan Peradilan*, 4(3), 399. <https://doi.org/10.25216/jhp.4.3.2015.399-418>

Kartika, S., & Harahap, M. Y. (2023). Kewenangan Mengadili Dalam Penyelesaian Perkara Kepailitan dan Penundaan Kewajiban Pembayaran Utang Perbankan Syariah. *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam*, 5(1), 101–112. <https://doi.org/10.37680/almanhaj.v5i1.2195>

Kholid, M. (2020). *Kepastian Hukum dalam Penyelesaian Sengketa Ekonomi Syariah Kepailitan dihubungkan dengan undang-undang nomor 37 tahun 2004 tentang kepailitan dan penundaan kewajiban pembayaran utang*. UIN Sunan Gunung Djati Bandung.

Kuran, T. (2018). Islam and Economic Performance: Historical and Contemporary Links. *Journal of Economic Literature*, 56(4), 1292–1359. <https://doi.org/10.1257/jel.20171243>

Kusumaningtyas, R. O., Subekti, R., Jaelani, A. K., Orsantinutsakul, A., & Mishra, U. K. (2022). Reduction of Digitalization Policy in Indonesian MSMEs and Implications for Sharia Economic Development. *JURIS (Jurnal Ilmiah Syariah)*, 21(2), 157. <https://doi.org/10.31958/juris.v21i2.6855>

Lamijan, & Tohari, M. (2022). Kemandirian dan Kemerdekaan Kekuasaan Kehakiman di Indonesia. *JPeHI (Jurnal Penelitian Hukum Indonesia)*, 3(1), 30–48. <https://doi.org/10.61689/jpehi.v3i1.333>

McMillen, M. J. T. (2012). An Introduction to Shari'ah Considerations in Bankruptcy and Insolvency Contexts and Islamic Finance's First Bankruptcy (East Cameron). *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.1826246>

Mertokusumo, S. (2019). *Mengenal Hukum Suatu Pengantar*. Maha Karya Pustaka.

Nadira, I. (2021). Studi Komparatif Terhadap Kepailitan Perusahaan Asuransi Syariah Menurut Hukum Islam Dan Undang-Undang No 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (PKPU). *Iuris Studia: Jurnal Kajian Hukum*, 2(2), 257–263. <https://doi.org/10.55357/is.v2i2.131>

Nsubuga, H. J. (2018). The interpretative approach to bankruptcy law. *International Journal of Law and Management*, 60(3), 824–841. <https://doi.org/10.1108/IJLMA-03-2017-0079>

Nugroho, L. (2019). Comparison of At Taflis Wal Hajr in Islamic Law and Bankruptcy in Positive Law. *Proceedings of the International Conference on Social Science 2019 (ICSS 2019)*. <https://doi.org/10.2991/icss-19.2019.134>

Nugroho, L. D. (2022). *Konstruksi Hukum Kepailitan Syariah di Indonesia*. Scopindo Media Pustaka.

Prihasmoro, A. (2023). *Penyelesaian Kepailitan Ekonomi Syariah di Peradilan Indonesia*. Dialektika.

Rahardjo, S. (2011). Hukum Progresif Hukum Yang Membebaskan. *Jurnal Hukum Progresif*, 1(1), 1–24. <https://doi.org/10.14710/hp.1.1.1-24>

Rahmi, S. (2017). Kedudukan dan Fungsi Yudikatif sebagai Pemegang Kekuasaan Kehakiman Dalam Sistem Negara Hukum di Indonesia. *Islam Transformatif: Jurnal of Islamic Studies*, 1(2). <https://doi.org/10.30983/it.v1i2.421>

Rusyd, A. al-W. M. bin A. I. (2004). *Bidayah al-Mujtahid Wa Nihayah al-Muqtashid* (Juz I). Dar al-

### Hadits.

Saprudin, A., & Satiri, A. (2018). *Teknik penyelesaian perkara kepailitan ekonomi syariah*. Pustaka Pelajar.

Saputera, A. R. A. (2019). Penyelesaian Sengketa Ekonomi Syariah di Indonesia. *Nizham Journal of Islamic Studies*, 7(01), 131–148.

Seider, M. A., Goldberg, A. J., & Adams, C. (2016). Maximizing Enterprise Value and Minimizing “Hold Up Value”: Reorganizations in the United States under Chapter 11 of the US Bankruptcy Code. In *Global Insolvency and Bankruptcy Practice for Sustainable Economic Development* (pp. 79–117). Palgrave Macmillan UK. [https://doi.org/10.1007/978-1-37-56175-6\\_3](https://doi.org/10.1007/978-1-37-56175-6_3)

Sriani, E., Hasan, F., & Ma'mun, S. (2023). Violation of Human Right for Collateral Fraud in Sharia Financial Institution Based on Fiduciary Guaranty Law and Rahn Law. *JURIS (Jurnal Ilmiah Syariah)*, 22(1), 133. <https://doi.org/10.31958/juris.v22i1.9157>

Suadi, A. (2021). *Hukum Kepailitan Syariah (Al-Taflis) Dalam Penyelesaian Sangketa Ekonomi Syariah*. Kencana.

Sulistiani, S. L. (2021). *Peradilan Islam*. Bumi Aksara.

Sunarmi, S., Sukarja, D., & Lubis, T. M. (2021). The Standings of Tax Receivables in Bankruptcy Cases: A Study on Managing and Settling Assets. *Syiah Kuala Law Journal*, 5(3), 329–344. <https://doi.org/10.24815/sklj.v5i3.23347>

Supriatna, A., Umiyati, & Kamal, M. (2022). The Influence of Sharia Compliance and Islamic Corporate Governance on Fraud. *ITQAN: Journal of Islamic Economics, Management, and Finance*, 1(2), 68–80. <https://doi.org/10.57053/itqan.v1i2.12>

Suryani, I., Muhtar, M. H., Rahman, Y. M., Mega Jaya, B. P., & Khalaf, A. Al. (2023). Integration of Islamic Law in Regional Development in Indonesia. *JURIS (Jurnal Ilmiah Syariah)*, 22(1), 1. <https://doi.org/10.31958/juris.v22i1.8770>

Syarifudin, A. (2017). *Penyelesaian Perkara Kepailitan Ekonomi Syariah* [UIN Sunan Kalijaga Yogyakarta]. <http://digilib.uin-suka.ac.id/id/eprint/26494>

Wahyudi, F. (2019). The Quo Vadis of Bankruptcy Settlement and PKPU Laws on Sharia Banking. *Jurnal Hukum Dan Peradilan*, 8(1), 1. <https://doi.org/10.25216/jhp.8.1.2019.1-20>

Watif, M., Atira, F., & Irwana, D. K. (2024). Understanding Law and Society in Legal Sociology Studies. *Agency Journal of Management and Business*, 4(1), 1–7.

Widjajati, E. (2019). Penyelesaian sengketa Kepailitan Menurut Hukum Perbankan Syariah. *AHKAM : Jurnal Ilmu Syariah*, 15(1), 117–126. <https://doi.org/10.15408/ajis.v15i1.2855>

Yunita, P. (2020). The Future of Indonesia Islamic Banking Industry: Bankruptcy Analyzing the Second Wave of Global Financial Crisis. *International Journal of Islamic Economics and Finance (IJIIF)*, 3(2), 199–226. <https://doi.org/10.18196/ijief.3227>

Zada, K., Suparta, M., Ruswadi, B., Dahri, H., & Sahid, M. M. (2022). Constitutionalizing Sharia: Identity and Independence of Islamic Politics Among Students. *JURIS (Jurnal Ilmiah Syariah)*, 21(2), 195–206. <https://doi.org/10.31958/juris.v21i2.6954>

Zhao, H. (2020). The Legislative Goals of the Enterprise Bankruptcy Law of the PRC. In *Government Intervention in the Reorganisation of Listed Companies in China* (pp. 45–76). Cambridge University Press. <https://doi.org/10.1017/9781108634557.002>

Zulkarnain. (2021). *Hukum Kompetensi Peradilan Agama: Pergeseran Kompetensi Peradilan Agama dalam Hukum Positif di Indonesia*. Prenada Media.

Zywicki, T. J., & Rajagopalan, S. (2017). Bankruptcy judge as a central planner. In *Research Handbook on Austrian Law and Economics*. Edward Elgar Publishing. <https://doi.org/10.4337/9781788113106.00025>

### Interview

Suadi, Amran. (2022). Chairman of the Religious Chamber of the Republic of Indonesia Supreme Court. Interview, July 25.

Sumanatha, I. G. A. (2022). Chairman of the Civil Chamber of the Republic of Indonesia Supreme Court. *Interview, August 18.*