



Ahkam

Jurnal Ilmu Syariah

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Rules on Wage Standard to Improve Workers' Living Needs in the Perspective of Maqasid Al-Shari'ah
- ❖ M. IKHSAN TANGGOK
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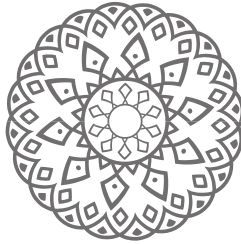
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REGULATION OF SHARIA INSURANCE AFTER THE ENACTMENT OF LAW NO. 40 OF 2014 CONCERNING INSURANCE

Wetria Fauzi

Abstrak: Sistem hukum Indonesia berasal dari hukum perdata yang dibawa oleh pemerintah kerajaan Belanda ke Indonesia selama masa kolonial. Hukum perdata Indonesia mewarisi hukum sipil Perancis dan hukum Romawi. Asuransi disamakan dengan perjudian. Konsep asuransi dalam undang-undang tentang dinyatakan bahwa asuransi merupakan lembaga transfer risiko. Meskipun UU No. 40 tahun 2014 tentang Asuransi, undang-undang masih mengkonseptualisasikan (* konseptualisasi) asuransi sebagai lembaga perlindungan. Undang-undang asuransi baru ini adalah sistem asuransi ganda, yang mengatur sistem asuransi konvensional dan syariah. Perlu dimulai Pembentukan Undang-undang Khusus mengatur asuransi syariah di Indonesia, karena konvensional dan syariah adalah dua hal yang sangat berbeda pada prinsipnya.

Kata kunci: Asuransi, syariah, sistem hukum

Abstract: Indonesia's legal system comes from civil law brought by the Dutch royal government to Indonesia during the colonial period. Civil law can be traced its roots to French civil law to Roman law. Insurance is equated with gambling. The concept of insurance in insurance legislation states that insurance is a risk transfer institution. Despite the Law No. 40 of 2014 on Insurance, the law is still conceptualize (* conceptualizing) insurance as an institution of protection. This new insurance law is a dual insurance system, which regulates conventional and sharia insurance systems. It needs to be initiated. The Formation of Special Law regulates sharia insurance in Indonesia, because conventional and sharia are two very different things in principle.

Keywords: Insurance, Shariah, legal system

ملخص: يأتي النظام القانوني في إندونيسيا من القانون المدني الذي جلبته الحكومة الملكية الهولندية إلى إندونيسيا خلال الفترة الاستعمارية. يمكن أن يعزى القانون المدني و جذوره إلى القانون المدني الفرنسي إلى القانون الروماني. يساوي التأمين مع القمار ينص مفهوم التأمين في تشريعات التأمين على أن التأمين هو نقل المخاطر. على الرغم القانون رقم ٤٠ لعام ٢٠١٤ بشأن التأمين تم تنسيقه، فإن القانون لا يزال يضع مفهوم التأمين كمؤسسة للحماية. قانون التأمين الجديد هو نظام التأمين المزدوج، والذي ينظم أنظمة التأمين تقليدية أو شرعية. يجب الشروع في العمل ينظم "تشكيل القانون الخاص" لتأمين الشرعي في إندونيسيا، لأن الشرعية والتقليدية هما مختلفان من حيث المبدأ.

الكلمات المفتاحية: التأمين، الشرعية، النظام القانوني

Introduction

Insurance is regulated in Article 1774 of the Civil Code (KUHPerdata) stipulates that: A chancy agreement is an action whose results, concerning profit and loss, both for all parties and for the parties depend on an event that is not necessarily. This is the insurance agreement, the interest on life, gambling and betting. (Man Suparman S; 2013)

The Indonesian legal system originated from civil law brought by the Dutch royal government to Indonesia during the colonial period. The civil law can be traced to French civil law to Roman law. The existence of insurance law in Indonesia has its roots in the codification of civil law (Civil code) and commercial law (Code de commerce) at the beginning of the nineteenth century during the reign of Emperor Napoleon in France. At that time, Dutch trade law only contained articles on marine insurance until the draft of the Commercial Code (Wet Boek Van koophandel) was issued in 1838 which contained regulations on fire insurance, crop insurance and life insurance. This system adopted for the Dutch East Indies until now is still valid in Indonesia. Insurance as a symptom of law in Indonesia both in terms of and in its form that is seen now comes from Western law, the Dutch government imported insurance as a legal form (*rechtfiguur*) in Indonesia by promulgating *Burgelijk Wetboek* and *Wetboek Van Koophandel* with an announcement on 30 April 1847 the two laws regulate insurance as an agreement. (www. Akademiasuransi :2013) Insurance agreements mean that people are willing to pay a little money to pay a large loss. Muslim-majority Indonesia will question the validity of insurance, whether *halal* or *haram* is seen from its religion. (Maryanto; 2004)

All aspects of life, the best way that can be taken Most of the people of Indonesia consist of Muslims. Islam has a law in substance, consisting of the field of worship and *muamalah*. Legal arrangements regarding worship are detailed. Whereas regarding *muamalah* or about all aspects of people's lives, it is not detailed, only the principles, the development and application of these principles is entirely left to the state and government officials, namely *ulil amri*. Because Islamic law has an important role in shaping and fostering Muslim social order and influencing is to scientifically seek the transformation of Islamic legal

norms into national law as long as it is in accordance with Pancasila and the 1945 Constitution and relevant to the specific legal needs of Muslims. (Muhammad Daud Ali : 1998) The essence of insurance in Islamic terms is mutual responsibility, mutual cooperation and protecting each other. (Gemala Dewi; 2007). The insurance agreement is conventionally equated with gambling. Law No. 40 of 2014 concerning Insurance has recognized the existence of Islamic insurance, is this law in accordance with the soul of Islam, the majority of the people of Indonesia or is it still aimed at the European soul. Islamic insurance is also an institution for investment, sharia-based by avoiding three things, namely, maisir, gharar and riba, but often considered to be less than optimal (Isfandani; 2011)

In order to get answers or solutions to problems (legal issues) that have been formulated and have also been proclaimed as objects of research in this dissertation 2 approaches to problem solving are used, namely the statutory approach and the conceptual approach. The statute approach aims to analyze the form and substance of legislation relating to insurance. This approach uses legislation as primary legal material. The first time needed is done by conducting an inventory of laws and regulations, then proceed with categorization and analysis of the substance of each. Through the analysis of the substance of the laws and regulations, it is expected that the harmonization and disharmony between the laws and regulations from one another can be known. (L. Budi Kagramanto : 2007)

Conceptual approach (conceptual approach) is used to obtain clarity and scientific justification based on legal concepts contained in legal principles. This is done when the researcher does not move from the existing legal rules, and is carried out because there are no or no legal rules or the rules of law are not strictly regulated for the problem at hand. (Peter Mahmud Marzuki ; 2008)

Peter Mahmud Marzuki stated: (Peter M Marzuki : 2008) to solve legal issues and at the same time provide prescriptions about what should be needed, research sources are needed. Legal research sources can be distinguished into research sources in the form of primary and secondary legal materials. Primary legal material is legal material that is authoritative means to have a priority. Primary legal materials consist of legislation and judges' decisions. While secondary

legal material in the form of all publications about the law which are not legal documents which are official documents. Legal publications include textbooks, legal dictionaries, legal journals and comments on court decisions.

In this study the research resources needed are in the form of legal materials, both primary legal material and secondary legal material. The primary legal material used is in the form of laws and regulations in the field of insurance law, including the Law on Commercial Law (KUHD), Law No. 2 of 1992 concerning the Implementation of Insurance Junto Law Number 40 of 2014 concerning Insurance. Secondary Legal Materials include materials that support the existence of journals, scientific magazines, research journals in the field of law, legal dictionaries as well as print and electronic media, as well as papers submitted in scientific meetings, such as discussions, seminars, workshops and so on that contain material relevant to this field of study.

Discussion

Regulation of Sharia Insurance After the Implementation of Law No. 40 of 2014 on Insurance

Article 1 number 1 of Law Number 40 of 2014 on Insurance states that insurance is an agreement between two parties, namely an insurance company and policy holder, which is the basis for receiving premiums by insurance companies in return for:

- a. Provide reimbursement to the insured or policy holder due to losses, damages, costs incurred, loss of profits or legal liability to the third party that may be suffered by the insured or policy holder due to an uncertain event, or
- b. Provide payments based on the death of the insured or payment based on the life of the insured with benefits that have been determined and / or based on the results of the management of funds.

Basically, Law No. 40 of 2014 on Insurance only regulates the issue of the implementation of insurance business only by the insurer in this case is the insurance company. But the legal aspects of the agreement still refer to KUHD.

The concept of insurance in insurance legislation states that insurance is an institution of risk transfer. Although Law No. 40 of 2014 concerning Insurance has been born, it turns out that this law still conceptualizes insurance as a protection institution. This latest insurance law is a dual insurance system, which regulates conventional and sharia insurance systems. In the history of the development of human civilization, a concept similar to the philosophy of insurance has actually begun since the heyday of Greece during the reign of Alexander the Great. Later in Roman times there were various associations similar to insurance concepts such as the Collegium Lambaesis and Collegium Tenuiorum. In short, the members provide a number of contributions collected and if there is one member who needs, such as death, and so forth will be given a kind of compensation.

Meanwhile, we can see the characteristics of insurance from insurance purposes. Insurance economics is someone who will make an insurance agreement if he feels he cannot bear a material risk, thus there is a function of risk transfer and risk sharing and social goal is a concern for the victims. In the case of people who cause harm to them they cannot (Prodjodikoro: 1979). Likewise with the existence of insurance where an insurance company is a community institution as a social goal. (Peter F. Dracker 1981). Insurance is a translation of insurance or verzekering or assurance, arising from human needs. (Man Suparman Sastrawidjaja: 2003) Insurance in its meaning implies an understanding of a risk Sri Rejeki hartono: 2008). Insurance companies act as guarantor and receive premiums to provide compensation to the insured for the risks that occur (Gazali dan Usman: 2010). There must be an interest (Emmy Pangaribuan: 1975) and clarity about the risks faced by the insured who will be taken over by the insurer in return for premium payments is very necessary (Ganie: 2011). Clarity of risk and interests will facilitate claims (Abdullah: 1996). when the event is not certain that causes the risk of loss to the insured occurs. Claims are statements of demands for the fact that someone has the right to demand something.

In line with the concept above HMN Purwosutjipto suggests that coverage is a reciprocal agreement where the insurer binds himself to compensate and or a sum of money (compensation) which is set at the time of closing the agreement if an evenement occurs (Purwosutjipto: 1986).

From the concept of insurance above, it can be concluded that theoretically the insurance contains four things, namely the agreement,

the insured parties and the insurer, even the risk. Of all the variants of the nature of insurance, it is implied that insurance is an institution that functions as a transfer of risk from the insured to the insurer. According to the theory of risk transfer (risk transfer theory), the insured realizes that there is a danger of property and life. In POJK No. 69 / June 05/2016 as stated in Article 7 number (2) which states that: General Insurance Company, Sharia General Insurance Companies, or Sharia Units in General Insurance Companies can only expand the business scope of PAYDI which has the least criteria as follows:: General Insurance Companies, Sharia General Insurance Companies, or Sharia Units in General Insurance Companies can only expand the business scope of PAYDI which has the least criteria as follows:

- a. risking death from personal accident; and
- b. policy period of at least 5 (five) years.

Property insurance is still unclear. A year there could be a big fire that burned the building. The claim is big, "This, according to Dumoly, is different from the line of personal accident insurance. The ratio of accidents and large claims, can still be calculated. Therefore, making investment-based products for general insurance is felt to be safe and does not disturb their liquidity. In the future, the next may be bias health insurance assisted by BPJS health mapping. To obtain an agreement to expand the scope of business as referred to in Article 4, Insurance Companies, Sharia Insurance Companies or Sharia Units in Insurance Companies must comply with the provisions of Article 6 of the

- 1) the minimum solvency level of the Insurance Company, Sharia Insurance Company, or Sharia Unit in the Insurance Company;
- 2) not being sanctioned by restrictions on business activities for Insurance Companies, Sharia Insurance Companies or Sharia Units in Insurance Companies; and
- 3) based on the results of the risk assessment carried out by the OJK it has a low or medium-low risk level.

In Article 7 point (1) POJK states that in addition to fulfilling the provisions referred to in Article 6, General Insurance Companies, Sharia General Insurance Companies, or Sharia Units in General Insurance Companies that expand business scope in PAYDI must meet the following conditions:

- a. have own capital of at least Rp250,000,000,000.00 (two hundred fifty billion rupiah) for general insurance companies
- b. have own capital of at least Rp150,000,000,000.00 (one hundred fifty billion rupiahs) for a Sharia General Insurance Company or Sharia Unit at a general insurance company
- c. have an actuary;
- d. has an investment manager;
- e. have an adequate information system; and
- f. have adequate supporting resources.

The arrangement of allowing general insurance to run investment-based insurance products above is a mandate of the Insurance Law. The issuance of Law No. 40 of 2014 on Insurance is one of the important milestones in the history of insurance in Indonesia, considering that in the Law there are new things related to the supervision and development of the insurance industry. Law No. 40 of 2014 concerning Insurance mandates the improvement of regulation and supervision of all insurance industry activities that have developed rapidly which is characterized by increased business volume, increased utilization of public insurance services, and increasingly varied insurance services in line with the development of community needs. In order to optimize the role of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies that are part of the insurance industry to support national economic growth and maintain financial system stability as a foundation for sustainable development, and realize public financial independence and support efforts increasing equity in development, one of the strategies developed by OJK was strengthening aspects of regulation and supervision as a whole with an emphasis on industrial competitiveness to support financial system stability. Regulations regarding the operation of the business of the Insurance Company, Sharia Insurance Company, Reinsurance Company, and Sharia Reinsurance Company are among the arrangements that constitute the pouring out of the mandate of Law Number 40 of 2014 on Insurance.

Investment-Based Insurance in Sharia Insurance

Islamic insurance is very rapidly developing in Indonesia. The development of the sharia insurance industry cannot be separated from

the increasing tendency of the Indonesian people who are predominantly Muslim to apply Islamic teachings. This is supported by the opinion of most scholars who classify conventional insurance as illegitimate transactions or actions because they contain usury, an element of uncertainty (gharar) and elements of gambling or speculation (maisyr) (Anshori : 2007).

The National Sharia Board states that Islamic insurance (*ta'mîn, takâful or tadhâmun*) is an effort to protect each other and help between a number of people / parties through investments in assets and / or tabarru 'that provide a pattern of returns to deal with certain risks through contracts (agreements) in accordance with sharia. Through mutual protection and help helping between a number of people or parties through investment in the form of assets. Unitlink, which is a combination of insurance and investment, provides a pattern of returns to deal with certain risks through contracts (agreements) in accordance with sharia (<http://asuransitakaful.net/unit-link-syariah>).

In Law Number 40 of 2014 concerning Insurance in Article 1 number 2 mentioned:

Sharia insurance is a collection of agreements, which consist of agreements between sharia insurance companies and policy holders and agreements between policyholders, in order to manage contributions based on sharia principles to help each other and protect each other by:

- a. Provide replacement to participants or policyholders because of losses, damages, costs incurred, loss of profits, or legal liability to third parties that may be suffered by participants or policyholders due to the occurrence of an uncertain event, or
- b. Provide payments based on the death of the participant or payment based on the life of the participant with the benefit of the amount determined and / or based on the results of the management of funds.

In the article above we can describe that premiums as important elements in the insurance agreement are not found in the concept of Islamic insurance above but are referred to as contributions. Payment of compensation to insurance participants is based on fund management. This means that there are differences in terms of the elements of conventional insurance and sharia insurance agreements. Islamic

insurance is carried out based on sharia principles. In Article 1 point 3 of the UUP, it is stated that sharia principles are the principles of Islamic law in insurance activities based on fatwas issued by institutions that have authority in establishing fatwas in the field of sharia.

The fundamental concept of Islamic insurance and conventional insurance is different (Sula: 2004). The concept needs to be studied at the beginning because if it is not understood the fundamental concept of Islamic insurance, the fundamental concept of Takaful is considered the same as conventional insurance. The MUI National Sharia Board defines the meaning of sharia insurance (*ta'min, takaful, or tadhamun*) as an effort to protect each other and help between a number of people / parties through investment funds in the form of assets or tabarru 'which provide a pattern of returns to face certain risks through contract (agreement) in accordance with sharia (MUI DSN fatwa No. 21 / DSN-MUI / X / 2001 on General Guidelines for Sharia Insurance) Based on the MUI DSN fatwa, it can be interpreted that the fundamental concept of sharia insurance is a helping aid activity among sharia insurance participants and is not commercially purposeful. Meanwhile, the basic concept of conventional insurance is buying and selling between participants and companies.

Investment in sharia can be seen from three angles, first, for individuals investment is a physical need, where every individual, owner of capital (money) always wants to enjoy his wealth in the widest possible time and field, not just his personality and even his descendants (Yuliana: 2013). A Muslim may choose three alternatives for his funds, namely: a) holding his wealth in the form of cash (idle cash), b) holding his savings in assets without producing such as bank deposits, real estate loans, gems, and c) investing his savings (such as have projects that increase national capital stock (Yuliana: 2013).

Second for the community, investment is a highly recommended muamalah activity as well as an important part of economic activity as a means to improve welfare in the present and the future, by investing in possessed assets to be productive and bring benefits to others. A concrete example of investing that starts with a seed becomes seven grains and eventually becomes seven hundred seeds. The Qur'an has provided an investment guide (although in this case it is infaq, which has a ukhrawi dimension), but if many people invest it will help hundreds and thousands

of poor people to productivity in a better direction so that the multiplier effect of *infaq* not only affects the hereafter but also affects the worldly dimension. Third, for religion, investment is a bridge in order to meet the needs of nature for Muslims to prepare for a better tomorrow so as not to leave descendants who are weak both morally and materially (in this case economically). Assets or capital may not produce from themselves, but must be with human effort. Basically, investment practices according to sharia principles must be carried out without pleasure (coercion), fairness and transactions based on production activities and services that are not prohibited by Islam including free manipulation and speculation. Non-sharia transactions are utilities (usability principles) while sharia transactions are based on the principle of benefit (Yuliana: 2013). Besides independent sharia investment, it can also be done through other parties, namely through Islamic insurance.

Contemporary *fiqh Wahbah az-Zuhaili* defines insurance based on its distribution. Insurance is divided into two forms, insurance help is an agreement on the amount of money to pay a sum of money as compensation when one of them gets a penalty and fixed division insurance is a contract that requires someone to pay some money with an agreement if the insurance participant gets an accident loss (Wirdayaningih: 2015).

The concept of sharia insurance is based on the Qur'an *Alma'idah* verse 2 which means: "Please help you in doing virtue and piety, and do not help to help in committing sins and transgressions." (Abdul Kadir Muhammad, : 2011) Based on this concept, the National Sharia Council of the Indonesian Ulema Council (MUI) provides an understanding of sharia insurance Article 1 paragraph 1 Fatwa of the National Sharia Council MUI No. 21 / DSN-MUI / X / 2001, stipulates that: Sharia insurance is an effort to protect each other and help in between a number of people / parties through investments in the form of assets and / or *tabarru* 'which provide a pattern of returns to deal with certain risks through a contract (an agreement which is sharia compliant). The concept of *takaful* (help or protect each other in truth as *Bermuamalat* in the *surah al-Maa'idah* verse 2. In the hadith of Bukhari and Muslim history, the Prophet said. "Believers against other believers such as buildings reinforce each other." Another Bukhari, "Believers in their love and affection are like one body. If one of the limbs suffers pain, then the whole body feels it" (Sula: 2015).

The concept of sharia insurance please help in this law contained in the law with the legislative model. As already formulated in Law Number 14 of 2014 on Insurance, regulated in Article 1 Chapter 1 number 2.

Sharia insurance is a collection of agreements, consisting of agreements between sharia insurance companies and policy holders and agreements between policyholders, in the framework of managing contributions based on sharia principles to help each other and protect by:

- a. Provide replacement to participants or policyholders because of losses, damages, costs incurred, loss of profits, or legal liability to third parties that may be suffered by participants or policyholders due to the occurrence of an uncertain event, or
- b. Provide payments based on the death of the participant or payment based on the life of the participant with the benefit of the amount determined and / or based on the results of the management of funds. The concept of sharia insurance please help in this virtue contained in positive law with the legislative model. As already formulated in Law Number 14 of 2014 concerning Insurance, regulated in Article 1 Chapter 1 number 2.

Management of contributions is based on sharia principles. The principle of sharia is the principle of Islamic law in insurance activities based on fatwas issued by institutions that have the authority to determine fatwa in the field of sharia. Al-Qur'an and hadith, indeed, do not really mention what and how to insure, this is because the laws governing the relationship between man and God (*hablu minallah*) are limitative, meaning that it is no longer possible for humans to develop. While the laws that regulate human relations with each other and their environment (*hablum minannaas*) are open, which means that Allah Almighty in the Qur'an only gives rules which are outlines. The rest is open to mujtahid to develop through his thoughts (Dewi: 2007) Basically the Qur'an does not logically mention the verse which explains the practice of insurance. However, sharia economists in discussing and allowing insurance practices as a banking transaction, they are guided by the Alqur verses and hadiths in general, which concerns the basic values of helping, cooperation or enthusiasm in community life to do virtue and piety.

Basically, the implementation of sharia insurance as one of the

principles of help among Muslims, in order to avoid everything that is forbidden in Islam, sharia insurance eliminates uncertainty (gharar), gambling (maisir) and elements of interest (usury) in business activities, so that the insured feels free from the practice of tyranny that harms him (Muhammad: 2006)

Islamic insurance is carried out by someone or more to strengthen the bonds of solidarity and responsibility of the Muslims through mutual helping mechanisms to create harmony and stability in the social life of the community (Ali: 2008).

Conclusion

Insurance arrangements in the Insurance Law are based on dual system insurance, where in this arrangement there are two concepts of insurance namely conventional insurance and sharia insurance. The author can draw conclusions related to this that Law No. 14 of 2014 regulates two insurance systems but basically the operation is the same without distinguishing sharia principles and institutions, meaning two systems but the operation remains the same. Whereas investment-based insurance is not explicitly stated in the insurance law. Investment-based insurance regulations in Indonesia have not fulfilled legal certainty. Investment-based insurance arrangements are found in several Financial Services Authority Regulations, so far there have been no specific arrangements regarding insurance related to this investment. These regulations are in some POJK, which creates obscurity in applicable laws.

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