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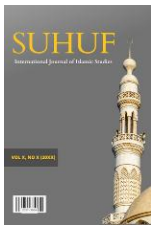

The Treatment of Bankruptcy Between Penal and Civil Matters; Legal Based on The Hammurabi Code, The Bible, and The Sunnah

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ABSTRACT

Background: This article addresses gaps in existing literature by re-examining the historical foundations and origins of bankruptcy law across different eras. **Objective:** It aims to reveal the evolution of bankruptcy treatment from the Babylonian period to the Prophetic tradition (Sunnah) as understood by the *fuqaha'*. **Methodology:** Utilizing a legal-semiotics-to-statute approach, this research qualitatively analyzes legal materials to provide a descriptive explanation of how bankruptcy concepts developed. **Results:** The findings show that bankruptcy in ancient times and early European states functioned primarily as a conflict-resolution tool within civil-penal systems. While the Bible transitioned bankruptcy into a civil matter specifically for the children of Israel, the Sunnah (since the 7th century) integrated both civil and penal aspects without criminalizing the state of bankruptcy itself. **Conclusion:** Bankruptcy treatment in the Hammurabi Code, the Bible, and the Sunnah consistently fluctuates between penal and civil realms, yet each possesses distinct characteristics. Notably, prophetic and divine values within *ahkam iflas* have conjecturally been absorbed into Western legal culture since the Middle Ages. This study fosters a deeper understanding of prophetic law and its historical legal transplantation, highlighting its convergence with modern bankruptcy frameworks.

1. Introduction

Many Western legal scholars and intellectuals such as Maine, Watson, Hobson, Mark Hill, Sprinkle, Gilissen dan Gorle acknowledge that the modern Western law, especially private-civil law, is built and compiled from the best laws from ancient times and the Bible "Alkitab" [1], [2], [3], [4],

[5], [6], [7], but bankruptcy law which in ancient times and the pre-medieval West was closely related to "*penal-penalisation*" may be an anomaly [8], [9], [10].

Based on Indonesian literature and bankruptcy law, whose legal tradition is acknowledged by Glenn as a mixed legal tradition between Western (Dutch), Islam, and *adat* [11]. Bankruptcy law of Indonesia known as "*pailit-kepailitan*," a Indonesian word derived from Dutch language "*failliet – faillissement,*" which known from several colonial statute, such as *Faillissement verordening (Fv) Staatsblad (S.)* No. 217 Year 1905, to non-colonial statute, such as "*Undang-Undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang*" [12], [13]," as a condition based on court decree on insolvent debtor, which has one or two creditor but unable to pay at least to one debt that has matured and can be collected, either at one's own request or at the request of one or more of one's creditors Article 2 [14]. This article does not discuss what earlier researchers have already discussed, such as the problems related to the ease of bankruptcy stemming from the socio-economic background of the statute in the past Indonesian crisis. Even bankruptcy, as a court decision, is similar to the *iflas* legal term in the Hanafi school of thought [15].

In several previous studies, such as Anisah's research, it was found that Indonesian bankruptcy law, adopted from the West, has many similarities with Islamic bankruptcy law, leading her to conclude that there is no need to separate bankruptcy rules for settling debts arising from conventional and sharia businesses [16]. Although on the contrary, researchers, Awad and Michael found that various methods of settlement and treatment of bankrupt debtors under classical Islamic law (Ibn Qudamah) are analogous with the treatment of bankrupt debtors under Civil and Common Law, especially Chapter 11 of *the United States Bankruptcy Code;* and Indonesian Law No. 37/2004 concerning Bancruptcy and Suspension of Debt Payment Obligations, but there are still several fundamental differences in basis principle such as interest prohibition (the issue of usury) to the non-accomodation of the delayment of debt payment obligation in difficult times [17], [18]. Some of these studies discuss bankruptcy law only in the context of its legal similarities in civil law and do not specifically address the relationship between "Bankruptcy; *kepailitan*; *faillisement*" and the criminal-penal law system. Meanwhile, several other studies, such as those by Usama, Al Naim, and others, also discuss it only from the perspectives of economics, business, management, or civil law, and are analyzed quantitatively [19], [20]. Interestingly, Stolker found and revealed that the history of English bankruptcy, 1543-1624, is still closely associated with "imprisonment" as part of the foundation of bankruptcy law in England before being abolished through the Debtor's Act 1869, without explaining the history of its origins or where the "imprisonment" tradition originated [21]. Then, decades before, Levinthal also descriptively-qualitatively found and reveals the early history of Western bankruptcy law that is inseparable from "*penalising debtors*" aimed for the creditors' property rights protection against debtor fraud in the relationship between the Hammuraby Code (briefly), Jewish Law, and Roman Law with its arrest and "*imprisonment*" inherited from Eropean Middle Ages [8]. However, Levinthal does not discuss the gap in the paradigm shift in bankruptcy law from penal law to civil law (based on the existing legal basis and substance), except for a brief qualitative explanation in the context of Jewish law's influence on Spanish law [8]. In fact, the current term and concept of bankruptcy, according to Bracewell and Giulani, originated in the 13th century at a bank in Venice [22], which later became known as part of the "Venice Effect" or "Italian influence" after coming into contact with Islamic law and civilisation through Sisilian Muslim conquest, academic activities to trading and shipping activities [8], [11], [23], [24].

Based on the gaps and explanations above, to identify the origins of several similarities between medieval Islamic law and Western bankruptcy law [25]. This article will analyse "How the treatment of bankruptcy in Babylonian times, in the Bible, and the Sunnah, as deeply understood by the *fuqaha'* in the *ahkam iflas*?" Therefore, the significance of the study is that this article seeks to fill the gap and address the shortcomings of previous research by examining bankruptcy law across civil and criminal law to provide a new understanding of its history from ancient times to the present, along with its various foundations. It is done by uncovering the treatment of bankruptcy in ancient times, as recorded in the legal basis of the Hammurabi Codes, the Bible, and the Sunnah of the Prophet Muhammad, Peace be Upon Him (PBUH), as understood by the *fuqaha'* in the *ahkam iflas*. It

provides insights and attempts to identify the possible origins of several similarities between Islamic law and modern Western bankruptcy law [26]. The application of these findings is theoretically useful for developing a better understanding of prophetic law. Strengthens the evidence of legal transplantation and convergence. Originally, it is more than just a discussion of the similarity of bankruptcy law in the civil law realm, but also its relationship with the ancient criminal justice system, by referring directly to the legal substance of each, starting with Hammurabi's Code analysis, the Bible analysis, and the Sunnah analysis in the next chapter.

2. Method

As library and normative legal research, which analyses the legal substance or basis, and the history of bankruptcy norms and laws between Ancient, Early Western states' law, and Islamic law, which was written in each code or legal basis and substance with its explanation in every legal book sources of ancient to modern times [27], [28]. To avoid anachronism in analysing the treatment of bankruptcy in Ancient Babylonian law, the Bible, Early Western states, and Islamic legal systems. As Pencak said, "all historian are semioticians" [29], or the legal semioticians explain that the legal word, such as "bankruptcy" in legal semiotics perspective and analysis is full of signs, which bound to legal substance, legal doctrine, legal basis, ideology, and legal context with its traditions explained by legal scholar studying the treatment of bankruptcy in modern, Islam, Early Western states, and ancient times [30], [31], [32]. This article utilises a legal-semiotics approach, comparison approach, and statute approach to identifying, selecting, categorising, analysing, and describing any contextual data of the research in each legal substance and times which full of signs the object of the research in the primary and secondary legal materials, to descriptively and qualitatively explain the treatment of bankruptcy as a civil and criminal-restorative penal matter based on Hammurabi's Code, the Bible, and the Sunnah [30], [32], [33]. Utilising those approaches, this article will analyse the legal substance regulating the treatment of bankruptcy from the archaic and ancient civilisation in a different language (Babylonian) and its translations by reputable Western legal scholars (Roth's, Kitchen's and Lawrance's translation and explanations) or Western legal scholars and archaeologists (Westbrook, etc) with its semantics in each era [34]. Then, utlitises those approach, the next explanation will analyse other primary legal material of the treatment of bankruptcy on the Bible (include Torah in several Jewish and Christian Bible), Sunnah, etc., and secondary legal materials which took from non-binding legal materials that explain a primary legal materials, such the book of *fiqh* from Ibn Rushd or Ibn Qudamah, or such reputable journal or books explain the object in ancient times to European Medieval Age will be analysed with several approach above. With legal semiotics, which includes other approaches and has become legal semiotic research (part of normative legal research), as this research will be bound to legal substance, legal doctrine, legal basis, ideology, and legal context and traditions, as explained by scholars, archaeologists or other researchers regarding the treatment of bankruptcy. This article will describe the development of bankruptcy treatment in Ancient times (Babylonian times), its correlation with the Bible and Western legal systems, and the prophetic era and its deep understanding of *ahkam iflas* among medieval Islamic *fuqah*a'. However, the benefits of all of it can be used to analyse and open the structure of legal subtance and its legal practice in each era, until reveal the legal context of the treatment of bankruptcy with its developing progress in each time and ages, begin from Ancient times (in Old Babylonia, such in this times differential between civil and penal matter in bankruptcy treatment is not primary matter) to the medieval Islamic *fuqaha'* which probably went the round of the Western states from the medieval ages [31], [32].

3. Results and Discussion

3.1 The Treatment of Bankruptcy in Babylonia; Hammurabi Code Restorative System

The Hammurabi Code (HC 1750 BC) is attributed to King Hammurabi (1792-1750 BC), the first Hammurabi Dynasty (1894-1595 BC, with its 282 articles which, when viewed today's perspective, simultaneously regulate formal and material criminal and civil cases in one codification such as cases of sorcery, types of false accusations, theft, marriage cases with their crimes (adultery,

premeditated murder, to incest), agricultural cases with their crimes, to medical cases with their crimes [7], [35], [36], [37]. Like other ancient codifications, such as the Code of Ur-Nammu, the Torah as the Ancient Jewish Code, the Twelve Tables and the medieval Leges Barbarorum, the Hammurabi Code still combines criminal and civil law and its procedures in one codification, the law book or Code [7], [38], [39]. Bankruptcy is a separate case regulated in Article 117 of the HC, in the translation of Kitchen and Lawrance entitled "Treatment of pledgees for debt" as follows [40]: "*117. If an obligation is outstanding against a man and he sells or gives into debt service his wife, his son, or his daughter, they shall perform service in the house of their buyer or of the one who holds them in debt service for three years, their release shall be secured in the fourth year*" [35], [41].

Based on the translation of Article 117 of the HC Roth, Kitchen and Lawrance above, if in the obligation (agreement) to pay an outstanding debt to someone has matured, the debtor can sell or give his wife, child, or sister in order to pay off the debt, then based on this article – according to Westbrook usually without having to go through the court – as a sanction they will (be required) to serve by devoting themselves to the house of their buyer or a creditor who holds their debt for 3 years, their freedom must be guaranteed to occur in the 4th year [36]. In the article regarding the bankruptcy provisions of the HC, several translations were found that made it less clear and uncertain, or indeed, that was the rule. It is none other than in the translation of Articles 117-118 of the HC there are two formulations of words, namely between "sell or give (his service and freedom)" in Article 117 of the HC – while the free translation in some literature is directly interpreted as "sell" even though the 4th year does not have to be redeemed because it is automatically free. While slaves who are given their ownership rights to creditors in Article 118 of the HC may be sold by the creditor, and the word "sells" is only used by Roth in Article 119 of the HC, because slaves that debtors sell and give birth to children as debt repayment will be redeemed. There are differences in status and impact that follow from the words sell and give in Article 117 of the HC (sell-give but automatically free in the 4th year), Article 118 of the HC (give but may be sold by the debtor because of their status as slaves 'part of property rights') and Article 119 of the HC (pregnant slaves have been sold as debt repayment but if they give birth must be redeemed) [35], [41].

Another aspect of the article concerns the context of victim service (creditors are conjecturally portrayed as victims protected and entitled to restoration) in bankruptcy proceedings under Article 117 of the HC. Based on the provisions of the type of sanction (*strafsort*), the burden of sanctions (*strafmaach*) to the method of restorative sanction enforcement (*strafmodus*), namely creditor's service (serving the credit owner as a slave for 3 years and being free in the 4th year to restore the creditor's properties rights; paying the debtor's debt). Based on the concept of temporary human exploitation (slavery) through the service of creditors as victims that prevailed during the Ancient Babylonian civilisation. Moreover, based on an extreme materialistic paradigm and understanding of the value of communal responsibility as a family unit. Family ties and relationship: when a debtor's family goes bankrupt from oneself, wife, children to sisters according to Article 117 can be forced by the debtor (as head of family) and/or creditor to share the responsibility of paying off the debt, namely by becoming a slave for a certain period of time serving the creditor or serving the party who bought their service period as explained [35], [41]; These provisions legalise the enslavement of oneself, one's children, one's wife, and even one's sistes, based on the value of family unity in bearing the burden of bankruptcy debt. This article presents a conjectural historical account of the criminalisation of bankruptcy, the values and principles of expanded criminal responsibility and liability that originated and prevailed in the restorative tradition of the Ancient Babylonian Code [35], [41].

Based on the Code and articles inside knows, that types of restorative outcome (sanctions) in Ancient Babylon: Although similarities are found with the types and patterns of restorative sanctions in the two previous ancient codices (Ur-Nammu and Lipit-Ishtar Code) [35], [41]; which only based on restitutions, restorative sanctions in Ancient Babylon were more developed, extending beyond restitution as a basis of restorative justice system explained by Eglash in 1950s [42], [43]. It is because various types of restorative sanctions in Ancient Babylon can include restitution to specific

party (the victim, victim's guardian/husband), forgivenes, and even services to the victim (such as service as a victim's/creditor's slave under the bankruptcy article) [35], [41], which a creditor also might forgive, as will be explained later. The majority of these restorative sanctions, particularly those in the form of restitution or service to the victim, are more definitive and material, valued in terms of assets/money or services specified in the Code. In addition to being specifically regulated in the Code, several provisions for the types of restorative sanctions in the table have also been established in accordance with traditions, values of justice, and socio-legal assessment standards that developed at that time [44], as seen below in Table 1.

Table 1. Ancient Babylon's Restorative Values Based on Bankrupcty Article.

Article	Type of penal sanction	Type of right protected	Ancient Babylonians' Restorative value
Article 117 of the HC	Creditor's service (serving the credit owner in slavery, as a slave for 3 years and being free in the 4th year to restore the creditor's properties rights; paying the debtor's debt (collective responsibility [8])	Propety rights of the creditor	The value of restoring property rights (loss) for a person due to being unable to manage finances and being unable to pay debts (restoration of property loss in banckruptcy crime)

Sources: Levintal, Roth, Kitchen and Lawrance, Rusydianta [8], [35], [40], [41], [44]

In principle, the values of restoring a personal's property rights due to certain types of bankruptcy or crimes that endanger those rights (types of theft; robbery, burglary, fraud) is a value whose protection threatens the perpetrator with two types of sanctions, either tha same or different, alternatively (restitution of the loss or the entire property or being sold into slavery; restitution or deat) or combined (victim services for a specified period [44]. Then, the relationship between collective responsibility and restorative sanctions under the Code is evident in the criminalisation of bankruptcy under Article 117 of the HC and in the legal protection of property rights and other rights in the aftermath of the crime of "robbery." It does not address issues related to robbery under the Code, but rather the concept and relationship between active responsibility and restorative sanctions in Hammurabi's bankruptcy. Althought Article 117 of the HC has a negative side, its positive aspect is the existence of traditions, philosophies, and values of unity to jointly bear restorative sanctions, based on bonds such as family ties (relationship in blood) that have existed since the civilisation of Ancient Babylon [45]. Interestingly, Article 117 of the HC is unique because it is now generally considered to be a civil law article (debts and bankruptcy), even though it is oddly formulated and imposes fairly complex sanctions. It seems to contain information about the extreme materialism that shaped and underpinned criminal-penal policies in Ancient Babylon time. Moreover, the same practice of punishing debtors for their inability to pay (insolvency) also persisted in the next generation (New Babylonia). However, slavery of bankrupt debtors at that time, Westbrook explains, was hard to find. However, it has evolved into creditors imprisoning or detaining bankrupt debtors until their debts are considered paid. Westbrook does not explain the type of imprisonment that could generate money to pay off debtors' debts in the New Babylonian period. However, debtors were likely required by their creditors to work or produce goods until their debts were considered paid, which may have been the beginning of the tradition of imprisoning debtors and imposing forced labor in ancient prisons [36], [38]. Perhaps the practice described in Article 117 of the HC has been passed down from generation to generation, which underlies the legalisation of creditors detaining or imprisoning bankrupt debtors during the New Babylonian era [46]. However, as an article of the Hammurabi Code enshrined in the Gospel, Matthew 18.24-34, it is precisely with the existence of a series of information on the metaphorical pratice of Article 117 of the HC that is enshrined in the Christian Holy Book [47]. It seems to provide a clue and strengthen the assumption that during the Ancient Babylonian era, the inability of the debtor "*awilum*" to pay debts, whether due to management problems or other things (personal – family problems), and causing bankruptcy has

been condisered a mistake that deserves to be crimialised and can be punished collectively by being enslaved by creditors for a certain period [36], [46]. During the enactment of the Hammurabi Code, based on Westbrook's explanation, specifically, as an exception, proof to execution outside the court without having to go through formal procedures is only found in law enforcement of bankruptcy article and its restorative sanctions, Article 117 of the HC [37].

Therefore, in the existing literature, this article is now discussed from two legal perspectives, namely civil and criminal. On the one hand, it is analysed by researchers like the current civil law, which primarily discusses interest, debt contracts, and failure to pay, as Westbrook discusses in the sub-section "debt and social justice" [36]. However, on the other hand, this article is also discussed by restorative justice researchers like criminal law – part of the ancient restorative and criminal justice system, ala HC [42], [48]. It is because the formulation of the sanction of slavery "debt service" is a term that combines the nature of the penal sanction of freedom (a period of slavery as debt repayment) and the sanction of action "treatment" similar to Article 54 of the HC concerning similar punishment for cases of negligence of garden water "agricultural offenses", where someone who negligently fails to strengthen the irrigation embankment/water embankment and causes flooding, the sanction is restitution with an alternative sanction, alternate to sale of the perpetrator and all of his property into slavery to pay restitution [35], [41]. At that time, slavery was also considered a form of restorative sanction that served the victim (creditor) to restore their rights. Although the difference lies in Article 54, the slavery sanction in Article 117 is for a limited period, not indefinitely, and bith appear to function as as form of compensation (restitution) and service to the victims as creditor of the bankrupt debtor [36], [40]. Uniquely, the same type and pattern of punishment (*isti'bad* or slavery in force labor) as the function of the provisions of the Article 117 of the HC is also found in cases of theft of Ancient Egyptian civilisation and the descendants of the Ancient Babylonian civilisation, namely the Prophet Yusuf [49], [50]. Morover, Mattew 18.24-28 contains information on the metaphorical and practical aspects of the Article 117 of the HC, namely the practice of forgiveness, the restoration of "vindication", and the forgiveness of debts by bankrupt debtors. Creditors who are seen and treated as victims are allowed (given the right) to forgive the bankrupt debtor by canceling all debts and freeing them from the slavery that they must endure, along with some or all of their family [47]. These are the various interesting, unique, and comlex aspects of Article 117 of the HC. Although it has been passed, it is now known that both forms of criminalising bankrupt debtors, int he Old and New Babylonian traditions, are prohibited under Islamic law and under Article 11 of the ICCPR [51]. In Islam, in accordance with the Sunnah (hadith) of the Prophet, which will be explained in the following discussion, there is a change in criminalisation similar to the provisions of the *Wetboek van Strafrecht voor Netherlandsch-Indie* (WvSNi)/Old 1946 Criminal Code, Chapter XXVI, concerning acts detrimental to debt collectors (*schuldeischers*) or rights owners "creditors" (*rechthebbenden*) [52], [53].

3.2 The Treatment of Bankruptcy in The Bible and Its Influence on The West's Legal History; Between Criminal And Civil Matters

The history and relationship of modern "civil" Western law with ancient Mesopotamian law and the Bible have been extensively explained by Maine, Burdick, Noble, Glenn, Gorle, Gilissen, and Watson. From them it is known that the Ancient Roman and Holy Roman empires with the Bible and the adherents of two different beliefs between "Jews" and "Christianity" with their various generations acted as a "bridge" between ancient law and modern Western law [1], [2], [7], [11], [54], [55]. From this, it is known that the initial relationship between Ancient Babylonian Law, the Law of Moses (Torah) and the Gospel is its object and implementation purpose of law, namely for the descendants of ancient Mesopotamian [7], [45], [56], [57], [58], with the children of Israel as the descendants of *Ya'qub* son of *Ishaq*, the grandson of Abram (Known as Abraham or *Ibrahim*; one of the residents of Ur of the Chaldees) and '*Isa* (Jesus "Joshua" son of *Maryam* along with his followers mediated the preservation and spread of ancient legal traditions until today with several changes (law reforms) and adjusments as recognised by Glenn, Hobson, David, Gilissen or Gorle [4], [7], [11], [58]. However, conjecturally, this is found to differ slightly in the context of bankruptcy law and its relation to other areas of law (criminal law area) [10], [38], [41], [59], such as found in the Bible

which contain Torah and Gospel inside, even Jews whose exclude Gospel has the different Bible than the christian whose included the Gospel inside their own Bible version. Nevertheless, the "Bible", which contains the Torah, is the Holy Book for the Christians too [7], [47], [60], and from it the Bible treatment of bankruptcy was enforced in the West to the Middle Ages era.

3.2.1 The Torah as Law Reform of The Treatment of Bankruptcy The Children of Israel

The Torah, as God's law, was imposed on one of the descendants of the ancient Mesopotamian (Sumerian, Akkadian, and Babylonian) civilisation, namely the Children of Israel [55], [59], [60], [61]. Even slavery of Ancient Babylon for simple debt was known among the Ancient Jews is mooted, but a number of Biblical references are cited to prove that slavery for debt did exist [8]. For those matter, God's law in the Torah was most likely intended to change (law reform) the tradition of punishing (imposing sanctions) for certain crimes, in the kind of the ancient civilisation's codes, which were still used as a way of life by the Children of Israel when they began to be revealed and enforced, as commanded Hammurabi in his Code to become way of life of his kingdom and its descendant [35], [56], then absorbed and improved to the Roman-Jews civil law and its civilisation [1], [3], [4], [7], [55], [64]. Therefore, for the standards of the Children of Israel at the time of the Prophet Moses (Musa), as received revelation and also applied afterwards until the time of the Prophet Jesus (Isa) [59]. Likely, our perspective on the decriminalisation of bankruptcy (now seen as part of the type of civil law and it case) probably is due to the influence of God's law in the Torah which makes it included in the absolute civil field through the revelation of the Torah, Deuteronomy 15.1-3, which updates and eliminates the paradigm of criminalisation of bankruptcy ala Ancient Babylonian legal tradition. The changes and law reforms in the legal field also include reforms to assumptions regarding criminal liability (the concept ot collective responsibility under Article 117 of the HC). As explained, the provisions regarding its criminalisation have been changed to eliminate the concept of collective responsibility, specifically, ala Babylonian bankruptcy. It was updated by being incorporated into the field of civil law with its individual liability and individual proprietary execution [8], [45].

Evidence based on the legal basis, along with further explanations regarding any divine law reform, changes the sanctions and legal fields, can still be seen in the Torah, Deuteronomy 15.1-3, "*[1] At the end of every seven years thou shalt make a release. [2] And this is the manner of the release: every creditor shall release that which he hath lent unto his neighbour; he shall not exact it of his neighbour and his brother; because the Lord's release hath been proclaimed. [3] Of a foreigner thou mayest exact it; but whatsoever of thine is with thy brother thy hand shall release*" [47], [56], and Table 2.

Tabel 2. Bankruptcy Law Reform in Comparison Between the Hammurabi Code and the Torah

Bankruptcy Treatment	
Hammurabi Code	**Torah**
Article 117 of the HC (collective service of victim/creditor's debt service; slavery for 3 years to compensate for losses, "restitution for creditor rights and interest")	Deuteronomy 15.1-3 (imperative debt release "write-off" in the 7th year)
Hammurabi Code: Restorative justice system; conditional restorative	Torah: decriminalisation and imperative Civil matter for the Children of Israel (the Sabbatical Year)

Sources: Levintal, Roth, Kitchen and Lawrance, the Bible

Based on the table, it is evident that the changes in the types of sanctions in the Torah are corrective and represent God's law with His punishment and law reform, reflecting the views and values of "Divine Justice" behind certain types of crimes (criminal acts and/or offences) in the Ancient civilisation codes. Bankruptcy: restorative sacntions in the syle of Article 117 of the HC in

the type of '*strafsort*' service to victims through the '*strafmodus'* method of becoming a slave to the creditor or another person who is pay for creditor restorative property rights in certain period of time (3 years) as compensation for bankruptcy and being unable to pay off debts to the victim/creditor [35], [41]. As explained previously, the restorative sanction in the HC appears to have been removed and decriminalised in the Torah, rendering and reforming bankruptcy a non-criminal act. The specific decriminalisation policy, based on the Torah (Deuteronomy 15.1-3), for debtors among the Children of Israel requires the forgiveness of debts (debt release 'write-off') every 7th year of the debtor's term [47], [60]. Ancient Babylonian criminal justice and penal tradition with its restorative sanctions, are reformed (replaced) by an obligation to forgive and release the Israelite debtor's debt within a certain period of time in a personal-civil law matter, outside the framework of Babylonian criminal law. It appear to be better than the penalisation and restorative sanctions under Article 117 of the HC, whose *strafsort* and *strafmodus* are carried out by serving the victim (creditor) through communal "enslavement of the bankrupt debtor" for certain period [42], [44].

Worth knowing! Based on the Torah (Deuteronomy 15.3) and its specifics, the decriminalised crime of debtor bankruptcy applies specifically only to the Children of Israel. It is supported by the possibility that the practice of criminalisation-penalisation and punishment of bankrupt debtors due to inability to pay (insolvency) was carried out during the time of Hammurabi (Article 117 of the Ancient Babylonian Code – 2100-2050 BC) and was still found during the New Babylonian period until the era in which the Bible – New Testament, Gospel, Matthew 18.24-34 was written, where the time of compilation or writing of the Bible was around the 13th/12th century BC to the 5th century BC (450 BC) for the Old Testament (include Torah) while for the New Testament (include Gospel) around the 1st and 2nd centuries AD [7], [36], [46], [47]. In fact, when compared with Article 117 of the HC from the 18th century BC, the new legal subtance in the Old Testament, the Torah, Deuteronomy 15.1-3, clearly abolished the practice of criminalising bankruptcy and slvaery as a restorative sanction and justice system of Ancient Babylon [35], [57], [60], [63]. Since the 1200s BC, the Torah requires creditors to release the debts of fellow Israelite debtors in the 7th year. Thus, specifically in this regard, it is clear that the HC influenced the Torah by eliminating the criminalisation of bankrupt debtors and its penal sanction among the Israelites (Deuteronomy 15.1-2). Although in practice against non-Israelites as can be seen in the practical metaphor of Article 117 of the HC in the New Testament, the Gospel, Matthew 18.24-34, as has been alluded to in the previous explanation, the provisions of the bankruptcy Article of the HC appear to be still applied to non-Israelites to the point of being immortalised as an example of the forgiveness of bankrupt debtors in restorative punishment in the Bible (Gospel) [47]. Because the penalisation and penal sanction "imprisonment" for bankrupt debtors, as in the New Babylonian era, was also still in place in medieval Europe [8], [21], [46], as will be explained in the following sub-chapter.

3.2.2 The Remaining Treatment of Bankruptcy for Non-Israel in The Gospel and European Centris - the Western States

Stolker, when explaining the forgotten history of bankruptcy in Medieval Europe era, found that the medieval European era, from the 16th to 19th centuries, was often still on the New and Ancient Babylonian view of criminalising bankruptcy, has been considered as a criminal misdemeanour, even though the aims was never to punish the debtor [21]. Stolker explained that insolvent debtors before 1861 and the last 19th century (to 1869) who could not be classified as "bankrupt" risked spending the rest of their lives in debtor's prison, while creditors often never received any satisfaction for the debts owed to them [21]. Before, in the 16th century, imprisonment for debt was not used solely by creditors to exercise economic pressure, but also served as a safety net against fraud [21]. While in the mid-sixteenth century, in common England, based on the bankruptcy judgment, the sherif has the power to put the debtor in debtor's prison until the debt was repaid, to het the debtor or debtor's family and friend to pay the debts [21], even in another reports imprisonment for debts was relatively rare since 1543 [21].

Decades before, Levinthal also explain and reveals the early history of Western bankruptcy law that is inseparable from "*penalising debtors,*" even were not penal in their nature, for the protection of creditors' property rights against debtor fraud in the relationship between the HC (briefly), Jewish

Law, and Roman Law with its arrest and "*imprisonment*" inherited from the several European state in Middle Ages below [8]:

1) Early Italian Law (from the 14th century '1313 AD' to the 16th century '1553 AD'). Levinthal explained that since 1313 to 1553, the Italians has been revived the old Roman System of private liquidation of the estates of insolvents by renewal and elaboration with "New" Italians bankruptcy regulation from 1313, which featured and introduced the most principle and doctrine, namely the suspension of payment by the debtor as an act of bankruptcy stopping payment constitute process, it was adopted in all of the italian cities, and become prevalent in many modern European bankruptcy system [8]. Even several old penal sanction such as the tortured practice in imprisonment "Roman" debtor's prison in order to force the debtor bankrupt in expose his property is occasionally exist, and in other hand the creditor who made any false claim will be punished: the creditor who claimed more than he was entitled to receive forfeited his entire claim, and who aided the bankrupt in concealing assets were frequently penalised to pay in full the bankrupt's debts [8]. The penal sanctions for the creditors are similar to Old Babylonian Provision Article 11 of the HC and the Old Testament, Torah, Exodus 22.9 [35], [41], [47], [60].
2) Early German law in Middle age, before and until the 17th centuries, is explained by Levinthal as common to the Italian Bankruptcy system in many features, such as the Italian influence on the principle of equality among creditor and the principle of priority, as noticeable in Hamburg and Bremen [8].
3) Early French Law from the 16th century (1510), Levinthal explained, was influenced by Germanic law, which in turn was influenced by Italian principle, such as the principle of priority, which was introduced to early French. As noted in 1510, Lyon, as trade center of France, had the same bankruptcy law as Italy at that time: the insolvent debtor could negotiate debt payment with his creditor in court [8].
4) Early Dutch Law, between 1245 and 1412, provide that if a debtor was insolvent and unable to pay his debts to creditors, he should be handed over until his debts were paid. Then, in the 16th century (between 1531 – 1540), the bankruptcy was introduced by the Holy Roman Empire, Charles V of Spain, to provide adminisitration of justice in Holland, which dealt equally with rich and poor, which accomodated penalisation in such an imprison for the debtor, capital punishment for who defrauding their creditors were to be regarded as common thieves. In His reign, bankruptcy law was not regarded as a private matter but as a public matter and a vital importance to the entire society and community [8].

From Levinthal or Stolker's explanation, the legal tradition of penalisation of bankruptcy in the religious sanctions wielded on several Western states and laws above probably comes from several legal sources and traditions that converge with each other as follows:

First, the effect of the Ancient Roman Law such as outlined in Twelve Tables (450-451 BC), which probably absorbed Babylonian bankruptcy tradition or Jewish Ancient law as Watson, Gorle - Gilissen noted and acknowledge improved and formulated from an Ancient law [2], [3], [7], [8]. Levintal explained that if the debtor failed to fulfill his obligation (debt), the creditor might arrest him by *manus injectio*, a mode of execution which proceeded directly, without any court, and with inexorable rigor againts the person of the debtor. After thrice publicly invited some one to pay the debt, the creditor might, in default of any one appearing, and after the lapse of sixty days, regard the debtor as his slave, and might either kill him or sell him into a foreign country [8], [65].

Second, the effect of the Bible (Torah on Ancient Roman or New Testament on Holy Roman Empire), which legalised penalisation and/or slavery for non-Israelite and enshrined the metaphorical practice of Article 117 of the HC as Divine information on Matthew 18.23-35, [7], [47].

The shortcoming explanation from Stolker and Levinthal are on their unfair acknowldgement and less noticed by denying the influence of Sunnah on Italian bankruptcy law and principles (the principle of private matter, the principle of priority, and the suspension of payment doctrine), which

are begun since the 12nd century to 13th century, as Glenn acknowledge the role of Islamic law in Sisilia and Normandia utilisation of it in the mix with Roman law in several century since their conquest on Sisilia Island in the 12nd century [11], see too [66]. All of it are kinds of a dissapproval to the effect of Islam and prophetic Sunnah on the Frederick II (Federico II 1194-1250 AD), the Holy Roman Emperor "Baptized Sultan" who introduce and applied the Islamic law through his Court and academic activities (translation Arabic books to Latin or Hebrew until the University of Naples conviction) since the 13th century [23], [24], [66], [67]. Thus, might give signs of any legal transplants and clue why many of the principles of modern European bankruptcy law are strongly analogous to the Sunnah of the Prophet Muhammad, PBUH, and its deep understanding of the 12-13th *fuqaha'*, as explained above, this did not intuitively appear in the Middle Ages of Early states of European bankruptcy law, as will be explained in the next chapter.

3.3 The Treatment of Bankruptcy in The Sunnah; Between Criminal and Civil Matter

Different from Article 117 of the HC, which probably considers bankruptcy as a crime (similar to medieval bankruptcy treatment in New Babylon or Europe; so that sanctions determined as stated in the regulations or Code), but in accordance with God's Law in Torah, which has made it part of private civil law, but related to criminal law in special conditions, even not criminalised debts act anymore. Nothing other than discussions related to bankruptcy in Islam are discussed in the context of private – civil matter since the time of the Prophet Muhammad, PBUH, as can be seen in the Surah Al-Baqarah verse 280 or various hadith of the Prophet such as in "*Kitab al-Buyu'*; the Book of Financial Transactions", as follows, from which Islamic bankruptcy law began to applied, discussed, and developed until the 12th and 13th centuries AD [59], [66]–[68]. Some of these hadiths include:

1) About the suspension of payment and its sequent of steps; "*Jabir said, "When the creditors of my father demanded their rights persistently, the Prophet requested them to take the fruits of my garden instead of the debt, but they refused. So, the Prophet neither gave them the fruits nor had the fruits plucked for them, but said, 'I will come to you tomorrow.' He came to us early in the morning and invoked Allah to bless the garden's fruits, and so I paid the creditors their rights*" [69] No. 2404.
2) About charity principle, "*Abu Sa'id said that in the time of the Prophet a man suffered loss affecting fruits he had bought and owed a large debt, so God's messenger told the people to give him sadaqa and they did so, but as that was not enough to pay the debt in full God's Messenger said to his creditors, "Take what you can find, but that is all you may have*" [70] No. 1556 (18), Book 11, Hadits 137 [71].
3) About the principle of priority and seizure of a bankrupt debtor's property, "*Al-Hasan said, "If somebody becomes bankrupt and he is judged to be so, he is not permitted to free his slave or sell or buy things*." The Prophet, PBUH, said, "*If a man finds his very things with a bankrupt, he has more right to take them back than anyone else*" [69] No. 2402.
4) About penal conditions and principle in "*Mathlu*" Procrastination the rights of creditor, the Prophet, PBUH, said, "*Procrastination (delay) in repaying debts by a whealthy person is injustice*" in other matan, "*Delay in payment (of debt) from the richman who can afford to pay or solvent person (al-wajid: al-ghany) makes it lawful to dishonor and punish him, or justifies his defamation and torture (by the judgment)*" [69], [72] No. 3628.

From the 7th century, Revelation (the Qur'anic verses) and Prophetic Times, as reflected in the sunnah, gave rise to various books discussing bankruptcy from the perspective of the four major schools of thought, guided by the two main Islamic legal sources. For example, in the Shafi'i school, the book "*Al-Umm* (820 AD/204 H) by Imam Shafi'i (767-820 AD/150-204 H) discussed bankruptcy in the chapter "*at-taflis*" [73], until in the 12th century AD, in the Maliki school, the book "*Bidayatu al-Mujtahid wa Nihayatu al-Muqtasid*" by Ibn Rushd (1126-1198/520-595 H) discussed bankruptcy in the chapter "*at-Taflis*". Interestingly, despite being a Maliki school, Ibn Rushd presented the discussion from the perspective of many schools of thought (Hanafi, Maliki, Syafi'i, Hambali, al-Laithi, etc) [67]. Dating back to Ibn Rushd's time, in the Hanbali school of

thought, *al-Mughni* (1223 AD), by Ibn Qudamah (1147-1223 AD/541-620 H), discussed in the chapter *al-Muflis* [68]. Interestingly, it is in the bankruptcy provisions of *al-Mughni* that Awad and Michael found several similarities with Chapter 11 of the United States Bankruptcy Code [17].

Derived from the hadiths about iflas "*atadruna ma al-muflis*" and Jabir about the suspension of payment applied to the poor debtor and every debtor who meets poor condition and circumstance, such as suffered loss, force majour, etc. It differs from the "*Mathlu*" condition when the rich debtor commits any procrastination act due to the rights of the creditor, which will be discussed later. The *fuqaha'*, such as Ibn Rushd or Ibn Qudamah deeply understood that *taflis* (bankruptcy process) or *iflas* (bankruptcy) according to Islamic law includes two meanings and situations, namely: *first*, the greater amount of debt that drowns (uses up) the debtor's assets, so that (even) what he has in his assets is not enough to pay his debts (become insolvent); *second*, (a person) who originally or basically does not have any "*malun ma'lum*" active assets that are known (basically does not have assets, capital or property) [67], [68]. In the sense that when the debtor truly has no active assets, or in insolvent situations, Ibn Rushd explains, *fuqaha'* agree that the debtor is given time to repay his debt until he is able [67]. If examined carefully, Ibn Rushd's explanation makes clear that the suspension of payment and its practice of postponing debt repayment obligation were part of the Prophet's tradition until Ibn Rushd's time, and the Prophet's hadiths exemplified it in the case of Jabir ra. Even in his book, Ibn Rushd does not explain further the time period, the mechanism, the relationship with the creditor, and other details. The lack of explanation may be due to the steps already described in the hadith of Jabir bin Abdullah Al-Ansari ra, who witnessed his father's debt when it was due, even though his father was a martyr of Uhud. The creditors charged him, and they went to the Prophet, PBUH. Then, after Jabir came to PBUH and explained the problem (at that time Jabir also showed his father's date palm garden, which had not been fruitful for years, to ask for a blessing from Him), he asked the creditors to receive the property (date palm garden) and justify (donate) his father's debt. Still, they were reluctant, and the Prophet, PBUH, did not give them the property nor share the provisions. However, the Prophet, PBUH, told the parties (creditors) to give an additional grace period (*sa'aghdu*) for their debt until tomorrow. Then, the next morning, the Prophet, PBUH, surrounded the dates while praying for blessings on the fruit. From the fruit of Jabir's palm dates, one can fulfil his obligations to his creditors and still have some of the fruit left over [69] No. 2404, [74], [75]. Based the hadith and its explanations, although Ibn Rushd does not explicitly discuss this, unlike the prohibited of *mumathalah*, and not as detailed as the provisions in Indonesian Bankruptcy Law and the Suspension of debt payment obligations (Article 222 to Article 255), the initiator of the suspension (postponement) of payment was the Prophet himself, acting as a judge, and, at the same time, acted as Jabir guarantor [14], [74]. Meanwhile, in the Surah Al-Baqarah, verse 280, the initiator of the suspension is the creditor, and indicated by the *mukhathab* of the verse [76], [77].

On the other hand, regarding the understanding under the main legal basis (Al-Baqarah verse 280 and several sunnah about iflas), Ibn Qudamah explained the sequence of steps. In his explanation, when the debtor's debt matures, the debtor is asked to pay, but does not. The judge supervises and assesses the debtor's solvency. If the judge finds that the debtor has assets that can be used to pay debts, he orders the debtor to fulfil his obligations. If the debtor says it belongs to someone else and he does not find any assets from the "*malan zahiran*" (every asset under tax and *zakah* obligations) type [80], and admits that he is having difficulties (*idda'a i'sar*). However, if the creditor gives it in charity, the debtor is not detained but is in a status of supervision (*inzhar*), and the creditor is no longer permitted to carry out *mulazamah* (attempting to collect rights as usual, including subpoenaing him; Ibn Qudamah explained that in his era, *mulazamah* usually did by the creditor before rise the case to the judge and before detentioning "*habs*" the debtor under any trial process). As the word of God in verse 280, and the word of Prophet, PBUH, in hadith narrated by Muslim, "*tashaddaqu 'alaihi* – give charity for him", because in Ibn Qudamah's opinion, detention is a futile and useless action when the debtor is in trouble and is also determined to pay their obligations (pay their debts), while the debtor is still in difficulty condition, and this difficulty is the reason or excuse for not being able to pay the debt (insolvency). For this reason, more or less, according to Ibn Qudamah, the debtor is not detained so that he can try to get out of his difficult

times and immediately fulfil his obligations. Then, to avoid bad faith, the debtor is placed under supervision. The debtor admits it or does not. If the creditor's suspicion is correct and the debtor admits that he has assets in the form of *mu'awwadhah* (assets-receivables), whether from sales, *qardh*, or admits another form of such, then the creditor's denial and denial are accepted. However, if the debtor denies, under oath, that he has no assets and is in a difficult situation, then the debtor is detained until he proves his difficulty [68] see too Vol. 10. And all of Ibn Rushd or Ibn Qudamah's understanding and explanation about the suspension of payment and its link to charity or social responsibility principle above is derived from the verse 280 and the hadith about *ahkam iflas* [17].

Derived from the hadiths about the principle of priority and seizure of a bankrupt debtor's property, in connection with the determination of *muflis* in the status of *mahjur 'alaihi* (being seized). Regarding this matter, Ibn Rushd explained the difference of opinion regarding what is withheld (confiscated) from the debtor's assets. However, before entering, discuss what types of assets are being held. Ibn Rushd explained that there are two conditions for *muflis'* property or assets, including: *First*, the situation when it is *falas* and *hajru* (seizure and detention confiscation) has not been determined for it; and *Second*, the situation after determining *al-hajru*; ban or detained (if the subject), seizure or confiscation (if the object/property) [67]. In the first situation, according to Imam Malik, a *muflis* may not transfer something (*itlaf*) or spend from his assets without a replacement or something that produces assets in exchange ('*iwadh*). Unlike Imam Malik, the majority if scholars hold that using a debtor's assets before the judgement is final is permissible until the "*hajru*" seizure is determined [67]. Ibn Rushd's explanation clearly shows that collateral seizure and executory seizure are not yet separated as they are today. As most scholars hold, both fall under the same term, namely *hajru*, which sometimes means general executory seizure (transfer rights after the final judgment) and sometimes mean collateral seizure simply to secure the credito's rights before judgment, depending on the sentence structure and its objection. Meanwhile, in the second situation (after *taflis* 'established seizure and confiscation'), both Malik and the majority agree that *muflis* and his assets may not be used or utilised in *muamalah* – civil, from any buying and selling, giving, taking, etc. In the other words, the seizure, detention-confiscation of the debtor's assets is determined, the debtor cannot carry out any *muamalah* activities at all related to his assets [67]. Then, regarding assets seized, detained or confiscated under the principle of priority, Ibn Rushd explained that these assets depend on the party controlling the goods, the type of good, and their level (quantity or quality). If the goods are still held by the creditor, without any difference of opinion, *fuqaha'* agree that the goods are the right of the seller (creditor) if the buyer or debtor goes bankrupt. Here, the credit owner takes priority; however, in the case where the debtor has taken the goods from the seller (creditor). If the goods, assets, or receivables have changed form, *fuqaha'* agree that they are the responsibility of the *muflis* and are taken from their assets. However, if the goods or assets from the debt still exist (intact) but no longer match the price or estimated price of the goods, they cannot be used to cover the debt. *Fuqaha'* differ in four groups of opinions between: 1) the goods become the rights of the creditor who owns them (Shafi'i and Hambali); 2) it depends on the price of the goods when the taflis decision is made (Maliki); 3) belonging to the debtor and sold to be distributed to other creditor (Abu Hanifah); 4) re-evaluated the goods, if the price is the same or lower, it will be decided for the creditor; if its price increase, just the original price is paid to the creditor. The difference among these 4 opinions stem from their varying understanding of the Sunnah text [67].

Worth knowing! Derived from the hadiths about the principle of priority and seizure of a bankrupt debtor's property, which is linked with the hadiths about penal conditions and principle in criminalised the "*Mathlu*" procrastination act of the rich debtor due to the rights of creditor delay-suspension of debt payment and makes it fulfil the lawful condition to dishonor and punish the wealthy debtor in several penal sanction such as detention. It is a legal basis, provision, and condition for criminalising the act of injustice arising from any prohibited *mumathalah,* such as the rich debtor's delay or suspension of debt payment to fulfil the creditor's property rights, with any fraud or other offence. According to Ibn Rushd's or Ibn Qudamah's work, in the case after the collateral or general executory seizure, the hadith narrated by Imam Abu Dawud becomes the legal basis for the criminalisation of any act due to "*Mathlu*" (procrastination the rights of creditor), such as the act

of delaying the fulfillment of rights that is detrimental to the creditor or his collector, similar to the provision of the WvSNi (Old Criminal Code 1946) Chapter XXVI regarding acts that are detrimental to debt collectors "*schuldeischers*" or rights owners (creditors) "*rechthebbenden*" [52], [53]. Therefore, in Islamic law for the Muhammad's ummah, '*uqubah'* (penal sanction such as detention of "*habsu*" not imprisonment "*sijn*") of bankrupt debtors is carried out by the judge at the request of the creditor due to rights violations such as *mumāṭhalah* (procrastination), detention or denial of rights even though he is actually solvent. Therefore, the punishment of a bankrupt debtor only occurs (is permitted) if he is declared bankrupt and/or actually solvent, hides his ability to pay, or commits any offence, such as withholds creditor rights, embezzeles creditor rights or denies the "verdict or decree (*iflas* legal decision)" in fulfilling his legal obligations. In essence, it does not justify treating debtors' detention or bankruptcy as a crime. Still, criminalisation is permitted if the debtor is found to have elements of error and a violation of rights arising from committing an unlawful act in *aḥkām iflās* explained above see also [67], [68].

4. Conclusion

The findings and explanations in this study reinforce previous research while also filling gaps and partially answering questions about the origins of the similarities between Western and Islamic bankruptcy laws. Based on the similarity, every analysis and explanation of legal substance above, it is conjectured that the prophetic and divine values in *ahkam iflas* have been absorbed unconsciously into Western legal culture since the Middle Ages, with some adjustments and improvements as we know and are familiar with them in Indonesian Bankruptcy law or the USA Bankruptcy Code. Because the threat of bankruptcy treatment in ancient times and in early European states tended to be more like a way to resolve "conflicts" in the ancient criminal system. Even the Bible conjecturally changes it into a civil matter that applies specifically only to the children of Israel (the Sabbatical Year: mandating a release from personal debts every seven years), while in early bankruptcy law in several European States, it was still like in Neo-Babylonian times, treating bankruptcy debtor and bankruptcy as a crime with its penalisation. On the other hand, bankruptcy law in the European Middle Ages was reformed by introducing elements of Italian Bankruptcy law, which may have absorbed Islamic prophetic tradition due to its similarity with the provisions, principles, and doctrines of *ahkam* of *iflas* in Islam. In Islam, from the 7th century to this century, according to the Prophet's sunnah, it is between civil and penal matters, now known as in *ahkam iflas*, without usury-interest and the criminalisation-penalisation of the debtor's bankruptcy.

However, this article left many questions due to the convergence process, with primary evidence from any confession by Western legal scholars, Western Middle Age bussines people, or a political superior who adopts *ahkam iflas* and its principle/legal basis in their way of life, or from any business document, legal, or legislative process document that substantiates the convergence of *ahkam iflas*. Then, to fully and convincingly demonstrate or prove that they originate from Islamic law and its prophetic traditions, further research is still needed to understand better and foster open intellectual awareness of any future deviance in Islamic legal treatment of bankruptcy.

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