

DEBTOR PROTECTION IN PERSPECTIVE OF *PANCASILA* JUSTICE VALUE ON SEPARATIC CREDITOR EXECUTIONS

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Abstract

The execution of the execution by separatist creditors without going through court adjudication as stipulated in Article 55 and Article 56 of Act No. 37 of 2004 is contrary to Pancasila justice. The method used in this research is a non-doctrinal method. Based on the data obtained, it can be seen that the implementation of bankruptcy executions as regulated in Article 55 and Article 56 of Act No. 37 of 2004 prioritizes the interests of separatist creditors, this is further complicated by the existence of a legal culture that shows that bankruptcy executions are guaranteed with mortgage rights. Without having to go through an amazing in court, the meaning of the debtor's insolvency should be an examination in court or through amazing regarding the debtor's ability to pay off his debt, not solely based on the analysis and views of the separatist creditors. This is implicitly based on Article 28D of the 1945 Constitution of the Republic of Indonesia and automatically contradicts the values of Pancasila social justice. This means that in the legal policy of bankruptcy execution, it must be able to create a balance of protection of rights between creditors and debtors, by the view of appreciation for human values or human rights awards in the form of equality before the law to be able to realize a just bankruptcy execution that can protect the interests of separatist creditors while protecting debtors from losses resulting from bankruptcy.

Keywords: *Creditors, Debtor, Execution, Legal Protection, Reorientation.*

A. INTRODUCTION

The monetary crisis that occurred in Indonesia in mid-1997 has given unfavorable influence on the national economy, causing great hardship on the business community in resolving the debts to continue their activities, and impacts are detrimental to society. At that time a lot of problems arise. Many companies have trouble paying their debt obligations to creditors and further many companies into bankruptcy.¹ The era of globalization brings various impacts on life, one of the positive impacts of globalization is more and more investment activities are happening not only within a country but also between countries. Countries that have a lot of natural resources are countries that are most desirable for foreign investors to do one of the investments is the

¹ Niru Anita Sinaga, Nunuk Sulisrudatin, Hukum Kepailitan dan Permasalahannya di Indonesia, *Dirgantara Journal*, Volume 7 Number 1, 2016, page 158

Indonesian state which owns various kinds of natural wealth.² The prosecutor confronts the execution of the replacement money payment the matter of corporate property which is used as collateral for debts to creditors.³ The basic idea of Postponement of Debt Payment Obligations is basically to provide opportunities for debtors to reorganize their businesses. The realignment of a business certainly takes a long time. The time given by Article 225 paragraph (4) of the Bankruptcy Law and Postponement of Debt Payment Obligations above is deemed insufficient to provide opportunities for debtors to restructure their business. Given that for 45 days the debtor must complete a peace proposal, lobby, and business reorganization, the shortness of time seemed to benefit the creditor.⁴

The insolvency test can be used as a legal instrument to protect the solvent debtor and good faith from bankruptcy abuse by its creditors in bad faith. This test can be put into the upcoming Bankruptcy Law amendments. The application of the insolvency test was not placed outside the bankruptcy petition trial but remains in the petition hearing the bankruptcy. The insolvency test can be applied by the judge breaker with a base on convincing evidence such as financial reports prepared by Registered Public Accounting Firm. Towards debtors who have bad faith in payment of their debt obligations to creditors do not deserve protection to avoid bankruptcy with the insolvency test instrument, though the debtor has good solvency. In-Act No. 37 of 2004 concerning Bankruptcy and The Postponement of Debt Payment Obligations has been ordered to be a judge can consider the debtor's solvency in good faith to refuse the application bankruptcy against the debtor, namely with based on Article 8 paragraph (6) letter a.⁵

The Postponement of Debt Payment Obligations application is just a debtor's way of avoiding a bankruptcy request submitted by creditors. The large number of subjects that can submit Postponement of Debt Payment Obligations applications to the Commercial Court causes the limitation of legal protection for creditors to be blurred. Considering Postponement of Debt Payment Obligations' efforts according to Article 229 paragraph (3) of the Bankruptcy and Postponement of Debt Payment Obligations Law states that if the Postponement of Debt Payment Obligations and bankruptcy petition is filed simultaneously at the Commercial Court, the application for Postponement of Debt Payment Obligations will be examined and decided previously.⁶

2 Putu Ayu Ossi, Pengaturan Terhadap Kepailitan Transnasional di Indonesia, *Kertha Semaya Journal*, Volume 6, Number 10, 2018, page 2

3 Lambok Marisi Jakobus Sidabutar, Hukum Kepailitan Dalam Eksekusi Harta Benda Korporasi Sebagai Pembayaran Uang Pengganti, *Integritas Journal*, Volume 5, Number 2, 2019, page 75

4 It was accessed via m.hukumonline.com/berita/baca/lt56173ed1a1cb/enam-kesalahan-uu-kepailitan on 27 September 2018 at 11.00 am

5 M. Hadi Subhan, Insolvency Test : Melindungi Perusahaan Solven yang Beriktikad Baik dari Penyalahgunaan Kepailitan, *Hukum Bisnis Journal*, Volume 33, Number 1, 2014, page 11

6 Article 223 Paragraph (3) Act No. 37 of 2004 about Bankruptcy and Postponement of Debt Payment.

Therefore, the main basis for the Postponement of Debt Payment Obligations application is the good faith conveyed by either the debtor or creditor.

The spirit of Bankruptcy Law is business sustainability, which means that the decision of bankruptcy is *Ultimum Remedium*. Some bankruptcy decisions are controversial because the debtor's financial condition is materially solvent but is formally insolvent.⁷ The ASEAN Economic Community also has another impact, namely increasingly easy migration for citizens because they can easily travel from one country to another including working there without having to use a visa. Look positive impacts arising from the existence of the AEC, in the field this investment is a supporting factor for its development investment between ASEAN member countries. This is of course give rise to the birth of multinational companies namely, companies investing in various countries which have subsidiaries in several states that produce certain components for assembled in different countries.⁸ Bankruptcy and suspension of obligation for debt repayment is one of the dispute resolution mechanisms that can be chosen by parties to solve the problem economically and transparently. This mechanism is regulated in Act No. 37 of 2004 of Bankruptcy and Suspension of Obligation for Debt Repayment (Insolvency Law). However, the Law has faced many problems in its implementation mainly related to consumer protection. This paper will discuss consumer position related to bankruptcy and its implementation.⁹ Furthermore, the Bankruptcy Law and Postponement of Debt Payment Obligations are seen as participating in regulating premature liquidation. This has an impact on the degradation of investor confidence from within and outside the country which tends to hinder the pace of domestic investment. So far, the Supreme Court through the Cassation Decision has often canceled the bankruptcy decree based on Article 2 of the Bankruptcy Law and Postponement of Debt Payment Obligations because the parties that can file bankruptcy applications for State-Owned Enterprises are not in sync with the state-owned enterprises Law. In addition, Article 2 paragraph (3) to paragraph (5) of the Bankruptcy and Postponement of Debt Payment Obligations Law also regulates the authority to apply for bankruptcy by the Prosecutor's office, Bank Indonesia, the Financial Services Authority, and the Ministry of Finance which are not the creditor.¹⁰

Several factors encourage the need for revision of bankruptcy law and suspension of debt payment obligations, among others: First, to avoid the debtor's assets if at the same time several creditors collect the receivables.

7 Bambang Pratama, Kepailitan Dalam Keputusan Hakim Ditinjau dari Perspektif Hukum Formil dan Materiil, *Yudisial Journal*, Volume 7, Number 2, 2014, page 157

8 Hikmahanto Juwana, Transaksi Bisnis Internasional dalam Kaitannya dengan Peradilan Niaga, *Jurnal Hukum dan Pembangunan*, Volume 25, Number 3, 2005

9 Luthvi Febryka Nola, Kedudukan Konsumen Dalam Kepailitan, *Negara Hukum Journal*, Volume 8 Number 2, 2017, page 1

10 It was accessed via <https://bhpsemarang.com/berita-kepailitan-dan-pkpu.html> on 27 September 2018 at 10.00 WIB.

Second, to avoid the existence of creditors who hold collateral rights material that claims its rights by selling the debtor's property regardless of the interests of the debtor or other creditor parties. Third, to avoid cheating by one of the creditors or debtors.¹¹

Another problem that arises is the authority of the curator. At the practical level, the curator's authority tends to go beyond the limit because he acts as an advocate as a result, the curator is difficult to touch by the law. The lack of a supervisory function in the implementation of the curator's duties to oversee the integrity of the curator, the authority of responsibility and fees for the curator's services for bankruptcy requirements which are considered too easy, and the lack of protection for debtors. In this case, the debtor becomes the loser. In addition to adding standards and supervision to curators, it is necessary to coordinate between the professional organizations that oversee the curators, namely the Indonesian Curators and Administrators Association, the Indonesian Curators and Administrators Association, and the Indonesian Curators and Administrators Association. The difference in mindset and interpretation of each of the performance of the curator organization above tends to affect the professionalism of the curator's performance in serving the debtor and creditor.¹² In the field of bankruptcy today, the legal substance is formulated in Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.¹³

Another major problem today can be seen in Article 2 (paragraph 1) of Act No. 37 of 2004 concerning irrational bankruptcy requirements because bankruptcy applications can be filed and a bankruptcy decision by the Commercial Court can be handed down against debtors who are still solvent namely debtors whose total assets are greater than the total amount of debts). With such bankruptcy conditions, it is very difficult to achieve legal certainty and the objective of implementing a just bankruptcy law. In addition, Act No. 37 of 2004 pays more attention to and protects the interests of bankrupt creditors than the interests of bankrupt debtors which should also be protected. This means that Act No. 37 of 2004 should pay attention to and provide balanced legal protection to the interests of creditors and debtors by the principle of bankruptcy in general, namely the principle of providing benefits and balanced legal protection between creditors and debtors and the principle of encouraging investment and business.¹⁴

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- 11 Catur Irianto, Penerapan Asas Kelangsungan Usaha Dalam Penyelesaian Perkara Kepailitan dan Penundanaan Kewajiban Pembayaran Utang, *Hukum dan Peradilan Journal*, Volume 4 Number 3, 2015, page 400
 - 12 It was accessed via <http://google.com/amp/amp.kontan.co.id/news/ruu-pailit-perketat-gerak-para-kurator> on 27 September 2018 at 10.15 WIB.
 - 13 Arbijoto, Tinjauan Kritis Terhadap Hukum Kepailitan, *Hukum Prioris Journal*, Volume 2, Number 3, 2009, page 129-130
 - 14 <https://www.hukumonline.com/pusatdata/detail/320/node/19/undangundang-nomor-4-tahun-1998/>, accessed on 4 July 2019.

The conditions for bankruptcy as referred to in Article 1 "*Faillissements-Verordening*" Bankruptcy Law, which took effect on November 1, 1906, even though only provided the possibility to file a bankruptcy petition against a debtor in disability (*Van de voorziening in geval van onvermogen van kooplieden*) or not being able to actually (*kennelijk onvermogen*) so that they are in a state of stopping to pay back their debts. This means that the debtor is insolvent (liabilities greater than the assets and receivables).¹⁵ Meanwhile, for debtors who are still solvent (their liabilities are smaller than their assets and receivables), the curator should ask the debtors to jointly find solutions to pay off their obligations by fixing management, for example, curators and debtors conduct independent audits to find out debtors' problems so that curators do not directly make asset settlement from bankrupt debtor.¹⁶

Examples of cases that show the irrationality of the bankruptcy requirements in the Bankruptcy Law are the bankruptcy case of PT Dirgantara Indonesia (PT. DI) and the bankruptcy of PT Telekomunikasi Selular Tbk. (PT. Telkomsel). In the bankruptcy case (PT. DI) as the debtor, whereas a state-owned company engaged in the public interest, PT DI can only be filed for bankruptcy with the permission of the Minister of Finance. This is regulated in Article 2 paragraph (5) of the Bankruptcy Law, which reads:

In the event that the Debtor is an Insurance Company, Reinsurance Company, Pension Fund, or State-Owned Enterprise engaged in the public interest, the application for a bankruptcy statement can only be submitted by the Minister of Finance.

However, the elucidation of this Article regulates more detailed matters, namely only state-owned enterprises that are not divided into shares that require a permit from the Minister of Finance. In other words, in this context, it is a state-owned enterprise whose capital is entirely owned by the state. The regulation regarding state-owned enterprises which is divided or not divided into shares is contained in Act No. 19 of 2003 concerning state-owned enterprises. In this law, state-owned enterprises which are divided into shares are in the form of Persero. Meanwhile, those that are not divided into shares are in the form of a public company. PT DI is in the form of a Persero, meaning that it is divided into shares and does not require the Minister of Finance's permission to be bankrupt. This does not provide legal protection for state-owned enterprises Persero because anyone can go bankrupt even though the state-owned enterprises Persero is an important State asset and has an effect on the nation's economy.¹⁷

Meanwhile, in the bankruptcy of PT Telekomunikasi Selular Tbk. (PT. Telkomsel) by Decision No. 48 /bankrupt/ 2012/PN. Niaga.JKT.PST stated that PT. Telkomsel is proven to have a maturing debt which can be collected by PT

15 Drs. Iur. R. Soejartin, *Hukum Dagang I dan II*, Penerbit Pradnya Paramita, page. 263.

16 *Loc.cit*

17 <https://www.hlplawoffice.com/perlindungan-hukum-seimbang-pada-kreditur-dan-debitur-pailit/>, was accessed on 4 July 2019.

Prima Jaya Informatika amounting to Rp5,300,000,000 and several other creditors, such as PT Extend Media Indonesia valued at IDR21,031,561,274 and Rp19.294.652.520,-.¹⁸

As is known the impact of bankruptcy (PT. Telkomsel) which concerns the fate of its product users and thousands of employees who are threatened with losing their jobs just because bankruptcy is so easy as intended by Article 2 (paragraph) of Bankruptcy Law Postponement of Debt Payment Obligations. This makes the bankruptcy conditions irrational, which do not provide equal legal protection for creditors and debtors. Telkomsel (as a Debtor), which has trillions of rupiah in assets and profits, as a company that is still very solvent, must go bankrupt even though at the Cassation level, the Supreme Court Judge overturned the commercial court decision.¹⁹

With the bankruptcy decision, the Curator has the authority to carry out the management and settlement of bankruptcy assets starting from the date when the bankruptcy decision was pronounced, which is valid since 00.00 local times (article 24 paragraph 2) even though cassation or reconsideration is filed against the decision (article 16 verse 1). If the decision to declare bankruptcy is overturned by the court as a result of cassation or review, all actions that have been done by the curator are still valid and binding on the debtor (article 16 paragraph 2). According to Article 98, the first task that the curator must do is to carry out all efforts to secure the bankruptcy estate and to keep all documents, money, jewelry, securities, and other liquid assets by providing a receipt.²⁰

B. RESEARCH METHODS

The type of legal research used is non-doctrinal. In non-doctrinal legal research, law is socially conceptualized as an empirical phenomenon that can be observed in people's lives.

C. RESULT AND DISCUSSION

1. The Implementation of Legal Protection for Debtors on Bankruptcy By Separatist Creditors

In its development, the implementation of bankruptcy has neglected justice for debtors. This can be seen in the provisions of Article 55 and Article 56 of Act No. 37 of 2004 concerning Bankruptcy and Liability of Debt Payment Obligations. As a result of the provisions referred to in Article 55 and Article 56 of Act No. 37 of 2004 concerning Bankruptcy and Liability for Debt Payment, in fact, there are many cases of debtors who are actually still

18 Jurnal Hukum on 14 September 2013, about: Judicial Review of the Bankruptcy Condition PT.Telkomsel (Case study of Decision No. 48/Pailit/2012/PN.Niaga.JKT.PST by: Robby Andrian, SH)

19 <https://www.hlplawoffice.com/perindungan-hukum-seimbang-pada-kreditur-dan-debitur-pailit/>, was accessed on 4 July 2019.

20 *Loc.cit.*

able to pay receivables that must be bankrupt by a prime creditor unilaterally. This is shown in cases with case number 21/Pdt.Sus-Pailit/2019/PN Niaga Semarang.²¹

In the case with case number 21/Pdt.Sus-Pailit/2019/PN Niaga Smg, the judge decided that PT. Mulya Jaya Perkasa Cemerlang and Yohanes Setiawan were declared bankrupt. The judge's consideration was PT. Mulya Jaya Perkasa Cemerlang and Yohanes Setiawan had been insolvent because they could not pay their debt to Joseph Chan Fook Onn one time in arrears. If you see this consideration it is very unfair considering that PT. Mulya Jaya Perkasa Cemerlang still has good ethics by making requests for debt repayments in the next period, because in this period there has been no budget for debt repayments, meanwhile so far PT. Mulya Jaya Perkasa Cemerlang has never been in arrears in paying debts to Joseph Chan Fook Onn.²² In addition, this can also be seen in the commercial court decision regarding the bankruptcy issue in the bankruptcy case that occurred in Medan with decision Number 267/Pdt.Sus-PHI/2019/PN Mdn 2025. In this decision the judge prioritized the views of the plaintiff and focused more on receivables agreements that are clear, most of the receivables agreement takes precedence the creditor's interest.²³

This clearly contradicts the *Pancasila* mandate which requires legal justice for all groups of Indonesian society, so that the provisions of Article 55 and Article 56 of Act No. 37 of 2004 also contradict the Fourth Paragraph of the 1945 NRI Constitution and Article 28D of the 1945 NRI Constitution which states that "Everyone has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law". This clearly contradicts the preamble to Act No. 37 of 2004.

Based on the various kinds of irregularities of justice that exist, it is clear that as a result Article 2, Article 55, and Article 56 of Act No. 37 of 2004 have contradicted its considerations, and also contradicts *Pancasila* and the 1945 Constitution of the Republic of Indonesia. This shows that Article 2, Article 55, and Article 56 of Act No. 37 of 2004 has no legal basis and is not based on existing basic laws so it is clear that it has violated the first point which states that "the legal system must contain regulations, meaning that it cannot contain mere decisions of ad hoc". This situation is further complicated by the passing of the Supreme Court Decree Number 109/KMA/SK/IV/2020 concerning the Enforcement of the Guidelines for Bankruptcy Case Settlement and Postponement of Debt Payment. This is due to the authority of the separatist creditors to file for Bankruptcy and Postponement of Debt Payment as referred to in Article 222 of Act No. 37 of 2004. This clearly adds to discrimination for the position of the debtor.

21 Data of Decision of Bankruptcy Cases from Commercial Court Semarang on 12 June 2020.

22 Richardus Helmy H., *Putusan Kasus Kepailitan Yang Diperoleh Dari Penitera Pengadilan Niaga Semarang*, Accessed on 12 February 2021.

23 Accessed via putusan.mahkamahagung.go.id, on 12 February 2021.

Based on the explanation above, it can be understood that legal norms are arranged in layers and layers, and groups, showing a legal political line. This is because the basic norms containing social ideals and ethical judgments of society are translated and concretized into lower legal norms. This shows that there is a demand from society, both social ideals and ethical judgments, to be realized in social life through created legal norms. These hierarchical and multi-layered legal norms also indicate a synchronization line between higher legal norms and lower legal norms. This is because lower legal norms are applicable, sourced, based, and therefore should not conflict with higher legal norms.

2. Debtor Protection In Perspective Of *Pancasila* Justice Value On Separatic Creditor Executions

Based on the opinion of Kelsen and Nawiasky and the description above, it is also clear that Article 2, Article 55, and Article 56 of Act No. 37 of 2004 as *Formell Gezets* (Formal Law) have contradicted the 1945 Constitution of the Republic of Indonesia which is *Staatsgrundgesetz* (Basic State Rules/State Fundamental Rules), as well as automatically contradicting *Pancasila* which is the *Statute Fundamentalnorm* (State Fundamental Norms). So automatically Article 2, Article 55, and Article 56 of Act No. 37 of 2004 also contradict legal principles, which include:

a. Principle of Balance

This law regulates several provisions which embody the principle of balance, namely, on the one hand, some provisions can prevent the misuse of bankruptcy institutions and institutions by dishonest debtors, on the other hand, there are provisions that can prevent the misuse of bankruptcy institutions and institutions by creditors who do not have good faith. According to Adrian Sutedi, he said that:²⁴

The bankruptcy law must provide equal protection for creditors and debtors, uphold justice and pay attention to the interests of both, covering important aspects deemed necessary to achieve a fast, fair, open, and effective settlement of debt problems.

b. Principles of Business Continuity

In this Law, there some provisions allow prospective debtor companies to continue. Therefore, requests for a bankruptcy statement should only be filed against insolvent debtors, namely those who do not pay their debts to majority the creditors.²⁵

c. Principles of Justice

In bankruptcy, the principle of justice implies that the provisions regarding bankruptcy can fulfill a sense of justice for the parties concerned. This principle of fairness is to prevent arbitrariness from

24 Adrian Sutedi, 2009, *Hukum Kepailitan*, Ghalia Indonesia, Bogor, page 30

25 *Ibid.*

collectors who seek to pay their respective claims against debtors, regardless of other creditors.

d. Principle of Integration

The principle of integration in this law implies that the formal legal system and its material law are an integral part of the civil law system and national civil procedural law.

This contradicts the *Pancasila* mandate which requires legal justice for all groups of Indonesian society so that the provisions of Article 55 and Article 56 of Act No. 37 of 2004 also contradict the Fourth Paragraph of the 1945 NRI Constitution and Article 28D of the 1945 NRI Constitution which states that "Everyone has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law". This contradicts the preamble of Act No. 37 of 2004. This is in line with the opinion of Hikmahanto Juwana who stated that:²⁶

Amendments to the Bankruptcy Law are very dominant with protection for creditors. This can be seen from the existence of conditions for debt that is due, but in the provisions of the Bankruptcy Law, there is no explicit provision that clearly and legally states that the debtor has been proven unable to pay the debtor is insolvent. This is not in accordance with the philosophy of the Bankruptcy Law which serves as a bridge in the problem of the inability of debtors to pay their debts to creditors. Thus, the implementation of bankruptcy law in the community has clearly been detrimental to debtors, this can be seen in various cases and court decisions related to bankruptcy as described above.

D. CONCLUSION

The implementation of legal protection for debtors in bankruptcy executions carried out by separatist creditors has not been able to bring justice to debtors, due to the provisions of Article 55 and Article 56 of Act No. 37 of 2004 which require that the creditors carry out bankruptcy execution unilaterally by not having to go through the court.

²⁶ Hikmahanto Juwana, *Hukum Sebagai Instrumen Politik: Intervensi Atas Keadaulatan Dalam Proses Legislasi Di Indonesia*, Delivered in the scientific oration of the 50th Anniversary of the Faculty of Law, University of North Sumatra on 12 January 2014.

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