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HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE

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Abstract.

Law No 37 Year 2004 on Bankruptcy and Liability Payment Postponement (PKPU) enables a debtor to come up with a settlement offer to the creditor, prior to or after bankruptcy, in order to pay for liabilities or end bankruptcy and PKPU. A settlement offer from a debtor, discussed and submitted after liability verification, which has been agreed and approved by both the debtor and the creditor must first be legalized by a panel of judges that decide on the case. This will give the settlement offer a fixed and binding legal status. Hence, it can be executed. However, the panel of judges do has the right to legalize a settlement offer agreed and approved by both the debtor and the creditor, as stipulated in Article 159 subsection (2) and Article 285 subsection (2) of Law no 37 Year 2004. This right to deny legalizing a settlement offer is against the universal principles of agreement, especially concerning mutual agreement, *pactasuntservanda*, freedom of contract, and common justice. The issues discussed in this research include (1) Why legalizing a settlement in the bankruptcy law does not reelect justice? (2) What are the consequences of legalizing a settlement in the bankruptcy law that does not reflect justice? (3) What is the law construction for legalizing a settlement in the bankruptcy law that is based on the values of justice?

The method employed was judicial sociology. Data were collected from interviews, observations, and documentations. Those data were then analyzed using the interactive analysis method.

Results show that (1) Legalizing a settlement in both the bankruptcy law and PKPU is not yet based on justice values, especially the value of dignified justice based on Pancasila, namely Principles, 2, 4, and 5. (2) Hindrances in legalizing a settlement among others are; the agreement between a debtor and all creditors or most/the majority of creditors in a settlement

offer is not recognized by the panel of judges; It is against the universal principles of agreement, especially the freedom of contract, the principle of *pactasuntsevanda*, and mutual agreement, and it does not recognize the deliberation between both the debtor and creditors, which is presided by a curator and a supervising judge and is in line with Principle 4 of Pancasila. (3) There needs to be a reconstruction for the ideal values of legalizing a settlement in bankruptcy law and PKPU, based on the values of dignified justice, that is aimed at protecting all parties involved in the settlement and PKPU.
Keywords: legalizing a settlement, bankruptcy law, PKPU, dignified justice

Introduction

A bankruptcy agency is one of the primary conditions in business activities as bankruptcy itself is one of the causes that makes a business man out of the market. Once a businessman can no longer play his part in the market, he/she can get out of the market by declaring himself/herself bankrupt, or in the worst case scenario, being ousted by his/her creditors.

Accordingto Subekti and R Tjitrosoedibio[1]; *Bankruptcy is a situation in which a debtor quits paying his/her liabilities. When this person is - by the request of his/her creditors or upon his/her own wish - declared bankrupt by the court, then his/her remaining assets are handed over to an Inheritance Agency as the curatrice in the bankruptcy case. These assets will then be used by all creditors.*

On the other hand, Abdurrachman[2]states that *:Insolvency or bankruptcy is a condition when a business person is already declared bankrupt by the court and all of his/her activa or inheritance has been allocated to pay for his/her liabilities*.Therefore, Adurrachman takes both insolvency and bankruptcy as for the same meaning. Bankruptcy is often mentioned in everyday situations and is more familiar compared to insolvency. Bankruptcy does not strip someone from his/her civil rights. Despite being bankrupt, a business person's civil rights are still respected and recognized.

The word insolvent in Arabic reads *falasa*(which is a verb), *aflas* (*superlative degree*) and*fuluus* (which are a form or*masdar*or*infinitive*). A person is said to be insolvent if he/she was once having a lot of money (*dirham*) and then running out of it. When *falasa*is pronounced as*alfanasa* (*laam*is replaced with*nun*), it means*an abject poverty.*In the*al-Muhiith*dictionary,

1 Subekti dan R. Tjitrosoedibio, 1978, *Kamus Hukum*, Pradya Pramita, Jakarta, hlm. 89
2 Abdurrachman, 1991, A, *Ensiklopedia Ekonomi, Keuangan dan Perdagangan*, Pradya Pramita, Jakarta,hlm. 303

*al Falasa*has plural forms of *aflasa*and*fuluusan*, meaning that a person is said to be insolvent when he/she no longer has money. Hence, it essence, insolvency is when someone's life changes from being easy (have possessions) into difficult as possessions are no longer there, and a judge declares this person insolvent[3].

According to Article 1 subsection 1 of the old Bankruptcy Law or FaillisementVerordeningStaatsblad 1905-217 jo 1906-348;*every debtor who stops paying, based on his/her own report or being reported by his/her creditors, is declared bankrupt by a judge.*

The latest definition of bankruptcy according to Bankruptcy Law No 37 Year 2004 is:*seizure of all assets from a bankrupt debtor is managed and handle by a curator under the supervision of a Supervising Judge as stipulated in this regulation (article 1 subsection (1)).*

The definition of bankruptcy as stated in article 1 subsection (1) of Bankruptcy Law No. 4 Year 1998, which is quoted in Bankruptcy Law No. 37 Year 2004,is included in section one that regulates the conditions for bankruptcy verdict as regulated in article 2 subsection (1) that reads; *a debtor with two or more creditors and is not able to pay at least one of his/her liability that is due and billable, is said to be bankrupt by the court, whether by his/her own request or one or more of his/her creditors.*

Based on those aforementioned facts, it can be inferred that bankruptcy law is meant to:

1. Guarantee appropriate share of assets between the debtor and his/her creditors;
2. Prevent the debtor from carrying out actions that may cause loss to his/her creditors;
3. Provide protection for the debtor from his/her creditors by getting his/her a debt-write-off.

According toProfessorRadin, the goal of *all bankruptcy laws*is to serve as a collective forum to clarify the rights of creditors against the assets of a debtor that may not cover all of a debtor's liabilities[4].

In the general explanation of Bankruptcy Law No. 37 Year 2004, some factors that explain the need for regulation on bankruptcy and postponement of liability payment include:

1. Preventing fights over a debtor's assets among creditors when they happen to collect their debts at the same time.

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[3] Abdul GhafarSholih, 1980,*Al Aflaas fi al-Syari'ah al-Islamiyah, DiraasahMuqaaranah*, As Sa'adah, Egypt,Cairo, p. 87

[4] Epstein, David G., Steve H. Nickles., James J. White, *Bankruptcy*, St. Paul, Minn : West Publishing Co, 1993

2. Preventing creditors who reserve the right to the assets from selling those assets without taking interest of both the debtor and the other creditors into consideration.
3. Avoiding fraudulence from one of the creditors or the debtor. For example, the debtor may try to put the interest of only some of his/her creditors before the other creditors, or he/she may want to run away with all his assets and do not uphold his duties to his/her creditors.

These are the three factors that underlie Law No. 37 Year 2004, which is a national regulation that will serve the both the need for law and law development in the society.

Law No. 37 Year 2004 on Bankruptcy and Postponement of Liability Payment (henceforth Bankruptcy and PKPU Law) is legalized in order to promote the growth and development of the national economy, as well as securing and supporting results of the national development, especially the world of business where problems with obligations must be resolved in fair, fast, open, and effective ways..[5]

Bankruptcy may take place as there is an obligation between a debtor and creditor(s). The problem is when a debtor does not pay his/her liabilities that are due, out of unwillingness or insolvency.

According to Man SuparmanSastrawidjaya, should this problem arise, there are some ways to solve it, among others:[6] 1). settlement (outside the court);2). suit via the court; 3). settlement within the court; 4). individual collection; 5). postponement of payment; 6). agreement to postpone payment; 7). bankruptcy; and 8). Settlement in bankruptcy.

Bankruptcy and PKPU Law provides two ways as to prevent a Debtor from being liquidatedagainst his/her assets in the case he/she is in a state of insolvency. First, *asking a debtor to propose a postponement of paying his/her liabilities prior to being declared bankrupt or are still under the investigation of the Court of Commerce.* Second, *holding a meeting for a settlement with between a debtor and creditor(s) once a debtor is declared bankrupt by the court.*

A plan for settlement (*accord*) proposed by a bankrupt Debtor is discussed in a *credit reconciliation meeting*. This is one of the most important processes in the first stage a Debtor is declared bankrupt. Settlement in a bankruptcy is the right of a Debtor against his/her

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5 See point "b" on the part of considering the Law on Bankruptcy and PKPU

6 Man SuparmanSastrawidjaya, *Antisipasi PT (Pesero) dalam Menyongsong Undang-undang Kepailitan,*in Mochtar Kusumaatmadja: Pendidikdan Negarawan, Kumpulan KaryaTulis Menghormati 70 Tahun Mochtar Kusumaatmadja, Penerbit Alumni, Bandung, 1999, p. 331, as quoted by Sunarmi, *Perbandingan Sistem Hukum Kepailitan Antara Indonesia (Civil Law System) Dengan Amerika Serikat (Common Law System),* Faculty of Law, Universitas Sumatera Utara, pages 18-19, find out athttp://library.usu.ac.id/ download/fh/perdata-sunarmi5.pdf

Creditors. It is an important part of solving the problem of bankruptcy and postponement of liability payment, the latter of which is the main objective. Therefore, planning and carrying out of settlement must be done in earnest. In terms of bankruptcy and postponement of liability payment, a settlement has its own procedure and characteristics.

Settlement is one of the ways a bankruptcy ends, other than insolvency or clearance of acquired property and cancellation of bankruptcy by the decision of the highest court or a review or even liquidation or closure/revoke (in the case when only a few or no asset is available).

Detailed discussion on settlement is regulated in Chapter II, Part Six, starting from Article 144 to Article 177 of Bankruptcy and PKPU Law, and Chapter III, Part Two, on Postponement of Liability Payment (PKPU) Article 265 to Article 294 UU of Bankruptcy and PKPU Law which state;*a bankrupt debtor may offer some sort of settlement to all creditors.* This means that this kind of offer may be made by a debtor once he/she is declared bankrupt by the Court of Commerce or prior to that.

According to Article 145 (subsection 1) andArticle 265 of Bankruptcy and PKPU Law, when a bankrupt debtor wishes to offer a settlement to his/her creditors, he/she must come up with a settlement plan first. This settlement plan should be ready at least 8 days prior to credit reconciliation meeting to the court registrar, so that the plan is available for all parties involved. This settlement plan must be discussed during and decided after the credit reconciliation meeting.

In bankruptcy law, *a settlement* already agreed upon by both the debtor and creditors does not necessarily have a legal power as in the other civil cases. This settlement must first be homologated by the Court of Commerce (a panel of judges that decides bankruptcy). It is only after this process that the settlement has a legal power that binds all parties involved.

Nonetheless,*the Court of Commerce*based on Article 159 subsection (2) andArticle 285 subsection (2) of Law No. 37 Year 2004 on Bankruptcy and PKPU must waive homologation for a settlement agreed by a debtor and his/her creditors, in cases of:

a. the debtor still reserves the right to an asset that is more valuable than the one agreed in the settlement;
b. there is no guarantee on the implementation of the settlement, and/or;
c. The settlement reached is marred with fraud or is a result of a plot with one or more creditors, or there are other dishonest aspects related to it, even though they are agreed upon by both parties.

d. Requital for or cost paid by the jurist and administrator is not yet paid or there is not guarantee for its payment.

This rejection for settlement homologation by the Panel of Judges of the Court of Commerce is not against the principles embedded in the settlement, especially the principles of consensus and pactasuntservanda, or even the principle of just.

A settlement in a bankruptcy case is *an agreement between a bankrupt debtor and his/her creditors*, in which a debtor offers paying some of his/her credits on condition that once he/she makes this payment, he/she is no longer liable to pay the rest of his/her credits. A settlement usually consists of the following possibilities:

1. a bankrupt debtor offers creditors certain payments based on some percentage of his credits and therefore, the rest are taken as settled;
2. a debtor hands over his/her assets to creditors with the help of a curator that sells his/her assets and shares the money obtained to all creditors according to the credits owed to each creditor, with or without exemption from the rest of the credits. This kind of settlement is known as a liquidation settlement (*liquidatieaccoord*);
3. A debtor submits a request of payment postponement and asks for a possible installment for his/her credits.

Hence, the writer concludes that homologation of a settlement proposal in the bankruptcy law as regulated in Law No. 37 Year 2004 on Bankruptcy and Postponement of Liability Payment is against the universal principles of agreement, especially the principles of consensus, pactasuntservanda, and freedom of agreement, and also the principle of just.

The Problem

The problem outline for this stems from the aforementioned background, the writer wishes to answer the following questions:

1. Why does not a settlement homologation in the bankruptcy law reflect just?
2. What are the impacts of this settlement homologation that does not reflect just in the bankruptcy law?
3. How do we reconstruct the law of settlement homologation based on the principles of just in the bankruptcy law?

Method

This study is both judicial and sociological in nature, which employs empirical methods. It refers to observations, interviews, and sampling as its empirical data.

The data are verdicts of and interviews with judges and registrars in the Court of Commerce, government curators (orphan's or inheritance court), and also private curators. It uses the critical theory and the qualitative-inductive analysis.

Result

Based on the research conducted by the writer at Semarang Court of Commerce, Central Jakarta Court of Commerce, interviews with curators at Semarang, Jakarta, and Surabaya Inheritance Agencies, and with curators James Purba private curator, it can be inferred that Judges at the Court of Commerce decides on homologation or non-homologation of a settlement proposal in bankruptcy cases based on the followings:

1. Absolute conviction from the judge;
2. normative conditions have been met; this means conditions stipulated in Article 159 subsection (2) and Article 285 subsections (2) and (3) of Law No. 37 Year 2004 on Bankruptcy and PKPU

Therefore, factors other than those two are not taken into account by the judges at the Court of Commerce. These include:

1. Opinions from the supervising judge, curators, and representatives of debtors and creditors;
2. Agreement between a debtor and the creditors in the settlement for bankruptcy can PKPU:
3. Justice for both the debtor and his/her creditors.

Hence, the writer concludes that Judges at the Court of Commerce rely heavily on their own conviction in making decision of homologation or non-homologation of a settlement offer, *once all normative conditions as stipulated in Article 159 subsection (2) and Article 285 subsections (2) and (3) of Law No. 37 Year 2004 on Bankruptcy and PKPU have been met.*This means that judges at the Court of Commerce are *very subjective in making decisions on homologation as they do not take agreements between the debtor and his/her creditors into account, despite the fact that these agreements are in line with the universal principles of agreement. These judgesalso failed to observe the principles of just for both the debtor and his/her creditors.*

The aforementioned facts lead to the need of Homologation Reconstruction in Bankruptcy and PKPU that is based on Dignified Justice that protects the debtor, the creditors, curators, and the supervising judge, and puts forwardmutual agreement and justice values. These requires financial strength and the ability to do just in homologation cases as stipulated in Law No. 37 Year 2004 on Bankruptcy and PKPU. It is expected that this reconstruction will fulfill the hope of the people and serve the legal requirement for homologation in cases of bankruptcy

and PKPU, founded on the Theory of Dignified Justice. Henceforth, reconstruction of the articles concerning homologationin Bankruptcy and PKPU can be realized.

The underlying principle of Dignified Justice as stated by its pioneer, TeguhPrasetyo,[7]is Pancasilaas the*Volksgeist,* the national soul of Indonesian people with its ***humanist***[8] characteristicof "**Treating People as Humans**". This also comes with the other principles of social justice as stated in the tenets ofPancasila.[9]Dignified justice stands on the principle of justice, usage, and conviction of law are aspects integrated in justice, the justice based on Pancasila.

TeguhPrasetyodefines dignified justice as:"*.....that the existing laws, i.e. those laws that treat and uphold all the values of humanity according to his/or her nature and life purposes. This is because humans, both men and women, are the precious creatures of the One God Almighty as mentioned in the basic principle of the second tenet of the Pancasila, that is the just and civilized humanity. In the second tenet of the Pancasila it has been acknowledged that human dignity and all human rights and obligations, require just treatment of one human being by another and also by society. The treatment as such is addressed to humanity, to his or herself, to the environment and also for the glory of theLord.*[10]

Based on those findings by the writer on Settlement Homologationin Bankruptcy and PKPU, the Promovendus comes up with a new theory called ***Impartial Justice.***This ***Impartial Justice*** theoryis the result of analyses by the writer problems occurring in Settlement Homologationin Bankruptcy and PKPU, in which a settlement agreed upon by all parties concerned containing their rights and responsibilities (between a debtor and his/her creditors) is not binding as the Judge does not issue homologation for the settlement.

The ***Impartial Justice*** theory, according to the writer, *is about giving the things all parties deserved in line with their own rights and responsibilities in a proportional way.* This ***Impartial Justice***, according to the writer, differs from the justice theory proposed by Aristotle, the first philosopher to define the meaning of justice. Aristotle proposed that justice is about giving everyone his/her **rights**,*fiat Justitiabereat mundus*. He further divided justice into two :*first, distributive justice*, which is determined by the law maker. It covers services, rights, and goodness for all members of the community based on the principle of proportional equality.

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7 Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum,* Bandung, Nusa Media, 2015, p.77

8 An interpretation by the Promovendus on the theory of Dignified Justice put forward by Teguh Prasetyo

9 Teguh Prasetyo, *Op. Cit*., p. 52

10 Teguh Prasetyo, *Pancasila The Ultimate of All the Sources of Laws (A Dignified Justice Perspective),* The International Institute for Science, Technology and Education/ IISTE, October 2016, p. 105.

Second, corrective justice, which guarantees, monitors, and protects this distribution against illegal means. In other words, *distributive justice is based on the service provided*, whereas *corrective justice is based on the equality of rights without taking services provided into account.*

Hence, the theory of justice put forward by Aristotle only emphasized on fulfilling the rights of everyone, while the theory of ***Impartial Justice***, by the writer, *does not only fulfill rights but also ask for responsibilities from all parties in a proportional way.*

Therefore, the settlement plan agreed upon by all parties, which contains the rights and responsibilities of a debtor and his/her creditors,is a law that binds them (pactasuntservanda). It is easy to see then that the decision or a Judge not to issue settlement homologation is against the principles of consensus, pactasuntservanda, and the rights of agreement. Hence, this kind of decision does not reflect the justice principle, especially *dignified justice or treating people as humans.* This also disrespects the rights and responsibilities of all parties concerned, i.e. in breach of the ***Impartial Justice***theory put forward by the Promovendus. This way of thinking, according to the Promovendus, is a humanistic linear way of thinking. Henceforth, reconstruction of Settlement Homologationin Bankruptcy and PKPU, especially Article 159 subsection (2) and Article 285 subsection (2) of Law No.37 Year 2004 on Bankruptcy and PKPU is definitely urgent to do.

Conclusion

Elaborations and analyses in earlier chapters lead to the following conclusions that answers questions of this research, they are:

1. Settlement Homologationin Bankruptcy and PKPU has not reflected justice as decisions from the Panel of Judges in in the Court of Commerce as those decisions on rejecting settlement homologation are only based on the convictions of the judges, who only pays attention to normative conditions. In fulfilling conditions stated in Article 159 subsection (2) and Article 285 subsection (2) of Law No. 37 Year 2004 on Bankruptcy and PKPU, Judges of the Court of Commerce do not consider opinions from Supervising Judges, Curators, Registrars, and Debtor and Creditor Representatives. Moreover, Judges of the Court of Commerce do not recognize agreements in settlement between a Debtor and all Creditors or most of Creditors, despite the fact that this agreement already observes the universal principles of agreement, the principle of consensus, and the principle of pactasuntservanda. This neglecting is also against the justice for all parties involved in the settlement.

2. The decisions to waive settlement homologation by the Judges of the Court of Commerce does not reflect justice and results in breaching the *grundnorm*of both the Indonesian People and the Nation, that is Pancasila. They also neglect the rights of Debtors, Curators, Registrars, and the Supervising Judges concerned with Bankruptcy and PKPU, as they do not get legal protections, that their rights and justice are not served. This is against the principle of Dignified Justice.
3. Reconstruction of Settlement Homologationin Bankruptcy and PKPU based on Dignified Justice is carried out by adding conditions for settlement homologationin Bankruptcy and PKPU which states that settlement should be issued with homologation once it is agreed upon by the Debtor and all or some of Creditors, as this already observes the universal principles of agreement stated in Law No. 37 Year 2004 on Bankruptcy and PKPU.

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