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Protection Relevance of the Execution of Separatic Creditors Based on Pancasila Justice

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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 is the normative juridical 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 without having to go through anmaning in court, the meaning of the debtor's insolvency should be a trial in court or through anmaning regarding the debtor's ability to pay off his debt, not solely based on the analysis and views of the separatist creditors. This is clearly implicitly based on Article 28D of the 1945 Constitution of the Republic of Indonesia and automatically contradicts the value of Pancasila social justice.*

Keyword: *Protection; Relevance Pancasila Justice; Separatic Creditors.*

1. INTRODUCTION

The basic idea of Postponement of Debt Payment Obligations is basically to provide an opportunity for debtors to reorganize or restructure their business. Realignment of a business certainly takes a long time. The time given by Article 225 paragraph (4) of the Bankruptcy and Suspension 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 short period of time seemed to benefit creditors.[1]

Applications for postponement of debt payment obligations are basically just a way for debtors to avoid bankruptcy requests submitted by creditors. The large number of subjects who can apply for a postponement of debt payment obligations to the commercial court causes the limitation of legal protection for creditors to be blurred. considering the efforts to postpone debt payment obligations according to article 229 paragraph (3) of bankruptcy law and postponement of debt payment obligations states

[1] Rahman Frija, Etty Susilowati, dan Hendro Saptono, Perlindungan Hukum Bagi Kreditur Separatis Terhadap Pelaksanaan Hak Eksekutorial Dalam Kepailitan Perseroan Terbatas, *Diponegoro Law Journal*, Volume 5, No. 3, Tahun 2016, Universitas Diponegoro, p. 3-4

that in the event that applications for postponement of debt payment obligations and bankruptcy are submitted simultaneously to the commercial court, the application for postponement of debt payment obligations will be examined and decided first.[2] Therefore, the main basis for the application for postponement of debt payment obligations is the good faith conveyed by either the debtor or creditor.

Furthermore, the bankruptcy law and postponement of debt payment obligations are seen as part of regulating premature liquidation. This has an impact on the degraded confidence of domestic and foreign investors, which tends to hinder the pace of domestic investment. So far, the Supreme Court through cassation decisions has often canceled decisions on bankruptcy statements on the basis of Article 2 of the bankruptcy law and postponement of debt payment obligations because the parties that can file bankruptcy applications for state-owned enterprises (SOEs) are not in sync with the State owned Enterprises (BUMN). In addition, Article 2 paragraph (3) to paragraph (5) of bankruptcy and suspension of debt payment obligations also regulates the authority to apply for bankruptcy by the prosecutor's office, Bank Indonesia, the Financial Services Authority (OJK), and the financial department which is not a creditor.[3]

Another problem that arises is the authority of the curator. In practice, 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, which are considered too easy for bankruptcy 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 (AKPI), the Indonesian Curators and Administrators Association (IKAPI), and the Indonesian Curators and Administrators Association (HKPI). 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 debtors and creditors.

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 the Fair 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 in accordance with the principle of bankruptcy in general, namely the principle of providing benefits and

[2] Article 223 paragraph (3) of Act No. 37 Of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.
[3] Maria Gabrielle Janice Angelie Siregar, *Eksekusi Jaminan Dalam Kepailitan Pada Kreditor Separatis Ketika Ditangani Oleh Kurator,* Jurist-Diction Law Journal, Universitas Airlangga, Surabaya, Volume 1 No. 2, November 2018, p. 600.

balanced legal protection between creditors and debtors and the principle of encouraging investment and business.[4]

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 (*bigger liabilities than assets and receivables*).[5] 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 to settle the assets of the bankrupt debtor.

Examples of cases that show the irrationality of the bankruptcy conditions 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, where as 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 BUMN which are not divided into shares which require the permit of the Minister of Finance. In other words, in this context it is a state-owned company whose entire capital is owned by the state. The regulation regarding BUMN which is divided or not divided into shares is contained in Law No. 19 of 2003 concerning BUMN. In this law, BUMN which is divided into shares is in the form of Persero. Meanwhile, those that are not divided into shares are in the form of public companies. 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 clearly does not provide legal protection for BUMN Persero because anyone can go bankrupt even though the BUMN Persero is an important State asset and has an effect on the nation's and State's economy.

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 time (article 24 paragraph 2) even though cassation or reconsideration is filed against the decision (article 16 verse 1). In the event that the decision to declare bankruptcy is canceled by the court as a result of Cassation or Judicial 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 carry out is to carry out all efforts to secure the bankruptcy estate and keep all documents, documents, money, jewelry,

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[4] *Loc.Cit*

[5] R. Soejartin*, Hukum Dagang I dan II,* Penerbit Pradnya Paramita, Jakarta, p. 263.

securities and other securities by providing a receipt.[6]

This study aims to analyze and discuss issues related to the implementation of bankruptcy execution by creditors who often marginalize the position of the debtor, due to the existence of Article 55 and Article 56 of Act No. 37 Of 2004.

2. RESEARCH METHODS

This type of legal research used is normative juridical. In this normative juridical legal research, law is textually conceptualized with the norm behind the text of the legal rule.[7] The data obtained will be analyzed using qualitative analysis using the concept of legal theory and legal philosophy to answer the problem. The approach method used in analyzing data and problems is the comparative and regulatory approach. Thinking process in drawing conclusions using deductive thinking processes.

3. RESULT AND DISCUSSION

3.1. Implementation of Debtor Legal Protection for Bankruptcy Conducted by Current 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 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 Smg.[8]

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 have 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.[9]

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[6] Rizal Widiya Priangga dan Yudho Taruno Muryanto, Analisis Yuridis Sita Umum Aset Badan Usaha Milik Negara Terhadap Undang-Undang Nomor 1 Tahun 2004 Tentang Perbendaharaan Negara, *Privat Law,* Vol. V No. 1 Januari-Juni 2017, Universitas Sebelas Maret Surakarta, p.124-130

[7] Depri Liber Sonata, Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas Dari Penelitian Hukum*, Jurnal Fiat Justisia Ilmu Hukum*, Volume 8, Nomor 1, Januari-Maret 2014, p. 14

[8] Data on the Decision on Bankruptcy Cases from the Semarang Commercial Court, obtained on June 12, 2020

[9] Richardus Helmy H., Decision on the Bankruptcy Case Obtained from the Semarang Commercial Court Clerk, Retrieved on June 12, 2020.

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.[10]

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 a nature. ad hoc". This situation became even more complicated with the passing of the Supreme Court Decree Number 109 / KMA / SK / IV / 2020 concerning Enforcement of the Guidelines for Bankruptcy Case Settlement and Postponement of Debt Payment.[11] 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.[12]

Based on the description above, it can be understood that legal norms are arranged in stages and layers, and in groups, showing a legal political line.[13] 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 the existence of a community demand, both social ideals and ethical judgments, wants to be realized in a 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.[14]

3.2. The relevance of Pancasila Justice in the Protection of Debtors for the Execution of Separatist Creditors

Truth is relative to be achieved. The ultimate truth can only be reached in the realm of the Creator. Humans as part of God's creation recognize a relative truth. Truth

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[10] Imanuel Rahmani, Perlindungan Hukum Kepada Pembeli Dalam Kepailitan Pengembang (Developer) Rumah Susun, *Jurnal Hukum Bisnis Bonum* Commune, Volume I, Nomor 1 Agustus 2018, Universitas 17 Agustus 1945, p. 47-48.

[11] Luthvi Febryka Nola, Kedudukan Konsumen Dalam Kepailitan The Position Of Consumer In Bankruptcy*, Jurnal Negara Hukum*, Vol. 8, No. 2, November 2017, Dewan Perwakilan Rakyat, p. 256-257.

[12] Adi Satrio dan R. Kartikasari, Eksekusi Harta Debitor Pailit Yang Terdapat Di Luar Indonesia Dihubungkan Dengan Pemenuhan Hak-Hak Kreditor*, Ganesha Law Review*, Volume 2 Issue 1, May 2020, Universitas Pendidikan Ganesha, p. 96-97

[13] Nurfaqih Irfani, Asas Lex Superior, Lex Specialis, Dan Lex Posterior: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum, *Jurnal Lesgislasi Indonesia*, Indonesian Journal of Legislation, Volume 17, Nomer 3, September 2020, p. 307

[14] Muhtadi, Penerapan Teori Hans Kelsen Dalam Tertib Hukum Indonesia*,* Fiat Justitia *Jurnal Ilmu Hukum*, Vol. 5 No. 2 September-Desember 2012, Universitas Lampung, p. 293-294

according to man is arranged in such a way as to become the form he expects. So in theory it is known as coherence truth, correspondence truth and pragmatic truth. The truth of coherence is the truth that is considered proper because it is consistent and is related to the previous truths. Correspondence truth is the truth that is deemed appropriate if the truth material relates to the facts referred to by the statement of truth. Meanwhile, pragmatic truth is a truth that is considered feasible if it has practical uses for human life.[15]

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 (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 are also contrary to legal principles, which include:[16]

1. Principle of Balance

   This law regulates several provisions which embody the principle of balance, namely, on the one hand, there are provisions that 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:[17] 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.

2. Principles of Business Continuity

   In this Law, there are provisions that allow prospective debtor companies to continue. Therefore, applications for bankruptcy statements should only be filed against insolvent debtors, namely those who do not pay their debts to the majority creditors.

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

[15] FL. Yudhi Priyo Amboro, Adakah Kepalsuan Hukum Di Dalam Hukum Kepailitan Indonesia? (Suatu Penghindaran Terhadap Kepalsuan Hukum), *Jurnal Selat*, Vol 3 No. 2 Edisi 6 2016, p.510-522

[16] Dedy Tri Hartono, Perlindungan Hukum Kreditor Berdasarkan Undang-Undang Kepailitan, Jurnal Ilmu Hukum Legal Opinion Edisi I, Volume 4, Tahun 2016, p.1-9

[17] Adrian Sutedi, *Hukum Kepailitan*, Ghalia Indonesiqa, Bogor, 2009, p. 30

4. 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 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. This is in line with the opinion of Hikmahanto Juwana which states that:[18] 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 debt or is insolvent. This is clearly 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. So it is clear that the issue of execution,[19] bankruptcy committed by creditors injures the justice of the debtor, this is increasingly complicated by the existence of a problematic law enforcement system.

Anis stated that a breakdown in the state legal system is the smallest part, namely the execution of bankruptcy due to a law enforcement crisis. Anis firmly stated that: The destruction of the legal system has mushroomed with corruption, collusion and nepotism intertwined with the momentary interests of law enforcement officials (even bureaucratic officials).[20]

In line with the injustice in this matter Francois Geny stated that social justice can be realized through income and protection of the economic rights of an even society, in this case the right of economic protection for debtors from acts of abuse of the situation by creditors.[21]

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[18] Hikmahanto Juwana, Hukum Sebagai Instrumen Politik: Intervensi Atas Keadaulatan Dalam Proses Legislasi Di Indonesia, Disampaikan dalam orasi ilmiah Dies Natalis Fakultas Hukum Universitas Sumatera Utara Ke-50, Pada 12 Januari 2014

[19] Sri Hartini, Setiati Widhiastuti, dan Iffah Nurhayati, Eksekusi Putusan Hakim Dalam Sengketa Perdata Di Pengadilan Negeri Sleman, *Jurnal Civics* Vol. 14 Nomor 2, 2017, Universitas Negeri Yogyakarta, Yogyakarta, p. 128

[20] Bambang Tri Bawono, Anis Mashdurohatun, Penegakan Hukum Pidana Di Bidang Illegal Logging Bagi Kelestarian Lingkungan Hidup Dan Upaya Penanggulangannya, *Jurnal Hukum,* Vol XXVI, No. 2, Agustus 2011, p.590-611

[21] Ana Suheri, Wujud Keadilan Dalam Masyarakat Di Tinjau Dari Perspektif Hukum Nasional *Jurnal Morality*, Volume 4 Nomor 1 Juni 2018, Universitas PGRI Palangkaraya, p. 257.

4. 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.

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