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The Reflection of Highest Value of Islam in the Protection of Debtors in Execution of Separatist Creditors

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Abstract. *The execution by separatist creditors without going through court proceedings as regulated in Article 55 and Article 56 of Act No. 37 of 2004 is contrary to the justice of Pancasila. The method used was a non-doctrinal method. Based on the data obtained, it can be seen that the execution of bankruptcy 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 which shows that the execution of bankruptcy with collateral rights without having to go through bailing in court, the meaning of debtor insolvency should be an examination in court or through bailing related to the debtor's ability to pay off his debts, not solely based on the analysis and views of separatist creditors alone. This is clearly 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, in accordance with the view of respect for human values or human rights awards in the form of equality before the law so as to be able to realize social justice execution of bankruptcy that is able to protect the interests of separatist creditors while protecting debtors.*

Keywords: Creditor; Debtor; Execution; Halal.

1. INTRODUCTION

The basic idea of PKPU is basically to provide an opportunity for debtors to reorganize or rearrange their business[1]. Restructuring a business certainly takes a long time. The time allotted by Article 225 paragraph (4) of the Bankruptcy Law and PKPU above is considered insufficient to provide an opportunity for debtors to reorganize their business. Bearing in mind that within 45 days the debtor must complete a proposal for peace, lobbying, and business reorganization. In short, the time seemed to provide benefits to creditors.[2]

The PKPU application is basically only a way for the debtor to avoid the bankruptcy petition filed by the creditor. The number of subjects who can apply for PKPU to the Commercial Court causes the blurring of the limits of legal protection for creditors. In

[1] Binov Handitya, Redesign The Relevance Of Justice In Debtor Protection Related To Parate Executions Performed By Separate Creditors In Liability Agreements, *Jurnal Akta*, Volume 8 No. 4, December 2021;
[2]Accessed via m. Hukumonline.com/berita/baca/lt56173ed1a1cb/enam-salah-uu-bankruptcy on 27 September 2018 at 11.00 WIB.

view of the efforts of PKPU, according to Article 229 paragraph (3) of the Bankruptcy Law and PKPU, it is stated that in the event that the application for PKPU and bankruptcy is filed simultaneously at the Commercial Court, the application for PKPU will be examined and decided first.[3] Therefore, the main basis for a PKPU application is good faith submitted by the debtor or creditor.[4]

Furthermore, the Bankruptcy Law and PKPU 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 hamper the pace of domestic investment. So far, the Supreme Court through the Cassation Decision has often canceled decisions on bankruptcy statements on the basis of Article 2 of the Bankruptcy Law and PKPU because the parties who can file for bankruptcy applications for State-Owned Enterprises (BUMN) are not in sync with the BUMN Law. In addition, Article 2 paragraph (3) to paragraph (5) of the Bankruptcy Law and PKPU also regulates the authority to file a bankruptcy application by the prosecutor's office, Bank Indonesia, the Financial Services Authority (OJK), and the Ministry of Finance who are not creditors.[5]

Another issue that arises is the issue of the curator's authority. In practice, the curator's authority tends to go beyond the limit because he acts as if he were an advocate, as a result, the curator is difficult to be touched by the law. The lack of a supervisory function on the implementation of the curator's duties to monitor the integrity of the curator, the authority of the curator's responsibility and compensation for the services of the curator for bankruptcy terms which are considered too easy and the lack of protection for debtors. In this case, the debtor is the aggrieved party. In addition to adding standards and supervision to curators, it is necessary to coordinate between professional organizations that oversee curators, namely the Indonesian Association of Curators and Administrators (AKPI), the Indonesian Association of Curators and Administrators (IKAPI), and the Indonesian Association of Curators and Administrators (HKPI).[6]

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 imposed on debtors who are still solvent, (i.e. debtors whose total assets are greater than the total amount of their 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.[7]

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*

[3]Article 223 paragraph (3) of Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.
[4] Didi Sukardi, The Legal Responsibility Of Debtor To Payment Curators In Bankruptcy Situation, *Jurnal Pembaharuan* Hukum, Volume 8, Number 2, August 2021;
[5]Accessedthroughhttps://bhpsemarang.com/berita-kepalitan-dan-pkpu.html on 27 September 2018 at 10.00 WIB.
[6]Accessedthroughhttp://google.com/amp/amp.kontan.co.id/news/ruu-pailit-perketat-gerak-para-curator accessed on 27 September 2018 at 10.15 WIB.
[7] https://www. Hukumonline.com/ Pusatdata/detail/320/node/19/undangundang-nomor-4-tahun-1998/, accessed on July 4, 2019.

voorziening in geval van onvermogen van kooplieden) or are not really capable (*kennelijk onvermogen*) so that they are in a state of stopping paying back their debts. This means that the debtor is in an insolvent state (larger liabilities than assets and receivables),[8]Meanwhile, for debtors who are still solvent (the liabilities are smaller than their assets and receivables) it is better for the Curator to ask the debtor to jointly find a solution to pay off his obligations by improving management[9], for example, the Curator and the debtor conduct an independent audit to find out the debtor's problem so that the curator does not directly Perform asset settlements from bankrupt debtors.[10]

Examples of cases that show the irrationality of the bankruptcy provisions in the Bankruptcy Law are the bankruptcy cases of PT Dirgantara Indonesia (PT. DI) and the bankruptcy of PT Telekomunikasi Selular Tbk. (PT. Telkomsel). In the case of bankruptcy (PT. DI) as the debtor, where as a BUMN 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 operating in the field of public interest, the application for a declaration of bankruptcy can only be submitted by the Minister of Finance[11].

However, the explanation of the article regulates things in more detail, namely only BUMN that are not divided into shares that require the Minister of Finance's permission[12]. In other words, in this context it is a state-owned enterprise whose entire capital is owned by the state[13]. The regulation regarding BUMN which is divided or not divided into shares is contained in Act No. 19 of 2003 concerning BUMN. In that law, BUMN which is divided into shares is in the form of a Persero. Meanwhile, shares that are not divided into shares are in the form of Perum. PT DI is in the form of a Persero[14], meaning that it is divided into shares and does not require the Minister of Finance's permission to go bankrupt. This clearly does not provide legal protection for BUMN Persero because anyone can be bankrupt even though the BUMN Persero is an important State asset and affects the economy of the nation and the State.[15]

While in the bankruptcy of PT Telekomunikasi Selular Tbk. (PT. Telkomsel) according to Decision No. 48/Bankruptcy/2012/PN. Niaga.JKT.PST stated that PT. Telkomsel is proven to have a debt due which can be collected by PT Prima Jaya Informatika amounting to

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[8]Drs. contribution. R. Soejartin, Commercial Law I and II, Pradnya Paramita Publishers, p. 263.

[9] Doni Budiono, Analisis Pengaturan Hukum Acara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, *JHAPER*: Vol. 4, No. 2, July – December 2018;

[10]Loc.cit

[11] Gregorius Yoga Panji Asmara, Protection Relevance of the Execution of Separatic Creditors Based on Pancasila Justice, *Jurnal Akta*, Volume 8 No. 1, March 2021;

[12] I Ketut Gde Swara Siddhi Yatna, Ni Putu Purwanti, Perbandingan Hukum Negara Indonesia Dengan Hukum Negara Belanda Dalam Penyelesaian Perkara Sisa Hutang Debitor Pailit, *ACTA COMITAS*, Vol 5 No 2 August 2020;

[13] Ibid.

[14] Izzy Al Kautsar, Danang Wahyu Muhammad, Urgensi Pembaharuan Asas-Asas Hukum Pada Undang-Undang No 37 Tahun 2004 Berdasarkan Teori Keadilan Distributif, *Jurnal Panorama Hukum*, Vol. 5 No. 2 December 2020

[15] https://www.hlplawoffice.com/perlindungan-law-seimbang-pada-creditor-dan-debtor-bankrupt/, accessed on July 4, 2019.

IDR 5.3 billion and a number of other creditors, such as PT Extend Media Indonesia worth Rp21,031,561,274 and Rp19,294,652,520,-.[16]

In fact, as is known, the impact of bankruptcy (PT. Telkomsel) which concerns the fate of users of its products and thousands of employees who are threatened with losing their jobs just because it is so easy to go bankrupt as intended by Article 2 (paragraph) of the UUKPKPU. This makes it irrational for bankruptcy terms that do not provide legal protection for creditors and debtors in a balanced way. Telkomsel (as Debtor) which has assets and profits of trillions of rupiah as a company that is still very solvent must go bankrupt even though at the Cassation level, the Judge of the Supreme Court annulled the decision of the commercial court.[17]

With the bankruptcy decision, the Curator has the authority to manage and settle bankruptcy assets starting from the date of the bankruptcy declaration decision, which is effective starting at 00.00 local time (article 24 paragraph 2) even though an appeal or judicial review is filed against the decision (Article 24 paragraph 2). 16 verse 1). In the event that the decision on the declaration of bankruptcy is canceled by the court as a result of a Cassation or Judicial Review, all actions taken by the curator are still valid and binding on the debtor (article 16 paragraph 2). The first task that must be carried out by a curator from the start of his appointment, according to article 98, is to carry out all efforts to secure the bankruptcy estate and to keep all letters, documents, money, jewelry, securities, and other securities by providing a receipt.[18]

2. RESEARCH METHODS

The type of legal research used was non-doctrinal. In this non-doctrinal legal research, law was conceptualized sociologically as an empirical phenomenon that can be observed in life.

3. RESULTS AND DISCUSSION

3.1. Implementation of Debtor Legal Protection for Bankruptcy Performed by Current Separatist Creditors

The implementation of bankruptcy in Indonesia in its development 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 Underwriting 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 Underwriting the Obligation for Payment of Debt, in fact there are many cases of debtors who are actually still able to pay their receivables, which must be unilaterally bankrupted by the private creditor. This is shown in the case number 21/Pdt.Sus-Pailit/2019/PN Niaga SMg.[19]

[16]Journal of Law dated September 14, 2013, Subject: Juridical Review of PT.Telkomsel Bankruptcy Decision (Case Study of Decision No. 48/Pailit/2012/PN.Niaga.JKT.PST by: Robby Andrian, SH)
[17]https://www.hlplawoffice.com/perlindungan-law-seimbang-pada-creditor-dan-debtor-bankrupt/, accessed on July 4, 2019.
[18]loc.cit.
[19]Data on Bankruptcy Decisions from the Semarang Commercial Court, obtained on June 12, 2020.

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 is PT. Mulya Jaya Perkasa Cemerlang and Yohanes Setiawan were insolvent because they could not pay the 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 payments in the next period, because in this period there is no budget for debt payments, meanwhile PT. Mulya Jaya Perkasa Cemerlang has never been in arrears in paying debts to Joseph Chan Fook Onn.[20] In addition, this can also be seen in the decision of the commercial court regarding the issue of bankruptcy in the bankruptcy case that occurred in Medan with the decision No.267/Pdt.Sus-PHI/2019/PN Mdn 2025. In this decision the judge prioritized the views of the plaintiff and focused more on the debt agreement, which is clear that most of the debt agreements prioritize the interests of creditors.[21]

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

Based on the various kinds of deviations in justice that exist, it is clear that Article 2, Article 55 and Article 56 of Act No. 37 of 2004 have contradicted their preamble, and are also contrary to *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 the existing basic law, it is clear that it has violated the first point which states that "the legal system must contain regulations, meaning that it cannot contain only decisions that are ad hoc". This situation has become even more complicated with the ratification of the Supreme Court's Decree Number 109/KMA/SK/IV/2020 concerning the Enforcement of the Guidebook for Settlement of Bankruptcy Cases and Debt Payment Delays.

Based on the foregoing description, it can be understood that legal norms which are arranged in layers and layers, as well as in groups, indicate a line of legal politics. This is because the basic norms that contain social ideals and ethical judgments of society are translated and concretized into lower legal norms. This shows that there is a demand from the community, both social ideals and ethical judgments of the community to be realized in a social life through created legal norms. The legal norms which are arranged in layers and layers also indicate the existence of a synchronization line between higher legal norms and lower legal norms. This is because lower legal norms apply, originate,

[20]Richardus Helmy H., Decision of the Bankruptcy Case Obtained from the Registrar of the Semarang Commercial Court, Retrieved on June 12, 2020.
[21]Retrieved through verdict.mahkamahagung.go.id, on June 12, 2020.

3.2. The Relevance of *Pancasila* Justice in the Protection of Debtors in the Execution of Separatist Creditors

Based on the opinions of Kelsen and Nawiasky as well as 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) are in conflict with the 1945 Constitution of the Republic of Indonesia which is the Staatsgrundgesetz (Basic State Rules / Basic State Rules), and automatically also contradicts *Pancasila* which is the *Staatsfundamentalnorm* (State Fundamental Norms). Then automatically Article 2, Article 55 and Article 56 of Act No. 37 of 2004 also contradict legal principles, which include:

a. Balance Principle

This law regulates several provisions which are the embodiment of the principle of balance, namely, on the one hand, there are provisions that can prevent the abuse of bankruptcy institutions and institutions by dishonest debtors, on the other hand, there are provisions that can prevent the abuse of bankruptcy institutions and institutions by unscrupulous creditors. According to Adrian Sutedi said that:[22]

The bankruptcy law must provide balanced protection for creditors and debtors, uphold justice and pay attention to the interests of both, covering important aspects deemed necessary to realize the settlement of debt problems quickly, fairly, openly and effectively.

b. Business Continuity Principle

In this Law, there are provisions that allow prospective debtor companies to continue to operate. Therefore, the petition for a declaration of bankruptcy should only be filed against debtors who are insolvent, namely those who do not pay their debts to the majority creditors.[23]

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 justice is to prevent the occurrence of arbitrariness of the collectors who seek payment of their respective bills to the debtor, without regard to other creditors.

d. Integration Principle

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 is clearly contrary to the mandate of *Pancasila* which requires legal justice for all classes of Indonesian society, so the provisions of Article 55 and Article 56 of Act No. 37 of 2004 also contradict the Fourth Paragraph of the 1945 Constitution of the Republic of Indonesia and Article 28D of the 1945 Constitution of the Republic of Indonesia which

[22]Adrian Sutedi, 2009, *Hukum Kepailitan*, Ghalia Indonesia, Bogor, p. 30
[23]Ibid.

states that "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law". This clearly also contradicts the preamble to Act No. 37 of 2004. This is in line with the opinion of Hikmahanto Juwana which states that:[24]

Amendments to the Bankruptcy Law are very dominant with the protection of creditors. This can be seen by the existence of a condition for the existence of a debt that is past due, but in the provisions of the Bankruptcy Law there is no explicit provision which requires that it is clear and based on law 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 is a bridge in the problem of the debtor's inability to pay his debts to creditors.

Thus, the implementation of bankruptcy law in the community has clearly harmed debtors, this can be seen in various cases and court decisions related to bankruptcy as described above.

3.3. Uncovering Islamic Values in the Perspective of Debtor Protection in Bankruptcy Law in Indonesia

In Mulla Sadra's Thesis, he explains that at any time humans are always moving, both at the level of accidental and substantial. The motion as described by Aristotle aims to lead to the mover itself. Which in the theological concept is called God. Returning to Mulla Sadra, according to him, human movement is evolutionary, starting from the soul of mining, the soul of plants, the soul of animals, to the human soul. The human soul is a quality that is achieved only if in life he always behaves ethically/morally. Mulla Sadra says that humans whose lives are only limited to fulfilling their urge to eat, drink and have sex are said to only have animal souls. Mulla Sadra's explanation is in line with the hadith which says that in the hereafter when humans are resurrected, the human condition will take various forms, some resemble monkeys, pigs, dogs, snakes and others. The human model when resurrected depends on the actual soul in him when the human is living in the world. Humans whose lives are full of cunning and deceit, then in the hereafter will be resurrected like a poisonous snake, as well as humans whose lives are only for pleasure (hedonism) then he will be resurrected to resemble a pig. From Mulla Sadra's thesis, we draw the conclusion that the imperative of ethics is not only because humans are the Caliphs of God on Earth, but also goes deeper than that. Ethics/morals is the path to human perfection. For this reason, ethics is a must that must be practiced by every human being. This is where the importance of Islamic sharia institutions such as the Indonesian Ulema Council (MUI) lies. This institution should not only issue regulations and Halal certification. But this institution must intervene to educate the public about the importance of applying ethics in everyday life. The possibility of applying ethics based on regulations and halal certification, Ethics is also not only based on rules but rather on internalization. Because if it's just a rule, people don't feel the importance of ethics in their practical life. In the study of Psychology, as described by Jalaluddin Rahmat in his book Psychology of Communication. There are three compliance models. Namely obedience because of the rules, such as the obedience of subordinates to their boss, secondly obedience because of the awareness that there

[24]Hikmahanto Juwana, Law as a Political Instrument: Intervention of Sovereignty in the Legislation Process in Indonesia, Delivered in a scientific oration at the 50th Anniversary of the Faculty of Law, University of North Sumatra, on 12 January 2014.

are benefits when he obeys. Like a patient's obedience to a doctor who suggests taking medicine even though he doesn't like it. However, the patient is aware that the drug is beneficial for his health.[25]

Based on the explanation above, it is clear that halal and haram are not only related to law but also related to the parameters of an act that can be said to be appropriate and not so as to be able to realize an orderly society. The existence of the MUI and the internalization of halal and haram understanding of a service product including in terms of financial services through Islamic economic education is very urgent to oversee the realization of bankruptcy law which not only protects creditors but also debtors in a balanced manner, besides being able to provide good ethics between debtors and creditors in the receivables agreement which in the end is able to realize healthy capital growth and in the end is able to realize a healthy economy as well.

4. CONCLUSION

The implementation of legal protection for debtors in the execution of bankruptcy carried out by separatist creditors has not been able to achieve justice for debtors, due to the provisions of Article 55 and Article 56 of Act No. 37 of 2004 which require the execution of bankruptcy unilaterally by creditors without having to go through court. This is clearly far from the mandate for the provision of halal financial services as intended by Islam.

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