

The Re-Narrate the Relevance of Justice in Debtor Protection Related to the *Parate Execution* Carried Out by Separatist Creditors

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Abstract. *The existence of Articles 55 and 56 of Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the position of debtor protection in the implementation of bankruptcy carried out by separatist creditors against creditors is weak. This is due to the absence of legal remedies that can be taken by debtors during bankruptcy has been found to have happened to him. Therefore, it is necessary to have a disposition of justice in protecting debtors from the rights of separatist creditors. The implementation of bankruptcy as referred to in Article 55 and Article 56 of Act No. 37 of 2004 has not been fair to the debtor, considering that the two articles are only based on the existence of debt from the debtor and are related to the position of solvent or insolvency based on the creditor's view. This is clearly the case because Act No. 37 of 2004 does not adhere to a balance sheet test system where before being declared bankrupt, it is necessary to test the condition of the debtor whether it is really insolvent or actually still solvent. 2) The factors that have resulted in bankruptcy law so far have not been fair to debtors are legal factors, namely in the form of the provisions of Article 55 and Article 56 of Act No. 37 of 2004 which are unfair to debtors. The law even though is widely known that the door to justice in bankruptcy cases is the judge's decision. 3) It is necessary to reconstruct Article 55 and Article 56 of Act No. 37 of 2004. So that the provisions of Article 55 and Article 56 of Act No. 37 of 2004 read: Article 55 of Act No. 37 of 2004: 1) Due to observance of the provisions as referred to in Article 56, Article 57, and Article 58, each Creditor holding a lien, fiduciary guarantee, mortgage, mortgage, or other collateral right, may exercise his rights as if there had been no bankruptcy.*

Keywords: Creditor; Debtor; Execution; Protection; Separatist.

1. INTRODUCTION

In its development, the business world has become one of the cornerstones for the progress of a country's economy, hence, the progress of the business world is also highly expected in various countries. This is because business progress in a country

can support economic growth and prosperity¹. Therefore, healthy capital lending activities become an important instrument in the progress of the business world which also needs to be considered. Accounts receivable institution with collateral is the realization of this basic idea. However, not infrequently in the development of the world of capital lending and receivables, they often experience various problems, especially problems in terms of paying off receivables by the debtor. So that in order to overcome these problems, various legal regulations related to bankruptcy were born.

In Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the definition of creditor is a person who has receivables due to an agreement or law that can be collected before the court. However, in the elucidation of Article 2 paragraph (1) of Act No. 37 of 2004, the definition of creditors in this paragraph is both concurrent creditors, separatist creditors and preferred creditors. Specifically regarding separatist creditors and preferred creditors, they can apply for a declaration of bankruptcy without losing their collateral rights over the property they have against the debtor's assets and their right to take precedence².

While the debtor is a person who has a debt due to an agreement or law, the payment of which can be collected before the court.³ In addition, as for another definition of creditor and debtor, namely creditor is a bank or other financing institution that has receivables due to an agreement or law.⁴ Debtor is a person or business entity that has a debt to a bank or other financial institution due to an agreement or law.⁵ Bankrupt debtors are debtors who have been declared bankrupt by a Court Decision.

The term creditor also often gives rise to multiple interpretations. Moreover, in the era of Act No. 4 of 1998 there were 3 (three) creditors known in the Civil Code, namely as follows:

- 1) Concurrent creditors

These concurrent creditors are regulated in Article 1132 of the Civil Code. Concurrent creditors are creditors with *pai Passau* and *pro rata* rights, meaning that the creditors collectively obtain repayment (without any precedence) which is calculated based on the amount of their respective receivables compared to their overall receivables, to the entire assets of the debtor. Thus, concurrent creditors have the same position in paying off debts from the debtor's assets without any precedence.

¹ Didi Sukardi, The Legal Responsibility Of Debtor To Payment Curators In Bankruptcy Situation, *Jurnal Pembaharuan Hukum*, Volume 8, Number 2, August 2021, see to Doni Budiono, Analisis Pengaturan Hukum Acara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, *JHAPER*: Vol. 4, No. 2, July – December 2018;

² Irianto, C, Penerapan Asas Kelangsungan Usaha Dalam Penyelesaian Perkara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (PKPU), *Jurnal Hukum dan Peradilan*, Vol 4 No 3 2015 see to 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;

³ Article 1 number 2 Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

⁴ Riduan Tobink dan Bill Nikholaus, "*Kamus Istilah Perbankan*", Atalya Rileni Sudeco, 2003, Jakarta, p. 118.

⁵ *Ibid*, p. 119.

2) Preferred (privileged) creditors

Namely creditors who by law, solely because of the nature of the receivables, get paid off first. Preferred creditors are creditors who have special rights, namely a right that is granted by law to a person with a debt so that the level is higher than that of another person with a debt, solely based on the nature of the debt.⁶ To find out which receivables are privileged, see Article 1139 and Article 1149 of the Civil Code. According to Article 1139, receivables that are privileged for certain objects include:

- 1) Court fees that are solely caused by a punishment for auctioning a movable or immovable object. This fee is paid from the income from the sale of the object in advance of all other privileged receivables, even before pledges and mortgages;
- 2) The rent of immovable objects, repair costs that are the responsibility of the lessee, along with all matters relating to the obligation to fulfill the lease agreement;
- 3) Purchase of movable objects that have not been paid for;
- 4) Costs that have been incurred to save an item;
- 5) The cost of doing work on an item, which must be paid to a handyman;
- 6) What an innkeeper has thus given to a guest;
- 7) Transportation fees and additional costs;
- 8) What must be paid to masons, carpenters and other builders for the construction, addition and repair of immovable objects, provided that the debt is not older than three years and the title to the parcel in question remains with the debtor.
- 9) Replacements and payments that must be borne by employees who hold public⁷ positions, for all negligence, mistakes, violations and crimes⁸ committed in their positions.

As for Article 1149 of the Civil Code stipulates that receivables which are privileged on all movable and immovable objects in general are those mentioned below, which receivables are repaid from the income from the sale of the objects in the following order:

- 1) Court fees, which are solely caused by the auction and settlement of an inheritance, these costs take precedence over pledges and mortgages;
- 2) Burial costs, without reducing the judge's power to reduce them, if the costs are too high;
- 3) All costs of care and treatment of terminal illness;
- 4) Wages of workers during the past year and wages that have been paid in the current year, along with the amount of money for the increase in wages;
- 5) Receivables due to the delivery of food ingredients to the debtor and his family during the last six months;
- 6) Receivables from boarding school entrepreneurs, for the last year;

⁶ Article 1134 of the Civil Code

⁷ Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. *JURNAL AKTA*: Vol. 5, No. 4, 1017-1026;

⁸ Chuasanga A., Ong Argo Victoria. (2019). *Legal Principles Under Criminal Law in Indonesia and Thailand*, *Jurnal Daulat Hukum*, Vol 2, No 1 (2019);

- 7) Receivables from children who are not yet adults and people who are able to all their guardians and guardians.
- 3) Separatist creditors

Namely creditors who hold the right to guarantee in rem, which in the Civil Code are referred to as pawns and mortgages. An important right that separatist creditors have is the right to have their own authority to sell/execute the object of collateral, without a court decision (*parate execution*)⁹. These rights are for:

- 1) Pawning, is regulated in Articles 1150 to 1160 of the Civil Code which applies to movable objects. In the pawn guarantee system, a person who gives a pledge (debtor) is obliged to relinquish control over the object to be pledged as collateral to the recipient of the pledge of creditor).
- 2) Mortgages that apply to ships with a minimum size of 20 m³ and have been registered with the harbormaster and aircraft.
- 3) Mortgage rights, mortgage rights are regulated in Act No. 4 of 1996 concerning Mortgage on Land and Objects related to Land, which are guarantees for certain land rights and objects attached to the land.
- 4) Fiduciary guarantees, fiduciary rights are regulated in Act No. 42 of 1999 concerning Fiduciary Guarantees, the objects of which are pledged as collateral, mortgages and mortgages.

Based on the various explanations above, it is clear that creditors and debtors have an inseparable relationship in the world of capital in Indonesia. Although there is a relationship between creditors and debtors, in reality the rights of separatist creditors are often detrimental to the debtor in terms of determining and implementing the bankruptcy of a debtor in the world of mortgage law in Indonesia. This problem occurs due to the provisions of Article 55 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, which states that while taking into account the provisions of Article 56, Article 57, and Article 58, every creditor holds a mortgage, fiduciary guarantee, dependents, mortgages, or other collateral rights on property, may exercise their rights as if there was no bankruptcy. This statement can clearly result in unilateral execution by the creditor against the debtor even though the debtor has the ability to pay¹⁰. This is further increased by the existence of Article 56 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations which states that after the statement of bankruptcy of the debtor is made by the creditor, there is a period of 90 days for the suspension of debt payments. This means that debtors who have been declared bankrupt by creditors will suffer losses due to the confiscation of various important assets and the declaration of bankruptcy by creditors, and must experience legal uncertainty for 90 days regarding the use of their assets. So it is clear that it is necessary to discuss regarding "Reconstruction of Debtor Protection for Creditor Separatist Rights Due to Value-Based Debtor Default".

⁹ Gregorius Yoga Panji Asmara, Protection Relevance of the Execution of Separatic Creditors Based on Pancasila Justice, *Jurnal Akta*, Volume 8 No. 1, March 2021 see to 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;

¹⁰ John C. McCoid, Discharge: The Most Important Development in Bankruptcy History, *American Bankruptcy Law Journal*, Vol 70, No. 2 (1996) see to Maria Gabrielle Janice Angelie Siregar, Eksekusi Jaminan Dalam Kepailitan Pada Kreditor Separatis Ketika Ditangani Oleh Kurator, *Jurist-Diction Law Journal*, Volume 1 No. 2, November 2018;

2. RESEARCH METHODS

The approach used in writing this article is a sociological juridical approach, in which the discussion method used looks at the law not only from the perspective of the textuality of legislation, but also looks at the sociological aspects that develop in society.

3. RESULT AND DISCUSSION

3.1. Problems Existing in the Implementation of Legal Protection for Debtors from Creditor Separatist Rights Related to the Execution of Bankruptcy Conducted by Separatist Creditors against Current Debtors

Article 55 of Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations expressly states that with due observance of the provisions of Article 56, Article 57, and Article 58, each creditor holds a pledge, fiduciary guarantee, mortgage, mortgage, or collateral rights on other objects, can exercise their rights as if there was no bankruptcy.

This article has resulted in the debtor being vulnerable to bankruptcy by creditors, even though the debtor has the ability to pay his debts to creditors. Then Article 56 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states that after the declaration of bankruptcy of the debtor is made by the creditor, there is a period of 90 days for the suspension of debt payments.

This article clearly results in debtors who have been declared bankrupt by creditors will suffer losses due to the confiscation of various important assets and the declaration of bankruptcy by creditors, and must experience legal uncertainty for 90 days regarding the use of their assets. This has clearly resulted in a disposition of justice¹¹ in the implementation of legal protection of debtors from the rights of separatist creditors in the event of bankruptcy in Indonesia.

The electronic mass media site kontan.co.id stated firmly that throughout 2018 there were 411 bankruptcy cases, consisting of 297 PKPU cases and 194 bankruptcy cases. This clearly shows that there has been an increase in bankruptcy cases in 2018, in 2017 there were 353 bankruptcy cases, consisting of 238 PKPU cases and 115 bankruptcy cases.¹²

This clearly also resulted in the number of companies in the country increasing in 2018. Furthermore, kontan.co.id also noted that the higher number of companies experiencing bankruptcy were manufacturing and property companies. The number of manufacturing companies that experienced bankruptcy cases consisted of 69 PKPU cases and 17 bankruptcy cases. Meanwhile, in the property sector, there were 69 PKPU cases and 22 bankruptcy cases.¹³ Meanwhile, the corporate sector that experienced the

¹¹ 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;

¹² Anggar Septiadi, *Sepanjang 2018, Jumlah Kasus Kepailitan Melonjak*, Diakses melalui kontan.co.id, On 12 May 2019

¹³ *Loc, cit.*

most bankruptcy problems in Indonesia in 2018 was information technology companies, which were only 6 PKPu cases and 3 bankruptcy cases.¹⁴ Then kontan.co.id stated that the majority of bankruptcies were filed by separatist creditors against debtors, not from debtor restructuring requests.¹⁵

This is clearly unfair to debtors, considering that the provisions relating to debtor bankruptcy are based on the authority of separatist creditors, which even after the determination of bankruptcy has been granted for at least 20 days, the debtor is only given protection measures in the form of submitting a proposal for restructuring. However, if the debtor's restructuring proposal is rejected by the separatist creditors, the debtor cannot do much to protect the position of the bankrupt debtor. So it is clear that this situation will significantly result in a debtor experiencing losses and bankruptcy.

In addition to the problems as described above, in the implementation of bankruptcy against debtors by separatist creditors, it can also be seen in Article 2 (paragraph 1) of Act No. 37 of 2004 concerning irrational bankruptcy requirements because bankruptcy applications can be filed and bankruptcy decisions by The Commercial Court can be imposed on debtors who are still solvent, (ie 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 Law¹⁶.

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 for the interests of creditors and debtors in accordance with the principle of bankruptcy in general, namely the principle of providing balanced legal benefits and protection between creditors and debtors and the principle of encouraging investment and business.¹⁷

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 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 a state of insolvency (larger liabilities than assets and receivables),¹⁸ while for debtors who are still solvent (lower liabilities than assets and receivables) the Curator should ask the debtor to jointly find a solution to pay off his obligations by fixing the problem of management, for example the curator and the

¹⁴ *Loc, cit.*

¹⁵ *Loc, cit.*

¹⁶ Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. *Sultan Agung Notary Law Review*, 1 (1), 46-56

¹⁷ <https://www.hukumonline.com/pusatdata/detail/320/node/19/undangundang-nomor-4-tahun-1998/>, accessed on 4 July 2019.

¹⁸ Drs. Iur. R. Soejartin, *Hukum Dagang I dan II*, Penerbit Pradnya Paramita, Jakarta, 2000, page. 263.

debtor conduct an independent audit to find out the problem of the debtor so that the curator does not directly settle the assets of the bankrupt debtor.¹⁹

The various problems above have clearly resulted in the violation of the mandate of Article 2 and Article 3 of Act No. 8 of 1999 concerning Consumer Protection which states that:

Article 2

Consumer protection is based on benefits, justice, balance, security, consumer safety, and legal certainty.

Article 3

Consumer protection aims to:

- 1) Increase consumer awareness, and ability to protect themselves;
- 2) Raise the dignity of consumers by preventing them from negative access to the use of goods and/or services;
- 3) Increase the empowerment of consumers in choosing, determining, and demanding their rights as consumers;
- 4) Create a consumer protection system that contains elements of legal certainty and information disclosure as well as access to information;
- 5) Raise awareness of business actors regarding the importance of consumer protection so that an honest and responsible attitude grows in doing business;
- 6) Improve the quality of goods and/or services that ensure the continuity of the business of producing goods and/or services, health, comfort, security, and safety of consumers.

3.2. Narrate the Relevance of Justice in the Implementation of Legal Protection for Debtors from Creditor Separatist Rights Related to the Execution of Bankruptcy Conducted by Separatist Creditors against Debtors

In order to realize the implementation of legal protection for debtors from the rights of separatist creditors related to the execution of bankruptcy by separatist creditors against debtors, it is necessary to reorient justice in the bankruptcy system carried out by separatist creditors against debtors. The implementation of the reorientation of justice is carried out by²⁰:

- 1) Implement a bankruptcy system carried out by separatist creditors against debtors based on Pancasila. The first principle of Pancasila requires a balance between the realization of the values of justice, humanity, and legal certainty in order to realize humane law or based on human rights in order to realize social justice for all groups of Indonesian people in various aspects of community life, both socio-cultural, legal, political, and economy. This also includes the implementation of bankruptcy by separatist creditors against debtors which must also contain the value of balance

¹⁹ *Loc.cit*

²⁰ Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). *Code of Ethics and Position of Notary in Indonesia. Sultan Agung Notary Law Review* 2 (4), 397-407;

between justice, certainty, and legal benefit, besides that it must also contain the principles of respect and guarantee of Human Rights, so that the implementation of the bankruptcy system carried out by creditors separatism against debtors can be fair to debtors as well as creditors; and

2) In order to realize the views on the first point above, the implementation of the bankruptcy system carried out by separatist creditors against debtors must be based on a judge's decision that has permanent power and is also based on the principle of just consumer protection, and guarantees the mandate as contained in Article 2 of Act No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Responsibilities. Article 2 of Act No. 37 of 2004 basically provides pre-requisites for bankruptcy of a debtor, while the prerequisites are: 1) The debtor owes debt to at least two creditors; 2) The debtor does not pay any creditors even though the debt is due; and 3) Creditors file an application for bankruptcy to the local court. The additional condition is that bankruptcy can be filed if there has been a legal remedy outside of another court in order to reach a peaceful legal settlement between the two parties. There is a need for a re-examination regarding the notion of not being able to pay debtors' debts with good ethics to creditors.

4. CONCLUSION

The existence of Article 55 and Article 56 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, has resulted in injustice to the debtor in the implementation of bankruptcy against the debtor by the creditor. So it is necessary to reorient justice in the implementation of debtor protection in the implementation of bankruptcy against debtors carried out by creditors by implementing a debtor protection system in the implementation of bankruptcy against debtors based on Pancasila, implementing Article 2 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Payment Responsibilities. Debts by adding other prerequisites in the form of bankruptcy can be filed if there has been a legal remedy outside the court before in order to reach an amicable legal settlement between the two parties. There is a need for a reassessment regarding the notion of not being able to pay debtors' debts with good ethics to creditors.

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