

## Repositioning the Value of Pancasila Justice in Debtor Protection in the Execution of Separatist Creditors

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**Abstract.** *The implementation of executions by separatist creditors without going through court proceedings as regulated in Article 55 and Article 56 of Law Number 37 of 2004 is contrary to Pancasila justice. The method used is the normative juridical method. Based on the data obtained, it appears that the implementation of bankruptcy execution as regulated in Article 55 and Article 56 of Law Number 37 of 2004 prioritizes the interests of separatist creditors without having to go through *aanmaning* in court, the meaning of the debtor's insolvency should be an examination in court or through *aanmaning* regarding the debtor's ability to pay off his debts, not solely based on the analysis and views of separatist creditors. 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.*

**Keywords:** *Creditor; Debtor; Execution; Legal; Protection.*

### 1. Introduction

The basic idea of PKPU is to provide an opportunity for debtors to reorganize or reorganize their business. Restructuring a business certainly takes quite a long time. The time given by Article 225 paragraph (4) of the Bankruptcy Law and PKPU above is considered insufficient to provide opportunities for debtors to reorganize their businesses. Bearing in mind that within 45 days the debtor must complete the peace proposal, lobbying and business reorganization. In short, this time seems to provide benefits to creditors.<sup>1</sup>

The PKPU application is basically just a way for the debtor to avoid a bankruptcy application submitted by the creditor. The large number of subjects who can submit PKPU applications to the Commercial Court causes the boundaries of legal protection for creditors to blur. Bearing in mind the PKPU efforts according

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<sup>1</sup>Rahman Frija, Ety Susilowati, and Hendro Saptono, Legal Protection for Separatist Creditors Against the Implementation of Executorial Rights in Limited Liability Company Bankruptcy, *Diponegoro Law Journal*, Volume 5, Number 3, 2016, Diponegoro University, p. 3-4.

to Article 229 paragraph (3) of the Bankruptcy and PKPU Law which states that if the PKPU and bankruptcy applications are submitted simultaneously to the Commercial Court, the PKPU application will be examined and decided first.<sup>2</sup>Therefore, the main basis for a PKPU application is the good faith conveyed by either the debtor or creditor.

Furthermore, the Bankruptcy Law and PKPU are seen as also 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 Cassation Decisions, has often canceled decisions on declaring bankruptcy on the basis of Article 2 of the Bankruptcy Law and PKPU because the parties who can file bankruptcy petitions for State-Owned Enterprises (BUMN) are not in sync with the BUMN Law. Apart from that, Article 2 paragraph (3) to paragraph (5) of the Bankruptcy Law and PKPU also regulates the authority to submit bankruptcy applications by the prosecutor's office, Bank Indonesia, the Financial Services Authority (OJK), and the Ministry of Finance which are not creditors.<sup>3</sup>

Another issue that arises is regarding the authority of the curator. At the practical level, curators' authority tends to exceed limits because they act as if they are advocates, resulting in curators being difficult to touch by law. The lack of a supervisory function in the implementation of the curator's duties to monitor the integrity of the curator, the authority, responsibility and compensation for the curator's services, the bankruptcy conditions are considered too easy and there is a lack of protection for debtors. In this case the debtor is the injured party. In addition to increasing standards and supervision for curators, it is necessary to coordinate between professional organizations that oversee curators, namely the Association of Indonesian Curators and Administrators (AKPI), the Association of Indonesian Curators and Administrators (IKAPI), and the Association of Indonesian Curators and Administrators (HKPI).

Another main problem today can be seen in Article 2 (paragraph 1) of Law Number 37 of 2004 concerning irrational bankruptcy requirements because a bankruptcy petition can be submitted and a bankruptcy decision by the Commercial Court can be imposed on debtors who are still solvent, ( namely 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 goal of implementing the Bankruptcy Law fairly. Apart from that, Law

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<sup>2</sup>Article 223 paragraph (3) Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

<sup>3</sup>Maria Gabrielle Janice Angelie Siregar, Execution of Guarantees in Bankruptcy for Separatist Creditors When Handled by Curators, Jurist-Diction Law Journal, Airlangga University, Surabaya, Volume 1 No. 2, November 2018, p. 600.

Number 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.<sup>4</sup>

The bankruptcy requirements as referred to in Article 1 "Faillissements-Verordening" (Bankruptcy Law), which came into effect on November 1 1906, even though they only provide the possibility of filing a bankruptcy petition against a debtor who is incapacitated (Van de voorziening in geval van onvermogen van kooplieden ) or is truly incapable (kennelijk onvermogen) so that he is in a state of stopping paying back his debts. This means that the debtor is in a state of insolvency (liabilities greater than assets and receivables),<sup>5</sup> Meanwhile, for debtors who are still solvent (their liabilities are smaller than their assets and receivables), the Curator should ask the debtor to jointly find a solution to pay off their obligations by improving management. One example is that the Curator and debtor carry out an independent audit to find out the debtor's problems so that the curator does not directly carry out the settlement of assets from bankrupt debtors.<sup>6</sup>

Examples of cases that show the irrationality of the bankruptcy requirements 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 bankruptcy case (PT. DI) as debtor, where as a BUMN that operates in the public interest sector, PT DI can actually 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 public interest sector, the application for a bankruptcy declaration can only be submitted by the Minister of Finance.

However, the explanation of this article regulates things in more detail, namely that only BUMN which are not divided into shares require permission from the Minister of Finance. In other words, in this context it is a BUMN whose entire capital is owned by the state. Regulations regarding BUMN which are divided or not divided into shares are contained in Law No. 19 of 2003 concerning BUMN. In this law, BUMN which is divided into shares takes the form of a Persero. Meanwhile, those which are not divided into shares are in the form of Perum. PT DI is in the form of a Persero, meaning it is divided into shares and does not require permission from the Minister of Finance to be bankrupted. This clearly

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<sup>4</sup>Loc. cit.

<sup>5</sup>Drs. Iur. R. Soejartin, Commercial Law I and II, Pradnya Paramita Publisher, p. 263.

<sup>6</sup>Loc. cit

does not provide legal protection for BUMN Persero because anyone can be bankrupted even though the BUMN Persero is an important state asset and has an influence on the nation's and state's economy.

With the bankruptcy decision, the Curator has the authority to manage and settle the bankruptcy assets starting from the decision to declare bankruptcy from the date the bankruptcy decision is pronounced which takes effect from 00.00 local time (article 24 paragraph 2) even though the decision is submitted for cassation or judicial review (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 carried out by the curator remain valid and binding on the debtor (article 16 paragraph 2). The first task that the curator must carry out since his appointment, according to article 98, is to carry out all efforts to secure the bankruptcy assets and keep all letters, documents, money, jewelry, securities and other securities by providing a receipt.<sup>7</sup>

This research aims to analyze and discuss the issue of implementing bankruptcy executions by creditors who often marginalize the position of debtors, due to Article 55 and Article 56 of Law Number 37 of 2004.

## **2. Research Methods**

The type of legal research used is normative juridical. In this normative juridical legal research, law is conceptualized textually with the norms behind the text of the legal regulations.<sup>8</sup>

## **3. Result and Discussion**

### **3.1. Implementation of Legal Protection for Debtors in Bankruptcy by Current Separatist Creditors**

In its development, the implementation of bankruptcy in Indonesia has neglected justice for debtors. This can be seen in the provisions of Article 55 and Article 56 of Law Number 37 of 2004 concerning Bankruptcy and Coverage of Debt Payment Obligations. As a result of the provisions as intended in Article 55 and Article 56 of Law Number 37 of 2004 concerning Bankruptcy and Guaranteed Debt Payment Obligations, in reality there are many cases where debtors who are actually still able to pay their receivables have to be unilaterally bankrupted

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<sup>7</sup>Rizal Widiya Priangga and Yudho Taruno Muryanto, *Juridical Analysis of General Confiscation of State-Owned Enterprise Assets Against Law Number 1 of 2004 concerning State Treasury*, Private Law Vol. V No. January 1-June 2017, Sebelas Maret University Surakarta.

<sup>8</sup>Depri Liber Sonata, *Normative and Empirical Legal Research Methods: Typical Characteristics of Legal Research*, *Fiat Justisia Journal of Legal Sciences* Volume 8, Number 1, January-March 2014, p. 14.

by private creditors. This is shown in case number 21/Pdt.Sus-Pailit/2019/PN Niaga Smg.<sup>9</sup>

In 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 become insolvent because they cannot pay their debt to Joseph Chan Fook Onn once in arrears. If you look at this consideration, it is very unfair considering that PT. Mulya Jaya Perkasa Cemerlang still has good ethics in making requests for debt repayment in the next period, because in this period there is no budget for debt repayment, meanwhile PT. Mulya Jaya Perkasa Cemerlang has never been in arrears in paying debts to Joseph Chan Fook Onn.<sup>10</sup>

This clearly contradicts the mandate of Pancasila which requires legal justice for all groups of Indonesian society, so that the provisions of Article 55 and Article 56 of Law Number 37 of 2004 also conflict with 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, guarantees, protection and fair legal certainty as well as equal treatment before the law." This clearly also contradicts the considerations of Law Number 37 of 2004.<sup>11</sup>

Based on the various kinds of deviations in justice that exist, it is clear that Article 2, Article 55 and Article 56 of Law Number 37 of 2004 are in conflict with its considerations, and also conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia. This shows that Article 2, Article 55 and Article 56 of Law Number 37 of 2004 has no legal basis and is not based on existing basic law, so it is clear that it violates the first point which states that "the legal system must contain regulations, meaning that it must not contain mere decisions that are ad hoc." This situation has become even more complicated with the ratification of Supreme Court Decree Number 109/KMA/SK/IV/2020 concerning the Implementation of the Guidelines for Settlement of Bankruptcy Cases and Postponement of Debt Payments.<sup>12</sup>This is due to the authority given to separatist creditors to file for Bankruptcy and Postponement of Debt Payments as intended

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<sup>9</sup>Data on Bankruptcy Case Decisions from the Semarang Commercial Court, obtained on June 12 2020.

<sup>10</sup>Richardus Helmy H., Bankruptcy Case Decision Obtained from the Registrar of the Semarang Commercial Court, Obtained on June 12 2020.

<sup>11</sup>Immanuel Rahmani, Legal Protection for Buyers in the Bankruptcy of Apartment Developers, Bonum Commune Business Law Journal Volume I, Number 1 August 2018, University 17 August 1945, p. 47-48.

<sup>12</sup>Luthvi Febryka Nola, The Position of Consumers in Bankruptcy The Position of Consumers in Bankruptcy, Journal of Legal Affairs, Vol. 8, no. 2, November 2017, House of Representatives, p. 256-257.

by Article 222 of Law Number 37 of 2004. This clearly adds to discrimination in the position of debtors.<sup>13</sup>

Based on the explanation above, it can be understood that legal norms are arranged in stages and layers, as well as in groups, showing a legal political line.<sup>14</sup>This is because basic norms containing social ideals and ethical judgments of society are elaborated and concretized into lower legal norms. This shows that there is a demand from society, both social ideals and ethical judgments that society wants to be realized in social life through the legal norms that are created. These legal norms, which are arranged in stages and layers, also show that there is a line of synchronization between higher legal norms and lower legal norms. This is because lower legal norms are valid, sourced, based, and therefore must not conflict with higher legal norms.<sup>15</sup>

### **3.2. The Relevance of Pancasila Justice in Debtor Protection 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 Law Number 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 also automatically conflict with Pancasila which is the Staatsfundamentalnorm (Fundamental State Norms). So automatically Article 2, Article 55 and Article 56 of Law Number 37 of 2004 also conflict with legal principles, which include:<sup>16</sup>

#### **1. Principle of Balance**

This law regulates several provisions that embody the principle of balance, namely, on the one hand, there are provisions that can prevent abuse of bankruptcy institutions and institutions by dishonest debtors, on the other hand, there are provisions that can prevent abuse of bankruptcy institutions and

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<sup>13</sup>Adi Satrio and R. Kartikasari, *The execution of assets of bankrupt debtors located outside Indonesia is linked to the fulfillment of creditor rights*, Ganesha Law Review Volume 2 Issue 1, May 2020, Ganesha Education University, p. 96-97.

<sup>14</sup>Nurfaqih Irfani, *Principles of Lex Superior, Lex Specialis, and Lex Posterior: Meaning, Problems, and Their Use in Legal Reasoning and Argumentation*, Indonesian Journal of Legislation, Indonesian Journal of Legislation, Volume 17, Number 3, September 2020, p. 307.

<sup>15</sup>Muhtadi, *Application of Hans Kelsen's Theory in Indonesian Legal Order*, Fiat Justitia Journal of Legal Studies Vol. 5 No. 2 September-December 2012, University of Lampung, p. 293-294.

<sup>16</sup>Dedy Tri Hartono, *Legal Protection of Creditors Based on Bankruptcy Law*, Legal Science Journal Legal Opinion Edition I, Volume 4, 2016

institutions by dishonest debtors. creditors who do not have good intentions. According to Adrian Sutedi, he said:<sup>17</sup>

Bankruptcy law must provide balanced protection for creditors and debtors, uphold justice and take into account the interests of both, covering important aspects deemed necessary to realize the resolution of debt and receivable problems quickly, fairly, openly and effectively.

## 2. Principles of Business Continuity

In this law, there are provisions that allow prospective debtor companies to continue to operate. Therefore, an application for a bankruptcy declaration should only be submitted to debtors who are insolvent, namely those who do not pay their debts to the majority of creditors.<sup>18</sup>

## 3. Principles of Justice

In bankruptcy, the principle of justice implies that the provisions regarding bankruptcy can fulfill a sense of justice for the interested parties. This principle of justice is to prevent arbitrariness by collectors who seek payment of their respective bills against debtors, without paying attention to other creditors.

## 4. Principles of Integration

The principle of integration in this law implies that the formal legal system and its material law constitute a complete unit of the civil law system and national civil procedural law.

This clearly contradicts the mandate of Pancasila which requires legal justice for all groups of Indonesian society, so that the provisions of Article 55 and Article 56 of Law Number 37 of 2004 also conflict with 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, guarantees, protection and fair legal certainty as well as equal treatment before the law." This clearly also contradicts the considerations of Law Number 37 of 2004. This is in line with the opinion of Hikmahanto Juwana who stated that:<sup>19</sup>

Amendments to the Bankruptcy Law are very dominant in protecting creditors.

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<sup>17</sup>Adrian Sutedi, 2009, Bankruptcy Law, Ghalia Indonesiqa, Bogor, p. 30

<sup>18</sup>Ibid.

<sup>19</sup>Hikmahanto Juwana, Law as a Political Instrument: Intervention on Sovereignty in the Legislative Process in Indonesia, Delivered in a scientific oration on the 50th Anniversary of the Faculty of Law, University of North Sumatra, on January 12 2014.

This can be seen in the existence of a requirement for debts that are past due, but in the provisions of the Bankruptcy Law there are no provisions that expressly state 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 to the problem of debtors being unable to pay their debts to creditors.

So, the implementation of bankruptcy law in society has clearly harmed debtors, this can be seen in various cases and court decisions related to bankruptcy as explained above. So it is clear that the issue is execution<sup>20</sup> Bankruptcy carried out by creditors often harms debtor justice, this is increasingly complicated by the existence of a problematic law enforcement system.

Anis stated that there was damage to the country's legal system, including the smallest part, namely bankruptcy execution due to the law enforcement crisis. Anis firmly stated that:<sup>21</sup>

The destruction of the legal system is increasingly mushrooming due to corruption, collusion and nepotism which are intertwined with the momentary interests of law enforcement officials (even bureaucratic officials).

In line with the injustice in this issue, Francois Geny stated that social justice can be realized through equal income and protection of the economic rights of the community, in this case the right to economic protection for debtors from acts of abuse of circumstances by creditors.<sup>22</sup>

#### **4. Conclusion**

The implementation of legal protection for debtors in bankruptcy executions 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 Law Number 37 of 2004 which require bankruptcy executions carried out unilaterally by creditors without having to go through court.

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<sup>20</sup>Basically, execution can be carried out through the judiciary and an agreement between the creditor and debtor. Execution issues that marginalize the debtor's interests violate the execution mechanism which must go through a judicial determination. See: Sri Hartini, Setiati Widhiastuti, and Iffah Nurhayati, "Execution of Judges' Decisions in Civil Disputes at the Sleman District Court", Civics Journal Vol. 14 Number 2, 2017, Yogyakarta State University, Yogyakarta, p. 128.

<sup>21</sup>Anis Mashdurohatun, Criminal Law Enforcement in the Field of Illegal Logging for Environmental Conservation and Efforts to Overcome It, Law Journal Vol XXVI, No. 2, August 2011.

<sup>22</sup>Ana Suheri, The Form of Justice in Society Viewed from a National Legal Perspective, Journal of Morality, June 2018, Volume 4 Number 1, PGRI University Palangkaraya, p. 257.



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