

The Bankruptcy Legal Politics in Indonesia based on Justice Value

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Decree No. 164/E/KPT/2021

pay his debts to creditors.² With the development of time, in this case the need for changes to the Law by improving, adding, and removing provisions that are no longer in accordance with the needs and developments of law in society, the idea arose to change the existing Law into Act No. 2004 Concerning Bankruptcy and Suspension of Debt Payment Obligations.³ The bankruptcy law was then designed based on a debtor's cooperative action toward his creditors while claims' fulfilment.⁴ However, in the implementation of this law, there are still many problems. For that we need a solution to overcome it, so that what is the purpose of making the bankruptcy law itself can be achieved, namely justice for the parties.⁵

Bankruptcy is a punishment for debtors who do not want to pay their debts, as well as punishing debtors who have bad intentions to deceive and prevent creditors from collecting debtors' debts by hiding their assets. Bankruptcy is also considered a debtor's fault, because it causes a failure in his business so that the debtor is unable to pay his debts to creditors. Debtors who are unable to pay will be put in prison and their assets will be taken and then sold as repayment of their debts to creditors.⁶

A debtor can only be declared bankrupt if it has been decided by the Commercial Court.⁷ Two important articles in the Civil Code, namely Articles 1131 and 1132 regarding the debtor's responsibility for his debts,⁸ provide assurance to creditors that the debtor's obligations will still be fulfilled/paid off with a guarantee from the debtor's assets, both existing and those that will exist in the future. So, this is an embodiment of the principle of guarantee of payment certainty for transactions that have been held.⁹ Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states that bankruptcy is a general confiscation, not an individual or individual confiscation, therefore in the Bankruptcy Law it is required to apply for bankruptcy must have 2 (two) or more creditors.

In bankruptcy law, creditors are divided into three groups, namely: Separatist Creditors; Preferred Creditors; and Concurrent Creditors. Separatist creditors are

² Sonyendah Retnaningsih, Perlindungan Hukum terhadap Debitor Pailit Individu dalam Penyelesaian Perkara Kepailitan di Indonesia, *ADHAPER*, Vol. 3, No. 1, January-June 2017, p.1-16

³ Didi Sukardi, The Legal Responsibility Of Debtor To Payment Curators In Bankruptcy Situation, *Jurnal Pembaharuan Hukum*, Volume 8, Number 2, August 2021, p.142-156

⁴ John C. McCoid, Discharge: The Most Important Development in Bankruptcy History, *American Bankruptcy Law Journal*, Vol 70, No. 2 (1996), p.163-94

⁵ Niru Anita Sinaga, Nunuk Sulisrudatin, Hukum Kepailitan dan Permasalahannya di Indonesia, *Jurnal Ilmiah Hukum Dirgantara*, Volume 7 No. 1, September 2016, p.158-173

⁶ Andriani Nurdin, *Kepailitan Badan Usaha Milik Negara (BUMN) Berbentuk Persero Dikaitkan Dengan Asas Kepastian Hukum Bagi Pengembangan Perekonomian Indonesia*, (Disertasi Doktor Ilmu Hukum Universitas Padjadjaran), Bandung, 2011, p.136-137

⁷ Zaeni Asyhadie, *Hukum Bisnis; Prinsip dan Pelaksanaannya di Indonesia*, PT RajaGrafindo, Jakarta, 2005, p.226.

⁸ Rahayu Hartini, *Penyelesaian Sengketa Kepailitan di Indonesia; Dualisme Kewenangan Pengadilan Niaga & Lembaga Arbitrase*, Kencana, Jakarta, 2009, p.73-74.

⁹ *Ibid.*

Decree No. 164/E/KPT/2021

creditors who can exercise their rights as if there was no bankruptcy. Including separatist creditors, for example, holders of pawns, holders of fiduciary guarantees, mortgages, mortgages, other material collateral. The position of the debtor bankrupt by the separatist rights of creditors results in injustice, especially in terms of the legal protection of the debtor.¹⁰ Preferred creditors or creditors with special rights are creditors as regulated in Article 1139 and Article 1149 of the Civil Code. 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 who has a debt so that the level is higher than that of other creditors, solely based on nature of the debt.¹¹ Meanwhile, concurrent creditors or competing creditors are creditors who do not have privileges so that their position is the same with each other.¹²

The distribution of bankrupt assets is carried out based on order of priority, in which creditors with a higher position receive the distribution first from other creditors with lower positions, and between creditors of the same level receive payments on a pro rata basis. (*pari passu pro rata parte*). It is that property owned by a person will become a guarantee for all his creditors in which the proceeds from the collection of such assets must be distributed evenly and proportionally, except if there are creditors who must prioritize the settlement of their receivables according to law.¹³

The principles adopted in Bankruptcy and Suspension of Debt Payment Obligations are a reflection of the principles contained in Article 1131 and Article 1132 of the Criminal Code. The principle of creditorium parity is reflected in Article 1131 of the civil code which stipulates that, for objects owned by parties who have debts, movable or immovable, currently owned by them or for something that may be owned one day will be pledged as collateral for the engagement they have made.¹⁴

Article 1131 of the Civil Code regulates: "*Segala kebendaan si berutang baik yang bergerak maupun yang tidak bergerak, baik yang sudah ada maupun yang baru akan ada dikemudian hari menjadi tanggungan untuk segala perikatannya perseorangan.*" These provisions indicate that each debtor is responsible for his debts. This responsibility is guaranteed by existing and future assets, both

¹⁰ Sutrisno, Legal Protection for Debtors over Separatist Creditors' Rights Related To Bankruptcy, *Jurnal Akta*, Volume 7 Issue 1, March 2020, p.83-92

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, p.222-229

¹² Man S.Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, PT. Alumnus, Bandung, 2010, p.127.

¹³ Shubhan, *Hukum Kepailitan; Prinsip, Norma, dan Praktik di Peradilan*, Kencana Prenada Media Group, Jakarta, 2012, p.27.

¹⁴ 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, p.375-388.

Decree No. 164/E/KPT/2021

movable and immovable assets. This provision is based on principle of responsibility for debt, which is needed in an effort to provide a sense of responsibility to debtors in order to carry out their obligations, and not to harm their creditors. This principle is also intended to protect the interests of creditors, so that they are balanced with the obligations that have been carried out to debtors, namely providing loans in the form of money.¹⁵

Article 2 paragraph (1) of the Law on Bankruptcy and Suspension of Debt Payment Obligations no. 37 of 2004 stipulates: a debtor who has two or more creditors and does not pay off at least one debt that has matured and can be collected is declared bankrupt by a court decision, either at his own request or at the request of one or more creditors.¹⁶

The application of the principle of justice in adjudicating bankruptcy cases can provide impetus to judges to first see whether they can fulfill justice for the debtor from the actions of creditors who try to act arbitrarily to get the debts repaid as soon as possible. Thus, the principle of justice is very important to be considered by judges in making a bankruptcy decision by expanding the meaning of the meaning of the principle of justice as stated in the Law on Bankruptcy and Suspension of Debt Payment Obligations.¹⁷

13

The purpose of this study is to find out and analyze the politics of bankruptcy law in Indonesia based on Justice Value, and the problems that occur in its application.

21

2. Research Methods

The research method used in this study was a normative legal research method, which was also known as doctrinal research on legal principles, legal systematics, levels of vertical and horizontal synchronization to obtain secondary data covering primary, secondary, and tertiary legal materials.¹⁸ Normative legal research was research aimed at obtaining objective law (legal norms). Thus, for the depth of research analysis, several approaches were used, namely the statutory approach, which examines the norms contained in the statutory provisions, and the conceptual approach.

5

¹⁵ Man S.Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, Alumni, Bandung, 2006, p.75.

22

¹⁶ Noor Azizah, *Hukum Kepailitan Memahami Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan*, Cetakan pertama, Universitas Islam Kalimantan Muhammad Arsyad Al-Banjari Banjarmasin, 2002, p.24

¹⁷ Serlika Aprita, Penerapan "Asas Keadilan" Dalam Hukum Kepailitan Sebagai Perwujudan Perlindungan Hukum Bagi Debitor, *Jurnal Hukum Media Bhakti*, Vol.3, No.1, June 2019, p.46-56

¹⁸ Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2010, p.5

Decree No. 164/E/KPT/2021

3. Results and Discussion

3.1. Bankruptcy Legal Politics in Indonesia based on Justice Value

The regulation of bankruptcy law in Indonesia has changed several times since the implementation of the *Faillissements Verordening Stb. 1905 No. 217 jo Stb. 1906 No. 348* until the latest amendment through the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. There are several factors that encourage the need for revision of the bankruptcy regulations, namely: First, to avoid seizure of debtor's assets if at the same time there are several creditors who collect their receivables from the debtor. Second, to avoid creditors holding material security rights who claim their rights by selling the debtor's property without paying attention to the interests of the debtor or other creditors. Third, to avoid fraud by one of the creditors or the debtor himself.¹⁹

The study of legal politics is one of the most discussed studies in the executive, legislative and judicial sectors, especially for those who want to critically and comprehensively understand the specific objectives of legislation through an interdisciplinary approach.²⁰ Legal politics itself is carried out by the state, and legal policies or legal directions aimed at achieving national goals can take the form of making new laws and replacing old laws. In this sense, legal politics must be based on goals of the state and the current state legal system. In the Indonesian context, these goals and systems are stated in the Preamble to the 1945 Constitution, particularly Pancasila. This gave birth to legal guidelines.²¹

In the context of legal politics, the reasons behind the amendment to the Bankruptcy Act No. 4 of 1998 became the law in which the material contained in the Law on Bankruptcy (*Faillissement verordening Staatsblad 1905:217 juncto Staatsblad 1906: 348*) it is time for changes to be made due to developments and urgent community needs, so Government Regulation Number 1 1998 concerning Amendments to the Law on Bankruptcy, which was later determined to be Act No. 4 of 1998 needs to be replaced. The change is expected to provide guarantees and legal certainty in debt disputes in the business world. The existence of Act No. 37 of 2004 is an inseparable part of Act No. 4 of 1998 concerning Bankruptcy.²²

¹⁹ 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, p.399-418.

²⁰ Syahriza Alkohir Anggoro, Politik Hukum: Mencari Sejumlah Penjelasan, *Jurnal Cakrawala Hukum*, Vol 10 No 1 2019, p. 78.

²¹ Moh.Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, Ed.2, Rajawali Press, Jakarta, 2011, p. 5.

²² Sumurung P. Simaremare, Bismar Nasution.etc, Legal Politics of Delay Terms Debt Payment Obligations in Indonesia, *Jurnal Ius Constituendum*, Volume 6 Nomor 2 April 2021, p.99-118

Decree No. 164/E/KPT/2021

Changes in the provisions for Postponement of Debt Payment Obligations, especially with regard to the time period, approval of creditors to reach a settlement agreement proposed by the debtor, and the opportunity to cancel the settlement which has permanent legal force, is more firmly protecting the interests of creditors. In addition, the protection provided to creditors and their stake holders must not harm the interests of the debtor's stake holders. Although the Law on Bankruptcy and Suspension of Debt Payment Obligations allows an application for a declaration of bankruptcy to be submitted by only one creditor, in the interests of other creditors, the Law on Bankruptcy and Suspension of Debt Payment Obligations opens up the possibility of a bankruptcy decision being pronounced, without the approval of other creditors. It should determine that the court's decision on bankruptcy application submitted by the creditor must be based on approval of other creditors obtained at the meeting of creditors.

One of the legal protections provided by the Bankruptcy Law and Suspension of Debt Payment Obligations for creditors is the *actio paulina*. *Actio Paulina* from the beginning has been regulated in Article 1341 of the Civil Code, where this gives the creditor the right to file for cancellation of any legal action that is not required to be carried out by the debtor, either in any name that can harm the creditor.²³

Faillissementsverordening in Act No. 4 of 1998, as well as Act No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, the Court bases the approval of creditors to determine PKPU. Bankruptcy should include a fair suspension of debt payment obligations that can only be carried out by a court that specifically handles bankruptcy issues.²⁴

A debtor to be declared under bankruptcy must meet certain requirements. This requirement is stipulated in Article 2 paragraph (1) of the Bankruptcy Law which stipulates that: "A debtor who has 2 (two) or more creditors and does not pay off at least one debt that has matured and is collectible, is declared bankrupt by a court decision, either on his own application or at the request of one or more creditors. Taking into account these provisions, the requirements to be declared bankrupt through a court decision are if: (1) the debtor has two or more creditors; and (2) the debtor does not pay off at least one debt that has matured and is collectible."²⁵

The Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations aims to make

²³ Doni Budiono, Analisis Pengaturan Hukum Acara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, *JHAPER*: Vol. 4, No. 2, July – December 2018: 109–128

²⁴ Thomas H. Jackson & Robert E. Scott, "On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain," 75 Va. L. Rev. 155 (1989), p. 163.

²⁵ Syafrudin Makmur, Kepastian Hukum Kepailitan Bagi Kreditur dan Debitur Pada Pengadilan Niaga Indonesia, *Mizan: Jurnal Ilmu Syariah, FAI Universitas Ibn Khaldun (UIKA) BOGOR* Vol. 4 No. 2 (2016), p.337-368

Decree No. 164/E/KPT/2021

bankruptcy cases resolved more quickly, fairly and openly. This law also aims to provide fair protection to protect the interests of creditors and debtors. On one hand, the creditor's goal of obtaining claims for his debts can be carried out immediately, while on other hand the debtor can still be guaranteed to continue his business. The Law on Bankruptcy and Suspension of Debt Payment Obligations stipulates that the settlement of bankruptcy cases in court is not the last resort in debt settlement. To achieve this goal, the Law on Bankruptcy and Suspension of Debt Payment Obligations implements several principles in the settlement of bankruptcy cases in court. These principles include 5 (five) things, namely the principle of justice, the principle of imposing bankruptcy not as an ultimun remidium, the principle of being known to the general public (openly), the principle of quick case settlement, and the principle of simple proof.²⁶

40

In relation to the enforcement of the Indonesian Bankruptcy Law, it is necessary to enforce a just law. This is because the law is a means to achieve justice. Legal products, both statutory regulations and court decisions in their implementation, in addition to providing legal certainty and order, must also provide legal protection to the parties concerned, which are based on justice and truth. Bankruptcy Law as a legal institution in resolving debtor debt problems gives meaning as a solution to debtor debt settlement, not being used to bankrupt a business. In principle, bankruptcy is a last resort to overcome a business that is experiencing bankruptcy, so it can be said that bankruptcy is an exit from financial distress, namely as a way out of financial problems that can no longer be resolved.

The principle of justice in Bankruptcy Law implies that the provisions regarding bankruptcy can fulfill a sense of justice for the interested parties, namely creditors, debtors and stakeholders. This principle of justice is intended to prevent the arbitrariness of the collectors seeking payment of their respective claims against the debtor, regardless of other creditors.

In order for the bankruptcy law that is now being enforced to fulfill the philosophical justice aspect, namely to bring out the elements and conditions necessary for a truly fair society, it is better if only debtors who are truly insolvent can be declared bankrupt. The condition in question is a status that can empower the debtor because the amount of assets is greater than the debt and the business is still running smoothly and generating profits. From debtors with this status, the elements and conditions necessary for a truly just society will emerge, namely debtors who are dependent on lives of many people, not only for the business community, in particular stakeholders, suppliers of goods and services. , but also society in general, namely by not declaring bankruptcy against debtors who are still solvent, because of the business ventures they obtain, debtors can pay taxes, and it is very necessary for the welfare of society and the development of the country, so

²⁶ *Ibid.*

Decree No. 164/E/KPT/2021

as to create elements and conditions that are conducive to necessary for a truly just society, as stated by John Rawls.²⁷

3.2. The Problems Faced Related to Bankruptcy Law and Postponement of Debt Payment Obligations

The bankruptcy law and postponement of debt payment obligations are seen as part of regulating premature liquidation. This has an impact on degraded confidence of domestic and foreign investors, which tends to hinder the pace of domestic investment²⁸ 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 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.²⁹

In the explanation of the Law on Bankruptcy and Suspension of Debt Payment Obligations, it is expressly stated that one of the principles underlying the regulation of bankruptcy is the principle of balance. Thus, it can be said that the Law on Bankruptcy and Suspension of Debt Payment Obligations was enacted to provide balanced benefits and protection to debtors, creditors and stakeholders. Not all provisions in the Law on Bankruptcy and Suspension of Debt Payment Obligations provide equal protection to debtors and creditors. There are several provisions that cause problems, so that debtors do not get balanced protection, namely:

- According to Article 2 paragraph (1) of the Law on Bankruptcy and Suspension of Debt Payment Obligations, the conditions for bankruptcy are as follows: "*Debitor mempunyai dua atau lebih kreditor dan tidak membayar lunas sedikitnya satu utang yang telah jatuh waktu dan dapat ditagih, dinyatakan pailit dengan putusan pengadilan, baik atas permohonannya sendiri atau atas permohonan satu atau lebih kreditornya.*" Article 2 paragraph (1) of the Law on Bankruptcy and Suspension of Debt Payment Obligations does not require that a debtor who can be bankrupt is a debtor who is

²⁷ 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, p.182-192

²⁸ Gregorius Yoga Panji Asmara, Protection Relevance of the Execution of Separatic Creditors Based on Pancasila Justice, *Jurnal Akta*, Volume 8 No. 1, March 2021, p.52-60

²⁹ 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, p.600

Decree No. 164/E/KPT/2021

insolvent. A debtor can be filed for bankruptcy if it can be simply proven that the debtor has not paid off his debts that have fallen due and are collectible. The notion of not paying in full can be interpreted as unable to pay (stop paying) or not wanting to pay. The non-implementation of the insolvency test causes the debtor to be legally bankrupt even though in reality his assets are more than his debts. According to Sutan Remy Sjahdeini, bankruptcy law not only regulates the bankruptcy of debtors who do not pay their obligations to only one creditor, but debtors must be in a state of insolvency so that debtors are not financially able to pay to most or all of their creditors.³⁰

- The Law on Bankruptcy and Suspension of Debt Payment Obligations does not differentiate bankruptcy against individual debtors and corporations, whether in the form of legal entities, or non-legal entities. In Article 1 paragraph (1) in conjunction with paragraph (11) in conjunction with Article 3 paragraph (3) of the Law on Bankruptcy and Suspension of Debt Payment Obligations, it is stated that the debtor is an individual or a corporation including those in the form of legal entities or non-legal entities.
- There is no unified understanding of debtors who have good intentions, so that in considering the decision of the Commercial Court, there are many interpretations of the good faith.
- There is no time limit on right of execution for creditors for the remaining debt of the debtor which has not been paid in full, causing the remaining debt to be attached to the debtor until the debt is paid off.³¹

An amendment of bankruptcy and suspension of debt payment obligations law is an ideal solution. It needed which can adjust to the development and situation of economic activity. However, this proposal will be difficult to realize. It is because, in Indonesia, the Law's amendment process is juridical and political. This process requires a long time and queues. A concrete suggestion in dealing with these facts is that in deciding a bankruptcy application based on provisions of the bankruptcy and suspension of debt payment obligations law, it is important to have the attitude of the Judge and the Judge's conviction to consider aspects of legal protection for the Debtor.³²

4. Conclusion

Legal politics with the concept of justice in the settlement of bankruptcy cases can be interpreted as a condition where the debtor stops paying his debts that have matured so that by the decision of the Commercial Court his assets are

³⁰ Sunami, *Prinsip Keseimbangan dalam Hukum Kepailitan di Indonesia*, Ed. 2, Softmedia, Jakarta, 2010, p.318.

³¹ Sonyendah Retnaningsih, *Op.Cit*, p. 1-16

³² Theresia Anita Christiani, Legal Analysis of Bankruptcy in The Perspective of Legal Purposes, *Jurnal Pembaharuan Hukum*, Volume 8, Number 1, April 2021, p.73-85

Decree No. 164/E/KPT/2021

declared as general confiscation to be sold by the curator and distributed to creditors in a fair and balanced manner according to the proportions under the supervision of the supervisory judge. The confiscation is carried out to ensure the interests of all creditors and prevent executions that are requested by individual creditors. Bankruptcy only concerns the general confiscation of the assets of the bankrupt debtor, excluding civil rights outside of property law, civil rights, public rights and social rights in social life in society. The problem in the Law on Bankruptcy and Suspension of Debt Payment Obligations is that it does not differentiate between debtors who are unable and unwilling to pay their debts to creditors; The Law on Bankruptcy and Suspension of Debt Payment Obligations does not distinguish bankruptcy against individual debtors and corporations, whether in the form of a legal entity, and not a legal entity; There is no unified understanding of debtors with good intentions who are entitled to legal protection in the settlement of bankruptcy cases; In the event that after the end of the bankruptcy the debtor still has remaining debt, then the creditor still has the right to collect the remaining debt that has not been paid in full.

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PAGE 4

PAGE 5

PAGE 6

PAGE 7

PAGE 8

PAGE 9

PAGE 10

PAGE 11

PAGE 12
