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Research Paper

Legal Politics of Establishment of Letters and Delivery Laws of Debt Payment Liabilities

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ABSTRACT

This research aims to explain the legal policy in the formation of bankruptcy laws and the postponement of debt payment obligations. Based on the normative approach using secondary data it can be concluded that before the Law No. 34 of 2007 concerning bankruptcy and postponement of the obligation to pay debts, the problem of bankruptcy in the company is regulated in Law No. 4 of 1998 and Perpu No. 1 of 1998 which is a mere translation of *faillisementverordening* (S. 1905 No. 217 jo S. 1906 No. 348) the Dutch bankruptcy law of bankruptcy law which is less popular among Indonesian society because of its dualism meaning it originally only applies to European and Eastern groups; foreigners are not for the natives, the bankruptcy process which takes a long time, is complicated and expensive. The occurrence of the monetary crisis in Indonesia in 1998 caused many private and state companies to experience bankruptcy. To overcome the monetary crisis and at the urging of the international world, especially the International Monetary Fund (IMF), a new Bankruptcy Law was formed in addition to overcoming bankruptcy problems, protecting foreign investors in Indonesia as well as anticipating free markets in the era of economic globalization in order to achieve justice and prosperity for all Indonesians as mandated by the 1945 Constitution.

Keywords: *Legal Politics, Bankruptcy Law and Delaying Debt Payment Obligations*

INTRODUCTION

Bankruptcy means the debts that the debtors cannot pay to the creditors and the factors why they are unable to finish the debts might vary. Broadly, there are two main factors, namely external and internal. The first relates to the country's economic condition or global economy that affects financial conditions (financial distress) of the debtor business that has underwent a setback, for instance the monetary crisis that has occurred in Indonesia and in several Asian countries in 1997 and the global economic crisis in 2009.

Indonesia's economic crisis was caused by six factors. First, rapid economic growth before the crisis was driven more by investment growth and not because of efficiency and innovation. Second, most of the market value of companies listed on the capital market was determined by company's growth expectation but not by the company's real performance (current earnings stream). Third, the financial structure of the company was basically unhealthy. A number of large companies outside banking relied on loans of more than 100% compared to equity. Even though the composition of healthy external funds was generally under 50% of the equity; the company had a high resilience to the crisis. Fourth, in the process of credit disbursement, the practice of mark up

occurred, and in the end it destroyed the capital structure itself.

Fifth, there was an unhealthy economic concentration. Data in 1996 showed that the peak of the pyramid of economic structure was only filled by 200 private conglomerates (owned by approximately 50 families) and 100 large state-owned enterprises. Entrepreneurs in the middle layer were almost non-existent. Meanwhile, in the lower layers there were approximately 39 million small economic actors and cooperatives including the informal sectors. Sixth, there was an absence of good corporate governance (GCG) in the management of the company. The Booz Allen & Hamilton study in 1998 showed that Indonesia's GCG index was the lowest in East Asia, which reached 2.88, compared to Malaysia 7.72, Thailand 4.87, Singapore 8.93 and Japan 9.17.

All this caused several Indonesian businessmen could no longer pay their debts (in foreign currency) to foreign creditors. In addition, non-performing loans in domestic banks also created enormous difficulties for the national economy, especially the ability of the business world to develop its business and to fulfill its debt payment obligations to creditors. Furthermore, government policies also caused congestion for debtors to pay their debts. Like a tight money policy, a high interest rate policy was a way to control inflation, to prevent capital rush or to prevent large dollar purchases that reduced the value of the Rupiah and others. All of which caused congestion in the business process because entrepreneurs were not easy to get capital. In other forms, the high interest increaseed production costs affecting the selling price (to become more expensive). Stalled businesses did not allow entrepreneurs to keep all agreements, including to repay their debts.

The second, that is the internal factor, is the one that comes from the debtors' companies. This can be caused by mismanagement either by the companies or by lacks of financial performance and company obligation reports, of supervision over management activities by commissioners and auditors, of external incentives to encourage efficiency in the company through fair competition mechanisms, by mistakes in investment or by less competence in the market. Overcoming the company's debt problems can be done by using the bankruptcy act and delaying debt payment obligations BADDPO). The postponement of debt and bankruptcy payment obligations is expected to guarantee the security and interests of the parties (creditors and debtors). Moreover, other efforts such as debt restructuring can also be utilized.

LITERATURE REVIEW

Legal politics (LP) refers to the legal policy or official policy by the governing government about the law that will be applied either by new legal actions or by changing the previous law in order to achieve the state's objectives. Several experts argued their opinions on legal politics (see Mahfud's book).

Wahyuno said that LP becomes the basic policy that determines the direction, form, and content of the law. Radhie defined it as a statement of the will of the state authorities regarding the laws that apply in its territory and regarding the direction of the development of law.

Raharjo defined LP is the way to achieve a social and legal purpose in the community whose scope includes answers to some fundamental questions, namely 1) what goals will be achieved through the existing system, 2) what ways and which are the best felt to be used in achieving these goals, 3) when is the time and through how the law needs to be changed, and 4) can a standard and established pattern be formulated to help formulate the process of selecting goals and ways to achieve these goals well. Soedarto stated that LP is a state policy through state agencies that are authorized to set the desired regulations that are expected to be used to express what is contained in society and to achieve what is aspired. Even Soedarto reiterated that it is

an attempt to realize good regulations in accordance with circumstances and situations at a time.

Manan stated that LP can be either permanent or temporary. Permanent LP is related to legal attitudes that will always be the basis for policy formation and law enforcement, for example, there is a national legal system with legal unification or the enactment of a legal system in all parts of Indonesia. Moreover, the communities also have a very important role in the formation of law, such as customary law and other unwritten laws that are recognized as national legal subsystems as long as life is evident and maintained in community relations. While temporary LP refers to the policies that are determined from time to time according to needs. In conlusion, LP is a policy of the government to enforce or replace a law to achieve state goals.

Bankruptcy comes from the word "bankrupt" and KBBI writes that it is related to the falling (about companies etc.) went bankrupt, fell into poverty. It can also be defined as the circumstances / condition of a person or legal entity that is no longer able to pay his obligations to the debtor.

Hartono argued the "bankruptcy" comes from the Dutch language "*Failliet*" meaning a strike or congestion in payment. In French, it is called "*le faille*" referring to the person who strikes or stops paying. In English, the *bankruptcy* comes from the word "to fail" related to the failure, which is the same as "fallire" in Latin, meaning "deceiving".

Garner in Black's Law Dictionary (2000) argued that *bankrupt* is defined as "*indebted beyond the means of payment; insolvent*". This definition leads to a state of debt in terms of payment. While *bankruptcy* refers to: (1) the statutory procedure which is credited by insolvency, by which a person is relieved of most judicially supervised governance or credit; (2) the fact of being financially unable to pay one's debt and meet one' s obligations; insolvency; (3) the status of a bankruptcy declared party under a bankruptcy statute; (4) the fact of having a bankruptcy declared under a bankruptcy statute; and (5) the field of law dealing with the right and title of debtors and creditor in bankruptcy.

Such definitions are more directed to a status because of the situation where someone who owes/debtor cannot pay the debt to the creditor. To sum up, bankruptcy has three aspects: (1) two parties: the debtor and the creditor, (2) a debt, and (3) a state of stopping payment.

In case of debtor and creditor, Sjahdeini (1998) argued a debtor is a party that has an obligation to pay a certain amount of money that arises due to any reason whatsoever, whether arising from the debt agreement or arising from the law. While, the creditor is the party that has the claim or claim rights in the form of payment of a number of debts that rights arise solely from the loan agreement only.

With regard to a debt, the term is not discussed in the old bankruptcy law (Law No. 4 of 1998) so that it became a contradiction regarding the definition of debt that had been handed over to the judge's discretion. Debt is an object of an agreement or engagement that occurs between the debtor and the creditor. In the law of engagement, a debt can be interpreted as an obligation to fulfill achievements, while the achievements in article 1234 of the Civil Code can be in the form of giving something, doing something and not doing something.

The debt in the engagement law is the legal relationship between the debtor and creditor that can come from the law or from the agreement, which the debtor cannot fulfill his performance as he should. Those who cannot fulfill the performance are referred to as defaults which can be categorized as debt. From a narrow sense of debt, there are some people who interpret debt in relation to the law of borrowing and lending, whether money or goods that can be valued by money born out of an agreement.

Garner in Black's Law Dictionary argued that *debt* in English is defined as: (1)

liability on a claim, a specific sum of money due to agreement or otherwise, (2) the aggregate off all existing claims against a person entity, or state, (3) a non monetary thing that one person owes is another such as goods or services, and (4) a common law write by which a court adjudicates claims involving fixed sum.

The most appropriate consideration is that debt referring to "*Liability on a claim, a specific sum of money due to agreement or otherwise*" which is defined as a liability from a claim / bill, a certain amount that comes from an agreement or another.

With reference to a state of stopping payment, Sjahdeini (ibid) stated that the state of ceasing to pay must be in an objective condition because the financial condition of the debtor has been incapacitated (has been unable) to pay off his debts. In other words, the debtor must not just refuse to pay his debts (not wiling repay his debts) but his financial objective situation has indeed been unable to pay his debts (not able to repay his debts).

The state of stopping payment in Article 7, paragraph (1) *Faillissements-verordening* (Fv) is said: "Every party that owes (debtor) who is in a state of stopping paying his debts with a judge's decision, either at his own request or at the request of someone or more of the debtor (creditor) is declared bankrupt". What is meant by the definition of stopping payment off his debts to the creditor can be applied for bankruptcy, and this clearly leads to the condition of not willing to pay his debts (not willing to repay his debts)".

The principle condition of stopping payment is also regulated in article 2 paragraph (1) of Law No. 37 of 2004 which reads: "A debtor who has two or more creditors and does not pay in full at least one debt that has matured and can be billed, declared bankrupt by a court decision, either on his own application or at the request of one or more creditors".

Such condition also seems to be more directed towards not paying in full and not being explicitly stated about not willing to pay off his debts (not able to repay his debts). From the provisions of article 1 paragraph (1) of Fv, article 1 paragraph (1) of the old UUK, article 2 paragraph (1) of the new UUK can be seen that a debtor is declared bankrupt when he has two or more creditors or the *concorus creditorium*, has one debt that has matured and can be collected then, there is a state of stopping payment, i.e. the debtor does not pay his debts and is submitted because of the request of the debtor himself or of one or more creditors.

To determine the financial situation the debtor has indeed been unable to pay his debts, or in other words the debtor is in an insolvent condition, and this must be determined objectively and independently, based on financial audit or due to diligence carried out by an independent public accounting firm.

DISCUSSION

Legal politics in pre-establishment of bankruptcy laws and postponement of debt payment obligations

In the period before the independence, the bankruptcy law in Indonesia was divided into two: (1) for traders, it applies Book III Article 749-910 WvK entitled *Van De Voorzieningen in Geval van Onvermogen van Kooplieden* (regulation on inability of traders), and (2) those who were not traders were regulated in Book III of Chapter VII of Article 899-915 entitled: *Van den Staat van kennelijk Onvermogen* (concerning the real disability) *reglement op de Rehtverordering (Rv)* Stb. 1847-52 jo. 1849-63.

Both of these regulations had a lot of difficulties in their implementation, such as many procedures taken, high costs, too few creditors participating in the bankruptcy process and the process which took a long time. In 1905, the Fv was promulgated (S.1905-217) which consisted of Chapter I: General bankruptcy and Chapter II: Delaying the obligation of payment of debt (*Verordening op het Faillisement en de*

Surseance van Betaling voor de Europeanen in Nederlands Indie). The rules were applied for Europeans since November 1906. With the entry into force of Fv, the entire Book III WvK and Book III of the Seventh Chapter Rv. Article 899-915.

After Indonesian independence, the Article II of the Transitional Rules of the 1945 Constitution stated that "all existing State bodies and regulations were still in force as long as the new constitution had not been held according to the Constitution", then the Fv was still valid. But in its development the existence of the Fv was not well known by the Indonesians so that it did not grow in the public legal awareness.

In 1997-1998 there was a monetary crisis as well as a political crisis which caused many private and state companies, and banks to experience bad loans so they could not pay their debts so that debtors' debts increased. To overcome this, the International Monetary Fund (IMF) urged the government to change the existing bankruptcy regulations (the Fv). As a result of this pressure, Government issued Regulations for Amendment Law (PERPU) No. 1 in 1998 concerning Amendments to the Bankruptcy Law. This PERPU had minor changes and only added faithful auditing. Government regulation (PP) No. 1 in 1998 then changed to Act No. 4 in 1998 consisted of Chapter I Bankruptcy, Chapter II Postponement of debt payment obligations, and Chapter III Commercial courts.

The regulations were implemented in the forms of (1) PP No. 17 in 2000 concerning the application for a bankruptcy statement for the public interest by the prosecutor's office, and (2) PP No. 80 in 1998 concerning voting rights for creditors who had receivables of up to Rp. 10,000,000 and had the right to cast one vote.

In general, there are seven main changes in Law No. 4 in 1998 compared to Fv, such as (1) refinement of bankruptcy application terms and procedures including a definite time frame for bankruptcy application decisions, (2) addition of provisions concerning temporary actions that can be carried out by creditors for the debtor's wealth before the bankruptcy decision, (3) improvement of the functions of the curator including BHP (heritage property), (4) affirmation that bankruptcy remedies are in the form of cassation and procedures and timeframes for the legal effort, (5) there is a mechanism to suspend the implementation of the rights of separatist creditors (mortgage holders) and the legal status of the debtor's engagement made prior to the bankruptcy decision, (6) refinement about delaying obligations to pay debt, and (7) the establishment of a special court for the settlement of bankruptcy problems, namely the commercial court.

There are several weaknesses in Law No. 4 in 1998, such as (1) there is no clear understanding of debt, (2) the different interpretations of the provisions in the Law on issues lead to inconsistencies in judges' decisions, which create legal uncertainty, (3) the period of 30 days to complete a bankruptcy case is considered to be too fast and short so the judge only focuses on simple verification of the terms declared bankrupt not on the evidence, and (4) The decline in the number of bankruptcy cases at the commercial court until 2001 was only 61 cases.

Legal politics in post-establishment of bankruptcy law and postponement of debt payment obligations

The discussion of the aforementioned issues is limited to the law policy on bankruptcy law and the postponement of debt payment obligations because it is based on the opinion of Mahfud who argued that legal politics is "legal policy or official line of law that will be enforced both by making new laws and with the replacement of the old law, in order to achieve the goals of the country".

Thus, legal politics is an option about the laws that will be applied as well as the choice of laws that will be revoked or

not enforced; all of which are intended to achieve the goals of the state as stated in the opening of the 1945 Constitution. Implementation of law that shows the nature and direction of the law will be built and enforced. Law No. 34 of 2007 concerning bankruptcy and postponement of debt payment obligation was born due to economic and trade developments and the influence of globalization that hit the world. Capital owned by entrepreneurs is a loan originating from various sources from banks, investments, investors, stocks and bonds. Finally, many cause problems in the settlement of debts.

Law is a political product, so the character of a legal product changes if the political configuration that gives birth changes. Throughout the history of the Republic of Indonesia, political changes have taken place (based on periods of the political system) between democratic political configurations and authoritarian political configurations.

In line with the changes in political configuration, the character of legal products also changes. When the political configuration appears democratically, then the legal products that are produced are responsive, whereas when political configurations create authoritarian, the laws that are established are orthodox. The causality relationship applies to public laws relating to *gezagsverhouding* with different levels of sensitivity. The stronger the legal content with the problem of power relations, the stronger the influence of political configuration on the law.

Theoretically, economic development, trade, and the influence of globalization that engulf the business world today, and considering the capital owned by entrepreneurs in general, are mostly the loans originating from various sources, either from banks, investments, bond issuance or other permissible methods that have caused many problems with the settlement of accounts payable in the community. For the benefit of the business world in settling the debt problem in a fair, fast, open and effective manner, a legal instrument is needed to support it. So in October 18, 2004 the bankruptcy Law and the postponement of payment obligations no. 18 were issued.

a. TNI/Polri Faction

The TNI / Polri faction looks at the background of the discussion of the bankruptcy bill draft and the postponement of debt payment obligations, covering the following recommendations: first, the constitutional mandate of the 1945 Constitution of the Republic of Indonesia, among others, is directed at the realization of a national legal system that is carried out by the formation of new laws, specifically legal products to support the development of the national economy. One of the necessary legal facilities, namely the regulation on bankruptcy, includes the regulation on delaying obligations to pay debt. (*Faillissements-verordering staatsblad 1905: 27 junto staatsblad 1906: 348*).

Second, the experience of the monetary crisis experienced by the Indonesia as the state and the nation since mid 1997 caused difficulties in the national economy and trade. The development of world capacity was very disturbed even many entrepreneurs fell bankrupt and it was difficult to fulfill the obligation to pay debts. Third, Government regulation in lieu of Law Number 1 in 1998 concerning Amendments to the Law on Bankruptcy, were then stipulated as Law Number 4 of 1998. Amendments are made because the law on bankruptcy is a legislation act of the Indies Government, which is no longer in line with the needs and development of the legal community to settle debt payable.

b. The Bulan Bintang Party faction

This faction has made several recommendations. First, basically, bankruptcy and postponement of debt payment obligations as regulated in this Bill are two insolvency processes that have different objectives, namely; on the one hand, bankruptcy which is concerned with

the debtor's wealth is liquidated to pay the creditor's claim. On the other hand, the payment delay gives the settlement for the debtors while against the demands of creditors to reorganize and continue business activities that ultimately satisfy the demands of the creditors. Therefore, according to the UN faction, the existence of the Law on bankruptcy and the postponement of debt payment obligations will certainly become a legal basis for a transparent judicial process, so that it can guarantee justice, legal certainty, and legal protection in settling debts between debtors and creditors, so in turn, it will further enhance investor's confidence (as the creditors) to invest in Indonesia.

Second, the substance of the process of insolvency on the finances of a company or individual regulated in the bill brings juridical consequences to the judicial process which will be more selective in case hearings, considering the process of applying for bankruptcy statements is not merely seen from the interests of creditors, but also submitted by authorized institutions according to the business scope of the debtor. This kind of arrangement shows the existence of the principle of balance in the framework of providing legal protection to all parties concerned with the settlement of accounts payable, so that the debtor becomes more responsible in carrying out his business.

Third, in order the goals to be desired by the people as stated in the formulation of this Act, the Government should immediately disseminate information to the community, academics and business professionals, and law enforcement officials to have a common understanding on the substance regulated by this Law later.

There are several factors that need to be regulated regarding bankruptcy and postponement of debt payment obligations, for instance, (1) avoiding the seizure of debtor's property if, at the same time, there are several creditors who collect their receivables, (2) avoiding creditors of the collateral rights holders to sell debtor's goods without regard to the interests of the debtor or other creditors, and (3) avoiding the shortcomings committed by creditors or debtors themselves.

The purposes of bankruptcy law according to Levinthal (in Jordan *et al*.) are related to (1) ensure equal distribution of debtor assets among its creditors, (2) prevent debtors from committing actions that are detrimental to the interests of creditors, (3) provide protection for debtors who have good intentions from creditors by obtaining debt relief.

Radin (in Jordan *et.al*) argued the purpose of all bankruptcy laws is to provide a collective forum to sort out the rights of various collectors against the assets of a debtor that has insufficient value.

Sjahdeiny stated about several purposes of bankruptcy law: (1) to protect concurrent creditors to obtain their rights in connection with the application of the guarantee principle in the Article 1131, (2) to ensure that the distribution of debtor's assets kept by creditors is in accordance with the principle of *pari passu* (dividing proportionally the assets of the debtor to the concurrent creditors) as stated in Article 1132 of the Civil Code, (3) to prevent the debtor from committing an act that is detrimental to the interests of the creditor, (4) to provide protection to debtors with good intentions to obtain debt relief. In the bankruptcy law of the US financial fresh start is only given to individual debtors not to legal entities, (5) to punish the management because its negligence caused the company to experience a bad financial condition so that the insolvency and bankrupt companies happened, and (6) to give the opportunity to debtors and creditors to negotiate on debt restructuring.

Debtors' debt restructuring in the Indonesian bankruptcy law is called the postponement of debt payment obligations (PKPU). In substance, Law no. 37 of 2004 has 7 Chapters and 308 Articles consisting of Chapter I: General provisions, Chapter II: Bankruptcy, Chapter III: Delaying debt payment, obligations, Chapter IV: Request

for judicial review, Chapter V: Other provisions, Chapter VI: Transitional provisions, and Chapter VII: Closing provisions.

RESULTS

At the time of the establishment of Law No. 37 in 2004 there are several key notes:

1. The problem of legal certainty

In recent years the threat of bankruptcy has become a scourge for the business world. Ironically, this threat also happens in businesses that fall into the healthy category. The state sees that if a company is going to be bankrupted, the company must prove that the company is truly unable and unwilling to repay its debts. In implementing the PKPU's bankruptcy and law, it is hoped that this will become a point of concern for the government, especially for law enforcement, so that the business world can obtain legal certainty in its efforts. If legal certainty is enforced, investors will also be tempted to come to Indonesia.

2. Quietness in business

In connection with the implementation of Article 2 of the bankruptcy law relating to insurance debtors, all insurance companies in Indonesia are under the auspices of the Ministry of Finance. But doubts arise about the independence and objectivity of the Minister of Finance, especially with regard to "exclusive rights" which only the Minister has, which can lead to a new "collusion" between insurance companies that try to avoid bankruptcy and the Minister.

On the other hand, there are concerns that insurance companies will act "arbitrarily" in paying for the rights and interests of the public and insurance policy holders, because they feel "immune from the law". If that happens, legal uncertainty is re-created and efforts to increase the confidence of investors and the Indonesian people in insurance products will be increasingly difficult, likewise in other business activities. Therefore, it is requested that there is certainty and calmness to try so that people's trust is immediately restored.

3. Synchronize with other Laws

The implementation of this Law must always confirm with other laws, for example, about insurance issues and then about the meaning and spirit of Law No. 2 in 1992 concerning insurance business. Because, the Law No. 2 in 1992 which was amended by Law No. 40 in 2014 explained that the application for bankruptcy statements against insurance companies in Article 20 Paragraph (1) of Law No. 2/1992 specifically regulates bankruptcy applications against an insurance company.

4. Request for bankruptcy

Proposing that any application submitted through Bank of Indonesia, BAPEPAM and the Ministry of Finance will automatically open an investigative step against the company suspected of default and seek a settlement before the bankruptcy application is filed. This application for bankruptcy has only been submitted if the stages of punishment given as a result of the company's mistakes do not also provide a good solution, or even considered to be detrimental to the public interest, including creditors.

Changes to the bankruptcy law in Indonesia are urgently needed because Indonesia needs a new legal product to support the national economy. The experience of the monetary crisis experienced by Indonesia since mid-1997 caused difficulties to the national economy and trade. The law on bankruptcy which is a law legacy of the Dutch East Indies Government which is no longer in line with the needs and development of community law to settle debts becomes the legal basis for a transparent judicial process, so as to ensure fairness, legal certainty and legal protection in the settlement of debt disputes between debtors and creditors and is able to provide legal certainty and legal protection

in resolving debt disputes and to overcome the problem of debt disputes that are increasingly complicated and complex in line with the development of the economy in the globalization era.

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