

The Government's Role in Legal Protection of Bankrupt Creditors

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ABSTRACT

The government has issued several Laws and Regulations - Invitations to overcome the economic impact of Covid-19 due to the increasing number of bankruptcies and Suspension of Debt Payment Obligations (DPO-PKPU) in court. Therefore, the government issued a policy through Financial Services Authority (FSA-OJK) Regulation Number 48/POJK.03/2020 of 2020 concerning Amendments to FSA Regulation Number 11/POJK.3/2020 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Corona Virus Disease 2019. However, previously the government had issued Law Number 37 of 2004 concerning Bankruptcy and PKPU as a form of legal protection for Bankruptcy, especially recently since Indonesia experienced the Covid-19 pandemic. In general, the economy has not been comprehensively resolved, so creditors and debtors, in solving their problems, prefer to carry out legal settlements through Bankruptcy and PKPU. In this study, there are several problems, namely, 1) What is the role of the government towards creditors under the Law on Bankruptcy and PKPU; 2) What forms of legal protection arrangements are provided for Bankruptcy? This research method uses normative or doctrinal juridical research, namely legal research that is based on or refers to the application of legal norms or norms contained in the Legislation - Invitation concerning the role of government in legal protection of Bankruptcy based on the Bankruptcy Act and PKPU.

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I. Introduction

The Government of the Financial Services Authority (FSA) has issued several regulations to address the economic impact of the Covid-19 pandemic. One of them is the policy on Stimulus and Relaxation of Provisions Related to Issuers or Public Companies and the approach of optimizing economic acceleration. The Covid-19 virus outbreak has been a tremendous blow to the business world. Many companies are slowly going bankrupt. The number of Delays indicates it in Debt Payment Obligations (PKPU) until bankruptcy concerns business actors and the government [1].

This data refers to the Information System for Tracing District Court Cases in Five Commercial Courts as of August 2021 [2]. The implementation of Law Number 37 of 2004 concerning Bankruptcy and PKPU has significantly increased. It has created legal problems and will result in the non-fulfillment of maturing obligations. A Bankrupt is someone who can no longer pay his debts [3]. "The state of being unable to pay its debts is due to financial distress (financial distress from the debtor's business that has experienced a decline" [4].

Meanwhile, "bankruptcy is a general confiscation of all assets of the Bankrupt Debtor whose management and the curator carry out a settlement under the supervision of the Supervisory Judge" [5]. "Bankruptcy is a way to get out of the debt problem that stifles a debtor, where the debtor no longer can pay debts to his creditors" [6]. Therefore, the government is obliged to provide legal protection for Bankruptcy. The law becomes the right of every citizen and, as best as possible, must be implemented. "Indonesia as a state of the law is contained in Article 1, Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, in its fourth" (4) amendment, which states, "Indonesia is the State of Law" [7], Legal protection be given to creditors to claim their rights to the debtor.

Creditors are people who have receivables due to agreements or laws that can be collected in court [8]. The creditors are concurrent, separatist, and preferred creditors [9]. According to Herawati Poesoko, the provisions of Article 1131 of the Civil Code are general guarantees or guarantees born from laws that protect all creditors in the same position, "paripassu pro parte rata." Therefore each creditor enjoys such a public security right. The provisions of this article are a universal principle contained in every legal system of guarantees in every country [10]. The creditor bears the risk of Bankruptcy because the debtor does not only result in one creditor whose receivables are due and collectible. It also applies to creditors whose receivables are not yet scheduled. As a result, all debts become due, and all business transactions with debtors are frozen or terminated unless expressly stipulated by the Bankruptcy Law and the PKPU to continue. Bankruptcy conditions require creditors to register their claims with the curator to be matched so that they can be paid from the bankruptcy estate [11]. Especially regarding separatist and preferred creditors, they can apply for a declaration of Bankruptcy without losing the collateral rights to the property owned by the debtor's assets and their right to take precedence [12; 13]. Based on the description above, the problems regarding the legal protection of bankrupt creditors and the government's role in protecting creditors by enforcing Law Number 37 of 2004 concerning Bankruptcy and PKPU.

Based on the above description that has been stated, several problems can be formulated as follows: a) What is the role of the Government towards Creditors under the Bankruptcy Act?; b) What are the forms of legal protection arrangements provided for Bankruptcy?

II. Methods

The research method used in this study is a normative juridical research method. "This research method is often referred to as doctrinal legal research, namely legal research based on or referring to the application of legal rules or norms contained in legislation or positive law" [13; 14; 15]. This research method was chosen because the object of the study is a study of Law Number 37 of 2004 concerning Bankruptcy and PKPU, which are related to Bankruptcy, to provide a clearer picture of the government's role in the legal protection of Bankruptcy

III. Result and Discussion

A. *The Government's Role in Bankruptcy Based on the Bankruptcy Law and PKPU*

One of the legal products from the government that guarantees legal certainty, fair law enforcement, and protection is that the government, through a policy issued by "presidential decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster" [17]. Most business sectors, especially micro, small, medium, and large, experienced various financial difficulties, primarily due to the decline in market demand and the ability to run a business, which gave rise to the potential for Bankruptcy. In this case, the government is willing to do so through the issuance of Financial Services Authority Regulation Number 48/POJK.03/2020 of 2020 concerning Amendments to FSA Regulation Number 11/POJK.03/2020 concerning National Economic Stimulus as a countercyclical Impact of the Spread of Corona Virus Disease 2019 as part of National Economic Recovery program. With various policies that have been carried out, the government continues to mitigate the impacts arising from Covid-19, including the increasing number of Bankruptcy and PKPU, especially in times of emergency. The number of cases of companies declared bankrupt by the court [18]. In such conditions, the government considers the option of a temporary policy (temporary measures) moratorium or postponement of filing a bankruptcy application. The PKPU supports debtors and creditors in solving the problem together. Another form of the government's role is to enforce Law No. 37 of 2004. "Initially aiming to protect creditors by providing a clear and sure way to settle unpaid debts, and in later developments, this law also aims to protect debtors by providing a way to settle their debts without paying them in total so that their business can bounce back without the burden of debt" [19]. A quick resolution of this bankruptcy problem will significantly help to overcome the uncertain situation in the economy [20] because the purpose of Bankruptcy is to maximize the economic returns of existing assets for creditors as a group by increasing the value of assets pooled for the rights of creditors to be exchanged.

Who can be declared bankrupt is a debtor (debt) who has been declared unable to pay his debts anymore. For those who can be declared Bankrupt as follows: a) The debtor's application; b)

Application of one or more creditors; c) Bankruptcy must be by the commercial court verdict; d) Bankruptcy may be at the request of the Prosecutor's Office in the public interest; e) If the debtor is a bank, the application for Bankruptcy shall only be submitted by Bank Indonesia; f) "If the debtor is a securities company, stock exchange, clearing and guarantee institution, depository institution and the settlement of bankruptcy applications can only be submitted by the Capital Market Supervisory Agency (Bapepam); and g) If the debtor is an insurance company, reinsurance company, pension fund or state-owned enterprise operating in the public interest, the application for a declaration of bankruptcy can only be submitted by the Minister of Finance" [21].

B. Forms of Legal Protection Arrangements Provided for Bankruptcy

Creditors are "people who have receivables due to agreements or laws that can be collected before the court" [22]. The form of legal arrangements to protect the rights of Bankruptcy before 1998 bankruptcy and PKPU is regulated in bankruptcy regulations promulgated in the 1905 Staatblad, no. 217 jo 1906 Staatblad, no. 348. In its development, Bankruptcy and PKPU regulations have existed for a long time, and many weaknesses are used as loopholes to be misused by bankruptcy institutions in business. These weaknesses, among others, relate to the bankruptcy requirements and the period for the bankruptcy settlement process, both regarding the settlement process in court and on the curator's part [23]. Some of the material no longer follows the community's legal needs. Therefore, the government changed it by issuing Law No. 37 of 2004 concerning Bankruptcy and PKPU. This law regulates filing for Bankruptcy. A bankruptcy filing was an application for a bankruptcy examination by the authorized parties. Article 3, Paragraph (1) of the Bankruptcy Law and PKPU states, "The decision on the petition for a declaration of bankruptcy and other matters related and regulated in this law, shall be decided by the court whose jurisdiction covers the area of legal domicile of the debtor." The application for a declaration of Bankruptcy is submitted to the Head of the Commercial Court.

In addition to being regulated by the Bankruptcy Law, several Laws and Regulations regulate Bankruptcy, including a) Regulated in the Civil Code; b) It is regulated in the Criminal Code; c) Law Number 37 of 2004 concerning Bankruptcy and PKPU; d) Law Number 4 of 1996 concerning Mortgage Rights.

The form of regulation on the legal protection of creditors' rights provided by bankruptcy law is that the creditor submits the cancellation of the legal act committed by the debtor and is given one year, as contained in Article 1341 of the Civil Code [24]. Then, to defend the bankruptcy estate, cancellation of all legal actions of the debtor that have been declared bankrupt can be requested, which is detrimental to the creditor's interests before the declaration of Bankruptcy. It is regulated in Article 41, Paragraph (2) of the Consumer Protection Act (CPA) and PKPU, which states, "cancellation can only be carried out if it can be proven that at the time the legal action was carried out, the debtor and the party with whom the legal action was carried out knew or should have known that the legal action was committed, will result in losses for creditors." Bankruptcy and PKPU provide legal protection for creditors, one of which is the Actio Paulina. The Actio Paulina provision occurs when a creditor gets into trouble with the debtor, and the creditor wants to apply for the cancellation of the debtor's legal actions that are not required and can harm the creditor regarding the element of the debtor not having good faith. Creditors in the event of Bankruptcy, the act of one or more creditors trying to collect their debts during the bankruptcy examination process is in progress, and the debtor's actions to pay these claims without regard to other creditors, including creditors who submit applications for bankruptcy statements that are being processed by the court and will undoubtedly be detrimental other creditors.

The types of creditors are people who have bills to other parties for their receivables. Three (3) types of creditors are known in the legislation: a) Preferred Creditors are creditors with privileges or priority rights. So that preferred creditors can pay off their receivables first because they have prior benefits based on the nature of their receivables. Special requests are regulated in Article 1134 of the Civil Code, which states, "A privilege is a right granted by law to a debtor which causes him to have a higher position than others, solely based on the nature of the receivable. Pawns and Mortgages are superior to privileges, except in cases where the act expressly stipulates the opposite" [25]; b) Separatist Creditors are Creditors who hold material security rights. It is regulated in Article 138 of the UUK and PKPU. It states that "creditors whose receivables are guaranteed by material guarantees can request to be granted the rights of the concurrent creditors on the part of the

receivables without prejudice to the right to take precedence over the objects that become collateral for their receivables" [26], and c) Concurrent creditors are creditors who do not hold material security rights. However, concurrent creditors have the right to collect debtors based on the availability of the estate asset. However, concurrent creditors get the most recent repayments in settlement of receivables after the preferred and separatist creditors have paid off their receivables [27]. It is regulated in Article 1132 of the Civil Code.

Based on the three types of creditors above, they have different levels and settlement processes in the bankruptcy process so that creditors can understand their legal position and how it is resolved in court.

IV. Conclusion

The government's role in Bankruptcy and PKPU during the Covid-19 pandemic in 2020- 2021 pays serious attention to business actors who cannot continue their business due to the economic impact of the Covid-19 pandemic led to bankruptcy cases and PKPU. Debtors no longer have the ability to pay debts to their creditors, with the government's policy issuing FSA Regulation No.48/POJK.03/2020 of 2020 concerning Amendments to "FSA Regulation Number 11/POJK.3/2020 concerning National Economic Stimulus as Countercyclical Policy Impacts on the Spread of Corona Virus Disease 2019. Previously, Law Number 37 of 2004 concerning Bankruptcy and PKPU has already existed as a legal basis for creditors to apply for bankruptcy". The form of legal protection arrangements provided to creditors and their stakeholders is one of them with the Actio Paulina, which was regulated earlier in article 1341 of the Civil Code. It gives creditors the right to file for cancellation of any legal action that is not required to be carried out by the debtor, whether under any name which can harm creditors but with Law Number 37 of 2004 concerning Bankruptcy and PKPU. It is determined that the application for Bankruptcy submitted by creditors must be based on the availability of another creditor. There needs to be a revision of the Bankruptcy Law and PKPU, which can regulate the submission of a bankruptcy application by one of three (3) types of creditors so as not to harm other creditors, and in making decisions must be based on the availability of another creditor.

References

- [1] Hofmann, Erik, and Calvin Klein. "Working Capital Management Study 2021–In search of the new normal." (2021).
- [2] Ismail, Atika. "Analisis Alternatif Restruturisasi Utang Atau Penutupan Perusahaan Pada Pandemi Covid-19 Melalui Pkpu, Kepailitan Dan Likuidasi." *Jurnal Kepastian Hukum dan Keadilan* 3, no. 1 (2022): 44-57.
- [3] Biddle, Gary C., Mary LZ Ma, and Frank M. Song. "Accounting conservatism and bankruptcy risk." *Journal of Accounting, Auditing & Finance* 37, no. 2 (2022): 295-323.
- [4] Hunter, R. J., and John H. Shannon. "Managing Financial Stress for Debtors and Creditors in the Midst of a Pandemic Part II: Bankruptcy." *International Journal of Business Management and Commerce* 5, no. 3 (2020): 1-13.
- [5] Siregar, Horman. "Peace (Homologation) In Bankruptcy After The Debtor Is Declared In Bankrupt Because Peace (Homologation) In PKPU Is Not Accepted." *Awang Long Law Review* 4, no. 1 (2021): 103-109.
- [6] Guzman, Martin, and Joseph E. Stiglitz. "1. Creating a Framework for Sovereign Debt Restructuring That Works." In *Too little, too late*, pp. 3-32. Columbia University Press, 2016.
- [7] Tibaka, Leli, and Rosdian Rosdian. "The Protection of human rights in Indonesian constitutional law after the amendment of the 1945 constitution of the republic of Indonesia." *FIAT JUSTISIA: Jurnal Ilmu Hukum* 11, no. 3 (2017): 266-288.
- [8] Danendra, Ravi, I. Gusti Ayu Ketut Rachmi Handayani, Abdul Kadir Jaelani, and Fatma Ulfatun Najicha. "Legal Protection Of Non Wage Workers'rights After Omnibus Law." *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 8, no. 1 (2021): 85-99.
- [9] Devi, Ria Sintha, Nanci Yosepin Simbolon, Lestari Victoria Sinaga, and Muhammad Yasid. "The Bankruptcy Legal Politics in Indonesia based on Justice Value." *Jurnal Pembaharuan Hukum* 8, no. 2 (2021): 142-156.

- [10] Ortoleva, Stephanie. "Inaccessible justice: Human rights, persons with disabilities and the legal system." *ILSA J. Int'l & Comp. L.* 17 (2010): 281.
- [11] Dewi, Mahayu Yustisia Kartika, and A. Tulus Sartono. "Position of Depositors in the Bankruptcy of Multidana Savings and Loans Cooperative in Ambarawa."
- [12] Baso, Fatihani, Ayu Kholifah, and Andi Novita Mudriani Djaoe. "Analysis Of The Balance Of Interest Protection Of Debtors And Credibtors In The Bankruptcy Law." *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 8, no. 2 (2021): 1-12.
- [13] Murniati, Rilda, and Desma Cahya Selvy. "Separatist Creditors vs Preferred Creditors Rights in the Bankruptcy Case Based on the Decision of Constitutional Court of 2013." *Fiat Justisia: Jurnal Ilmu Hukum* 13, no. 3 (2019): 231-240.
- [14] Hutchinson, Terry. "Doctrinal research: researching the jury." In *Research methods in law*, pp. 15-41. Routledge, 2013.
- [15] Baude, William, and James Y. Stern. "The Positive Law Model of the Fourth Amendment." *Harvard Law Review* (2016): 1821-1889.
- [16] Budianto, Agus. "Legal Research Methodology Reposition in Research on Social Science." *International Journal of Criminology and Sociology* 9 (2020): 1339-1346.
- [17] Kresia, Kresia, Nada Rahmahnia Handriyana, and Nabilla Rahmadina Hariyanti. "The Juridical Implications of National Covid-19 Disaster on National Security." *IN-PROLEGURIT* 1, no. 1 (2021): 410-421.
- [18] Mackevičius, Jonas, Ruta Šneidere, and Daiva Tamulevičienė. "The waves of enterprises bankruptcy and the factors that determine them: the case of Latvia and Lithuania." *Entrepreneurship and Sustainability Issues* 6, no. 1 (2018): 100-114.
- [19] Pertiwi, Madayuti, Efa Laela Fakhriah, Isis Ikhwansyah, Bernard Nainggolan, and Agus Budiman. "The Function of Peace in Delay in Obligations Debt Payment to Prevent Bankruptcy in the Settlement of Company Debt Disputes in Indonesia." *Review of International Geographical Education Online* 11, no. 9 (2021).
- [20] Jobst, Andreas, Peter Kunzel, Paul Mills, and Amadou Sy. "Islamic bond issuance: what sovereign debt managers need to know." *International Journal of Islamic and Middle Eastern Finance and Management* (2008).
- [21] Dwi Pangestu, Puja. "Actio Pauliana as the Rights Protection Efforts for Creditors in the Bankruptcy Case." *J. Priv. & Com. L.* 3 (2019): 26.
- [22] Fahren, Fahren, Sunarmi Sunarmi, Tan Kamello, and Budiman Ginting. "The Role of the IMF in encouraging the Reform of Indonesia's Bankruptcy Law (Legal Analysis of Bankruptcy Decisions in the Commercial Court)." In *International Conference Communication and Sosial Sciences (ICCOMSOS)*, vol. 1, no. 1. 2020.
- [23] Singadimeja, Holyness, Rai Mantili, and Ema Rahmawati. "The Implementation of Legal Certainty Principles in the Reporting Process of Debtor Bankruptcy Settlement by Curator to Supervisory Judge in Bankruptcy Practice." *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 5, no. 3 (2018): 506-526.
- [24] Iriyani, Dewi. "The Status of Debtor and Creditor in the Process of Deferment of Debt Payment Obligation (DDPO) in the Perspective of Debt Agreement and Bankruptcy Law in Indonesia." *JL Pol'y & Globalization* 79 (2018): 91.
- [25] Przeska, Tina. "The legal status of the mortgage creditor and the mortgage debtor." *Collection Papers Fac. L. Nis* 70 (2015): 657.
- [26] Badriyah, Siti Malikhatun, Siti Mahmudah, Amiek Soemarmi, and Yos Johan Utama. "Juridical Implications of Bankruptcy on Debtor's Property as a Business Entity CV." *Systematic Reviews in Pharmacy* 11, no. 12 (2020).
- [27] Rinaldo, Alfitra, and Indra Afrita. "Juridical Review Against Rejection Of Peace In The Case Of Bonded Company." *JILPR Journal Indonesia Law and Policy Review* 2, no. 2 (2021): 133-150