

## **The Fulfillment Of Worker's Rights In The Process Of Bankrupt Estate Clearance**

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**Abstract:** This research aims at discovering the fulfillment of worker's wage in bankrupt estate clearance process and the legal protection of worker's wage in bankrupt estate clearance process. The research is conducted with data collected using interview and documentation. The method used is juridical-normative one directed towards regulations of law (statute approach) using case approach. The research result indicate that since law is made for human, rather than for objects or other goods such as security from the secured creditor and the state with its taxes, it is therefore quite fair if the fulfillment of worker's rights is prioritized over other bills.

**Keywords:** Worker's Rights, Bankrupt Estate, Company

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### **I. INTRODUCTION**

In their journey, a company does not always have stable growth. It may even go bankrupt. Bankruptcy according to Article 1 Point (1) of Law Number 37 Year 2004 concerning Bankruptcy and Delayed Obligation to Repay Debts is a general seizure of a bankrupt debtor's wealth the settlement and clearance of which are done by a receiver under the monitoring of a supervisory judge. Bankrupt is a condition under which a debtor fail to make payments for his/her creditors' debts. The state of failing to pay is usually because of the financial distress of the debtor's business which has declined. Under such circumstance, in addition to having difficulty in repaying the debts to creditors, the company also finds it hard to fulfill the labor/worker's rights. Therefore, a set of legal instruments is needed to govern the fulfillment of labor/worker's rights when the company goes bankrupt.

A company's bankruptcy is a corporate legal phenomenon feared the most by both the company's owners and management.<sup>1</sup> Below are some companies with Limited Liability Company (PT) entity legal forms who have a problem with their workers when they go bankrupt:

1. PT. Sindol Pratama. Its case had been adjudicated and decisions have been made and it is mentioned that PT. Sindol Pratama is declared to have been bankrupt under the applicable regulations of law, thus is worker's wages and rights constitute debts the payments of which should be prioritized. The panel of judges refer to Article 95 Paragraph (4) of Law Number 13 Year 2003 on Employment. In this case, the appointed receiver submits a rebuttal on the basis of Article 26 Law Number 37 Year 2004 concerning Bankruptcy and Debt Repayment Obligation;

2. PT. Dirgantara Indonesia (PT DI). It is the first State-Owned Enterprise (BUMN) to ever go bankrupt. In this case, PT. Dirgantara Indonesia is declared as having been bankrupt under Article 2 Paragraph (1) of Law Number 37 Year 2004. However, the Supreme Court rescinds PT. DI's bankruptcy;

3. PT. Adam Sky Connection Airlines, a flight company which is declared as having been bankrupt by the Supreme Court in 2008 can still pay its worker's wages and severance pay by selling their assets;

4. PT. Starwin, PT. Dong Joe, and PT. Koryo also go bankrupt in 2008. The receiver sells the assets to pay its creditors, particularly its workers.

Out of the great number of bankrupt companies within the territory of Indonesia, many still fail to settle its debts in the form of payments of wage and severance pay for their own workers since the company's assets

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<sup>1</sup>Asep Suryadi, Tanggung Jawab Direksi Dalam Kepailitan Perseroan Terbatas, Jurnal Wawasan Hukum, Vol. 26 No. 01, 2012, p.475

when they go bankrupt is generally inadequate to pay all of their debts to the creditor. This employer's failure to pay and settle their debts to workers results in many strikes by labors.

From this fact, there seems to be a clash between the fulfillment of labor's rights which shall be prioritized under the Employment Law and Bankruptcy Law. However, in law there is this principle saying *lex specialis derogat legi generalis*, which means the more specific regulation overrides the more general one, hence a study regarding the labor's rights during bankruptcy is needed in reference to the more specific law, the law or regulation which directly discusses and governs bankruptcy, i.e. Law Number 37 Year 2004. Furthermore, it is also mentioned in Government Regulation Number 78 Year 2015 on Wage Payment that "In case the employer is declared as bankrupt, the labor's wage then constitutes a debt the payment of which shall be prioritized in accordance with the applicable regulations of law on bankruptcy."<sup>2</sup>

### **Research Method**

The method used is juridical-normative one using statute, historical, conceptual and case approaches on the basis of law doctrines, theories and principles with law reasoning/logic as a law argumentation.

## **II. DISCUSSION**

The monetary crisis which hits Indonesia has created various pressures to Indonesia, including the pressure to amend the bankruptcy law.<sup>3</sup> The global crisis is full of uncertainties since no one can predict for sure what will happen in the future.<sup>4</sup> This is because when a company goes bankrupt, it means the company has failed in doing its business or at least has failed in paying its debts.

The financial distress that a company has also affects its workers.<sup>5</sup> A law arrangement is needed to prevent debtors from avoiding their obligations as well as to ensure that the bankruptcy wealth is divided fairly for all parties. The government needs to follow up this phenomenon just as what they did in the field of tax by issuing the Regulation of Supreme Court of the Republic of Indonesia Number 1 Year 2000 concerning Hostage Institution (hereinafter referred to Perma No. 1 Year 2000).

Below is the number of bankrupt companies to whom a decision has been made by Commercial Courts of several regions for the last three (3) years, i.e. 2015 to 2017:

1. Commercial Court of Semarang:
  - a. In 2015 it adjudicated nine (9) cases;
  - b. In 2016 it adjudicated sixteen (16) cases;
  - c. In 2017 it adjudicated forty six (46) cases.
2. Commercial Court of Jakarta:
  - a. In 2015 it adjudicated forty nine (49) cases;
  - b. In 2016 it adjudicated ninety four (94) cases;
  - c. In 2017 it adjudicated one hundred (100) cases.
3. Commercial Court of Medan:
  - a. In 2015 it adjudicated five (5) cases;
  - b. In 2016 it adjudicated seven (7) cases;
  - c. In 2017 it adjudicated sixteen (16) cases.
4. Commercial Court of Surabaya:
  - a. In 2015 it adjudicated twenty nine (29) cases;
  - b. In 2016 it adjudicated thirty one (31) cases;
  - c. In 2017 it adjudicated forty one (41) cases.
5. Commercial Court of Makassar:
  - a. In 2015 it adjudicated one (1) case;
  - b. In 2016 it adjudicated two (2) cases;
  - c. In 2017 it adjudicated five (5) cases.

Source: Supreme Court's Website, 2018

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<sup>2</sup>Interview with Imran Nating, a Receiver domiciled in Jakarta on 15 June 2018

<sup>3</sup>Djoko Imbawani Atmadjaja & Anwar, Kedudukan Menteri Keuangan Dalam Kepailitan Perusahaan Asuransi, Jurnal Media Hukum, Vol. 19, No. 1, 2012, p.13

<sup>4</sup>Sri Redjeki Slamet, Kepailitan Suatu Solusi Dalam Memaksimalkan Penagihan Piutang Kreditur, Lex Jurnalica Vol. 7 No. 3, 2010, p.216.

<sup>5</sup>Catur Irianto, Penerapan Asas Kelangsungan Usaha Dalam Penyelesaian Perkara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (Pkpu), Jurnal Hukum Dan Peradilan, Vol. 4, No. 2015, p. 409

Based on the data above, it can be seen that the number of bankrupt company cases adjudicated in five (5) Commercial Courts in Indonesia for the last three (3) years, i.e. from 2015 to 2017, increased. In 2015, it is recorded that in total ninety three (93) cases were adjudicated and declared as bankrupt. Meanwhile, in 2016 a total of one hundred and fifty (150) were adjudicated and declared by these Commercial Courts as bankrupt. For 2017, a total of seventy eight (78) cases were adjudicated by the Commercial Court of Central Jakarta and two hundreds and eight (208) companies were declared bankrupt.

Based on this fact, it can be seen that there is an increase to the number of companies adjudicated and declared bankrupt by five (5) Commercial Courts in Indonesia. According to Makkasau<sup>6</sup> the trigger of this is the world's uncertain global economy which has some influence on the national economy. Additionally, the relatively less skilled human resources owned by companies in Indonesia also contributes to it.

According to Imran Nating,<sup>7</sup> one of the objectives of arranging the bankrupt company process is to protect the concurrent creditors to obtain their rights in relation to the applicability of security principle, i.e. "all debtor's wealth, be it movable or immovable, existing or to exist in the future, shall be the security for the debtor's binding." This is done by providing them with facilities and procedures to fulfill their bills to the debtors. According to Indonesia's law, this security principle is guaranteed by Article 1131 of Civil Code. The bankruptcy law prevents the creditors from fighting over the creditor's wealth in relation to this security principle. In the absence of bankruptcy law, it is possible that the stronger creditors will receive greater portions than the weaker ones.

Moreover, according to Imran Nating the bankruptcy arrangement is also intended to ensure that the debtor's assets are divided among the creditors in accordance with the *pari passu* principle (proportional division of debtor's assets to unsecured creditors based on the proportion of each creditor's amount of bills). In Indonesia's law, the *pari passu* principle is guaranteed by Article 1132 of Civil Code.

For comparison, in the reorganization framework in the United States,<sup>8</sup> the bankruptcy law gives a protection to the debtor acting in good faith from their creditors by giving them an exemption of debts. According to the United States' bankruptcy law, an individual debtor will be exempted from their debts upon the completion of clearance or liquidation action of their assets. Even if the value of their assets after being liquidated or sold by the Liquidator is not sufficient to settle all of their debts to their creditors, this debtor will no longer be required to settle the debts. This debtor then is given the chance to obtain a financial fresh start.

The bankrupt adjudication changes the debtor's legal status to incompetent to take any legal action, to control and manage their assets since the bankrupt declaration is established.<sup>9</sup> In currently applicable bankruptcy law of Indonesia, neither civil nor criminal sanctions are governed therein, rather they are governed in Law No. 1 Year 1995 concerning Limited Liability Company and Criminal Code. In several other countries, these sanctions are set forth in their Bankruptcy Law. In England, the criminal sanctions related to bankruptcy are set forth in Companies Act 1985 and Insolvency Act 1986.

The bankruptcy process is also intended to give the debtor and their creditors a chance to discuss and make an agreement in regard to restructuring the debtor's debts.<sup>10</sup> In the United States' Bankruptcy Code, this is governed in Chapter 11 concerning Reorganization. In Indonesia's bankruptcy law the chance for the debtor to reach an agreement on the restructuring of their debts with their creditors are set forth in CHAPTER II on Delayed Obligation to Repay Debts (PKPU).

In regard to labor/worker's rights of wage and other labor/worker's rights, the applicable billing mechanism so far is by assigning labor's representatives to directly ask the company to pay the amount of bills including both labor/worker's wage which is included in bankruptcy costs and other labor/worker's rights which are classified as creditor's debts. The amount of debts billed is determined by verification meeting with relevant parties such as receiver, supervisory judge, and tax office officers and secured creditors.

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<sup>6</sup>Interview with Makkasau, a senior commercial judge in South Sulawesi who has several times been a supervisory judge, on 11 July 2018, who explains the decrease in the number of bankrupt companies each year in Indonesia.

<sup>7</sup>Interview with Imran Nating, a receiver domiciled in Central Jakarta on 12 July 2018, who explains the objectives of bankrupt company's asset handling to prevent the creditors from fighting over the assets between themselves.

<sup>8</sup>Siti Anisah, Studi Komparasi terhadap Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan, Jurnal Hukum Ius Quia Iustum, Vol. 16 (Edisi Khusus), 2009, p. 39.

<sup>9</sup> Erma Defiana Putriyanti dan Tata Wijayanta, Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi, Jurnal Mimbar Hukum, Vol. 22, No. 3, 2010, p.483.

<sup>10</sup>Tri Afiani, Ety Susilowati & Moch. Djais, Penyelesaian Sengketa Sebagai Akibat Ditolaknya Permohonan Pailit Pada Perusahaan Modal Ventura, Diponegoro Law Review, Vol. 5, No. , 2016, p. 13.

When a comparison is made between the state tax debt collection mechanism and the fulfillment of labor/worker's rights in the event the company goes bankrupt, a difference occur, i.e. the Tax Service Office issues a list of tax bills to the bankrupt company which constitutes a set of actions to ask the tax bearer settle the indebted taxes and tax collection costs by reprimanding or warning, executing the collection at once, delivering enforcement letter, suggesting prevention, executing seizure, executing hostaging, selling the seized goods.

The administrative bases and facilities for the Director General of Tax to collect the taxes under Tax Collection Notice, Underpaid Tax Assessment Notice, Additional Underpaid Tax Assessment Notice, and Decision Letter of Correction, Decision Letter of Objection and Appeal Decision lead to the increased amount of payable taxes. PPSP law does not specifically mention the procedure to collect tax debt to the bankrupt company. Likewise, in the taxation formal regulations the main points are governed in Law of Taxation General Provisions.

Below are the names of bankrupt companies which fail to pay/underpay their tax debts in a bankruptcy case:

1. PT. Samyoung Recycling Technology, domiciled at Jln. Industri Selatan Blok JJ. No. 12 Kawasan Industri Jababbeka Tahap 2 Cikarang Jakarta Pusat;
2. PT. Samwoo Indonesia, having its address in Ds. Parung Mulya Kecamatan Ciampel, Karawang 41361 Jawa Barat;
3. PT. Lokarahayu Plywood Industries, domiciled at Jln Letjend Soepono No. 34 Arteri Permata Hijau, Jakarta Selatan;
4. PT. Dawamiba Engineering, having its address in Menara Gracia Lt.9 Jln. H.R. Rasuna Said Kav. C-7 Jakarta;
5. PT. Starwin Indonesia, having its address in Ruko Sentra Menteng Blok MN. No. 88 M. Lantai 2 Sektor VII Bintaro Jaya Tangerang, Banten;
6. PT. Metrocorp Indonusa, having its address at Jln. Melawan No. 26/22 (Pangeran Jayakarta) Jakarta Pusat;
7. PT. Artika Optima Inti, having its office at Jalan Hidup Baru Raya No. 27 Gandaria Utara, Kebayoran Baru, Jakarta 12140;
8. PT. Babinusa Indonesia, domiciled at Jln. Industri No. 15 Bandung.

A tax debt or bill should be paid by taxpayers or tax bearers. The existence of tax bill allows the state to have the right to precede the collection of taxes of goods owned by the tax bearers, as set forth by Article 21 Paragraph (1) of Law of Tax General Provisions, i.e. "The state has the right to precede for the indebted taxes of goods owned by the Tax Bearer." The term the state's right to precede is explained further in the Explanation of Article 21 Paragraph (1) of Law of Tax General Provisions, i.e. to establish the state's position as the preferent creditor with a right to precede over the goods owned by the tax bearer which will be auctioned for public.

The state's right to precede over the tax debts is exercised by requiring the tax bearer to first make payment of tax debts and the payment to other creditors can be made after the tax debts are paid. The provisions on this right to precede include tax principal, administrative sanction in the form of interest, fine, increase, and tax collection costs. As the KUP Law is amended, Article 21 in particular has an additional paragraph, i.e. Paragraph (3a), which states that in case the Taxpayer is declared bankrupt, a receiver or individual or entity tasked to make the clearance is prohibited from distributing the assets of Taxpayer in bankruptcy to its shareholders or other creditors before using the assets to pay the Taxpayer's tax debts.

Nevertheless, the state's right to precede as set forth in Article 21 Paragraph (3) which states that the tax debt shall precede any other right to precede except court fee which is caused only by a punishment to auction a movable and/or immovable goods, the costs spent to save the said goods; and/or court free which is caused only by auction and settlement of an inheritance.

In the writers' opinion, the tax debt cannot necessarily applies its right to precede over the debt with material security right based on the following considerations:

a). The position of the state as a preferent creditor and the existence of right to precede over the tax debt cannot release the right of security inherent to the goods used as the security object by the debtor (bankrupt company), hence the creditors holding the security right still have the right to take settlement first over the goods;

b). The right to perform the execution over the security goods by the creditors is acknowledged by UUK and PKPU, the creditors can perform the execution and they do not violate any regulations of law, neither UUK nor PKPU nor KUP Law.

Meanwhile, the provisions of Article 21 Paragraph (3a) of KUP Law which prohibit the distribution of assets of the Taxpayer in bankruptcy to shareholders or other Creditors prior to the use of these assets to pay its tax debt, can be rebutted using the argumentation that when executing of the debtor's assets imposed by security, the execution is performed by the creditors themselves, rather than by the receiver. Even, when the sales of the debtor's assets imposed with security right is made by the receiver, the Creditors shall still have the

right of their lending settlement, with being imposed with bankruptcy costs.<sup>11</sup> However, in the writers' opinion another problem will arise in this bankruptcy process, i.e. what about the other preferent creditors' lendings, i.e. the labor and bankruptcy costs and receiver's fee.

According to Imran Nating,<sup>12</sup> in many countries for years the country is given the privilege in case of bankruptcy, yet for more than twenty years several jurisdictions have questioned this privilege and studied in-depth the costs arised and the benefits and moral basis of this policy. The existence of (state's) right to precede of all debtor's assets as referred to in Article 21 of KUP Law and in relation to the existence of other creditors, such as labors and bankruptcy costs, then it is necessary to consider the following:

a. Secured creditor clearly would not want to release the material security right inherent to the debtor's assets to be used to pay the tax debts first. In addition, the various instruments in the material security right have been made for legal certainty of debt settlement to the material security right holder;

b. The amount of fund obtained from the tax debt payment in bankruptcy is really small as compared to other incomes. Additionally, bankrupt debtors may be unable to pay anything, including tax debts. It is recommended that the tax debt collection be prioritized to be billed to other taxpayers capable of paying it.

c. Creditors are reluctant to settle their receivables through bankruptcy because of the (state's) right to precede for tax debt, the amount of which may be significantly reducing the payment to non-secured creditor.

In the event the bankrupt assets are not sufficient to pay all debts, then if the (state's) right to precede for tax debt continues to be exercised, the labors and concurent creditors will not get any penny at all due to the considerations explained earlier regarding worker's wage debt.

Based on the explanations above, it can then be concluded that the mechanism of legal protection of labor/worker's rights in the clearance of a company's bankrupt estate is less optimal. According to Lawrence M. Friedman's theory, a legal system consists of three elements, namely structure, substance and legal culture.<sup>13</sup> Friedman suggests that the structure element of a legal system includes various institutions created by this legal system with their numerous functions in the effort of allowing the legal system to work. One of these institutions is the court. The substance component comprises of anything which is the result of the structure, including legal norms in the form of both regulations, decisions, and doctrines as well as the norms agreed upon by the parties as set forth in a deed of settlement.

Furthermore, Purnadi Purbacaraka's<sup>14</sup> theory suggests that philosophically the meaning and definition of legal protection is an activity of synchronizing the relationship of values contained in rules of law or views which steadily assess and exemplifies the attitude and action as a set of explanation of final stage values, i.e. creating (as a social engineering), maintaining and keeping (as a social control) of peaceful life interaction of human beings.

Based on the theory above, when related to the mechanism of legal protection of fulfillment of labor/worker's rights in the bankrupt estate clearance process, then it has been appropriate and in line with the existing regulations of law particularly in the perspective of Constitutional Court to place labor/workers as human being and to require their protection by the law and on behalf of justice.

## CONCLUSION

The fulfillment of labor/worker's rights in the bankrupt estate clearance process is that since law is made for human, rather than for objects or other goods such as security from the secured creditor and the state with its taxes, it is therefore quite humane and fair if the fulfillment of worker's rights is prioritized over other bills. Socio-economically speaking, labor/workers have weaker and lower position than employers, thus principally, the law should provide an assurance of protection for their rights to be fulfilled by prioritizing their right fulfillment, so that the essence of human interest be placed above the interest of material and other goods is fulfilled.

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<sup>11</sup> Ardy Billy Lumowa, *Tanggung Jawab Perusahaan Yang Dinyatakan Pailit Terhadap Pihak Ketiga*, *Lex Privatum*, Vol. 1, No. 3, 2013, p.22

<sup>12</sup> Interview with Imran Nating, a receiver domiciled in Central Jakarta on 12 July 2018 who explain the special authorization to the state in case of bankrupt asset estate clearance.

<sup>13</sup> Lawrence Friedman, 1985. *The Legal System, A Social Science Perspective*, Russel Sage Foundation: New York., p. 75

<sup>14</sup> Sumbayak, R.F.S, 1985. *Beberapa Pemikiran Kearah Pemantapan Penegakan Hukum*, IND-HILL, Co. 85: Jakarta, p. 30

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