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Research Article

INDONESIAN BANKRUPTCY LAW POLICY AFTER POLITICAL & MONETARY TURMOIL IN 1998

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ABSTRACT

The monetary turmoil that occurred in 1998 plunged Indonesia into an economic crisis that had an unfavorable impact on the national economy, which at the time was dependent on foreign investment. In the end, to help improve the economy in Indonesia, the Government at that time took action to ask for assistance from the International Monetary Fund (IMF). The injection of funds from the International Monetary Fund (IMF) provided conditions for the Government of Indonesia to establish new bankruptcy regulations from the commonly used Dutch Bankruptcy Law of 1905 (Faillissements-Verordening, Staatsblad 217/1905 and Staatsblad 348/1906) so that the Government issued Government Regulation in Lieu of Law Number 1 of 1998 concerning Amendments to the Bankruptcy Law. In PERPPU 1/1998, it provides easy bankruptcy application requirements where the conditions only require 2 creditors and one of the creditors has a debt that has matured. Until Law No. 37/2004 on Bankruptcy and PKPU was enacted, the requirements for bankruptcy applications remained unchanged, so this paper aims to analyze the requirements for filing bankruptcy applications, which tend to be pro-creditor, so that it is straightforward to put debtors in a state of bankruptcy or PKPU, where the existence of the Bankruptcy and PKPU Law should provide help for debtors to find a solution to the debt pressure that has hit the debtor.

Keywords: *bankruptcy, creditors, debtors, policy*

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I. INTRODUCTION

The mid-1997 economic crisis had a wide-ranging impact on the economy, particularly the loss in corporations' capacity to repay their creditors. This has prompted concerns about creditors' ability to compel borrowers repay their obligations. Creditors feel the necessity for a legal solution that can safeguard creditors' interests in terms of payback of the investment they have made, namely the institution of bankruptcy. The bankruptcy law mechanisms available in Indonesia at the time, mainly the *Faillissement verordenin*g S. 1905-217 jo S. 1906-348, were deemed inadequate or no longer relevant to societal situations, particularly the developing business world.

As a result, the IMF, Indonesia's largest creditor, requested that the Indonesian government swiftly reform the Bankruptcy Law and establish a Commercial Court, as stipulated in the memorandum of understanding between the Indonesian government and the IMF. The IMF's demands and insistence prompted the government to change the *Faillissement Verordening* quickly, via PERPPU Number 1 of 1998, which was later incorporated into Law Number 4 of 1998. In essence, the substance of the bankruptcy law amendment is more intended to protect creditors by referring to the principles of fast, simple, transparent, and effective to ensure the fulfillment of the interests of the parties in bankruptcy and to aid financial sluggishness following the economic crisis. Therefore, in order to address the issues that occur in the world of firms that go bankrupt and result in the fulfillment of overdue commitments, the government revised the existing Bankruptcy Law (Hartono, 2016).

The Bankruptcy Law has not been applied in the field as planned at the implementation level. This is due to various flaws in the substance of the regulation, including the legislation's ambiguity, which ultimately leads to multiple interpretations. Furthermore, the Commercial Court's existence as a special court empowered to hear bankruptcy matters has been undermined by a lack of suitable buildings and equipment. Until finally promulgated Law Number 37 of 2004 concerning Bankruptcy and PKPU which until now has been used in the practice of Bankruptcy and PKPU law in Indonesia, unfortunately if we examine the Law it appears that there is an imbalance in filing bankruptcy and PKPU applications, The new Bankruptcy and PKPU Law only requires the existence of 2 or more creditors and that one of the debts has matured as well as simple proof that must be presented during the trial at the Commercial Court.

II. RESEARCH METHODOLOGY

In finding solution to the above legal issues, the research method employed in this work is doctrinal approach and study Indonesian national legislation, especially Law 37 of 2004. This research approach generates descriptive data, which is data that describes and explains aspects of the subject under study, in this case the Indonesian Bankruptcy Law Policy after the

Reformation Era in 1998. Analysis and discussion in this paper will be divided into two sections. The analysis will begin from the legal framework insolvency. It will be followed by a brief overview on how Law No. 37 of 2004 deals with transnational issues. The analysis on some Indonesia's insolvency proceedings and analyze the requirements for filing bankruptcy applications. This analysis aims to provide arguments for the results of the research that has been carried out in the study. Providing prescriptive analysis means providing an assessment of whether it is true or false or what should be according to the law regarding the facts or legal events from the results of the research. According to Peter Mahmud Marzuki that Legal events and legal acts give rise to legal consequences, namely consequences regulated by law. A legal event can cause several legal consequences. (Marzuki, 2013, p. 213) The author's data gathering approaches include using literature and documentation studies, which entail seeking and collecting data on the topics at hand through the literature of books, journals, the internet, and others relating to the topic under investigation.

III. DISCUSSION

The History of Bankruptcy Law in The World

Similar to bankruptcy law, legal procedures extend back over 2000 years, first appearing in Roman times in 118 BC (Sjahdeini, 2018, pp. 28–29). If a debtor could not repay his debts to the creditor in the 5th century BC, the creditor had the authority to sell the debtor as a slave. Even back then, the penalty of a debtor failing to pay his or her obligations could include death, limb amputation, jail, or exile. However, before selling the debtor as a slave, the creditor must offer the debtor 60 days to repay the debt. Death, enslavement, dismemberment, incarceration, or exile were all consequences of a debtor's failure to pay a debt in ancient Greece and the Roman Republic. According to evidence, if a debtor died without paying his debts, the creditor might seize his body as security for the debtor's heirs until the debt was settled. Such a practice was consistent with Roman culture at the time, as it was believed that a person's body needed to be entire for the deceased to make a successful journey to the hereafter. Religious principles have been utilized as an inducement to settle creditors' bills. In the Roman Republic, this was already the law of bankruptcy.

The Roman Empire abolished debtor slavery around the 2nd century BC. Debtors might still be imprisoned, but creditors could not exploit imprisoned debtors as servants. Debtors could only be held as collateral until someone, or someone in their family, agreed to repay the obligation. As a further development, execution in connection with the debtor's failure to pay his debts is now carried out against his assets rather than his body. The sale of the debtor's assets is used to repay his creditors for his debts. It was known as *"missio in bona"* at the time, which meant that the debtor's assets might be auctioned to pay off creditors' debts *(venditio bonorum)*. The purchaser *(bonorum emptor)* is a person who gets rights to the debtor's property on the basis of general principles relating to debt repayment on the debtor's property. The debtor will pay off his debts in proportion to the revenues of the sale of the property, according to the amount of each creditor's bill (Sjahdeini, 2018, p. 28-29). The underlying basic idea is

that "every debt must always be collectible by the creditor and must be paid by the debtor." Furthermore, the principle states that "all assets of the debtor, both existing and future, become collateral for his debts to his creditors" (Sjahdeini, 2018, p.17-18).

During the Roman period, execution of debtors' possessions to settle debts was widespread practice in Italian trading centers such as Genoa, Florence, and Venice. Judges supervised the settlement of creditors' claims from the profits of the sale of the debtor's property, ensuring that each creditor's claim was settled in proportion to the amount of the claim. Furthermore, the development of bankruptcy law across Europe is also occurring in the Netherlands through its Code de Commerce of 1811, Faillissementwet 1893 and The Dutch Bankruptcy Act of 2013.

As its former colony, the bankruptcy law applicable in Indonesia is a legal product of Dutch heritage. The progress that occurred caused the old legal products to no longer be able to accommodate the legal needs of the community. So, this is one of the reasons for legal reform, especially bankruptcy law. Like the Dutch bankruptcy law, which has undergone developments regarding the settlement of the debtor's remaining debts.(Yatna & Purwanti, 2020)

The History of Bankruptcy Law in Indonesia: Prior to Independence in 1945

Indonesia's bankruptcy laws have changed and been replaced throughout its history. Changes and replacements are made to adjust to the demands that occur throughout a specific time period in order to meet the law's objectives. The adjustments take into account the interests of the regulated parties as well as those involved in the law's implementation, providing certainty, justice, and order.

As a result of the distinction between traders and non-merchants, there exist two sorts of bankruptcy regulations. The bankruptcy regulations that apply to a merchant are governed by the *Wetboek van Koophandel (W.v.K)*, Book Three, entitled *Van de Voorzieningen in geval van onvermogen van kooplieden* (Regulations on Merchant Incapacity). Originally contained in Articles 749 to 910 of the W.V.K, this rule was later abolished in accordance with Article 2 of the *Verordening ter Invoering van de Faillissementsverordening* (Elyta Ras Ginting, 2018, p.31).

Meanwhile, bankruptcy for non-merchants (entrepreneurs) is governed by the *Reglement op de Rechtsvordering* (S.1847-52 jo.1849-63), Third Book, Seventh Chapter, entitled: *Van den Staat van Kennelijk Onvermogen* (On the State of Real Incapacity), in Articles 899-915, which was later repealed by S. 1906-348 (Elyta Ras Ginting, 2018). The existence of these two regulations has resulted in numerous implementation challenges, including:

1. there are many formalities to go through;
2. high costs;

3. too few creditors are able to intervene in the bankruptcy process; and
4. the implementation of bankruptcy takes a long time.

Bankruptcy regulated in the Commercial Code and Rv caused many difficulties in its application, so that a simple bankruptcy regulation was desired. As a solution to this problem, the *Faillisementsverordening (Staatsblad 1905 No. 217)* was enacted, or in full, the *Verordening op het Faillisements en de Surseance van Betaling voor Euro peanenin Nederlands Indie* (Bankruptcy Regulation and Suspension of Debt Payment Obligations for Europeans) Based on the *Verordening ter invoering van de Faillissementsverordening (S. 1906-348),* the *Faillissementsverordening (S. 1905-217),* the *Faillissementsverordening (S. 1905-217),* and the *Verordening ter invoering van de Faillissementsverordening. (1906-348),* the *Faillissementsverordening (S. 1905-217),* the regulation was declared to come into force on November 1, 1906, which in line with the provisions of Article 163 *Indische Staatsregeling* (IS) reads as follows:(*Article 163 of the Indische Staatsregeling (IS)*, n.d.)

Where the provisions of this law, other general regulations, reglements, police regulations and administrative provisions differentiate between Europeans, natives and foreigners, the following rules shall apply:

1. Subject to the provisions for Europeans are:
   a. All Dutch people
   b. All people of European origin
   c. All Japanese
   d. All persons of other origins whose countries are subject to family law based essentially on the same principles as Dutch law.
   e. Legally recognized children and children referred to in letters b and c who were born in India.
2. Subject to the provisions for indigenous persons, except for the position of indigenous Christians, which must be regulated by ordonantie, all persons who belong to the Dutch East Indies and have not moved into another population group than the indigenous group, as well as those who once belonged to another population group than the indigenous group, but have blended in with the indigenous population, are subject to the provisions for indigenous persons.
3. Subject to the provisions for foreign Orientals, Except for those among them who profess the Christian faith, whose legal status will be regulated by an ordonance, are all those who are not subject to the conditions indicated in paragraphs 2 and 3 of this Article.

With the enactment of the *Faillisements verordening*, all provisions of Book III of the WvK, Book III, Chapter VII Articles 899-915 are revoked.

Article II of the 1945 Constitution's Transitional Rules states that "all existing state bodies and regulations remain in effect as long as no new ones are established in accordance with this Constitution." According to the Transitional Rules, all legal instruments dating back to the Dutch East Indies era remained in force following the declaration of independence, unless they were judged to be incompatible with the principles enshrined in Pancasila and the stipulations enshrined in the 1945 Constitution (Sjahdeini, 2018, p.20-21). n conjunction with the terms of the Transitional Rules, the *Faillissementverordening* S. 1905-217 jo S. 1906-348, also known as the "Bankruptcy Regulation" in Indonesian, applies to bankruptcy following the proclamation of independence (Sjahdeini, 2018).

The currency crisis in Indonesia in 1998 caused major challenges for the national economy and trade, affecting the development of community enterprises and even making business activities difficult, which also had a significant impact on company development. Entrepreneurs' ability to meet their debt repayment commitments was severely hampered (Tirayo & Halim, 2019, p.131). According to the fourth paragraph of the Preamble of the Republic of Indonesia and Pancasila's 1945 Constitution, national legal development to realize a just and prosperous society is aimed at realizing a national legal system through the establishment of new laws, particularly legal products, which are required to support citizens' economic development. Products that are required to promote residents' economic progress. One of the options for large-scale economic development is bankruptcy legislation. Corporate debt problems are extremely beneficial in meeting the legal requirements of company actors in order to overcome debt and credit problems (Kheriah, 2013, p.239).

Under Presidents Soeharto and Habibie, the government committed to a wide program of transformation that was largely driven by foreign international financial organizations, particularly the International Monetary Fund (IMF). The antiquated and little-used Dutch bankruptcy laws of 1905 (Faillissements-Verordening, Staatsblad 217/1905, and Staatsblad 348/1906) had become irrelevant to the country's economic circumstances at the time, so the Commercial Court was established on August 23, just three months after Soeharto's resignation. The IMF planned for these steps to aid in the resolution of Indonesia's economic crisis by assuring foreign and domestic creditors that debts could be recovered through the legal system; however, the outcomes have been unsatisfactory (Lindsey, 1998, p.119).

The primary impediment to effective legal reform in Indonesia is that it is sorely required. On the one hand, there is a tremendous amount of political and societal pressure for reform. This is also obvious in the agendas of the global financial institutions, which now dominate Indonesian policymaking. These entities establish comprehensive legislative reform timeframes that the Indonesian government cannot refuse or negotiate. On the other hand, the sheer magnitude of change required, along with the extremely short time frame, makes it an

almost difficult assignment for a government that has lost the majority of its budget revenue, is stuck in economic disaster, and is hampered by a continuing political crisis.

Insolvency policy has always been difficult because it resides at the intersection of business activity, economic and legal theory, and politics. However, this is exactly what the IMF is requesting of Indonesia, despite the fact that Indonesia lacks basic insolvency jurisprudence (legal philosophy or theory) on which to establish an insolvency system. Even the Ministry of Justice was unable to locate more than 25 written court opinions from 1905 to 1998. As a result, around 30 new Commercial Court judges had to decide complex financial issues based on training that the IMF had prepared in less than a month and completed only a few days before the court started. The receivers at the center of the new system had to go through similar hurried training. Attempts by Indonesian officials to postpone the start date of the Commercial Court were met with a clear 'not under any circumstances' answer from the IMF. As a result, it should have been obvious from the start that it would take more than a few short training sessions led by foreigners to overturn the long-standing and generally accurate view of the judiciary's terrible state.

The underlying assumption is a fundamental one: bankruptcy legislation should promote negotiating among creditors in order to maximize their interests as a group. Creditors essentially have two options: liquidate the debtor and distribute the resulting assets, or enter into a settlement that may include, for example, payment in installments, partial debt forgiveness, debt exchange for equity, assignment of all or part of assets, or negotiated debt reconstruction. Then, bankruptcy courts are inherently harsh dispute resolution systems that rely on adjudication rather than collaboration. Experience has shown that a broken insolvency system frequently forces creditors to select liquidation or debt forgiveness over less dramatic alternatives. A successful tribunal that results in huge amounts of debt being liquidated or written off can also erode investor trust.

The IMF's justification for pressing for bankruptcy courts, despite considerable practical and political barriers, was Indonesia's reliance on foreign investment. This has been a cornerstone of New Order development policy since the mid-1980s oil crisis. The toppling of Soeharto and the worsening economic situation in Indonesia only increased the need. As the Coordinating Minister for Economy, Finance, and Planning, Ginandjar Kartasasmita, has recognized, this left the politically weakened post-Soeharto government with little alternative except to obey instructions from multilateral institutions that regulate market sentiment. As a result, the government is caught between three powerful and often conflicting forces: global institutions, the ill-defined "reform movement," and the local economic elite (many of whom are former Soeharto "cronies")(Lindsey, 1998b, p. 122).

Furthermore In its development, one of the issues that is very urgent and requires resolution is the settlement of corporate debts, and thus the existence of bankruptcy regulations and postponement of payment obligations that can be used by debtors and creditors in a fair,

fast, open, and effective manner becomes very important to be realized immediately. Aside from meeting the needs mentioned above in the context of debt settlement, the realization of a fair, fast, open, and effective dispute resolution mechanism through a special court within the General Court that is established and tasked with handling, examining, and deciding various disputes in the field of bankruptcy and PKPU is also very important in the implementation of business activities and economic life in general.

The History of Bankruptcy Law in Indonesia: After Reformation Era in 1998

Indonesian currency crisis of 1997-1998, rattled the national economy and necessitated dramatic changes. To assist the business world in resolving the loan problem as soon as possible, then on April 22, 1998, the President of the Republic of Indonesia signed a Government Regulation in Lieu of Law Number 1 of 1998, concerning Amendments to the Bankruptcy Law (State Gazette of 1998 Number 87 Supplement to State Gazette Number 3761). The PERPPU was then approved by the House of Representatives and became law on September 9, 1998 (State Gazette of the Republic of Indonesia 1998 Number 135) (Hoff, 2000, p.5).

In addition, there are several principles that form the basis for the enactment of the Bankruptcy and PKPU Law to replace the Old Bankruptcy Law. These principles include: (Gunawan Widjaja, 2009, p. 6-7)

1. Principle of Balance
2. Business continuity principle
3. Principle of Justice
4. Principle of Integration

The notion of paritas creditorium and the principle of pari passu prorata parte are explicitly stated in Law No. 4 of 1998. This is reflected in Article 1 paragraph 1 of the 1998 UUK, which represents a departure from the Faillissement Verordening in principle. According to Article 1 paragraph (1) of the 1998 Bankruptcy Law, a debtor with two or more creditors who fails to pay at least one debt that has fallen due and receivable is declared bankrupt by a court decision, either at his own request or at the request of one or more of his creditors (Hadi Shubhan, 2008, p.8).

This clause is consistent with the idea of the aim of bankruptcy, which is to provide a system for distributing assets fairly and equitably among creditors in the event of a debtor's failure to pay due to the debtor's inability to carry out these duties. If the debtor has only one (one) creditor, the meaning of bankruptcy is lost. Creditors do not wage arduous battles over the debtor's assets in order to collect on their receivables. More than five years after the 1998 Bankruptcy Law went into force, there were numerous flaws and deficiencies that compelled revisions to some of its provisions. Among these flaws is the lack of a precise explanation of the idea of debt, which has resulted in varied interpretations of the meaning of debt, leading to legal confusion. A group of commercial judges interprets debt to mean only debts arising from

money receivable agreements (interpreting debt narrowly), whereas another group of commercial judges contends that debt is any performance arising from an agreement that has not been paid by the debtor (interpreting debt broadly). Another flaw is the exclusion of insurance companies from the list of companies whose bankruptcy is handled by the relevant government, in this case the Ministry of Finance (Hadi Shubhan, 2008, p.11).

The topic of interest in connection with this writing is the bankruptcy case of PT Cipta Televisi Pendidikan Indonesia (hereinafter TPI) filed by Crown Capital Global Limited (hereinafter Crown Capital). TPI issued a Subordinated Bond Purchase Agreement on December 20, 1998, and PT Bhakti Investama served as the placement agent and arranger. The Subordinated Bond Purchase Agreement states that TPI will issue bearer Subordinated Bonds in the amount of USD $53,000,000, - (fifty-three million United States dollars) with Crown Capital as the creditor on December 24, 2006.

The bonds were issued on December 24, 1996, and they were due to mature on December 24, 2006. TPI, on the other hand, did not pay off the bonds when they matured. The Commercial Court panel of judges determined that Crown Capital's bankruptcy petition satisfied the requirements of simple proof set down in Article 8 paragraph (4) of the Bankruptcy Law. Because it has been established that Crown Capital has past-due and recoverable debts. TPI has further creditors. As a result, the bankruptcy conditions of Article 2 paragraph (1) are also met.

In connection with the above problems, PERPPU No. 1 of 1998 concerning Amendments to the Bankruptcy Law was enacted on April 22, 1998 which was then passed into Law No. 4 of 1998 concerning the Bankruptcy Law (UUK) on September 9, 1998. According to the terms of Law No. 4 of 1998 (UUK), bad debts are expected to be handled through bankruptcy processes, which are particularly beneficial to business actors. Bankruptcy is not popular or appealing in the public view, but it has recently become the procedure of liquidating troubled loans, and businesses sorely need it. This is demonstrated by the growth in the number of bankruptcy petitions filed with the Jakarta Central Commercial Court, which reached 100 in 1999.

Initially, the business community was optimistic that the commercial court would be able to process incoming cases promptly, transparently, and equitably. However, as it evolved, the commercial court encountered numerous hurdles in carrying out its tasks, resulting in suboptimal implementation results. This circumstance has disappointed business actors and diminished their desire in carrying out their responsibilities to settle bankruptcy processes including serious credit problems.

Many issues are fueling the need for modifications to bankruptcy laws and the postponement of debt payments, including: First, avoid the behavior of the debtor's assets if numerous creditors are collecting debts at the same time. Second, it is critical to avoid

circumstances in which the security held by the primary creditor claims by selling its rights to the debtor's property regardless of the debtor's or other creditors' interests. Third, prevent deceit by either the creditor or the debtor (Irianto, 2015). To address the many deficiencies and weaknesses of the Bankruptcy Law, Bankruptcy Law Number 37 Year 2004 on Bankruptcy and Suspension of Debt Payment Obligations was enacted and published in State Gazette Number 131 and Additional State Gazette Number 4443 (Irianto, 2015, p.12).

The facts usually reveal that the chances of a peaceful settlement in Indonesian bankruptcy and PKPU processes are still relatively slim. In fact, Law Number 37 of 2004 permits for amicable settlement in both bankruptcy and PKPU cases. Amicable settlement is not specified in Law No. 37/2004, although it can be seen in Article 222 of Law No. 37/2004 for a general understanding. A payment plan, in general, involves a proposal to repay some or all of the obligation to creditors (Amboro, 2020, p.104). unfortunately if we examine the Law it appears that there is an imbalance in filing bankruptcy and PKPU applications, The new Bankruptcy and PKPU Law only requires the existence of 2 or more creditors and that one of the debts has matured as well as simple proof that must be presented during the trial at the Commercial Court.

IV. CONCLUSION

The economic crisis that occurred in mid-1997 has impacted various sectors of the economy, especially the decline in the ability of companies to repay their debts to creditors. The bankruptcy law that Indonesia had at that time, namely *Faillissementverordening S. 1905-217 jo S. 1906-348*, was considered inadequate or no longer relevant to the conditions of society, especially the growing business world. Therefore, the IMF asked the Indonesian government to immediately revise the Bankruptcy Law and the establishment of the Commercial Court and PERPPU Number 1 of 1998 was born, which was later enacted into Law Number 4 of 1998. At the implementation level, the application of the Bankruptcy Law in the field has not been as expected.

This occurred due to several weaknesses in the substance of the regulation, including the vagueness of the regulation which ultimately led to multiple interpretations, finally promulgated Law Number 37 of 2004 concerning Bankruptcy and PKPU which until now has been used in the practice of Bankruptcy and PKPU law in Indonesia, unfortunately in the Law it can be seen that there is an imbalance in filing bankruptcy and PKPU applications, where currently only requires the existence of 2 or more creditors and one of the debts has matured as well as simple proof that must be shown during the trial at the Commercial Court.

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