

# The Urgency of Legal Protection towards the Debtor of the Prospective Company in Bankruptcy Process in Commercial Court

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## Abstract

Article 2 paragraph (1) *juncto* Article 8 paragraph (4) The Law Number 37 Year 2004 about Bankruptcy and Postponement of Loan Payment Obligation states that the debtor must be bankrupted if he/she is proven to have the creditor more than one and does not settle at least a loan on time and receivable. This provision makes unfairness towards the debtor of the prospective company, because in the settlement process in the court the prospective aspect of the debtor to repay the loan is not made as the basic by the judge to make decision. The decision of bankruptcy statement towards the company will gives effect not only on the debtor but also on another side related to the existence of the company. Technically since it is judged as bankrupt, the company must stop the whole business process. It means that the business relation with colleague, consumer, or even with the employee will also automatically stop. The company will loose the right of authorization of all wealth because it has been submitted to the curator to do general confiscation. Based on this, the problem that will be investigated is that what is the urgency of the protection towards the debtor of the prospective company in the bankruptcy. The method that is used in this study is normative study by using primary and secondary law material through conceptual and constitutional approaches by doing analysis in analytical prescriptive. There are 3 principles of the importance of giving protection towards the debtor of prospective company in the bankruptcy which are 1). The principle of public welfare protection 2). The principle of prospective business protection 3). The principle of national economic empowerment.

**Keywords:** Legal Protection, Debtor of Prospective Company, Bankruptcy

## 1. Introduction

The prospective company is defined as the company that is healthy, that if the company is included in the category of liquid and solvable. The liquidity shows the company's ability in fulfilling the obligation of debt in the short term. Then the solvency is the company's ability in fulfilling all the obligation either in short term or long term. The bankruptcy law must consider the impact of a decision of bankrupt statement.

The bankruptcy is one way that can be done by the creditor to recover the civil right if the debtor does not pay the debt based on the agreement. The bankruptcy law in Indonesia regulates in Article 2 paragraph (1) *juncto* Article 8 paragraph (4) that, if the creditor wants to settle the debt through bankruptcy way in Commercial Court, so the requirement that should be fulfilled is that the debtor has two or more creditors and does not settle at least one debt that has missed the deadline of the payment and receivable. If that requirement has been fulfilled by the debtor, so the commercial court must grant the bankrupt demand of the creditor in 60 days maximally, since the demand of the bankrupt declaration is registered.

That procedure practically causes the unfairness for the company's debtor, especially the company's debtor that still have the ability to pay (prospective), it is because there is no requirements to consider the aspect of debtor's ability. The company that is still potential should be given the law protection to keep running its business without effort of bankrupting. The decision of bankrupt declaration towards the company will bring the wide implication, not only for the debtor but also for any sides that have authority in the viability of the debtor's business. The law effect of decision of bankrupt declaration by the judge towards the company is not simple, so it needs to be reviewed that why the company that is still prospective should be given the law protection of the bankruptcy.

## 2. Research Method

This study is a normative study, which is a study that is from the legal norms and principles. This study uses conceptual and constitutional approaches.

## 3. Theoretical Basic

### 3.1. Theory of Legal Protection

The law protection consists of two words that are "law" and "protection". It means a protection according to the

applied law and constitution. Because the law basically must give the protection towards all sides with its legal status because every person has the same position in the legal status. The law will give the protection towards every legal relation or any aspects in social life that is ruled by the law itself.

The law protection is the picture of the working legal function to achieve the purposes of law that are fairness, usefulness, and legal certainty. The law protection is the protection that is given to the law subject based on the legal rule; either it is preventive or repressive, either written or unwritten in order to uphold the legal rule.

According to Hadjon, “the law protection is always related to the power. The law protection is the confession and guarantee that are given by law related to the rights (human rights).”<sup>1</sup> The law protection for the citizen covers two things, first: preventive law protection that is a form of law protection to prevent the dispute to happen, second: repressive law protection that is a form of law protection which is aimed more to settle the dispute. Conceptually, the law protection that is given to the citizen of Indonesia is the implementation of confession and protection principles towards the value and prestige of human based on the five principles and the constitutional state principle based on five principles.<sup>2</sup>

The law protection that is preventive is formed with the legislation and rule that regulates the law protection towards the prospective debtor, while the repressive law protection is formed in the implementation of that rule in the procedure of bankruptcy settlement. The law protection in bankruptcy basically must give the protection to the public, creditor and debtor fairly. The law protection that is given to those three components in a preventive way should be stipulated in the bankruptcy law (*legislation*). Besides, the law protection can also be given to the court that is repressive (*litigation*). Moreover, the form of another law protection can also be made by the creditors and debtors in a form of agreement based on the self regulation.

The purpose of the making law about bankruptcy is to give the balance between the creditor and debtor in facing the bankruptcy problem, give the certainty of the process, either related to time, manner, responsibility of managing the bankrupt wealth and to ease the debt settlement quickly, fairly, openly, and effectively.<sup>3</sup>

### 3.2. Value Based Theory

This theory is based on Donald R. Korobkin’s value that emphasize, the bankruptcy law is not merely an answer for economic problem that is as a tool of collecting debt but also optimizing its division. This theory is based on value to identify the bankruptcy law as the answer of financial distress that is not only as the economic problem but also as the moral, political, personal and social problem that affect the participants.<sup>4</sup>

According to this theory, it needs the certain answer about the solution to the financial distress of debtor, because every financial distress has the specific historical context. The bankruptcy law is a full respond for all problems that appear from the financial distress, not only economy, but also moral, political, personal and social. This theory that is based on value concludes that the bankruptcy law is not only a respond towards the problem of collecting debt and division, the purpose of the bankruptcy law is to solve the financial distress and create the condition for discourse in which the values of the related parties can be rehabilitated to be coherent vision. In line with it, the bankruptcy law is aimed to rehabilitate and redefine the debtor’s value to the new coherent version about what company should do.

The value-based theory supports the protection towards the party that have authority beyond the bankruptcy, redistribution of wealth in bankruptcy and non-investor protection. The value-based theory claims that in responding the financial distress, the bankruptcy law claims the right of interest beyond the bankruptcy. It is not forbidden, but it is as the economic responsibility, that is important and cannot be denied that is a part of whole respond towards the financial distress. There are good economic and non-economic reasons to maintain the right of Constitution, but in certain context, there will be a strong reason to change it. The bankruptcy law structurally is aimed to give the protection related to the parties.

## 4. Discussion

The debtor of the company that have financial distress, but still have prospect to develop, the bankruptcy law will not consider it as the field in the form of collecting debt only then distribute it. It is because the growth and the development of prospective company are indicators of running economic wheel. The economic growth is closely related to the investment level. To push the high level of investment it needs the existence of cooperation relation or harmonious relation with the policy of the government in the economy. Moreover Indonesia will face the Asean Free Trade Area (AFTA) and Asean Economic Community (AEC) or *Masyarakat Ekonomi Asean (MEA)* that has been started since 2015. The protection towards the prospective company to develop is a certainty.

<sup>1</sup>Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat*, (Surabaya : Bina Ilmu, 1987), hlm 23.

<sup>2</sup>*Ibid.* hlm 3-6

<sup>3</sup>Bernadete Waluyo, *Hukum Kepailitan dan Penundaan Pembayaran Utang*, (Bandung : Mandar Maju Cet I., 1999), hlm 5.

<sup>4</sup>Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, (91.Rev. Colum.,1991), hlm .717.

At least there are 3 (three) reasons of the importance of giving the law protection towards the debtor of prospective company in the process of bankruptcy:

### 1. Principle of Public Welfare Protection

Since the independence of Indonesia is proclaimed, Indonesian hold promise to reach the nation's goal that is social welfare for all people of Indonesia. That goal is stipulated in the Preamble of Constitutional State 1945 that declare one of the main duty of country is to increase the general welfare, educate the country and national life and also conduct the world's order that is based on the independence, eternal reconciliation and social fairness.

Related to that thing above, the bankruptcy law in Indonesia must give the advantage not only for the creditor but also for the debtor or stakeholder may not get disadvantage. That balance interest protection is in line with the basis of the country Indonesia Republic that is The Five Principles. The Five Principles not only claim someone's interest but also many people or public's interests. The Five Principles should not only pay attention to the individual rights, but also pay attention to the rights of all citizens. Based on the moral principle "the fair and civilized humanity" it should develops the behavior that is not arbitrary to other people especially to many people.<sup>1</sup>

The usefulness aspect in bankruptcy from the perspective of economic theory assumes that the perfect bankruptcy system is that it gives the advantage that is quite precious for the economy, so the economically analysis about the bankruptcy is not only focused on the relation of creditor and debtor only, but also pay attention or consider the public's interest.<sup>2</sup> The bankruptcy covers three elements, first, social debtor's responsibility in a bankruptcy case. Second is the creditor's responsibility towards another creditor. Third is the responsibility of debtor dan creditor towards the public.<sup>3</sup>

According to Mukti Fajar,<sup>4</sup> the impact of bankrupt declaration will be very crowded. Technically, since it is declared bankrupt, company must stop all the business processes. It means that the business relation with colleague, consumer, or even the employee practically stops. The company (or individu) will loose the right of authorization of all its wealth. It has been given to the curator to do '*conservatoir*' or general confiscation.

The decision of bankrupt declration towards the prospective company brings chain effect; many sides lose out, either internal side that is the company's employee, or eternal side such as stakeholder/public. The law must be able to give balance protection to the debtor, creditor and stakeholder/public. Giving the advantage and law protection shouls be included in the component of protection in law and regulation (preventive protection), and court protection (refresif protection) through decision of bankrupt declaration that is fair. The decisison of court must consider any interests that exist in society, debtor's interest and creditor's interest. These three interests must be balanced through fair judicature system. The court is allowed to consider any interests related to bankruptcy.

The bankruptcy of company is related to the public's interest, it is because that company gives big impact either towards the public's interest, employee or labor's interest, or to the consumer of that company. Public also have interest to the existence and the viability of business of bankrupt supplicant, that also give opportunity to wor to the public, because it s certain that bankruptcy make the dissolution of working relation to the worker or labor and also employee that owe his/her family life to the company. Then if the company of bankrupt supplicant is bankrupted, so that the bankruptcy will also influence the *supply* of goods and services obtained by bankrupt supplicant to the public, that affect to the merchantmen that are involved and depended on the commerce of the goods and service obtained by the bankrupt supplicant, or clearly will bring impact that is also very meaningful for public.

The juridical impact of the bankruptcy of debtor is valid since it is decided so the continued impact of this bankruptcy is the third party that is directly connected to the bankrupt debtor that is the public. In the bankruptcy there are many interests involved; beside the creditor's interest there are also stakeholder's interests which are different from bankrupt debtor, moreover if the bankrupt debtor is a company. The Law Number 40 Year 2007 about limited copany claims that there is bound of another party in company's life, which is:

- a. Company's interest;
- b. Minority shareholder's interest;
- c. Company Employee's interest;
- d. Public's interest;
- e. Healthy competition's interest in doing business.

<sup>1</sup>Sutan Remy Sjahdeini, *Hukum Kepailitan : Memahami Failissementverordening Juncto Undang-Undang Nomor 4. Tahun 1998*, (Jakarta : Grafiti, 2002), hlm 35.

<sup>2</sup>Andriani Nurdin, *Kepailitan BUMN Persero Berdasarkan Asas Kepatian Hukum*, Cetakan 1, (Bandung : PT. Alumni, 2012), hlm. 322.

<sup>3</sup>Siti Anisah, *Perlindungan Kepentingan Kreditor Dan Debitor Dalam Hukum Kepailitan Di Indonesia : Studi Putusan – Putusan Pengadilan*, (Disertasi : Universitas Indonesia, 2008), hlm 30.

<sup>4</sup>Mukti Fajar, *Analisis Batavia Pailit*, (Yogyakarta : Fakultas Hukum-LP3M UMY, 2008), hlm 2.

Public's interests that should be paid attention by the bankruptcy law are the:<sup>1</sup>

1. Public that need working opportunity from the debtor
2. Public that supply goods and services to the creditor
3. Public that life depends on the supply of goods and services of the debtor either they are consumer or seller.

The companies give the wide working opportunity to the public, beside that the company also give the business opportunity to the suppliers either goods or services suppliers. These suppliers are the small and middle companies that relies the life on big companies. Therefore, the bankruptcy of the prospective company will also stop the public's opportunity as the goods and services suppliers, and working opportunity of the public in that company.

The bankruptcy of the company will influence the supply of the goods or services that are produced by that company to the public. The further impact is felt by the seller that is involved and relied on the trade of goods and service produced by bankrupt company. These sellers are usually the small and the middle sellers. It is certainly that the consumer who needs or uses the goods and services from that company will also get the impact.<sup>2</sup>

The easiness to bankrupt the company also pulverize the consumers' interests. Many bankruptcies that befall the company in the service sector, even the company who has big asset can lose out the consumers. The fate of public who become the consumer will be a riddle when the company is bankrupt, because the consumer cannot be judged as same as the creditor, moreover if the consumer is placed at the last place that is very possibly to have nothing. According to Sutan Remy Sjahdeini,<sup>3</sup> in the aspect of the bankruptcy of a bank, then the aspects that should be paid attention are interests, first, the interest of people who save the money at bank which is declared bankrupt, second, the interest of people who get the credit from the bank that will have difficulty to use the credit if the bank is declared bankrupt. Then according to Sutan Remy Sjahdeini,<sup>4</sup> banking world and financing institution want and have interest so much in order that the company which is the customer is not bankrupted but the existency is still maintained and grow continuously because of the relation between the bank and the colleague debtor. The bankruptcy of a prospective company that becomes a customer of a bank means that the bank loses one of the potentials for distribution and giving credit and also other facilities from bank. It certainly loses out the bank itself. One of the reasons why only Bank Indonesia that can bankrupt bank is because banking world is closely related to the public's money that should be protected, in general to protect the public's interest.<sup>5</sup>

The urgency of public protection as one of the aspects that emerges from the bankrupt bank that is still prospective is a certainty in order the country gives the protection. The protection given by the country as the form of social justice that is hard obligation, do not struggle the social justice is the same as let the injustice existed. Doing fairly is a moral demand; moral basic is started with the willingness to always do fairly.<sup>6</sup> Social justice is the justice that the implementation is relied on the structure of process of economy, politics, social, and culture. Public is a part of the process that flow continually following the structure of that power.<sup>7</sup>

The public welfare is the main goal in the development. The government in every policy implementation always makes the welfare as the goal that wants to be achieved. One of the expected policies is protecting the prospective company, thus it will indirectly gives impact to the giving of public welfare. It is in line with the National Medium Term Development Plan (*Rencana Pembangunan Jangka Menengah Nasional (RPJMN) 2015-2019*) that is stipulated in Presidential Rule Number 2 Year 2015; one of the government's commitments is directing the development to achieve the increase of ongoing welfare for public, with the developmental strategy to stimulate growth for the maximum ongoing public welfare.

A country has an interest towards the existency and the development of prospective companies in Indonesia, in terms of giving the protection towards the fulfillment of public welfare, because the running of prospective business can absorb much manpower, and the moving of public economic wheel.

## **2. Principle of Prospective Business Protection**

The growth and the development of prospective business is one of indicators of the economic wheel which runs well. So the productive business needs a protection from a bankruptcy thread. The economic growth is closely related to the investment level. To push the high investment level, it needs the harmonious cooperation or relation with the government's policy in the economy.

<sup>1</sup> Sutan Remy Sjahdeini, *Op.Cit.* hlm 35-36.

<sup>2</sup>*Ibid*, hlm 37.

<sup>3</sup>*Ibid* hlm 36.

<sup>4</sup>*Ibid*. hlm 38.

<sup>5</sup>Thomas Suyatno, *Bank Indonesia, Bank Tidak sehat, BPPN dan Masalah Kepailitan*, Jurnal Hukum Bisnis Volume 7, 1999, hlm 36.

<sup>6</sup>Frans Magnis Suseno, *Etika Politik*, (Jakarta : Gramedia Pustaka Utama, 1987), hlm 330.

<sup>7</sup>*Ibid*.



Furthermore, if it is related to the economic condition of Indonesia nowadays that face the retardation, it is very worrying if the economic crisis that ever happen in 1998 will recur. In which there are many companies who have difficulty in repayment the debt/loan because of the high exchange rate of rupiah towards the dollar, moreover with the implementation of AEC at the end of 2015. The economy of Indonesia faces the lateness since 2014 and continues until 2015, marked by the fluctuative exchange rate of rupiah, inflation, price increase, all of this happen because the global pressure.

The target of increase of national strength and sustainability is directed to the increase of economic growth, in this case the entrepreneur's contribution for the government is quite big in providing the vocation.<sup>1</sup> To support the economic growth, so the government makes a set of Structuring of National Economic Policy to:

1. Develop a conducive macro economy
2. Move National Economy Menggerakkan Ekonomi Nasional
3. Protect the society who has low income and social security.<sup>2</sup>

Further explanation related to the Structuring of National Economic Policy, President Joko Widodo establishes a set of economic policies, in terms of maintaining the economic stability of Indonesia that covers:

1. A set of Economic Policies I, on 9<sup>th</sup> of September 2015
2. A set of Economic Policies II, on 29<sup>th</sup> of September 2015
3. A set of Economic Policies III, on 7<sup>th</sup> of October 2015
4. A set of Economic Policies IV, on 15<sup>th</sup> of October 2015
5. A set of Economic Policies V, on 22<sup>th</sup> of October 2015
6. A set of Economic Policies VI, on 5<sup>th</sup> of November 2015
7. A set of Economic Policies VII, on 4<sup>th</sup> of December 2015
8. A set of Economic Policies VIII, on 21<sup>th</sup> of December 2015
9. A set of Economic Policies IX, on 27<sup>th</sup> of January 2016
10. A set of Economic Policies X, on 11<sup>th</sup> of February 2016

A set of policies of Joko Widodo's government in general is aimed to give easiness for business world (dunia usaha) to develop and create the wider vocation and better working opportunities. As a business institution, a company will absorb the manpower from the societies. The more advanced and developed a company; the more manpower are absorbed because the working opportunities that are available are wider.

If the development of business world in Indonesia becomes conducive, so the society will be prosperous. The advance of business world will help to increase the national economic growth. The more advanced and developed business world, the more working opportunities that is available. In addition, the scale of business will be bigger also because the product that is produced will be greater and the segment of market is also wider. In the long term, it will also influence the level of Gross Domestic Product/ *Produk Domestik Bruto (PDB)* of a country that means the increase of national economic growth.

From the perspective of interest of business world, the bankruptcy law is actually needed in the business world to select inefficient businesses,<sup>3</sup> because the inefficient company will affect badly to the economy and will become burden of that economic system itself.<sup>4</sup> Based on that explanation, the implementation of bankruptcy law that destroys the healthy business is the behavior that is contradictory with the purpose of bankruptcy law.

### 3. Principle of National Economic Empowerment

Country as a one of the parties is related to the bankruptcy of a company, which is the interest to not losing the tax source that is largely from the business sector. In the past years, the main source of tax acceptance of Indonesia comes from the sectors of oil and gas, but these oil and gas sectors now are not the main source of tax acceptance anymore.<sup>5</sup> By the decreasing tax role from the sector of natural resources at this moment, it turns to the non-oil and gas sector and the more important is from the creative industry.

The tax is one of the supports of national income. Tax donates almost 70% of all national income. The benefit of tax for a country is very vital. Tax is main aspect for the development of a country. It means that tax finances all aspects of life of a country such as development, infrastructure, health cost, tuition fee, the building of public facilities, and etc. if the tax that is accepted by the country is greater, there will be many infrastructure and public facilities that can be built. Thus, it will be beneficial for public welfare and the tax is closely related to the economic activity.<sup>6</sup>

The great tax role in a country makes the tax to have main position in the axis of a country to move. The tax becomes the starting machine of the development, without tax all activities starting from economic activities,

<sup>1</sup>Kasmir, *Analisis Laporan Keuangan*. Cetakan Kedelapan. Jakarta : PT. RajaGrafindo, 2015. hlm 3.

<sup>2</sup>*Ibid.* hlm 9.

<sup>3</sup>Sutan Remy Sjahdeini, *Op.Cit.*, , hlm. 12

<sup>4</sup>Douglas GBird " *A World Without Bankruptcy*" dalam *Prosiding Rangkaian Lokakarya Terbatas Masalah-Masalah Kepailitan dan Hukum Bisnis Lainnya*, Pusat Pengkajian Hukum, September, 2005, hlm.xx.

<sup>5</sup>Rachmat Soemitro, *Asas-Asas Hukum Perpajakan*, (Bandung : Bina Cipta BPHN, 1991), hlm 23.

<sup>6</sup>Mardiasmo, *Perpajakan*, Edisi Revisi, (Yogyakarta : Penerbit Andi, 2013), hlm 12-16.

the development in the efforts of achieving the public welfare must be obstructed.

Therefore, in order that the country does not lose the tax source from the potential company so the country has the role in order that the existence of the companies can be maintained. For the interest of a country, the country has the duty to create conducive business climate for the existence and the growing of companies. Hence, it needs protection from the government in order that the prospective company cannot be easily bankrupted. The protection towards the company in Indonesia, in macro economic will affect the smooth running of national economic system.

Considering the role of company that is very bigger towards the empowerment of economic system in Indonesia, the content of the bankruptcy law especially related to the easiness in bankrupting the potential and prospective company should be revised, because the rule that is very loose to bankrupt a company is a incompatibility with the effort of economic empowerment of Indonesia.

The growth of investment in Indonesia is better through the support of policy which is given by the government, according to Presiden Joko Widodo the strategy for the change of Indonesia in the policies that will be taken are: 1). Change the consumption-based economy to be production-based economy, 2). The policy of subsidy of fuel that is replaced for the infrastructure building, and 3). Subsidy for the right target. This policy is aimed to increase the role of industrial economy sector to increase the number of vocation. In the first semester of 2015, there is an increase of vocation 12, 31 %. It means that the public welfare will also increase. Thus, the vocation will be increasing more, the economy is enthusiastic and Indonesia will be more productive. The potential of national income from the tax sector is also increased.

Based on that thing above, the bankruptcy law in Indonesia that is possible to bankrupt the prospective business with the easy way and requirement even is contradictory with the government's interest now to give the protection towards the existence of business world and society protection. Therefore, the protection of prospective company is one of the efforts for the empowerment of national economic system.

## 5. Closing

### 5.1. Conclusion

The urgency of law protection towards the debtor of prospective company is (a). the principle of welfare protection for public especially related to the debtor such as the employee or labor, consumer, supplier, public. (b). principle of prospective business protection because the growth and the development of prospective business is one of indicators of the running of economic wheel. and (c). the principle of national economic empowerment, because the potential companies is one of the supports of national income through tax. If the tax that is given to the country is bigger so the infrastructure and public facilities that can be built are also greater. Largely, it will affect the smooth national economic system.

### 5.2. Suggestion

Based on the principles of law protection towards the debtor of prospective company, it needs to do revision towards the verification system in the bankruptcy law of Indonesia. The prospective company does not get the law protection because of the present implementation of the simple verification.

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