STATE, PUBLIC INTEREST, AND BANKRUPTCY; THE CASE OF INDONESIA

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ABSTRACT

Involvement of the state as a public authority participated in the bankruptcy process to safeguard the public interest cannot be avoided. The relationship between the state and its power in safeguarding the public interest in the bankruptcy process in Indonesia raised several issues. In the context of Indonesian Bankruptcy Act, the interests of the state dominate the substance of public interest both regarding the exclusive and prerogative authority of OJK and the Minister of Finance in applying for bankruptcy petition. Even on the authority of the Public Prosecutor's Office to file a bankruptcy petition in the public interest which conforms with the basic concept and mechanism of bankruptcy in general, but its application strongly influenced by government agencies. Similarly, protection mechanisms using exclusive and prerogative powers removed the control over the use of such authority by public institutions while the other hand generating moral hazard of debtors. In line with the establishment of a guarantee institution for both the public savings and the policy insurance, it is necessary to evaluate and reconsider the urgency of such authority.

Keywords: State, Public-Private, Public Interest, Bankruptcy

INTRODUCTION

There is always Uncertainty in this life. Plans and targets can't be all accomplished and achieved as desired. Various problems can cause a plan failed in reaching its predetermined target. An anticipatory effort and adjustment mechanism need to be set up to maintain the maximizing achievement closer to a predetermined target. Such efforts are also needed in order to mitigate the negative impacts arisen from plans that are not working as expected. In the larger scope, these efforts need to be systematically institutionalized to increase their capacity to maximize achievement near predetermined targets and reduce the negative impact of uncertainty. In the context of civil law, the institution is known as a bankruptcy institution. The bankruptcy institution as a special mechanism in debt settlement has a very important role. When the debtor's assets are insufficient to repay all debts, creditors will compete unfairly for payment (*common-pool proble*m). The number of debt issues also disrupt the debtor business continuity. In a larger scope, the condition may disrupt the supply and demand balance in the economic system.

Bankruptcy institution in its current development is not only seen as a mechanism of debt settlement between debtor and creditor. The complexity of transactions in the current era of economic globalization requires an adjustment in bankruptcy institutions. Bankruptcy institutions are encouraged to take into consideration other interests affected by the bankruptcy process as a result of an increasingly complex and connected pattern of economic transactions with the interests of many parties. It should be recognized that in certain situations the bankruptcy process and decision may harm the interests of other parties and the public in general, either directly or indirectly. Involvement of the state as a public authority participated in the bankruptcy process to safeguard the public interest cannot be avoided. The relationship between the state and its power in safeguarding the public interest in the bankruptcy process in Indonesia raises several issues.

The *Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang* (Bankruptcy Act) have protected the public interest by limiting the authority to file a bankruptcy petition. This mechanism has proven to be ineffective in the face of efforts to file a bankruptcy petition both voluntary or involuntary, as well as the varied decisions of the commercial courts in responding to the request. Since the enactment of restrictions on the right to file bankruptcy applications, there are two petitions against banks, eleven petitions securities companies, fifteen petitions against State Owned Enterprise (SOE), and three petitions against insurance and other financial institutions. Three petitions for judicial review have also been submitted to the *Mahkamah Konstitusi* (Constitutional Court) against the restriction on the right to file a bankruptcy petition under Article 2 Paragraph (5), Article 6 Paragraph (3), Article 223, Article 224 and Paragraph (6) of the Bankruptcy Act. In addition, public institutions that are authorized to file a bankruptcy petition also tend to be reluctant to use the authority. These facts indicate that the system of protection of public interest in bankruptcy with restrictions on the right to file a bankruptcy petition has not been a fair and effective solution.

This paper is based on non-doctrinal legal research that uses the standpoint of participants with inductive reasoning which conceives the law empirically (Shidarta, 2013, p. 137; Irianto & Shidarta, 2013, p. 131-132; Wignjosoebroto, 2013, p.120). The paradigm used is the Post-positivism paradigm that ontologically sees that reality exists but can never be fully understood by researchers (*critical realism*). Similarly, the law as a set of rules that apply in a society that its validity will be greatly influenced by other factors (*law as it is in society*). The approach used is the statute approach and the conceptual approach will be used in examining the relationship between state, public interest and bankruptcy in Indonesia and the problems therein.

STATE, PUBLIC-PRIVATE, AND BANKRUPTCY

According to Locke, the state was formed with the aim of preserving the rights of individual ownership. Increased wealth owned by individuals as a result of their work raises concerns about the threat and disruption in the *state of nature*. The awareness of the need for the protection of property ownership and the owner then encourages the individual to delegate some of his natural rights to a ruler called Locke as *supreme power* (state or political power) through social covenants (Suhelmi, 1999, p. 157-158). The establishment of the state according to Locke is an individual's joint effort to safeguard lives, liberties, and estates through state power and its legal instruments.

The legal state Theory holds that the use of power should be based on just law. The relationship between the government and the governed is not based on power but on the basis of an objective norm that also binds the government (Suseno, 2001, 295); Mahfud, 2012, p. 23). The important principle in the rule of law is the principle of proportionality and the principle of the prohibition against an excessive action (Suseno, 2001, p.299). The principle of proportionality requires that state interference should not violate interest that is more important than the outcomes to be achieved with such intervention. Whereas the principle of the prohibition against excessive action requires, within the framework of the principle of proportionality, that the inevitable violation of interests are do not go beyond the measure required to achieve the desired goal. So basically the right to limit the freedom that has to be proved not the right to freedom itself (Suseno, 2001, p.230).

The study of public interest in bankruptcy cannot be segregated from the dichotomy of the public and private spheres (Barnet, 1986; Pound, 1939). However, the simplicity of the concepts, differences in the legal system and the lack of capability of public and private schemes in solving the problems raises many critics and pessimistic views of the dichotomy (Harlow, 1980; Cane in Leyland, 2003, p. 248; Allison, 1996; Owens, 2008; Rosenfeld, 2013). The development of the current legal system shows that public law is more likely to dominate and easily sacrifice the protected interests of private law to safeguard and protect the public interest (as cited in Pound, 1939). Though the concept of public interest itself is not an objective concept still is determined unilaterally by the state. However, such facts should not be used as an excuse to reject and remove the dichotomy of public law and private law. On the contrary, these facts show that the dichotomy of public law and private law is actually indispensable in certain situations (Scholten, 1992, p.36; Radbruch in Pound, 1939; Owen, 2008; Arendt, 1958, p. 28). Thus, although there is some drawback of the dichotomy of the public and private areas, it is necessary for the process of adjusting various interests in the public and private areas. The same adjustment process carried out in the bankruptcy process.

The number of interests involved in the bankruptcy process sparked a long debate about the nature and purpose of bankruptcy institutions. The debate raises many thoughts that can be grouped in two schools of law and economics schools and public interest school. Law and Economics School sees bankruptcy institutions only in the context of a civil law relationship between the debtor and the creditor. The bankruptcy institution will only consider the interests of creditors and debtors in debt settlement between the parties because of its position as a civil settlement institution. Even in some narrower view the bankruptcy institution only functioned as a collection tool for creditors (Jackson, 1982; Jackson 1982; Jackson, 1984; Jackson & Scott, 1989; Baird, 1987). As the initial concept of bankruptcy institution that is intended to protect the interests of creditors, whether the protection of the interests of one creditor from other creditors as well as the interests of creditors from the debtor (Levinthal, 1918). On the other hand, the Public Interest School believes that the bankruptcy institution other than as a place for debt settlement between debtor and creditors should also pay attention to the rights and interests of other parties either directly or indirectly affected by the bankruptcy process (Wardrop, 2014; Martin, 1998; Veach, 1997). The debate over the main objectives of the bankruptcy institution still continues to this day.

PUBLIC INTEREST IN INDONESIAN BANKRUPTCY ACT

The drafting and amendments process of Indonesian Bankruptcy Act that has been made twice is conducted in responding both, the bankruptcy cases noticed by the public and the economic crisis. The situations where the drafting and amendment process takes place, forming the legal policy of the Bankruptcy Act tends to protect the interests of creditors, including Undang-undang Nomor 37 Tahun 2004 Tentang Kepailitan dan Penundaan Pembayaran Utang, as the current Indonesian Bankruptcy Act. The Legal Policy that emphasizing the more protection of the creditors' interests that can be inferred from the mechanisms and processes provided the right and authority that determines to the creditors are manifested in the requirement of simple bankruptcy filing (Article 2 paragraph (1)), a brief proofing process (Elucidation of Article 8 paragraph (4)), and debt (Article 1 paragraph (6)) in wide meaning resulting in many parties which may be a creditors in bankruptcy (Elucidation of article 2 paragraph (1)). Moreover, the Bankruptcy Act firmly states that the bankruptcy does not grant the debtor exemption from the obligation to pay the remaining debts that are not paid in bankruptcy proceedings (Article 204). A special mechanism is then established to protect the public interest in the highly pro-creditor regime.

Some bankruptcy mechanisms are specifically regulated in the Bankruptcy Act. This special mechanism authorizes the *Kejaksaan* (Public Prosecutor's Office), Minister of Finance, and *Otoritas Jasa Keuangan* (OJK/Financial Services Authority) to file for bankruptcy petition against certain types of debtors. This special mechanism intended to protect certain interests beyond the interests of debtors and creditors. Any interest outside the rights and obligations between the creditor and the debtor protected in the bankruptcy process is assumed to be in the public interest. The exclusive and prerogative nature of OJK's authority is intended to waive the creditor and debtors authority in bankruptcy.

Based on Article 2 Paragraph (2) of the Bankruptcy Act, the Public Prosecutor's Office has the authority to file a bankruptcy petition in the public interest in the event that the requirements for filing a bankruptcy petition as referred to in Article 2 paragraph (1) have been fulfilled and no party has filed a bankruptcy petition against the debtor. According to the Elucidation of Article 2 paragraph (2) of the Bankruptcy Act, the public interest here is the interest of the nation and the state and or the interests of the wider community. Such public interest may arise when the debtor is uncooperative, embezzles assets and or

escapes. Public interest also arises when debtor debt is a fund that directly or indirectly comes from the public and/or State Owned Enterprise (SOE). In addition, the Public Prosecutor's Office is given wide discretionary authority in considering other forms of public interest.

There are three elements of public interest in the authority of the Public Prosecutor's Office. The first element is the debtor's debt status derived from public funds and/or SOEs. This criterion can be easily met given that most loans come from financial institutions such as banks, savings and credit cooperatives, and other financial institutions. As an intermediary institution, these financial institutions raise funds from the community and distribute them in the form of credit. In fact, most of these intermediary functions are still dominated by financial institutions that are SOE. The second element is the existence of bad faith and uncooperative attitude of debtors in settling their debts, such as by embezzling assets and or escaping. While the third element is a situation where none of the parties who apply for bankruptcy petition, both creditors, and debtors. It means that the Public Prosecutor's Office position is only a substitute and represents the interests of many creditors in applying for bankruptcy petition. The bankruptcy institution provides the same processes and outputs, whether requested by the creditor or the Public Prosecutor's Office. So it can be concluded that public interest concerning Public Prosecutor's Office in applying for bankruptcy in the public interest is the interest of the creditors.

Based on Article 2 paragraph (2), paragraph (3) and paragraph (5) of Bankruptcy Act jo. article 55 of *Undang-Undang Nomor 21 Tahun 2011 Tentang Otoritas Jasa Keuangan* (FSA Act) and Article 50 of *Undang-Undang Nomor 40 Tahun 2014 Tentang Perasuransian* (Insurance Act), OJK is the only party with exclusive authority to file a bankruptcy petition when the debtor is a bank, Securities Company, Securities Exchange, Clearing, and Guarantee Institution, Depository and Settlement Institution, Insurance Company, Reinsurance Company, and the Pension Fund. The filing of a bankruptcy petition for such financial institutions is the authority of OJK and is solely based on an assessment of the financial condition and condition of the banking system as a whole. Even the Bankruptcy Act emphasizes that the use of this authority is not needed to be accounted for because of its prerogative and based solely on the assessment of the financial condition and the condition of the banking system as a whole. The exclusive and prerogative authority is intended to support OJK's duties and function in maintaining the level of public confidence in the financial institutions that manage public funds and have a strategic position in the development and the economy.

The prerogative nature of OJK authority indicates that the position of OJK in the request for bankruptcy petition against the financial institution is not directly related to the interest of the debtor and its creditors. Despite the fact that the debtor has debts of two or more creditors, and/or the value of the debt exceeding the value of its assets is juridically overruled and not the basis of consideration for submission of a petition for bankruptcy. Whereas the authority as a public authority is certainly more precise and effective in maintaining the stability of the financial sector and banking in macro. So it is difficult not to assume that the authority of OJK in the filing for bankruptcy petition is only to cover the possibility of financial institutions being filed for bankruptcy by other parties. If a financial institution is filed for bankruptcy it is assumed that it will disrupt the stability of the financial sector because it psychologically encourages the withdrawal of funds by the public (rush). So it can be concluded that the public interest in the context of OJK’s authority is the stability of the financial sector.

The most authority of the Minister of Finance in applying for bankruptcy petition against insurance companies, reinsurance companies, pension funds, has been submitted to OJK since this institution was established. Currently, the Minister of Finance is only authorized in applying for bankruptcy petition against SOE engaged in the public interest. As the nature of the authority of OJK, the Bankruptcy Act also provides exclusive and prerogative authority to the Minister of Finance to file a bankruptcy petition against SOE. The basis of consideration of the use of authority to file a bankruptcy petition is not different from OJK which is based solely on the assessment of the condition of the financial system as a whole. Elucidation of Article 2 paragraph (5) of the Bankruptcy Act states that SOE engaged in the field of public interest is an SOE whose capital is owned by the state and not divided into shares. Then the public interest in question here is the interests of the state of its shares in the SOEs. If all state-owned capital is owned by the state then the SOE is actually an extension of the hand or institution of the state because it is fully controlled by the state. So it can be concluded that the public interest here is identical with the interests of the state itself.

ISSUES ON STATE, PUBLIC INTEREST, AND BANKRUPTCY IN INDONESIA

The state through commercial court judges and curators take over the control of the settling debtors' debt process that is experiencing difficulties in bankruptcy proceedings. The main objective of the state's presence here to ensure that the settlement of debts is conducted fairly and transparently. But in its position as the party responsible for maintaining the public interest, the state certainly has an interest in ensuring that the settlement of debt issues between creditors and debtors does not have a negative impact on the public. The state is unlikely to allow a process in the private jurisdiction that gives a negative impact on the wider community, especially in this bankruptcy process the state plays an active role as a facilitator. State’s efforts in protecting the public interest are through exclusive and prerogative authority to file a bankruptcy petition against special debtors.
The protection of the public interest in the bankruptcy process in Indonesia has not been worked as expected. Most authorized authorities tend to be reluctant to use their authority to file for bankruptcy against special debtors. The special mechanism of bankruptcy only to prevent submission of the bankruptcy petition against particular debtors, whether filed by creditors or voluntarily by the debtor himself. Since the enactment of restrictions on the right to file the bankruptcy petition against a special debtor, there are two submissions bankruptcy against banks, eleven applications against securities companies, three applications against insurance companies and fifteen petitions against SOEs. The filing of a petition for bankruptcy in the public interest by the Public Prosecutor's Office has only been filed twice. The first request for bankruptcy petition was filed by Kejari Lubuk Pakam against PT Aneka Surya Agung in 2005, and the second request for bankruptcy filed by Kejari Cibadak against PT Qurnia Subur Alam Raya and Ramli Araby in 2013.

The lack of requesting of the bankruptcy petition in the public interest filed by the Public Prosecutor's Office is caused by the understanding of most prosecutor that there should be a power of attorney from government agencies and/or SOE as the basis for it to actively engaged in private law litigation including bankruptcy cases. The consequence of such opinion is the existence of the public interest as the basis for filing for bankruptcy petition is also fully determined by government agencies and/or SOE. This view is not in accordance with the Bankruptcy Act provisions which does not mention power of attorney as a requirement on the request of bankruptcy by Public Prosecutor's Office, instead giving a wide discretionary authority to the Public Prosecutor's Office in determining the form of public interest which is used as the basis for bankruptcy petition. In addition to the power of attorney, the involvement of Public Prosecutor's Office in bankruptcy case also based on the court decision. Only a few prosecutor have argued that the authority of the Public Prosecutor's Office in filing for bankruptcy petition in the public interest can be done without a Power of Attorney and is entirely based on the authority of the Public Prosecutor's Office in the sphere of law enforcement under article 30 paragraph 3 of *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan* (Public Prosecutor's Office Act).

The issue also arises on the authority of the OJK and the Minister of Finance as the sole party who can file for bankruptcy petition against the special debtor under its control and supervision. This particular bankruptcy mechanism creates a conflict of interest within the two public institutions. Submission of a request for bankruptcy petition against debtors regulated and supervised by a public institution indirectly indicates that the public institution is incapable of performing its duties and functions properly. This conflict of interest has caused all authorities never to use the authority to file for bankruptcy. OJK and the Minister of Finance as a public institution will certainly prefer to use its authority in the public domain to solve the financial problems of the special debtor under its supervision. This conflict of interest furthermore reducing the possibility of OJK and the Minister of Finance to use bankruptcy mechanisms in debt settlement from financial institutions and SOEs as debtors. This will impact on the limited choice of mechanisms that can be used by creditors and special debtors to solve the debt problem.
State dominance in defined the concept of public interest and its implementation can be found in the legal products of each country. Even in certain categories, the public interest is identified with the interests of the state (Pound, 1945; Pound, 1943). In the context of Indonesian Bankruptcy Act, as outlined above, the interests of the state dominate the substance of public interest both regarding the exclusive and prerogative authority of OJK and the Minister of Finance in applying for bankruptcy petition. Even on the authority of the Public Prosecutor's Office to file a bankruptcy petition in the public interest which is conceptually still in accordance with the basic concept of bankruptcy, but in the implementation, it is fully determined by government agencies.

The relation of power in the bankruptcy process, as well as similarizing the interests of the state as a public interest, brings several consequences. The state as an organization becomes a very dominant and purified entity. Various efforts will be made to safeguard the dignity and honor of the state entity among others by putting aside other interests based on claims in the public interest. The concept of public interest identified with the interests of the state indirectly carries the interests of state authorities in bankruptcy. The dominance of the interests of state authorities makes bankruptcy provisions to be repressive. Excessive protection will result in loss of protection against individual interests and other social interests (Pound, 1943). The state as a political organization is not always in its ideal performance as expected. Then the public interest should not be equated with the interests of the state and left entirely in the will of the state.

CONCLUSION

The dichotomy of public law and private law is indispensable in adjusting various interests in the public and private areas as in the role of the state in the bankruptcy process. However, the concept of public interest given by the Bankruptcy Act still raises several problems. Similarly, protection mechanisms using exclusive and prerogative powers remove the control over the use of such authority by public institutions and on the other hand generate moral hazard of debtors. In line with the establishment of a guarantee institution for both the public savings and the policy insurance, the evaluation of the authority of the public authorities in applying for the bankruptcy petition is necessary to reconsider the urgency of such authority and minimize the conflict of interest between the interests of the public authority and the interests as the only party authorized to apply for a bankruptcy petition.

The issue of protection of the public interest in bankruptcy cannot be simply answered by limiting the right to file an application for bankruptcy. If all issues of public interest protection in bankruptcy are done by limiting the right to file a bankruptcy petition, then it is certain that the right to file a bankruptcy petition against all debtors will be in a public institution because the public interest aspect will appear in all areas in line with the increasing number and level of community dependency of certain products and services. This problem-solving effort needs to be performed fundamentally by reconstructing the bankruptcy institution in order to accommodate various interests in a balanced way. Some basic changes that need to be done include running the insolvency test as a process of verifying whether the amount of assets of the debtor is not enough to pay all its obligations so it is worth declared bankrupt. In addition, the terms and mechanism of bankruptcy should be differentiated between individual debtors and debtors who are companies or legal entities. This is because they have different characteristics that give different effects when it declared as bankrupt. Furthermore, the mechanism of public interest protection can be done indirectly without involving the state and the authority acts as the applicant. The state through the regulatory authority and the supervisor of each sector shall serve as *amicus curiae* in court proceedings to give opinions and views to the judges on the public interest aspect of the bankruptcy case being examined. Thus, the panel of judges can make a fair decision by considering not only the interests of creditors or debtors but also the public interest.

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