

LEGAL CULTURE INFLUENCE ON IMPLEMENTATION OF BANKRUPTCY LAW IN INDONESIA

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ABSTRACT

The development of business relations between debtors and creditors increasingly complex and thus require a formulation that protects the parties involved in the business relationship itself. The bankruptcy law has not changed significantly since the monetary crisis in 1998. Therefore, we need a study to consider the factors that are influence the formulation of the bankruptcy law system itself. Among them is the legal culture factor. Where the legal culture itself as one component of the legal system refers to public knowledge, attitudes and behavior patterns of society with regard to the legal system, including law enforcement officers. Research results showed that the legal culture influence bankruptcy law in two mechanisms, which are in the legal system and in the community. From the sides of the legal system, it can be assessed that the legal culture moves through the components of the law and have a level of dependency that is quite close. Legal culture forming either substantive law, procedural law, decision rules and decision habits components. Where the four components depart from the norms and values of society. Not only the form, but likewise in execution is also influenced by legal culture Dynamic relationship between the legal culture and legal system that emphasizes how the legal system can not be separated from the legal culture. Meanwhile, in terms of relevance to the community legal system can be evaluated how community characteristics affect the legal system and vice versa legal system in accordance with the characteristics of people tend to get strong support from the community. Rule of law can not be applied properly if it is not adapted to the legal culture of society. Legal cultere as a bridge between the value system promoted by the legal product would be appropriate (as a manifestation) with consciousness value in the communities. This means that the legal culture and society has a reciprocal basis of relationship. Overall the legal culture in the system of bankruptcy law formed the legal value either procedural or substantive.

Keywords: Legal culture, Bankruptcy Law

Introduction

The rapid development of Indonesia's economy makes the various companies involved had to expand their business. Under conditions where the companies developing their business, the need to use bailout funds arises. Bailout funds give to the company based on the assumption that investors believe the company can fulfill their short term and long term liabilities. This makes the company has the rights and obligations to the investor.

If inability in fulfilling its financial obligations to third parties condition of these companies appear, it will make some of the companies being on the verge of bankruptcy. The inability of these companies to meet the financial obligations, some times give effect to the number of claims against debtors in default, even sued the bankrupt and declared bankrupt by the commercial court upon the request of its creditors. The bankruptcy proceedings, will be followed by the bankruptcy estate settlement process (the assets of insolvent defendant will be liquidated).

On the other hand that investment requires a healthy business climate and the existence of clear regulations. Regulation in this case required that the investor who want to invest can feel a clear legal protection. Legal protection for investors will eventually be a consideration before deciding to invest in a country. In this case, the decision of investors to invest can not be separated from the investor confidence on security of funds they want to invest, including legal protection obtained for the investment fund if the company or debtors went into bankruptcy.

This leads to where regulation is needed in Indonesia that can be used as a form of legal certainty for investors and foreign investors who want to invest in Indonesia. The regulations include Act No. 25 of 2007 on Investment, Law No. 40 of 2007 on Limited Liability Companies, and Law No. 37 of 2004 on Bankruptcy and Suspension Of Obligation For Payment Of Debts. Various legislation is one of the legal certainty provided by the Indonesian government to investors. Legal protection efforts by the Indonesian government in this regard relates to Law No. 37 of 2004 on Bankruptcy and Suspension of Payment (hereinafter referred to as the Bankruptcy Act). The existence of the law allows the creditor to obtain legal protection of their rights to the bankruptcy debtor estate. Legal protection is done through a process of trial on bankruptcy cases in the Commercial Court.

According to Law Number 37 Year 2004 Bankruptcy is defined as "Bankruptcy shall mean general confiscation of all assets of a Bankrupt Debtor that will be managed and liquidated by a Curator under the supervision of Supervisory Judge as provided for herein;" It is stated in Article 1 (1) of the Bankruptcy Act. Based on this, according to the Bankruptcy Act, there are several elements of the bankruptcy case, the foreclosure process, elements of Bankrupt Debtors wealth, Curator elements, and elements Supervisory Judge. Simply put, bankruptcy can be interpreted as a confiscation of all assets of the debtor being put into

bankruptcy petition.¹ Bankruptcy is intended to prevent foreclosure and execution requested by individual creditors, as well as just about debtors is not his personal property.² Therefore, the bankruptcy debtor does not necessarily lose its ability to pursue legal action, but lost the right to control and take care of his assets were included in the bankruptcy as from bankruptcy statement is issued.

But what happened in his practice, there are several decisions bankruptcy incompatible with the original purpose of the establishment of Law Number 37 of 2004 on Bankruptcy and Suspension of Payment, which is to support the development of national economy. Some bankruptcy by the court ruling against some debtors have changed the legal status of the debtor becomes incapacitated to perform legal acts, control, and manage the wealth since the declaration of bankruptcy verdict was read. In fact, the parties filed bankruptcy or debtor has assets exceeding the amount of debt that must be paid to the creditor, and the party that filed for bankruptcy are, in fact, still have a chance to be able to run the company in order for the payment of any obligations or debts of the debtor to creditors..

Therefore, in the application of bankruptcy law is influenced by various factors including cultural aspects. As well as the legal system of bankruptcy law Indonesia also comprises aspects of the patterns of behavior and concrete actions the business community and officials bankruptcy law (judge of the commercial court). A fact that the legal cultural factors make the difference between the law enforcement community with one another. This has attracted researchers to examine Cultural Influence Law Against Bankruptcy Act Implementation in Indonesia.

Problem Formulation

According to research background above, the formulation of the problem that can be compiled in this study is: How can cultural factors influencing the implementation of bankruptcy laws in Indonesia?

Literature review

1. Legal Culture Concept

Legal culture is a combination of two words, namely culture and legal (law). The word culture (budaya) comes from the Sanskrit is buddhaya, which is the plural of buddhi (the mind or intellect) is defined as matters related to the mind and human reason.³ In English, word culture is derived from the Latin word *Co Iere*, the processing or working. "It could be interpreted also as tilling the soil or farming. Departing from the above cultural understanding some experts as Soerjono Soekanto legal culture is defined as the same general response from certain people for phenomena of law. The response was an unified view of the values and behavior of the law, so a legal culture shows the behavior patterns of individuals as members of society who describe responses. Legal culture is described as an attitude that became cultural products from a community.

Culture according to Gustav Radbruch is an embodies the values (which contains the field should have) in fact, which is reflected in people's behavior and rules. Law, according to Gustav Radbruch, reflect the culture which is the bridge between values and reality. Thus, according to Gustav Radbruch human will not be as free as possible, because he was committed to values. In view of Gustav Radbruch, the rule of law is a blend of values that must be realized and the reality that should not be in violation of those values. The value contained in that law by Gustav Radbruch is justice. In his view, the insistence on justice must be realized in actual changes.⁴

Legal culture as one component of the legal system refers to public knowledge, attitudes and behavior patterns of society with regard to the legal system, including law enforcement officers. Assessment of legal issues just emphasizes to how the law works according to prosedur formal as outlined in the legislation, has not been able to explain completely and broadly how real people resolve legal problems, including in this case how judicial approach decisions behavior patterns which are influenced by the values espoused.⁵

2. Bankruptcy

The word bankrupt in French called *faillite* which means congestion payments, while in the Dutch language used in legal terms *failliet* and Anglo America known as *bankruptcy*.⁶ The word bankrupt in English is derived from legislation in Italy called *banca ruota* and it is known that in medieval Europe occurred in the practice of bankruptcy is done by destroying the benches of the bankers or traders who fled secretly with bringing creditors wealth.⁷

Bankruptcy can be interpreted as a confiscation of all assets of the Debtor in bankruptcy petition.⁸ In general, the term bankruptcy is used to refer to the general encumbrances on all the property of the debtor to achieve peace between the

¹ Rahayu Hartini, 2008, *Hukum Kepailitan*, Malang, UMM Press, pp. 22.

² *Ibid*

³ Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, 1989, *Kamus Besar Bahasa Indonesia*, Jakarta, Balai Pustaka, pp. 130.

⁴ FX. Adji Samekto, 2013, *Hukum Dalam Lintasan Sejarah*, Indepth Publishing, Bandar Lampung,

⁵ Rahardjo. S. 2009. *Masalah Penegakan Hukum. Suatu tinjauan Sosiologis*. Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman.

⁶ Rahayu Hartini, 2008, *Hukum Kepailitan*, Malang, UMM Press, pp. 4.

⁷ Jono, 2008, *Hukum Kepailitan*, Jakarta, Sinar Grafika, pp. 1.

⁸ Rahayu Hartini, *op.cit*, pp. 22.

debtor and the creditor that such property be divided equally among the creditors.⁹ Bankruptcy is intended to prevent foreclosure and execution requested by the individual creditors, and bankruptcy only applies to property of the debtor, not personal.¹⁰

3. Declaring Bankruptcy

Terms to apply for a declaration of bankruptcy of the debtor can be seen at Article 2 (1) Law No. 37 of 2004 on Bankruptcy and Suspension Of Obligation For Payment Of Debts which stated that "A debtor having two or more creditors and failing to pay at least one debt which has matured and became payable, shall be declared bankrupt through a Court decision, either at his own petition or at the request of one or more of his creditors".¹¹

According to article 2 (1), (2), (3), (4), (5) Law No. 37 of 2004 on Bankruptcy and Suspension Of Obligation For Payment Of Debts, shows that the party may apply for a declaration of bankruptcy for a debtor is:

- a. Debtor itself
- b. Creditor or creditors
- c. Public Prosecutor in the public interest.
- d. Bank Indonesia, if the debtor is a Bank
- e. Capital Market Supervisory Board. (BAPEPAM), if the debtor is in the form of a Securities Company, Stock Exchange, Clearing and Custodian Institution, Settlement and Depository Institution
- f. Minister of Finance, if the debtor is in the form of Insurance Company, Reassurance Company, Pension Funds, or State-Owned Enterprise engaged in the sectors of public interest.¹²

Research Method

The kind of this research is a normative legal research with the type of library research. Normative legal research is legal research using secondary data. Secondary data were sought preferable to bankruptcy trial decisions by the commercial court or the Supreme Court, however, in addition to secondary data sourced from the decision also comes from the study of legislation and research literature related to the research topic. Secondary data derived from primary legal materials, secondary law and tertiary legal materials. A data collection study conducted by the method of documentation that refers to / collect the materials are documented, while the data collection tools used for documentation study is a method of studying data either in the form of books, research reports, conference papers, handwriting experts, decisions court and all legislation relating to materials research. Data were analyzed with content analysis. Content analysis was done for to all secondary data collected, however, content analysis, especially for documents that form the commercial court decision.¹³

Discussion

1. Legal Culture influence to The Legal System

Various studies have shown how the legal culture influence the course of a legal system. Legal culture is the mirror of identity and at the same time a source of reflection, resource abstraction embodied in the values contained in any legal product, and institutionalized in any legal institution, the product substance of the law, and are also formed in the attitude and behavior of any officer and employees who works in the legal field as well as those who seeking for justice (justice seekers) and citizens in general. Even the legal culture also affect the way leaders and leadership mechanisms of law in practice. Called law enforcement professionals because of the ability to think and act beyond the written law without injuring the value of justice. In upholding justice, demanded the ability of law enforcement to criticize the law and practice of law in order to find what it is supposed to do as a professional.¹⁴

When applied in the legal system of bankruptcy, legal certainty in the implementation of the provisions of the arrest of the bankrupt debtor in the Labor Law and PKPU felt still less, as they often do not appear legal certainty in its application that caused by many conditions that give rise to legal loopholes, such as the period of detention, the ability of judges who are subjective in carrying out the arrest of the bankrupt debtor.

Another legal culture factors that can be incorporated more is the moral integrity of judges in applying the law in a concrete way on the court, in this case is certainly to do with the profession of a judge of the commercial court, when applying the provisions of bankruptcy law and in applying the process of the trial, judge should take into consideration the principles of the Bankruptcy Act. Here the judge at the examine time decide on the subjects of law that the parties of the bankruptcy case, so the decision lead to a harmonious life among all members of society. The judge's decision will be at the discretion in

⁹ Munir Fuady, 2005, *Hukum Pailit dalam Teori dan Praktik*, Bandung, PT Citra Aditya Bakti, pp. 8.

¹⁰ Rahayu Hartini, *op.cit*, pp. 22.

¹¹ Munir Fuady, *op cit* pp 8

¹² Law No. 37 of 2004 on Bankruptcy and Suspension Of Obligation For Payment Of Debts Article 2 (1), (2), (3), (4), (5)

¹³ Bogdan dan Taylor dalam Lexy J. Moleong, 2010, *Metodologi Penelitian Kualitatif*, PT Remaja Rosdakarya, Bandung, H. 4

¹⁴ Ahmad Jalaludin, "Budaya Hukum Bias Gender Hakim Pengadilan Agama Dalam Perkara Cerai Talak", *Jurnal Muwazah*, Volume 7, Nomor 2, Desember 2015

social interaction, because the judge's decision is based on conscience internally and autonomous underlying its decision, that decision is not only for the interests of investors and stakeholders of its course, but also for the interests of all members of society,

Sometimes can also happen how the judge of the commercial court subjectively know that if the provisions of the bankruptcy law applied textual, then the decision will result in the loss not only to debtors who are still solvents as individual, but also have adverse effects on its stakeholders and all society members, but still applied it. Thus the judge's decision reflects not only contrary to public policy in social interaction, but also contrary to conscience of man, so this kind of judge can not be stated as a professional judge that have high moral integrity.¹⁵

It was underlined that the legal culture can influence how the legal system is formed and ran. Where the legal culture moves through the components of the law and have quit close level of dependency. The component in question is the substantive law, procedural law, decision rules and decision habits. In the case of the other four components departing from the norms and values of society. All four of these components as part of the legal system is influenced both in its creation and implementation by the culture of law. Therefore by the concept the legal system can not be separated from the legal culture.

The Influence of Legal Culture to Society

The influence of legal culture in society arise from the awareness that culture arise from the values, ethics and attitudes in society. So that a good legal culture will not rule out the role of the community in shaping the good legal culture that adjacent with the court system itself. In other hand, the other consciousness is how the law itself has a reciprocal relationship with the community. When the society structure can be a barrier as well as a social means of allowing the law to be applied as well as possible. This is why legal culture can not be separated from society.¹⁶

Therefore, to create a society that has awareness and high legal culture in order to realize the state of law and the creation of a society that is fair and democratic, we needs to made of a development grand design (strategy) of a legal culture as a guidelines/reference to the increase of public awareness in order to know and aware of their rights and obligations, and be able to behave in accordance with legal norms.

If implemented, a lot of things that need to be assessed on the role of communities in improving the culture of bankruptcy law. *The first* is the importance of public awareness and understanding of what it's all underlying aspects of the creditor debtor trust and agreement. Trust is constituted by the company's financial history as well as the suitability of the information submitted by the company (negating the asymmetry of information).¹⁷ While the basis of the agreement of creditors debtors should begin with trust but does not rule out the logical calculations about the risks that are owned by creditors. It requires precision and caution of investors in understanding the agreement.

Meanwhile, an agreement between creditors to debtors resulted in the emergence of the engagement, one of which requires the debtor to restore its debt as an achievement that should be done. Later if defaults problems arise, then the creditor may perform legal measures, among others, through peace, alternative dispute resolution, delay debt payment obligations, and bankruptcy. Civil code recognize three (3) forms of default, there are:

1. The Debtor does not meet the achievement target at all;
2. Debtor late in fulfilling the achievement;
3. The debtor does not perform achievement as it should be

Then people are also able to understand the phenomenon whereby the implementation of the company tax debts bill payment in case of bankruptcy has not been optimal. This is because the funds or money from the sale of corporate assets to pay the debt / insolvency tax bill is still less than it must be, even the money from saling the assets of some bankrupt company were already run out so there are no money available to pay the tax debt. In addition, the fact that separatist creditors usually will confiscated all assets of the company at the first chance becaius the whole of the assets encumbered by a security interest or already use as loan guarantees. *Second*, the emergence of various factors that hinder the implementation of the company's bill payment of tax debts in case of bankruptcy is the substance of the legislation, inter-party coordination, lack of transparency and accountability, as well as weak supervision.¹⁸

This is why people have to raise awareness to recognize and realize what it was investment, measures consideration, the binding agreement, the legal consequences that accompany engagement in the agreement, as well as legal measures if the debtor in default. Thus the law of cultural factors can move as "motor justice" as well as Friedman statement that serves to bridge the legal system with public attitudes.¹⁹ Included are non formal legal system as an adjunct or substitute for regulatory oversight of non-formal law.

¹⁵ Tata Wijayanta, *Asas Kepastian Hukum; Keadilan dan Kemanfaatan Dalam Kaitannya Dengan Putusan Sidang PEngadilan Niaga*, Fakultas HUKUM Universitas Gadjah Mada Yogyakarta

¹⁶ Emmi Warasih, 2005, *Pranata Hukum Sebuah Telaah Sosiologis*, Semarang: Suryandaru Utama, pp: 85

¹⁷ Komalasari, Puput, 2001, *Asimetri Informasi dan Cost Equality Capital*, Simposium Nasional Akutansi III

¹⁸ Reynold Martinus Halim, 2011, *Pelaksanaan Pembayaran Utang Kreditor Preferen Dalam Kasus Kepailitan*. Tesis Program Kenotariatan Universitas Hasanuddin.

¹⁹ Lawrence Friedman dalam Gunther Teubner 1986

In other hand, the legal culture in society affect how people change the value of the legal system itself. Each of the value of these communities have similarities and differences, in the end the similarities should be used to devise a law unification. But the differences that exist should not be underestimated, because it is not uncommon concerning the basics of the communities system or sub-system. Therefore, in preparing legislation, legal awareness and legal culture enhancement should receive a proportionate priority. It is necessary, given that many laws and regulations in Indonesia are arranged solely on the basis of normative thinking and less propped on it counterpart, that is the empirical thought or values that live and thrive in society.²⁰

In more detail Daniel Lev explained that people's characteristics will affect the system and vice versa legal system in accordance with the characteristics of people tend to get strong support from the community.²¹ It is emphasized that the ideal law is the law which is the direct product of the culture of the people itself so that the value system promoted by the legal product would be appropriate (as a manifestation) with awareness of the value (value consciousness) in the communities.²² Therefore, a rule of law can not be applied properly if it is not adapted to the existing legal culture in society

Conclusion

Legal culture is a manifestation of the values in fact, which is reflected in people's behavior and rules. Thus the rule of law is a blend of values that must be realized and the reality that should not be in violation of those values. The value contained in the law is justice. In it views, the effort for justice to be realized in real regulations. Similarly in bankruptcy law, legal culture has very close influence in shaping the legal system and to society.

Based on the sides of the legal system, it can be assessed that the legal culture moves through the components of the law and have quit close level of dependency. The component in question is the substantive law, procedural law, decision rules and decision habits. In the case of the other four components departing from the norms and values of society. All four of these components as part of the legal system is influenced both in its creation and implementation by the culture of law. Therefore by the concept the legal system can not be separated from the legal culture

Meanwhile, from the point of view of the law system linkage can be reviewed by how community characteristics affect the legal system and vice versa legal system in accordance with the characteristics of people tend to get strong support from the community. Rule of law can not be applied properly if it is not adapted to the culture of law in the legal culture of society as a bridge between the value system promoted by the legal product would be appropriate (as a manifestation) with awareness of the value (value consciousness) in the communities.²³ This means that the legal culture and society have reciprocal basis relationship. Overall, the legal culture in the system of bankruptcy law formed the legal value either procedural or substantive

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²⁰Jawardi 2013, "Strategi Pengembangan Budaya Hukum", Jakarta: Penyuluh Hukum Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM, hal: 78-79

²¹ Daniel S Lev, Lembaga Peradilan dan Kultur Hukum Indonesia dalam Yahya Muhaimain dan Colin Mac Andrews 1980, Masalah-Masalah Pembangunan Politik Yogyakarta, UGM Press

²²Lawrence Friedman, 1990, *The Republic of Choice Law, Authority, and Culture*, Massachusetts, Harvard University Press, pp. 47.

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