

STATE'S RESPONSIBILITY FOR FULFILLING THE NORMATIVE RIGHTS OF WORKERS/LABORERS IN THE BANKRUPT-DECLARED COMPANIES

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ABSTRACT

State's Responsibility for Fulfilling the Normative Rights of Workers / Laborers in Companies declared Bankrupt .The enactment of two law norms emerge conflicted between Law of Manpower and Law of Bankruptcy that put on the position of worker/laborer in fulfillment of their normative rights become weak even unprotected. Article 95 paragraph (4) explained "in the case of companies being bankrupt and or liquidated based on the laws and regulations applies, then the wages and other rights of the worker/laborer constitute the debt that payment takes precedence".. Law of Bankruptcy did not specifically regulated the position of workers/laborer as preference creditor, special creditor therefore whenever become bankrupt in a company then the prioritized the payment is separatist creditor. In this case the role of the State or state's responsibility when the company unable to provide normative rights for their workers/laborer.

Keywords: Fullfilling workers/labor's normative rights, bandkrup company. State's Responsibility

A. Introduction

The purpose of Indonesia, cited in the fourth paragraph of the opening of Indonesia's 1945 Constitution (UUD NRI 1945), is that "...[to] protect all of the Indonesian nation and all of its bloodshed and to advance the general welfare, educate nation's life, and involved in world's order based on independence, eternal peace, and social justice". Efforts to realise the state's purpose is being done through national development. According to Sjachran Basah, multi-complex development brings the consequences that the country must be majorly involved in their people's lives, in all of the life sectors. The involvement is inscribed in the provisions of the legislation, either in the form of law or other implementation rules.¹

Indonesia also adheres the state law principal (rechtstaat), which in this principle, it stated that activities involving people sovereignty are regulated by juridical norms. This state teaching (staatleer) becomes the stepping stones for everyone who does the statehood management to confirm it to the norms of the law.²

Role of the workers/labours is significant to reach the goal of development. So that the law of the employment affairs have the purpose to protect the worker/labour's rights that normatively regulated by the 1945 Constitution and Law no. 10 year 2003 about Employment.³ Protection for the worker/labour is intended to ensure the basic rights of workers/labours in work relationship and also ensure opportunity and treatment without discrimination based on anything to create workers/labours' welfare.⁴ On article 27 paragraph 2 of 1945 Constitution declares that "every citizen have rights on humanly decent work and livelihoods", and on article 28i paragraph 1 on the same constitution, it stated that "every person have rights to live, not tortured, free in thoughts and hearts, have rights to religion, have rights not to be enslaved, have rights to be recognised before the law as a person, and have rights not to be sued of retroactive legal basis are human rights and cannot be diminished in any circumstances.⁵

Law no. 13 the year 2003 formulated as the further explanations of the mandate of both article 27 paragraph 2 and article 28i paragraph 1 of the 1945 Constitution. Therefore, constitutionally, Law no. 13 the year 2003 about Employment must reflect normative rights of the workers/labours as human rights as mandated by the 1945 Constitution.

Protections of these workers/labours' basic rights certainly must be reflected in the fulfilment of the normative rights when the company is declared bankrupt, as written in the provision of article 95 paragraph 4 Law no. 13 year 2003 that states salaries and other rights of the workers/labours are the debt that "must be paid first". However, by the effectuation of Law no. 37 year 2004 about Bankruptcy and Postponement of Debt Payment Obligation (PKPU) ignites norm conflict if a company declared bankrupt,

¹ Sjahan Basah, Perlindungan Hukum Warga Negara, Alumni, Bandung, 1992 h 11

² Siti Marwiyah & M. Syahrul Borman, Pilkada sebagai Eksaminasi Konstruksi Kedaulatan Rakyat, Jurnal Hukum Kenegaraan, Volume 1 Nomor 1, September 2018, h 30-31

³ Ibid. h. 15

⁴ A. Syadiqi, Zumi. Hukum Kerja: Hukum Ketenagakerjaan Bidang Hubungan Kerja, Raja Grafindo Persada, Jakarta, 2007, h.10

⁵ Majda El-Muhtaj, Hak Asasi Manusia Dalam Konstitusi dari UUD 1945 sampai dengan amandemen UUD 1945, Kencana-Jakarta, 2005, h. 21

because in the implementation of bankruptcy decision, the phrase of “must be paid first” generates multi implementation so it leads to law uncertainty in normative rights fulfilment of workers/labours if a company declared bankruptcy due to they being positioned after the repayment towards state’s rights, the creditors, and curator’s fee.

Compared with state’s rights such as tax and separatist creditor’s rights, the positions of workers/labours is definitely weaker so it should be put into attention later. It is illogical, if looking at the state’s receivables are being put first then the workers/labours rights, because however, the state is constitutionally responsible for its people’s decent livelihood assurance, workers/labours included. So those normative rights for the workers/labours must be accordingly and rightly prioritized above other creditors.

The effectuation of Law no. 37 the year 2004 as one of the law’s tools required in ensuring justice for the entrepreneurs, creditors, and workers/labours, this law is expected to provide answers on workers/labours rights of a declared-bankruptcy company, on the other side, this particular law is intended for the national law development to realise the prosper and just society based on Pancasila ideology and the 1945 Constitution, but, on the contrary, its effectuation creates norm conflicts.

The conflict of norm between the Law no. 13 the year 2003 and Law no. 37 the year 2004 implies on the uncertainty of assurance, law protection, and just law certainty for the workers/labours of the bankruptcy-declared company.

The problem is the difference between economy and law position related to the payment in bankruptcy condition between the separatist creditor and the workers/labours. For the separatist creditors, the payment during bankruptcy is repayment-guaranteed through mortgages, collateral, fiduciary, mortgage and mortgage rights.

For the workers/labours, as a special preference creditor, its position is below the separatist creditors, so if all of the debtor’s assets have been turned into collaterals and owned by the separatist creditors, it can result in workers/labours do not get their normative rights. It contradicts the protections of the workers/labours rights that ensured in the 1945 Constitution, which is the law certainty because they have right to receive an honorarium and also have a decent and just treatment from the work that already supports their right to live.

If there is a guarantee holders creditors between those creditors, then this creditor gets the priority, according to the article 138 on Bankruptcy Law. Furthermore, on article 55 paragraph 1, the law states that “...with due regard to the provisions referred to in article 56, article 57 and article 58, each creditor holding a mortgage, fiduciary guarantee, mortgage, mortgage or collateral rights over other material, can exercise their rights as if there was no bankruptcy.”

There are many bankruptcy cases when the workers/labours rights are being ruled out by the curators when they pay the debt or obligations from the bankrupt debtors, which leads to uncertainty and unprotected workers/labours rights.

To reach the determination of ranking of settlement or repayment of credit bills of debtor in bankruptcy process that regulated by various law products either in Code of Civil Law (KUH Perdata) or Law no. 4 year 1996 about Mortgage Rights over Land along with Objects Relating to Land as long as about the position of the workers/labours have been repaired in such a way in the Law no. 37 year 2004 about Bankruptcy and PKPU so that workers/labours’ salary that previously only included in the fourth preference creditors (article 1149 number 4 KUH Perdata), that below the position of separations creditors becomes bankruptcy assets under the bankruptcy fees and curator fee, according to the article 39 paragraph 2 of Bankruptcy Law and need to be reviewed, because no matter what it still injures workers/labours.

On those context, according to the Constitutional Court Decision number 67/PUU-XI/2013, article 95 paragraph 4 of Employment Law which formulates that labour’s salary in the bankruptcy process in the “paid first” phrase must be understood that those salary must be put first before the separatist creditors that guaranteed by mortgages, collateral, fiduciary, mortgage, mortgage rights, secured loan, bankruptcy fee, and curator fee.

In this research, the authors will review the problem of workers/labour’s normative right fulfilment on the bankruptcy-declared company.

B. Problem’s Formulations

Fulfillment of normative rights of workers/labours on bankruptcy-declared companies in justice perspective.

C. Research Method

This research conducted by normative law research, which is the law research process that conducted to produce arguments, theories, and new concepts as the prescription to answer law’s issue that conducted by reviewing and analyzing statutory provisions, court’s decision, and other legal materials. Furthermore, Peter Mahmud Marzuki stated that law research is a process to found legal regulation, legal principals, and legal doctrines to answer the legal issues that were faced.⁶

⁶ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta, Premada Media, 2005, Hal. 29-36

D. Discussions

It needs to be understood that the authority in this matter besides protecting public interest also have to protect every individual's interest. Then the consequence is, authority in implementing their rights or obligations in keeping the country's integrity cannot neglect and/or violate its citizens' rights.⁷

Indonesia's employment affairs are faced with a complex problem. One of the aspects in Indonesia's employment problems is the problem of enforcement or protection of human rights, by this context is the worker's rights.⁸

Bankruptcy or Liquidation of a company will generate negative effect towards the rights and future protection rights of the workers/labours, so the workers/labours interest in a bankruptcy-declared company is related to salary payment and its pension. The state must take a role and cannot let the company left the workers/labours helpless and cannot have a decent livelihood.⁹

The condition of workers/labours in Indonesia still faces various problems such as political, economic, culture, and law. This hideous image of the mess in this employment condition needs to be scrutinized and criticized and it needs to do some substantial changes in the policy regulation and implementation strengthening so that Indonesia's workers/labours conditions can be freed from the structural poverty. The right device and system to regulate workers/labours welfare is the law and government. Based on those two, then the things dreamed of to fulfil workers/labours can be guaranteed by the law to achieve a better social system.¹⁰ Workers that should be given protection, on the contrary, are the one who always lose their rights. Companies that should give protection, on the contrary, issued policies that harm or dehumanize them.¹¹

The presence of the country through Employment Law has not provided legal certainty in the fulfilment of workers/labours' normative rights. It is proven by positioning workers/labours as the rearmost position in the creditors' queue when the bankruptcy asset being shared by the curator. This happened due to Bankruptcy Law, Mortgage Rights Law, and Code of Civil Law placed other creditors such as states' debt and mortgage rights owner higher than the workers/labours, so it is the time to revise those regulations.

The presence of the country in Bankruptcy Law that regulates debtor's provisions, including the company in problem can regulate bankruptcy provisions in the article 2 paragraph 1 of Bankruptcy Law that states "...debtor who has two or more creditors and cannot fully pay at least one debt that already due and can be billed, declared as bankrupt, strengthened by the decision of authorized court by his own plea or by his one or more creditor's plea."

The responsibility of the state through Bankruptcy Law also does not specifically regulates the positions of workers/labours as the preference creditor. However, on the implementation, workers/labours rights are often less protected in the bankruptcy process. It means preference position owned by the workers/labours cannot just be preceded, but it is often that the workers/labours are being put on the second or of less importance.¹²

That aforementioned juridical product ideally does not contradict with the 1945 Constitution or as a constitutional product, because a constitution is a sacred source and foundation for legal renewal such as law, government regulation, et cetera. Synchronization in this legal renewal politics, in fact, is in the same way with the legal principals, that the lower legal product should be synchronized with its main source, 1945 Constitution.¹³

The state, through Employment Law, has regulated wages on bankruptcy condition in article 95 paragraph 4 of the law, which is as the debt that should be paid first, but the payment method and its provisions on the workers/labours positions as the creditors during bankruptcy condition are not explicitly regulated. The inability of the state to repair the employment condition, specifically in the fulfilment of basic rights in work termination due to bankruptcy is indicated by the rising mass protest or industrial actions due to the weak protection for workers/labours that guarantees the fulfilment of basic rights.¹⁴ Juridical norms

⁷ Siti Marwiyah, *Kewenanga Konstitusional Presiden terhadap "Hal Ikhwal Kegentingan Yang Memaksa, Masalah-Masalah Hukum*, Jilid 44 no 3, Juli 2015

⁸ Syahrul Borman, *Hak Keadilan Untuk Pekerja Outsourcing Paskah Putusan Mahkamah Konstitusi, Jurnal Konstitusi*, Pusat Kajian Konstitusi Universitas DR. Soetomo Surabaya bekerjasama engan Mahkamah Konstitusi Republik Indonesia, Volume 1 No 1, November 2012, h. 18

⁹ *Ibid.* h. 11

¹⁰ Rahmad Syafa'at, *Op.Cit*, h. 12

¹¹ *Ibid*, h18

¹² Rachman Usma, *Dimensi Hukum Kepailitan di Indonesia*, Gramedia Pustaka Utama, Jakarta, 2004 h. 16

¹³ Syahrul Borman, *Rekonstruksi idealism: Pembaruan Hukum Yang Konstitusional*, Jurnal Konstitusi, Pusat Kajian Konstitusi Universitas DR. Soetomo Surabaya bekerjasama dengan Mahkamah Konstitusi Republik Indonesia, Volume II No 1, September 2013

¹⁴ <http://hukum.kompasiana.com/2012/05/13/perlindungan-hak-hak-normatif-pekerja/buruh-pada-perusahaan-pailit-457042.html>. diakses pada 15 Junj 2018

that does not being optimally implemented results in the weakness of the law's sacred function. Laws that essentially protects social control, in the end, failed to be materialized.¹⁵

Even though there are some "development" in realizing and fulfilling fundamental rights (at least on the level of de jure formal acknowledgement), but it can be effectively executed. Employment Law cannot be viewed as an autonomous and independent value instrument. Instead, the law comes out as the effort of social engineering (the law is a tool of social engineering), being implemented by the country.¹⁶

On the list of creditors queue, workers/labours are not on the first order. In reality, even though on an arguably more superior position based on Employment Law, they often placed on the rearmost of the creditor's queue. It happened because Bankruptcy Law, Mortgage Rights Law, dan Code of Civil Law are definitely placed another creditor, such as state debt and the mortgage right owner on the higher position than the workers/labours.

Meanwhile, state's legal protection has the meaning as the state protection by using legal infrastructure or protection provided by the law, aimed at the protection towards particular interests, which is by making those interests that need to be protected in legal rights. In legal studies, "rights" also dubbed as subjective law. This law is an active side of legal relations provided by objective law (e.g. norms, conventions).

Juridical norms that does not being optimally implemented results in the weakness of the law's sacred function. Laws that essentially protects social control, in the end, failed to be materialized.¹⁷

Workers/labours positioning can be viewed in two aspects: juridical and socio-economics. From the socio-economic aspect, workers/labours require legal protection from the state of the possibilities of an employer's arbitrary. The form of protection given by the government is by making regulations that bounds workers/labours and employers, conducting some skill development programs, and conducting industrial relationship process, which is the building of communication, consultation, and negotiation that supported by the high ability and commitment from all elements involved inside the company.¹⁸

Juridically, based on article 27 of 1945 Constitution, the position of workers/labours is the same with their employers, but on the socio-economic perspective, both are not on the same level, where the employers are on the higher level. This low-high level in work relationship can results in disparity relationship (*dienstverhoeding*), so it triggers tendency from the employers to act arbitrarily to his workers/labours.

According to the principle of law, workers/labours and employers have an equal position, which in labour terms dubbed as "work partner". However, in its implementation, those two actors are not on the same level. The employers as the capital owner have a higher level than their employee. It is explicitly shown in the creation of a company's policies and regulations.¹⁹ State's protection for workers/labours is intended to ensure the fulfilment of their basic rights and ensure equal opportunity and free discrimination treatment on any basis to generate welfares on workers/labours and their family but keep on paying attention to the business world.

Working protection aims to ensure the implementation of work relationship without any pressure from a stronger actor to the weaker one. For this relationship, employers have to implement those protection provisions in accordance with applicable laws and regulations.

The state, in its relations with the scope of workers/labours protections according to the Employment Law, is as follows:

1. Protection of workers or labours fundamental rights to negotiate with the employers;
2. Protection of occupational health and safety;
3. Special protection for female workers/labours, minors, and disabled; and
4. Protection on wages, welfares, social security.

On the creditor's queue, workers/labours are not on the first order. Employment Law is indeed mentioned that workers/labours must be the first to be paid. But in the bankruptcy, curators usually set aside workers/labours interest, even though the workers are on the first order by the law. But they are always being set aside on creditor's queue. This happened due to Bankruptcy Law, Mortgage Rights Law, and the Code of Civil Law placed other creditors such as states' debt and mortgage rights owner higher than the workers/labours. So it is no wonder that based on Law no. 13 the year 2003, a worker/labour that terminates his/her

¹⁵ Siti Marwiyah, *Dekonstruksi Stagnasi Penegakan Hukum Pemberantasan Korupsi, Masalah-Masalah Hukum*, Jilid 42 No 1, Jnuari 2013

¹⁶Rahmad Syafa"at, *Op.Cit* , h. 12.

¹⁷ Siti Marwiyah, *Dekonstruksi Stagnasi Penegakan Hukum Pemberantasan Korupsi, Masalah-Masalah Hukum*, Jilid 42 No 1, Januari 2013

¹⁸ Nasution M. Darwin, *Hukum Ketenagakerjaan, kebebasan Berserikat Bagi Pekerja*, Mandar Maju, Bandung, 2005, h. 45

¹⁹Toha Halili dan Hari Pramono, *Hubungan Kerja antara Majikan dan Buruh*, cetakan pertama, Biana Aksara, Jakarta, 1997, h. 57

contract due to the company's bankruptcy should access their rights during their working time. But after the curator shared bankruptcy's asset, the workers/labours do not get their rights meet and, moreover, they even did not get anything.

Constitutional Court's Decision finally gives certainty to the normative rights of the workers/labours on September 11, 2014, through Decision number 67/PUU-XI/2013. The applicant, PT. Pertamina in the material trial session plea so that the court gives the interpretation of the "be paid first" controversial phrase. The phrase is contained in article 95 paragraph 4 Employment Law. The Court accepted the plea by creating two new norms, so if a company is declared bankrupt, Constitutional Court stated that:

(a) Workers' salary should be paid first on every bill available from other creditors, including separatist creditor and state's tax bills.

(b) Other workers' rights have to be paid first from every other creditor, except if the debtor has the separatist creditor.

Constitutional Court gives the different position towards worker's salary and other rights. Salary placed higher and the most important than other rights.²⁰

The decision of the Constitutional Court No. 67/PUU-XI/2013, on 11 September 2014, is as follows: "Article 95 paragraph 4 of Employment Law (Republic of Indonesia Gazette No. 4179) is on the contrary with the 1945 Constitution of the Republic of Indonesia as long as not being interpreted as: "salary payment of workers/labours that being billed are put first amongst all of the creditors, including separatist creditor, state rights bill, auction office, and government-formed general boards, meanwhile the payment of other workers/labours rights are being put first amongst all of the bills including state rights bill, auction office, and government-formed general boards, except the bill from the separatist creditors";

According to the welfare state theory on the second problem's formulations, the country is obliged to prosper their citizens, including the workers/labours who do not receive their normative rights due to bankruptcy declaration. As a welfare state, the county is obliged to protect workers/labours' normative rights as one of the citizen's constitutional rights, so that they keep being guaranteed of its welfares to access their normative rights if the company declared bankruptcy. Viewed from the welfare state aspect that the workers/labours have not got an exact assurance about the country's responsibility to ensure workers/labours welfares. This can be viewed when the state let the company declares bankrupt, it shows favour towards separatist creditors to have their rights if being viewed from the positions and ability side that the separatist creditors have a stronger position on its socio-economic level compared to the workers that usually weaker, economically. If being reviewed from the welfare state theory, then the country is obliged in the fulfilment of workers/labours normative rights if the company is unable to fulfil it.

Conclusion

- a. Normative rights fulfilment is workers/labours' fundamental rights that must be obeyed on the working relationship even when the company declared bankruptcy, because the fundamental rights are part of the human rights, as written on article 28D paragraph 2 of the 1945 Constitution: "every person have the right to work and receive just and decent salary and treatment in working relationship". Even though the company filed for bankruptcy, the workers/labours still have the right to get their rights, both in the form of salary and other rights from workers/labours in accordance to the applicable laws.
- b. Even being regulated in article 95 paragraph 4 Law no. 13 the years 2003 about Employment, in Constitutional Court no. 67/PUU-XI/2013 and justice perspective, the settlement of bankrupt debtor assets is contrary to the principles of social justice and article 28 paragraph 2 of the 1945 Constitution.

REFERENCE

- Asyhadie, Zaeni, *Hukum Kerja, Hukum Ketenagakerjaan Bidang Hubungan Kerja*, Raja Grafindo Persada, Jakarta, 2007.
Majda El-Muhtaj, *Hak-Hak Asasi Dalam Konstitusi UUD 1945 sampai Amendemen UUD 1945*, Jakarta, 2005
Nasution, M. Darwin, *Hukum Ketenagakerjaan, Kebebasan Berserikat Bagi Pekerja*, Mandar Maju, Bandung 2005.
Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta, Premada, 2005
Rachman Usma, *Dimensi Hukum Kepailitan di Indonesia*, Gramedia Pustaka Utama, Jakarta
Syahrhan Basah, *Perlindungan Hukum Warga Negara*, Alumni, Bandung, 1992
Toha, Halili, Hari Pramono, *Hubungan Kerja Antara Majikan Dan Buruh*, Cetakan Pertama, Penerbit Bina Aksara, Jakarta, 1997.

JOURNALS

- Siti Marwiyah, *Dekonstruksi Stagnasi Penegakan Hukum Pemberantasan Korupsi*, Masalah-Masalah Hukum, Jilid 42 No 1, 2013
Siti Marwiyah, *Kewenanga Konstitusional Presiden terhadap "Hal Ikhwal Kegentingan Yang Memaksa*, Masalah- Masalah Hukum, Jilid 44, 2015
Siti Marwiyah, *Kewenanga Konstitusional Presiden terhadap "Hal Ikhwal Kegentingan Yang Memaksa*, Masalah- Masalah Hukum, Jilid 44 no 3, Juli 2015

²⁰ HukumOnline.com. MK pastikan hak pekerja dalam kepailitan, Diakses dari internet <http://www.hukumonline.com>, pada tanggal 6 Agustus 2018 pukul 13.00 WIB

Syahrul Borman, *Hak Keadilan Untuk Pekerja Outsourcing Paskah Putusan Mahkamah Konstitusi*, *Jurnal Konstitusi*, Pusat Kajian Konstitusi Universitas DR. Soetomo Surabaya bekerjasama engan Mahkamah Konstitusi Republik Indonesia, Volume 1 No 1, November 2012,

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