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CURATOR LIABILITY FOR MANAGEMENT AND SETTLEMENT OF BANKRUPTCY ASSETS BASED ON THEORITICAL JUSTICE PERSPECTIVE REVIEW

Raden Besse Kartoningrat

ABSTRACT

Legal certainty, purposiveness and justice is the goal of enforcement of Bankruptcy Law. Bankruptcy which is a institution for the distribution of bankrupt assets must be had a legal certainty. Bankruptcy at least involves the Debtor and bankruptcy statement, both the Debtor itself and the Creditors and other parties. In addition, bankruptcy requires a curator who acts as a neutral party to carry out the management and / or settlement of bankruptcy assets. This research is a normative research with a conceptual approach in which the study in this study is about justice from various philosophical genre in relation to the liability of bankruptcy curators. The result is utilitarianism is a relevant concept in constructing the responsibilities of the Curator in the Management and Settlement of equitable bankruptcy assets. Because with utilitarianism, justice that is essential for curators can be translated into existing law. So that the curator in carrying out the management and settlement of bankruptcy assets provides happiness and certain benefits is the most important part to realize impartial justice, equal rights, decent, morally reasonable and morally correct by each party.

Keywords: Justice, Curator, Liability

INTRODUCTION

Indonesia has three legal objectives namely justice, purposiveness and legal certainty. The discussion about that legal objectives is often confused with the function of law. In fact, there is a difference between the purpose of law and the function of law. Various experts in the field of law and in other social fields expressed their views on the purpose of law, according to their starting point and point of view. Achmad Ali said that the problem of legal objectives can be examined through three points of view, each as follows :

1. From the perspective of positive-normative, or dogmatic juridical jurisprudence, where the purpose of law is emphasized in terms of legal certainty.
2. From the perspective of legal philosophy, where the purpose of law is emphasized in terms of justice.
3. From the perspective of legal sociology, where the purpose of law is emphasized in terms of its usefulness.

In contract law, there are at least two parties who are bound by the legal relationship, namely Creditors and Debtors. Each party has rights and obligations born from the legal relationship, namely achievement and counter achievement, giving, doing and not doing something, or by law referred to as onderwerp object, whereas in the Anglo Saxon book, achievement is known as the term "consideration". The history of bankruptcy law has existed since Roman times. The word bankrupt, in English it is called bankrupt comes from an Italian law called bancarupta. The word bankrupt comes from the French "failite" which means payment jam. In the Dutch language the term "failliet" is used. While in Anglo America's law, the law is known as the Bankruptcy Act[1].

In the practice, the default of a Debtor (owed) is often caused by a state of force (overmacht) so that it cannot fulfill obligations for achievement. Thus, in the world of commerce, if the Debtor is unable or unable to pay his debts to the Creditors, then a solution has been prepared to resolve the problem, which is known as the "Bankruptcy" or "Delayed Payment" Institution.

A bankruptcy case at least involves the Debtor or Creditors as well as other parties mentioned in Article 2 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. In addition, bankruptcy requires a curator who acts as a neutral party to carry out the management and / or settlement of bankruptcy assets. The duties of the curator are clearly outlined in Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as Indonesian Bankruptcy Act), while the curator's liability for his mistakes or negligence in carrying out his duties is regulated as in Article 72 of the Indonesian Bankruptcy Act which reads "The curator is responsible for his mistakes and negligence in carrying out his management duties and / or settlement that causes losses to bankrupt assets. "

The decision of a Debtor to become a bankrupt Debtor by the commercial court brings legal consequences that is, for Debtors General Confiscate is imposed on all the assets of the Bankrupt Debtor and the loss of the authority of the Bankrupt Debtor to control and manage the assets of the bankrupt. As for creditors, there will be uncertainty about the legal relationship that exists between creditors and bankrupt debtors. For this reason, the Law has determined which parties will take care of Debtor and Creditor matters through the Curator. A curator is an inheritance Hall or individual appointed by the Court to administer and settle the Bankruptcy Debtor's assets under the supervision of a Supervising Judge (Article 1 point 5 Indonesia Bankruptcy Act).

In carrying out their duties, the curator is not just about how to save the bankrupt assets that have been collected and then distributed to creditors, but as much as possible can increase the value of the bankrupt assets. As such, curators are demanded to have integrity based on truth and justice and the obligation to comply with professional and ethical standards. This is to avoid any conflict of interest with the Debtor or Creditors. However, in practice the performance of the curator is hampered by the curator and most have problems with uncooperative Debtors, in which case the Debtor refuses to provide information and documents, refuses to meet, and even prevents the curator from checking the Debtor's place of business. So that makes the curator very potential

[1] Rahayu Hartini, *Hukum Kepailitan*, UMM Press, Malang, 2007, p. 4.

to be criminalized. So, it is necessary to study related to the proper principles of justice in the management and settlement of bankrupt assets.

RESEARCH METHODS

This research is normative research. The selection of this method, aims to produce legal arguments, theories or new concepts as a prescription in solving the legal problems encountered. This is in accordance with what was written by Peter Mahmud Marzuki[2], which states that legal research is a scientific process to find solutions to emerging legal issues with the aim of prescribing what should be the legal issues that arise. This research uses a conceptual approach which is an approach that starts from the existence of thoughts and doctrines that develop in the science of law.

DISCUSSION

Liability of the Curator for the Management and Settlement of Fair Bankruptcy Assets

Bankruptcy as a result of the inability of bankrupt debtors to pay their debts to their creditors gives authority and liability to the Curator to manage and settle the assets of the bankrupt debtor. The curator must be responsible for mistakes or omissions in carrying out the maintenance and / or settlement obligations that cause loss or decrease in the value of bankrupt assets.[3]

According to **Harold F. Lusk**[4] describe the function of bankruptcy as follows :

> *The purpose of the bankruptcy act is (1) to protect creditors from one another, (2) to protect creditors from their debtor, and (3) to protect the honest debtor from his creditors. To accomplish the objectives, the debtor is required to make disclosure of all his property and to surrender it to the trustee. Provisions are made for examination of the debtor and for punishment of the debtor who refuses to make an honest disclosure and surrender of his property. The trustee of the bankruptcy's estate administers, liquidates, and distributes the proced of the estate to creditor. Provisions are made for determination of creditor rights, the recovery of preferential payments, and the disallowance of preferential liens and encumbrances. If the bankcrupt has been homest in his business transaction and his bankcruptcy proceedings, he is guaranted a discharge.*

The concept of liability in article 72 of the Indonesian Bankruptcy Act is vague because the limits of mistakes or negligence are not explained in detail so that it can create injustice in the Curator in carrying out his duties and authority. In the facts on the ground, the application of Article 72 of the Indonesian Bankruptcy Act is apparently different, it is found that the curator has made a mistake or negligence which has caused a loss of bankruptcy assets, then the curator can be sued civilly and must pay compensation.

Curators have a lot of authority which is very risky to be misused. Curator is called a profession because curator is included in the legal profession where this profession is a noble profession or Officium Nobile. It is said to be a noble profession because it is closely related to humanity. The definition of "noble" according to the Indonesian General Dictionary, is: high (position, rank, dignity); sublime; honorable.[5] It is said to be an honorable profession because what the curator does in carrying out his duties is to help both Debtors and Creditors to solve their debt problems.

The liability of the curator in carrying out his duties, namely the management and settlement of bankruptcy assets, is stated in Article 72 of the Indonesian Bankruptcy Act which states in that article that the curator is responsible for his mistakes or negligence in carrying out his duties. The concept of liability that causes harm is contained in Article 1365 and Article 1366 of the Civil Code.

According to Martono[6], liability in general has three kind of meaning i.e accountability, responsibility and liability. Accountability is a responsibility that has to do with finance or trust, for example the accountant must be responsible for accounting reports. Responsibility is responsibility in the sense of public law. Perpetrators can be prosecuted before a criminal court based on the applicable laws and regulations both criminal violations and crimes or administrative sanctions imposed by their superiors if the person does not carry out their duties as stated in the letter of appointment. Liability is a legal responsibility according to civil law. Etymologically responsibility is a combination of two words response and able which means the ability to response or the ability to answer or respond. Responsibility comes from the Latin respondeo which means I answer or I answer.[7] Liability is a condition where a person or public entity is responsible for any losses that might occur or losses that have occurred.[8] According to civil law, liability is divided into two types, namely error and risk. Thus known as liability based on fault) and liability without fault, also known as strict liability.[9]

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[2] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Edisi Revisi, Jakarta, 2016, p. 40-42.
[3] Imran Nating, *Peranan dan Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit*, RajaGrafindo Persada, Jakarta, 2004, p. 114.
[4] Harold F. Lusk, *Bussiness Law: Principle and Cases*, Richard D. Irwin Inc., Homewood Illinois, p. 1076-1077.
[5] W.J.S. Poerwadarminta, *KamusUmum Bahasa Indonesia*, Balai Pustaka, Jakarta, 1986, p. 660.
[6] K. Martono, *Kamus Hukum dan Regulasi Penerbangan*, Edisi Pertama, RajaGrafindo Persada, Jakarta, 2007, p. 306-307.
[7] Magdalena Bexell, *Exploring Responsibility Public and Private in Human Rights Protection*, Lund Political Studies 135, Department of Political Science, Lund University Sweden, 2005, p. 66.
[8] Glenn M. Wiser dan Daniel B. Magraw, *Principles and Approaches of Sustainable Development and Chemical Management (SAICM)*, Center for International Environmental Law, July 2005, p. 38.
[9] *Ibid.*

Regarding the intention of the curator in accordance with the provisions of Article 72 of the Indonesian Bankruptcy Act, Jerry Hoff believes that a curator can be held responsible if he has committed an illegal act. A degree of error and negligence is enough to give rise to responsibility. Jerry Hoff further stated, how could it make a difference between (i) the responsibility of the curator acting in his capacity as a curator (a qualitatequa responsibility) and (ii) the curator's personal responsibility (a pro se responsibility). This difference is common according to Dutch law. This means that the curator is not personally liable if he has committed an unlawful act in his capacity as a curator, that is by paying for the damage or loss caused.[10] Meanwhile, M. Hadi Shubhan said that the scope of norms contained in Article 1365 of the Civil Code was too flexible so because of the extent of the coverage there needed to be clear restrictions, because in practice many curators misused their authority as curators.[11]

Basically, the curator is obliged to act transparently in front of the parties involved in his assignment. The curator is not allowed to show and or convey to any third party any confidential information obtained in the context of carrying out his duties as curator. The need to limit the curator's authority that could potentially carry out acts of abuse of authority is intended to create the value of justice by the parties both Debtor and Creditors.

Justice from the Natural Law Perspective

Gustav Radbruch stated in many literatures that the purpose of law or legal ideals is nothing but justice.[12] He further state that : "*Est autem jus a justitia, sicut a matre sua ergo prius fuit justitia quam jus*", which can be translated as : "But the law comes from justice as born from the mother's womb, therefore justice has existed before the law." Referring to **Ulpianus,**[13] *Justitia est perpetua et constans voluntas jus suum cuique tribuendi*, which means justice is a continual and constant desire to give people what they are entitled to.

According to Aristotle as adherents of ethical theory, states that justice is the feasibility of human action or fairness in human action. Feasibility is the midpoint between the two extremes of too much and too little. Both ends involve two people or two objects so that there are at least 4 things. If the two people have something in common in terms of a predetermined size, each must obtain the same thing. If it is not the same, then each person will receive an unequal portion. But the distribution is based on a consideration so that it is justice, that is called distributive justice (distributive justice). A consideration or proportion is nothing but the equation of two comparisons (equality of ratios). Thus justice is a kind of balance covering these four elements. Justice is what violates these proportions.[14]

The essence of justice stems from human morals that are manifested in a sense of love and togetherness.[15] The person who first put forward morals as the basis for rules was Thomas Aquinas.[16] Thomas Aquinas states that humans cannot deny the existence of their bodies. It is this body that triggers actions, desires and passions. According to Thomas Aquinas,[17] humans through the power of will and mind they have can break away from these controls. Human intellectual power can rank the meaning of what humans have. Wealth, pleasure, power, and knowledge are objects of desire that humans can have.

According to Thomas Aquinas, law is primarily concerned with the obligations laid down by reason. The law covers power, and this power gives obligations. Authorities through positive law can give nonsense commands or force people to do wrong actions, but the positive law works not in accordance with the nature of the law. Natural law is determined by human reasoning.

In line with what has been stated by Thomas Aquinas is the view of Lon L. Fuller. Fuller said that the problem of morality is part of natural law.[18] But the rules are still grounded. Indeed the word moral is often associated with a person's inner state, such as noble character, hospitality, or obedience in carrying out religious obligations and all attitudes that have the benefit of all people and themselves. But such an attitude is ideal, because the law is unable to reach such things. The law was created to protect the existential function of social life from the actions of humans or other groups of people who try to destroy that existence. Therefore, moral in this case is something that is operational.

In the context of bankruptcy law, this relates to the legal arrangements for debtors, that is, debtors must still be accountable to creditors for all their debts. Through common confiscation of the debtor's assets is to secure the debtor's assets from the struggle or overtake each other by his creditors, so the creditors must act together (concursus creditorium). Referring to **M. Rasjidi**, law and morals must co-exist, because morals are the subject of law.[19] Therefore, laws and regulations that ignore aspects of protection of Debtors are a form of violation of moral values as developed by philosophers of natural law philosophy.

Justice in the Legal Positivism Perspective

Legal positivism is actually reduced to concrete activities. The issue of validity (legitimacy) of the rules is still given attention, but the standard of regulation used as a reference are also legal norms. Logically, legal norms can only be tested with legal norms as well, not with non-legal norms. Positive norms will be accepted as axiomatic doctrine, as long as it follows the "rule-systematizing

[10] *Ibid.*

[11] M. Hadi Shubhan, *Hukum Kepailitan Prinsip, Norma, dan Praktik di Pengadilan,* Kencana Prenada Media Group, Jakarta, 2012, p. 109.

[12] Kurt Wilk, *The Legal Philosophies of Lask, Radbruch,and Dabin*, Harvard University, Cambridge, 1950, p. 73.

[13] O. Notohamidjojo, *Masalah: Keadilan*, Tirta Amerta, Semarang, 1971, p. 18-19.

[14] The Liang Gie, *Teori-teori Keadilan Super,* paper submitted in Yogyakarta, 30 June 1979, p. 22-23.

[15] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana Prenada Media Group, Jakarta, 2009, p. 44.

[16] *Ibid.*, p. 139.

[17] Wayne Morrison, *Jurisprudence: From The Greeks to Post-Modernisme*, Cavendish, London, 1998, p. 67.

[18] Lon L. Fuller, *The Morality of Law*, Yale University Press, New Haven, 1975, p. 96.

[19] H.M Rasjidi, *Keutamaan Hukum Islam,* Bulan Bintang, Jakarta, 1972, p. 18.

logic of legal science" which contains the principles of exclusion, subsumption, derogation, and non-contradiction.[20] The strength of the Legal Positivism argument lies in the application of the structure of positive norms into the structure of concrete cases.

In relation to the achievement of justice in the management and acquisition of bankrupt assets by the curator from the perspective of legal positivism, the implementation of bankruptcy and regarding the duties of the curator are already in the Civil Code and The Indonesian Bankruptcy Act. By normalizing the duties and authority of the curator in the law, the curator can carry out the duties and authorities that have been given so that the curator cannot be criminalized in carrying out his duties.

M. Hadi Shubhan[21] said that the scope of norms contained in Article 1365 of the Civil Code was too flexible so because of the extent of the coverage there needed to be clear restrictions, because in practice many curators abused their power as curators. M. Hadi Shubhan's view suggests that in the perspective of legal positivism the functions and authority of curators need to be regulated in more detail in the law, so that the curator in exercising his authority has clear norms for achieving justice for curators with legal certainty.

Meanwhile, if we follow Kelsen's opinion about justice then[22], justice that can be realized in conducting legal relations is always relatively in accordance with human limitations. For him justice from the point of view of a scientist is that the order of society provides protection against the fertile search for truth. This is as he said that "My" justice, then, is the justice of freedom, the justice of peace, the justice of democracy-trie justice if tolerance. Thus, if the meaning of unjust is unequal, then fair is equal, as a simple form of fair. For most people justice is a general principle, namely that these individuals should receive what they deserve.

Justice in the Utilitarianism Perspective

The Utilitarianism legal reasoning model basically starts from the same starting point with Legal Positivism. The ontological aspect of Utilitarianism's reasoning model is no different. What distinguishes Utilitarianism and Legal Positivism is the top-down movement which is then followed by the bottom-up movement. This bottom-up movement arises because positive norms in the legislation system must be tested in the realm of reality. The reasoning pattern shows the motion of the pendulum z_{10}, z_{11}, z_{12}, ... z_{19}, then z_{19}, z_{18}, z_{17}, ... z_{10}.

The basis of Utilitarianism is the same as Legal Positivism, so this model of reasoning can be considered a modification of Legism, the most conservative form of Legal Positivism. This reasoning model is even considered a "sociology infiltration" through the back door of the Legal Positivism building. Therefore, it is not surprising that this model is acceptable in both the common law and civil law family areas.

In Utilitarianism's view, if it is connected with the responsibility of the curator in the management and acquisition of bankrupt assets, in principle, in addition to the authority and responsibility of the curator to be normalized to obtain legal certainty, legal certainty must also bring value to the parties, both for the Curator as the party managing bankrupt assets and for creditors and debtors. Therefore, the curator must have good faith and integrity and be able to act proportionally professionally for the sake of the benefit of the law exemplified by Utilitarianism.

CONCLUSION

Utilitarianism is a concept that is relevant in constructing the responsibilities of the Curator in the Management and Settlement of bankrupt property with justice. The author agrees with the view of Rudolf von Jhering who collaborated the views of Bentham and John Stuart Mill who stated that justice can not only be achieved by promoting individual interests but also the interests of the people who need attention. Thus, to synergize these two interests, it is necessary to regulate the laws and regulations as echoed by thinkers of legal positivism, namely John Austin. Therefore, in the management and settlement of bankrupt assets by the curator, happiness and certain benefits are the most important part to realize impartial justice, equal rights, worthy, morally reasonable and morally right by each party.

RECOMMENDATION

There is an urgent need for an act reformulation related to the authority and responsibility of the curator in the management and settlement of bankrupt assets to prevent the criminalization of curators and the legal impilication of abuse of authority by the professional curator. For this reason, in the management and settlement of bankruptcy assets by the curator the most important thing is to sit, be quiet and walk in the essence of truth and justice first and foremost.

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[20] J.W. Harris, *Law and Legal Science: An Inquiry into the Conceps Legal Rule and Legal System*, Oxford, Clarendon Press, 1982, p. 10.
[21] M. Hadi Shubhan, *Loc.Cit.*
[22] Hans Kelsen, *What is Justice, Law, and Politics in Mirror for Science*, University of California Press, Barkeley and Los Angeles, 1957, p. 24.

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