The Urgency of Good Faith Principle Implementation in Indonesian Bankruptcy Regime

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Abstract
This article aims to argue the urgency of good faith principle implementation in the Indonesian bankruptcy regime. The problem is focused on describing several flaws in the Indonesian bankruptcy law related to the good faith principle, several example bankruptcy abuse cases in Indonesia. Furthermore, this study also aims to propose notions to minimalize Indonesian bankruptcy regime abuse in the future. In order to approach this problem, the normative legal research method is used. The data is collected through library research and analyzed qualitatively. The study concludes that several flaws in Indonesian bankruptcy law related to the good faith principle, such as excessively modest bankruptcy petition requirements, lack of governmental supervision in the bankruptcy process, and severe punishment for the bankruptcy fraudsters. In the future, the Indonesian bankruptcy regime is expected to implement an insolvency test, improve the role of the Property and Heritage Agency, and strictly punish bankruptcy fraudsters for minimalizing bankruptcy abuse by bad faith parties.

Keywords: Good Faith; Bankruptcy; Indonesia.

INTRODUCTION

Bankruptcy courts, as a component of a bankruptcy regime, possess tremendous authority. The bankruptcy courts might annul contracts, suspend or diminish a portion of debt value, restrain the workers for their rights of wages in time, and even stave off the tax income for the government. If the principle of good faith is not being employed as a tool to restrict the courts' authority, the authority could be abused by parties who do not hold good faith and generate injustice in society. (Jones, 1998)

The good faith principle displays an essential guide for the bankruptcy courts to decide a properly petitioned bankruptcy case compared to a bankruptcy case petitioned under bad faith from debtors or creditors. (Cohn, 1988) The bad faith debtors or creditors might perform fraudulent acts, for example: (Situmorang & Soekarso, 1994) a debtor might accumulate as many debts as possible before filing a voluntary petition right after concealing or transferring a portion of his assets or whole of it; a debtor cooperating with a third party who disguises as a false creditor in order to generate fictitious debts which obscure the authentic debts; a debtor abuses bankruptcy petition as a “mask” to veil his bad faith by transferring his assets to the newly established company or third parties; a creditor threatens a good faith debtor with an involuntary petition to pressure the debtor to resolve his disputed debts.

According to Miller, there are several reasons why the principle of good faith should be implemented in a bankruptcy regime, which as follows: (Miller, 1997) to preserve the integrity of the bankruptcy courts; to reflect the principle of good faith, which is inherently contained in bankruptcy law; to prevent bad case dismissals; To provide uniformity and predictability regarding the relationship between debtors and creditors; to extend the role of bankruptcy courts as a collective debt resolution forum.

The several reasons stated earlier regarding the importance of the good faith principle in a bankruptcy regime could be synthesized into one: to preserve the integrity of the judicial body. (Venditto, 1993) The principle of good faith is one of the powers to prevent the practice of bankruptcy mechanism to uncloak the fraudulent bankruptcy petition scheme. (Ordin, 1983) Therefore, the bankruptcy courts are expected to be not a part that contributes to the abuse of the judicial body.

The Indonesian bankruptcy regime does not explicitly adhere to the good faith principle. As a consequence, there are various cases of bankruptcy abuse by bad faith debtors or creditors. The bankruptcy courts ought to be utilized with good faith rather than as a mechanism against the value of decency and rationality in normative human behaviors. (Ponoroff, 1993) This kind of action shall bring demise to the stakeholders in a bankruptcy case, including the state as the tax receiver, the people who put their living on the debtor, the people who supply goods and services to the debtor, the people who depend on the goods and services supplied by the debtor and the customer of financial institutions including banks and non-bank financial institutions. (S. A. Nugroho, 2018)

The main notion of this article is good faith in bankruptcy regime. There are 3 (three) previous researches on good faith principle related to bankruptcy. First, research by Nugroho, which argues good faith of the debtor can be benchmarked by insolvency test. The debtor is considered having bad faith in the bankruptcy process if the debtor passed insolvency test but still insists on not paying up his debts. (L. D. Nugroho, 2016) Second, research by Dalle and Gultom which argues company directors who caused the company went bankrupt in bad faith may be hold responsible for their actions. (Dalle & Gultom, 2023) Third, research by Hidayansyah and Agustina, which argues
good faith principle is the limitation of the free will of the party involved in a secured transaction regarding in a bankruptcy case. (Hidayansyah & Agustina, 2023) Therefore, this research is safe to be considered novel and hold totally different issue from the three researches mentioned before.

Based on the explanation above, this study aims to provide solutions for the Indonesian government on how to prevent and eradicate bankruptcy abuse by the bad faith debtors and creditors in the future. This article will be written in a structure as followings: 1) the introduction part which explains why the article is important; 2) research method that being employed in this article; 3) The weakness in the Indonesian Bankruptcy Regime related to the good faith principle; 4) Several cases of bankruptcy abuses in Indonesia; 5) Several proposals to prevent and eradicate bankruptcy abuse by bad faith parties in Indonesia; and 6) Conclusion.

RESEARCH METHODS

This study was conducted based on normative legal research (Soekanto & Mamudji, 2015), including statute, case and conceptual approach. (Marzuki, 2013) The data were collected through library research which will be analyzed by using deductive reasoning to present the solution for the problems. (Gozali, 2021)

RESULTS AND DISCUSSION

The Weaknesses in The Indonesian Bankruptcy Regime Related to the Good Faith Principle

The general explanation section of the Indonesian Bankruptcy Law (Law No. 37 of 2004 on Bankruptcy and Suspension on Payment) declared that the Indonesian bankruptcy law is to restrict creditors individually seizing the debtor's assets, to prevent arbitrary acts from the secured creditors, and to deter frauds by the debtors or creditors. This purpose is appeared reliable normatively and parallel with the bankruptcy law philosophy. Unfortunately, in practice, the Indonesian bankruptcy law possesses several weaknesses prone to be exploited by the bad faith debtors or creditors. The weaknesses related to the good faith principle in Indonesian bankruptcy law will be explained in the next subsections.

1. The Bankruptcy Petition Requirements are Excessively Modest

As regulated in Article 2 paragraph (1) of Indonesian Bankruptcy Law, the bankruptcy petition requirements are excessively modest. It is stated that every debtor that possessed at least two or more creditors and did not pay off at least one debt that is overdue and can be solicited could be declared bankrupt by the bankruptcy court. The bankruptcy petition requirements do not distinguish a debtor who is unwilling to settle his debts from a debtor who is unable to settle his debts. In other words, the Indonesian bankruptcy regime does not consider the solvency state of the debtor; as long as the modest requirements are satisfied, the debtor may be declared bankrupt by the bankruptcy court. This condition will transform bankruptcy law into a tool which can be utilized by the creditors to threaten their debtors as long as the debtors fulfill the requirements stated in Article 2 paragraph (1) Indonesian Bankruptcy Law. (Fuady, 2014)

Jackson asserts that bankruptcy law at its core is a debt collection law. (Jackson, 2001) However, the debt collection through bankruptcy mechanism is distinct from the common debt collection mechanism. Bankruptcy law ought to provide a forum to restructure the financial obligations from the debtor to increase the overall value of his assets. The assets must be regarded as a pool of assets that possess going concern value while considering the interest of
creditors and the stakeholders. (Feibelman, 2012)

Bankruptcy law is not supposed to provide a private debt collection mechanism; instead, it should offer a collective debt collection method for a debtor's creditors who can't afford to pay up his debts satisfactorily. (Killborn & Walters, 2013) Indonesian Bankruptcy Law actually adheres to this principle, which can be seen in Article 1 and Article 2 paragraph 1. Both of these articles stipulate Indonesian Bankruptcy Law is a collective debt tool, but due to the excessively modest requirement, the Indonesian Bankruptcy Law prone to be abused either the bad faith debtor or creditor.

Indonesian bankruptcy regime still could not maximize its potency as a collective debt collection method. The before-mentioned condition renders Indonesian bankruptcy law has no other function rather than a debt collection tool. Besides being a debt collection tool, bankruptcy law must also consider the interest of the stakeholders. (Korobkin, 1991) If the excessively modest bankruptcy requirements are applied literally by the bankruptcy judges, it will bring more harm than good. (Nurdin, 2012)

Indonesian bankruptcy regime should not be viewed as a mere tool for the creditors to collect the claims from their debtors. This spirit is adhered by the Indonesian Bankruptcy Law as stipulated in the General Explanation section of the law. The principle of balance, as one of the 4 principles adhered by the Indonesian bankruptcy law, stated that Indonesian Bankruptcy Law also aims to prevent Indonesian Bankruptcy System being abused by the bad faith debtors and creditors. However, there are no articles in the Indonesian Bankruptcy Law that really contains the norm which adhere to the principle of balance, on the contrary, the bankruptcy petition requirement regulated by the law is way too simple, which making it prone to be abused by bad faith debtors and creditors.

2. Lack of Government Supervision in Bankruptcy Process

Presently in Indonesia, there is no governmental institute supervising the bankruptcy process from the petition to the bankruptcy estate liquidation. This situation also renders the potential of frauds in the Indonesian bankruptcy system. Indonesia can learn from the United States of America in term of supervising the bankruptcy process.

In the United States of America, there is an institute acknowledged as The United States Trustee Program (USTP). USTP is a governmental body that is part of the United States Department of Justice. (The United States Department of Justice, 2019) USTP is formed based on the mandate from the Bankruptcy Reform Act of 1978. At first, USTP was located in 18 bankruptcy courts all over the United States. (The United States Department of Justice, 2012) In 1986, The United States Congress added 88 USTP in bankruptcy courts in every state except Alabama and North Carolina. The USTP's headquarter is located in Washington D.C. The establishment of USTP based on several purposes, as follows:

a. Protects the integrity of the United States’ bankruptcy system;
b. Promotes effectivity and efficiency in the United States’ bankruptcy system;
c. Preserves operational excellence to obtain expected results through constant improvement in every operation on the field, administration, information technology, evaluation, planning, and diversity.

Aside from the purposes mentioned earlier, The USTP is also granted authority to identify and investigate fraud and abuse allegation in the bankruptcy process. The USTP may coordinate with the United States Attorney, Federal Bureau of Investigation and other law enforcement officers in performing the investigation.
Indonesia has no institute that yields a similar purpose and authority as the USTP; therefore, there is a flaw in bankruptcy process supervision, causing the Indonesian bankruptcy law prone to be abused by the bad faith parties.

People may argue that the bankruptcy process in Indonesia may be appealed to the Supreme Court of Indonesia, but it must be stressed that Supreme Court only review the law applied by the Commercial Court (judex jurist). The Supreme Court will not review any facts or evidence nor supervising the bankruptcy process. That’s why the existence of a supervision body in Indonesia which possess function and authority like USTP in United States of America is important.

3. Lack of Severe Punishment for Bankruptcy Fraudsters

Before entering the bankruptcy process, the debtor must demonstrate honesty and good faith. Sometimes the debtor attempted to defeat the bankruptcy system for his advantage. This kind of behaviour is also referred to as bankruptcy fraud. Bankruptcy fraud can be defined as deliberate and unlawful activities which bring adverse effects to the financial interest of the creditors of a debtor. Bankruptcy fraud also considered as a form of white-collar crime, in which typical crime is usually related and performed by people who have distinguished social status. Bankruptcy fraud is a crime that brings serious financial consequence for the parties related to the debtor. The former workers’ claims could be deferred for several months, the creditors do not collect repayment for their claims, and the state does not receive tax from the debtor.(Geldrop, 2011)

Bankruptcy fraud may be performed in a few patterns as followings:(Sjahdeini, 2016)

a. Receive credit from a bank, the debtor conspires with a consultant who conducts a feasibility study on the debtor. The debtor may demand the consultant deliver out a false report on the feasibility study. In most cases, the report asserts that the debtor is feasible to obtain more credit than expected. The rest of the credit is prone to be abused by the debtor for other personal interests.

b. A debtor manipulates his financial report by conspiring with a Public Accountant Office. The debtor’s balance sheet is falsified, so it does not exhibit the actual financial condition of the debtor.

c. A debtor deliberately abuses the credit provided by a bank for another purpose other than the acknowledged purpose in the credit agreement. The debtor then suffers financial distress and is forced to declare bankruptcy. This kind of action will bring disadvantageous consequences to the creditors, especially banks.

d. A debtor conspires with an appraisal to mark up his collateral objects’ value higher than the actual market price. The marked-up collaterals were then offered to the bank in order to receive credit.

e. The debtor performs various wicked deeds when he realizes he will not repay his debts soon. The evil deeds are including conspiring with specific creditors, concealing his assets, transferring his assets to third parties, and creating a fictitious creditor.

f. The debtor inputs invalid data in all of his records and forges false proofs before filing for bankruptcy.

The Indonesian bankruptcy law does not contain any single provision that regulates the penalty or punishment for the bankruptcy fraudsters. Therefore, a debtor or certain creditors will not hesitate to abuse the bankruptcy system for personal interest. It is believed that a strict penalty to
the bankruptcy fraudsters will preserve public confidence in a bankruptcy regime.

For comparison, the Title 18 United States Code does regulate provisions regarding bankruptcy crime. Section 152 of the Title 18 United States Code identifies nine types of bankruptcy offences which can be classified into three general categories: (Ogier & Williams, 1998)

a. Concealment offences;
b. False oaths; and
c. Offences by creditors.

The three general categories of bankruptcy offences stated above could be broken down into nine offences, as followings: (Robert & Agustina, 2020)

a. Debtor hiding assets from the bankruptcy officials;
b. Debtor providing a false statement under oath in a bankruptcy case;
c. Debtor providing a false declaration under punishment of perjury in a bankruptcy case;
d. Debtor brings forth or using false evidence of claim in order to fight for the rights of the bankruptcy estate;
e. Third parties who received assets from a debtor after filing a bankruptcy petition with the intent to defraud the bankruptcy system;
f. Any party who is giving, offering, receiving, or attempting to obtain anything of value for acting or forbearing to act in a bankruptcy case;
g. Any party who is transferring or hiding assets in contemplation of a bankruptcy case filed by or against the asset owner;
h. Any party who is concealing, destroying, or making a fake entry in recorded information relating to debtor's financial affairs;
i. Any party whom after filing a bankruptcy case, withholding or hiding recorded information relating to the debtor's financial affairs form the bankruptcy officials.

Under the same provision, most bankruptcy fraudsters in United States are punishable by a maximum of five years in prison and fined up to 500,000 USD. Therefore, engaging in a bankruptcy crime could be one’s express ticket to the loss of freedom and financial ruin. (Gaumer, 1998)

Based on the comparison on bankruptcy crime stated above, strict and severe regulation regarding penalties for the bankruptcy fraudster is crucial in a bankruptcy regime, which is no exception for Indonesia.

**Several Examples of Bankruptcy Abuses Cases in Indonesia**

1. **Fictitious Creditor**

The example of debtor brings in fictitious creditor can be observed in PT. Bank Mandiri (Persero), Tbk v. Yana Supriatna (Indonesian Supreme Court Decision No. 970K/Pdt.Sus-Pailit/2017). In this case, PT. Bank Mandiri (Persero), Tbk as Petitioner, file the renvoi procedure against the curator of PT. Rockit Aldeway (the bankrupt debtor). Petitioner is one of the debtor’s creditors who holds claim around 253 billion IDR based on Working Capital Credit Agreement dated 25th March 2015.

Petitioner files for the renvoi procedure because the curator approves all of the claims filed by another creditor of the debtor, Trillium Global, Pte.Ltd and other 12 creditors’ claims. The Petitioner alleges the curator has been erroneous in accepting the claim registration from Trillium Global, Pte. Ltd with the amount of 1 trillion IDR. The Petitioner puts high doubt on the validity of this claim because the Petitioner has no access to the debtor’s financial records.

The Petitioner highly doubts that Trillium Global, Pte.Ltd is a valid and honest creditor. Petitioner requested that the Supreme Court grant decision that declares Trillium Global Pte. Ltd is not a valid creditor; therefore, its claims must be excluded from the claim registration list that the curator has arranged. Unfortunately, the Supreme Court Judges denied the Petitioner’s request because they consider the Petitioner cannot prove
its allegations. The Judges should have ordered the curator to reveal the debtor's financial records in order to determine whether the disputed claim is valid or not. If Trillium Global Pte. Ltd is indeed a fictitious creditor; then it means the debtor has gotten away while damaging his creditors and the stakeholders under the protection of the Supreme Court.

2. Pseudo-Voluntary Petition

Another form of bankruptcy abuse, a pseudo-voluntary petition, can be observed in the Suparjo Rustam case (Medan Commercial Court Decision No. 08/Pdt.Sus-Pailit/PN.Niaga.Mdn). In this case, Suparjo Rustam (the Debtor) filed a voluntary petition in Medan Commercial Court immediately after realizing he cannot maintain his business because of financial difficulties. Debtor admitted to possess unsecured debts to his creditors with a total of 901.420.084 IDR.

In his bankruptcy statement, Debtor declared that he never arrange any form of financial records of his business. Besides, Debtor only discloses his single asset, which is a car worth 140.000.000 IDR. The Debtor is willing to hand over his car as a bankruptcy asset. The Debtor does not disclose any other assets other than his car.

The Judges, in this case, accepted the Debtor's voluntary petition. The Judges never ordered the creditors to be present in the proceedings to verify the Debtor's bankruptcy statement. Therefore, the Debtor is declared bankrupt by the court and The Property and Heritage Agency is named the curator in this case. It is highly alleged that the Debtor is filing a pseudo-voluntary petition because the Debtor did not report any other assets besides his car. If the Debtor is scrupulously honest and comes in good faith, he should disclose all of his assets unconditionally, such as his properties, bank accounts, accounts receivable from third parties, and other types of investments such as gold, stocks and bonds. The Debtor is alleged to file bankruptcy solely to avoid his financial obligations to his creditors. Therefore, good faith and honesty from the Debtor regarding accurate and valid information on his assets are critical in a bankruptcy case.

3. Creditor Threatens Debtor

An excellent example of where the creditor abuses bankruptcy law by threatening a debtor can be observed in Excellift, Sdn, Bhd & PT. Kawasan Dinamika Harmonitama v. PT. Multi Ocean Shipyard case (Medan Commercial Court Decision No. 13/Pdt.Sus-PKPU/2018/PN.Niaga.Mdn). In this case, Excellift, Sdn, Bhd (the creditor) filed an involuntary "Suspension of Payment" ("Penundaan Kewajiban Pembayaran Utang") petition against PT. Multi Ocean Shipyard (the debtor) in Medan Commercial Court. The creditor declared that the debtor owned 122.150 SGD to it.

The debts, in this case, emerged from the contractual obligations between the creditor and debtor, which the creditor considered the debtor had not fulfilled satisfyingly. The debtor purchased a crane from the creditor. In the sales contract, it is stated that the creditor shall perform the crane installation. When the crane has arrived at the debtor's site, the creditor is reluctant to install the crane as promised without any legitimate reason. Besides, the crane that arrives at the site has different specifications from the agreement.

Consequently, the creditor promised to deduct the crane price from 122.150 SGD to 88.650 SGD. Eventually, the creditor broke its commitment by claiming complete payment from the debtor, 121.150 SGD instead of 88.650 SGD. The debtor is only willing to repay the deducted price. Therefore, the creditor seeks another creditor, in this case, PT. Kawasan Dinamika Harmonitama to fulfil the involuntary Suspension of the
Payment petition requirements. PT. Kawasan Dinamika Harmonitama holds claims against the debtor for 288,855,501 IDR.

During the proceedings, the debtor states that it did not feel willing to fulfil the claim from the creditor because the creditor breached the agreement to deduct the crane’s price. The debtor also argued that the matter should be presented in the district court, not the commercial court. Unfortunately, the Judges hold a contrary belief in this case. The Judges granted the creditor’s petition, and therefore the debtor is declared under the state of Suspension of Payment. The debtor is obliged to arrange a settlement proposal to his creditors under 45 days or shall be declared bankrupt by law. The debtor has no option but to repay the total price of the crane. After fulfilling its debts, the debtor and the creditors have subsequently reached a reconciliation agreement. Therefore, the debtor is cleared from it’s under the Suspension of the Payment status.

Several Proposals to Prevent and Eradicate Bankruptcy Abuse by the Bad Faith Parties

The previous sections have described the several weaknesses in Indonesian bankruptcy law and, consequently, how the bad faith debtors and creditors abused the flaws for their advantages. The following sections propose several methods to promote the implementation of the good faith principle in the Indonesian bankruptcy regime. Rusch argues that implementing the good faith principle can contribute aid to the bankruptcy process in the court by guiding the courts in conducting a rational analysis of the parties' good faith. (Rusch, 1996) The following proposal is supposedly minimalizing the potency of bankruptcy abuse in the Indonesian bankruptcy process.

1. Insolvency Test Requirement to Protect Good Faith Debtors

The Indonesian bankruptcy law does not require a debtor to be insolvent before accessing a bankruptcy process. (Sunarmi, 2010) As the result, the bankruptcy process in Indonesia is likely to be abused by the bad faith debtors and creditors. The bankruptcy petition requirement should be tightened, e.g., the debtor’s financial records must be complete and investigated thoroughly to determine whether an abuse intention exists or no and whether the creditors are intended to harass the debtor. (Sunarmi, 2017) One of the mechanisms to examine the appropriateness of a bankruptcy petition is known as the insolvency test. Indonesia’s bankruptcy law does not adopt the insolvency test. Accordingly, the Indonesian bankruptcy law needs to adopt the insolvency test as one of the bankruptcy petition requirements based on two reasons. First, to prevent solvent debtors are declared bankrupt by the courts. Second, the broad definition of claim adopted by the Indonesian bankruptcy law needs a complex proofing procedure, and an insolvency test is deemed appropriate for this task. (Anisah, 2008)

By the time of this article is being written, Indonesian Bankruptcy Law still not being a priority to be amended by the Indonesian Government via National Legislation Program. (Hidayat, 2023) However, there is another method to amend the Indonesian Bankruptcy Law, especially the provisions that make it easy to declare a debtor bankrupt and the requirement of insolvency test. The method is by filing judicial review the Indonesian Bankruptcy Law to the Indonesian Constitutional Court. The filing reason could be stated as the provision regulating bankruptcy petition in Indonesian Bankruptcy Law tends to violate the constitutional right of the party who filed the review (Martitah, 2023), which the right of legal certainty and protection in bankruptcy process.
A debtor is considered solvent as long the value of his debts does not exceed the value of his assets. (Eow, 2006) The two commonly employed methods as insolvency tests in the bankruptcy process are the balance sheet and cash flow tests. (Cieri & Riel, 2004) According to the balance sheet test, a debtor is considered to have entered the insolvency area when the value of his debts exceeds the value of his assets. (McCoid II, 1987) On the other hand, the cash-flow test is utilized to examine the debtor's capability to repay his debts at a particular time on a cash flow basis. (Keay, 2001) These insolvency tests are suitable to protect good-faith debtors from being harassed or threatened by the creditors. If the solvent debtors are likely declared bankrupt by the court, it will adversely affect the bankruptcy as a whole system. The investors might lose their confidence in the bankruptcy system. Therefore, insolvency test is recommended to be implemented to replace the simple verification method which is adopted by the current Indonesian bankruptcy law.

2. Criminalization of Bankruptcy Fraudsters

One of the bankruptcy law's purposes is to provide an efficient and equitable debtor's assets distribution mechanism among his creditors. Another goal of bankruptcy law is to provide an opportunity for the cooperating debtor and honest debtor a debt discharge and fresh start. (McCullough, 1997) Sometimes, not every debtor acted in good faith and honestly during a bankruptcy process. Honesty and good faith from the debtor play an important in the bankruptcy process. (Sousa, 2007)

Dishonest debtors might file invalid or incomplete information to the court, conceal their assets, transfer their assets to friends or families, or even bribing the creditors and curator for not taking specific actions against the debtor. (Ogier & Williams, 1998) When it comes the time if a debtor, creditor, curator, and other parties involved in a bankruptcy process attempted to beat the system, then it will be more difficult and yet expensive to pursue the goal of claim fulfillment and a fresh start for the debtor. (Gaumer, 1998) The abuse of a bankruptcy system is a kind of fraud towards the stakeholders; therefore, a bankruptcy law is considered incomplete if it does not regulate provisions on punishments on bankruptcy frauds. (McCullough, 1997) Hence, Indonesian bankruptcy law is deemed incomplete because it does not regulate legal provisions regarding bankruptcy frauds.

Clement argues that there are three reasons why legal provisions regarding bankruptcy frauds are important: (Clement, 2015)

a. Bankruptcy frauds affects the tax income of the government. Government tends to collect less tax income if many business organizations went bankrupt for non-economic issues;

b. Bankruptcy frauds increase the credit cost. Creditors realize the risk of not getting paid by the debtor is high; therefore, the credit cost in increased to mitigate the risk of bad credit;

c. Bankruptcy frauds damage the public confidence towards the integrity of a bankruptcy system.

In the context of Indonesian law, uniquely, the provisions regarding bankruptcy fraud are regulated in the Penal Code, which is outdated compared to the modus operandi of modern bankruptcy frauds. Hence, it is recommended that the Indonesian government amend the Indonesian bankruptcy law by criminalizing bankruptcy fraudsters.

The criminalization of bankruptcy fraudsters in Indonesia is crucial by considering two limitations: (Priel, 2018)

a. The offence must be serious. Bankruptcy frauds are serious offences
that bring adverse effects not only to the debtor and creditors involved, but also the stakeholders such as customers, community, government, workers, suppliers, etc.

b. The fault from the action must be in scope of public law or bring damages to the third parties. Bankruptcy law should be considered as a public law because the effect of a bankrupt decision does not only affect the debtor, but also other parties involved directly or indirectly with the bankrupt debtor. Therefore, any frauds committed in the bankruptcy process should be considered fault in the scope of public law.

Based on the previous arguments, the criminalization of bankruptcy fraudsters is considered one of the efforts of exemplary faith implementation in a bankruptcy regime.

3. Reinforcing Property and Heritage Agency’s Role as Public Trustee

In the Indonesian bankruptcy regime, besides the private curator, Property and Heritage Agency (“Balai Harta Peninggalan”) can also serve as a curator in a bankruptcy case. Property and Heritage Agency also share a comparable capacity as a public trustee similar to the United States Trustee Program but lacks investigation authority. Unfortunately, the Property and Heritage Agency is less desirable than the private curators because it is considered slow and less effective in performing its duty than the private curators. (Kurniawan, 2018) Hence, it’s important to improve the role of the Property and Heritage Agency.

The Indonesian government can learn from the USTP. USTP supervises every action of the parties involved in a bankruptcy case, including the debtor, the creditors, curators and other third parties. USTP must place the public interest first in a bankruptcy case for a fair, quick and economic debt settling procedure. Clement, p. 412. The USTP can also cooperate with The United States Attorney Office, the Federal Bureau of Investigation and several other legal enforcement institutions to identify and investigate the alleged bankruptcy abuse and frauds. (Singh & Maria, 2019) Besides, USTP additionally accommodates various extensive training for the federal prosecutors and legal enforcers, members of the USTP and the private curators. (Morse, 2018)

The lack of investigation authority from the Property and Heritage Agency is the prevailing weakness of the governmental supervision in the bankruptcy process. The Property and Heritage Agency can learn from the USTP, especially in identifying and investigating bankruptcy abuses and frauds. The Property and Heritage Agency can also cooperate with the Indonesian Public Prosecution Office, the Director-General of Tax, State Intelligence Body, Directorate General of Immigration and Financial Transaction Report and Analysis Center. If all of the stated bodies can develop a mutual commitment and synergy, the potential of bankruptcy abuses and fraud in Indonesia could be limited. It will also induce positive effects on the bankruptcy regime by elevating public confidence towards it.

CONCLUSION

Based on the description in the previous sections, it can be inferred that the Indonesian bankruptcy regime holds several weaknesses, which prone to be abused by the bad faith debtor and creditors. The weaknesses are as follows: First, the bankruptcy petition requirements are excessively modest. Second, lack of governmental supervision in the bankruptcy process. Third, lack of severe punishment for bankruptcy fraudsters.

The evidence of bankruptcy abuses in Indonesia can also be observed in the three cases described above, such as a fictitious creditor, pseudo-voluntary petition, and creditor threatens debtor.
In order to prevent and eradicate bankruptcy abuse and frauds in the future, the implementation of the good faith principle is crucial. Implementing the good faith principle in the Indonesian bankruptcy regime can be performed in at least three ways: implementing the insolvency test to protect good-faith debtors, criminalizing bankruptcy fraudsters, and reinforcing the Property and Heritage Agency's rule the bankruptcy process. Therefore, it is expected that the potency of bankruptcy abuses and frauds in the Indonesian bankruptcy regime can be minimalized.

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