LAW HARMONIZATION ON HEIR RESPONSIBILITY OF PERSONAL GUARANTOR IN BANKRUPT COMPANY[Ω]

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Abstract

The heirs who are taken as bankruptcy debtor is based on the court's decision Article 1826 BW, as a result, the inheritance and their personal property shall be carried out as public confiscation under Article 1 paragraph 1 of the Bankruptcy Law. This research employs normative-juridical research method. Public confiscation includes all of debtor's wealth that will be bankruptcy boedel. Whereas Article 209 the Bankruptcy and PKPU Law stipulates the separation of inheritance boedel and personal property of the heirs. This disharmony among Article 1826 BW, Article 1100 BW, Article 209 Law of Bankruptcy and PKPU (debt postponement petition) require harmony through revision. The revision through bankruptcy law and PKPU comprehends liability limitation of heir as bankruptcy debtor to pay the debts as well as the separation of heir personal property and the inheritance.

Keywords: law harmonization, heirs, personal guarantee.

Abstraksi

Ahli waris yang dijadikan debitor pailit berdasarkan putusan pengadilan dengan menerapkan Pasal 1826 BW, sehingga terhadap harta warisan dan harta pribadi ahli waris dilakukan sita umum berdasarkan Pasal 1 ayat 1 UU Kepailitan. Metode penelitian ini menggunakan penelitian yuridis normatif. Sitaan umum meliputi segala harta kekayaan debitor baik yang ada maupun yang akan ada menjadi boedel pailit. Padahal Pasal 209 UU Kepailitan dan PKPU mengatur adanya pemisahan antara boedel waris dengan harta pribadi ahli waris. Disharmoni hukum antara Pasal 1826 BW dan Pasal 1100 BW dengan Pasal 209 UU kepailitan dan PKPU sehingga perlu adanya harmonisasi hukum melalui revisi UU Kepailitan dan PKPU yang meliputi pembatasan kewajiban tanggung jawab ahli waris sebagai debitor pailit dalam membayar utang pewaris serta Pemisahan harta pribadi ahli waris dan harta waris yang diterima dalam kepailitan.

Kata kunci: harmonisasi hukum, ahli waris, jaminan perorangan.

Introduction

Personal guarantee provides reassurance to bank that the given debt will be repaid by debtor. An unpaid debt causes non-performing loan, thus, through the given guarantee, the bank has source of repayment and has the guarantor finish the repayment. Therefore guarantee is not an absolute requirement but one of the requirements even though it becomes obligatory element in form of debtor's property to provide to get loan from bank.[1]

According to Khoidin personal guarantee is a guarantee that causes a direct relation towards certain individuals. The creditor's right is relative namely individual rights. Consequently, there is no difference which first debt and subsequent ones.[2]

The existence of individual's agreement between creditor and guarantor creates law on rights and obligations for both. The guarantor's obligation is to meet the presentation or pay off the loan for the benefit of creditors. Yet

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[1] Bambang Catur PS, Pengamanan Pemberian Kredit Bank dengan Jaminan Hak Guna Bangunan, *Jurnal Cita Hukum*, Vol. II No. 2 December 2014, p. 275.

[2] M. Khoidin, 2017, *Hukum Jaminan (Hak-Hak Jaminan, Hak Tanggungan, dan Eksekusi Hak Tanggungan)*, Surabaya: Laksbang Yustisia, p. 12-13.

there are also rights for guarantor, including: rights to make the debtor's assets are taken first (Article 1831 BW), right to share the debt (Article 1836 BW), right to file a debt (Article 1849, 1850 BW), and right to be dismissed guarantor (Article 1848 BW).[3]

The main guarantor's obligation of is to repay the debt when the debtor defaults on the loan obligations. It applies the general guarantee that every asset of guarantor will be the guarantee for debt repayment. Why is it mentioned every asset of guarantor? It is because the repayment cannot be determined by which asset it is. If the guarantor has repaid the debt, they can demand redemption along with the form of cost (*regres* right).

The guarantee agreement has also legal implications towards the heir of guarantor when the guarantor passed away. This matter is regulated in Article 1826 BW which is "The engagements of guarantor shift to the heir". In practice, Supreme Court Judicial Review No. 125 PK/Pdt.Sus/Pailit/2015 *juncto* Supreme Court Cassation Verdict No 19 K/Pdt.Sus-Pailit/2015, *juncto* Decision of Commercial Court Makassar On District Court Makassar No. 02/Pailit/2014/PN. Niaga.Mks, thus, panel of judges in judgement applied Article 1826 BW as strong base for creditor to state the heir from personal guarantor who unleashes his privileges in repayment towards the creditor.

As decided the heir as bankruptcy debtor, it appears the legal disharmony in Article 1 No.1 Law No. 37 Year 2004 on Bankruptcy and Postponement of Obligations Payment (hereafter called as Law of Bankruptcy) and Article 1826 Burgerlijke Wetboek (hereafter abbreviated as BW) with Article 209 Law of Bankruptcy *juncto* Article 1100 on assets of heir as *boedel pailit* (bankrupt estate). This condition will be injustice for heirs, especially if they do not acknowledge this agreement beforehand.

This article discusses the effect of legal disharmony between Article 1 paragraph 1 Law of Bankruptcy and Article 1826 BW on the obligations of personal guarantor's heir towards the bankrupt company and the solution about this legal disharmony.

Research Method

This is juridical-normative research by applying statute approach, conceptual approach and comparative approach. Primary and secondary law materials are used. The primary law materials include *Burgerlijk Wetboek (BW)*, Law No 37 Year 2004 on Bankruptcy and Postponement of Debt Payment Obligation (PKPU), Supreme Court Ruling Verdict No. 125 PK/Pdt. Sus/Pailit/2015 *juncto* Supreme Court Cassation Verdict No 19 K/Pdt.Sus-Pailit/2015, *juncto* Decision of Commercial Court Makassar On District Court Makassar No. 02/Pailit/2014/PN.Niaga. Mks, while the secondary law material is the study about Law of Guarantee and Law of Bankruptcy written in various literature. The materials are analyzed using descriptive-qualitative method.

Discussion

The Effect of Legal Disharmony in Law of Bankruptcy and BW towards heir of Personal Guarantor in Bankrupt Company

Law functions as protection for people interest. Thus law has to be implemented professionally to give security, as explained:

> Law is created as means or instrument to control rights and obligations of subject of law, so each will do the obligations well and get their rights properly. Law violation occurs when certain subjects of law do not meet the obligations or violate other subject of law's right.[4]

For the benefit of one's debt repayment, the heir is included as bankrupt debtor according to court verdict by applying Article 1826 BW, thus every inheritance and heir's personal assets will be the public confiscation based on Article 1 paragraph 1 Law of Bankruptcy and PKPU. Public confiscation involves every asset of debtor whether in cash or one that will be

[3] Nurman Hidayat, "Tanggung Jawab Penanggung Dalam Perjanjian Kredit", *Jurnal Ilmu Hukum Legal Opinion*, Vol. 2 No. 4 July 2014, p. 5.

[4] Evi Deliana HZ, Perlindungan Hukum Terhadap Anak Dari Konten Berbahaya Dalam Media Cetak Dan Elektronik, *Jurnal Ilmu Hukum,* Vol. 3 No. 1 August 2012, p. 7.

boedel estate. Even though Article 207 and Article 209 Law of Bankruptcy and PKPU and PKPU regulate the separation of *boedel* inheritance from the heir's personal asset. Therefore the impact for the heir is interesting to be analyzed in perspective of justice.

From the literature review and documents, it is found that the heir's obligation of guarantor, who holds personal guarantee, comes from the guarantee agreement made by guarantor and creditor for the benefit of debtor. By the death of guarantor, based on Article 1826 BW, every engagement that was made passes on the heir.

The content of Article 1826 is very normative since the explanations whether the heir has to take the law obligations with their knowing or not about the agreement are not provided. Ideally, referring to *asaspacta sunt servanda* principle of agreement, it is those who made the agreement that must fulfill it.

Heir is one who is entitled by law to receive the rights of predecessor's inheritance and obligate to settle all his debts. The obligation and rights happen after the predecessor passed away since there are inheritance rights and liabilities.[5] This obligation is emphasized on Article 1100 BW that heirs who are willing to receive inheritance as well as guarantor's debt, grant of will and other responsibilities. It is equal with what they receive.

Legally, the implementation of Article 1826 BW is not wrong, but viewed from justice perspective, the court decision which uses Article 1826 BW is unfair since heirs are responsible for paying debts of guarantor who holds personal guarantee. Moreover, conceptually someone should responsible for their own action.

Even more, when the heirs do not know about the underwriting agreement made by guarantor. When the debtor exclaimed bankrupt and the guarantor passed away, is it proper to force the heir becomes bankruptcy debtor and his wealth is used to pay for the sake of guarantor debts as personal guarantee holder?

Personal guarantee substantively has privilege in accordance with Article 1831BW that guarantor does not have to pay for the debts except the debtor neglected his obligation. To pay the debts, debtor's wealth is taken and auctioned. Therefore, the basic principle is the guarantor of personal guarantee obliges to pay debtor's debt as the debtor defaults on the obligation.

The guarantor who has already detached his privilege also means has declared himself responsible for debtor's debts. If debtor or guarantor cannot afford to pay the debts, creditor would sue debtor bankruptcy and heir of the guarantor simultaneously.[6] In consequences, the heir would be considered bankrupt if guarantor has detached his privilege in his lifetime. Personal guarantee in case of debtor bankruptcy is used to tie someone to pay the debts. In this case personal guarantee can be identified as main agreement, thus responsibility process which will be passed is the same as main debtor bankruptcy process.[7]

Regulation on bankruptcy practice, if guarantor cannot pay debtor's debts or breach the contract, he would exclaimed bankrupt as the qualification in Article 2 paragraph (1) law Number 37 year 2004 of bankruptcy and postponement of debts obligation has been fulfilled. In giving bankruptcy decision towards guarantor who is positioned as debtor, it must fulfill the requirement of bankruptcy decision.[8]

Therefore, needless to say that that creditor as applicant of bankruptcy can submit bankruptcy towards guarantor who has detached his privilege. This regulation is not only applied for guarantor who holds personal guarantee but when he died, his heirs will replace the

[5] Oemar Moechthar, "Kedudukan Negara Sebagai Pengelola Warisan Atas Harta Peninggalan Tak Terurus Menurut Sistem Waris Burgerlijk Wetboek", *Yuridika*, Vol. 32, May 2017, p. 290.

[6] Yudha Pradana, "Kedudukan Ahli Waris Penanggung Perseroan Pada Perseroan Terbatas yang Dipailitkan Secara Bersama-sama", *Diponegoro Law Journal*, Vol. 5 No.3 July 2016, p. 3.

[7] Luky Pangastuti, "Pertanggungjawaban Pihak *Personal Guarantee* yang Dinyatakan Pailit", *Jurnal Repertorium*, Vol. II, July-December 2015, p. 152.

[8] Annisa Amalia Rachmah, "Analisis Yuridis Kedudukan Penjamin Perorangan (Personal Guarantee) pada Kepailitan Perseroan Terbatas", *Diponegoro Law Journal*, Vol. 5 No. 4 October 2016, p. 7.

guarantor position. In practice, Article 1826 becomes a powerful foundation for creditor to apply bankruptcy towards heir of personal guarantee holder (guarantor) but detached his privilege. This condition causes injustice for the heir who does not know about the agreement made by guarantor when he was alive.

In the case of Supreme Court Judicial Review Number. 125 PK/Pdt.Sus/Pailit/2015 *juncto* Supreme Court Cassation Number 19 K/Pdt. Sus-Pailit/2015, *juncto* Niaga Makassar court decision on government Makasar court Number. 02/Pailit/2014/PN. Niaga.Mks. is known that law foundation used by bankruptcy applicant is Greenfich premier Article 1820 BW juncto article 1826 BW and article 1832 BW that use simple authentication. Simple authentication only show existing debts with creditor, and other creditor authentication which stated in bankruptcy law and PKPU. PKPU is a simple authentication which does not need other evidences. Meanwhile if the authentication is quite complicated, it should be settled in civil court in case of law violation but not in bankruptcy issue.

The stipulation of simple authentication is written on Supreme Court decision Number 03 K/N/2005. In the case of PT. PMF finance as creditor/in this case as bankruptcy applicant against Ny. MNH as individual and representative of PL as requested appeal (both of them are heirs). Judges panel decision refused all of PT.PMF application since their evidences are not simple towards heirs of guarantor.

Different condition is found in decision 02/Pdt.Sus.Pailit/2014/PN Niaga Mks (*judex facti) juncto* decision number 19 K/Pdt.Sus-Pailit/2015 (judex juris). Decision of WT case (heir of late AS), etc and YW (heir of late GS), against GPF. Judge used Article 1826 BW to make heir of guarantor who holds personal guarantee bankrupt. In consequences, it made Article 1 Number 1 juncto Arti 21 law of Bankruptcy and PKPU is valid. Therefore, all of heir wealth become public confiscation to pay the debts of guarantor of debtor bankruptcy.

The stipulation used by judges panel causes disharmony of Article 1100 BW juncto article 2019 law bankruptcy and PKPU that separate heirs wealth from their personal asset. Moreover, it is injustice for heir who cannot use his own wealth.

Law Harmonization on the Protection of the Heirs of Personal Guarantor in Bankrupt Company

According to the National Law Development Agency (BPHN), Law Harmonization is a scientific activity to reach the written law harmonization process which refers to philosophical, sociological, economical, and juridical values.[9] This activity does not completely adopt the whole conditions of two law systems to create the same law conditions. According to M. Hesselink, the harmonization is relatively partial rather than comprehensive. It means that the law harmonization does not attempt to create the only law authority on a certain subject as instruments to harmonize the law can not run beyond the needs.[10]

The national law development is urgently enforced. Moreover, it needs the harmonious national law concept and system, which means they are aligned, well-suited, and balanced. Thus, the law harmonization can integrate the various law in harmonious, aligned, and balanced arrangement in the national law system framework.[11] Practically, the law harmonization method varies due to highly complex harmonization process. It includes many actors, different purposes, and other considerations to take. Therefore, some theories of law harmonization classification are based on the various point of view or review.[12]

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[9] Lukman Yulianto, "Harmonisasi Hukum tentang Pengawasan dan Pengendalian Minuman Beralkohol", *Jurnal Ilmu Hukum MIZAN*, Vol. 1 No. 2 December 2012, p. 34.

[10] Tri Sediaty, "Harmonisasi Prinsip-Prinsip TRIPs Agreement dalam Hak Kekayaan Intelektual dengan Kepentingan Nasional", *Fiat Justisia Jurnal Ilmu Hukum*, Vol. 8 No. 4, October-December 2014, p. 609.

[11] Lukman Hakim, "Upaya Harmonisasi Hukum terhadap Perlindungan Pengetahuan Tradisional (*Traditional Knowledge*) di Indonesia", *Jurnal YUSTIKA*, Vol. 12 No. 2 December 2009, p. 179.

[12] Subianta Mandala, "Harmonisasi Hukum Perdagangan Internasional: Sejarah, Latar Belakang dan Model Pendekatannya", *Jurnal Bina Mulia*, Vol. 1 No. 1 September 2016, p. 56.

Based on the word formulation of harmonization, the law harmonization is an effort to align the law to be proportional and beneficial for people interests. The main purpose of law harmonization is to find out the similarity or the meeting point of the fundamental principles of the existing law system (that will be harmonized). It is not easy task, however, since every state has a basic difference based on its historical, legal, and cultural background. One of the basic problems is pluralism. Consequently, the efforts to actualize the law harmonization is not easy.[13]

According to Kusnu Goesniadhie, there are five steps of the law harmonization:[14] *first*, identifying the law disharmonious position in the law implementation; *second*, dentifying the causes of the law disharmony; *third*, attempting to look for the law using the law interpretation and construction method to change the disharmony into harmony; *fourth*, doing a law reasoning effort so that the result can make sense or be logical; and *fifth*, arranging the rational argumentation with a good understanding of governance to support and explain the law commentary, law construction, and law reasoning result."

The law harmonization also functions as a society renewal tool. It is in line with Mochtar Kusumaatmaja's statement that law is expected to function beyond what is believed as "society renewal tool" with these following principles:[15]

> "the legal renewal steps both by formulating law and legal harmonization of new development in international law including economic, finance, trading, and banking field, have evidently not fulfill justice and legal certainty ideals that are always mentioned in law education process."

In bankrupt case in Supreme Court No.19 K/PdtSus-Pailit/2015. Andi Sutanto, the debtors, has died. It results in a new problem in which the guarantor heirs refuses if the creditor demands them to pay the debt, because they think that they are not included in the agreement and the debt has been paid. In addition, the agreement was made without the guarantor's wife's approval. Thus, they think that the agreement is null and void. Therefore, the heirs filed legal action to the creditor in appeal rate. It is based on: *first*, they do not think that they are the debtor of those creditors; *second*, they think that those creditors are not legal creditor because the agreement is signed with-out the debtor's wife's, Wiwiek Tjokrosaputro, approval; *third*, they think that this case is so complicated and requires complicated evidence in civil court, so it does not fulfill the requirement written in Article 8 section (4) Law of Bankruptcy in PKPU.

Appeal Judge Panel's verdict No. 19 K/ Pdt.Sus-Pailit/2015 refuses all appeal requests from the heirs of Andi Sutanto and Gunawan Sutanto in the legal considerations as follows: *first*, even if the deferment certificate was created without the guarantor's wife approval, it is still legal because the guarantor death make them divorced and separates the properties into 2 parts, for Andi Sutanto and Wiwik Tjokrosaputra. It means, since he passed away, the personal guarantee is half of their treasure/properties which then become the heritage. *Second*, the evidence of this case is very simple because according to the admission of bankruptcy petitioned party I, it is true that he has debt to the bankruptcy petitioner.

According to Law of heirs in Article 1826 BW, "the obligations of guarantor move to the heirs" creates consequence that the debt is delegated to the guarantor's heirs. The heirs must endure all consequences of guarantor even they do not know any relation of it.

The arrangement of article Number 1826 BW on the heir responsibility from guarantor that holds Individual Guarantee, the researcher describes the elements as follows; *firstly*, guarantor's obligations. The obligation in this

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[13] Siti Nurjannah, "Harmonisasi Prinsip-Prinsip Hukum Kontrak Melalui Choice Of Law", *Jurnal Hukum Pidana Dan Ketatanegaraan Al Daulah,* Vol. 2 No. 2 December 2013, p. 165.

[14] Kusnu Goesniadhie, 2010, *Harmonisasi Sistem Hukum Mewujudkan Tata Pemerintahan Yang Baik,* Bandung: NASA Media, p 12-13.

[15] Romli Atmasasmita, "Tiga Paradigma Hukum dalam Pembangunan Nasional", *Jurnal Hukum Prioris,* Vol. 3 No. 1 January 2012, p.3.

case is that the guarantor in his lifetime has tied himself to the creditor in debt agreement to be debtor pledge proven by official document of personal guarantee. In the document, the guarantor has privilege to not pay debt until the debtor defaults on the obligation and his wealth has been auctioned, can dismiss the privilege directly which results in replacing the main debtor's position or joint liabilities. *Secondly*, shift. Shift means changing the current rights and obligation, it shifts the right and obligation not lost. Thirdly, the heirs. The heirs can be meant as what Article No. 833 BW says that states as follows; The heirs, by all means of law, achieve rights of possession over all properties, rights and debts of the passed one".

In the analyzed case, it is found that the responsibility of the heir of guarantor is not merely about the remains of the guarantor's wealth. The heirs is liable for the obligation in engagement made by the guarantor including the guarantor's debts. This causes the heir's personal wealth capable of being accused to settle the debts of the guarantor as personal guarantee holder.

In bankrupt case, for the bankruptcy debtor, it is obliged to pay the debts to the creditor including the bankruptcy debtor (which was the personal guarantee holder). Nevertheless, the existence of the Law No. 37 Year 2014 on the Bankruptcy and PKPU does not arrange explicitly about the personal guarantee relationship, heir, and heir's responsibility to bear guarantor debts. This condition causes law uncertainty for either the heirs of the guarantor or creditor. Law Harmonization to Article No. 1826 BW and Article No.1100 BW with the Law No. 37 Year 2004 on the bankruptcy and PKPU is then urgently required.

Regarding the case, it requires harmonization of the regulation of law written in the Law of Bankruptcy and PKPU along with BW which provides more justice to every parties, so that every rights of parties, especially heir which is guaranteed through law protection given by the Law. Law harmonization in the case of responsibility of the guarantor heir is Article 1826 BW that states every engagement is moved to the heirs. However, responsibility needs to be limited, especially when it comes to completion of the debts payment as a guarantor of the bankrupt company which has passed away as stated in Article 1100 BW that heir bears the burden of the debts of the guarantor that is equal to what the heir receives.

In this bankrupt case, when the heir of guarantor of the bankrupt company is declared bankrupt, the given inheritance of the heir is the only one that can be executed by the creditor, instead of the whole personal wealth of the heir that becomes the completion of debts to creditor as written in the Article 1 No. 1 Law Juncto Bankrupt Article 21 Law of Bankruptcy. Due to the bankruptcy, all of debtor bankruptcy wealth becomes confiscated to complete every debt of its creditor. Nonetheless, referring to the rules arranged in the Article No.209 Law of Bankruptcy on the remains of the guarantor's wealth which is declared bankrupt turns out that it has separated from the heir's wealth.

As explained, it is proven that there has been a disharmony between Article 1826 BW and Article 1100 BW with Law of Bankruptcy. As for that matter, the action of law harmonization to both law regulations is as follows; *firstly*, there has to be an arrangement about personal guarantee in Law Bankruptcy and PKPU. This is necessary because creditor in credits deals with guarantor as personal guarantee holder is frequently affiliated by debtor. *Secondly*, there has to be a disposition of law certainty for the heir of the guarantor as personal guarantee holder which is declared bankrupt by the court that consists of: the limitation of the obligation of the heir's responsibility as bankrupt debtor in paying guarantor debt, and the separation of the personal wealth of heirs with the received inheritance or some portion of the heirs in processing bankruptcy for certainty about the wealth that becomes the b*oedel bankruptcy* by the curator.

The case of the heir's responsibility for the completion of the guarantor debt that signs up Personal Guarantee to the bankrupt company

has happened. At this moment, the government needs to give legal certainty for each party involved in the completion of the case.

The effort to realize law harmonization in providing law protection to the heirs of the guarantor shall take accounts of the principles of law written in Law Bankrupt and PKPU, one of those are balance and justice to every involved parties until it prevents the misuse of bankruptcy institution and prevents the curator's despotism to execute the assets of the heirs which is declared bankrupt. This principle might be used by the judges in implementing Article No.209 Law of Bankruptcy and PKPU alongside with Article 1100 BW that separates personal wealth from the given inheritance. Therefore, when the heirs are declared bankrupt, the inheritance of the heirs is the only thing that can be executed by the curator to pay the debts of the guarantor as a personal guarantee holder.

Conclusion

Due to the law disharmony, the heir's responsibility as mentioned in Article 1826 BW juncto Article 1 No. 1 Law of Bankruptcy causes every heir's wealth is declared as a public confiscation which settled by curator. Hence, the personal wealth and the given inheritance become the burden debts for creditor that it creates injustice and against the Article 1100 BW juncto Article 209 Law Bankrupt and PKPU that separates the remains of the guarantor's wealth from his heirs. A law harmonization is required in terms of limitation of obligation for heirs as a bankrupt debtor in paying the guarantor debt along with the separation of the heirs' personal wealth and the given inheritance of the heirs in the process of bankruptcy. Therefore, there is certainty about the wealth that becomes the bankruptcy inheritance (*boedel pailit)* by the curator as it is stated in the Article 1100 BW junto Article 209 BW Law of Bankruptcy and PKPU in principles stipulation has given protection to the heirs over their personal wealth that is not declared as a public confiscation. This suited the principles of justice and balance in the Law of Bankruptcy and PKPU.

Otherwise, for legal council which handle the bankruptcy shall do law construction by seeing law harmonization between Article 1100 BW juncto Article 209 Law of bankruptcy and PKPU toward bankrupt heirs. Hence, when they declared bankrupt, heir just bears all debts by *boedol* inheritance but does not include their personal wealth. This provision is proportional and meets the principles of balance and justice in the law of bankruptcy.

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