

Punishing The Bankruptcy Fraudsters: What Can Indonesia Learn from United States of America?

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Abstract

Bankruptcy is a system that was created to provide financially distressed debtors relief from their debts while providing the creditors with a fair portion of the debtors' assets. Unfortunately, certain parties might attempt to beat the system unfairly. The goals of this study are to compare Title 18 United States Code with Indonesia's legal system regarding bankruptcy fraud and how the Indonesian bankruptcy law ought to be in regulating bankruptcy fraud. This research is qualitative, using a black letter method and legal comparative approach. The result of this study shows that Indonesian bankruptcy law does not regulate provisions regarding bankruptcy fraud as comprehensive as Title 18 United States Code. It is suggested that the Indonesian government amends the bankruptcy law, therefore the public's confidence in the bankruptcy system can be preserved while providing a deterrence effect for the participants who might exploit the bankruptcy system for their advantages.

Keywords: bankruptcy; bankruptcy crime; fraud; white collar crime.

Abstrak

Kepailitan adalah suatu sistem yang dibuat untuk menyediakan kelegaan bagi debitor yang tengah mengalami kesulitan keuangan di samping menyediakan para kreditor bagian yang adil dari aset debitor. Namun, beberapa pihak mungkin mencoba untuk mengalahkan sistem kepailitan secara curang. Tujuan dari penelitian ini adalah untuk membandingkan Title 18 United States Code dengan sistem hukum Indonesia terkait kejahatan kepailitan dan bagaimana seharusnya hukum kepailitan Indonesia mengatur kejahatan kepailitan. Penelitian ini bercirikan kualitatif dengan menggunakan metode black letter dan pendekatan perbandingan hukum. Hasil dari penelitian menunjukkan bahwa hukum kepailitan Indonesia tidak mengatur tentang kejahatan kepailitan selengkap Title 18 United States Code. Disarankan agar pemerintah Indonesia mengamandemen hukum kepailitan, dengan demikian kepercayaan publik terhadap sistem kepailitan dapat dipertahankan di samping menyediakan sebuah efek jera bagi para partisipan yang mungkin mencoba menyalahgunakan sistem kepailitan untuk keuntungan pribadi mereka.

Kata kunci: kepailitan; kejahatan kepailitan; kejahatan kerah putih.

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Introduction

Several authors have argued about the purpose of bankruptcy law. One of the oldest opinions regarding the purpose of bankruptcy law came from Levinthal, who argued bankruptcy law, no matter where or when issued, has at least two objectives. First, to secure an equitable distribution of the bankrupt debtor's assets among his creditors. Second, to prevent the debtor perform any acts that detriment the interest of his creditors and protect the honest debtor from his creditors (Levinthal, 1918). Jackson, for instance,

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argued that the purpose of bankruptcy law is to temporarily suspend any efforts from the creditors to grab the debtor's assets while hoping that the debtor's business can be preserved or liquidated (Jackson, 2001). On the other hand, Warren argued that Bankruptcy law is a tool that supposedly preserves those debtors who are unable to protect themselves properly from a disaster distributed with the creditors and make creditors incorporate the cost of a breakdown in debtors' business (Warren, 1987). Another viewpoint regarding the purpose of bankruptcy law came from Korobkin, who argued that bankruptcy law attempts to solve several multi-dimensional issues that emerged from a debtor's financial difficulties, including social, political, economics, and even issues regarding morals (Korobkin, 1991). There are numerous views on the bankruptcy law purpose depending on the paradigm by the experts.

Regardless of the views regarding the purpose of bankruptcy law stated before, the generally accepted primary purpose of the bankruptcy law nowadays is debt collective enforcement by gathering the debtor and his creditors in a single forum to the best interest of both parties (Gebbia, 2012). Bankruptcy law grants a tool for the most efficient and fair distribution of the assets. By utilizing bankruptcy law, creditors are able to recover some portion of their claims, where they may have received nothing had the debtor been allowed to linger on its prepetition path. A secondary purpose of the bankruptcy law is to provide an honest debtor with another opportunity in the commercial world (Hirsch, 1994). There comes a time when the debtor should be allowed to admit its mistake, perform what amends it can, under judicial surveillance. Its debts may be discharged in whole or in part, and in time, it may reenter the commercial world, presumably in a rehabilitated state, having learned from its mistakes (Publisher's Editorial Staff, 2018). Hopefully, the debtor can recover his social position and become a productive member of society instead of becoming a debt-drowned desperate individual.

In the past, bankrupts were treated harshly by society. Back in the ancient days, the society considered being bankrupt is deemed as the debtors' fault because of the lack of capability of the bankrupt debtors to manage their financial affairs (Efrat, 2006a). Besides being treated harshly, the bankrupts were also suffered inhuman punishments, which includes auctioned as slaves, imprisonment, or even capital punishment (Efrat, 2006b). As time goes by, the stigma towards the bankrupts has evolved. The bankrupts are no longer considered criminals. They are considered as the unfortunate victims of the relentless trading system (McCoid, 1996). In the 18th century, debt discharge was introduced to protect honest yet unfortunate bankrupts. It is considered a humane way to treat the debtors rather than treating them as criminals. To date, discharge is still considered as one of the most vital aspects of the bankruptcy system (Kadens, 2010). Although the bankruptcy system has been altered to protect the debtors from their creditors, yet some tricky debtors might still abuse the bankruptcy system for their benefits while, on the other hand producing detrimental damages to their creditors or even the stakeholders.

Honesty from the debtors is one of the most crucial aspects to make sure the bankruptcy system operates appropriately (*In re Hogan*, 214 B.R. 882 (Bkrcty.B.D.Ark), 1997).

Bankruptcy courts are equity courts equipped with powerful tools to terminate contracts, delay or reduce the payment of debts, prevent the workers from receiving timely wages, defer debtor compliance with the environmental, securities, and economic regulatory measures, and finally, staving off taxes (Jones, 1998). In order to utilize this powerful tool, the debtor must exhibit genuine honesty upon entering the bankruptcy system. Despite the basic necessity of debtors' honesty, many debtors are tempted to beat the system which resulted in debtors registering misleading or incomplete information to the court, covering their assets, and even bribing creditors or trustees to not exercising a particular action (Ogier & Williams, 1998). If these actions related to the bankruptcy proceedings, then numerous potential crimes in the form of bankruptcy system exploitation might happen (Smolik & Kajanova, 2018).

The exploitation of the bankruptcy system by a debtor is a fraud on the court and creditors. These exploitative acts by the debtors must be treated seriously and punished. If the exploitative acts by the debtor are neglected and left unpunished, it will bring adverse effects to the integrity of the whole bankruptcy system (Clement, 2015). Stowell and Barker argued that bankruptcy fraud will bring three social and economic consequences. First, bankruptcy fraud affects the tax income. The government will receive fewer tax revenues than it was supposed to receive if there are no bankruptcy frauds, Second, it increases the cost of lending from the creditors to honest debtors. Creditors might develop a fear of risk that a debtor will attempt to defraud them, so another alternative to secure this risk is by increasing the lending interest or demand collateral that is higher in value from the debtor. Third, it also promotes a negative impact on society's confidence in the bankruptcy system. Society will have less faith in the integrity and honesty of the system (Stowell & Barker, 2011). The bankruptcy system will lose its purpose because of being abused by the fraudsters. Therefore, the legal provision that penalizes bankruptcy fraudsters is an indispensable element to complete a bankruptcy system (McCullough, 1997), including the Indonesian bankruptcy system.

Unfortunately, the positive law of Indonesia that governs bankruptcy crime is out-of-date. Ideally, the provisions that govern bankruptcy crimes should be regulated in the Bankruptcy Law. Instead of being regulated in the Bankruptcy Law, Indonesia's provisions regarding bankruptcy crime are regulated in the Penal Code. The current provisions governing bankruptcy crimes in the Indonesian penal code are outdated by the modus operandi of the alleged in every bankruptcy case. There are two recent bankruptcy cases in Indonesia that display strong indicators of debtor's intention to deceive the creditors. The first case is *CV. Hitado v. New Universal Pte.Ltd (CV. Hitado v. New Universal Pte.Ltd, 2017)* and the second case is *Suparjo Rustam v. PT. Halimjaya Sakti – Medan, et.al. (Suparjo Rustam v. PT. Halimjaya Sakti - Medan, et.al, 2019)*. In these cases, both debtor's voluntary petitions are confirmed by the court, even though the debtors are clearly showing one of the signs of the intention to conduct bankruptcy fraud. The particular sign was holding back information or not revealing an honest statement regarding the debtors' assets. However, these debtors' malicious intentions are undetected by the law and left unpunish-

ed. These particular actions will induce adversarial consequences to the Indonesian bankruptcy system's integrity and honesty. Therefore, the Indonesian government should arrange specific actions to prevent and eradicate every form of abuse in the Indonesian bankruptcy system.

Bankruptcy crime is a severe threat to the integrity of a bankruptcy system. Many countries in this world have their regulation and strategy in combating bankruptcy crime, including the United States of America. United States of America is one of the nations in the world which thinks highly about the importance of regulating and combating bankruptcy crime. According to the Federal Bureau of Investigation, bankruptcy crime can be viewed as only the “tip of the criminal iceberg”, which involves other serious offenses such as “money laundering, mortgage fraud, public corruption, and identity theft.” Bankruptcy crime in the United States of America is deemed a white-collar crime and must be handled thoughtfully (Barker et al., 2010). Inferring the opinion by the Federal Bureau of Investigation before, the bankruptcy crime might lead to another variety of serious crimes that can produce unfavorable consequences not only to the bankruptcy system but also to the nation's security and economy. Hence, the Indonesian government must evaluate the law that governs bankruptcy crime and analyze what the Indonesian government can learn from the United States of America on combating bankruptcy crime.

Research Problems

This study intends to provide an ideal model of Indonesian law on sentencing bankruptcy fraudsters in the future. Consequently, the research will respond to the following problems: *first*, the comparison between legal provisions that govern bankruptcy crime in Indonesia and the United States of America; *second*, an ideal model of the law that Indonesia can learn from the United States of America regarding bankruptcy crime.

Research Method

This study was conducted based on qualitative research methodology by employing a systematic study of legal rules (Yaqin, 2007). The legal comparative approach is also applied in this study to provide an answer to the problem that was unresolved by the Indonesian bankruptcy law approach (Zweigert & Kotz, 1998). The data were collected through library research. The collected data will be investigated to present the solution to the problems.

Discussion

Overview of Law on Bankruptcy Crime in United States of America

The United States of America's earliest bankruptcy law could be traced to the early 1800s. The first United States of America's bankruptcy law was designed following the English bankruptcy law (Countryman, 1976). Bankruptcy law has always been representing

an essential function in the American legal system. The importance of the bankruptcy law to the American society can be observed from Jordan and Warren's statement, who stated: "we have seen that under the early law bankruptcy was exclusively a creditor's remedy, and in modern times bankruptcy is still an important, though little used, creditor's remedy" (Jordan & Warren, 1993). Jordan and Warren also stated that: "outside of bankruptcy there is often little relief for a debtor who is unable to pay creditors" (Jordan & Warren, 1993). Thus, bankruptcy law plays a vital role in the American market and society. One of the signature features of the early United States of America bankruptcy law is the protection of the honest debtors by granting discharge to some percentage of the debtor's debt (Countryman, 1976). Although the United States of America's bankruptcy law's primary purpose is to protect honest debtors, it does not automatically cause every debtor to comply with the law. The bad faith debtors might attempt to beat the law for their interests. They might perform several fraudulent actions such as departing from the state, concealing themselves or their properties beyond the reach of their creditors with the intent to delay or defraud their creditors.

The United States Congress was aware of this kind of acts by the bad faith debtors and their detrimental effects on the integrity of the American bankruptcy system, therefore since 1800, The United States Congress has provided criminal punishments for those who abuse the bankruptcy system (Lorber & Markell, 1994). These punishments were designed to "set basic rules [of behavior] for participation in the civil bankruptcy process" (*United States v. Ellis* 50 F.3d 419, 7th Cir. 1995). The current bankruptcy crime provisions are regulated under Title 18 United States Code §152 to §158. §152 "is a congressional effort to cover all viable attempts by which a debtor or any other person may seek to beat the goal and outcome of the bankruptcy system through various efforts to prevent assets from being equitably distributed among creditors" (*United States v. Goodstein*, 883 F.2d 1362, 7th Cir. 1989). Bluntly speaking, the primary objective of §152 is to set up legal basis which prevent and punish a debtor who tried to prevent the distribution of any part from the liable bankruptcy estate (*Stuhley v. Hyatt*, 667 F.2d 807, 1982).

§152 identifies nine types of bankruptcy offenses. These offenses can be classified into three general categories: "1. Concealment offenses, 2. False oaths, and 3. Offenses by creditors" (Ogier & Williams, 1998). The nine offenses are:

1. Debtor concealing or hiding estate properties from the bankruptcy officials.
2. Debtor providing a fake statement under oath in a bankruptcy case.
3. Debtor providing a fake declaration under punishment of perjury in a bankruptcy case.
4. Debtor brings forth or using fake proof of claim in order to fight for the rights of the bankruptcy estate.
5. Third-party who received properties from a debtor after filing a bankruptcy petition with the intent to defraud the system.
6. Any party who is giving, offering, receiving or attempting to obtain anything of value for acting or forbearing to act in a bankruptcy case.

7. Any party who is transferring or concealing property in contemplation of a bankruptcy case filed by or against the property owner.
8. Any party who is concealing, destroying, or making a fake entry in recorded information relating to debtor's financial affairs.
9. Any party whom after filing a bankruptcy case, withholding or concealing recorded information relating to the debtor's financial affairs from the bankruptcy officials" (United States Code Title 18 §152).

§152 was designed primarily to punish the debtors and third parties who performed any single actions stated before. The most common offences in §152 charged to the debtors are assets concealment, making false oaths in the creditors meeting, bankruptcy schedules and financial affairs, and making false entries in the documents related to the bankruptcy estate (Gaumer, 1998).

Furthermore, §153 and §154 regulate criminal offences conducted by officers of the bankruptcy estate or persons who participate in the administration of the bankruptcy estate. The bankruptcy estate officers should have performed their duty with good faith. According to §154, specific actions by the custodian, trustee, or other bankruptcy court officers can be considered a federal crime. The prohibited actions are as following:

1. Knowingly purchasing any property from the bankruptcy estate of which the person is the officer, whether directly or indirectly;
2. Knowingly restrict a party from having a reasonable opportunity to investigate every document and accounts associating with the affairs of the bankruptcy estate in the person's management;
3. Knowingly decline to provide the United States Trustee Program to have a reasonable opportunity to investigate the records.

If any court officers are found guilty of these offences, the officer can be fined and forfeited from the office.

§155 regulates inappropriate fee fixing arrangements between two parties in interest by not to challenge fees each is seeking from the bankruptcy estate. §156 regulates fraudulent violations of the Bankruptcy Code by a person who is preparing documents as a requirement for filing a bankruptcy petition which results in dismissal of the case. §157 regulates criminal sentences for those who specifically intended to bring forth fake documents or false representation in order to carry out a fraudulent scheme before bankruptcy proceedings begin. §158 regulates the duties within the United States Attorneys' Offices and Federal Bureau of Investigation ("FBI") to address breaches of §152-§157 (Morse, 2018).

There is a similarity regarding criminal offenses in §152-§157, which is the criminal intent requirement that a defendant abused the bankruptcy system by "knowingly" and "fraudulently" (*United States v. Ballard* 779 F.2d 287, 5th Cir. 1986). The phrase "knowingly" had been defined by the court as the defendant abused the system "voluntarily" and "intentional". On the other hand, the phrase "fraudulent" was simply defined by the court as the intention of the debtor to cheat or deceive the creditors. Further, it is no necessary

for the government to prove that a defendant's conduct was performed with the knowledge that it transgressed the law. (*United States v. Zehrbach* 47 F.3d 1252, 3rd Circ. 1995).

The judge, receiver, or trustee may file a report to United States Attorney if they suspected a bankruptcy fraud had occurred. This report must be made with reasonable grounds for believing that such a violation occurred (Title 18 United States Codes §3057(A)). If the before-mentioned report is received, then the United States Attorney is obligated to investigate the validity of the allegation and the facts surrounding it before presenting the investigation results to the judge. If the United States Attorney holds unquestionable doubt that a criminal offense exists, then the United States Attorney must bring forth the matter to the Grand Jury as soon as possible. On the other hand, if the United States Attorney decided there is no criminal offense detected during the investigation, the United States Attorney has to report the facts to the Attorney General. The Attorney General will guide the United States Attorney regarding the report (Title 18 United States Codes §3057(b)).

Under Title 18, most bankruptcy crimes are punishable by a maximum of five years in prison. The convicted must also pay a 250,000 United States Dollar fine while serving in prison (United States Code Title 18 §152; United States Code Title 18 §3571(b)(3)). If the defendant is an organization, then it could be fined up to 500,000 United States Dollar (United States Code Title 18 §3571(c) (3)). Another type of punishment is a period of supervised release or additional term of imprisonment for violation of a condition of a supervised release (United States Code Title 18 §3583). The convict may also be obliged to pay a special assessment to the victim's assistance fund. The special assessment fine is 100 United States Dollar if the defendant is an individual or 400 United States Dollar if the defendant is a person other than an individual (United States Code Title 18 §3013(a)(2)). Criminal restitution may also be ordered to the defendant if deemed appropriate (United States Code Title 18 §3663).

Since bankruptcy in the United States is governed by federal law, parties convicted of committing bankruptcy crimes are subject to the federal sentencing guidelines (Sano, 2000). The guidelines are planned to aid the court in deciding the proper punishment for a convict based upon the type and scope of the crime conducted (Publisher's Editorial Staff, 2018). The guidelines are not easy on bankruptcy fraudsters. Engaging in a bankruptcy crime or fraud can be an express ticket to the loss of freedom and financial ruin (Gaumer, 1998).

Another crucial feature of the United States Bankruptcy system is the United States Trustee Program. The United States Trustee Program is one of the departments under the United States Department of Justice. The United States Trustee Program holds an essential function, which is to preserve the integrity and efficiency of the US bankruptcy system in order to serve the interests of all stakeholders in the system (The United States Department of Justice, 2020). The United States Trustee Program also collaborates with

the FBI and United States Attorney to identify and investigate bankruptcy crimes and abuses (The United States Department of Justice, 2020).

The United States Trustee Program employs 4 (four) primary methods to identify whether a bankruptcy fraud or abuse has occurred or not, namely:

1. The information from the private trustees regarding the case review.
2. The information which the field officers present regarding the statements, schedules, and petition of a bankruptcy case.
3. The information from the debtor's insiders, including former spouses, former business partners, or any other party who might be offended by the fraudulent acts from during the bankruptcy proceedings.
4. The report from the audit which performed on the debtor (Clancy & Carroll, 2007).

The United States Trustee Program will appoint an independent firm if the audit of a bankruptcy case is considered necessary. The firm will investigate several matters, which involve the debtor's bankruptcy petition, the financial statement, and any additional documents from the debtor that associated with the bankruptcy proceeding (Clement, 2015). Once the audit is accomplished, the firm will register a report to the judge and presenting the report copy to the United States Trustee Program (Clancy & Carroll, 2007). The report has no legal power. The court has to determine whether the debtor has committed a bankruptcy fraud or not. If the court concludes a bankruptcy fraud has been committed by the debtor, then the United States Trustee Program has to determine what kind of action to the debtor that is deemed appropriate (Clement, 2015).

The actions that might be exercised by the United States Trustee Program depends on the ruling by the court: 1. The United States Trustee Program could file a motion which deny the discharge being granted to the debtor, 2. The United States Trustee Program could file a report of the bankruptcy fraud or abuse to the United States Attorney (Kampf & Quam, 1991; Singh & Maria, 2019). The debtor may correct a material misstatement in the petition by registering another schedule that has been amended. The debtor may also prove that he holds no dreadful intention to insert false information in the petition. If the debtor has corrected the material misstatement, then the United States Trustee Program may decide to allow the debtor to continue with the bankruptcy process (Clement, 2015). United States Trustee Program may also take action against attorneys who filed a bankruptcy petition for an improper purpose. A debtor often relies on the attorney to guide them through a complex and uncommon bankruptcy system; therefore, it is the obligation of the attorneys to guide them through the system without actually abusing it. If the attorneys knowingly and fraudulently guided the debtor to the improper purpose of a bankruptcy petition, then it is considered a crime, and the attorney may be prosecuted (Newman, 2018).

United States Trustee Program is committed to combating bankruptcy crime and fraud by establishing cooperation with more than 70 bankruptcy and mortgage fraud working groups and several specialized task forces spread all over the United States of America. The specialized task forces consist of representatives of the Federal Bureau of

Investigation, United States Postal Inspection, Internal Revenue Service Criminal Investigation, Office of Inspector General for Social Security Administration and the Department of Housing and Urban Development, United States Secret Service, Office of the Special Inspector General for the Troubled Asset Relief Program, and Immigration and Customs Enforcement (Morse, 2018).

Based on the preceding explanation, it could be inferred regarding the commitment from the United States Trustee Program to combat the bankruptcy crime. It is suitable for the Indonesian government to learn from the United States of America in establishing a governmental body that supervises the bankruptcy system in Indonesia. The governmental body will hold an important position to preserve the integrity of the Indonesian bankruptcy system.

Overview of Law on Bankruptcy Crime in Indonesia

In Indonesia, the statutory provisions regarding bankruptcy are legislated under Law No. 37/2004 on Bankruptcy and Suspension of the Payment (“Bankruptcy Law”). The current Indonesian bankruptcy law (Law No. 37 of 2004) was not enacted based on Indonesian legal policy and national interest; therefore, it is not relevant with the global development of business activities and bankruptcy law. There are two reasons to support the previous statement.

First, because of the legal policy of Dutch Colonialism in Indonesia. The root of current Indonesian bankruptcy law can be traced back to the *Het Wetboek van Koophandel* (The Commercial Code), which the Dutch enforced in Indonesia in 1848 (Sunarmi, 2016). The first written bankruptcy law in Indonesia was regulated in the Commercial Code. Because the fore-mentioned bankruptcy law was difficult to enact, the Dutch Colonial Government designed a new bankruptcy law to supersede the Commercial Code. The replacement law known as: “*Verordening op het Faillissements en de Surseance van Betalin voor de Europeanen in Nederlands Indie*” (Bankruptcy and Suspension of the Payment for the European in the East Indies) or “*Faillissements-Verordening*” (FV) (Nugroho, 2018).

By 1945, Indonesia declared its independence. Indonesia becomes an independent nation to determine its future, legislation, and public policies (Gandhi et al., 2016). Unfortunately, by that time, Indonesia had not legislated its national bankruptcy law. In order to prevent a legal vacuum, the Indonesian government relies on Article II of Transitional Rules in the Constitution of Republic Indonesia. Thus, the bankruptcy law applied in Indonesia after the independence declaration based on Article II of Transitional Rules in the Constitution of Republic Indonesia was the *Faillissements-Verordening* (Sunarmi, 2017).

The second reason is the foreign intervention in Indonesia's bankruptcy policy. Indonesia was one of the countries that the 1997 Asian Financial Crisis hit. The crisis led the entire of Indonesia's financial system to chaos (Conboy, 2015). The crisis also brought down the exchange value of the Indonesian Rupiah towards the United States Dollar to a

disturbing event (Tambunan, 1998). The condition was also worsened by the national banking crisis, which later transformed into a national economic crisis for Indonesia (Tambunan, 2010). On 5th November 1997, the Indonesian government had no additional option but to receive aid from the International Monetary Fund (IMF) for 23 billion United States dollars. The aid was assigned to restore the market's confidence and Rupiah's stability (Sharma, 1998).

Faced with a dire economic situation, the foreign creditors were seeking methods to settle their claims. The *Faillissements-Verordening* was considered ineffective. IMF demanded the Indonesian government to settle the foreign debts of the domestic entrepreneurs as a way to climb out of the depth of the crisis (Juwana, 2005). The IMF obliged the Indonesian government to reform the Indonesian bankruptcy law to 'modern law.' Steele stated that the phrase 'modern law' in the bankruptcy law context means that the Indonesian government has to form a bankruptcy law that is parallel and supports the market economy by accommodating the interests of foreign investors and entrepreneurs (Steele, 1999).

As cited by Timothy Lindsey, Mary Hiscock argued that the effort from IMF to 'modernize' the Indonesian law could be deemed a 'westernization effort' to the existing systems in Indonesia. This argument was based on the reality that legal reformation was a condition that Indonesia must satisfy to secure a loan from international organizations, such as the IMF. IMF is considered partaking in cultural imperialism, or even worse, neocolonialism in Indonesia. The utilization of bankruptcy law reformation as a loan condition in Indonesia as a part of 'legal modernity' can be scrutinized as an excellent illustration of how an international organization that dominated by the developed countries' interest can dictate the governmental policies of developing countries (Lindsey, 1998).

By 1998, the Indonesian government issued Government Regulation in Lieu of Law No. 1 of 1998 on Bankruptcy which was later amended as Law No. 4 of 1998. This law was intended to protect the interest of foreign creditors rather than saving the Indonesian economy from private sector debts (Juwana, 2005). By 2004, the Indonesian government amended Law No. 4 of 1998 to Law No. 37 of 2004 on Bankruptcy and Suspension of the Payment (Nugroho, 2018). The amendment was just another "old wine in the new bottle" because it was just a mere replication of the old law to the new law. There were no substantial bankruptcy law principles added to the amendment (Shubhan, 2012). This is also the reason why the Law No. 37 of 2004 does not regulate provisions regarding bankruptcy crimes. Sjahdeini explained that even though the provisions regarding bankruptcy crimes are not regulated in the Bankruptcy Law, it does not imply that parties who committed bankruptcy crimes will be left untouched by the law (Sjahdeini, 2016).

Instead, the statutory provisions on bankruptcy crimes are legislated in the "Kitab Undang-Undang Hukum Pidana" (Penal Code). The Penal Code is one of the legacies from Dutch colonialism in Indonesia back to the 18th century and still applicable to date based on Article II Transitional Provision in the Constitution of Indonesia (Hamzah, 2008). The

Penal Code contains a special chapter (Chapter XXVI) that governs on Acts that Injure Creditors or Other Parties that Hold Rights on the Debtors (bankruptcy crime). In this chapter, the provisions on bankruptcy crime are regulated in Article 396 – 405. Besides these provisions, there are other provisions which regulated acts that might have a connection with bankruptcy crimes such as forgery (Kitab Undang-Undang Hukum Pidana, Article 263, 264, 1946b), false statements (Kitab Undang-Undang Hukum Pidana, Article 266, 1946), and fraud by the debtors (Kitab Undang-Undang Hukum Pidana, Article 378, 379a, 1946).

The criminal acts which were regulated in Chapter XXVI could be classified as: 1. Debtor's acts that injure the creditors, which involves debtor being too exorbitant subsequent the decision from the court, the debtor made fraudulent debts, and understanding the debts will not protect the debtor from bankruptcy and debtor unable to present comprehensive financial records during a bankruptcy proceeding, 2. Fraudulent assets transfer by the debtor, 3. Acts of fraud by the bankrupt debtor to his creditors, 4. Fraudulent arrangements between the debtor and his creditors, 5. Debtor fraudulently diminishes the rights of the creditors, 6. The act of a company director which breaches the company's deed of enactment.

The fore mentioned acts are punishable by no more than 6 years imprisonment. Unfortunately, the amount of fine regulated in the Indonesian Penal Code regarding bankruptcy crimes are quite low compared to global economic development nowadays. Even though the Supreme Court had issued Supreme Court Regulation No. 2/2014 on Adjustment on the Limit of Minor Offences and the Amount of Fine in Penal Code, which rearranged the amount of fine in the Penal Code for 1000 times except for the crime regulated in Article 303, yet the amount of the fine for the bankruptcy crimes are not higher than 150.000.000 Indonesian Rupiah (which equals around 10.000 United States Dollar). These punishments are considered not too severe compared to the effect caused by a bankruptcy crime; thus, the bankruptcy fraudsters will not hesitate to abuse the bankruptcy law for their interests. Therefore, the modern regulation of bankruptcy crime is one of the most vital elements in a bankruptcy regime.

Lessons for Indonesia from United States of America regarding Law on Bankruptcy Crime

Based on the comparison in the previous section, it could be inferred that the Indonesian positive law has regulated provisions regarding bankruptcy crimes although not as comprehensive as the Title 18 United States Code. The legal provisions regarding bankruptcy crime in Indonesian law are regulated in the outdated Penal Code instead of the Bankruptcy Law No. 37 of 2004. Therefore, there are several flaws in the Indonesian law compared to the United States law regarding bankruptcy crimes, which could be described as followings:

First, Indonesian law does not regulate criminal offenses committed by officers of the bankruptcy estate or persons who partake in the management of the bankruptcy

estate. The decision by the bankruptcy court is not the last phase in the bankruptcy process, instead, it is the beginning of the process to identify and distribute the bankrupt debtor's assets to his creditors equitably. The officers who partake the administration of the bankruptcy estate (trustee and the supervising judge) are the parties that presumably to abuse the bankruptcy system besides the debtors (Lorber & Markell, 1994; Sjahdeini, 2016). The legal provisions that penalize the abusive actions by these bankruptcy officers are essential. There is no guarantee that the bankruptcy officers will not abuse their authority for the benefit of themselves. Besides, Indonesian law also does not regulate criminal sanctions toward parties that arrange a fraudulent bankruptcy petition scheme. The government of Indonesia should amend the Bankruptcy Law No. 37 of 2004 and integrate the provisions that govern criminal sanctions to the bankruptcy officers and parties that arrange a fraudulent bankruptcy petition to preserve public confidence and the integrity of the Indonesian bankruptcy system.

Second, absence of a governmental institution that supervises the bankruptcy system. Ideally, there should be a governmental institution that supervises the Indonesian bankruptcy system. Unfortunately, a governmental institution that supervises the bankruptcy system does not exist in Indonesia; instead, a governmental institution that serves as a public trustee in Indonesia does exist. The governmental body that serves as a public trustee in bankruptcy cases in Indonesia based on Article 15 of Law No. 37 of 2004 is known as the Property and Heritage Agency (*Balai Harta Peninggalan*). This public trustee does not possess an essential function in the bankruptcy system in Indonesia except being a public trustee. In other words, the Property and Heritage Agency does not serve an equal role with the United States Trustee Program in a bankruptcy system.

The Property and Heritage Agency is employed as an "alternative" trustee in bankruptcy proceedings since most of the trustees appointed in bankruptcy cases are private trustees. This condition is understandable because historically, the purpose of the Property and Heritage Agency establishment was to manage the properties left by the *Vereenigde Oostindische Compagnie* (Dutch East India Company) members to benefit their successors in the Netherland. (Direktorat Jenderal Peraturan Perundang-undangan Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, n.d.) After the Dutch Colonial Government published *Faillissements-Verordening*, the Property and Heritage Agency received another authority, which serves as a public and the only trustee in bankruptcy cases. By the time Government Regulation in Lieu of Law No. 1 of 1998 and Law No. 4 of 1998 was issued, the private trustees are approved by the government and more favorable by the parties in a bankruptcy case because they are considered to have better and more efficient performance than the Property and Heritage Agency (Nugroho, 2018).

The Indonesian government should elevate the function of the public trustee and grant it the authority as the United States Trustee Program possesses. Currently, no institution in Indonesia possesses similar authorities as United States Trustee Program has. The Property and Heritage Agency serves as an excellent candidate to be promoted as an institution with similar authorities as United States Trustee Program. Another option

for the government is to establish a new governmental institution that also shares similar authorities as United States Trustee Program. Since bankruptcy crime and its perpetrators often difficult to detect (Wickowski, 1999), it is recommended for the renewed Property and Heritage Agency or the newly-established institution to collaborate with the Indonesian Attorney Office (*Kejaksaan Republik Indonesia*), the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*), Indonesian State Intelligence Agency (*Badan Intelijen Negara*), Directorate General of Taxes (*Direktorat Jenderal Pajak*), Directorate General of Customs (*Direktorat Jenderal Bea Cukai*), Directorate General of Immigration (*Direktorat Jenderal Imigrasi*), Financial Services Authority (*Otoritas Jasa Keuangan*), the Financial Transaction Reports and Analysis Centre (*Pusat Pelaporan dan Analisis Transaksi Keuangan*) and private trustees in investigating a bankruptcy crime or fraud. Therefore, the Property and Heritage Agency or the newly-established institute will fulfill the role as a "watchdog" (Morse, 2018) of the Indonesian bankruptcy system.

Third, the lack of public information concerning the ongoing process of a bankruptcy proceeding. The publicity of the bankruptcy case information is crucial. In Indonesia, one might access the bankruptcy court or Supreme Court decision via Directory of Supreme Court Decision web to learn about a court's opinion in deciding a certain bankruptcy case. Unfortunately, the post court decision information cannot be obtained from the previously stated source. Article 74 of Law No 37/2004 has ordered the trustee, either it is a public or private one to present information regarding bankruptcy estate administration accessible to everyone and free of charge. However, in the practice it is difficult for someone to obtain the information regarding bankruptcy estate administration.

Consequently, it would be wise if the Indonesian government introduces an electronic system of bankruptcy records which accessible by public. The public bankruptcy records can be established comparable with Public Access to Electronic Court Records ("PACER"). PACER provides public access to an enormous amount of documents regarding court records stored at all federal courts in the United States of America electronically (Administrative Office of the U.S. Courts, 2020). Therefore, the public surveillance towards the officers who administer the bankruptcy estate can be improved. In the same time, it will also decrease the opportunity for the bankruptcy officers to commit bankruptcy crimes while administering the bankruptcy estate.

Fourth, the amount of fine for bankruptcy crimes regulated in Indonesian law is way too low. Most bankruptcy crimes will involve an element of cost-benefit analysis. The debtors or creditors who attempt to defraud the bankruptcy system for their benefits are likely to weight the gain they might accrue compared to the potential loss of freedom and fines they could have to pay if caught (Gaumer, 1998). The policy of fine was intended to decrease the financial load on the criminal justice system. It is also utilized as an extra source of income for the government to sponsor other government actions and policies (Quilter & Hogg, 2018). Besides, fines are also designed to charge the perpetrators to pay a sum of wealth as a form of punishment to rehabilitate justice and order in society (Budivaja & Bandrio, 2010).

The low amount of fine in Indonesian law regarding bankruptcy crimes is not parallel to the purpose of fines in the first place. The debtors, creditors or the bankruptcy officers won't hesitate to attempt to beat the bankruptcy system because the potential of accruing financial benefits is greater than the loss. This flaw in the law must be amended by the government of Indonesia. The government of Indonesia can learn from the United States Federal Sentencing Guidelines on setting up the proper amount of fine for certain type of bankruptcy crimes conducted in Indonesia. The revision of the law is expected to educate the parties involved in the bankruptcy process about the perils they may encounter if they perpetrate bankruptcy crime, fraud, or abuse (Gaumer, 1998).

Conclusion

Based on the description in the previous sections, it can be concluded that the bankruptcy courts hold potent tools that might alter the rights and obligations of the debtor and his creditors, including the stakeholders' interests. If the bankruptcy participants do not utilise this power, it might strike down the integrity of a bankruptcy system. Therefore, the integrity of a bankruptcy system heavily relies on the honesty of the participants. If the participants are acting dishonestly in the bankruptcy process, it will ruin the system's integrity. There will be severe punishments for the parties who exploited the system for their benefit. Unfortunately, the legal provisions regarding bankruptcy crimes in Indonesia are obsolete and not regulated as comprehensively as the United States of America. The current Indonesian bankruptcy law does not contain any provisions that regulate bankruptcy crimes. Instead, it is held in an outdated law, which is the Penal Code. The Indonesian government must amend the current bankruptcy law and attach several provisions regulating penalties for bankruptcy crimes. The amendment should also consider a proper amount of fine for the bankruptcy crime and fraud perpetrators since the amount of fine regulated in the current law is too low compared to the damage caused by the perpetrators. The reform of Indonesian law regarding bankruptcy crime must be one of the priorities for government policy. Hopefully, the government could preserve the public's confidence in the Indonesian bankruptcy system.

Suggestion

One of the suggestions which arise from this study is the Indonesian government should establish a new institution which holds the same function as the United States Trustee Program, or at least attempt to reform the Property and Heritage Agency since it possesses the statutory purpose as the public trustee for bankruptcy cases in Indonesia. Another suggestion is the improvement of the role of the Indonesian district attorney in investigating bankruptcy crime. It is also recommended to involve the Indonesian Attorney Office (*Kejaksaan Republik Indonesia*), the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*), Indonesian State Intelligence Agency (*Badan Intelijen Negara*), Directorate General of Taxes (*Direktorat Jenderal Pajak*), Directorate General of

Customs (*Direktorat Jenderal Bea Cukai*), Directorate General of Immigration (*Direktorat Jenderal Imigrasi*), Financial Services Authority (*Otoritas Jasa Keuangan*), the Financial Transaction Reports and Analysis Centre (*Pusat Pelaporan dan Analisis Transaksi Keuangan*) and private trustees in investigating a bankruptcy crime since it is a complex crime and the perpetrators might develop a range of intricate schemes for committing bankruptcy crimes. Hopefully, these suggestions could be starting topics for those who interested in conducting the future works regarding bankruptcy crimes.

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