



Justice in Article 21 of the Law on Dependent Rights and Article 56 Paragraph (1) of the Bankruptcy Law for Creditors and Debtors

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ABSTRACT

In the business world, the time of 90 (ninety) days, which is contained in the regulation of the Period of Stay in bankruptcy is not a short time. In practice, usually those who hold dependent rights urgently need to accelerate capital turnover. This acceleration of capital turnover will result in profits and losses that will be experienced by the parties concerned. The longer the credit that should be returned but not paid to the separatist creditor who holds the right of dependency, will also have an impact on the loss of the separatist creditor for the profits that he must receive. This research is prescriptive. So that it is understood for academics and legal practitioners that the Lex Specialis Derogat Lex Generali Principle, in overcoming the conflict of legal norms between the Bankruptcy Law and the Law on the Rights of Dependents (UUHT) regarding the Rights of Dependents, has a role to complement (aanvullend) not to deviate (uitzondering)

INTRODUCTION

The right to material security includes the rights of dependents, with the creditor possessing the right of dependency referred to as the separatist creditor. Separatist creditors prioritize the subordinate rights they possess. A key feature of the right of dependency is that the agreement specifies that, in the case of debtor default, the creditor may independently sell the subject of the right of dependency. The preference associated with the right of dependency illustrates the principle of guarantee law, particularly the principle of preference (*droit de préférence*).

The enforcement of the rights of creditors possessing the right of dependency, as stipulated by Article 20 paragraph (1) of the aforementioned Law on the Right of Dependency, does not imply the absence of challenges. The authority to sell independently necessitates judicial approval. Likewise, in the execution of the right of dependency derived from the executory authority of the certificate of dependency, encountering resistance (*verzet*) is not uncommon.

Resistance may manifest as *partij verzet*, a challenge initiated by the debtor against the enforcement of the right of dependency, or as *derden verzet*, a challenge submitted by a third party.

This resistance serves as an obstacle that ultimately affects the acceleration of repayment by creditors with a right of dependency. The enactment of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations affects the institution of dependent rights. Upon the declaration of bankruptcy for the debtor, all assets belonging to the debtor will be subjected to universal confiscation under the curator's power. At that point, creditors will be classified as secured creditors, preferential creditors, or unsecured creditors.

The enactment of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations affects the institution of dependent rights. Upon the declaration of bankruptcy for the debtor, all assets belonging to the debtor will be subject to universal confiscation under the curator's jurisdiction. At that juncture, creditors will be classified as separatist creditors, preferential creditors, or concurrent creditors. The effect of bankruptcy on the right of dependency is regulated by Article 56, paragraph (1) of the Law on Bankruptcy and Suspension of Debt Payment Obligations, which states that the enforcement rights of separatist creditors with a right of dependency over the debtor's assets are suspended for a maximum of 90 days (stay period).

The suspension of the execution of the right of dependency under Article 56 Paragraph (1) of the Bankruptcy Law, along with the suspension of debt payment obligations, will pose challenges for creditors holding the right of dependency, particularly concerning the exercise of their own authority (*parate execution*). In contrast, Article 21 of the Law on Dependent Rights specifically stipulates that if the debtor is declared bankrupt, the creditor holding the dependent rights may execute as if bankruptcy had not transpired, without any interruption. Article 21 of the Law on Dependent Rights states: "If the grantor of the right of dependency is declared bankrupt, the holder of the right of dependency retains the authority to exercise all rights conferred by this law."

Article 21 of the Law on Dependent Rights clearly states that the subject of dependent rights is exempt from bankruptcy assets. The Explanation of Article 56, paragraph (1) of the Bankruptcy Law and the Suspension of Debt Payment Obligations states that the suspension of the execution of the right of dependency seeks to improve the probability of reaching a settlement, maximizing bankruptcy assets, or ensuring the curator fulfills their responsibilities efficiently.

This provision indicates that the delay in execution is not exclusively advantageous to creditors. Article 56, paragraph (1) of the Bankruptcy and Suspension of Debt Payment Obligations Law states that assets encumbered with a right of dependency prior to bankruptcy are classified as bankruptcy assets upon the debtor's declaration of bankruptcy.

The entitlements of the right of dependency holder, as protected by Article 21 of the Law on the Right of Dependency, are no longer safeguarded following the debtor's bankruptcy declaration, pursuant to Article 56, paragraph (1) of the Bankruptcy and Suspension of Debt Payment Obligation, which enforces a 90-day suspension on the enforcement of the holder's rights. Legal scholarship indicates that the stipulations in the Bankruptcy Law and Suspension of Debt Payment Obligations regarding the rights of dependents, specifically as detailed in Article 56 paragraph (1) in conjunction with Article 21 of the Law on the Rights of Dependents, have engendered a conflict of legal norms. This arises from the conflict of legal standards present in the two articles of the law, rather than a conflict of legal rules or statutes.

In the business world, especially banking, 90 (ninety) days is not a short time. In practice, usually those who have or hold the right of dependency are banking institutions, which urgently need to accelerate capital turnover. This acceleration of capital turnover will result in profits and losses that will be experienced by banking institutions. The longer the credit that should be returned but not paid to the bank as a separatist creditor holder of the right of dependency, the greater the bank's losses for the profits it must receive.

Seeing the problems as described above, the principle of law is important for every law enforcement officer whether an event will be applied to the rules of "this" or "that". Meanwhile, the "this" or "that" is determined by which of the rules among the rules is general, while the other rules are special. Where we know this as the legal principle of *Lex Specialis Derogat Lex Generalis*.

This discussion aims to elucidate the function of the legal principle *Lex Specialis Derogat Legi Generalis* in resolving the normative conflict between the Bankruptcy Law, the Suspension of Debt Payment Obligations, and the Law on Dependent Rights (UUHT), in accordance with the principle of formulating appropriate Indonesian laws and regulations. By addressing the issue of whether Article 56 of the Law on Dependent Rights and Article 21 of the Bankruptcy Law deliver equitable outcomes for Creditors and Debtors.

LITERATURE REVIEW

John Rawl's Theory of Justice

Justice is a paramount objective of every legal system, alongside other legal aims such as legal certainty, utility, and order. John Rawls articulated the principle of justice as the equitable sharing of societal values, except where an unequal distribution yields advantages for all individuals. This implies that all individuals ought to gain from any social disparity.

John Rawls is famous for his ideas on substantive justice theory and divides the principles of justice into two, namely: a. The principle of equal freedom, that every individual has equal rights to basic freedoms whose system is the same as liberty for all b. The principle of difference regarding socio-economics is the principle of social and economic inequality which is arranged to provide the greatest benefit to the disadvantaged.

In the context of bankruptcy and dependent rights, John Rawls' theory of justice can be applied in an effort to maintain a balance between the rights of creditors and debtors. The principle of equal liberty recognizes the right of creditors to demand legitimate payment of debts, while the principle of difference emphasizes that inequality in the distribution of bankruptcy proceeds should benefit the most marginalized parties (in this case, debtors). Thus, although creditors who hold dependent rights have priority rights in bankruptcy, the process must still pay attention to the principle of fair justice and provide sufficient protection for debtors facing economic difficulties.

Philipus M. Hadjon's Legal Protection Theory

Legal protection, as articulated by Philipus M. Hadjon, is a subjective condition indicating the existence of multiple legal subjects entitled to promptly acquire various resources essential for their continued existence, which are assured and safeguarded by law, thereby facilitating their influence in political and economic decision-making processes, particularly concerning resource allocation within both individual and structural frameworks.

Philipus M. Hadjon succinctly highlighted "government action" (bestuurshandeling or administrative action), categorizing legal protection for individuals into two types: Preventive legal protection is a legal mechanism designed to avert disputes by enabling individuals to express objections or opinions prior to the finalization of governmental decisions. This is particularly significant for government actions grounded in discretionary authority, as it compels the government to exercise caution in its decision-making processes. b.

Repressive legal protection refers to the legal measures enacted in response to a violation of the law. This legal protection is enforced through punishments or statutes, including fines, imprisonment, confinement, and others. seeks to address issues comprehensively, encompassing the provision of legal protection for individuals by both the general court and administrative courts in Indonesia. Article 21 of the Law on Dependent Rights and Article 56, paragraph (1) of the Bankruptcy Law invoke Philipus M. Hadjon's theory of repressive legal protection, which establishes a legal framework safeguarding creditors' rights to prioritize claims in the distribution of bankruptcy assets. This framework also affords debtors protection against arbitrary actions and facilitates a more equitable debt resolution process, including debt restructuring or financial rehabilitation.

M.Isnaeni's Legal Protection Theory

M. Isnaeni contends that legal protection can fundamentally be analyzed through its sources, specifically "external" legal protection and "internal" legal protection. Internal legal protection is established through an agreement between the parties involved. The parties formulate their own provisions or content of the agreement, which can establish legal protection for those bound by it. The agreement was established to ensure that the interests of the parties are reconciled via mutual consent. Legal protection under the agreement will be achieved if the parties' positions are equitable and balanced. b. External legal protection refers to legal safeguards instituted by authorities through the formulation of legislation designed to serve the interests of disadvantaged parties. Regulations should be formulated in a reasonable and proportionate manner, avoiding bias or favoritism towards any particular party. Legal protection is externally instituted to avert injustice, the caprice of competing interests, and detriment to vulnerable persons. For example, when a debtor violates creditors' rights, creditors need legal protection as well. The packaging of laws and regulations provides legal protection to the parties proportionally.

According to Isnaeni's theory of external legal protection, the bankruptcy law against creditors who hold the right of dependency is regulated in such a way as to provide fair protection for the creditor, but also maintain justice for other parties, including debtors and other creditors. Creditors who hold a right of dependency benefit from priority rights over the debtor's bankruptcy estate, but they must follow the applicable legal procedures, which also protect the debtor from excessive adverse actions. In this context, the theory of external legal protection emphasizes the importance of fairness, transparency, and protection for all parties involved in the bankruptcy process.

METHODOLOGY

The study methodology employed is Normative Law study. Legal science is normative. This research employs a conceptual framework and a legislative analysis by scrutinizing all pertinent laws and regulations concerning the legal concerns addressed. The study's findings provide a rationale for resolving these issues by referencing the Bankruptcy Law and the Law on Dependent Rights. The source of legal materials comprises primary legal materials and secondary legal materials.

RESULTS AND DISCUSSION

a. Justice in Article 21 of the Law on Dependent Rights and Article 56 Paragraph (1) of the Bankruptcy Law

The regulations pertaining to the execution rights of creditors holding the Right of Dependency are specified in two legal statutes that regulate the conduct of separatist creditors post-bankruptcy declaration: Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations (Bankruptcy Law) and Law Number 4 of 1996 on Dependent Rights (Law on Dependent Rights). Article 55, paragraph 1 of the Bankruptcy Law delineates the acknowledgment of separatist rights for creditors possessing dependent rights. It stipulates that any

creditor with Dependent Rights, Pawns, Fiduciary Guarantees, Mortgages, or Collateral Rights on other assets may exercise their rights as if bankruptcy had not transpired, while adhering to the stipulations of Articles 56, 57, and 58 of the Bankruptcy Law. The clause conflicts with Article 56, paragraph 1 of the Bankruptcy Law, which suspends the creditor's authority to enforce land rights burdened by Dependent Rights for a maximum of 90 days from the date of the bankruptcy declaration decision.

Article 56, paragraph 1 of the Bankruptcy Law clarifies that the purpose of this suspension is to increase the probability of reaching a settlement, to maximize bankruptcy assets, or to assist curators in doing their duties efficiently. During the suspension period, all litigation intended to recover a receivable is prohibited from judicial proceedings, and the third-party creditor is restricted from executing or pursuing the confiscation of the collateralized asset.

Article 56, paragraph 1 of the Bankruptcy Law effectively negates the preferential rights of creditors possessing the Right of Liability as acknowledged in Article 55, paragraph 1, by stipulating that those encumbered with the Right of Dependents constitute bankruptcy assets. Legal provisions establishing the occurrence of a standstill or automatic stay, which maintains the status quo for debtors and creditors, are typically enacted not post-declaration of bankruptcy by the court, but rather during the bankruptcy examination, specifically from the moment the application for bankruptcy declaration is filed with the court, or during negotiations between the debtor and creditors regarding debt restructuring. Upon the declaration of bankruptcy, the sole action taken is the liquidation of the debtor's assets.

Throughout the duration of the stay, the curator may utilize the bankruptcy assets, whether movable or immovable, or sell the movable assets under their supervision, in the context of maintaining the debtor's business continuity, provided that adequate safeguards are in place to protect the interests of creditors or third parties (Article 56, paragraph 3 of the Bankruptcy Law). The Bankruptcy Law does not distinguish between things encumbered by Dependent Rights and those that are not considered bankruptcy assets. The institution of the Right of Dependency becomes devoid of significance, obscuring its philosophical foundation and intended function.

Article 21 of the Law on the Rights of Dependents states that if the grantor of the Right of Dependency is declared bankrupt, the holder of the Right of Dependency retains the capacity to exercise all rights granted under the provisions of the Law on the Right of Dependency. The rights of the Right of Dependency holder are safeguarded notwithstanding the grantor's insolvency. The protection is clarified in the Explanation of Article 21 of the Law on the Right of Dependency, which states that the provisions of Article 21 strengthen the holder's position by nullifying the impact of bankruptcy on the subject of the Right of Dependency. Article 21 of the Law on Dependent Rights establishes the preferential position of the holder of Dependent Rights concerning the subject of those rights in comparison to other creditors. Thus, the Right of Dependency will not be integrated with the bankruptcy estate designated for other creditors of the Right of Dependency.

This Article states that the separatist rights of creditors with the Right of Dependency are not impacted by the bankruptcy declaration. The provisions of Article 55, paragraph 1 of the Bankruptcy Law correspond with Article 21 of the Law on Dependent Rights and the specific rights of the holder of dependent rights as outlined in the Criminal Code. As previously stated, one rationale for the suspension of the holder's Right of Dependency to comprehend a law frequently necessitates the examination of further articles within that law or other statutes and regulations.

Reading the Bankruptcy Law as a whole, starting from the considerations to its explanation, the author finds that there is not a single provision that alludes to the relationship between bankruptcy provisions and the regulations listed in the Law on Dependent Rights, especially Article 21. So it seems that when drafting the law, the makers of the Bankruptcy Law forget or do not pay attention to other related legislation that should be carried out comprehensively.

The requirement that the execution rights of the creditor holding the Right of Dependency be suspended for 90 days, as outlined in Article 56, paragraph 1 of the Bankruptcy Law, poses a potential detriment to the creditor holding the Right of Dependency, particularly if they possess the status of a preferred creditor (principle of *droit de préférence*).

The opportunity for loss that may occur is the creditor of the holder of the Right of Dependency for the loss that may occur is that the creditor of the Right of Dependency gets a prospective buyer who is willing to buy the object that is the collateral at a high price, but the creditor of the right of dependency cannot exercise his right of execution because of the suspension period and the opportunity may not necessarily be obtained when the suspension period ends.

If the object used as collateral is in the form of land, then the suspension period can reduce its value or selling price because there is a possibility that the land during the suspension period experiences natural disasters such as floods or landslides can reduce the value of land in the area, poor road access, lack of public facilities, or an unmaintained environment that results in a decrease in the value or selling price.

This situation may be unfair to the Creditor, both in terms of time and face value. A decrease in the price of collateral can have an impact on the interests of creditors, creditors also cannot immediately receive repayment. Furthermore, due to the grace period, the execution *parate* provided by the Law on the Rights of Dependents as stipulated in Article 6 becomes useless. The objective of ensuring convenience and certainty for creditors possessing the Right of Dependency to execute this right has not been fulfilled. The bankruptcy decision enables the provision of justice for the debtor, as it results in the debtor (bankrupt) forfeiting the power to manage and control their assets. The oversight and administration of the property is delegated to the curator/Heritage Center.

b. Clash of Norms in Article 56 of the Bankruptcy Law and Article 21 of the Law on the Rights of Dependents (Lex Specialis Derogat Lex Generalis)

It is necessary to compare the provisions of the Bankruptcy Law and the Suspension of Debt Payment Obligations concerning the rights of separatist creditors as holders of dependent rights in relation to the objects of those rights, where the rights of creditors with dependent rights are protected by Law Number 4 of 1996 regarding Dependent Rights on Land and Land-Related Objects (Law on Dependent Rights). The rights of creditors with dependence rights are specified in Article 20, paragraph 1 of the Law on the Rights of dependence, and are reaffirmed in Article 21, which categorizes these creditors as separatist creditors.

The researcher references Setiawan's claim that Law Number 37 of 2004, concerning Bankruptcy and Postponement of Debt Payment Obligations (Bankruptcy Law), encompasses both formal legal dimensions (procedural law) and a public legal nature, in addition to substantive legal stipulations. Thus, a bankruptcy defined as such serves as a special provision (*lex specialis*), as the Bankruptcy and Suspension of Debt Payment Obligations Law is inapplicable unless the debtor is declared bankrupt; in these instances, the Law on Dependent Rights continues to apply. Consequently, the researcher asserts that the principle of *lex specialis derogat lex generalis* is applicable, with Bankruptcy Law serving as the *lex specialis*.

Based on the legal principles established in the Bankruptcy Law, particularly Article 56 paragraph 1, Article 59 paragraph 2, and Article 60, in relation to Article 20 paragraph 1 and Article 21 of the Law on Dependent Rights, a conflict of legal norms has arisen. This arises from the conflict of legal standards present in the two articles of the law, rather than a conflict of legal rules or statutes.

According to legal science, legal norms are aspects of the rule of law, in terms of legal norms contained in the Law on the Rights of Dependents and the Bankruptcy Law. These two laws are basically still in effect, but if there is bankruptcy against the debtor, it will cause a conflict of legal norms regarding the rights of creditors who hold the right of dependency to the object of the right of dependency they hold. In this case, the legal norms (regarding the rights of creditors who hold the right of dependency) in the two laws are in conflict with each other.

Because legal norms are not hierarchical, that is, legal norms are found in all hierarchies of legal rules, but legal norms recognize general legal norms and special legal norms. The aforementioned rules regarding the right of dependency in the Law on the Rights of Dependency are general legal norms, but the legal norms pertaining to the rights of dependents in the Bankruptcy Law are specific norms. According to the researcher, the contradictory legal norms in the two statutes necessitate a refinement of the provisions regarding the right of dependency in both the Law on the Rights of Dependency and the Bankruptcy Law. This refinement is essential to ensure that general and special legal norms operate in harmony, ultimately granting the Law on the Rights of Dependency normative or formal enforcement.

CONCLUSION AND RECOMMENDATION

A contradiction exists between the Law on Dependent Rights and the Bankruptcy Law concerning the execution rights of creditors possessing Dependent Rights following the bankruptcy ruling. Article 21 of the Bankruptcy Law affirms the creditor's entitlement to enforce the guarantee, although Article 56 of the Bankruptcy Law imposes a 90-day suspension on this right. This suspension seeks to establish peace, enhance bankruptcy assets, or provide curators with additional time. This is negative to creditors, since they may forfeit the chance to sell collateral at a premium or see a decline in collateral value owing to natural disasters or environmental issues. The Debtor may not be adversely affected, as the issuance of the bankruptcy judgment results in the debtor (bankrupt) forfeiting the right to manage and control their assets to satisfy the Creditor's claims. The oversight and administration of the property is delegated to the curator/Heritage Center. Furthermore, this suspension makes the execution *parate* in the Law on the Rights of Dependents useless.

It is necessary for academics and legal practitioners to understand that the *Lex Specialis Derogat Lex Generali* Principle, in overcoming the conflict of legal norms between the Bankruptcy Law and the Suspension of Debt Payment Obligations and the Law on Dependent Rights (UUHT) regarding Dependent Rights has a role. As well as the need to improve the Bankruptcy Law and the Suspension of Debt Payment Obligations related to the regulation of the execution of the right of dependency so that there is harmony of the legal norms in the Law on Dependent Rights with the Bankruptcy Law and the Suspension of Debt Payment Obligations, so that the role of separatist creditors as holders of dependent rights has legal certainty and is protected based on the Law on Dependent Rights.

FUTHER STUDY

This research is still delayed, so further research is needed related to the topic of Justice in Article 21 of the Law on Dependent Rights and Article 56 Paragraph (1) of the Bankruptcy Law for Creditors and Debtors in order to improve this research and add insight for readers.

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