

# CHAPTER I

## INTRODUCTION

### 1.1. Background

In every country, it is an important matter for that country to ensure the welfare of every citizen. The state has the responsibility to create people's welfare through development. The state's duties are, first, the state is obliged to provide a sense of security from all kinds in any form for all its citizens. This welfare is the right for every citizen to get justice in social life. In Indonesia, this obligation of a country is also being implemented, and has also been regulated in Article 27 jo. 28 of the 1945 constitution of the Republic of Indonesia. In the Article 27 (2) of the 1945 Constitution of The Republic of Indonesia, it is stated that:

“every citizen has the right to work and a living that is decent for humanity.”

and in the Article of 28 (a) of the 1945 Constitution, it is stated that:

“every citizen has the right to work and a living that is decent for humanity.”

The verses shows that it is necessary for the state to make every effort to make its citizen live in a good and prosper condition by owning

their right to make every effort for them to keep up with the environment and to not live in deprivation.

The welfare of life for the citizen that has the most influence on one's living is from the sector of their economy. However, the economic prosperity is not something that is freely given by the state and received by people, but it is something that must be earned through effort by individuals. The state is only obliged to provide facilities to its people in order to make sure that every citizen receive justice in order to earn the economic prosperity. The prosperity in economical factor of its citizen could give interpretation of the economic condition of a state.

The economic stability of a state is determined by the economic growth within the state. The influential factor on the economic growth within a state could be determined by the macroeconomic stability within a state. According to Ministry of National Development Planning of the Republic of Indonesia / National Development Planning Agency, macroeconomic stability is a fundamental factor to ensure sustainable economic growth. Efforts to maintain macroeconomic stability were carried out through measures to strengthen the resilience of the domestic economy against various shocks that emerged, both from within and from abroad.<sup>1</sup> However, the macroeconomic stability also influenced by microeconomic condition that is going on within the state, which the ones

---

<sup>1</sup> [https://www.bappenas.go.id/files/7613/5022/6074/bab-24\\_\\_20090202204616\\_\\_1756\\_\\_25.pdf](https://www.bappenas.go.id/files/7613/5022/6074/bab-24__20090202204616__1756__25.pdf)

who take over the role in operating the microeconomic in the state is the citizen.

In microeconomic factors, it does not rare to deal with the terms of businessmen. They are the ones whose right are being used to operate a business in order to achieve and earn prosperity for their own life in the term of economic prosperity. In the business world, the transactions could be done through borrow and lending whether with banks, partnerships, and so on. The definition of borrow and lending is also regulated under the Article 1754 of Indonesian Civil Code:

“A loan for consumption is an agreement, in which one party provides another with a specific amount of consumable items, subject to the condition that the latter mentioned is return similar types of items of the same amount and quality. (Bw. 505, 1392, 1740, 1763; Civ . 1892)”.

However, this kind of transactions can cause loss to one the creditors when the debtor unable to pay the debt to the creditor. This phenomenon could make the debtor to be considered as bankrupt, and is regulated under Law No. 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

Bankruptcy is general confiscation of debtor assets both at the time of the bankruptcy statement and obtained during the bankruptcy took place for the benefit of all creditors who at the time the creditor was declared bankrupt had debts carried out under the supervision of the authorities.<sup>2</sup> As stated in Law No. 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (PKPU), Article 1 point 1 stated that,

---

<sup>2</sup> Rahayu Hartini. 2017. *Hukum Kepailitan (Edisi Revisi)*. Malang: UMM Press. p. 5.

bankruptcy is a general confiscation of the assets of bankrupt debtors, which is managed and administered by a curator under the supervision of a supervisory judge. Inability to pay debtors is generally caused by difficulties in the company's financial condition / financial distress.

The meaning of Bankruptcy in Indonesia is pailit. Based on the Indonesian Dictionary the meanings of pailit are the condition or condition of a person or legal entity that is no longer able to pay its obligations (in terms of debts) to the debtor.

The purpose of declaring bankruptcy is to protect both the bankrupt debtor and the creditor. Protection for the debtors is the event of a bankruptcy verdict, so that illegal executions can be avoided or even stopped. While the protection for creditors that are diverse and will lead to a chaotic situation, then the existence of a bankruptcy decision, can avoid and stop the wrapping of assets both overtaking each other or competing forces.<sup>3</sup>

In bankruptcy law, a debtor can be declared bankrupt if the debtor is unable to pay or is called insolvency, whether caused by a financial crisis or an economic crisis experienced by the debtor to repay all of his debts. The meaning of insolvency in English is inability to pay debts. Furthermore, according to Fridmen, Jack P in Munir Fuady, insolvency means “the disability to fulfill financial obligations when it is due, in accordance with business, or the excess of liabilities compared to assets in

---

<sup>3</sup> Hadi Subhan.2009.*Hukum Kepailitan: Prinsip Noema & Praktik di Peradilan Kencana*. Jakarta, p.. 168-169.

a certain time.<sup>4</sup> Other meanings of insolvency, according to Faillissementsverodening, insolvency is defined as a condition of “stop paying”. However, there is no significant considerations from the judge for a debtor to be declared bankrupt on how many times the debtor has not been able to pay the debt, whether once or twice. On the other hands, according to Tirtaatmidjaja, he argued that a debtor who refuse and does not pay their debt only one time is not yet qualified to be declared in a state of stop paying.<sup>5</sup> In Indonesian law, the definition of insolvency is stated in Art 57 (1) of Bankruptcy Law which means the disability of the debtor to pay its debt, or where the debt is bigger than the asset owned by the debtor. This means, when the debtor has fulfilled the two elements to be declared bankrupt, which is having more than one creditor and at least one of the debt is not paid back, they still have less asset owned than the debt they have. One important stage in the bankruptcy process is the insolvency stage because at this stage the fate of the bankrupt debtor is determined. If the debtor has been declared insolvency, then the debtor has truly been declared bankrupt.

In the statutory regulation, the meaning of insolvency can be found in the Elucidation of Article 57 paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, what is meant by insolvency is the condition of not being able to pay. However, in Law Number 37 of 2004 concerning Bankruptcy and

---

<sup>4</sup> Hervana Wahyu, Sunarmi, Rahmad Hendra, *Insolvensi Dalam Hukum Kepailitan di Indonesia*. Fiat Justisia Jurnal Ilmu Hukum Volume 8 No. 2, April-Juni 2014. p. 332

<sup>5</sup> *Ibid.*

Delaying Obligations for Debt Payment, the insolvency is not included as a requirement that the debtor can be declared bankrupt. The conditions for bankruptcy shall be regulated in Article 2 paragraph (1) of Law Number 37 of 2004 which states.

"Debtors who have two or more creditors and do not pay off at least one debt which is due and is billable, are declared bankrupt by a Court Decision, both at their own request and at the request of one or more of their creditors.

Based on the elements above, it can be seen that the requirements for bankrupt debtors are very clear and vivid in the provisions of bankruptcy in Indonesia. This is reiterated in Article 8 Paragraph (4) of Law Number 37 Year 2004 which states that:

"Requests for bankruptcy statements must be granted if there are facts or conditions which are simply proven that the requirements for bankruptcy as referred to in Article 2 Paragraph (1) of Law Number 37 Year 2004 have been fulfilled."

Which means, if the debtor has been proven to have at least one debt that is due to one of its creditors, the debtor has fulfilled the requirements for a bankruptcy decision by the commercial court regardless of the background of the debt or condition of the debtor's assets that are still solvent or not.<sup>6</sup>

There are two cumulative requirements for bankruptcy, namely the debtor has a debt that is past due that can be collected that has not been paid in full and has two or more creditors.<sup>7</sup> The law does not provide

---

<sup>6</sup> Lili Naili Hidayah. "Indikator Insolvensi Sebagai Syarat Kepailitan Menurut Hukum Kepailitan Indonesia". Law Journal. Vol. 7. No. 1. Maret. 2016.

<sup>7</sup> Hadi Shubhan. 2008. *Hukum Kepailitan Prinsip, Norma dan Praktek di Pengadilan*. Jakarta: Kencana. p. 82.

conditions other than these two things, including not requiring a certain minimum amount of debt or requiring an insolvent situation in which the debtor's assets (assets) are much smaller than the debts owned (liabilities). Usually in other countries' bankruptcy law, it is measured by an instrument called bankruptcy inclusion called the insolvency test,<sup>8</sup> the component is to determine whether the debtor's financial situation is in a state of being unable to pay its debts, or in other words the debtor has been in an insolvent state, it must be determined objectively and independently based on financial audits conducted by an independent public accounting firm<sup>9</sup> through the company's financial statements. But this is clearly very difficult to implement in Indonesia because only companies listed on the exchange can be accessed by financial statements or public companies (open).

Not implementing Insolvency Test in Indonesia has caused many companies in Indonesia experience bankruptcy, especially to the LLCs (Limited Liability Company). Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (PKPU) only regulates Insolvency, but does not further regulate Insolvency Test in determining bankruptcy in Limited Liability Companies (LLC). As regulated in Law No. 37 Year 2004 concerning Bankruptcy, debtors can be declared bankrupt if they fulfilled the two elements which stated in Article 2 of Bankruptcy Law, regardless of the financial health of the

---

<sup>8</sup> *Ibid.* p. 83

<sup>9</sup> Sutan Remy Sjahdeini. *Op. Cit.* Hal.39

debtor, whether the debtor is actually still able to pay his debts or not. Thus, it could raise several effects in the concept of insolvency in Indonesia.

These effects are unbalance protection toward the debtor, creditor, and stakeholders and the emergence of barriers to investment in Indonesia. As the indicator to attract foreign investor to invest in a country, the invested country must have the three major indicators which are economic opportunity, political stability, and legal certainty. However, with the uncertain laws regarding the insolvency in the concept of bankruptcy, it shows that the legal certainty in Indonesia is not well implemented and could cause negative effects to the economic opportunity and the political stability, as of the foreign investors do not have much interest to invest in Indonesia. Whereas, FDI is one of the tools to build a country's economic stability, especially for developing countries such as Indonesia.<sup>10</sup>

In the common law countries, the insolvency test has been implemented within its law in order to protect the interest of both creditors and debtors. With the declare of bankruptcy of a Limited Liability Company (LLC), the property of the Limited Liability Company will be in a public confiscation and the Limited Liability Company will lose its right to manage its assets.

As in the United States, the country has experienced a very rapid development of bankruptcy law even though the form of the legal system

---

<sup>10</sup> Diana Surjanto. *Urgensi Pengaturan Syarat Insolvensi Dalam Undang-Undang Kepailitan dan penundaan Kewajiban Pembayaran Utang*. Acta Comitatus Vol. 03 No. 2. 2 October 2018. p. 263 – 264.



is common law. The Common Law State is often become a reference in making laws, without exception the Law on Bankruptcy or what is called as the Bankruptcy Reform Act Of 1978 or the Bankruptcy Code. In the Act, it regulates about Insolvency Test. Where in the United States, the regulation of Insolvency Test is important to determine whether a company is considered as legal entity or a debtor is considered to be solvent or insolvent. In the Act, the Uniform Fraudulent Transfer Act (UFTA), manages to provide a solution regarding the existence of an insolvency test that can be applied in terms of proving a debtor who has been insolvent to be requested and decided on bankruptcy.

The insolvency concept regarding bankruptcy is written under the UNCITRAL Model Law on Cross-Border Insolvency which was adopted on May 30<sup>th</sup>, 1997. The USA enacted the Model Law by the Bankruptcy Abuse Prevention and Consumer Protection Act. This enactment then replaces the section 304 of Bankruptcy Code with Chapter 15 of that Code.<sup>11</sup> However, there are numbers of theories needed to set out a standards on how the international insolvency laws could be applicable as principle, which are universalism, modified universalism, territorialism, cooperative territorialism, and universal proceduralism.<sup>12</sup>

However, until now the practice of bankruptcy in the Bankruptcy Law in Indonesia still causes many problems and juridical debate, because the conditions for bankruptcy judgments assessed by some academics are

---

<sup>11</sup> Hannan, Neil. 2017. *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law*. Singapore. Springer

<sup>12</sup> *ibid*

too simple, which only requires the proof of having two creditors and the existence of debts that are due, these conditions are too easy to consider the debtor to be bankrupt and so it is feared that it could be misused for purposes that deviate from the purpose of bankruptcy law.

Based on the aforementioned background, I am interested in conducting further research in a thesis scientific paper entitled "**Juridical Analysis of Comparison Arrangement of Bankruptcy to Companies in Positive Law in Indonesia and the United States**".

## **1.2. Formulation of Issue**

Based on the background above, the formulation of the problem in this proposed legal research are:

1. How are the regulations for the bankruptcy of companies under positive law in Indonesia?
2. What are the different agreements for bankruptcy of companies in the positive law of Indonesia and the United States in regards with Insolvency Test?

## **1.3. Purpose of Research**

Based on the background and problem formulation above, it can be explained that the research objectives are as follows:

1. To identify and analyze the bankruptcy regulations against companies in positive laws in Indonesia

2. To find out and analyse the differences in the bankruptcy regulations against companies the positive law of Indonesia and the United States.

#### **1.4. Benefit of Research**

The benefits expected from this studies are as follows:

##### **1.4.1. Theoretical Benefits**

The theoretical benefit is the benefit of this legal research that is related to the development of legal science. The theoretical benefits of this research are as follows:

1. The result of this research is expected to be beneficial for the development of the legal science in general and in Civil Law in particular, which related with the normative legal research particularly in the field of comparative bankruptcy regulations against companies under positive law in Indonesia and the United States
2. The results of this research are also expected to enrich references and literature in the world of literature on Civil Law so that it can be used as a reference for similar studies for the next stage.

##### **1.4.2. Practical Benefits**

The practical benefit is the benefit of this legal research that is related with problem solving. The practical benefit of this research are as follows:

1. Becoming a tool for researchers to develop reasoning and to form mindsets, as well as to find out the ability of researchers in applying the knowledge that has been obtained.
2. The result of this research is expected to be able to help providing input to the formulation of statutory policies in the formulation of civil law reformation in Indonesia.

## **1.5. Framework of Writing**

### **CHAPTER I: BACKGROUND**

In Chapter I, the author describes how the explanation an introduction in the issues raised by the author, which is the explanation about the reason of the author conducted research related to the comparative juridical analysis of the regulation of bankruptcy against companies under positive law in Indonesia and the United States. In this chapter, the author also attaches two formulations of issue, purpose of research, benefit of research that consists of theoretical benefit and practical benefit. The author also includes a writing framework that outlines the substantial content in CHAPTER I, II, III, IV and V.

### **CHAPTER II: LITERATURE REVIEW**

In Chapter II the author describes the general review about bankruptcy, which includes the description of the meaning of stop paying, the purpose and consequences of bankruptcy, and the

requirements of filing for bankruptcy and its legal basis. There is also a description of an overview of insolvency, which includes an explanation of the meaning of insolvency and also of the insolvency test afterwards.

### **CHAPTER III: RESEARCH MEHTOD**

In Chapter III, the author describes on the types of the legal research, types of data, data collection methods, types of approaches and methods of data analysis.

### **CHAPTER IV: RESEARCH RESULT AND ANALYSIS**

In CHAPTER IV, the author describes the explanation of the discussion which contains the analysis of two problem formulations, namely the analysis to identify and analyze the bankruptcy regulations against companies in positive law in Indonesia. As well as the analysis of the differences in the bankruptcy regulations against companies in the positive law of Indonesia and the United States.

### **CHAPTER V: CONCLUSION AND SUGGESTION**

In CHAPTER V the author closes the thesis research by writing the conclusions from the thesis discussion and includes suggestions that can be recommended to several relevant stakeholders.