




Problems of Justice in Legal Protection Efforts against Banks as Separatist Creditors related to Execution of Collateral Tied with Mortgage Rights on Bankrupt Debtor's Assets

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Abstract

Introduction: The rights of banks as separatist creditors in the UU-KPKPU cannot be implemented. Banks also often get a share that is not under the amount of debtor debt, causing injustice.

Purposes of the Research: This study aims to analyze and explain the forms of justice problems in legal protection efforts against banks as separatist creditors related to the execution of collateral tied with mortgage rights on the assets of bankrupt debtors and their solutions.

Methods of the Research: This research uses normative legal research. Research materials were used, namely secondary data and primary data as a support. This research material was collected by document study and interviews. The material that has been collected is then processed and analyzed using a qualitative approach, which is then drawn to conclusions using the deductive method.

Results of the Research: There are two forms of the problem of justice in the legal protection of banks as separatist creditors related to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor. First, the neglect of bank rights as separatist creditors by UU-KPKPU can be seen in the provisions of Article 56 paragraph (1) and 59 paragraph (1) which contradicts Article 55 paragraph (1). Second, banks as separatist creditors often get a share that is not under the amount of debt of the bankrupt debtor. The author suggests that the UU-KPKPU be changed based on distributive justice which requires proportional distribution.

1. INTRODUCTION

Banks are one of the institutions that provide credit to the public as stated in Article 1 number 2 of the Law of the Republic of Indonesia Number 7 of 1992 concerning Banking as amended by Law of the Republic of Indonesia Number 10 of 1998 (abbreviated as Law-Banking). The bank in this case is called the creditor, while those who borrow money/capital from banks are called debtors (borrowers of money/capital). Banks in disbursing credit always adhere to the 5C principles, namely capability, collateral, capital, character, and condition of economics. The provision of credit by the bank will always be accompanied by the provision of guarantees so that the bank will ask for the provision of

guarantees and prioritize guarantees in the form of fixed assets in the form of land and buildings.¹

Collateral required by creditors (including banks), can be material or individual.² At a practical level, credit guarantees used are generally special guarantees, namely material guarantees in the form of land³ because economically the land has favorable prospects⁴ and the value of the land will not decrease.⁵ Material guarantees (*zakelijke zekerhed*/ security right in rem) are used to guarantee the fulfillment of the obligations of the debtor concerned in the event of a breach of contract (default).⁶

The guarantee rights imposed on land rights are called mortgage rights as stated in Article 1 point 1 of the Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land (abbreviated as UU- Mortgage). The mortgage right can include other objects that are an integral part of the land. The position of creditors who hold collateral rights to land (mortgage rights) takes precedence over other creditors.

Following the general explanation of the UU-Mortgage, the meaning of the position of the creditor holding the mortgage guarantee is that the creditor can sell his/her mortgage object (in the form of land) through a public auction with prior rights when the debtor defaults. This priority position certainly does not affect the repayment of debtors' debts to other creditors. The law regarding modern credit guaranteed by mortgage stipulates certain agreements and debt-receivable relationships between creditors and debtors, which include the creditor's right to sell auctions of certain assets that are specifically designated as collateral (object of the mortgage) and take repayment of their receivables from the proceeds of the sale if the debtor defaults.⁷

Seen from the classification of creditors, banks as holders of mortgage rights in providing credit are referred to as separatist creditors who can act alone. This group is not affected by the bankruptcy declaration decision, meaning that their execution rights can still be implemented as if there was no debtor bankruptcy.⁸ The creditor as the holder of the mortgage has the right in advance of other creditors (*droit de preference*) to take repayment of the sale. Then the mortgage also continues to burden the object of the mortgage in the

¹ Ari Murti Susanto, Erwin Malonda, Imron Rosadi, Muhammad Rizki, "Perlindungan Hukum Bagi Bank Atas Upaya PKPU (Penundaan Kewajiban Pembayaran Utang) Dari Pihak Ke 3 (Tiga)," *Justitia Jurnal Hukum* 3, no. 1 (2019).

² Sofwan in Akira Widyanti, "Pelaksanaan Lelang Eksekusi Oleh Kreditor Terhadap Jaminan Sebagai Sarana Pelunasan Hutang Debitur Berdasarkan Pasal 6 Ayat (1) Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan," *Rechtsregel Jurnal Ilmu Hukum* 3, no. 1 (2020).

³ Suyatno Anton, *Kepastian Hukum Dalam Penyelesaian Kredit Macet Melalui Eksekusi Jaminan Hak Tanggungan Tanpa Proses Gugatan Pengadilan* (Jakarta: Fajar Interpretama Mandiri, 2016).

⁴ Irma Devita Purnamasari in Emil Cahyo Prasajo dan Gransham Anand, "Akibat Hukum Kreditor Pemegang Hak Tanggungan Terhadap Obyek Hak Tanggungan Yang Dinyatakan Gugur Demi Hukum Berdasarkan Putusan Pengadilan," *Jurnal Selat* 5, no. 2 (2013).

⁵ St. Nurjanah, "Eksistensi Hak Tanggungan Sebagai Lembaga Jaminan Hak Atas Tanah (Tinjauan Filosofis)," *Jurisprudentie* 5, no. 1 (2018).

⁶ Herowati Poesoko in Emil Cahyo Prasajo dan Gransham Anand, "Akibat Hukum Kreditor Pemegang Hak Tanggungan Terhadap Obyek Hak Tanggungan Yang Dinyatakan Gugur Demi Hukum Berdasarkan Putusan Pengadilan."

⁷ Boedi Harsono in St. Nurjanah, "Eksistensi Hak Tanggungan Sebagai Lembaga Jaminan Hak Atas Tanah (Tinjauan Filosofis)."

⁸ Poesoko in Udin Silalahi dan Claudi, "Kedudukan Kreditor Separatis Atas Hak Jaminan Dalam Proses Kepailitan," *Masalah-Masalah Hukum* 49, no. 1 (2020): p 35-47.

hands of whoever the object is, this means that the creditor holding the mortgage still has the right to sell the auction of the object, even though the rights have been transferred to another party (*droit de suite*).⁹

The creditor's right to sell the mortgage object himself has been stipulated in Article 6 of the UU- Mortgage which reads "If the debtor is in default, the first mortgage holder has the right to sell the mortgage object on his own power through a public auction and take repayment of his receivables from the proceeds of the sale. the." Such provisions were then reaffirmed in Article 20 paragraph (1) of the UU- Mortgage. According to Jono,¹⁰ the implementation of the rights of mortgage holders as mandated by Article 20 paragraph (1) of the UU- Mortgage is not as easy as expected. The right to sell with its power (*beding van eigen machtige verkoop*) still requires approval (*fiat executie*) from the court. Likewise, in the implementation of the execution of mortgage rights based on the executorial power of the mortgage certificate, it is not uncommon to face resistance (*verzet*).

The right of the separatist creditor to sell the mortgage object himself also applies when the mortgage provider (the debtor) is declared bankrupt. Such provisions have been confirmed in Article 21 of the UU- Mortgage which reads, "If the mortgage provider is declared bankrupt, the mortgage holder remains authorized to exercise all the rights he has obtained according to the provisions of this Law". According to his explanation, this provision further strengthens the priority position of the mortgage holder by excluding the effect of the bankruptcy of the mortgagee on the object of the mortgage.

Separatist creditors as a group whose rights take precedence to mean that their position is prioritized over other creditors. The position of these separatist creditors in the UU-KPKPU is confirmed in Article 55 paragraph (1) which reads, "With regard to the provisions as referred to in Article 56, Article 57, and Article 58, every creditor holds a pledge, fiduciary guarantee, mortgage, mortgage, or collateral rights over other objects, can exercise their rights as if there was no bankruptcy." This provision is similar to Article 21 of the UU-Mortgage which states that the mortgage holder is still authorized to exercise all rights obtained from the law if the mortgage provider is declared bankrupt. One of the rights possessed by the mortgage holder in the UU-Mortgage is to be able to execute the mortgage object himself when the debtor defaults. If this provision is related to the provisions of Article 21 of the UU-Mortgage, the mortgage holder can execute his rights as if there was no bankruptcy¹¹.

Even though the UU-KPKPU has recognized the rights of separatist creditors, in practice it is still difficult for separatist creditors to exercise their rights in the event of bankruptcy. In addition, there are still many stipulations or decisions in which the bank (the separatist creditor) does not get its rights or does not get the full proceeds from the sale of the bankruptcy estate auction for the debtor that has been pledged to him, even though the auction proceeds are below the amount of the separatist creditor's claim. This happens because the rights of the separatist creditors still have to be shared with other creditors

⁹ Boedi Harsono in St. Nurjanah, "Eksistensi Hak Tanggungan Sebagai Lembaga Jaminan Hak Atas Tanah (Tinjauan Filosofis)."

¹⁰ Titie Syahnaz Natalia, "Akibat Hukum Kepailitan Terhadap Kreditor Pemegang Hak Tanggungan Dalam Eksekusi Hak Tanggungan," *Jurnal Manajemen Dan Bisnis Sriwijaya* 16, no. 3 (2018).

¹¹ Compare to Udin Silalahi dan Claudi, "Kedudukan Kreditor Separatis Atas Hak Jaminan Dalam Proses Kepailitan."

whose position is not as a separatist creditor.¹² An example can be seen from the cassation filed for the bankruptcy case decision at the Central Jakarta Commercial Court between PT Bank Mandiri (the creditor) and PT. Rockit Aldeway and Harry Suganda (the bankrupt debtor). The results of the examination of this case were then stated in decision number 762 K/Pdt.Sus-Pailit/2017. Bank Mandiri's total bills reached Rp 1.02 trillion, but only received a payment of Rp 56.39 billion.

This situation can lead to injustice for banks as separatist creditors in the event of bankruptcy. Even though the UU-KPKPU has adopted the principle of balance by mentioning "the principle of fairness". In the general explanation of the law, among other things, it was stated "The main points of improving the Law on Bankruptcy include important aspects that are considered necessary to realize the settlement of debt and receivable problems quickly, fairly, openly and effectively."¹³ The goal is to give each person what he or she deserves. Justice does not mean that everyone gets the same rights¹⁴.

From the situation above, the writer is interested in studying the problems of justice in legal protection efforts against banks as separatist creditors related to the execution of collateral that is tied with mortgage rights on the assets of the bankrupt debtor. As for the problems in this paper, namely: 1) What are the forms of justice problems in legal protection efforts against banks as separatist creditors related to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor?; 2) What is the solution to the problem of justice in legal protection for banks as separatist creditors related to the execution of collateral tied with mortgage rights?

2. METHOD

This study uses a type of normative legal research, namely legal research conducted by examining library materials or secondary data as the basic material for research by searching a search on regulations and literature related to the problems studied.¹⁵ The use of this type of research is based on the reason that this research is based on library materials in the form of legislation and literature that discusses legal protection for banks as separatist creditors in the execution of collateral tied with mortgage rights on the assets of the debtor who is declared bankrupt. This research is also conducted in the field of empirically to find out the execution of collateral tied with mortgage rights by the bank as a separatist creditor on the assets of the bankrupt debtor. The research approach used includes a legal approach, a conceptual approach, a case approach, and a futuristic approach. The types of research materials used are secondary and primary data as support. Secondary data is sourced from primary, secondary, and tertiary legal materials. The research materials were collected using document studies and interviews. The research materials that have been collected are then processed and analyzed using a qualitative approach. After being analyzed, conclusions are drawn using the deductive method, namely by concluding general discussions into specific

¹² Hukumonline.com, "Hakim Perintahkan Kreditor Separatis Berbagi Hak Dengan Buruh," n.d., <http://www.hukumonline.com/baca/lt4bal1d3b8804/hakim-perintahkan-kreditor-separatis-berbagi-hak-dengan-buruh>.

¹³ Sutan Remy Sjahdeni, *Hukum Kepailitan : Memahami Faillissements Verordening Jo. Undang- Undang Nomor 4 Tahun 1998* (Jakarta: Pustaka Grafiti, 2002).

¹⁴ L.J. Van Apeldoorn, *Pengantar Ilmu Hukum* (Jakarta: Pradnya Paramitha, 2001).

¹⁵ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2011).

conclusions, so that they can achieve the desired goal, namely answering the problem formulation.¹⁶

3. RESULTS AND DISCUSSION

3.1 The Forms of Justice Problems in Legal Protection Efforts against Banks as Separatist Creditors related to Execution of Collateral Tied with Mortgage Rights on Bankrupt Debtor's Assets

a. The Neglect of Bank's Rights as Separatist Creditors related to Execution of Collateral Tied with Mortgage Rights on Bankrupt Debtor's Assets

Article 55 paragraph (1) of the UU-KPKPU has emphasized that separatist creditors (including banks) can execute their rights as if there was no bankruptcy. In practice, this provision cannot be implemented because two provisions in the UU-KPKPU prevent separatist creditors from exercising their rights. **First**, Article 56 paragraph (1) of the UU-KPKPU determines the period of suspension (stay period) for executions by separatist creditors, which is a maximum of 90 (ninety) days from the date of the pronouncement of the bankruptcy declaration decision. In the elucidation of Article 56 paragraph (1) of the UU-KPKPU, it is emphasized that during the period of detention, all legal claims to obtain a settlement of a receivable are not submitted in court proceedings, and neither the creditor nor the third party concerned is prohibited from executing or requesting confiscation of the object be collateral.

With the provisions of Article 56 paragraph (1) of the UU-KPKPU, it is clear that separatist creditors cannot directly execute themselves on collateral tied with mortgage rights on the assets of the bankrupt debtor. In this case, the rights of the separatist creditors are blocked or restricted because their execution rights are suspended for 90 (ninety) days. This suspension provision is considered inconsistent and contrary to the provisions of Article 55 paragraph (1) UU-KPKPU¹⁷. Inconsistent provisions can reflect legal certainty and ultimately do not provide justice, especially for separatist creditors.

Second, Article 59 paragraph (1) of the UU-KPKPU determines the time for the implementation of the rights of separatist creditors as referred to in Article 55 paragraph (1) after the start of the insolvency situation, no later than 2 (two) months. This time is considered too fast because, in practice, separatist creditors (banks) sometimes need a longer time to sell their collateral tied with mortgage rights on the assets of the bankrupt debtor. Such provisions can also be seen as ignoring the rights of separatist creditors which have been guaranteed by Article 55 paragraph (1) of the UU-KPKPU and are felt to be unfair, especially for banks as separatist creditors.

Thus, it can be stated that the provisions of Article 56 paragraph (1) and Article 59 paragraph (1) of the UU-KPKPU limit the rights of separatist creditors (including banks) to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor. Such restrictions are a form of neglect of the rights of banks as separatist creditors and are deemed unfair, especially in relation to distributive justice, namely that everyone gets what is their right (proportionately). The UU-KPKPU is said to be fair if everyone gets what is

¹⁶ Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: RajaGrafindo Persada, 2003).

¹⁷ See Sularto in Udin Silalahi dan Claudi, "Kedudukan Kreditor Separatis Atas Hak Jaminan Dalam Proses Kepailitan."

their right proportionally. With the enactment of Article 56 paragraph (1) and Article 59 paragraph (1) and (2) of the UU-KPKPU, the distribution of rights to obtain debt repayment is not proportional among creditors. Separatist creditors should be prioritized and separated from other creditors in the event of bankruptcy or when the debtor is declared unable to pay his debts (insolvency).

When humans agree on the existence of justice, then like it or not justice must color human behavior and life with God, with fellow individuals, with society, with government, with nature, and with other God's creatures. Justice must be realized in all lines of life, and every human product must contain the values of justice because unfair behavior and products will give birth to imbalances, and inconsistencies that result in damage, both to humans themselves and the universe. Justice must be realized to be able to interpret the rule of law, eliminate legal impartiality, and remain in the entity of justice.¹⁸

According to Theo Huijbers, the law has a very close relationship with justice. Some even state that law must be combined with justice for it to be truly meaningful as law. This statement has to do with the response that law is part of human efforts to create ethical co-existence in the world. People can live in peace toward physical and spiritual well-being only through a just order of law.¹⁹ A positive legal system which means it must be based on justice. Although the meaning or meaning of justice varies from one system to another, a legal system cannot survive if it is not perceived as fair by the people governed by the law (legal subjects). In other words, injustice will disturb the order which is the goal of the legal order itself. Disrupted order means disorder and therefore legal certainty is no longer guaranteed. So a legal order cannot be separated from justice. Viewing the law or legal system formally is not a realistic way of looking at the law and only gives satisfaction to the logical thinking process.²⁰

Satjipto Rahardjo stated that the idea of justice is never separated from the law because discussing the law always talks about justice, both clearly and vaguely.²¹ It can be stated that law and justice are like two sides of a coin that cannot be separated from each other.²² Justice is an absolute demand for social institutions so justice is the main priority for social institutions. A social institution must be reformed or abolished if it is unfair, even though it is efficient and highly organized.²³ Taking one's freedom for the greater good of the person is not justified in the name of justice. The sacrifice of a few outweighs the gain for the greater number of others is also not justified. Injustice is only allowed to happen to avoid greater injustice.²⁴

Thus, law and justice always have a close relationship. The law must contain justice, and justice must be contained in the law to create a just law. The UU-KPKPU which

¹⁸ Yasonna H. Laoly, "Kesadaran Hukum Dan Terwujudnya Keadilan Bagi Seluruh Rakyat Indonesia, Meteri Kuliah Umum Menkumham," n.d., https://www.unuja.ac.id/unduh/10/Materi_Kuliah_Umum_Menkumham.pdf.

¹⁹ Ramiyanto, "Reformulasi Aturan Tentang Pengajuan Permintaan Peninjauan Kembali Dalam Perakra Pidana Sebagai Upaya Mewujudkan Suatu Aturan Yang Berbasis Pada Nilai Keadilan Pancasila" (Universitas Diponegoro, Semarang, 2020).

²⁰ Mochtar Kusumaatmadja dan Bernard Arief Sidharta in Ramiyanto.

²¹ See Ramiyanto.

²² Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum* (Bandung: Nuansa Media, 2015).

²³ John Raws, *Teori Keadilan (Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara)*, Diterjemahkan Oleh Uzair Fauzan dan Heru Prasetyo (Yogyakarta: Pustaka Pelajar, 2011).

²⁴ See Yoachim Agus Tridianto, *Keadilan Restoratif* (Yogyakarta: Cahaya Atma Pustaka, 2019).

regulates bankruptcy is one of Indonesia's positive laws which is seen as not providing justice because it has not provided protection to separatist creditors (including banks). Therefore, the legal norms contained in the UU-KPKPU need to be based on justice because law and justice are interconnected.

The UU-KPKPU which is used as the legal basis for resolving bankruptcy disputes in Indonesia today is based on the principle of justice. In bankruptcy, the principle of justice implies that the bankruptcy provisions can fulfill a sense of justice for stakeholders. This principle of justice prevents the occurrence of arbitrary actions of a creditor who asks for repayment of his bill from the debtor by ignoring other creditors.²⁵

Bankruptcy is a further implementation of the provisions of Article 1131 and Article 1132 of the Civil Code. Bankruptcy is used as an alternative to settle debtors' obligations (debts) to creditors to be more effective, efficient, and proportional. This provision provides certainty to creditors that all existing and new debtor assets will exist in the future (Article 1131 of the Civil Code) as joint guarantees for all creditors in a balanced or proportional manner, except for creditors who have the right to pre-order (Article 1132 Civil Code).

Thus, Articles 1131 and 1132 of the Civil Code are general provisions, while the provisions on bankruptcy (UU-KPKPU) regulate in a more specific scope the mechanism for settlement of debt or debt payments that fair and proportional to all creditors. Therefore, justice is fundamental in the settlement of bankruptcy cases in the Commercial Court.²⁶ Justice is one of the most important legal goals, in addition to certainty, usefulness, and legal order. There are four values as an important foundation for a good human life, namely justice, truth, law, and morals. But justice is the highest virtue, as Plato stated that "Justice is the highest virtue which harmonizes all other virtues".²⁷ Therefore, justice is also an important thing in bankruptcy because it is part of human life.

b. The Distribution of Proceeds from the Sale of Bankrupt Assets is Not Proportional

The purpose of the principle of justice in the UU-KPKPU is to avoid disputes over debtor assets by several creditors in collecting their debts in ways that are dishonest or arbitrary without paying attention to other creditors. In the event of bankruptcy, it is expected that the debtor's assets can be used to pay debts to creditors fairly and equitably.²⁸ The word "fair and equitable" here should be adjusted to the position of each creditor in bankruptcy. So, the UU-KPKPU has actually been based on the principle of justice so that the formulation of norms in the law should also reflect justice.

In the literature, there is no unified opinion about justice so many opinions give meaning to the concept of justice. Everyone has their measure of justice so justice can be said to be something abstract and difficult to interpret. A question of justice is often heard, but the correct understanding is complex and even abstract, especially when it is associated with very complex interests.²⁹ According to K. Bertens, three characteristics always mark justice:

²⁵ Hartini in Isis Ikhwanasyah dan Lambok Marisi Jakobus Sidabutar, "The Implementation of Insolvency Tes on Debt' Bankruptcy in Performing the Principle of Justice," *Media Hukum* 26, no. 2 (2019).

²⁶ Isis Ikhwanasyah dan Lambok Marisi Jakobus Sidabutar.

²⁷ Amarini in Isis Ikhwanasyah dan Lambok Marisi Jakobus Sidabutar.

²⁸ Isis Ikhwanasyah dan Lambok Marisi Jakobus Sidabutar.

²⁹ Burhanuddin Salam in Dwi Tatak Subagyo, *Hukum Jaminan Dalam Perspektif Undang-Undang Jaminan Fidusia (Suatu Pengantar)* (Surabaya: UWKS Press, 2018).

justice is directed at others, justice must be served and justice demands equality.³⁰ Rawls argues that we must understand justice as fairness, namely justice based on reasonable procedures.³¹ Because justice has been put forward by many experts and there is no unified opinion, the author in this discussion refers to the concept of justice put forward by Aristotle who emphasizes his theory of justice in balance or proportion, namely equality of rights must be the same among the same people.³²

Aristoteles justice in this discussion is distributive justice which refers to the distribution of goods and services according to their position.³³ Distributive justice is justice that demands that everyone gets what is their due, so it is proportional. Here what is considered fair is if everyone gets what is their right proportionally. Distributive justice is concerned with the determination of rights and the fair distribution of rights in the relationship between the community and the state, in the sense of what the state should give to its citizens. The rights granted can be in the form of undivided goods, namely mutual benefits such as protection, public facilities, both administrative and physical, and various other rights, that citizens can enjoy without disturbing the rights of others in the enjoyment process.³⁴

The distribution of proceeds from the sale of bankrupt assets has not been proportional, as can be seen in several examples of cases such as that experienced by Bank Mandiri. Based on the results of an interview with Amir Machfud (AVP Legal Advis and Litigation PCR of Bank Mandiri, there are several examples of cases regarding the disproportionate distribution of proceeds from the sale of bankrupt assets experienced by Bank Mandiri, namely:

- 1) The bankruptcy case of PT. Rokit Aldeway and Harry Suganda (the bankrupt debtor). In this case, the total bill of Bank Mandiri is Rp. 1.02 Trillion at PT. Rokit Aldeway and Harry Suganda, but after being declared bankrupt they only received a payment of Rp. 53.69 Billion.
- 2) Bankruptcy Cases of PT Gabriel Muda and Herry Gabriel. In this case, Bank Mandiri only received a payment of Rp. 2.4 billion after the bankruptcy of the total bill of Rp. 8.3 Billion.
- 3) The bankruptcy case of Johan Konggudinata (private company). After being declared bankrupt, Bank Mandiri only received a payment of Rp. 2.06 billion of the total bill of Rp. 9.06 Billion.
- 4) The bankruptcy case of PT. Hannya Inter Niaga Supply (the bankrupt debtor). In this case, the total bill of Bank Mandiri to PT. Hannya Inter Niaga Supply of Rp. 53.5 billion, but only paid Rp. 4.7 billion after the declaration of bankruptcy.

From the four examples above, it is clear that in practice there are still banks as separatist creditors whose debt payments do not match the amount after the debtor is declared bankrupt. This is because the proceeds from the sale of the assets of the bankrupt debtor are also distributed to other creditors (including those who are not separatist

³⁰ Sylvia Janisriwati, *Kepailitan Bank: Aspek Hukum Kewenangan Bank Indonesia Dalam Kepailitan Suatu Bank* (Bandung: LoGoZ Publishing, 2011).

³¹ Sylvia Janisriwati.

³² J.H. Rapar in Bahder Johan Nasution, "Kajian Filosofis Tentang Konsep Keadilan Dari Pemikiran Klasik Sampai Pemikiran Modern," *Yustisia* 3, no. 2 (2014).

³³ Inge Dwisnar, "Keadilan Dalam Perspektif Filsafat Ilmu," *Jurnal Dinamika Hukum* 11, no. 3 (2018).

³⁴ Bahder Johan Nasution, "Kajian Filosofis Tentang Konsep Keadilan Dari Pemikiran Klasik Sampai Pemikiran Modern."

creditors). In addition, it is also because the curator in dividing the proceeds from the sale of bankrupt assets (*boedel*) also imposes other costs other than those determined by laws and regulations, sometimes even the costs are not of reasonable value. This fact shows that in practice, banks receive disproportionate payment of debts from the sale of the assets of the bankrupt debtor. Following distributive justice which requires a balanced distribution (proportional), then the bank should receive a distribution that is by the number of debt receivables.

Thus, the rules contained in the UU-KPKPU can be said to have ignored the ratio of guarantee rights³⁵ and have not reflected the value of justice. This is certainly not in line with the purpose of bankruptcy itself as stated in the UU-KPKPU. Under the explanation of the law, the main objective is to settle debt and receivable cases fairly, quickly, openly, and effectively. In addition, bankruptcy also aims to avoid confiscation and individual execution of the assets of debtors who are unable to pay off their debts. Individual executions carried out simultaneously have the potential to cause conflict in the form of struggles between creditors.³⁶ Another purpose of bankruptcy is to prevent creditors holding material security rights from claiming their rights by selling the debtor's goods without paying attention to the interests of the debtor and other creditors. Bankruptcy also aims to avoid fraud committed by creditors or debtors.

The UU-KPKPU which limits the rights of banks as separatist creditors can be said to have not provided legal protection related to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor. In other words, banks as separatist creditors have not received legal protection related to the execution of collateral that is tied with mortgage rights on the assets of the bankrupt debtor. Protection through the UU-KPKPU is legal protection for the interests of the parties involved in the bankruptcy process. The UU-KPKPU has not protection separatist creditors in obtaining their rights. Banks as separatist creditors also need to get protection in fulfill the right to obtain debt repayment by the amount of the bill.

Legal protection includes preventive protection to prevent violations and repressive protection to settle bankruptcy cases related to the execution of collateral that is tied with liability rights. Such protection is realized by regulating matters relating to the management and settlement of bankrupt assets, including by separatist creditors. If the two types of legal protection are related to the UU-KPKPU, what is not maximized is repressive legal protection, namely legal protection after a bankruptcy declaration decision is made. This can be seen from several facts regarding the provisions of Article 56 paragraph (1) and Article 59 paragraph (1) of the UU-KPKPU as well as several examples of cases showing that banks as separatist creditors do not receive payments by the number of their debts from the sale of bankrupt assets.

3.2 Solutions to Justice Problems in Legal Protection Efforts against Banks as Separatist Creditors related to Execution of Collateral Tied with Mortgage Rights on Bankrupt Debtor's Assets.

Seeing several forms of justice problems related to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor by the bank as a separatist creditor on

³⁵ Compare to Sutan Remy Sjahdeni, *Hukum Kepailitan : Memahami Faillissements Verordening Jo. Undang-Undang Nomor 4 Tahun 1998*.

³⁶ Luthvi Febryka Nola, "Upaya Perlindungan Hukum Secara Terpadu Bagi Tenaga Kerja Indonesia (TKI)," *Negara Hukum* 7, no. 1 (2016).

the previous page, the regulators in the UU-KPKPU need to base on the theory of distributive justice proposed by Aristoteles. Following this theory of justice, the UU-KPKPU must give rights to every creditor involved in the bankruptcy process proportionally. Every creditor as a holder of collateral rights who is involved in the bankruptcy process must receive a distribution of collateral according to his position. In this context, the separatist creditor, by his priority and priority position, needs to be given the right to sell his collateral even though there is bankruptcy. Restrictions on the rights of banks as separatist creditors must be removed in the UU-KPKPU.

In addition to Aristoteles justice, the UU-KPKPU (Indonesian bankruptcy law) which is based on the principle of justice is also very relevant to the notion of justice taught by John Rawls. Aristoteles in his concept states that justice is a virtue related to the relationship between humans. Fair can mean according to law and what is proportionate and proper. A creditor is said to be acting unfairly if he takes more than the proper share. Meanwhile, the concept of justice taught by John Rawls who developed the concept of justice of fairness can be realized by distributing freedom and opportunity to all parties involved in debtor bankruptcy cases fairly and equally.³⁷

The principle of balance for both debtors and creditors is a realization of the principle of justice wherein the principle of balance requires justice in the sense that everyone has the same position in law (equality before the law) so that they are entitled to the same rights. This is reinforced by the legal fact that the UU-KPKPU adopts the principle of balance by mentioning the principle of "fairness" in the General Elucidation. The definition of "fair" as explained in the General Elucidation of the UU-KPKPU is that both the interests of creditors and debtors must be considered in a balanced manner³⁸. Based on the opinion John Rawls stated that a fair way to unite various interests is through the balance of interests itself, without any preferential treatment of interest to create justice for each party³⁹.

Thus, it can be understood that justice is one of the principles underlying the UU-KPKPU, but the formulation of legal norms contained in the law does not yet reflect justice, especially regarding the rights of separatist creditors concerning their rights in paying off debts from bankrupt debtors. Following the principle of justice, the provisions in the UU-KPKPU should not limit the rights of separatist creditors (including banks) so that they are prioritized and separated from other creditors in the event of bankruptcy or when the debtor is declared unable to pay his debts (insolvency). In this case, the provisions of Article 56 paragraph (1) and Article 59 paragraph (2) of the UU-KPKPU need to be amended immediately based on justice. In addition, in practice, it is necessary to deviate based on justice so that separatist creditors (including banks) are truly protected in exercising their rights, namely the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor.

4. CONCLUSION

Based on the description of the discussion above, it can be concluded that the bank as a separatist creditor related to the execution of collateral tied with mortgage rights on the assets of the bankrupt debtor, although it has been guaranteed by the UU-KPKPU, is not

³⁷ See Nurdin in Serlika Aprita dan Rio Aditya, "Penerapan 'Asas Keadilan' Dalam Hukum Kepailitan Sebagai Perwujudan Perlindungan Hukum Bagi Debitor," *Jurnal Hukum Media Bhakti* 3, no. 1 (2019): 46-56.

³⁸ Sjahdeni in Serlika Aprita dan Rio Aditya.

³⁹ Kusumaatmadja in Serlika Aprita dan Rio Aditya.

easy to implement. This is because the UU-KPKPU has limited the rights of separatist creditors (including banks) by determining the stay period for executions and the execution period is too short, whereas in practice it sometimes takes longer. In addition, banks as separatist creditors in reality also often receive payments that are not by the amount of debt of the bankrupt debtor. This situation shows that there is a problem of justice in the legal protection of banks as separatist creditors related to the execution of collateral that is tied with mortgage rights on the assets of the bankrupt debtor. The author suggests that the UU-KPKPU needs to be amended immediately based on distributive justice. In addition, in the practice of bankruptcy, law enforcement officers also need to ignore the provisions contained in the UU-KPKPU for the sake of realizing justice, especially distributive justice which requires the distribution of the rights of each party in a proportional (balanced) manner.

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