

The Urgency to Renew Bankruptcy Law Requirements and Summary Proof in Indonesia

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ABSTRACT

The provisions pertaining to bankruptcy and summary proof in Law Number 37 of 2004 present various drawbacks in their application, particularly impacting debtors. Debtors can be declared bankrupt with relative ease, and the requirement for declaring bankruptcy does not directly indicate the debtor's insolvency. This can present difficulties for other creditors, as the leniency in bankruptcy requirements for debtors is viewed as means to accelerate debt resolution, even though not all face the same circumstances. This research will focus on the issues regarding the urgency of revising Law Number 37 of 2004, specifically with regard to the conditions for bankruptcy and summary proof. The method used in this research is the doctrinal legal research method, which entails scrutinizing literary sources, legal theories or principles, research journals, and legislative regulations to analyze the subject of the research. Furthermore, a comparative approach is adopted to evaluate the development of Indonesian law by examining the bankruptcy legal frameworks in France and the Netherlands. The study concludes that the pressing need for amendments to the conditions for bankruptcy and summary proof in Law Number 37 of 2004 necessitates a responsive legal system. This can be achieved through a comprehensive review of problematic regulations. Therefore, the incorporation of additional measures, such as an insolvency test and a proactive approach by judges, establishes a regulatory mechanism that can be viewed as a responsive outcome in the future.

Keywords	Urgency; Bankruptcy Law Requirements; Summary Proof; Indonesia
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PRELIMINARY

Bankruptcy is a legal procedure where a debtor's assets are seized to repay their debts to creditors (Perdana, 2021). According to Levinthal, as cited by Sutan Remy Sjahdeini, bankruptcy has three primary objectives; ensuring a fair distribution of proceeds from the sale of the debtor's assets, prevent insolvent debtors from causing harm to their creditor's interests, and provide protection to well-intentioned debtors from actions by their creditors that could be detrimental (Sjahdeini, 2016). Inability to meet debt obligations is often a result of financial distress due to business setbacks (Shubhan, 2019a). Financial distress encompasses situations ranging from short-term liquidity issues to insolvency.

Law Number 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations describes the criteria for declaring bankruptcy does not directly imply that the debtor is insolvent. This represents a distinctive perspective on comprehending insolvency in Indonesia, whereas in other countries, insolvency can lead to bankruptcy due to the inability to repay debts (Amboro, 2023). In France, the French bankruptcy code includes a series of procedures designed to address financial failures within corporations (The French Commercial Code in English, 2006), where the bankruptcy process hinges on the debtor's capability to fulfill its financial responsibilities. Article 2 of Law Number 37 of 2004 mentions if the criteria for bankruptcy are met, the debtor can swiftly declare insolvent. This discrepancy presents a practical challenge, as the term 'failure to pay,' emphasized in both Law Number 37 of 2004 and Law Number 4 of 1998, does not distinguish between the debtor's inability or unwillingness to settle debts that are due and payable to their creditors (R. Simanjuntak, 2011).

The bankruptcy requirements appear to contradict with the fundamental principles of bankruptcy law, as the substance of Law Number 37 of 2004 seems to be adversely affect the ongoing operations of the indebted party's business (Amboro, 2023). Essentially, bankruptcy serves a commercial solution for a debtor ensnared in debt-related issues and no longer capable of repaying their debts to creditors (Shubhan, 2019a). The ease of bankruptcy requirements for debtors to declare bankruptcy are viewed as a means to expedite debt resolution, but this leads to injustice, especially for debtors who still have potential. This is inconsistent with the universal principle of Law Number 37 of 2004, which aims to provide a resolution for both parties when a debtor is incapable of repaying their debts (Surjanto, 2018).

In the explanation of Article 8, paragraph (4) of Law Number 37 of 2004, it is stated that the requirement to bankrupt a debtor is based on the fact that the debt has matured and is 'unpaid'. The concept of 'unpaid' debt does not refer the essence of bankruptcy related to the debtor's inability to pay. The absence of a requirement for the debtor's capability when declared bankrupt by the Commercial Court poses legal issues. This article primarily ensures legal certainty while overlooking other aspects, such as justice and utility (Wijayanta, 2010). Therefore, if all aspects are met, it can create a balanced legal protection between creditors and debtors (Sunarmi, 2010).

This research focuses into the fundamental ontological and philosophical aspects, specifically centered on the *ratio legis*, within a legal framework. It draws insights from a spectrum of discussions that arise during the bill formulation process. These discussions provide insight into how legislators rationally address the issues governed by legal norms, concerning the criteria for bankruptcy and the summary proof in Indonesia. The *ratio legis* is integral to shaping the legal principles that underpin the framework. It acts as the foundation for enacting a law, providing clarity on why specific provisions are include in that particular legislation (Nurhayati, 2020). Diana Surjanto's research concludes that insolvency criteria serve as a solution to determine a debtor's bankruptcy, aiming to establish fairness, practicality and legal certainty. She argues that the current application of bankruptcy requirements and summary proof in Indonesia has led to various concerns within the business and investment (Surjanto, 2018).

In 2023, Serlika Aprita and Hasanul Mulkan research underscores the considerations in crafting comprehensive bankruptcy regulations. Moreover, the study by Robert, Rosa Agustina, and Bismar Nasution delves into policy of debt discharge for individual debtors within Indonesia's bankruptcy framework. They draw comparisons between legal system of civil law and common law jurisdictions, incorporating Pancasila as the foundational principle in debt discharge within the state (Nasution, 2022). The notable absence of requirements regarding a debtor's capability to be declared bankrupt presents a substantial legal issue. This doesn't sufficiently ensure legal certainty or safeguard debtors with the capacity to settle their debts.

Therefore, the researcher intends to build on prior studies, contributing to a comprehensive framework that may influence the future reform of Indonesia's bankruptcy legislation. Based on the description provided, the researcher divides it down into a set of inquiries: what issues exist regarding the bankruptcy requirements and summary proof in Indonesia? How might the bankruptcy legal frameworks in France, the Netherlands, and Indonesia impact the Indonesian legal system? This study ultimately develops concepts that can be an integral part of the efforts to reform Indonesia's bankruptcy law.

METHODS

The researcher in this research utilizes the doctrinal legal research methodology, which entails examining secondary literature sources akin to legal references or sources of legal argumentation. This legal inquiry fundamentally delves into norms that govern society and provide guidance for each individual (Disemadi, 2022). The research also relies on primary legal materials obtained from legislation, legal theories or principles, research journals, research reports, thesis analyses, and similar sources. Additionally, the approach employed is the statute approach, which clarifies the meaning and interpretation of the Bankruptcy Law, Indonesia Civil Code, as well as established doctrines and jurisprudence. This is then integrated with pertinent legal theory concepts through the conceptual approach. Furthermore, a comparative approach is applied to generate new perceptions and legal developments for Indonesia in the future, drawing insights from the bankruptcy legal systems of France and the Netherlands. Data collection techniques center around core issues, involving a study of literature materials to conduct an analysis of veracity based on theories and expansions related to the research subject. The analytical techniques applied encompass description, systematization, interpretation, and argumentation based on the obtained legal materials.

RESULT AND DISCUSSION

Bankruptcy Law Requirements and Summary Proof According to Law Number 37 of 2004

Indonesia's legal framework for handling bankruptcy issues is governed by Law Number 37 of 2004, which substitutes Law Number 4 of 1998. Previously, the country's bankruptcy regulations were based on the *Faillissements-verordenen* (Amboro, 2023), known for its complex legal processes and lack of transparent legal certainty (Andani, 2022). The enactment of Law Number 37 of 2004 plays a crucial role in ensuring fair resolution of debt-related matters (Shubhan, 2019a). Article 1131 and Article 1132 of the Indonesian Civil Code establish that all debts incurred by an individual are collateralized by their entire portfolio, including future assets. Consequently, in cases where a debtor fails to meet their financial obligations, all assets will be seized and liquidated to compensate creditors, considering the amount of debt owed (referred to as '*ponds ponds gewyze*') (Kartono, 1985). Moreover, this safeguard grants debtors and creditors the opportunity to negotiate and reach agreements regarding the restructuring of the debtor's indebtedness, in accordance with the stipulations of the PKPU (Sitanggang, 2023).

Article 2, paragraph (1) of Law Number 37 of 2004 outlines the current bankruptcy requirements in Indonesia, including the need for multiple creditors, the debtor's inability to settle at least one debt, and that the debts must be due and collectible. This first requirement is based on the principle of *concursum creditorium*, mandating the debtor to have more than one creditor. The structure of creditors in the bankruptcy process is determined by their priority rights to receive payment for their claims (Sjahdeini, 2016), with three types of creditors distinguished: unsecured or concurrent creditors, secured creditors with collateral rights, and preferent creditors with priority based on legal provisions. Law Number 37 of 2004 specifically pertains to monetary obligations, encompassing those expressed in terms of a specific sum of money arising from various agreements, legal stipulations, or court decisions (Sjahdeini, 2016). For a debtor to face potential bankruptcy,

they must have at least two creditors. If a debtor has only one creditor, the justification for Law Number 37 of 2004 seems to diminish, as all assets automatically become collateral for settling the debt. In such cases, there's no requirement for an equitable distribution (*pari passu prorata parte*) of assets, and the debtor is not susceptible to bankruptcy (Jono, 2008). The second requirement mandates that the debtor must have at least one unpaid debt, meaning among the two or more creditors, one debt must remain unsettled with a single creditor. This condition holds even if other debts have been partially settled or if the provided sum doesn't cover the entirety of the debt (H. A. Simanjuntak, 2020).

Law Number 37 of 2004 incorporates the essence of Articles 1335 and 1337 of the Indonesia Civil Code, manifested in the third requirement of Article 2 paragraph (1) (Ginting, 2018). This requirement underscores that the debt must have reached maturity and be enforceable, implying that the debtor must settle a debt that has exceeded the agreed-upon timeframe. This may occur due to expedited debt collection, imposition of sanctions, or a court judgment compelling payment to the creditor (Hartini, 2017). The due and payable debt signifies the legitimate point at which a payment request can be made. Jono argues that this right hinges on a comprehensive agreement, involving the principles of *schuld* and *haftung* (Jono, 2008). Thus, without a mature and enforceable debt, a bankruptcy petition is considered premature (Ginting, 2018).

The procedure for determining bankruptcy status under this law is simple, as outlined in Article 8 paragraph (4) of Law Number 37 of 2004. This implies that assessing bankruptcy doesn't require intricate evidentiary tools as outlined in Book IV of the Indonesia Civil Code. The submission for bankruptcy status should only be pursued when there are tangible facts reasonably demonstrating that the prerequisites for declaring bankruptcy have been met (Khairandy, 2017). However, in cases involving agreements with consultants, especially regarding billed work outputs, the evidentiary process demands more careful assessment due to its complexity (Pratiwi, 2021). This process cannot be simplified. Nonetheless, some court decisions have viewed bankruptcy applications as not straightforward, leading to their rejection, as the Commercial Court's authority adheres to simple verification or summary proof (Anisah, 2008).

Summary proof, also referred to as '*summier proof*' (Harahap, 2017), is an integral practice within Indonesian Bankruptcy Law. It serves to expedite, ensure fairness, transparency, and efficiency in debt resolution, aligning with Article 2 paragraph (1) of Law Number 37 of 2004. This approach aims to prevent delays and protracted bankruptcy proceedings (Yulianny, 2005). When a creditor initiates bankruptcy proceedings, the process of substantiating the creditor's entitlement to claim the debt is streamlined. Consequently, in bankruptcy examinations, a simplified verification suffices, bypassing the need to strictly adhere to the procedures and evidentiary framework of Indonesian civil procedural law (Azwar, 2016).

During the National Working Meeting (RaKerNas) in September 2002, the Supreme Court clarified that in bankruptcy cases, the responsibility of providing evidence lies with one party, not both (Nurbayanti & Herni Sri, 2004). Although Article 8 paragraph (1) of Law Number 37 of 2004 mandates the summoning of the debtor, it does not imply that the debtor must submit responses, counterarguments, or conclusions as in typical civil proceedings. The summons of the debtor by the Judge is intended for them to hear the arguments put forth by the applicant (creditor). The Judge's role is solely to assess the completeness of the required documents for granting an application, by verifying the data with the creditor (Nurbayanti & Herni Sri, 2004). If the available evidence is deemed sufficient to establish the conditions for bankruptcy, the request for a declaration of bankruptcy will be granted. It's important to note that the concept of summary proof in Law Number 37 of 2004 is specifically applicable in the context of bankruptcy proceedings. However, in the PKPU, there is no specification as to whether evidence should be presented in a simple manner or not.

Law Number 37 of 2004 doesn't expressly define PKPU, but experts have provided interpretations. According to Syamsudin M. Sinaga, PKPU grants a debtor, estimated to be

unable to continue settling overdue and recoverable debts, a period for discussions with creditors on debt repayment methods, including restructuring through a peace plan that may entail partial or complete debt settlement (Sinaga, 2012). Munir Fuady views PKPU as a specific period stipulated by law through a decision by the Commercial Code. During this time, both creditors and debtors can negotiate debt settlement, potentially involving restructuring. Essentially, PKPU serves as a legal moratorium (Fuady, 2002). According to Kartini Muljadi, if restructuring proves unsuccessful, the debtor can still meet their obligations and continue their business (Sjahdeini, 2018).

In summary, Law Number 37 of 2004 and PKPU play vital roles in overseeing debt relations in Indonesia. This legislation supersedes previous rules and provides safeguards for both creditors and debtors through a streamlined and more efficient bankruptcy mechanism. With explicit criteria like the requirement of at least two creditors, presence of unpaid debts, and debts that have matured, the law establishes a solid foundation for an equitable and transparent bankruptcy process. Additionally, the concept of PKPU allows debtors and creditors to negotiate and reach agreements on debt restructuring. However, the law faces certain challenges related to a debtor's financial constraints, which are not fully addressed in the definition of bankruptcy.

Issues in Bankruptcy Law Requirements and Summary Proof According to Law Number 37 of 2004

The bankruptcy criteria outlined in Law Number 37 of 2004 have been criticized for their perceived simplicity. Experts such as Zahrul Rubain and Sutan Remy Sjahdeini argue that the existing provisions make it easy for courts to declare a company bankrupt based on just two creditors and a single unpaid debt. This criticism stems from the belief that these prerequisites are too simple, potentially leading to financially capable companies being erroneously declared bankrupt through a swift court process. This could pose a risk to the country's economy and business landscape, heightening the potential for economic instability (Sjahdeini, 2018). The Constitutional Court has also addressed this matter in various decisions, asserting that lawmakers erred in formulating Article 2 paragraph (1) of Law Number 37 of 2004 by omitting the requirement of 'financial incapacity to pay.' This consequence prompts several considerations that warrant thorough examination within the context of bankruptcy law in Indonesia.

Firstly, a debtor can be declared bankrupt even if they have just one overdue debt, regardless of the status of another creditor's claim (J. Simanjuntak, 2023). This results in the seizure of all the debtor's assets to settle the debt, which contradicts the intended principles of Law Number 47 of 2004, advocating for a collective debt repayment process involving multiple creditors (Shubhan, 2019b). Sjahdeini strongly argues that this provision does not effectively deter a creditor from pursuing bankruptcy, even if the petitioner creditor's claim constitutes only a minor portion of the overall debt owed by the debtor (Sjahdeini, 2018).

In the United States and Europe, the predominant bankruptcy doctrine holds that individuals should be deemed bankrupt when their debts outweigh their assets. This principle is in place to ensure an equitable dispersion of the debtor's resources among the creditors. Consequently, if a debtor's liabilities significantly outweigh their assets, the declaration of bankruptcy is viewed as the most appropriate course of action. This methodology ultimately maximizes the recovery of debts for creditors (Nasution, 2022). This means bankruptcy philosophy occurs when the debtor is unable to fulfill their obligations (Shubhan, 2019a).

Furthermore, (Shubhan, 2020) emphasizes that a debtor can be declared bankrupt solely based on the request of another creditor, obliging all creditors to partake in the bankruptcy proceedings, even if they are not facing difficulties in receiving their payments. In cases where a debtor has only one creditor, that creditor does not face concerns about receiving payment from the debtor's assets. However, within the current system, a single bankruptcy petition from another creditor can trigger a process involving all parties,

including creditors not experiencing payment difficulties (Suherman, 2020). This situation may lead to certain creditors being engaged in the bankruptcy proceedings, even though they face no challenges with payments, adding an extra layer of complexity to a legal process meant to address the debtor's financial insolvency (Nugroho, 2020).

The Indonesian bankruptcy system stands out from global practices due to its absence of a defined minimum debt threshold (Wahjoeono, 2022). For example, in the UK, bankruptcy standards set since October 2015 specify a threshold of £5,000 Sterling Pounds, mandating the submitted debt amount for bankruptcy to meet or exceed this level (UK, 2015). The lack of a clear requirement for a minimum qualifying debt to initiate bankruptcy proceedings raises significant concerns. This loophole enables creditors with relatively modest debts to pursue bankruptcy, potentially disrupting the debtor's business operations and affecting the liquidity of other creditors (Syarifuddin Hidayat et al., 2018)(Nurudin, 2020). This impedes the smooth resolution of debts to creditors, a process that ideally should proceed without complications.

(Juwana, 2005) argues that Law Number 37 of 2004 does not necessitate insolvency as a prerequisite for declaring bankruptcy. The phrase 'failure to fully pay the debt' in Law Number 37 of 2004 allows a bankruptcy decision to be enforced without considering the actual financial condition of the debtor or the reasons behind the inability or unwillingness to pay the debt (Wijayanta, 2010). Considering the definition of bankruptcy as the general seizure of all assets of the bankrupt debtor (Article 1 number 1 Law Number 37 of 2004), this legal definition does not effectively represent the core nature of bankruptcy as a scenario where the debtor is unable to meet their debt obligations.

Lastly, Article 8 paragraph (4) of Law Number 37 of 2004 lacks explicit guidelines for Judges to interpret facts or simple evidence in its implementation, leading to potential discrepancies in their understanding of what constitutes simple evidence in bankruptcy cases (Nurbayanti & Herni Sri, 2004). This inconsistency in approach has generated legal uncertainty in the execution of bankruptcy proceedings, with varying decisions being made (Kapoyos, 2017). Interpreting and applying it is not only difficult but also involves the court's duty to declare bankruptcy once the formal requirements in Article 2 paragraph (1) of Law Number 37 of 2004 are met, as specified in Article 8 paragraph (4) of the same law (Sudikno Mertokusumo, 2006). Consequently, in practice, Judges often focus on verifying if these formal conditions are met, often without considering other aspects, such as the financial health of the company. It's important to note that not all bankruptcy cases can proceed using summary proof (Karya, 2022).

Comparison Between the laws of France, the Netherlands and Indonesia Regarding Bankruptcy Requirements and Summary Proof

Development of bankruptcy law in Indonesia, categorized under civil law, was heavily influenced by European legal studies. During the period of French occupation in the Netherlands, the Dutch adopted the French civil law system, incorporating it into their official Civil Code (Febrianto, 2022). Subsequently, when Indonesia was under Dutch East Indies rule, the application of civil law policies in the Netherlands significantly impacted the Indonesian legal framework. This resulted in a substantial portion of Indonesia's civil law principles being derived from French law, particularly the Code Napoleon, with a smaller portion from Dutch law. This forms the foundation for researchers to conduct comparative studies within this field. Further details on the regulation of bankruptcy will be provided below.

a. Provisions Regarding Bankruptcy Requirement in France

The French bankruptcy code comprises several procedures aimed at addressing corporate financial distress (The French Commercial Code in English, 2006). If a company is unable to meet its obligations within forty-five days, it enters a state of payment suspension. Consequently, the debtor can settle claims through two procedures: judicial liquidation or *redressement judiciaire*. The Commercial

Court, based on the business's location, determines the option of judicial liquidation. This procedure requires not only a failure in payment but also an inability to restore the financial health of the business through restructuring. A bankruptcy practitioner appointed by the competent court concludes the company's operations by selling its assets to settle creditor claims.

In contrast, the *redressement judiciaire* serves as a mechanism for reorganization with three primary objectives: ensuring the debtor's viability, safeguarding employment, and repaying creditors (Nicolae Stef & Jean-Joachim Bissieux, 2022). At the outset of this process, the debtor undergoes a maximum observation period of eighteen months. During this time, both the debtor and the court-appointed administrator work on strategies to achieve these three primary objectives. This period involves a deferment of claims, allowing the management to maintain its position with the support of the administrator (Blazy, R., Chopard, B., Nigam, 2013).

The French bankruptcy code encompasses procedures for companies not in default. French system relies on amicable liquidation, originating from a voluntary decision by shareholders during an extraordinary general meeting. Sufficient assets must cover the liabilities to ensure full creditor payment. The appointed liquidator sells assets and settles debts, aiming to terminate operations and manage remaining assets. This procedure can facilitate reconstruction by reinvesting or reallocating assets or redistributing to partners. If asset sale proceeds fall short, and creditors reject a lesser return, the Court's decision must be followed (Peljhan, D., Zajc Kejzar, K., Ponikvar, 2020).

Companies not under payment suspension but facing financial difficulties have the option to initiate a *sauvegarde procedure* for restructuring. Similar to *redressement judiciaire*, this procedure targets financial rejuvenation and employment preservation, with an observation period of around twelve months. If payment cessation occurs during plan implementation, the court may convert the *sauvegarde procedure* into judicial liquidation or *redressement judiciaire*.

b. Provisions Regarding Bankruptcy Requirement in Netherlands

Initially, the Netherlands adopted bankruptcy law as a standard for the Code de Commerce. The Dutch Bankruptcy Act (*Faillissementswet*) has since undergone revisions, leading to changes in regulations, including the settlement of remaining debts after a bankruptcy decision (Yunara, 2021). Chapter 1 Article 1 of the *Faillissementswet* describes a person is deemed bankrupt if they are unable to meet their debts as they come due and must be declared bankrupt by a court decision, the individual's own request or at the request of one or more creditors. Bankruptcy decision can also be issued based on public interest or at the request of the Public Prosecutor (Yunara, 2021). *Faillissementswet* specifies that if a debtor seeks to apply for bankruptcy on their own behalf, they must provide substantial evidence of their inability to meet financial obligations. The same standard applies if the application is submitted by a creditor. They must identify other creditors whose debts have likewise gone unsettled as supporting evidence for the Judge to determine a debtor's bankruptcy status (Putu Purwanti, 2020).

To seek a declaration of bankruptcy, a debtor must adhere to specific formal criteria outlined in Article 4 of the *Faillissementswet*. This article encompasses various regulations concerning the process, including the submission procedure and prerequisites that need to be met based on the legal form of debtor, jurisdiction and to be declared in an open court and can be enforced immediately without consideration of appeals or conflicting legal proceedings. If these requirements are satisfied, the Judge may decide to grant the bankruptcy application.

c. Differences and Similarities

France, as a member of the European Union, follows the civil law system, a tradition that spread globally under France's influence during Napoleon's reign and European colonization (Sjahdeini, 2018). Indonesia, have been under French occupation during the Dutch East Indies era, inherited this system from the Netherlands. Therefore, France is credited with initiating the development of the modern civil law system, rooted in Roman law (Al-Fatih, 2018). Indonesia, a nation extensively applying Dutch national laws, including bankruptcy legislation, has further evolved these laws significantly.

While safeguarding the rights of creditors and ensuring an equitable debt settlement process are primary objectives in the bankruptcy systems of these three countries, notable disparities exist in their criteria, procedures, and settlement process. In French bankruptcy law, a company enters a state of payment suspension if it fails to meet its obligation within forty-five days. Conversely, under the Dutch system, an individual can be declared bankrupt if they fail to meet debt obligations and are declared so by a Court decision, supported by evidence of insolvency (Andrian, 2023). Meanwhile, in Indonesia, the prerequisites for bankruptcy include having a minimum of two creditors, one unpaid and enforceable debt.

Moving on to the bankruptcy procedures in these legal systems, France has two primary approaches: judicial liquidation and *redressement judiciaire*. Judicial liquidation is pursued when there is no foreseeable way to restore the financial health of the business, while *redressement judiciaire* focuses on securing the debtor's viability. The subsequent figure offers a comprehensive breakdown of how these bankruptcy procedures function in France.

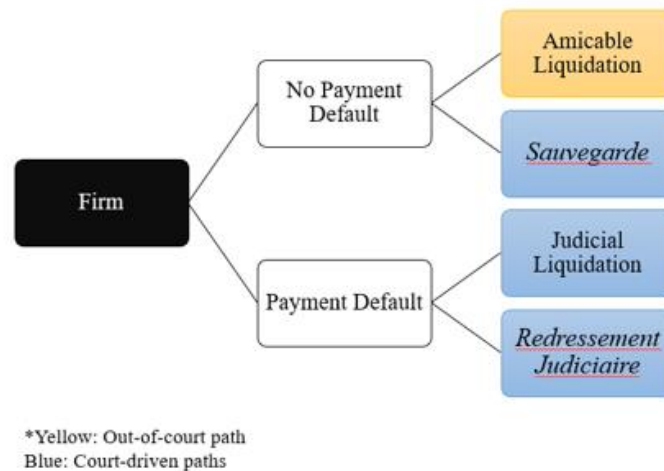


Figure 1. Bankruptcy Procedures in France

In the Netherlands, the process of initiating bankruptcy commences with the submission of a petition by both the debtor and creditors with the competent court. The Court then evaluates the justifiability of declaring bankruptcy. Conversely, in Indonesia, meeting three criteria allows both debtor and creditor to file for bankruptcy without the need to prove the debtor's inability to repay debts (Pratama, 2021). Nonetheless, both France and Indonesia feature a restructuring procedure, known as PKPU in Indonesia.

In the context of French bankruptcy law includes a provision for voluntary liquidation, which can be initiated by shareholders or asset owners with sufficient resources to cover creditor claims. Similarly, in both the Netherlands and Indonesia, a bankruptcy decision results in the liquidation of assets to distribute proceeds to creditors. However, in the Netherlands, a bankruptcy decision may be issued on

grounds of public interest or at the request of the Public Prosecutor. In contrast, Indonesia follows a creditor hierarchy, prioritizing secured creditors (based on collateral), followed by preferential creditors, and concurrent creditors (ordinary) for debt settlement distribution (Yuhelson, 2016) as in table below.

Requirements	Indonesia	France	Netherlands
The Bankruptcy Law (latest applicable law)	Debtor who have two or more creditors and fail to pay at least one due and collectible debt	A company is considered to be in a state of payment suspension if it cannot meet its obligation within 45 days	Debtor didn't pay what they should be paid and meet the four formal requirements under article 4 of the Dutch Bankruptcy Act
	*Can be filed by either creditors or debtors	*Can be filed by either creditors or debtors	*Can be filed by either creditors or debtors
The Bankruptcy Procedure	Suit filed into competent court with condition which are stated in Article 2 paragraph 1 Law Number 37 of 2004	Judicial Liquidation (when there is no hope in restoring financial health of business) and <i>Redressement Judiciaire</i> (to ensure debtor's survival)	Suit must be filed into competent court, along with insolvency test of the debtor
The Bankruptcy Settlement	Terminate a company's assets by selling it to repay structured creditors	Terminate a company's assets by selling it to repay creditors (judicial liquidation)	Terminate a company's assets by selling it to repay creditors
		*other alternatives are <i>redressement judiciaire</i> and voluntary liquidation	*can be issued on grounds of public interest or upon request from the Public Prosecutor

Table 1. Comparison of Bankruptcy Laws in Indonesia, France, and the Netherlands

d. Adoption

Achieving social change and advancing social justice requires a legal system that is responsive and capable of accommodating and addressing the genuine needs and concerns of the community, as perceived and experienced by the people themselves, not solely by government officials (Zikra & Cuong Lan Minh, 2022). To accomplish this, specific efforts and the establishment of new avenues for participation become crucial. The concept of responsive law involves selectively adapting to emerging demands and pressures, with a focus on two aspects: firstly, a shift from strict rules to broader principles and objectives; secondly, recognizing the importance of citizenship, both as a legal goal and as a means to achieve it (Arman, 2023).

This approach renders legal regulations less rigid, considering them as specific tools to realize more general aims. When formulating bankruptcy laws, the characteristics of responsive law offer valuable guidance. Nonet and Selznick illustrate this with an example involving precise legal procedures (Selznick, 2003). To achieve this, an institution requires clear objectives as guiding principles. These objectives establish benchmarks for evaluating established actions and open up possibilities for change. Responsive law asserts that objectives can be made sufficiently objective and robust to govern the creation of adaptive regulations (Selznick, 2019).

The responsive legal framework, as applied in Law Number 37 of 2004, demands specific prerequisites and a comprehensive evaluation of potentially problematic regulations. In terms of bankruptcy criteria, a debtor can be declared bankrupt with just one overdue debt, regardless of their ability to pay. Furthermore, a single application can impact the claims of other creditors, and there is no minimum debt threshold, potentially leading to an increase in bankruptcy applications. As a result, judges face a lack of clear guidance in determining what qualifies as simple evidence.

The urgency to advocate for initiatives aimed at enhancing Indonesia's bankruptcy system. Improvements to Law Number 37 of 2004 could involve

introducing an insolvency test as an additional requirement for a debtor's bankruptcy petition (Candini, 2022). Implementing this test carries benefits for both debtors and creditors. The test can be conducted by public accountants or independent auditors appointed jointly by creditors and debtors. In case of disagreement, the Court can appoint the relevant auditor (Pratama, 2021). Similar to practices in France and the Netherlands, the chosen method for the test is the balance sheet test, evaluating if the debtor's total assets exceed their total liabilities. This involves steps such as valuing the debtor's assets using the Highest and Best Use (HABU) method, which is then analyzed against their total debts (Tivana Arbiani Candini & Reisar Alka, 2022).

When handling civil cases that underlie a bankruptcy, the Judge is tasked with determining the existence of the pertinent legal relationship that forms the basis of the lawsuit. This involves actively seeking the truth about the relevant events through evidence examination. The Judge's responsibilities encompass distributing the burden of proof, assessing evidence admissibility, and evaluating its strength (Kamalia, 2021). Judges in the Commercial Court are expected to adopt a proactive approach, similar to the system in France where, after an observation period, the Court decides on restructuring, liquidation, or sale.

It is imperative to take urgent action in Indonesia to address and modernize the existing legal overlaps, particularly in the realm of bankruptcy law and summary proof. This is crucial for the well-being of both debtors and creditors. It aims to prevent the misuse of the bankruptcy process in business competition and uphold the integrity of the bankruptcy legal framework. Implementing an insolvency test, along with providing clear guidelines for valuing debts in bankruptcy filings, is essential. Moreover, there should be a heightened emphasis on the PKPU mechanism in Indonesia. This mechanism highlights that if a debtor possesses more assets than debts, it acts as a protective measure for debtors acting in good faith (Tobing, 2018). Consequently, it becomes the responsibility of the law to determine which financially stable debtors qualify for legal protection. In this process, Judges should be mindful of these considerations.

CLOSING

The criteria for commencing bankruptcy proceedings against a debtor in Indonesia possess a critical loophole, as they do not take into account the debtor's capacity to settle outstanding debts. This creates a discrepancy, mirroring the situation in countries like the United States and Europe. Article 2, paragraph (1) of Law Number 37 of 2004 only specifies the need for multiple creditors and at least one unpaid debt. However, this falls short of ensuring legal assurance or protecting solvent debtors. This gap in the Indonesian bankruptcy system has the potential to impact the nation's economy and business sector negatively. The absence of a defined minimum debt threshold in Indonesia's bankruptcy system results in a disparity between bankruptcy filings and the total value of a debtor's assets that could potentially be utilized to repay other creditors. In practical terms, there are no explicit guidelines available for Judges to interpret simplified conditions during bankruptcy proceedings. A comparative analysis of bankruptcy legislation in France, the Netherlands, and Indonesia reveals similarities in safeguarding creditors' rights and ensuring a fair debt settlement process. Therefore, the formulation of bankruptcy requirements and summary proof in Law Number 37 of 2004 can adopt a responsive framework, necessitating the use of the balance sheet test and Judges to proactively evaluate the strength of evidence, echoing practices in both the French and Dutch legal systems.

BIBLIOGRAPHY

Al-Fatih, F. A. S. (2018). Perbandingan Sistem Hukum Common Law, Civil Law Dan Islamic Law Dalam Perspektif Sejarah Dan Karakteristik Berpikir. *Legality Jurnal Ilmiah Hukum*, 25(1), 98–113. <https://ejournal.umm.ac.id/index.php/legality/article/view/5993>

- Amboro, F. Y. P. (2023). Pengaturan Hukum Kepailitan Indonesia: Kajian Perbandingan Hukum Amerika Serikat Dan Inggris. *Lex Prudentium Law Journal*, 1(2), 62–81.
- Andani, D. (2022). Perlindungan Hukum Kepailitan Perusahaan Solvable di Indonesia. *Kajian Hukum*, 7(1), 76–91. <https://doi.org/10.37159/kh.v7i1.2>
- Andrian. (2023). Mekanisme Insolvency Test Dalam Mencegah Iktikad Buruk Pemailitan Korporasi Oleh Kreditor. *Krtha Bhayangkara*, 17(2), 409–424. <https://doi.org/10.31599/krtha.v17i2.2358>
- Anisah, S. (2008). *Perlindungan Kepentingan Kreditor dan Debitor Dalam Hukum Kepailitan di Indonesia*. Total Media.
- Arman, M. T. A. H. M. A. H. M. F. A. G. M. Z. (2023). *Sosiologi Hukum* (1st ed.). PT Global Eksekutif Teknologi.
- Azwar, R. S. D. H. K. D. (2016). Konsep Hutang Dalam Hukum Kepailitan Dikaitkan Dengan Pembuktian Sederhana (Studi Putusan No: 04/Pdt.Sus.Pailit/2015/Pn.Niaga.Jkt.Pst). *Usu Law Journal*, 4(4), 30–39.
- Blazy, R., Chopard, B., Nigam, N. (2013). Building legal indexes to explain recovery rates: An analysis of the French and English bankruptcy codes. *Journal Banking Finance*, 37(6), 1936–1959. <https://doi.org/10.1016/j.jbankfin.2012.10.024>
- Candini, R. A. T. A. (2022). Insolvensi Tes Sebagai Dasar Permohonan Pailit Dalam Hukum Kepailitan di Indonesia. *Gloria Justitia*, 2(2), 181–193. <https://doi.org/10.25170/gloriajustitia.v2i2.3900>
- Disemadi, H. S. (2022). Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies. *Journal of Judicial Review*, 24(2), 289–304. <https://doi.org/10.37253/jjr.v24i2.7280>
- Febrianto, R. A. H. V. M. (2022). Sejarah Berlakunya BW dan KUHPerdara di Indonesia. *Journal of Criminology and Justice*, 2(1), 11–16. <https://journal.fkpt.org/index.php/criminology>
- The French Commercial Code in English, 1 (2006).
- Fuady, M. (2002). *Pengantar Hukum Bisnis: Menata Bisnis Modern di Era Global*. Citra Aditya Bakti.
- Ginting, E. R. (2018). *Hukum Kepailitan: Teori Kepailitan*. Sinar Grafika.
- Harahap, M. Y. (2017). *Hukum Acara Perdata* (2nd ed.). Sinar Grafika.
- Hartini, R. (2017). *Hukum Kepailitan*. Universitas Muhammadiyah Malang.
- Jono. (2008). *Hukum Kepailitan*, (Tarmizi (ed.)). Sinar Grafika.
- Juwana, H. (2005). Politik Hukum UU Bidang Ekonomi di Indonesia. *Jurnal Hukum*, 1(1), 24–39.
- Kamalia, N. S. (2021). Asas Pasif dan Aktif Hukum Perdata serta Relevansinya dalam Konsep Kebenaran Hukum Formal. In *Pengadilan Agama Rumbia*. Mahkamah Agung Republik Indonesia Pengadilan Agama Rumbia. <https://www.pa-rumbia.go.id/berita-seputar-peradilan/364-asas-pasif-dan-aktif-hakim-perdata-serta-relevansinya-dalam-konsep-kebenaran-formal>
- Kapoyos, N. (2017). Konsep Pembuktian Sederhana Dalam Perkara Kepailitan Kajian Putusan Nomor 125 Pk/Pdt.Sus-Pailit/2015. *Yudisial*, 10(3), 338.

- Kartono. (1985). *Kepailitan Dan Pengunduran Pembayaran* (3rd ed.). Pradnya Paramita.
- Karya, W. (2022). Rekonstruksi Pembuktian Secara Sumir Dalam Hukum Acara Kepailitan Terkait Dengan Bukti Elektronik Di Indonesia. *Jurnal Pendidikan Tambusai*, 6(2), 16404–16417. <https://doi.org/10.31004/jptam.v6i2.5079>
- Khairandy, R. (2017). *Pokok-Pokok Hukum Dagang Indonesia*, Yogyakarta (3rd ed.). FH UII Press.
- Nasution, A. R. R. B. (2022). The Rationalization of Debt Discharge Policy for Individual Debtors in the Indonesian Bankruptcy Regime. *Sriwijaya Law Review*, 6(1), 101–121. <https://doi.org/10.28946/slrev.Vol6.Iss1.928.pp101-121>
- Nicolae Stef, & Jean-Joachim Bissieux. (2022). Resolution of Corporate Insolvency During Covid-19 Pandemic. Evidence from France. *International Review of Law and Economics*, 70, 1–16. https://doi.org/10.1016/j.irle.2022.106063?utm_source=ideas
- Nugroho, S. A. (2020). *Hukum Kepailitan di Indonesia Dalam Teori dan Praktik Serta Penerapan Hukumnya* (2nd ed.). Prenadamedia Group.
- Nurbayanti, A. S. E. N., & Herni Sri. (2004). *Analisis Hukum Kepailitan Indonesia di Negeri Pailit*. Pusat Studi Hukum dan Kebijakan Indonesia.
- Nurhayati, Y. (2020). *Pengantar Ilmu Hukum*. Penerbit Nusamedia.
- Nurudin, A. (2020). Bankruptcy and Postponement of Debt Payments for Large Companies. *International Journal of Economics and Business Administration*, 8(2), 388–395. <https://doi.org/10.35808/ijeba/469>
- Peljhan, D., Zajc Kejzar, K., Ponikvar, N. (2020). Ownership Structure And Firm Exit Routes. *Appl. Econ.*, 52(15), 1671–1686. <https://doi.org/10.1080/00036846.2019.1677850>
- Perdana, I. F. S. S. (2021). Akibat Hukum Putusan Pernyataan Pailit Debitur Terhadap Kreditor (Analisis Putusan Mahkamah Agung Nomor 443k/Pdt.Sus/2012) Legal Consequences Of Decision On Debtor Bankruptcy Declaration Against Creditors. *Journal of Education, Humaniora and Social Sciences (JEHSS)*, 3(3), 1300–1306. <https://doi.org/10.34007/jehss.v3i3.552>
- Pratama, G. A. (2021). Hilangnya Tes Insolvensi sebagai Syarat Kepailitan di Indonesia. *Krtha Bhayangkara*, 15(1), 1–10. <https://doi.org/10.31599/krtha.v15i1.450>
- Pratiwi, D. A. W. B. (2021). Prinsip Pembuktian Sederhana dalam Permohonan Penundaan Kewajiban Pembayaran Hutang. *Jurnal Hukum IUS QUIA IUSTUM*, 28(3), 635–656. <https://doi.org/10.20885/iustum.vol28.iss3.art9>
- Putu Purwanti, K. G. S. S. Y. N. (2020). Perbandingan Hukum Negara Indonesia Dengan Hukum Negara Belanda Dalam Penyelesaian Perkara Sisa Hutang Debitor Pailit. *Jurnal Hukum Kenotariatan*, 5(2), 375–388. <https://doi.org/10.24843/AC.2020.v05.i02.p14>
- Selznick, P. N. P. (2003). *Hukum Responsif: Pilihan di Masa Transisi* (B. Susanti (ed.)). Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis.
- Selznick, P. N. P. (2019). *Hukum Responsif*. Penerbit Nusamedia.
- Shubhan, M. H. (2019a). *Hukum Kepailitan: Prinsip, Norma, Dan Praktik Di Peradilan*. Kencana.
- Shubhan, M. H. (2019b). Misuse of Bankruptcy Petitions by Creditors: The Case of Indonesia. *International Journal of Innovation, Creativity and Change*, 10(6), 195–207.
- Shubhan, M. H. (2020). Legal Protection of Solvent Companies from Bankruptcy Abuse in

- Indonesian Legal System. *Academic Journal of Interdisciplinary Studies*, 9(2), 142–148.
- Simanjuntak, H. A. (2020). Akibat Hukum Terhadap Kreditor Lain Apabila Salah Satu Kreditor Mengajukan Pernyataan Pailit (Due To The Law On The Other Creditors If One Of Creditors Submitting Statement Pailit). *Jurnal Justiqua*, 2(1), 40–53. <https://doi.org/10.36764/justiqua.v2i1.329>
- Simanjuntak, J. (2023). Tinjauan Hukum Atas Kewenangan Kreditor Mengajukan Penundaan Kewajiban Pembayaran Utang Berdasarkan Undang-Undang Nomor 37 Tahun 2004. *Honeste Vivere Journal*, 33(1), 69–76. <https://doi.org/10.55809/hv.v33i1.193>
- Simanjuntak, R. (2011). *Hukum Kontrak: Teknik Perancangan Kontrak Bisnis* (2nd ed.). Gramedia Pustaka Utama.
- Sinaga, S. M. (2012). *Hukum Kepailitan Indonesia*. Tatanusa.
- Sitanggang, T. (2023). Eksistensi Lembaga Kepailitan Dalam Upaya Pelunasan Hutang. *Fiat Iustitia : Jurnal Hukum*, 3(2), 209–220. <https://doi.org/10.54367/fiat.v3i2.2536>
- Sjahdeini, S. R. (2016). *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Hutang* (2nd ed.). Kencana.
- Sjahdeini, S. R. (2018). *Sejarah, Asas dan Teori Hukum Kepailitan Memahami Undang-Undang No 37 Tahun 2004 Tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang*. Pranata Media Group.
- Sudikno Mertokusumo. (2006). *Hukum Acara Perdata Indonesia*. Liberty.
- Suherman, R. R. (2020). Perlindungan Hukum Terhadap Kreditor Pemegang Jaminan Fidusia Terhadap Harta Debitor Yang Dinyatakan Pailit. *Jurnal Hukum Adil*, 11(1), 87–196. <https://doi.org/10.33476/ajl.v11i1.1446>
- Sunarmi. (2010). *Prinsip Keseimbangan Dalam Hukum Kepailitan Di Indonesia* (2nd ed.). PT Sofmedia.
- Surjanto, D. (2018). Urgensi Pengaturan Syarat Insolvensi Dalam Undang-Undang Kepailitan dan Penundaan Kewajiban Pembayaran Hutang. *Acta Comitas: Jurnal Hukum Kenotariatan*, 3(2), 258–268. <https://doi.org/10.24843/AC.2018.v03.i02.p03>
- Syarifuddin Hidayat, A., Samul Anam, & Muhammad Ishar Helmi. (2018). Perlindungan Hukum Terhadap Anak Sebagai Kurir Narkotika. *Jurnal Sosial & Budaya Syar-I*, 5(3), 307–330. <https://doi.org/10.15408/sjsbs.v5i3.10416>
- Tivana Arbiani Candini, & Reisar Alka. (2022). Insolvensi Tes Sebagai Dasar Permohonan Pailit Dalam Hukum Kepailitan di Indonesia. *Jurnal Gloria Justitia*, 2(2), 181–193. <https://doi.org/10.25170/gloriajustitia.v2i2.3900>
- Tobing, C. N. (2018). Menggagas Pengadilan Hubungan Industrial Dalam Bingkai Ius Constituendum Sebagai Upaya Perwujudan Kepastian Hukum dan keadilan/Initiating An Industrial Relations Court In The Framework of Ius Constituendum As An Effort To Realize Legal Certainty and Justi. *Jurnal Hukum Dan Peradilan*, 7(2), 297–326. <https://doi.org/10.25216/jhp.7.2.2018.297-326>
- UK, G. (2015). *Guide to Bankruptcy*. <https://www.gov.uk/government/publications/guide-to-bankruptcy>
- Wahjoeono, L. T. D. S. D. (2022). *Problematika Hukum Proses Permohonan Penundaan Kewajiban Pembayaran Utang Tetap Oleh Kreditor* [Universitas 17 Agustus 1945 Surabaya]. <http://repository.untag-sby.ac.id/14144/>

- Wijayanta, E. D. P. T. (2010). Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi. *Mimbar Hukum*, 22(3), 482–497. <https://doi.org/10.22146/jmh.16240>
- Yuhelson. (2016). *Prioritas Pembagian Harta Kekayaan Debitor Pailit (Boedel Pailit) Terhadap Kreditor Preferen Dan Kreditor Separatis Berdasarkan Prinsip-Prinsip Keadilan Dan Kepastian Hukum*. Universitas Jayabaya.
- Yulianny, N. (2005). *Kajian Penyelesaian Perkara Hutang Piutang Putusan Pengadilan Niaga dalam Hubungannya dengan Pengertian Sumir Berdasarkan Undang-Undang Nomor 4 Tahun 1998 tentang Kepailitan* [Universitas Diponegoro]. <http://eprints.undip.ac.id/15053/>
- Yunara, S. P. S. B. N. S. E. (2021). Reviewing the Comparison of the Legal Bankruptcy System Between Indonesia and the Netherlands. *Turkish Journal of Computer and Mathematics Education (TURCOMAT)*, 12(6), 2290–2296. <https://doi.org/10.17762/turcomat.v12i6.4834>
- Zikra, I., & Cuong Lan Minh. (2022). Participation of Judicial Decisions as The Form of The Implementation of Moral Values in Case Statement Based on Rechtvinding Activities and Negative Wetjlike Theorie. *Contemporary Issues on Interfaith Law and Society*, 1(1), 77–100. <https://doi.org/10.15294/ciils.v1i1.56714>