



Criminal Liability of the Curator for Illegal Acts in the Independence Principle*

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Abstract

An entity or individual bankruptcy statement can occur if the Debtor fulfills the elements of bankruptcy where the application is submitted to the commercial court by an advocate. The appointment of a curator in one of the contents of a commercial court decision will determine a person or more curators who originate at the request of the bankruptcy applicant, either by the creditor applicant or the debtor applicant himself. This study aims to determine the form and mechanism of the curator's criminal liability to the law based on the principle of independence in managing and settling bankrupt assets. This study uses a prescriptive normative legal research method with a statutory approach. The results of the study state that the recommendation of a curator by the bankruptcy applicant will tend to have a conflict of interest if there is no independent curator in carrying out the obligations mandated to him in Article 15, Paragraph (3) of the PKPU UUK. The applicable criminal threat remains based on the source of criminal law in force in Indonesia following the actions of the curator as an individual who is not immune to the law.

Keywords: Recipients and Administrators; Bankruptcy Curator; PKPU administrators

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Pertanggungjawaban Pidana Kurator Atas Perbuatan Ilegal dalam Asas Independensi

Abstrak

Pernyataan pailit suatu badan maupun perorangan dapat terjadi bila debitur tersebut memenuhi unsur-unsur kepailitan dimana permohonannya diajukan kepada pengadilan niaga oleh advokat. Pengangkatan kurator dalam salah satu isi penetapan putusan pengadilan niaga akan menetapkan seseorang atau lebih kurator yang bersumber dari usulan pemohon kepailitan, baik oleh kreditur pemohon ataupun oleh debitur pemohon itu sendiri. Penelitian ini bertujuan untuk mengetahui bagaimana bentuk dan mekanisme pertanggungjawaban pidana kurator melawan hukum berdasarkan prinsip independensi pengurusan dan pemberesan harta pailit. Penelitian ini menggunakan metode penelitian hukum normatif preskriptif dengan pendekatan perundang-undangan. Hasil penelitian menyatakan bahwa Pengusulan kurator oleh pemohon kepailitan ini akan cenderung memiliki benturan kepentingan apabila tidak ada independensi kurator dalam melaksanakan kewajiban sebagaimana yang diamanatkan kepadanya dalam pasal 15 ayat (3) UUK PKPU. Ancaman pidana yang berlaku tetap berdasarkan dari sumber hukum pidana yang berlaku di Indonesia sesuai dengan tindakan kurator sebagai pribadi yang tidak kebal terhadap hukum.

Kata Kunci: Receiver and Administrator; Kurator Kepailitan; Pengurus PKPU

Уголовная ответственность куратора за неправомерные действия в принципе независимости

Абстрактный

Заявление о банкротстве юридического или физического лица может быть подано, если должник выполняет элементы банкротства, когда заявление подается в арбитражный суд адвокатом. Назначение попечителя в одном из содержаний решения арбитражного суда определяет лицо или несколько попечителей, которые исходят по заявлению заявителя о банкротстве либо от кредитора-заявителя, либо от самого должника-заявителя. Настоящее исследование направлено на выяснение формы и механизма уголовной ответственности попечителя по закону, основанного на принципе самостоятельности в управлении и урегулировании активов банкрота. В данном исследовании используется предписывающий нормативно-правовой метод исследования с нормативным подходом. Результаты исследования показывают, что рекомендация кандидатом на банкротство попечителя будет иметь тенденцию к конфликту интересов, если нет независимого попечителя при выполнении обязанностей, возложенных на него пунктом (3) статьи 15 ПКПУ УУК. Применимая уголовная угроза по-прежнему основывается на источнике уголовного права, действующего в Индонезии, в соответствии с действиями куратора как лица, не обладающего иммунитетом от закона.

Ключевые слова: Получатели и Администраторы; Куратор Банкротства; Администраторы Пкпу

A. INTRODUCTION

The Republic of Indonesia is a Rechtsstaat, which means that all official and citizen conduct must be consistent with the rule of law. Pancasila and the 1945 Constitution of the Republic of Indonesia constitute the basis of the Indonesian legal state, which is an agreement to build a state government, defend the entire nation and all of its homeland, promote public welfare, and educate the nation's life. According to the present rules of the law, it is Indonesia's primary responsibility to ensure the health and happiness of its population. The welfare state is synonymous with the contemporary practice of law. ([Muhammad, 2004](#))

There must always be at least two parties in a traffic law contract: the Creditor and the Debtor. Achievement and contra-achievement, giving, doing, and not doing anything, or by law, it is termed the onderwerp object. However, in Anglo-Saxon texts, the achievement is known as the term "consideration," are rights and duties originating from that legal relationship between the parties. In this field of law, the concept of force majeure (overmatch) is used to describe situations in which a debtor is prevented from meeting their performance commitments. As a result, a "bankruptcy" or "delay in payment" organization has been established in the business sector to help when a debtor cannot pay his loan to a creditor.

Filing for bankruptcy means you can no longer pay your debts to creditors. When a debtor cannot make payments, it's usually because their firm has hit hard times. On the other hand, the bankruptcy process ends with a court order that seizes all of the Debtor's current and prospective assets. After a judge at the Commercial Court ruled that the Debtor should be declared bankrupt, the court-appointed a "curator" to oversee the bankruptcy estate and ensure that its assets were distributed fairly. If a party has been declared bankrupt, it can only initiate legal action concerning its assets if doing so will benefit those assets (*boedel*). ([Kurniawan, 2018](#))

The curator is the Probate Court (BHP) or an individual appointed by the Commercial Court to manage and settle a bankrupt debtor's assets under a Supervisory Judge's supervision. (Article 1 point 5 UUK PKPU No 37 2004). A curator carries out management and settlement of bankruptcy under the supervision of a supervisory judge with the primary objective of using the proceeds from the sale of these assets to pay all debts of the bankrupt Debtor proportionally (*prorate parte*) and following the structure of the Debtor. ([Waluyo, 1999](#))

Based on the provisions of Section 2(1) of Article 2 of Law No. 37 of 2004 Relating to Bankruptcy and Certain Debt Obligations (hereinafter referred to as "UU K" and "PKPU"). A bankruptcy petition might be filed against an individual who owes money to multiple persons but does not have the funds to repay even one. ([Irianto, 2015](#))

Nonpayment in the business context, or at least concerning property assets based on the Debtor's inability to satisfy his obligations to creditors, is what this clause means when it pertains to debts exclusively. Nonetheless, we cannot do so because of our unwillingness to do so for grounds including default, claims of letter forgery, fraud, embezzlement, intricacy, and non-summary matters. Insolvency is not explicitly mentioned as a defence to or justification for nonpayment in this clause. The provision of Article 2, paragraph (1) contains unclear criteria that can confuse judging which Debtor's situation should be submitted for a bankruptcy statement because the meaning of the word "not paying bills" is not addressed in the explanation. ([Sinaga, 2012](#))

In light of the preceding, should the Creditor file for bankruptcy on behalf of the Debtor, the latter may apply to the commercial court to postpone his debt payment responsibilities if he is unable or believes he cannot continue making his required debt payments. ([Article 222, Paragraph 2 of UU K and PKPU](#))

As a result, the Debtor's request to postpone debt payment obligations (*surseance van betaling*) through an advocate to the commercial court is typically intended to submit a settlement plan which includes payment of all or part of the money to concurrent creditors to avoid bankruptcy. Thus, PKPU is prioritized in decision-making if multiple cases are filed simultaneously. Doing so can benefit many parties, including employees, the business chain, shareholders, and creditors whose obligations would be reimbursed. So, it is necessary that the court order a "temporary" delay in debt payments (Article 225 paragraph 2 UUK and PKPU). The Panel of Judges must make a Bankruptcy Declaration Decision before a debtor in good faith can file for PKPU. ([Hartini, 2015](#)).

When bankruptcy petitions are filed with the court, they are sometimes met with opposition in the form of an exception. After the court clerk has read the complaint or bankruptcy petition, the defendant can respond. In bankruptcy and PKPU (Suspension of Obligations for Payment of Debt) cases, the respondent is entitled to file an objection (in line with Article 222 paragraph (2) of the Bankruptcy Code and PKPU No. 37 of 2004).

Bankruptcy applications are often met with a rebuttal or PKPU in Commercial Court proceedings. This means that a debtor filing for bankruptcy might object to the petition ([Hasan, 2021](#)). The legal issues of bankruptcy and debt and the suspension of responsibility to pay debts are two examples of legal concepts related to the problem. They can be identified at the legal theory level in this study's framework. ([Indrapraja, 2014](#))

The Bankruptcy Rules allow debtors filing for bankruptcy to submit PKPU applications to postpone the commencement of bankruptcy while simultaneously restructuring their debts to creditors. Article 222, paragraph 2 of the Bankruptcy and Suspension of Obligations for Payment of Debts contains provisions on protection granted to debtors to apply for PKPU. To avoid filing for bankruptcy, debtors can ask the Commercial Court for a postponement of their debt payment obligations by hiring an advocate to do so on their behalf. This allows the Debtor more time to submit a reconciliation plan that includes payment of all or part of the debt to concurrent creditors.

Indeed, debtors who have had their bank accounts frozen don't use the PKPU's legal institutions, which may be used as legal institutions to submit peace plans but aren't. Reconciliation plans typically include an offer to settle some or all of the debt owed. A debtor may request a postponement of debt payment obligations following Article 222, Paragraph (2) of UU K and PKPU if he is unable to pay or anticipates that he will not be able to continue paying his debts that are due and recoverable. So, the use of this PKPU institution by insolvent debtors constitutes an admission of insolvency vis-a-vis the creditors who justified the bankruptcy. ([Lubis, 2013](#)). The Debtor cannot employ PKPU efforts to fight the Creditor's bankruptcy petition. In light of the explanation provided in Paragraph 2 of Article 222, "Creditor" refers to every Creditor, including both concurrent and Priority Creditors. When creditors who file for bankruptcy are in default and suspicions of fraud in filing for bankruptcy arise, a legal vacuum results because debtors who are petitioned for bankruptcy do not submit PKPU efforts mandated by the Bankruptcy Law and PKPU. Bankrupt debtors who have legal difficulties have no use for this PKPU entity. ([Irianto, 2015](#))

The author will analyze how the curator's duty to be impartial when handling bankrupt assets and to settle claims and potential criminal liability is implemented. This paper examines the curator's legal liability for breaking independence in insolvent property management and settlement. This paper should also have practical applicability. Academically, it is intended to inform the revision of related laws and regulations, particularly regarding the

curator's criminal culpability based on independence in bankruptcy asset management and settlement.

B. METHODS

According to Peter Mahmud Marzuki, the research conducted in this work is the prescriptive normative legal investigation, which seeks to investigate such topics as the function of law, the values of justice, the efficacy of legal regulations, legal conceptions, and norms ([Marzuki, 2010](#)). Based on the principle of independence enshrined in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Peter Mahmud Marzuki asserts that the purpose of legal research is to generate arguments, theories, or new concepts as prescriptions for addressing the problems that arise ([Marzuki, 2010](#)). This argumentation decides the study's legality. According to Peter Mahmud Marzuki, legal issues in the dogmatic legal space arise when: first, the parties to the dispute or debate put forward different or even conflicting interpretations of the text and regulations due to their ambiguity; second, there is a legal vacuum; and third, there are further facts interpretations. Therefore, academic research should have legal applications. Furthermore, judges should cite legal literature intellectually since their rulings will be reviewed.

C. RESULTS AND DISCUSSION

1. The Principle of Independence in Curator Practice for the Administration and Settlement of Bankruptcy Assets

Following the financial crisis in mid-July 1997, bankruptcy law was a hot topic of inquiry. The capacity of businesses to raise capital has been greatly diminished, if not entirely eradicated, due to the current financial crisis. When a debtor cannot pay his debts in full, the law allows for specific actions to be taken in connection to the Debtor's remaining or future assets, which is where the bankruptcy institution comes in. As a general rule, declaring bankruptcy means the Debtor will "stop paying" his debts. For a bankruptcy filing, however, proof of insolvency is not required, and it makes no difference whether the Debtor has stopped making payments because they are unable to or are just unwilling to do so.

The principle of independence and impartiality is one of the main principles recognized in various provisions of international law. UUKPKPU

also desires the declaration of independence. Article 15 paragraph 3 UUKPKPU clarifies that a curator appointed according to paragraph 1 must be impartial, free of conflicts of interest with debtors or creditors, and not currently serving as a curator in more than 3 (three) cases involving bankruptcy or delays in debt payment requirements. The article reads the same as Article 234 paragraph (1), namely that the appointed administrator, as referred to in Article 225 paragraph (2), must be independent and not have a conflict of interest with the Debtor or Creditor. The similarity in the intent of Article 15 paragraph (3) and Article 234 paragraph (1) of the UUKPKPU illustrates that although the UUKPKPU differentiates the scope of duties and authorities between curators and administrators, it does not mention the legal position of each, including in what matters the curator or administrator may be subject to criminal liability. The provisions regarding the principle of independence are emphasized in the Code of Ethics of the Indonesian Curator and Administrator Association (AKPI), which states that in every appointment received, members of the Indonesian association of curators and administrators (hereinafter referred to as "Members") must be independent and free from anyone's influence. ([Suyatno, 2012](#))

Based on the definitions above, it is clear that a curator must be free from the Debtor's and the curator's influence and must not be dependent on the parties involved in the bankruptcy. According to Bryan A. Garner's definition in Black's Law Dictionary, an independent person is unaffiliated with others and whose existence is not predicated on the fact of any other entity. At the same time, a curator oversees the business of another.

The above concerns can be contrasted to those outlined in the Indonesian Accountant Code of Ethics, which governs the conduct of accountants and specifies the standards to which they must adhere regarding their independence, honesty, and objectivity. According to Article 101, a public accountants must be independent of any influence that could compromise their impartiality or integrity while performing their duties. Article 102 further specifies that integrity is a necessary trait for success in the workplace. Therefore, professionals should always put integrity at the top of their value list when evaluating any decision they make on the job. To maintain this level of trustworthiness, the auditor (public accountant) must act honestly, within the bounds of the subject's confidentiality. Public service and confidence cannot be sacrificed for private gain. An auditor's services are more valuable because of the auditor's confidence in objectivity, a trait that the auditor must possess.

This impartiality is a hallmark of public accountants and helps set them apart from those in other fields. The auditor (public accountant) is responsible for adhering to this principle of impartiality by ensuring they are disinterested, intellectually honest, and free from conflicts of interest. Members of the KAP are expected to act with honesty and objectivity in their official capacities, to avoid conflicts of interest, to disclose no materially misleading information, and to never cede control of any relevant factor to a third party. ([Subhan, 2008](#))

The Indonesian Association of Curators and Managers (AKPI) professional code of ethics and the Indonesian Accountants Code of Ethics place independence as the main principle of professional ethics by providing signs of autonomy related to the appointment received by association members. The Indonesian accountants' code of ethics defines "independence of the curator," whereas the AKPI code does not. The curator's legal power is unassailable (obligations). The curator can settle insolvent estates. The curator must be unbiased while dealing with creditors and debtors. The curator's ability is limited. ([Hartini, 2015](#))

The curator must be a neutral third person without a financial stake in the outcome of the case, as stated in the DPR RI's official treatise on the discussion of the draft Law on Bankruptcy and Suspension of Obligations for Payment of Debt on September 22, 2014 ([Kartoningrat & Besse, 2016](#)). Since the curator, as defined by Article 15 paragraph (3) UUKPKPU, is a party with authority over bankruptcy assets as of the date the bankruptcy decision is announced, the curator must adopt measures that do not favour one party and cause injury to the other. ([Marzuki, 2010](#))

According to the preceding discussion, "independence" in the context of bankruptcy refers to the curator's internal state, which values honesty, independence, neutrality, or impartiality concerning the interests of the debtors or creditors. Furthermore, they must respect the standards of integrity and objectivity in performing their duties to achieve the purpose, which is the equitable settlement of bankrupt assets for both creditors and debtors. ([Aprita: Hasyim, 2022](#))

As the curator has such broad control over the bankruptcy estate, they must be free from any potential conflicts of interest, as required by Articles 6 through 11 of Law Number 37 of 2004. The museum officials must take the legal position. In most cases, the Creditor who files the bankruptcy petition also suggests the curator's name. Even though the Creditor is advancing, the curator must be impartial because he bears ultimate responsibility for his

actions. Even if an appeal or court review is filed challenging the bankruptcy's pronouncement, the curator can generally manage and settle the bankruptcy's assets. Articles 6 through 11 of Law 37 of 2004 outline the procedure for filing for bankruptcy and the commercial court's subsequent decision to declare the Debtor bankrupt. The curator plays a crucial role in managing and resolving the bankrupt Debtor's assets, ensuring that the Debtor's creditors are paid back as much as possible. The curator must accept responsibility for any losses sustained by the Debtor due to any errors or omissions on the curator's part during the management and settlement process.

This is significant because the curator, in the course of managing and clearing bankruptcy assets, frequently finds himself in a precarious position between the interests of the Debtor and the creditors, and is subject to numerous temptations to pursue their economic interests, even if doing so would be detrimental to the bankruptcy estate. ([Kurniawan, 2013](#))

2. Curator's Criminal Liability Under the Principle of Independence in the Administration and Distribution of Bankruptcy Assets

The conditions for non-independent activities that could result in a punishment for a curator become murky due to the interconnected nature of Article 15 paragraph (3) UUKPKPU, Article 234 paragraph (2), and the theory of criminal law. This is because strict requirements must be met for a sentence to be imposed under criminal law. These requirements are as follows: (1) the commission of an act constituting criminal conduct; (2) the existence of criminal guilt and responsibility; and (3) the imposition of an appropriate criminal sanction. However, the articles mentioned above from the UUKPKPU fail to specify what kinds of behaviour qualify as "not independent" activities. This connotation stands on its own, but it does not constitute a separate aspect of criminality; instead, it relates to the moral ideals of professional standards that must be upheld.

Independence values primarily aim to help curators stay out of jail. Thus, it is vital first to comprehend and equate perspectives linked to the position of the curator as a legal profession before addressing the responsibilities of the bankruptcy curator in more detail. In general, there are three pillars upon which a job rests: first, a foundation in knowledge rather than common sense. In other words, a career is attained by continuously pursuing scientific knowledge. Second, it's not enough to merely be knowledgeable; you must also be skilled at using that knowledge. In third

place, we are constrained by the existence of a moral norm, which is intrinsically linked to our ethical principles.

Ethical standards will be enforced on the curator because of the nature of the job. Bertens argues that morals need legislation because they will disappear if not represented and institutionalized in society. This is evident in criminal law, where there are moral prohibitions not to kill or cheat and legal prohibitions against these behaviours. The perpetrator also needs to face serious consequences. The law provides more specific guidance on the effects than ethical precepts. ([Anisah, 2008](#))

This is a moral norm that the curatorial community must uphold, and it's closely related to the notion of independence. A direct connection exists between maintaining moral standards and doing the right thing. If an ethical breach occurs in the future, it will be important to determine if it is also a legal breach. This is because, whereas law is a norm, morality is not always one. While there may be legal consequences for breaking the law, such effects are not always in place for ethical transgressions. ([Muryati, 2017](#))

Since there is no consensus on how to apply the UUKPKPU, a standard of impartiality is required to serve as a guide not only for the curator in their job of settling insolvent assets but also for law enforcement personnel (police, prosecutors, attorneys, and judges) in their work with criminal cases. ([Purwosutjipto, 1976](#)). The moral weight of the curator's behaviour is essential in determining whether he should face criminal penalties. If it can be shown that the curator committed a criminal act, then the violation of ethics will also be considered a criminal act. ([Slamet, 2017](#)). However, on the other hand, some ethics remain in the realm of ethics, with the benchmark of whether or not it is wrong by returning it to moral and ethical standards. This ethical violation is known as unprofessional conduct. ([Asikin, 2001](#))

Based on the explanation above, independence in bankruptcy law can be interpreted that the curator may not and cannot be intervened by anything, either by debtors, creditors, or other individuals within or outside the bankruptcy institution ([Tumbuan, 2005](#)). Being independent reflects the curator's integrity, which includes the following qualities: a noble character; trustworthiness in carrying out his position; the ability to act wisely and prudently in dealing with a plural reality between the interests of debtors and creditors; consistency between his words and the responsibilities he carries; adherence to the values and Norms, both written and unwritten; and, last but not least, an orientation toward the best interests of the obligors ([Hartono, 2016](#)). A curator who agrees to act as trustee of a bankrupt debtor's assets

following a commercial court's order must also guarantee that he has no financial ties to the Debtor or the creditors. The curator must also refrain from engaging in dishonourable conduct, such as illegally profiting from the bankruptcy estate's assets, and must honor the rights of all affected parties concerning any legal proceedings he initiates over the estate's holdings. ([Hasan, 2021](#))

Independence is essential since impartiality and museum curators' values are linked. The curator's legal interests conflict with those of the Debtor and Creditor. Therefore, the curator must uphold the court, debtors, and creditors' trust, adhere to professional and ethical standards following their content and spirit and maintain professional relations that govern working relations with related parties, such as the Debtor, creditors, and supervisory judges. The curator's impartiality shows in their decisions. Outside influences must not affect the curator. ([Yani & Widjaja, 2002](#))

According to the criteria laid out above, the role of the curator can be classified as one in the field of law. In addition, curators adhere to a code of ethics for the curatorial profession; in Indonesia, for example, several well-recognized professional curatorial organizations, such as the Indonesian Association of Curators and Administrators (AKPI) (HKPI). When a violation of the professional code of ethics occurs, it can be broken down into two categories: (a) unprofessional conduct, which is directly tied to the competence of the curator in question, and (b) administrative misconduct, which is linked to the curator's shameful behaviour. ([Purwosutjipto, 1976](#))

The curator's organization must take action and issue sanctions when ethical infractions occur. The Minister of Law and Human Rights is the only entity authorized to give licenses for the appointment of curators, and sanctions can take the form of reprimands, suspensions, terminations, and the eventual revocation of permits. The purpose of this termination penalty is to forestall even higher future losses.

In light of the preceding, it seems appropriate to reconsider the purpose of criminal law in light of the curator's duties. According to the findings of this study, criminal law serves two purposes: first, as a system unto itself or as an independent entity, and second, as a protector of social standards. When enforcing the law, the criminal law and its associated punishments take precedence as the "*primum remedium*" for any wrongdoing that may have occurred. Yet if criminal law is a watchdog over social standards, it serves as a last resort when other avenues of redress have failed. ([Leden, 2009](#))

Regarding the curator's role as a member of the legal profession, not all oversights should result in disciplinary action. This is because, as mentioned previously, criminal law in bankruptcy serves as a guardian of norms to prevent the curator from engaging in illegal or dishonourable behaviour. As a result, it is the last resort. But if the curator meets the elements of the crime he is suspected of committing, the criminal law can still be enforced.

According to the previous, curators need to have strong ethical beliefs based on the principles of independence. For example, the PKPU Law and the curator's code of ethics could serve this purpose. On one side, curators have a road map for doing their jobs thanks to a precise formulation respecting the independence of curators. Also, it is helpful for law enforcement officials, especially judges, to have an accurate formulation of the values of the curator's freedom which can be considered when deciding whether or not the act committed by the curator meets the criteria of a crime. Likewise, this exemplifies the idea that all individuals are on equal footing in the eyes of the law. ([Sanjaya, 2014](#))

D. CONCLUSIONS

The Principle of Independence in the Execution of the Profession of Curator for the Management and Settlement of Bankruptcy Assets, in which the curator, carrying out his duties, must comply with the mandate of UUK PKPU Article 15 paragraph (3). It is reasonable for the trustee to split a bankrupt company's assets between its creditors based on their credit rating rather than providing preference to the applicant who submits the name of the curator when carrying out its responsibilities. These competing economic objectives can coexist and cause a conflict of interest.

Duty of the Curator in Criminal Matters According to the "Principle of Independence in the Management and Settlement of Bankruptcy Assets," the PKPU Law does not yet clarify the nature of the criminal charge that can be brought against curators who are not independent. The criminal law currently in effect in Indonesia is the basis for the possibility of legal action against the curator. This law applies to everyone in Indonesia. Many reports to the police are filed against curators who are doing their duties. These reports are filed to hinder the curator's duties and in situations when he has committed a criminal act. It's a good idea to advise that the UUK PKPU be stricter about crimes committed by curators so that unfounded accusations don't surface and

curators can continue to do their jobs in line with the spirit of the law governing the settlement of debts owed by bankrupt debtors.

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