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The Principle of Justice in the Legal Position of Suretyship in Indonesian Insolvency Law

Faris Muhammad Irfan*, Hanif Nur Widhiyanti, Amelia Sri Kusuma Dewi
Faculty of Law, Universitas Brawijaya, Indonesia
Corresponding author: farismuhammad@student.ub.ac.id

ABSTRACT
This paper analyzes the legal position of suretyship (*borg*) in Indonesian bankruptcy and debt suspension (PKPU) proceedings, focusing on the principle of justice. The study addresses the incomplete norms in Law Number 37 of 2004, which do not explicitly regulate petitions against sureties. Using a normative juridical method based on statutory, conceptual, and case approaches, the research finds that sureties are often treated as debtors, even though the Indonesian Civil Code defines suretyship as accessory and subsidiary. Several court verdicts have accepted joint petitions against debtors and sureties without independent proof or separate legal assessment. This precedent undermines commutative and procedural justice, as the surety does not bear primary responsibility and is not a joint and several debtors. These findings indicate the need for legal reform to ensure that the surety receives separate procedural treatment aligned with their legal capacity.

Keywords:
Suretyship;
Justice;
Bankruptcy;
PKPU;
Commercial Court.

INTRODUCTION

Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (PKPU) contains four fundamental principles: the principle of balance, the principle of business continuity, the principle of justice, and the principle of integration. The principle of justice means that bankruptcy proceedings must ensure fairness for all parties involved, particularly to prevent arbitrariness by creditors seeking payment through coercive means. This principle is also grounded in Article 28D and Article 28G of the 1945 Constitution of the Republic of Indonesia, which guarantee legal protection and certainty before the law, the right to protection of property under one's control, and the right to a sense of security. Additionally, Article 33 of the 1945 Constitution stipulates that the national economy shall be organized based on the principle of equitable efficiency.

Law Number 37 of 2004 provides for bankruptcy and PKPU as legal institutions for collective debt settlement. Bankruptcy constitutes a general attachment (*sita umum*) over all assets of the bankrupt debtor, managed and settled by a curator under the supervision of a supervisory judge, where the declaration of bankruptcy is issued by the Commercial Court (Yuhelson, 2019). Meanwhile, PKPU is a court-granted period in which the debtor is allowed to negotiate with creditors a plan for full or partial repayment, including restructuring of debts if necessary (Nugroho, 2018). According to Articles 2 and 222 of Law No. 37/2004, bankruptcy and PKPU may be filed against a debtor who has at least two creditors and at least one due and payable debt. The term "debtor" itself is defined in Article 1 point 3 of the law as a person who owes a debt arising from an agreement or law and whose repayment can be demanded in court. Based on this provision, a person is considered a debtor not only when they owe money under a loan agreement, but also under any type of agreement where the obligation can be measured in monetary terms. This is clarified further in Article 1 point 6 of the law, which defines "debt" as an obligation expressed or expressible in a sum of money, whether in Indonesian or foreign currency, whether existing or contingent,

arising from contract or law, and which must be fulfilled by the debtor, failure of which entitles the creditor to obtain payment from the debtor's assets.

Considering this, parties who are not directly bound by the principal debt agreement, such as sureties (*borg*) under a suretyship agreement (*borgtocht*), may nonetheless be subjected to bankruptcy or PKPU proceedings initiated by the creditor. A suretyship agreement is a specific type of contract regulated in Book III of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata), specifically Articles 1820 to 1850. According to Article 1820 of the Civil Code, a suretyship is a contract whereby a third party, for the benefit of the creditor, binds themselves to fulfil the debtor's obligation if the debtor fails to do so. This definition indicates that no specific asset is pledged, rather, it is the person (the surety) who serves as the guarantor. Under a suretyship agreement, the surety (*borg*) legally undertakes responsibility by pledging their assets, whether present or future, for the purpose of guaranteeing the debtor's obligations to the creditor, especially if the debtor is unable to pay. This is in line with Articles 1131 and 1132 of the Civil Code, which provide that all of debtor's assets serve as collateral for their debts.

Further, the legal consequences arising between creditor, debtor, and surety are governed in Articles 1831–1838 of the Civil Code. The surety is granted a special right, namely the right to demand that the debtor's assets be seized and sold before the surety is held liable. This reflects the anticipatory nature of the surety's liability, which arises only when the debtor lacks sufficient assets to fulfil the obligation or owns no seizable property at all. If the proceeds from the sale of the debtor's assets, either through auction or private sale, are insufficient to satisfy the debt, the creditor may then seek payment from the surety. This mechanism, as stipulated in Article 1831 of the Civil Code, is designed to maintain balance between creditor, debtor, and third-party surety. Accordingly, the surety's obligation only arises once the debtor's liability has been pursued and executed. The rationale underlying the existence of this special right is that a party who does not bear the primary burden of responsibility should not suffer the consequences of the negligence committed by the party who is actually responsible, the debtor (Koops, 2010).

However, the Civil Code also permits the surety to waive this special right through an express statement in the suretyship agreement. Therefore, the right under Article 1831 is considered a *naturalia* clause or *aanvullend recht* (default provision), which the parties may contractually deviate from. The effect of such waiver is that the creditor may seek payment directly from the surety upon the debtor's default, without first executing the debtor's assets.

In bankruptcy and PKPU proceedings, the terms applicant and respondent are used. The applicant refers to the legal subject of submitting bankruptcy or PKPU petition against a debtor. Among these petitions, many involved both the debtor and the surety being petitioned jointly for bankruptcy or PKPU. However, the inclusion of the surety (*borg*) as a respondent alongside the principal debtor raises significant legal concerns. In principle, the surety is a third party who provides a personal guarantee (*borgtocht*) to the creditor for the fulfillment of the debtor's obligations. The nature of the surety's liability is subsidiary, and the suretyship agreement is accessory. Although creditors may pursue claims against the surety, the surety remains, by legal position, distinct from the debtor

Nevertheless, several court verdicts have granted bankruptcy or PKPU petitions against both the debtor and the surety in a single proceeding. Such examples include Verdict No. 16/Pailit/2015/PN-Niaga.Surabaya, Verdict No. 24/Pailit/2015/PN-Niaga.Surabaya, Verdict No. 141/Pdt.Sus-PKPU/2020/PN.Niaga-Jkt.Pst, and Verdict No. 4/Pdt.Sus-PKPU/2020/PN-Niaga.Sby. Article 24 of the 1945 Constitution of the Republic of Indonesia affirms that judicial power is an independent authority tasked with administering justice and upholding the rule of law and justice. Based on the foregoing background, this research aims to examine the realization of the principle of justice in the legal standing of suretyship (borg) within bankruptcy and debt suspension proceedings.

METHOD

The type of research used in this study is normative juridical research, also referred to as doctrinal legal research (Qamar, 2017). This research focuses on three main approaches, statutory approach, conceptual approach, and case approach (Soekanto, 2003). The legal materials used consist of both primary and secondary legal sources. Primary legal materials derive from formal legal documents issued by official institutions, such as legislation and court verdicts (Marzuki, 2005). The legislation referred to includes: (1) the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata); and (2) Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Secondary legal materials consist of books, academic journals, and legal dictionaries. Secondary legal sources were collected through library research, and analyzed using deductive reasoning, systematic interpretation, grammatical interpretation, and comparative interpretation (Usanti, 2019).

RESULTS AND DISCUSSION

1. Regulation of the Legal Position of Suretyship in Bankruptcy and Suspension of Debt Payment Obligation Proceedings

Suretyship (*borgtocht*) under Indonesian civil law is classified as a named contract regulated in Articles 1820 to 1850 of the Indonesian Civil Code. Pursuant to Article 1820 of the Civil Code, a suretyship agreement is a contract in which a third party, for the benefit of the creditor, undertakes to fulfill the debtor's obligation if the debtor fails to perform. This provision establishes the surety's legal status as a secondary party who is liable only after the principal debtor fails to fulfill their obligation (Fuady, 2013). Suretyship is characterized by its voluntary, accessory, and subsidiary nature (Hadi, 2013). Its accessory character means that the suretyship agreement is dependent on the principal contract (Amalia, 2013). If the principal obligation is nullified, the suretyship is also extinguished. Its subsidiary character means that the surety can only be required to satisfy the debt once the debtor is proven to be in default (Harahap, Segi-Segi Hukum Perjanjian, 1982).

Article 1831 of the Civil Code further affirms this subsidiary principle by granting the surety the right to demand that the creditor first execute the debtor’s assets through seizure and sale to recover the debt. This right is commonly known as the *voorrecht van uitwinning* in Dutch legal terminology (Bergervoet, 2014). Article 1832 of the Civil Code provides that this right may be voluntarily waived by the surety in the agreement.

This indicates that the provision is classified as *regelend recht* or supplementary law, rather than *dwingend recht* or mandatory law.

In the context of bankruptcy and debt suspension proceedings governed by UUK-PKPU, the legal position of the surety is not specifically regulated. Article 1 point 3 of the law defines a debtor as a person who has a debt arising from an agreement or statute that can be claimed before a court. Articles 2 and 222 of the law further establish the general requirements for a debtor to be declared bankrupt or granted PKPU, namely the existence of two or more creditors and at least one debt that is due and collectible.

The absence of explicit provisions concerning parties other than the principal debtor has opened the possibility of a broad approach. In fact, creditors have submitted bankruptcy or PKPU petitions against both the debtor and the surety in a single application (Ramadhania, 2023). This has led to a shift in the legal understanding of suretyship, treating it similarly to joints and several liability, even though the two have fundamentally different characteristics, this differentiation also said by Paul Scholten in his book (J. Scholten, Y. Scholten, Bregstein, 2013). One key distinction is that the surety is only liable when the principal debtor is in default. Additionally, the surety does not directly receive the benefits of the debt (Koops, 2010).

The incomplete norms in the UUK-PKPU, particularly in Articles 2 and 222 concerning the requirements for bankruptcy and PKPU, Article 5 concerning multi-debtor petitions, and Article 1 point 3 on the definition of debtor, have resulted in the lack of legal limits on filing a joint petition against both the debtor and the surety. Under civil law, a suretyship cannot be equated with joint and several liability, where each co-debtor bears full and direct responsibility for the same debt.

2. Legal Reasoning of the Judges Regarding the Legal Position of Surety in Bankruptcy and Suspension of Debt Payment Obligations Cases

In the procedural framework of bankruptcy and debt suspension proceedings under Law Number 37 of 2004 (UUK-PKPU), commercial court judges are authorized to examine and adjudicate petitions for bankruptcy and PKPU filed by creditors against debtors. Pursuant to Article 8 paragraph (4) of the UUK-PKPU, the judge may grant the petition if there is "simple evidence" indicating that the requirements for bankruptcy have been fulfilled, namely the existence of two or more creditors and at least one debt that is due and collectible.

However, the law does not further clarify how the judge should assess a petition when it is not only directed against the debtor but also against a third party such as a surety (*borg*). In such cases, the panel of judges has discretion to conduct legal discovery/finding (*rechtsvinding*), particularly in determining whether the surety includes within the meaning of “debtor” as defined in Article 1 point 3 of the UUK-PKPU. If no applicable provision is found in statutory law, the judges may rely on other sources of law such as unwritten law, jurisprudence, treaties, and doctrine in hierarchical order (Harahap, 2019).

Below are several court verdicts that granted bankruptcy and PKPU petitions against both the debtor and the surety within a single proceeding, with the first respondent is principal debtor, and the other respondent are surety, including the factual background and judicial reasonings as follows:

Table I: Comparison of Legal Reasonings of the Judges in Determining the Position of Surety in Bankruptcy and Debt Suspension Cases

Aspect	Verdict No. 24/Pailit/2015/PN-Niaga.Surabaya	Verdict No. 141/Pdt.Sus-PKPU/2020/PN.Niaga.Jkt.Pst	Verdict No. 4/Pdt.Sus-PKPU/2020/PN-Niaga.Sby
Type of Suretyship	The second Respondent acted as a surety based on a Suretyship Agreement dated 15 July 2015.	The second Respondent acted as a surety based on a Personal Guarantee Agreement No. 30 dated 25 August 2016.	The second and third Respondents acted as sureties based on Personal Guarantee No. 53 dated 25 October 2013 and Corporate Guarantee No. 14 dated 5 January 2016.
Waiver of Surety's Privilege	Surety waived their privilege under Articles 1430, 1831, 1833, 1835, 1837, 1838, 1848, and 1849 of the Civil Code.	Surety waived their privilege under Articles 1430, 1431, 1821, 1831, 1832, 1833, 1834, 1835, 1837, 1838, 1843, 1847, 1848, 1849, and 1850 of the Civil Code.	The sureties waived their privilege under Articles 1430(1), 1831, 1833, 1837, 1847(1), 1848, 1849, and 1850 of the Civil Code.
Basis for Treating Surety as Debtor	The second Respondent was treated as a debtor under Article 2 (1) *jo.* Article 8 (4) UUK-PKPU.	Because the surety waived their privileges, the applicant could directly claim payment from the surety, thereby treating the surety as a debtor.	Because the sureties waived their privileges, the applicant could directly claim payment from them, thereby treating them as debtors.

Several court verdicts indicate that panels of judges tend to equate the legal standing of a surety with that of a debtor when the surety has waived their legal privileges as stipulated in Article 1831 of the Indonesian Civil Code. In Verdict No. 141/Pdt.Sus-PKPU/2020/PN.Niaga.Jkt.Pst, the court reasoned that since the second PKPU Respondent, acting as surety, had waived such rights, the creditor could directly claim payment of the principal debt from the surety. This reasoning was then used to establish that the surety qualified as a "debtor" under Article 1 point 3 of the UUK-PKPU and could therefore be subjected to PKPU proceedings.

This judicial approach assumes that the absence of restrictions in the UUK-PKPU allows for such treatment. However, this is the result from incomplete norms in the UUK-PKPU concerning the position of the surety in insolvency proceedings. The legal nature of suretyship differs fundamentally from that of the principal debtor. Surety does not create the debt, rather, they guarantee its performance. The surety's obligation is subsidiary, not primary. The waiver of rights under Article 1831 only affects the order of execution, not the legal capacity of the surety. As stated in Article 1820 of the Civil Code, suretyship remains accessory in nature, and the surety's liability is subsidiary.

Other verdicts, such as No. 24/Pailit/2015/PN-Niaga.Surabaya, also treated the surety as a debtor without clearly establishing how this shift aligns with civil law. The court merely cited Article 1 point 3 of the UUK-PKPU and concluded that the surety had a debt that could be claimed before the court. By treating the surety as if they were a principal debtor, the court creates a legal consequence that disregards the requirements for the surety's liability to arise. This approach departs from the structure and purpose of suretyship as regulated in the Indonesian Civil Code. The application

of incomplete norms without proper legal distinction risks undermining the principle of justice for third parties such as sureties.

First, the waiver of the privilege of execution (*uitwinning*) under Article 1831 of the Indonesian Civil Code does not transform the legal status of the surety into that of a principal debtor. Article 1832 of the Civil Code allows the parties to derogate from this right, but the subsidiary nature of the suretyship remains unchanged.

Second, there is no provision in the UUK-PKPU that states that such a waiver elevates the surety to the same legal standing as a debtor in the context of bankruptcy or PKPU petition. If the court grants the petition against the surety solely based on a waiver clause, such a verdict cannot be justified. It lacks legal certainty and violates the principle of justice.

Third, the absence of independent proof of debt against the surety in a joint petition with the principal debtor creates inconsistency in the application of Article 8 paragraph (4) of the UUK-PKPU, which requires “simple proof”. The requirement of simple proof should apply separately to each respondent. In the case of the surety, the proof should include: (1) the existence of a valid suretyship (*borgtocht*) agreement; (2) the occurrence of default by the principal debtor; (3) a valid waiver of the *uitwinning* right; and (4) fulfillment of the conditions for bankruptcy or PKPU against the surety. However, some panels of judges have failed to address elements (3) and (4), as can be seen in Verdicts No. 24, which omitted such considerations.

Judicial authority, as stipulated in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, is an independent power exercised to uphold law and justice. Therefore, in bankruptcy and PKPU proceedings, judges do not merely perform a technical role in assessing administrative proof but also bear a constitutional responsibility to ensure legal protection for all parties, including the surety as a third party in the contractual relationship.

In this context, the judge should reject a petition against the surety if there is no independent proof establishing the existence of a debt that is concrete, due, and collectible from the surety. A contingent or conditional guarantee cannot be treated as a due and payable debt as required under Articles 2 and 222 of the UUK-PKPU. Accordingly, the surety must be positioned in accordance with the legal nature of the suretyship agreement, namely as a secondary party who may only be subjected to insolvency proceedings upon the fulfillment of certain conditions, such as when the principal debtor first declared bankrupt.

The consequence of these incomplete norms is the potential emergence of erroneous precedents that deviate from the legal character of suretyship as both accessory and subsidiary. The inclusion of the surety in collective proceedings without recognition of their status as a third party disproportionately harms their legal rights. In this regard, what is required is legal discovery/finding (*rechtsvinding*) by the court to affirm that a petition against the surety may only be accepted if it can be independently proven that the surety owes a collectible debt, and only after the proceedings against the principal debtor have been completed and there remains an outstanding obligation.

3. Realization of the Principle of Justice towards the Position of Sureties in Bankruptcy and Suspension of Debt Payment Obligations

The General Elucidation of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations explicitly states that the principle of justice

is one of the fundamental principles within the Indonesian insolvency legal system. In this context, the principle of justice is intended to prevent arbitrary actions, whether by the debtor or the creditor, and to ensure legal protection for all parties involved. Nevertheless, the application of this principle to the surety (*borg*) has not been fully realized within Indonesia's insolvency law framework.

In this regard, the realization of the principle of justice must encompass all parties who may potentially be subjected to bankruptcy or PKPU petitions, including the surety. However, Articles 2, 222, and 1 point 3 of the UUK-PKPU do not regulate the legal standing of the surety as a subject who may be petitioned. This incomplete norm has led to the surety frequently being treated in the same manner as a debtor, even though under civil law as codified in the Indonesian Civil Code, their legal positions are fundamentally distinct.

In Aristotle's theory of justice, two principal forms are recognized, distributive justice and commutative justice (Aristoteles, 2011). In the context of a suretyship agreement, the relevant form is commutative justice, as the relationship is individual in nature, between the surety and the debtor, as well as between the surety and the creditor. As a third party who does not receive the direct benefit of the loan, the surety should only bear responsibility in a manner that is proportionate and consistent with the accessory and subsidiary nature of the agreement.

When the surety is directly petitioned for bankruptcy without separate proof or without ensuring that the principal debtor has undergone all the stages of asset liquidation, there is no balanced exchange of responsibility. This violates the principle of commutative justice, which requires placing each party according to their actual responsibility.

John Rawls, in *A Theory of Justice*, emphasizes the importance of procedural justice, as justice is not only assessed based on outcomes but also requires a fair process (Rawls, 2006). A fair procedure is an integral part of a just legal system. In this context, the surety holds a weaker position compared to the creditor because the surety does not incur the debt but only functions as a guarantor.

However, in many cases, the surety is denied procedural fairness. The surety is not granted a separate debt verification process, is not protected regarding the subsidiary nature, waived *voorrecht van uitwinning*, and is even petitioned jointly with the debtor. This reflects a failure of the legal system to implement procedural justice as mandated and expanded by the justice principle in the UUK-PKPU.

This view aligns with Egbert Koops's statement that (Koops, 2010):

> *"...dat degene die niet de hoofdverantwoordelijkheid draagt, niet behoort te lijden onder de nalatigheid van degene die die verantwoordelijkheid wel draagt."*

It means, the party that does not bear the principal responsibility should not suffer due to the negligence of the party that does.

Further, Ronald Dworkin argues that the legal system must treat every individual with equal concern and respect, by considering their respective capacities and roles (Dworkin, 1977). In this regard, the surety should not be treated the same as the debtor, as the surety's legal responsibility arises only when specific conditions are met, not from the inception of the debt.

Similarly, Lon L. Fuller asserts that a just legal system must uphold the inner morality of law, which includes clarity, consistency, and legal certainty (Fuller, 1964). When a surety is declared bankrupt without an explicit legal basis and without a clear

proof procedure, it undermines the moral foundations of law and the justice promised by a formal legal system.

Fair treatment does not mean treating all parties identically but treating them in accordance with their respective capacities and responsibilities. This principle is reaffirmed by Aristotle, who states that (Hernoko, 2010):

> *"Justice consists in treating equals equally and unequals unequally, in proportion to their inequality."*

The surety must not be equated with debtor or joint and several debtors (J. Scholten, Y. Scholten, Bregstein, 2013). Since under the Indonesian Civil Code, suretyship is expressly defined as an accessory and subsidiary obligation. These characteristics are inherent and cannot be derogated from by agreement, as they form the fundamental legal distinction between a surety and a co-debtor. In bankruptcy and PKPU proceedings, the surety is not the party bearing the principal responsibility. Therefore, justice requires that the surety be treated differently from the debtor.

A petition against the surety is only justifiable if the debtor has already been declared bankrupt, the asset distribution process has been completed, and a remaining debt still exists. Without a normative reform that clearly sets the limits and procedures for filing petitions against the surety, the Indonesian bankruptcy system will continue to expose the surety to structural injustice. The justice principle within the UUK-PKPU can only be fulfilled if the legal standing of the surety is determined in accordance with the accessory and subsidiary nature of the suretyship agreement.

CONCLUSION

The principle of justice in the legal standing of suretyship (*borg*) within Indonesian bankruptcy and debt suspension proceedings has yet to be properly realized. This is due to a normative deficiency in Law Number 37 of 2004 (UUK-PKPU), which does not explicitly regulate the position of the surety as a legal subject distinct from the debtor. Specifically, Article 2, Article 222, and Article 1 point 3 of the law do not provide clear restrictions or procedural requirements regarding petitions filed against sureties, resulting in legal practices that place them on equal footing with debtors. Such treatment is normatively unfair because it ignores the legal nature of suretyship as an accessory and subsidiary obligation. The absence of a clear distinction in the law allows creditors to file joint petitions against debtors and sureties, even though the surety does not bear the principal obligation and should not be subject to insolvency proceedings without an independent legal basis. To ensure justice, the legal regulation of suretyship in insolvency matters must reflect the accessory and subsidiary character of the relationship. Given that the surety's legal capacity is not the same as the debtor's, they must be treated separately and not automatically subjected to bankruptcy or PKPU alongside the debtor.

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