

# COMPARISON OF THE USE PRINCIPLES OF BUSINESS CONTINUITY IN BANKRUPTCY LAW AND THE JUDGE'S CONSIDERATION DECIDES THE BANKRUPTCY CASE BETWEEN INDONESIA AND WITH UNITED STATES

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**Abstract:** *This study aims to compare the use of the principles of business continuity in bankruptcy law and judge's considerations in deciding bankruptcy cases between Indonesia and countries that use the common law system, especially in the United States. This research method is normative juridical using secondary data obtained from literature studies and supported by analysis of solutions through conceptual approaches, comparisons, and case studies of bankruptcy decisions at the first-level commercial court in Central Jakarta. The results of this study indicate that the United States has applied the principles of business continuity to companies that are healthy with the insolvency test, while Indonesia has not, so it is necessary to use it as the judge's main consideration. Based on data, the panel of judges used the principles of business continuity at the Central Jakarta Commercial Court in deciding bankruptcy cases as the main consideration for only 1.9% of the 416 total decisions from 2015 to 2022. There are several articles in Law 37/2004 that do not reflect the principles of continuity of business, especially the articles that are often used by judges to decide on bankruptcy cases, namely article 1 paragraph (1) regarding "the definition of bankruptcy" and article 2 paragraph (1) concerning "the terms of bankruptcy" including the article related to article 8 paragraph (4). Recommended that lawmakers carry out a reconstruction of the articles that are often used by judges in deciding bankruptcy cases.*

**Keywords:** *Bankruptcy Law, Principles of Business Continuity, Judge's Consideration, Comparison, Indonesia, United States.*

## 1. Introduction

Rapid economic development and cross-border trade and the effects of globalization can affect changes in national law (Widyantari & Sulistiyono, 2020). In this economic growth, large companies also grow, and foreign companies also grow in Indonesia, it is possible for debt disputes to occur between cooperating parties, let alone involving foreign companies that have different laws (Yohanes et al., 2017). Every type of dispute that occurs always demands a fair, fast, and transparent resolution and resolution through bankruptcy law as stipulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations or abbreviated as "UU 37/2004" (Sulistiyono & Hum, 2005).

This study aims to compare the use of the principles of business continuity in bankruptcy law and judges' considerations in deciding bankruptcy cases between Indonesia and the United States.

Bankruptcy law in Indonesia has a background in resolving disputes during the monetary crisis that hit Asian countries including Indonesia in mid-1997 and has caused great difficulties for the national economy and trade. But with economic development (Sulistiyono, 2007) and changes in globalization demand improvement or reconstruction of Indonesian bankruptcy law by making comparisons with other countries which governments widely referred to in the world (Lindsey & Taylor, 2000). Until this research was made, namely in December 2022, bankruptcy law in Indonesia had not been perfected. Plans for renewal have been carried out with the drafting of a bill on amendments to Law 37/2004, which until now has not been enacted, so it is required and requires "consideration by a judge in deciding bankruptcy" that is as fair as possible and takes into account all interested parties, including companies from other countries operating in Indonesia (Sulistiyono, 2018).



Unlike the bankruptcy cases that occurred in the United States, the company was declared bankrupt and had already gone through the company health test process, so the implementation of the principles of business continuity had been applied when the company filed for bankruptcy in court. Examples of foreign companies operating in Indonesia include Manulife, Prudential, Samsung, Coca-Cola, Google, IBM, Intel, HP, Merck, Nike, Philip Morris, Visa, Procter and Gamble, Boeing, and Ford. In addition, in the automotive, energy, and mining sectors, such as Toyota, Honda, Suzuki, Mercedes, Chevron, Freeport, and many more. The potential for bankruptcy is highly probable by Indonesian bankruptcy law, regardless of the amount of debt and whether the company is in a state of insolvency (the condition of the company is in an unhealthy condition and is no longer able to pay its obligations) or solvent.

A few years ago, the example of a controversial bankruptcy decision happened to Manulife, Prudential, and Telkomsel; when the company was deemed unable to pay or unwilling to pay its obligations, the panel of judges could easily decide on bankruptcy. Companies considered unable to pay and unhealthy; one example is Telkomsel, whose performance continues to grow, a cellular operator that claims to have more than 122 million subscribers, posted revenue of around IDR 48.73 trillion or an increase of 11 percent compared to the same period in 2011 (Hindra, 2012).

In the United States, a country with an Anglo-Saxon legal system, bankruptcy law is regulated by the Bankruptcy Code. The Bankruptcy Act in the United States implements that bankruptcy of the Debtor is only possible if the Debtor is already insolvent. According to Sutan Remy Sjahdeini, the law in the US Bankruptcy Code, companies experiencing financial difficulties (financial distress) are not liquidated immediately. Still, they must first be reorganized considering the principles of business continuity because creditors are believed to be better protected. The US Bankruptcy Code will provide a fresh start (restarting a business without burdening its debts) for bankrupt debtors who have good faith after all their assets are liquidated, and the proceeds are distributed to their creditors (Sjahdeini, 2016).

Learning from the example cases above, it is necessary to use the principles of business continuity in considering bankruptcy decisions by judges. It is also necessary to look for lessons learned from the United States as best practices so that bankruptcy law in Indonesia can be perfected. This research is expected to contribute ideas that are useful for knowledge in general, legal science in particular, and more specifically in the field of bankruptcy law in Indonesia as an effort to realize legal certainty, justice, and benefits to the legal system in Indonesia.

## **2. Literature Review**

### **a. Principles of Business Continuity**

The Bankruptcy Law in force in Indonesia contains the principles of bankruptcy law, both expressly and implicitly stated. Several principles must be considered by a country's bankruptcy law to meet some of the primary needs of the business world, both national and international; it must adopt the principles of bankruptcy law that apply globally. The principles of Indonesian bankruptcy law include the following:

- 1) The Principles of Balance: preventing the abuse of bankruptcy institutions by Debtors and Creditors who do not have good intentions.
- 2) The Principles of Business Continuity: a prospective company continues.
- 3) The principles of justice: can fulfill a sense of justice for interested parties.
- 4) Principles of Integration: the formal legal system and its material law are an integral part of the national civil law system and civil procedural law.

Meanwhile, the principles of bankruptcy law that are in line with global provisions, as applicable in the United States, according to Sutan Remy Sjahdeini, are as follows:

- a. Only insolvent debtors can be bankrupt.
- b. Provision of a financial fresh start to bankrupt debtors after completion of settlement actions.



#### **b. Judge's Consideration**

The judge's consideration is one aspect that is very important to realize the value of a judge's decision which contains justice (*ex aequo et bono*) and contains legal certainty, besides that there are also benefits for interested parties, so this judge's consideration must be properly addressed (Sulistiyono, 2018)

If there is a vacuum in the rule of law or the regulations are not clear, then the solution is regulated in Article 27 of Law No. 14 of 1970 states "Judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that live in a society". This means that a judge must have the ability and activeness to find the law (Mertokusumo & Pitlo, 1993)

Judges in finding law must uphold justice, expediency, and legal certainty and cannot be separated from juridical considerations (consideration of regulations formed to resolve legal issues or fill legal voids by taking into account existing rules, to guarantee legal certainty and a sense of community justice). ), philosophical considerations (considerations that describe the legal principles and philosophy of the Indonesian people originating from Pancasila and the 1945 Constitution), and sociological considerations (considerations that describe that regulations are formed to meet the needs of society in various aspects, taking into account social impacts, interested parties and concerning the needs of the state).

#### **c. Legal certainty theory**

The provisions of article 28D paragraph (1) of the 1945 Constitution, "Every person has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law".

Legal certainty is part of the effort to realize justice. Legal certainty itself has a real form, namely the implementation and law enforcement of action regardless of what the individual is doing, without any discrimination.

Legal certainty from the point of view of the principles of business continuity in bankruptcy law is a legal norm that can guarantee that the law is carried out according to its rights so that it can be used as a guideline for a judge's consideration in deciding bankruptcy cases fairly. The following experts put forward the theory of legal certainty: (Wijayanta, 2014)

1) Gustav Radbruch explained that legal certainty is one of the objectives of the law itself. Law is a positive thing that can regulate the interests of every human being in society and must always be obeyed. Legal certainty is a condition that is certain and fair.

2) Jan M. Otto argues that legal certainty can be achieved if the substance of the law is to the needs of the community.

3) Sudikno Mertokusumo, it is a guarantee that the law can work properly, meaning that it must be carried out in a good way and have a juridical aspect that can guarantee certainty that the law functions as a rule that must be obeyed.

In this study, the authors chose the theory of legal capacity from Gustav Radbruch, because it has strong relevance to this research, namely legal certainty is always preceded by justice and usefulness.

#### **d. Economic analysis of law theory**

Richard A Posner (1970) in his book entitled economic analysis of law states that common law rules are in fact "efficient", and common law rules should be efficient (d'Agostino & Greenberg Max E.R., 2022). These two ideas become a new paradigm for the approach to economic analysis in law. The idea was born in the United States which adheres to common law where the judge's decision has an important role (Crespi, 2011). According to Posner, the court has two functions; First, interprets the agreements of the interested parties. Second, providing services to the community in solving the problem in question. One of the importance of the court is not only to enforce statutory regulations but also to interpret these laws so that they can assist in increasing economic efficiency (Posner, 1973).

### 3. Research Methods

This research was conducted qualitatively using a doctrinal approach, namely by searching, downloading, inventorying and studying and analyzing data sources of applicable laws and regulations, the results of bankruptcy decisions by judges at the Central Jakarta Commercial Court from 2015 to 2022 on the web page of the Directory of Decisions Supreme Court of the Republic of Indonesia with the link <https://putusan3.mahkamahagung.go.id/direktori/index/kategori/kepailitan.html> and other secondary data. Conducting literature studies, analyzing expert scientific results, analyzing relevant research, studying related legal books and journals as well as comparing bankruptcy law between Indonesia and the United States as well as comparing judges' considerations in deciding bankruptcy cases.

### 4. Research Results and Discussion

#### a. Comparison of The Use Principles of Business Continuity

##### 1) Comparison of Bankruptcy Law

The comparison in this study is focused on the definition of bankruptcy. According to Levinthal, the notion of bankruptcy which is based on one legal system alone is not appropriate to describe the true meaning of bankruptcy so that it can be applied to all different legal systems (Levinthal, 1918). According to John M. Echols and Hassan Shadily, Bankruptcy or bankruptcy means that the debtor is in a state of stopping paying debts because he is unable.

The following is a comparison of bankruptcy law in Indonesia and the United States.

Comparison	Indonesia	United States
Use of Business Continuity Principles in bankruptcy law, particularly about the notion of bankruptcy	The definition of bankruptcy in bankruptcy law Article 1 paragraph (1) of Law 37/2004 namely "general confiscation of all assets of the bankrupt debtor", does not yet reflect the principles of business continuity, because this article focuses more on the liquidation of assets and does not reflect the causes of bankruptcy, more explained that due to bankruptcy, the Debtor's assets were confiscated and the curator under the supervision of the Supervisory Judge was tasked with managing and settling all the assets of the Debtor who had gone bankrupt.	The definition of bankruptcy in the common law system is focused on the causes of bankruptcy, namely bankruptcy is the legal status of a person who is unable to fulfill his obligations to pay his debts (Thompson, 1967). Bankruptcy Law in the United States, bankruptcy is only possible if the Debtor is already insolvent (Sjahdeini & Ismail, 2014). The United States Bankruptcy Act has adopted the insolvency test. This test is intended to determine the extent of the Debtor's ability to fulfill his obligations.
	Article 2 paragraph (1) of the Indonesian Bankruptcy Law does not stipulate the amount of debt as a condition for bankruptcy and does not recognize the test of insolvency, so judges only use legal considerations, not paying	The legal system in the US applies Bankrupt fresh start, namely freeing debts to debtors who have good intentions. This bankruptcy discharge is only carried out for individual debtors (Lieberman & Siedel, 1989).

	attention to whether the company is healthy and capable or incapacitated. This greatly affects the security of foreign investment in Indonesia.	
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According to the author of the Definition of Bankruptcy in Article 1 paragraph (1) of Law 37/2004, it does not reflect the principles of business continuity and is not in line with universal or global provisions.

Until the current conditions, namely December 2022, Indonesia is still open for the operation of foreign companies, so the definition of bankruptcy in Article 1 paragraph (1) of Law 37/2004 should be adjusted or harmonized with a universal meaning (global provisions). Bankruptcy is defined as a company that is no longer able to fulfill its obligations to pay its debts because the company has insufficient funds to continue its business (the company is in a state of insolvency).

Based on the explanation of the results of the research above and the comparative approach with the United States which is a reference for other countries, bankruptcy law in Indonesia needs to be considered for reconstruction, especially in the "definition of bankruptcy" which must be interpreted universally (global provisions). In the period before the refinement of this law, it was necessary for the panel of judges to "consider the condition of the company" when deciding on bankruptcy cases.

## 2) Judge's Consideration Comparison

There are times when the Law's explanation is incomplete or, there is a vacuum in the legal rules or the rules make a different interpretation, so to overcome this it is regulated in Article 27 of Law No. 14 of 1970 states "judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that live in a society", meaning that a judge must have the ability and activeness to find the law in consideration of deciding a bankruptcy case.

The following is a comparison of the judge's considerations between Indonesia and the United States (a country that is widely followed by other countries). The basis for consideration of the panel of judges in deciding bankruptcy in each country can be influenced by the legal system applied in that country.

Comparison	Indonesia	United State
The use of the principles of business continuity in judge's considerations in deciding bankruptcy cases.	Judge's considerations in deciding bankruptcy are mostly based only on the terms of bankruptcy, namely article 2 paragraph (1) of Law 37/2004 "Debtors who have two or more creditors and do not pay off at least one debt that has matured and can be collected, are declared bankrupt by decision court, either at his request or at the request of one or more of his creditors".	The consideration of judges in the United States prioritizes corporate rescue, compared to liquidating the debtor's assets (Sjahdeini& Ismail, 2014). The consideration of the judges of the United States is implementing a fresh start bankruptcy, namely freeing debts to debtors who have good intentions. This bankruptcy discharge is only carried out for individual debtors as adhered to by the US Bankruptcy Code. Discharge was also widely accommodated in the renewal of individual bankruptcy laws in European countries in the late 20th and early 21st centuries (Tabb, 2005).The application of Chapter 11 of the US Bankruptcy Code even inspired several other countries to reform their bankruptcy laws, such as Japan (Abe, 2003), France (Schick, 2006),and European Countries(Miller &Waisman, 2004)as well as the United Kingdom which is supported by a special directorate for

	<p>And also based on Article 8 paragraph (4) of Law 37/2004 "The application for a declaration of bankruptcy must be granted if there are facts or circumstances that are simply proof that the requirements for being declared bankrupt as referred to in Article 2 paragraph (1) have been fulfilled." These two articles do not reflect the principles of business continuity, because a company that is healthy and able to pay can easily go bankrupt. Based on the data sources in Figure 1 or Table 1, it can be seen that of the 416 judges' decisions at the Central Jakarta Commercial Court, only 1.9% or 8 decisions used the principles of business continuity by the panel of judges.</p>	<p>dealing with insolvency, namely The Insolvency Service's Legal Services Directorate.</p> <p>The application of the legal system in the United States provides a basis for judges' considerations in deciding bankruptcy cases. The judge is more directed at business continuity or the continuity of the debtor's business.</p> <p>Judges' considerations in the United States are based on the results of the insolvency test, among others:</p> <ol style="list-style-type: none"> <li>1) The Ability to Pay Solvency Test (Cash Flow Solvency Test) Is a test used to assess the debtor's ability to pay by determining whether a debtor can pay his debts when the debt is due.</li> <li>2) The Balance Sheet Test Is a debt assessment test by looking at the ratio of debt that is greater than the total assets.</li> <li>3) The Capital Adequacy Test Is a debt assessment test by providing a Delay in Debt Payment or what is often referred to as "Postponement of Debt Payment Obligations" to give the Debtor the opportunity to manage the company from the beginning inside to a new one so that the company can get back on its feet.</li> </ol>
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Taking into account the comparison above, bankruptcy law in Indonesia still needs to be improved. Following is a source of data on judges' decisions at the Central Jakarta Commercial Court from 2015 to 2022, which proves that it is difficult for judges to apply the principles of business continuity. The consideration of judges in deciding bankruptcy cases using the principles of business continuity is only 1.9% of the 416 decisions, see figure 1 or table 1.

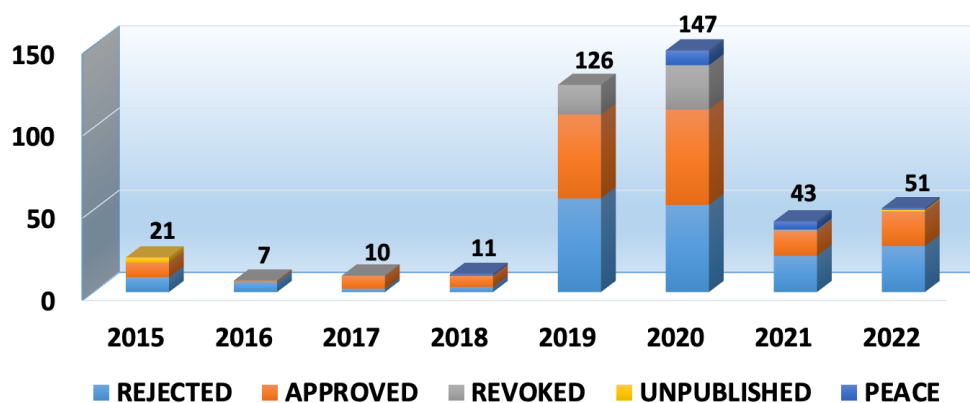


Figure 1. Judges' Decisions at the Central Jakarta Commercial Court for 2015 - 2022



**Table 1. Judges' Decisions at the Central Jakarta Commercial Court for 2015 - 2022**

No		2015	2016	2017	2018	2019	2020	2021	2022	TOTAL
1	<b>REJECTED</b>	9	6	2	3	57	53	22	28	180
a	Bankrupt	8	5	1		32	22	5	5	78
b	Postponement of Debt Payment Obligations			1	3	18	22	5	4	53
	Principle of Business Continuity	1				1		1	1	4
c	The Cancellation of The Peace		1			2	2		7	12
d	Others (other lawsuits, procedure renvoi, dismissed)					4	7	11	11	33
2	<b>GRANTED</b>	9	1	8	8	51	67	20	22	186
a	Bankrupt	6	1			12	14	1		34
b	Postponement of Debt Payment Obligations	2		3	3	15	35	8	17	83
	Principle of Business Continuity	1		1		1	1			4
c	The Cancellation of The Peace			1		5	2	3	2	13
d	Others (Another lawsuit, approved in part)			3	5	18	15	8	3	52
3	<b>REVOKED</b>					18	27	1		46
4	<b>UNPUBLISHED</b>	3							1	4
	<b>TOTAL</b>	<b>21</b>	<b>7</b>	<b>10</b>	<b>11</b>	<b>126</b>	<b>147</b>	<b>43</b>	<b>51</b>	<b>416</b>

The explanation in Figure 1 or Table 1 is that 8 judges' decisions using the principles of business continuity during 2015-2022 can be described as shown in Figure 2 and Figure 3.

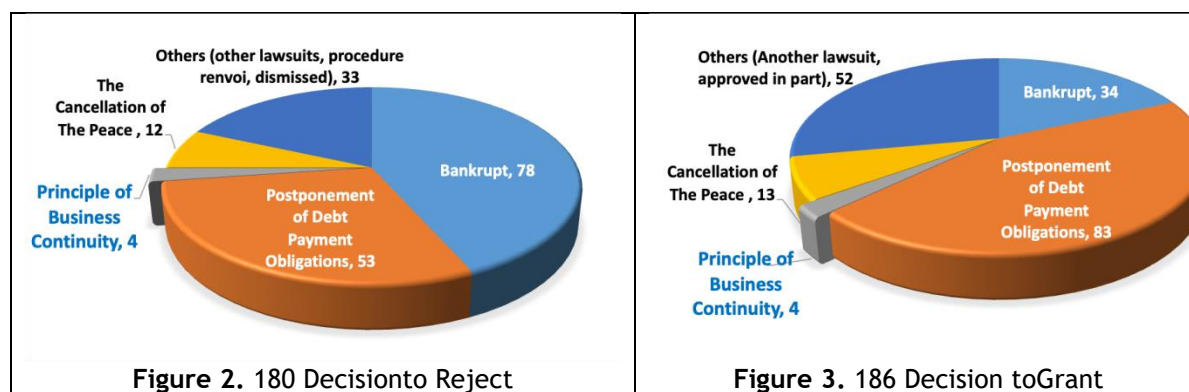


Figure 2: only 4 (2.22% of 180) decisions using the principles of business continuity during 2015-2022 with details in table 2.

**Table 2. The Use of Principles of Business Continuity**

2015	2019	2021	2022
1 decision	1 decision	1 decision	1 decision
Rejecting bankruptcy requests from creditors	Rejecting bankruptcy requests from creditors	Rejecting bankruptcy requests from creditors	Rejecting the cancellation of the peace from Creditors

The meaning of table 2 is that by considering the use of the principles of business continuity, there are 3 decisions rejecting bankruptcy requests from creditors because the debtor is still able to maintain business continuity and there is no negligence in carrying out the peace agreement and 1 decision rejecting the cancellation of the peace because the debtor is not negligent in carrying out the contents of the peace agreement and in line with the principles of business continuity.

Figure 3: only 4 (2.15% of 186) decisions using the principles of business continuity with details in table 3.

**Table 3. The Use of Principles of Business Continuity**

2015	2017	2019	2020
1 decision	1 decision	1 decision	1 decision
Granted the bankruptcy request	Granted the cancellation of the peace	Granted the cancellation of the peace	Granted the cancellation of the peace

The meaning of table 3 is that the judge, taking into account the use of the principles of business continuity, has 1 decision to grant the bankruptcy request, because the debtor is no longer able to pay his obligations (for example the “mandala air” case) and 3 decisions to grant the cancellation of the peace because the judge has used the principles of business continuity by providing an opportunity to carry out peace, but the Debtor breaks his promise and violates the peace agreement.

Studying the 416 decisions, there are judges' considerations that reflect the principles of business continuity, namely 12 decisions (3%) rejecting the cancellation of the peace (Figure 2) and 83 decisions (16%) granting “The Postponement of Debt Payment Obligations” request (Figure 3). Based on these data sources, it can be concluded that the use of the principles of business continuity in determining the application for bankruptcy was not much considered by the panel of judges, even though this principle has been regulated in the elucidation of Law 37/2004.

Judges' considerations in deciding bankruptcy cases must uphold justice, expediency, and legal certainty and cannot be separated from several other considerations, including:

#### **1) Juridical considerations**

Juridical considerations are the first and foremost aspect, which is based on applicable laws and seeks laws related to the case at hand. Consideration of regulations formed to resolve legal issues or fill legal voids by considering existing regulations.

Judges need to master the principles of corporate law as a basis for consideration in deciding bankruptcy cases (Ramli, 2008). The judge's considerations are also heavily influenced by written law, for example in the United States, the requirements for a bankruptcy application require an insolvency test (a situation where the debtor does not have sufficient liquidity to pay off his debt). Insolvency that leads to bankruptcy is affected by the cessation of creditors' trust in the ability of debtors to be able to manage and pay their debts, considering the maturity of the agreed agreement (Nesvold et al., 2011).

The implementation of the insolvency test in the United States provides a tighter guarantee for the protection of companies (Debtors) compared to Indonesia which is regulated in Article 8 (4) of Law 37/2004 the application for a bankruptcy statement “must” be granted as far as the circumstances in Article 2 paragraph (1) simply proven. The word “must” in article 8 does not reflect the principles of business continuity.

#### **2) Philosophical considerations**

Philosophical considerations are considerations that are based on truth and justice and describe the legal principles and philosophy of the Indonesian people which originate from Pancasila and the 1945 Constitution (Sulistiyono, 2007).

Mastery of cases and understanding of judges is necessary, especially to ensure the continuity of the debtor and fairness of the parties in making decisions. Bankrupt companies will affect national economic growth to support Article 33 paragraph (4) of the 1945 Constitution, namely “The National Economy is organized based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity”.

Bankruptcy decisions for companies that are healthy and able to pay will have an impact on hampering national economic growth, namely transactions between companies will decrease and state revenue in the form of taxes will also decrease. A decrease in income can result in a decrease





in contributions to society in the form of corporate social responsibility (CSR) (Pujiyono et al., 2017).

### 3) Sociological considerations

Sociological considerations are considerations that illustrate that regulations are formed to meet community needs in various aspects, considering impacts (Pujiyono et al., 2017), interested parties, and the needs of the state.

Based on the explanation above, several articles do not reflect the principles of business continuity, in particular the articles that are often used by judges in deciding bankruptcy, namely article 1 paragraph (1) of Law 37/2004 concerning the definition of bankruptcy and article 2 paragraph (1) concerning the terms of bankruptcy, including the related article, namely article 8 paragraph (4) regarding the obligation for a judge to decide bankruptcy if the debt is proven simply. This weakness is because this Law was created in a situation of monetary crisis whose main objective is to save the assets of the Debtors which can be divided among all Creditors fairly. The current conditions are much different, there are changes and developments in the era that need to be aligned, adjusted, and reconstructed. It has been proven that many companies that are healthy and able to pay can easily go bankrupt. Examples of such cases include PT. Manulife, PT. Prudential and PT. Telkomsel.

### b. The Judge's Reasons must Use The Principles of Business Continuity

Noting the need for a judge's consideration of the principles of business continuity in deciding the bankruptcy of a company that is healthy and able to pay, the authors use two approaches, namely the legal approach and the economic approach.

#### 1) Legal Approach

Following the provisions of article 28D paragraph (1) of the 1945 Constitution, "Every person has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law". Legal certainty regarding the principles of business continuity in Bankruptcy Law has an important role in providing legal protection for Debtors who are healthy and able to pay, as in the example of the bankruptcy case of PT. Manulife, PT. Prudential and PT. Telkomsel.

According to Satjipto Rahardjo, the legal principle is the heart of legal regulations because the legal principle is the broadest basis for the birth of legal regulations. The principles of continuity of business guide judges that prospective companies are to continue or healthy companies are to be maintained to support national economic growth as mandated in Article 33 paragraph (4) of the 1945 Constitution and "The Bankruptcy and Postponement of Debt Payment Obligations".

Injustice will occur if the amount of debt is small for a very large asset value, it must be declared bankrupt which results in the debtor's company assets being transferred to the curator and the continuity of the company will be determined by the completion of the bankruptcy process, said Man S. Sastrawidjaja (2006). If the reconciliation efforts are rejected and proceed to the execution stage (Figure 2, there are 29% or 53 judges' decisions to reject "Postponement of Debt Payment Obligations" out of 180 decisions), then it is certain that the Debtor's company is in a state of disrepair which will result in general confiscations carried out by the authorities.

Gustav Radbruch explained that legal certainty is a positive thing that can regulate interests and must always be obeyed. Law enforcement must comply with three principles, namely the principles of justice (*gerechtigheit*), the principle of expediency (*zweckmassigkeit*), and the principle of legal certainty (*rechtssicherheit*).

Based on the explanation of some of the opinions of the experts above, the authors express their opinion that the judge's consideration in deciding bankruptcy for a company that is still healthy and able to pay must consider the use of the principles of business continuity by the provisions in the Bankruptcy and Postponement of Debt Payment Obligations.

Following are the reasons judges must use the principles of business continuity in deciding bankruptcy cases through a legal approach, including:



a) Deciding bankruptcy cases on companies that are large and healthy and able to pay debts has a major impact on the Debtor because the Debtor will lose his right to develop the assets owned. Legal certainty in a judge's decision must take into account the principles of business continuity, of course, it must be able to distinguish whether a company is truly healthy or bankrupt, able to pay or unwilling to pay.

b) The principles of business continuity that have been determined in the Bankruptcy and Postponement of Debt Payment Obligations aim to support the development of national law to create a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia article 33 paragraph (4) so that judges must consider in deciding bankruptcy cases.

c) The judge is expected to save the prospective debtor's business rather than liquidate his assets. If the principle of business continuity is not used, it will cause injustice and destroy the company which will disrupt the economy, because all transactions will be disrupted.

## 2) Economic Approach

Companies that are not in a condition of bankruptcy can pay their debts and still make a large contribution to the national economy.

Considering the reasons above, the economic approach to resolving bankruptcy cases is very relevant for research. The author will use the economic analysis of law theory approach from Posner because he is a legal expert, legal theorist, and economist as well as a judge. He is a pragmatist in philosophy and an economist in legal methodology (Posner, 1973).

Richard A Posner (1970) in his book entitled *Economic Analysis of Law*, states that common law rules are in fact "efficient", and common law rules should be efficient (d'Agostino & Greenberg, 2022). The judge's decision has an important role in considering the two new paradigm ideas (Crespi, 2011). Through economic principles, Posner hopes to increase legal efficiency, including efficiency in improving social welfare (Philipson & Posner, 1993).

The rule of law is supposed to increase efficiency and provide valuable input for social justice and welfare (Mercuro & Medumo, 1999).

Todd J. Zywicki and Anthony B. Sanders, in their writing entitled "Posner, Hayek, and The Economic Analysis of Law" that the consideration of the future economic system for social welfare will be very large, where judges must be able to understand legal rules including theories legal theory for the sake of the implementation of a good legal system (Zywicki & Sanders, 2008).

Following are some of the reasons judges must use the principles of business continuity in deciding bankruptcy cases through an economic approach. Judges must have efficient resource goals for their decisions through the principles of business continuity to maintain national economic fundamentals, because:

1) Bankruptcy decisions by judges against companies that are healthy and able to pay, cause many losses for debtors, creditors who are not in dispute, and stakeholders, including:

a) **State:** Large and healthy companies can pay large taxes to the state and have an impact on the livelihood of many people.

b) **Customers:** The panel of judges pays attention to the state's interest in tax revenues from VAT (transactions between business actors and customers).

c) **Employee:** The panel of judges should pay attention to the rights of employees in companies that are still in good health and not eligible for bankruptcy and provide income tax to the state.

d) **Work partners (business partners):** Increase economic development by maintaining cooperation agreements between debtors and their partners (Pujiyono et al., 2021). Partners exist because they are needed to develop the company's business in a better direction.

e) **Suppliers (Supplier):** Building the economy through developing suppliers to companies in running their business to achieve mutually beneficial conditions (Pujiyono et al., 2021).

f) **Community:** The community will benefit from a portion of the profits donated through the Corporate Social Responsibility (CSR) program to the community. The regulations governing CSR are



Article 74 Paragraph (1) Law Number 40 of 2007 concerning Limited Liability Companies concerning legal obligations that must be carried out by a company (Pujiyono et al., 2017).

2) The impact of the decision, if the wrong decision is taken then an unfair legal formation will occur because every decision can be used as a reference (jurisprudence).

3) In deciding a bankruptcy case, the panel of judges needs to consider psychological considerations by paying attention to the level of caution, whether a domestic company or a global company (Soehartono, 2014).

4) Judges need to consider the impact of bankruptcy which will destroy healthy companies and also destroy investor confidence and destroy national economic growth.


Based on the explanation above, taking pay attention to the legal certainty theory approach and the Economic Analysis of Law theory approach from Posner, the authors convey the importance of judges using the principles of business continuity in bankruptcy law in deciding prospective company bankruptcy (companies that are healthy and able to pay and have larger assets). of its debts) to maintain national economic growth.

## 5. Conclusion

The United States prioritizes the continuity of the Debtor's business, while in Indonesia according to Article 1 paragraph (1), it is more about asset liquidation. Therefore, it is necessary to adjust the "definition of bankruptcy" with a universal understanding. The implementation of the principles of business continuity has been carried out through an insolvency test as a condition for applying for bankruptcy. In Indonesia, according to article 2 paragraph (1) concerning "the terms of bankruptcy", it cannot distinguish a company that is healthy or bankrupt. There are weaknesses in bankruptcy law and following the provisions of Article 28D paragraph (1) of the 1945 Constitution "Every person has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law" as well as the principles of business continuity that has been regulated in the general explanation of Law 37/2004, the judge must have the ability and activeness to "consider legal findings" and consider his decision based on juridical, philosophical and sociological views. The Indonesian government must immediately reconstruct the articles that are often used by judges in deciding bankruptcy. Refinements can be prioritized in Article 1 paragraph (1), Article 2 paragraph (1), and Article 8 paragraph (4) which can provide security for the operations of foreign and domestic companies in Indonesia. Of course, it can also have an impact on improving and maintaining national economic fundamentals.

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