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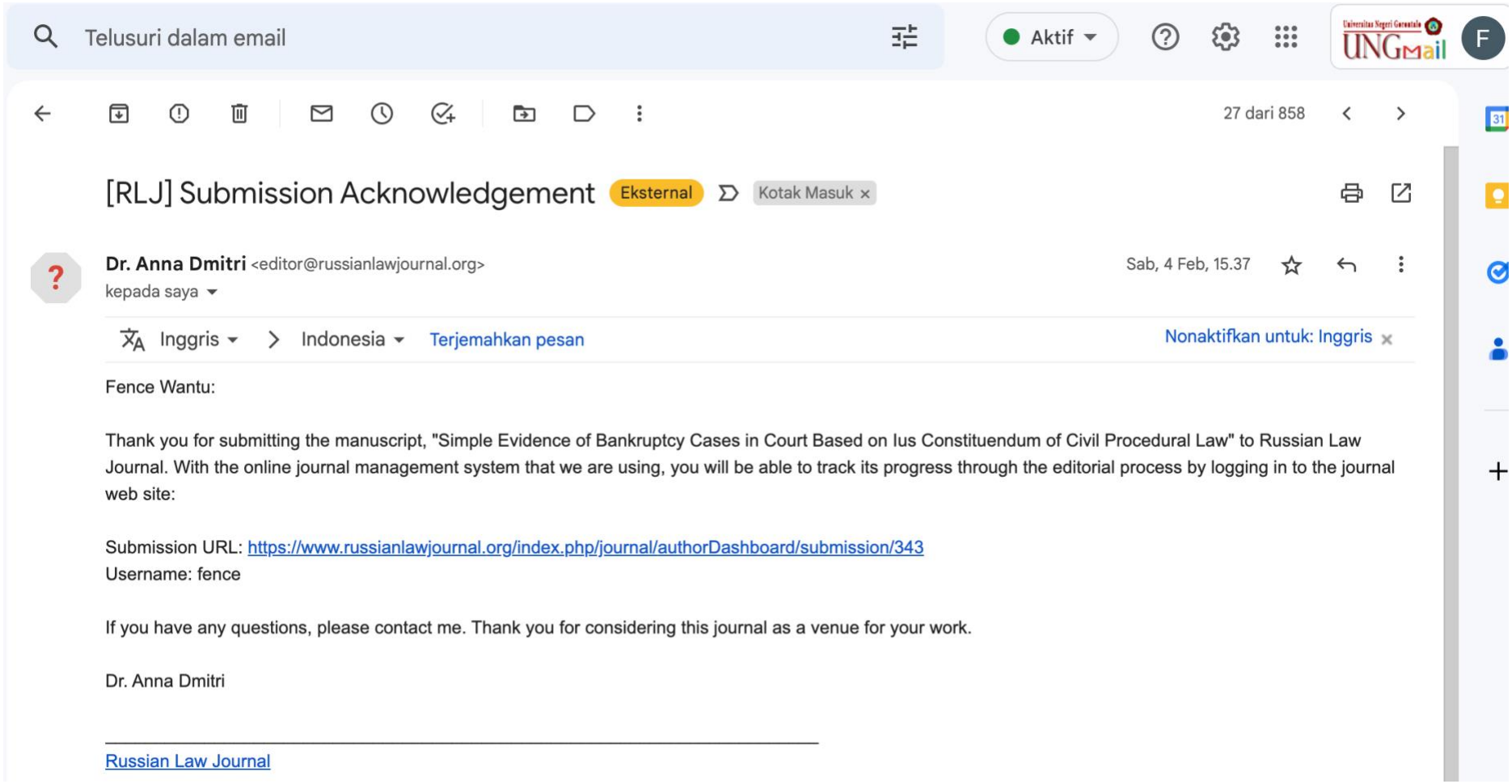
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Simple Evidence of Bankruptcy Cases in Court Based on *Ius Constituendum* of Civil Procedural Law

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Abstract

Simple evidence principle in the Commercial Court is not easy to imagine. Simple evidence (*sumir*) currently still uses civil procedural law as a formal source in court. In addition it exists in various other regulations such as bankruptcy. The purposes of this study are 1). Analyze simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts. 2). Analyze the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law.This research used method of normative legal research. It also used doctrinal research. The approach is carried out using the following methods: statute approach, conceptual approach, and case approach.The results of the research indicated that simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts, are not as simple as one imagine because in reality there are inconsistencies in the panel of judges in examining cases. Afterward, the *ius constituendum* regulation for simple evidence (*mumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining the case.

Keyword: *Evidence, Bankruptcy, Court, Ius Constituendum, Civil Procedural Law*.

A. Introduction

Judicial power can be stated to occupy a strategic position in a rule of law state. This is in accordance with what is emphasized in the 1945 Constitution which reads "the State of Indonesia is based upon law (*Rechtstaat*), it is not based upon more power (*Machtstaat*)[1]. Judicial power is a power which contains the task of carrying out legal principles through, among other things, the judiciary. Judicial power is an independent power to administer justice in order to uphold law and justice[2].

This affirmation is also contained in the Judicial Power Act which states that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila for the sake of the implementation of the legal state of the Republic of Indonesia[3].

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[1] Fence M. Wantu, 2011, *Idee Des Recht: Kepastian Hukum, Keadilan Dan Kemanfaatan (Implementasi Dalam Proses Peradilan Perdata)*. Pustaka Pelajar. Yogyakarta. Hlm 6

[2] Pasal 24 ayat (1) Undang-Undang Dasar tahun 1945.

[3] Pasal 1 UU No 48 tahun 2009 Tentang Kekuasaan Kehakiman

The authority and credibility of the court institution must be properly maintained in the public, as the court institution is a place for justice seekers to seek the truth. There is a growing opinion that the judiciary is often said to be the last bastion of law and order. This also applies to the judicial process in Indonesia, including civil courts.

In principle, civil courts provide legal protection to everyone, which is caused by vigilante actions (*eigenrichting*) carried out by fellow legal subjects within private relations. In other words, civil justice must provide an assurance for the implementation of law in the field of civil law[4].

A true and just judicial process will contribute to the truth and enlighten people's behavior gracefully. Furthermore, a correct and wise court decision will prevent the emergence of vigilante actions and distrust of the court institution.

In the process of proceedings in court, evidence plays a very vital role, so that many opinions state that proving when a case occurs is a complex part. According to M. Yahya Harahap[5], evidence is a complex part as it proves something related to the ability to construct events that have occurred as truth.

The process of self-proving in court practice is influenced by the applicable legal system. In general, according to Satjipto Rahardjo[6], there are two different legal systems, which are the Continental European Legal System and the English Legal System. This system is commonly known as the Roman-German Legal System or Civil Law System for the former, and the Common Law System for the latter.

Basically, evidence in civil procedural law can be distinguished from bankruptcy cases. In civil procedural law, evidence is clearly regulated in Article 1865. Meanwhile, in bankruptcy cases regarding evidence, there is a specificity, which is the use of simple evidence. The meaning of simple evidence can be interpreted as the ability of both the debtor and the creditor to prove the event of:

a) Debtor who has more than one creditor;
b) Debtor does not pay off the due and collectible debts;
c) Has been declared bankrupt based on a court decision either voluntarily or directly from creditors.

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[4] Fence M. Wantu, 2011, Opcit. Hal 10.
[5] M. Yahya Harahap, 2004, Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan, Sinar Grafika Group, Jakarta. Hal 496.
[6] Satjipto Rahardjo. 1991, Ilmu Hukum.: PT Citra Aditya Bakti, Bandung. Hal 235

The legal basis for simple self-proofing is regulated in Article 8 paragraph (4) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, hereinafter referred to as UUK-PKPU. The provisions of Article 8 paragraph (4) of the UUK-PKPU emphasize that a request for a declaration of bankruptcy submitted voluntarily by the Debtor or submission by the Creditor must be granted by the Panel of Judges if there are facts or circumstances that are proven simply, relating to the requirements for submitting a bankruptcy request in Article 2 paragraph (1).

In the course of practice simple evidence (*sumir*) of bankruptcy cases turns out to be problematic. It can be viewed from the different interpretations by the judges examining the case, one example of which is the receipt of a request for a complicated debt[7].

Based on this description, it would be very interesting to conduct research on this matter, especially in relation to efforts to establish civil procedural law in the future. As it is known at the moment, the government has already submitted a draft civil procedural law and is just waiting for approval. In the future, what the evidentiary regulation will be like in the draft civil procedural law, including evidence in bankruptcy cases, will be explained later.

B. Problem Formulation

Based on the description above, the problems in this study are as follows:

1. What is the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially in civil courts?
2. What is the *ius constituendum* regulation for simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law?

C. Research Methodology

This research used the type of doctrinal research, which is research on laws and regulations as well as literatures related to the discussed material by providing a systematic explanation of legal norms that become a certain category and analyzing the relations of legal norms, explaining the difficult fields and is expected to predict the development of these norms.

The approach using the following methods:

[7] Sutan Remy Sjahdeini, 2016, Sejarah, Asas, dan Teori Hukum Kepailitan, Prenada Media Group, Jakarta. Hal 265.

a) Statute approach (statutory approach)[8], which is the approach taken by examining all relevant laws and regulations and other regulations related to the addressed legal issues.
b) Conceptual approach[9], which is the approach taken by studying the views and doctrines in the field of law.
c) *Case approach*[10], which is the approach to the problem formulation through existed cases in the field of work related to the addressed topics.

The employed sources of legal materials consist of primary legal materials, secondary legal materials and tertiary legal materials. Whereas the analysis used a descriptive technique and comparative technique in this study.

D. Discussion Results

1) Practice of Simple Evidence (*Sumir*) in Bankruptcy Cases

The history of mankind indicates that the better the laws and courts of a nation, the higher the quality of the nation's civilization. A transparent, logical, independent and fair trial process will make a positive contribution to moral truth, and enlighten the thinking and behavior of a society of grace. Courts bear the burden of great responsibility in resolving every case as it is in the process of proofing to examine cases submitted to court.

The basic principles of the civil law system which were then practiced in the Continental European justice system stated that law has binding force, as it is embodied in regulations in the form of laws and systematically arranged in certain codifications or compilations. In addition, the judge who examines the case is not bound by precedent or the *stare decicis* doctrine, so that the law becomes the main legal reference. Another thing is the nature of inquisitorial justice, meaning that judge has a big role in directing and deciding a case. Judge is active in finding legal facts and careful in assessing evidence. This basic principle is adhered considering that the main value as the goal of law is legal certainty.

Whereas it is different with the countries adhering to the common law system which is practiced in the Anglosaxon justice system, the source of law is not based on written regulations let alone in the form of codification. The unwritten source of law

[8] Pieter Mahmud Marzuki, 2006, Penelitian Hukum. Kencana Prenada Media Group. Jakarta. Hal 93.
[9] Ibid. Hal 94
[10] Ibid. hal 95

refers to customs and through judge's decisions are made legally enforceable. According to Nurul Qomar[11], the features or characteristics of the Common Law legal system or the Anglosaxon justice system are first, Jurisprudence as the main source of law; Second, the implementation of the Stare Decicis Doctrine or Precedents System; Third, Adversary System in the judicial process.

Basically, the Indonesian civil court, including the practice of evidence in court, refers to the civil law justice system, in which the role of the judge is only to apply the law. In the Indonesian civil justice system which is more inclined towards civil law, judges are less able to think freely, meaning they are always bound by the law.

In contrast, in the common law justice system, as adopted by Singapore, judges form the law. Furthermore, in the common law justice system, judges can think liberally, so that their decision in certain circumstances can serve as a new law. Singapore's common law legal system is characterized by the doctrine of judicial precedent (or stare decisis). This doctrine stated that the law was built and developed continuously by the judges through previous events.

In Singapore courts judges are only required to apply acceptable reasons or considerations in making decisions (*ratio decidendi*) at a higher court in the same hierarchy. Furthermore, *ratio decidendi* can be found in the decisions of judges at Singapore courts for appeals which are directly binding, both at the Singapore High Court (High Court/Court of Appeals), the District Court and the Magistrate's Court[12].

Ratio decidendi in the Singapore courts contained in the decisions of the Singapore Court of Appeal are strictly binding on the Singapore High Court, the District Court and the Magistrate's Court. It is quite interesting in Singapore that the decisions of the UK courts and other Commonwealth countries are not strictly binding on Singapore. Other judicial statements (*obiter dicta*) made in decisions of courts in the higher level, which do not directly affect the outcome of a case, may be overlooked by courts in the lower level[13].

Basically, civil court, including the process of proofing in bankruptcy cases, uses a separate procedural law which raises pros and cons regarding the material truth

[11] Nurul Qamar, 2010, Perbandingan Sistem Hukum dan Peradilan Civil Law System dan Common Law System. Pustaka Refleksi. Makassar. Hal 47

[12] Reference to Singapore Laws, The Singapore Legal System, chapter 1. Diakses pada tanggal 12 Agustus 2022.

[13] Ibid

produced by a commercial court decision. This can be viewed through the limited trial time, while on the other hand, bankruptcy issues are so complicated.

Based on the actual procedure, bankruptcy cases require quite a long time. It is based on simple logic that bankruptcy cases are not only regulated in civil law and commercial law, but also involve other areas of law.

According to Ricardo Simanjuntak[14], simple evidence is an absolute requirement that limits the authority of commercial court in an effort to prove whether a debtor who is being petitioned for bankruptcy is proven to have at least one debt that is past due and collectible, and the debtor's inability to pay off the debts that are past due and collectible. Simple evidence (*sumir*) has very close relationship with efforts to prove whether or not the conditions referred to in Article 1 paragraph 1 of Law Number 4 of 1998 amended by Article 8 paragraph 5 of Law Number 37 of 2004 on Bankruptcy and Suspension of Liability Debt Payment (PKPU) must have been decided no later than 30 days from the date the bankruptcy request was registered. In other words, the principle of being quick and transparent and effective in resolving debt problems referred to by the PKPU Law makes it a measure that a debtor can be declared bankrupt if it is proven that he is in a state of discontinuing paying his debts.

In fact, if one looks at it further, the simple evidence (*sumir*) procedure in bankruptcy cases is not specifically regulated in UUK-PKPU. Based on the provisions of Article 8 paragraph (4) UUK-PKPU it is interpreted that the procedure for simple evidence (*sumir*) in Bankruptcy cases is as follows:

a) The Petitioner proves that the Debtor has two or more Creditors;
b) The Petitioner proves that the Debtor has not paid in full at least one debt that is due and collectible;
c) The Petitioner proves that he has the capacity to file a Bankruptcy Request.

Thus the evidence of the three elements above is proven through evidence adapted to the Civil Code which takes into account other provisions in the UUK-PKPU, that is Article 299 which states unless otherwise specified in the UUK-PKPU, the applicable procedural law is civil procedural law, thus evidence in Bankruptcy to prove the 3 simple elements evidence refers to Article 1866 of the Civil Code, which is evidence in the form of First, written evidence; Second, witness evidence; Third,

[14] Ricardo Simanjuntak, 2004, Esensi Pembuktian Sederhana Dalam Kepailitan dalam Emmy Yuhassarie (ed), Undang-Undang Kepailitan dan Perkembangannya. Pusat Pengkajian Hukum. Jakarta. Hal 52.

presumption; Fourth, oath; and Fifth, confession. In judicial practice in bankruptcy cases what is often used is only documentary evidence and witnesses.

In fact, Law Number 37 of 2004 does not provide a detailed explanation of how a simple evidence is carried out so that the implementation and interpretation is fully carried out by the panel of judges who examine and decide on the bankruptcy case in question[15]. Simple evidence in practice in a commercial court is not as simple as meant in Article 8 paragraph (4) of the Bankruptcy Law. This happens because there are different interpretations from the judges who examine the case resulting in inconsistencies in the interpretation of the clarity of simple evidence.

Basically, the form of bankruptcy case is included in the category of request. Even though bankruptcy cases are in the form of request, the law itself stipulates that the court will provide justice in the form of a decision. According to Prinst[16], bankruptcy decisions actually have serious legal consequences for debtors. The debtor on this decision can submit legal remedies and the possibility of such bankruptcy decision is canceled. Legal remedies can be taken by one of the parties who feel that the court's decision is not as expected, so that according to the purpose of the legal remedy, which is to request an annulment of the decision of court in the lower level to a court in the higher level.

The commercial court is part of the general court which has the competence to examine and decide on bankruptcy cases and postponement of debt payment obligations, as well as other cases in the commercial sector as stipulated by government regulations. The position of the commercial court in Indonesia is that of a special court to examine and decide cases in the commercial sector. As part of the general court, the commercial court only evaluates and decides trade-related cases such as bankruptcy cases, postponement of debt payment obligations, intellectual property rights (IPR) and other trade cases.

Basically, bankruptcy decisions at the Commercial Court are immediate and constitutive, which is eliminating circumstances and creating new legal conditions. Based on the provisions of Article 8 paragraph (5) of Law No. 37 of 2004, the judge's

[15] Putriyanti dan Tata Wijayanta, 2010, Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi. Jurnal Mimbar Hukum Volume 22 edisi 3. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta. Hal 483.

[16] Prinst, D,2002, Strategi Menyusun dan Menangani Gugatan Perdata.Citra Aditya Bakti. Bandung.

decision at the Commercial Court must be completed within 60 (sixty) days of submiting the bankruptcy request.

Anticipating this situation, the Supreme Court in one of its circular letters stated that judge's decisions are only intended for the parties concerned, thus as a result the justice system has no public accountability, as the public cannot evaluate decisions made by the judges. Besides that, it can lead to dissatisfaction for justice seekers and the public towards the court institution itself.

According to Mochtar Kusumaatmadja there are at least 6 (six) factors underlying the community's dissatisfaction with the judicial process so far. These factors are, as follows:

1. Delay in settlement of cases;
2. An impression that the judge is not really trying to decide cases seriously based on his legal knowledge;
3. Frequent cases of bribery or attempts to bribe judges cannot be proven;
4. The case being examined was outside the judge’s knowledge concerned, due to the problem complexity and the judge's sluggishness to refer to the reference book;
5. Unprofessional lawyers act on behalf of clients;
6. The justice seeker himself does not see the court process as a way to seek justice according to law, but only as a means to win his case by any means[17].

The Bankruptcy Law should strictly regulate its own procedural law, especially in relation to the evidentiary process. In fact, Article 2 paragraph (1) of Law Number 37 of 2004 has regulated a simple evidence process for granting a request for a bankruptcy stipulation, which is: Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt with a court decision, either at his own request or at the request of one or more of his creditors.

Likewise with the Elucidation of Article 8 paragraph (4) of the Bankruptcy Law No. 37 of 2004, it is actually an elaboration of a simple evidentiary process, which explains that what is meant by "facts or circumstances that are proven in a

[17] Muhammad A. Asrun, 2004, Krisis Peradilan Mahkamah Agung Di Bawah Soeharto Cetakan Pertama. ELSAM-Lembaga Studi Dan Advokasi Masyarakat. Jakarta Hlm 24.

simple way are the fact that there are two or more Creditors and the fact that debts are past due".

Application of the simple evidence principle in practice in court turns out to lead to different perspectives which also result in different decisions of the Panel of Judges of the Commercial Court, both at the same level and at the higher level, in examining cases of bankruptcy requests. This difference is due to the lack of similarities between the Panel of Judges in interpreting something, for example the definition of debt, the definition of maturity debt and the definition of creditors, and so on.

The efforts made by the Commercial Court to deal with problems in applying the simple evidence principle in imposing bankruptcy decisions so far have basically summoned and heard the Experts. The main reasons for the appointment are due to several reasons, including:

a) there are still unclear things.
b) the only way that is considered to clarify is mostly based on reports or information from experts who are really competent to give opinions or thoughts regarding the cases being disputed according to their specialization.

Basically the reason for summoning and hearing experts is because the case in dispute is beyond the reach of the knowledge and experience of the judge or the parties to the case, so that information is required from a competent and experienced person in that field.

In fact, evidence in civil procedural law arises when there is a conflict of interest that is resolved through the courts. The task of the court is to receive, examine and decide who is entitled to the dispute. The court or judge who examines the dispute may not only have to rely on his own convictions, but in accordance with the arguments of the evidence put forward by both parties to the dispute.

In practice, a simple evidence (*sumir*) process uses special civil procedural law, while complex evidence (not simple or complex) tends to use ordinary civil procedural law, which is often used to settle ordinary debt cases by filing a lawsuit in district court. Based on this reality, the concept of a simple evidentiary (*sumir*) system needs to be regulated firmly and clearly both separately and in civil procedural law in the future. It is expected that clear and strict regulation for simple evidence (*sumir*) will not cause new problems and inconsistent interpretation of the panel of judges in every dispute that is submitted to the court.

In the end, simple evidence (*sumir*) which thus far uses specific civil procedural judges of which regulation have been minimal all this time. Apart from that, simple evidence (*sumir*) is spread across civil procedural law and bankruptcy procedures themselves, thus more specific regulation is required which should be considered and reviewed by the legislators to amend so as not to cause overlapping of simple evidentiary regulation. In fact, the momentum for discussion of the new Civil Procedural Law is the starting point for a breakthrough in efforts to clearly and decisively regulate the status of simple evidence (*sumir*) in laws and regulations. Simple evidentiary regulation (*sumir*) should ideally only be regulated and sourced from one legal provision and not not spread all over, so as not to give rise to different interpretations.

2) *Ius Constituendum* Simple Evidence (*Sumir*) Based on Civil Procedural Law

The basic regulation regarding evidence in civil cases are generally regulated in the Civil Code, which in Articles 1865 to Article 1945. The provisions of Article 1865 of the Civil Code explain that every person who feels that he has the right or designates an event to strengthen his rights or refute a right of another person, is obliged to prove the existence such right. The meaning of this evidentiary article is that everyone can strengthen the rights they have based on the collected facts.

In addition, the principle of evidence in civil law is regulated in Article 163 Herzien Inlandsch Reglemen (HIR), which states "whoever claims to have rights over an item, or designates an event to confirm his rights, or denies the rights of another person, then that person must prove it."

Evidence in the Civil Procedural Law does not adhere to a *stelsel negative* evidentiary system according to the law, but in the civil court process only seeks formal truth. The principle of evidence is that it gives the burden of evidence to the plaintiff to prove the argument or events that can support the argument put forward by the plaintiff, while for the defendant, the judge is obliged to give a burden of evidence to prove his rebuttal to the argument put forward by the plaintiffs.

Basically, the evidentiary law system adopted in Indonesia is a closed and limited system in which the parties are not free to submit the type or form of evidence in the process of settling a case. The law has explicitly determined what is valid and has value as evidence.

In its development in Indonesia, when judges will make decisions, they sometimes also look at other regulations, which is jurisprudence. It cannot be stated

that Indonesian judges are bound by jurisprudence as it applies in the common law justice system, which is the binding force of precedent. The judge's orientation towards the decision he followed was in accordance with his belief that the decision was correct as the persuasive force of precedent[18].

Sudikno Mertokusumo[19] stated that even though we do not adhere to (the binding force of precedent) as adhered in England, the judges are bound or oriented as they are sure that the decisions they follow regarding similar cases convince them that the decision is correct (the persuasive force of precedent). They must follow and understand the legal values that live in society.

According to Nelson Kapoyos[20], in civil evidence the judge must admit the truth of the incident in question which can only be obtained through the evidentiary process to make a fair decision, so the judge must recognize the events of which truth has been proven. This was also emphasized by Elizabeth Butarbutar[21], who stated that proving in procedural law has a juridical meaning of which evidence only applies to the parties to the case. Evidence in law is historical in nature, meaning that evidence tries to establish what has happened concretely.

The fourth book of *Burgerlijk Wetboek*/Civil Code contains all the basic rules in civil law and evidence in BW is solely related to cases. The benefit of this evidence is to define the existence of a fact or to postulate an event.

Evidence is required in a case that tries a dispute before the court as well as in cases of application that result in a decision. Thus the meaning of evidence is the whole rule regarding evidence that uses valid evidence as a tool with the aim of obtaining the truth of an event through a decision or judge's stipulation.

In essence, the best and most appropriate implementation of civil law is when it is carried out voluntarily or peacefully by the parties. Civil procedural law is intended to enforce civil laws expressed and enforced by courts. Courts must be able to give decisions that are intended to resolve cases in nature, which are in accordance with the legal awareness of society, so as to create peace in society.

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[18] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115

[19] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta. Hlm

[20] Nelson Kapoyos, 2017, Konsep Pembuktian Sederhana Dalam Perkara Kepailitan. Jurnal Yudisial Vol. 10 No. 3 Desember. Jakarta. Hal 334-335.

[21] Elizabeth Butarbutar, (2010). Arti pentingnya pembuktian dalam proses penemuan hukum di peradilan perdata. Jurnal Mimbar HukumEdisi 22 Volume 2. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta.Hal 356.

When referring to procedural law regulations in general regarding simple evidence set forth in Herzein Inlandsch Reglement (H.I.R) article 83 f in its explanation relating to minor cases before the court, which are cases that fall under the authority of the Landraad of which examination in the General Court Session is in sumir, both implementation of the law as well as about the evidence. However, in H.I.R there is no explicit explanation regarding this sumir evidence.

At the present the number of PKPU and bankruptcy request filing has increased, it can cause legal uncertainty which has an impact on the emergence of negative investor sentiment towards the investment sector. From a macro perspective this phenomenon will have implications for the level of ease of doing business in Indonesia[22].

The Constitutional Court's decision Number 23/PUU-XI/2021 on the case of reviewing the constitutionality of Article 253 Paragraph (1), Article 293 Paragraph (1), and Article 295 Paragraph (1) of Law No 37/2004 to Article 28D of the 1945 Constitution of the Republic of Indonesia has revolutionary changed normative structure and implementation of PKPU institutions in Indonesia. A quo decision is pragmatically quite populist and progressive in reflecting respect for human rights. However, on the other hand, a quo decision has distorted the essence of the PKPU institution itself and legal certainty in resolving business disputes in Indonesia.

Explicitly, UUK-PKPU does not provide a definition of what is called PKPU, both in corpus of law and its explanation. Article 222 Paragraph (2) and Paragraph (3) UUK-PKPU only stipulates that:

a) Debtors who are unable or predict that they will not be able to continue paying their debts which are due and collectible, may apply for a PKPU, with the intention of submitting a settlement plan which includes an offer to pay part or all of the debt to creditors;
b) Creditors who estimate that the debtor cannot continue to pay his debts which are due and collectible, can request that the debtor be given PKPU, to allow the debtor to submit a settlement plan which includes an offer to pay part or all of it to his creditors.

[22] Anita Apriana Teguh Tresna Puja Asmara, Isis Ikhwansyah, 2019, Easy of Doing Business: Gagasan Pembaharuan Hukum Penyelesaian Sengketa Investasi di Indonesia. Law Jurnal Volume 4 No 2 University of Bengkulu. Hal 120

In following up the Constitutional Court Decision Number 23/PUU-XIX/2021 regarding the material review of Article 235 paragraph (1) and Article 293 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU 37/2004) to the 1945 Constitution of the Republic of Indonesia (1945 Constitution). Based on the Constitutional Court's decision, the draft law on amendments to Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations certainly needs an adjustment.

Based on Article 299 of Law no. 37 of 2004 on Bankruptcy and Requests for Suspension of Debt Payment Obligations states that the existence of procedural law from the commercial court is the enactment of civil procedural law. The procedural law for bankruptcy statement is included in the field of civil procedural law. The relationship between civil procedural law in general and bankruptcy procedural law which is specifically regulated in the Bankruptcy Law can be viewed in the provisions of Article 299 of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

To this date, most of the Civil Procedural Law has not been regulated in the form of national laws. In the provisions of Article 10 (1) Law No. 48 of 2009 on Judicial Power which states that the court (judge) may not refuse to examine and decide on a case submitted to him even if the legal pretext is unclear or unavailable. Therefore the judge must still accept to examine and decide on a case submitted to him even though there is no law, for this reason the judge must make legal finding.

Previously, Article 5 (1) Law No. 48 of 2009 on Judicial Power states that judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. Even if the law is unclear or unavailable, the judge must try to find the law, as the judge decides a case based on law which consists of written law (statute) and unwritten law (legal values that live in society).

At the present the Government of the Republic of Indonesia is currently working to embody the codification of civil procedural law which is national unification, as a national legal system. In order to build a national legal system, it is necessary to rearrange the material of civil procedural law which is spread out in various laws and regulations. In addition to rearranging the material for civil procedural law, it is also important to make an inventory of substances related to civil procedural law to meet the development needs of the community. One of the ways is by adding norms or reinforcing existing regulation.

Structuring of norms in the civil procedural law includes, among other things, the examination of cases by quick proceedings, the evidence of which is carried out by means of simple evidence. In simple evidence on the argument for a claim that is acknowledged and/or denied by the defendant, there is no need for evidence, except if the argument for the claim is refuted, it requires an evidentiary examination to carry out.

The draft Civil Procedural Law is very significant given the rapid development of society and the influence of globalization which demands a judiciary that can resolve disputes in the civil field in a more effective and efficient way.

In general, the Draft Law on Civil Procedural Law is even more urgent to be formed at this time, as it is expected that it will be able to become a comprehensive formal law in resolving disputes in the fields of business, trade and investment. Apart from that, the Draft Law on Civil Procedural Law can provide legal certainty for investors and the business field. The Law Number 11 of 2020 on Job Creation must also be followed by formal law which is used as a means of defending material law.

Sources of civil procedural law that are spread in various regulations create difficulties in practice, which is the problem of inconsistency in the practice of civil procedural law. In addition, there are still various legal vacuums, including the difficulty in interpreting the simple evidentiary process between the Commercial Court and the Supreme Court. Moreover, there is difficulty in the fast, simple and low-cost judicial process, expansion in proofing evidence, and simplification the filing of lawsuits and execution.

It can be said that the drafting of the Civil Procedural Law is very urgent to carry out in order to deal with the current problems, as well as in the future. The simplification of laws and regulations, like the law on job creation, requires legal instruments that produce the best solution as soon as possible. In addition, business development must be immediately followed by developments in national law, including in the field of procedural law which can thoroughly resolve problems including inconsistencies in the application of bankruptcy law.

The draft Civil Procedural Law should be brought forth according to the current and urgent needs and not based on the interests of certain groups. Regulation for simple evidence (*sumir*) in the Draft Civil Procedural Law must receive serious attention to maintain continuity and protect businessmen from legal uncertainty itself. As a result, the public trust in the world of justice has been failed, especially in the

handling of cases in commercial courts. This public distrust has a further impact, which is there is no longer reverence or respect for the court which is the last resort to seek justice.

In the end, simple evidence (*sumir*) regulation in commercial court cases in the Draft Civil Procedural Law are absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition, efforts to reform the PKPU Law have become a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future. The vision of forming such a law is not an easy task, but at least there must be earnestness to carry out better reforms.

E. Closing

1. Conclusion

Based on the discussion above, it can be concluded in this study as follows:

1. Whereas the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially civil courts, is not as simple as one might imagine due to the fact that there are inconsistencies in the panel of judges in examining cases. The simple evidence process (*sumir*) has developed very rapidly and is no longer dependent on the legal system (civil law and common law) and the judicial system adopted by a country, including Indonesia.
2. Whereas the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level including at the Supreme Court. Apart from that, the renewal of the PKPU Law is a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future.

2. Suggestion

In accordance with the above conclusions in this study the following suggestions can be given:

1) The government, together with the legislature, immediately regulates and establishes clear and firm rules from simple evidence (*sumir*) in the new PKPU law.
2) The court, in this case the panel of judges examining cases using simple evidence (*sumir*), without trapped in different interpretations.
3) Formation of Draft Civil Procedural Law in laws and regulations ideally can reach and become the formula law of various existing laws regulations, for example the job creation law.
4) The Supreme Court as the highest judicial institution can provide solutions to legal problems, especially in the event of a legal vacuum.

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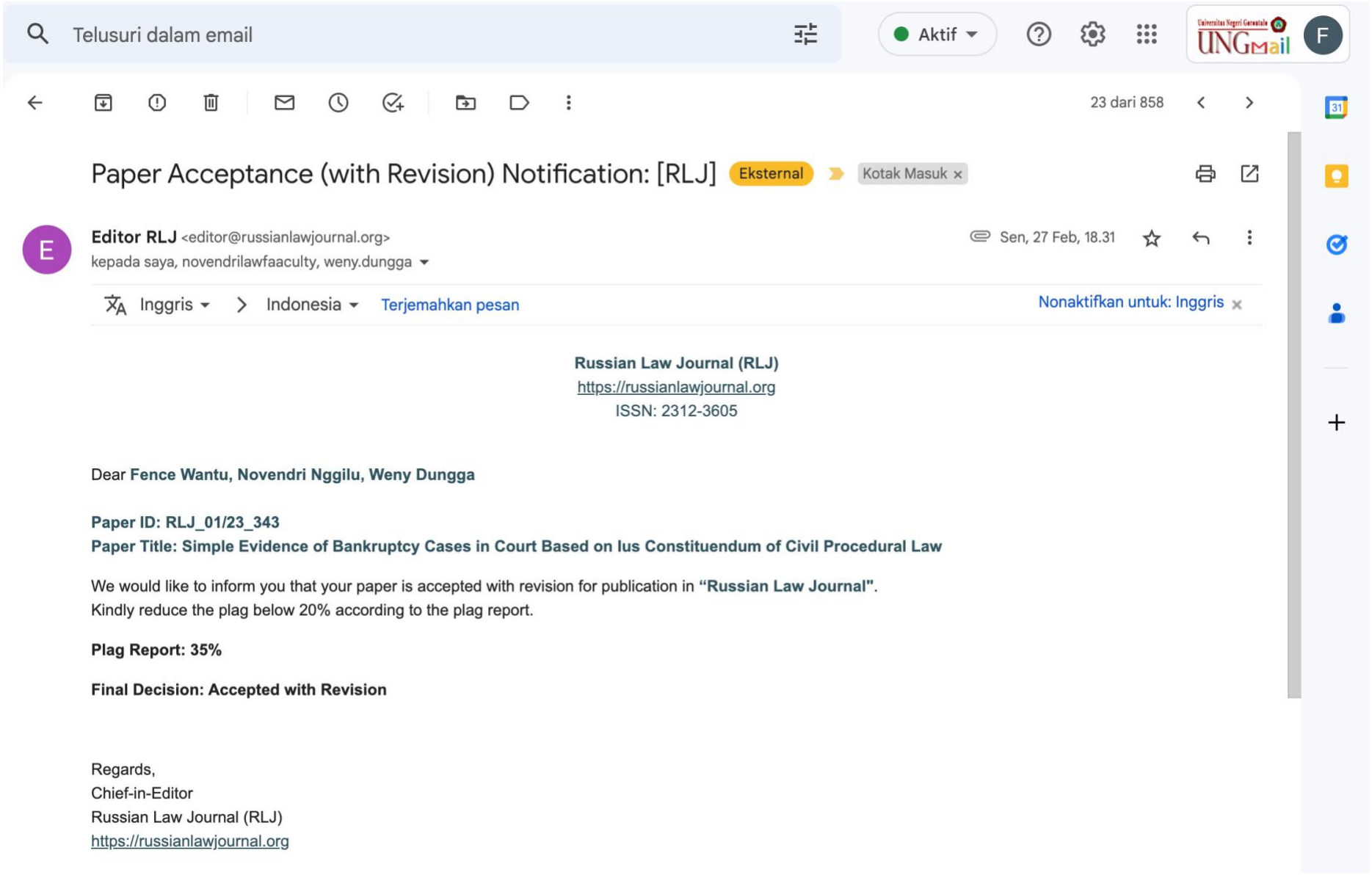
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Simple Evidence of Bankruptcy Cases in Court Based on *Ius Constituendum* of Civil Procedural Law

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Abstract

Simple evidence principle in the Commercial Court is not easy to imagine. Simple evidence (*sumir*) currently still uses civil procedural law as a formal source in court. In addition it exists in various other regulations such as bankruptcy. The purposes of this study are 1). Analyze simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts. 2). Analyze the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law.This research used method of normative legal research. It also used doctrinal research. The approach is carried out using the following methods: statute approach, conceptual approach, and case approach.The results of the research indicated that simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts, are not as simple as one imagine because in reality there are inconsistencies in the panel of judges in examining cases. Afterward, the *ius constituendum* regulation for simple evidence (*mumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining the case.

Keyword: *Evidence, Bankruptcy, Court, Ius Constituendum, Civil Procedural Law*.

A. Introduction

Judicial power can be stated to occupy a strategic position in a rule of law state. This is in accordance with what is emphasized in the 1945 Constitution which reads "the State of Indonesia is based upon law (*Rechtstaat*), it is not based upon more power (*Machtstaat*)[1]. Judicial power is a power which contains the task of carrying out legal principles through, among other things, the judiciary. Judicial power is an independent power to administer justice in order to uphold law and justice[2].

This affirmation is also contained in the Judicial Power Act which states that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila for the sake of the implementation of the legal state of the Republic of Indonesia[3].

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[1] Fence M. Wantu, 2011, *Idee Des Recht: Kepastian Hukum, Keadilan Dan Kemanfaatan (Implementasi Dalam Proses Peradilan Perdata)*. Pustaka Pelajar. Yogyakarta. Hlm 6

[2] Pasal 24 ayat (1) Undang-Undang Dasar tahun 1945.

[3] Pasal 1 UU No 48 tahun 2009 Tentang Kekuasaan Kehakiman

The authority and credibility of the court institution must be properly maintained in the public, as the court institution is a place for justice seekers to seek the truth. There is a growing opinion that the judiciary is often said to be the last bastion of law and order. This also applies to the judicial process in Indonesia, including civil courts.

In principle, civil courts provide legal protection to everyone, which is caused by vigilante actions (*eigenrichting*) carried out by fellow legal subjects within private relations. In other words, civil justice must provide an assurance for the implementation of law in the field of civil law[4].

A true and just judicial process will contribute to the truth and enlighten people's behavior gracefully. Furthermore, a correct and wise court decision will prevent the emergence of vigilante actions and distrust of the court institution.

In the process of proceedings in court, evidence plays a very vital role, so that many opinions state that proving when a case occurs is a complex part. According to M. Yahya Harahap[5], evidence is a complex part as it proves something related to the ability to construct events that have occurred as truth.

The process of self-proving in court practice is influenced by the applicable legal system. In general, according to Satjipto Rahardjo[6], there are two different legal systems, which are the Continental European Legal System and the English Legal System. This system is commonly known as the Roman-German Legal System or Civil Law System for the former, and the Common Law System for the latter.

Basically, evidence in civil procedural law can be distinguished from bankruptcy cases. In civil procedural law, evidence is clearly regulated in Article 1865. Meanwhile, in bankruptcy cases regarding evidence, there is a specificity, which is the use of simple evidence. The meaning of simple evidence can be interpreted as the ability of both the debtor and the creditor to prove the event of:

a) Debtor who has more than one creditor;
b) Debtor does not pay off the due and collectible debts;
c) Has been declared bankrupt based on a court decision either voluntarily or directly from creditors.

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nce M. Wantu, 2011, Opcit. Hal 10.

[5] M. Yahya Harahap, 2004, Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan usan Pengadilan, Sinar Grafika Group, Jakarta. Hal 496.

[6] Satjipto Rahardjo. 1991, Ilmu Hukum.: PT Citra Aditya Bakti, Bandung. Hal 235

The legal basis for simple self-proofing is regulated in Article 8 paragraph (4) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, hereinafter referred to as UUK-PKPU. The provisions of Article 8 paragraph (4) of the UUK-PKPU emphasize that a request for a declaration of bankruptcy submitted voluntarily by the Debtor or submission by the Creditor must be granted by the Panel of Judges if there are facts or circumstances that are proven simply, relating to the requirements for submitting a bankruptcy request in Article 2 paragraph (1).

In the course of practice simple evidence (*sumir*) of bankruptcy cases turns out to be problematic. It can be viewed from the different interpretations by the judges examining the case, one example of which is the receipt of a request for a complicated debt[7].

Based on this description, it would be very interesting to conduct research on this matter, especially in relation to efforts to establish civil procedural law in the future. As it is known at the moment, the government has already submitted a draft civil procedural law and is just waiting for approval. In the future, what the evidentiary regulation will be like in the draft civil procedural law, including evidence in bankruptcy cases, will be explained later.

B. Problem Formulation

Based on the description above, the problems in this study are as follows:

1. What is the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially in civil courts?
2. What is the *ius constituendum* regulation for simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law?

C. Research Objectives

Based on problem formulation, the objectives of this study are as follows:

1. Analyze simple (*sumir*) evidentiary practices in bankruptcy cases in court, especially civil courts.
2. Analyze the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law

D. Research Methodology

This research used the type of doctrinal research, which is research on laws and regulations as well as literatures related to the discussed material by providing a systematic

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[7] Sutan Remy Sjahdeini, 2016, Sejarah, Asas, dan Teori Hukum Kepailitan, Prenada Media Group, Jakarta. Hal 265.

explanation of legal norms that become a certain category and analyzing the relations of legal norms, explaining the difficult fields and is expected to predict the development of these norms.

The approach using the following methods:

a) Statute approach (statutory approach)[8], which is the approach taken by examining all relevant laws and regulations and other regulations related to the addressed legal issues.

b) Conceptual approach[9], which is the approach taken by studying the views and doctrines in the field of law.

c) *Case approach*[10], which is the approach to the problem formulation through existed cases in the field of work related to the addressed topics.

The employed sources of legal materials consist of primary legal materials, secondary legal materials and tertiary legal materials. Whereas the analysis used a descriptive technique and comparative technique in this study.

E. Discussion Results

1) Practice of Simple Evidence (*Sumir*) in Bankruptcy Cases

The history of mankind indicates that the better the laws and courts of a nation, the higher the quality of the nation's civilization. A transparent, logical, independent and fair trial process will make a positive contribution to moral truth, and enlighten the thinking and behavior of a society of grace. Courts bear the burden of great responsibility in resolving every case as it is in the process of proofing to examine cases submitted to court.

The basic principles of the civil law system which were then practiced in the Continental European justice system stated that law has binding force, as it is embodied in regulations in the form of laws and systematically arranged in certain codifications or compilations. In addition, the judge who examines the case is not bound by precedent or the *stare decicis* doctrine, so that the law becomes the main legal reference. Another thing is the nature of inquisitorial justice, meaning that judge has a big role in directing and deciding a case. Judge is active in finding legal facts

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[8] Pieter Mahmud Marzuki, 2006, Penelitian Hukum. Kencana Prenada Media Group. Jakarta. Hal 93.
[9] Ibid. Hal 94
[10] Ibid. hal 95

and careful in assessing evidence. This basic principle is adhered considering that the main value as the goal of law is legal certainty.

Whereas it is different with the countries adhering to the common law system which is practiced in the Anglosaxon justice system, the source of law is not based on written regulations let alone in the form of codification. The unwritten source of law refers to customs and through judge's decisions are made legally enforceable. According to Nurul Qomar[11], the features or characteristics of the Common Law legal system or the Anglosaxon justice system are first, Jurisprudence as the main source of law; Second, the implementation of the Stare Decicis Doctrine or Precedents System; Third, Adversary System in the judicial process.

Basically, the Indonesian civil court, including the practice of evidence in court, refers to the civil law justice system, in which the role of the judge is only to apply the law. In the Indonesian civil justice system which is more inclined towards civil law, judges are less able to think freely, meaning they are always bound by the law.

In contrast, in the common law justice system, as adopted by Singapore, judges form the law. Furthermore, in the common law justice system, judges can think liberally, so that their decision in certain circumstances can serve as a new law. Singapore's common law legal system is characterized by the doctrine of judicial precedent (or stare decisis). This doctrine stated that the law was built and developed continuously by the judges through previous events.

In Singapore courts judges are only required to apply acceptable reasons or considerations in making decisions (*ratio decidendi*) at a higher court in the same hierarchy. Furthermore, *ratio decidendi* can be found in the decisions of judges at Singapore courts for appeals which are directly binding, both at the Singapore High Court (High Court/Court of Appeals), the District Court and the Magistrate's Court[12].

Ratio decidendi in the Singapore courts contained in the decisions of the Singapore Court of Appeal are strictly binding on the Singapore High Court, the District Court and the Magistrate's Court. It is quite interesting in Singapore that the decisions of the UK courts and other Commonwealth countries are not strictly binding on Singapore. Other judicial statements (*obiter dicta*) made in decisions of courts in

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[11] Nurul Qamar, 2010, Perbandingan Sistem Hukum dan Peradilan Civil Law System dan Common Law System. Pustaka Refleksi. Makassar. Hal 47

[12] Reference to Singapore Laws, The Singapore Legal System, chapter 1. Diakses pada tanggal 12 Agustus 2022.

the higher level, which do not directly affect the outcome of a case, may be overlooked by courts in the lower level[13].

Basically, civil court, including the process of proofing in bankruptcy cases, uses a separate procedural law which raises pros and cons regarding the material truth produced by a commercial court decision. This can be viewed through the limited trial time, while on the other hand, bankruptcy issues are so complicated.

Based on the actual procedure, bankruptcy cases require quite a long time. It is based on simple logic that bankruptcy cases are not only regulated in civil law and commercial law, but also involve other areas of law.

According to Ricardo Simanjuntak[14], simple evidence is an absolute requirement that limits the authority of commercial court in an effort to prove whether a debtor who is being petitioned for bankruptcy is proven to have at least one debt that is past due and collectible, and the debtor's inability to pay off the debts that are past due and collectible. Simple evidence (*sumir*) has very close relationship with efforts to prove whether or not the conditions referred to in Article 1 paragraph 1 of Law Number 4 of 1998 amended by Article 8 paragraph 5 of Law Number 37 of 2004 on Bankruptcy and Suspension of Liability Debt Payment (PKPU) must have been decided no later than 30 days from the date the bankruptcy request was registered. In other words, the principle of being quick and transparent and effective in resolving debt problems referred to by the PKPU Law makes it a measure that a debtor can be declared bankrupt if it is proven that he is in a state of discontinuing paying his debts.

In fact, if one looks at it further, the simple evidence (*sumir*) procedure in bankruptcy cases is not specifically regulated in UUK-PKPU. Based on the provisions of Article 8 paragraph (4) UUK-PKPU it is interpreted that the procedure for simple evidence (*sumir*) in Bankruptcy cases is as follows:

a) The Petitioner proves that the Debtor has two or more Creditors;
b) The Petitioner proves that the Debtor has not paid in full at least one debt that is due and collectible;
c) The Petitioner proves that he has the capacity to file a Bankruptcy Request.

Thus the evidence of the three elements above is proven through evidence adapted to the Civil Code which takes into account other provisions in the UUK-

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[13] Ibid
[14] Ricardo Simanjuntak, 2004, Esensi Pembuktian Sederhana Dalam Kepailitan dalam Emmy Yuhassarie (ed), Undang-Undang Kepailitan dan Perkembangannya. Pusat Pengkajian Hukum. Jakarta. Hal 52.

PKPU, that is Article 299 which states unless otherwise specified in the UUK-PKPU, the applicable procedural law is civil procedural law, thus evidence in Bankruptcy to prove the 3 simple elements evidence refers to Article 1866 of the Civil Code, which is evidence in the form of First, written evidence; Second, witness evidence; Third, presumption; Fourth, oath; and Fifth, confession. In judicial practice in bankruptcy cases what is often used is only documentary evidence and witnesses.

In fact, Law Number 37 of 2004 does not provide a detailed explanation of how a simple evidence is carried out so that the implementation and interpretation is fully carried out by the panel of judges who examine and decide on the bankruptcy case in question[15]. Simple evidence in practice in a commercial court is not as simple as meant in Article 8 paragraph (4) of the Bankruptcy Law. This happens because there are different interpretations from the judges who examine the case resulting in inconsistencies in the interpretation of the clarity of simple evidence.

Basically, the form of bankruptcy case is included in the category of request. Even though bankruptcy cases are in the form of request, the law itself stipulates that the court will provide justice in the form of a decision. According to Prinst[16], bankruptcy decisions actually have serious legal consequences for debtors. The debtor on this decision can submit legal remedies and the possibility of such bankruptcy decision is canceled. Legal remedies can be taken by one of the parties who feel that the court's decision is not as expected, so that according to the purpose of the legal remedy, which is to request an annulment of the decision of court in the lower level to a court in the higher level.

The commercial court is part of the general court which has the competence to examine and decide on bankruptcy cases and postponement of debt payment obligations, as well as other cases in the commercial sector as stipulated by government regulations. The position of the commercial court in Indonesia is that of a special court to examine and decide cases in the commercial sector. As part of the general court, the commercial court only evaluates and decides trade-related cases such as bankruptcy cases, postponement of debt payment obligations, intellectual property rights (IPR) and other trade cases.

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[15] Putriyanti dan Tata Wijayanta, 2010, Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi. Jurnal Mimbar Hukum Volume 22 edisi 3. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta. hal 483.

[16] Prinst, D,2002, Strategi Menyusun dan Menangani Gugatan Perdata.Citra Aditya Bakti. Bandung.

Basically, bankruptcy decisions at the Commercial Court are immediate and constitutive, which is eliminating circumstances and creating new legal conditions. Based on the provisions of Article 8 paragraph (5) of Law No. 37 of 2004, the judge's decision at the Commercial Court must be completed within 60 (sixty) days of submiting the bankruptcy request.

Anticipating this situation, the Supreme Court in one of its circular letters stated that judge's decisions are only intended for the parties concerned, thus as a result the justice system has no public accountability, as the public cannot evaluate decisions made by the judges. Besides that, it can lead to dissatisfaction for justice seekers and the public towards the court institution itself.

According to Mochtar Kusumaatmadja there are at least 6 (six) factors underlying the community's dissatisfaction with the judicial process so far. These factors are, as follows:

1. Delay in settlement of cases;
2. An impression that the judge is not really trying to decide cases seriously based on his legal knowledge;
3. Frequent cases of bribery or attempts to bribe judges cannot be proven;
4. The case being examined was outside the judge's knowledge concerned, due to the problem complexity and the judge's sluggishness to refer to the reference book;
5. Unprofessional lawyers act on behalf of clients;
6. The justice seeker himself does not see the court process as a way to seek justice according to law, but only as a means to win his case by any means[17].

The Bankruptcy Law should strictly regulate its own procedural law, especially in relation to the evidentiary process. In fact, Article 2 paragraph (1) of Law Number 37 of 2004 has regulated a simple evidence process for granting a request for a bankruptcy stipulation, which is: Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt with a court decision, either at his own request or at the request of one or more of his creditors.

[17] Muhammad A. Asrun, 2004, Krisis Peradilan Mahkamah Agung Di Bawah Soeharto Cetakan Pertama. ELSAM-Lembaga Studi Dan Advokasi Masyarakat. Jakarta Hlm 24.

Likewise with the Elucidation of Article 8 paragraph (4) of the Bankruptcy Law No. 37 of 2004, it is actually an elaboration of a simple evidentiary process, which explains that what is meant by "facts or circumstances that are proven in a simple way are the fact that there are two or more Creditors and the fact that debts are past due".

Application of the simple evidence principle in practice in court turns out to lead to different perspectives which also result in different decisions of the Panel of Judges of the Commercial Court, both at the same level and at the higher level, in examining cases of bankruptcy requests. This difference is due to the lack of similarities between the Panel of Judges in interpreting something, for example the definition of debt, the definition of maturity debt and the definition of creditors, and so on.

The efforts made by the Commercial Court to deal with problems in applying the simple evidence principle in imposing bankruptcy decisions so far have basically summoned and heard the Experts. The main reasons for the appointment are due to several reasons, including:

a) there are still unclear things.
b) the only way that is considered to clarify is mostly based on reports or information from experts who are really competent to give opinions or thoughts regarding the cases being disputed according to their specialization.

Basically the reason for summoning and hearing experts is because the case in dispute is beyond the reach of the knowledge and experience of the judge or the parties to the case, so that information is required from a competent and experienced person in that field.

In fact, evidence in civil procedural law arises when there is a conflict of interest that is resolved through the courts. The task of the court is to receive, examine and decide who is entitled to the dispute. The court or judge who examines the dispute may not only have to rely on his own convictions, but in accordance with the arguments of the evidence put forward by both parties to the dispute.

In practice, a simple evidence (*sumir*) process uses special civil procedural law, while complex evidence (not simple or complex) tends to use ordinary civil procedural law, which is often used to settle ordinary debt cases by filing a lawsuit in district court. Based on this reality, the concept of a simple evidentiary (*sumir*) system needs to be regulated firmly and clearly both separately and in civil procedural law in

the future. It is expected that clear and strict regulation for simple evidence (*sumir*) will not cause new problems and inconsistent interpretation of the panel of judges in every dispute that is submitted to the court.

In the end, simple evidence (*sumir*) which thus far uses specific civil procedural judges of which regulation have been minimal all this time. Apart from that, simple evidence (*sumir*) is spread across civil procedural law and bankruptcy procedures themselves, thus more specific regulation is required which should be considered and reviewed by the legislators to amend so as not to cause overlapping of simple evidentiary regulation. In fact, the momentum for discussion of the new Civil Procedural Law is the starting point for a breakthrough in efforts to clearly and decisively regulate the status of simple evidence (*sumir*) in laws and regulations. Simple evidentiary regulation (*sumir*) should ideally only be regulated and sourced from one legal provision and not not spread all over, so as not to give rise to different interpretations.

2) *Ius Constituendum* Simple Evidence (*Sumir*) Based on Civil Procedural Law

The basic regulation regarding evidence in civil cases are generally regulated in the Civil Code, which in Articles 1865 to Article 1945. The provisions of Article 1865 of the Civil Code explain that every person who feels that he has the right or designates an event to strengthen his rights or refute a right of another person, is obliged to prove the existence such right. The meaning of this evidentiary article is that everyone can strengthen the rights they have based on the collected facts.

In addition, the principle of evidence in civil law is regulated in Article 163 Herzien Inlandsch Reglemen (HIR), which states "whoever claims to have rights over an item, or designates an event to confirm his rights, or denies the rights of another person, then that person must prove it."

Evidence in the Civil Procedural Law does not adhere to a *stelsel negative* evidentiary system according to the law, but in the civil court process only seeks formal truth. The principle of evidence is that it gives the burden of evidence to the plaintiff to prove the argument or events that can support the argument put forward by the plaintiff, while for the defendant, the judge is obliged to give a burden of evidence to prove his rebuttal to the argument put forward by the plaintiffs.

Basically, the evidentiary law system adopted in Indonesia is a closed and limited system in which the parties are not free to submit the type or form of evidence

in the process of settling a case. The law has explicitly determined what is valid and has value as evidence.

In its development in Indonesia, when judges will make decisions, they sometimes also look at other regulations, which is jurisprudence. It cannot be stated that Indonesian judges are bound by jurisprudence as it applies in the common law justice system, which is the binding force of precedent. The judge's orientation towards the decision he followed was in accordance with his belief that the decision was correct as the persuasive force of precedent[18].

Sudikno Mertokusumo[19] stated that even though we do not adhere to (the binding force of precedent) as adhered in England, the judges are bound or oriented as they are sure that the decisions they follow regarding similar cases convince them that the decision is correct (the persuasive force of precedent). They must follow and understand the legal values that live in society.

According to Nelson Kapoyos[20], in civil evidence the judge must admit the truth of the incident in question which can only be obtained through the evidentiary process to make a fair decision, so the judge must recognize the events of which truth has been proven. This was also emphasized by Elizabeth Butarbutar[21], who stated that proving in procedural law has a juridical meaning of which evidence only applies to the parties to the case. Evidence in law is historical in nature, meaning that evidence tries to establish what has happened concretely.

The fourth book of *Burgerlijk Wetboek*/Civil Code contains all the basic rules in civil law and evidence in BW is solely related to cases. The benefit of this evidence is to define the existence of a fact or to postulate an event.

Evidence is required in a case that tries a dispute before the court as well as in cases of application that result in a decision. Thus the meaning of evidence is the whole rule regarding evidence that uses valid evidence as a tool with the aim of obtaining the truth of an event through a decision or judge's stipulation.

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[18] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115

[19] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta. Hlm

[20] Nelson Kapoyos, 2017, Konsep Pembuktian Sederhana Dalam Perkara Kepailitan. Jurnal Yudisial Vol. 10 No. 3 Desember. Jakarta. Hal 334-335.

[21] Elizabeth Butarbutar, (2010). Arti pentingnya pembuktian dalam proses penemuan hukum di peradilan perdata. Jurnal Mimbar HukumEdisi 22 Volume 2. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta.Hal 356.

In essence, the best and most appropriate implementation of civil law is when it is carried out voluntarily or peacefully by the parties. Civil procedural law is intended to enforce civil laws expressed and enforced by courts. Courts must be able to give decisions that are intended to resolve cases in nature, which are in accordance with the legal awareness of society, so as to create peace in society.

When referring to procedural law regulations in general regarding simple evidence set forth in Herzein Inlandsch Reglement (H.I.R) article 83 f in its explanation relating to minor cases before the court, which are cases that fall under the authority of the Landraad of which examination in the General Court Session is in sumir, both implementation of the law as well as about the evidence. However, in H.I.R there is no explicit explanation regarding this sumir evidence.

At the present the number of PKPU and bankruptcy request filing has increased, it can cause legal uncertainty which has an impact on the emergence of negative investor sentiment towards the investment sector. From a macro perspective this phenomenon will have implications for the level of ease of doing business in Indonesia[22].

The Constitutional Court's decision Number 23/PUU-XI/2021 on the case of reviewing the constitutionality of Article 253 Paragraph (1), Article 293 Paragraph (1), and Article 295 Paragraph (1) of Law No 37/2004 to Article 28D of the 1945 Constitution of the Republic of Indonesia has revolutionary changed normative structure and implementation of PKPU institutions in Indonesia. A quo decision is pragmatically quite populist and progressive in reflecting respect for human rights. However, on the other hand, a quo decision has distorted the essence of the PKPU institution itself and legal certainty in resolving business disputes in Indonesia.

Explicitly, UUK-PKPU does not provide a definition of what is called PKPU, both in corpus of law and its explanation. Article 222 Paragraph (2) and Paragraph (3) UUK-PKPU only stipulates that:

a) Debtors who are unable or predict that they will not be able to continue paying their debts which are due and collectible, may apply for a PKPU, with the intention of submitting a settlement plan which includes an offer to pay part or all of the debt to creditors;

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[22] Anita Apriana Teguh Tresna Puja Asmara, Isis Ikhwansyah, 2019, Easy of Doing Business: Gagasan Pembaharuan Hukum Penyelesaian Sengketa Investasi di Indonesia. Law Jurnal Volume 4 No 2 University of Bengkulu. Hal 120

b) Creditors who estimate that the debtor cannot continue to pay his debts which are due and collectible, can request that the debtor be given PKPU, to allow the debtor to submit a settlement plan which includes an offer to pay part or all of it to his creditors.

In following up the Constitutional Court Decision Number 23/PUU-XIX/2021 regarding the material review of Article 235 paragraph (1) and Article 293 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU 37/2004) to the 1945 Constitution of the Republic of Indonesia (1945 Constitution). Based on the Constitutional Court's decision, the draft law on amendments to Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations certainly needs an adjustment.

Based on Article 299 of Law no. 37 of 2004 on Bankruptcy and Requests for Suspension of Debt Payment Obligations states that the existence of procedural law from the commercial court is the enactment of civil procedural law. The procedural law for bankruptcy statement is included in the field of civil procedural law. The relationship between civil procedural law in general and bankruptcy procedural law which is specifically regulated in the Bankruptcy Law can be viewed in the provisions of Article 299 of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

To this date, most of the Civil Procedural Law has not been regulated in the form of national laws. In the provisions of Article 10 (1) Law No. 48 of 2009 on Judicial Power which states that the court (judge) may not refuse to examine and decide on a case submitted to him even if the legal pretext is unclear or unavailable. Therefore the judge must still accept to examine and decide on a case submitted to him even though there is no law, for this reason the judge must make legal finding.

Previously, Article 5 (1) Law No. 48 of 2009 on Judicial Power states that judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. Even if the law is unclear or unavailable, the judge must try to find the law, as the judge decides a case based on law which consists of written law (statute) and unwritten law (legal values that live in society).

At the present the Government of the Republic of Indonesia is currently working to embody the codification of civil procedural law which is national unification, as a national legal system. In order to build a national legal system, it is necessary to rearrange the material of civil procedural law which is spread out in

various laws and regulations. In addition to rearranging the material for civil procedural law, it is also important to make an inventory of substances related to civil procedural law to meet the development needs of the community. One of the ways is by adding norms or reinforcing existing regulation.

Structuring of norms in the civil procedural law includes, among other things, the examination of cases by quick proceedings, the evidence of which is carried out by means of simple evidence. In simple evidence on the argument for a claim that is acknowledged and/or denied by the defendant, there is no need for evidence, except if the argument for the claim is refuted, it requires an evidentiary examination to carry out.

The draft Civil Procedural Law is very significant given the rapid development of society and the influence of globalization which demands a judiciary that can resolve disputes in the civil field in a more effective and efficient way.

In general, the Draft Law on Civil Procedural Law is even more urgent to be formed at this time, as it is expected that it will be able to become a comprehensive formal law in resolving disputes in the fields of business, trade and investment. Apart from that, the Draft Law on Civil Procedural Law can provide legal certainty for investors and the business field. The Law Number 11 of 2020 on Job Creation must also be followed by formal law which is used as a means of defending material law.

Sources of civil procedural law that are spread in various regulations create difficulties in practice, which is the problem of inconsistency in the practice of civil procedural law. In addition, there are still various legal vacuums, including the difficulty in interpreting the simple evidentiary process between the Commercial Court and the Supreme Court. Moreover, there is difficulty in the fast, simple and low-cost judicial process, expansion in proofing evidence, and simplification the filing of lawsuits and execution.

It can be said that the drafting of the Civil Procedural Law is very urgent to carry out in order to deal with the current problems, as well as in the future. The simplification of laws and regulations, like the law on job creation, requires legal instruments that produce the best solution as soon as possible. In addition, business development must be immediately followed by developments in national law, including in the field of procedural law which can thoroughly resolve problems including inconsistencies in the application of bankruptcy law.

The draft Civil Procedural Law should be brought forth according to the current and urgent needs and not based on the interests of certain groups. Regulation for simple evidence (*sumir*) in the Draft Civil Procedural Law must receive serious attention to maintain continuity and protect businessmen from legal uncertainty itself. As a result, the public trust in the world of justice has been failed, especially in the handling of cases in commercial courts. This public distrust has a further impact, which is there is no longer reverence or respect for the court which is the last resort to seek justice.

In the end, simple evidence (*sumir*) regulation in commercial court cases in the Draft Civil Procedural Law are absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition, efforts to reform the PKPU Law have become a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future. The vision of forming such a law is not an easy task, but at least there must be earnestness to carry out better reforms.

F. Closing

1. Conclusion

Based on the discussion above, it can be concluded in this study as follows:

1. Whereas the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially civil courts, is not as simple as one might imagine due to the fact that there are inconsistencies in the panel of judges in examining cases. The simple evidence process (*sumir*) has developed very rapidly and is no longer dependent on the legal system (civil law and common law) and the judicial system adopted by a country, including Indonesia.
2. Whereas the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level including at the Supreme Court. Apart from that, the renewal of the PKPU Law is a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future.

2. Suggestion

In accordance with the above conclusions in this study the following suggestions can be given:

1) The government, together with the legislature, immediately regulates and establishes clear and firm rules from simple evidence (*sumir*) in the new PKPU law.
2) The court, in this case the panel of judges examining cases using simple evidence (*sumir*), without trapped in different interpretations.
3) Formation of Draft Civil Procedural Law in laws and regulations ideally can reach and become the formula law of various existing laws regulations, for example the job creation law.
4) The Supreme Court as the highest judicial institution can provide solutions to legal problems, especially in the event of a legal vacuum.

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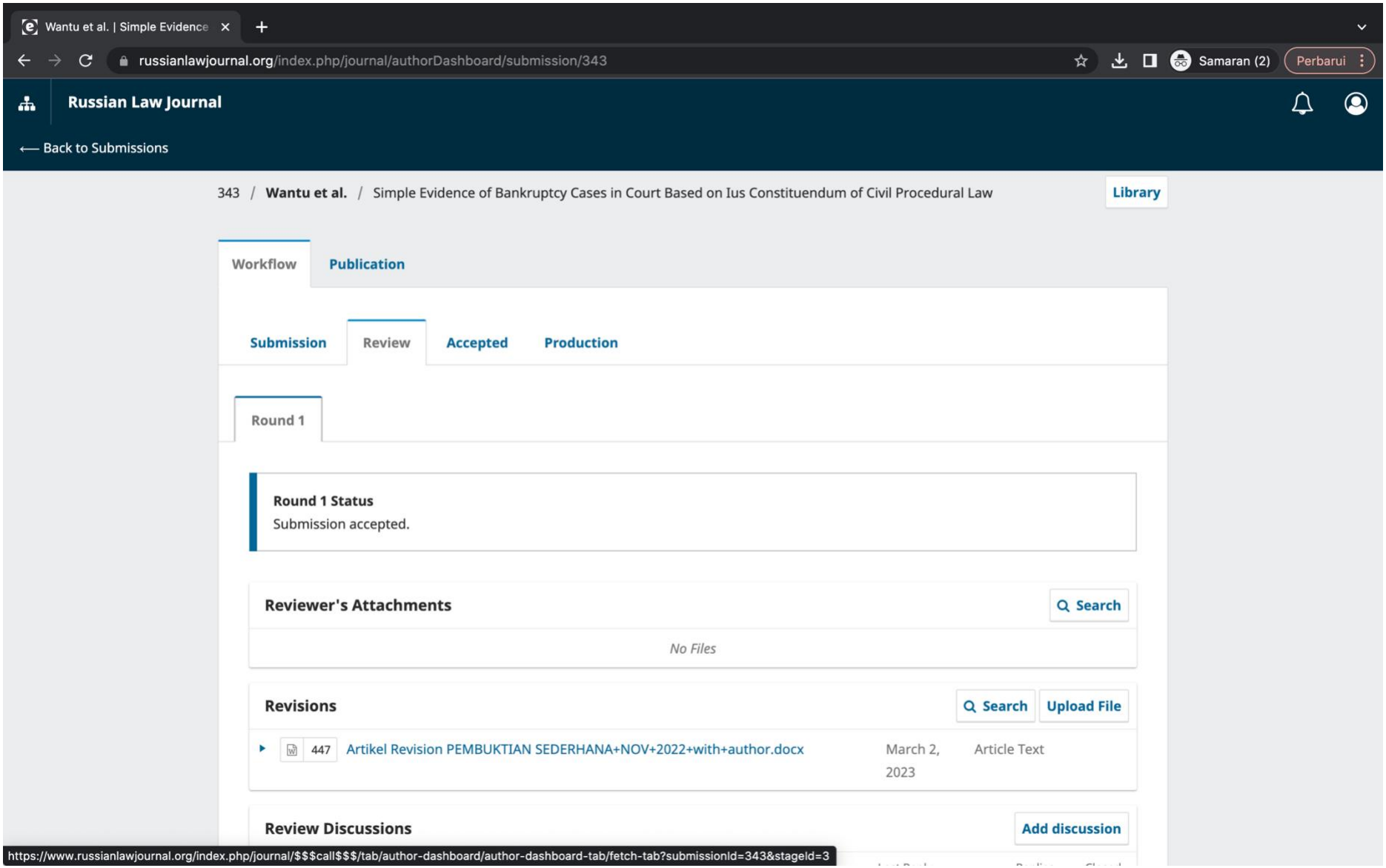
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Simple Evidence of Bankruptcy Cases in Court Based on *Ius Constituendum* of Civil Procedural Law

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Abstract

Simple evidence principle in the Commercial Court is not easy to imagine. Simple evidence (*sumir*) currently still uses civil procedural law as a formal source in court. In addition it exists in various other regulations such as bankruptcy. The purposes of this study are 1). Analyze simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts. 2). Analyze the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law.This research used method of normative legal research. It also used doctrinal research. The approach is carried out using the following methods: statute approach, conceptual approach, and case approach.The results of the research indicated that simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts, are not as simple as one imagine because in reality there are inconsistencies in the panel of judges in examining cases. Afterward, the *ius constituendum* regulation for simple evidence (*mumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining the case.

Keyword: *Evidence, Bankruptcy, Court, Ius Constituendum, Civil Procedural Law*.

A. Introduction

Ideally, as a rule of law, judicial power (judiciary) occupies a strategic position as stipulated in the constitution of the 1945 Constitution, which is "the state of Indonesia is based on law (*rechtstaat*), rather than based on mere power" (*machtstaat*)[23]. One of the duties of the judiciary is to oversee the course of the judicial process. In order to conduct the judicial process, the judicial power must be independent from the interference of any power[24].

This is also confirmed in the provisions of Article 1 of Law No. 48 of 2009 on Judicial Power, it is stated that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila for the sake of the implementation of the legal state of the Republic of Indonesia.

The authority and credibility of the court institution must be properly maintained in the public, as the court institution is a place for justice seekers to seek the truth. There is a

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[23] Fence M. Wantu, 2011, Idee Des Recht: Legal Certainty, Justice and Expediency (Implementation in Civil Court Process). Pustaka Pelajar. Yogyakarta. Hlm 6

[24] Article 24 paragraph (1) of the 1945 Constitution.

growing opinion that the judiciary is often said to be the last bastion of law and order. This also applies to the judicial process in Indonesia, including civil courts.

In general, the duties of the civil court are as stated by Fence M Wantu[25] which is provide legal certainty and protection in the field of civil or private relations to anyone who is in a dispute not to take the law into their own hands (*eigenrichting*).

A true and just judicial process will contribute to the truth and enlighten people's behavior gracefully. Furthermore, a correct and wise court decision will prevent the emergence of vigilante actions and distrust of the court institution.

In the process of proceedings in court, evidence plays a very vital role, so that many opinions state that proving when a case occurs is a complex part. According to M. Yahya Harahap[26], evidence is a complex part as it proves something related to the ability to construct events that have occurred as truth.

In practice within the court, the process of proving itself is determined by the legal system adopted by each country. In this regard, Satjipto Rahardjo[27] stated that there are two different legal systems, which is, First, the Roman-German Legal System or *Civil Law System* and, Second, Common Law System.

Basically, evidence in civil procedural law can be distinguished from bankruptcy cases. In civil procedural law, evidence is clearly regulated in Article 1865. Meanwhile, in bankruptcy cases regarding evidence, there is a specificity, which is the use of simple evidence. The meaning of simple evidence can be interpreted as the ability of both the debtor and the creditor to prove the event of:

d) Debtor who has more than one creditor;
e) Debtor does not pay off the due and collectible debts;
f) Has been declared bankrupt based on a court decision either voluntarily or directly from creditors.

The legal basis for simple self-proofing is regulated in Article 8 paragraph (4) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, hereinafter referred to as UUK-PKPU. The provisions of Article 8 paragraph (4) of the UUK-PKPU emphasize that a request for a declaration of bankruptcy submitted voluntarily by the Debtor or submission by the Creditor must be granted by the Panel of

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[25] Fence M. Wantu, 2011, Opcit. Pg. 10

[26] M. Yahya Harahap, 2004, Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan, Sinar Grafika Group, Jakarta. Hal 496.

[27] Satjipto Rahardjo. 1991, Ilmu Hukum.: PT Citra Aditya Bakti, Bandung. Hal 235

Judges if there are facts or circumstances that are proven simply, relating to the requirements for submitting a bankruptcy request in Article 2 paragraph (1).

In the course of practice simple evidence (*sumir*) of bankruptcy cases turns out to be problematic. It can be viewed from the different interpretations by the judges examining the case, one example of which is the receipt of a request for a complicated debt[28].

Based on this description, it would be very interesting to conduct research on this matter, especially in relation to efforts to establish civil procedural law in the future. As it is known at the moment, the government has already submitted a draft civil procedural law and is just waiting for approval. In the future, what the evidentiary regulation will be like in the draft civil procedural law, including evidence in bankruptcy cases, will be explained later.

B. Problem Formulation

Based on the description above, the problems in this study are as follows:

3. What is the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially in civil courts?
4. What is the *ius constituendum* regulation for simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law?

C. Research Methodology

This research used the type of doctrinal research, which is research on laws and regulations as well as literatures related to the discussed material by providing a systematic explanation of legal norms that become a certain category and analyzing the relations of legal norms, explaining the difficult fields and is expected to predict the development of these norms.

The approach using the following methods:

d) Statute approach (statutory approach)[29], which is the approach taken by examining all relevant laws and regulations and other regulations related to the addressed legal issues.
e) Conceptual approach[30], which is the approach taken by studying the views and doctrines in the field of law.

[28] Sutan Remy Sjahdeini, 2016, Sejarah, Asas, dan Teori Hukum Kepailitan, Prenada Media Group, Jakarta. Hal 265.
[29] Pieter Mahmud Marzuki, 2006, Penelitian Hukum. Kencana Prenada Media Group. Jakarta. Hal 93.
[30] Ibid. Hal 94

f) *Case approach*[31], which is the approach to the problem formulation through existed cases in the field of work related to the addressed topics.

The employed sources of legal materials consist of primary legal materials, secondary legal materials and tertiary legal materials. Whereas the analysis used a descriptive technique and comparative technique in this study.

D. Discussion Results

3) Practice of Simple Evidence (*Sumir*) in Bankruptcy Cases

The history of mankind indicates that the better the laws and courts of a nation, the higher the quality of the nation's civilization. A transparent, logical, independent and fair trial process will make a positive contribution to moral truth, and enlighten the thinking and behavior of a society of grace. Courts bear the burden of great responsibility in resolving every case as it is in the process of proofing to examine cases submitted to court.

The practice of countries that adhere to a civil law system which is identical to the Continental European justice system states that the binding power of law is embodied in regulations in the form of systematic laws in the form of codification or compilation. The teachings of this system are that judges in examining cases are not bound by precedent or the *stare decicis* doctrine, as they refer more to laws as their main source. In addition, judges are active in finding legal facts and careful in assessing evidence, so that the main value of the purpose of law is legal certainty.

Whereas it is different with the countries adhering to the common law system which is practiced in the Anglosaxon justice system, the source of law is not based on written regulations let alone in the form of codification. The unwritten source of law refers to customs and through judge's decisions are made legally enforceable. According to Nurul Qomar[32], the features or characteristics of the Common Law legal system or the Anglosaxon justice system are first, jurisprudence. Second, the Stare Decicis Doctrine or System of Precedents; Third, Adversary System.

Verification process in civil courts in Indonesia, as it is known, refers to the Continental European justice system, that judges examine cases based on the law. The tendency of the process of verification to the Continental European justice system is consequently to be unliberated as it is bound by law.

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[31] Ibid. hal 95

[32] Nurul Qamar, 2010, Perbandingan Sistem Hukum dan Peradilan Civil Law System dan Common Law System. Pustaka Refleksi. Makassar. Hal 47

In contrast, in the common law justice system, as adopted by Singapore, judges form the law. Furthermore, in the common law justice system, judges can think liberally, so that their decision in certain circumstances can serve as a new law. Singapore's common law legal system is characterized by the doctrine of judicial precedent (or stare decisis). This doctrine stated that the law was built and developed continuously by the judges through previous events.

In Singapore courts judges are only required to apply acceptable reasons or considerations in making decisions (*ratio decidendi*) at a higher court in the same hierarchy. Furthermore, *ratio decidendi* can be found in the decisions of judges at Singapore courts for appeals which are directly binding, both at the Singapore High Court (High Court/Court of Appeals), the District Court and the Magistrate's Court[33].

The interesting thing in Singapore is that as a former British colony, the court decisions are not bound by decisions of British courts or Commonwealth countries. Other judicial statements (*obiter dicta*) for which there is a High Court decision do not directly affect the final outcome of a lower court decision or or in other words can be disregarded[34].

Basically, civil court, including the process of proofing in bankruptcy cases, uses a separate procedural law which raises pros and cons regarding the material truth produced by a commercial court decision. This can be viewed through the limited trial time, while on the other hand, bankruptcy issues are so complicated.

Based on the actual procedure, bankruptcy cases require quite a long time. It is based on simple logic that bankruptcy cases are not only regulated in civil law and commercial law, but also involve other areas of law.

In fact, the simple verification as stated by Ricardo Simanjuntak[35] restricts the authority of the Commercial Court in proving whether a debtor is in a state of bankruptcy and has debts that are due to be collectible, and the debtor can pay off debts that are due that are collectible. Simple evidence (*sumir*) has very close relationship with efforts to prove whether or not the conditions referred to in Article 1 paragraph 1 of Law Number 4 of 1998 amended by Article 8 paragraph 5 of Law Number 37 of 2004 on Bankruptcy and Suspension of Liability Debt Payment (PKPU)

[33] Reference to Singapore Laws, The Singapore Legal System, chapter 1. Diakses pada tanggal 12 Agustus 2022.
[34] Ibid
[35] Ricardo Simanjuntak, 2004, The Essence of Simple Proving In Bankruptcy Emmy Yuhassarie (ed), Bankruptcy Law and Its Development. Pusat Pengkajian Hukum. Jakarta. Hal 52.

must have been decided no later than 30 days from the date the bankruptcy request was registered. In other words, the principle of being quick and transparent and effective in resolving debt problems referred to by the PKPU Law makes it a measure that a debtor can be declared bankrupt if it is proven that he is in a state of discontinuing paying his debts.

In fact, if one looks at it further, the simple evidence (*sumir*) procedure in bankruptcy cases is not specifically regulated in UUK-PKPU. Based on the provisions of Article 8 paragraph (4) UUK-PKPU it is interpreted that the procedure for simple evidence (*sumir*) in Bankruptcy cases is as follows:

d) The Petitioner proves that the Debtor has two or more Creditors;
e) The Petitioner proves that the Debtor has not paid in full at least one debt that is due and collectible;
f) The Petitioner proves that he has the capacity to file a Bankruptcy Request.

Thus the evidence of the three elements above is proven through evidence adapted to the Civil Code which takes into account other provisions in the UUK-PKPU, that is Article 299 which states unless otherwise specified in the UUK-PKPU, the applicable procedural law is civil procedural law, thus evidence in Bankruptcy to prove the 3 simple elements evidence refers to Article 1866 of the Civil Code, which is evidence in the form of First, written evidence; Second, witness evidence; Third, presumption; Fourth, oath; and Fifth, confession. In judicial practice in bankruptcy cases what is often used is only documentary evidence and witnesses.

In fact, Law Number 37 of 2004 does not provide a detailed explanation of how a simple evidence is carried out so that the implementation and interpretation is fully carried out by the panel of judges who examine and decide on the bankruptcy case in question[36]. Simple evidence in practice in a commercial court is not as simple as meant in Article 8 paragraph (4) of the Bankruptcy Law. This happens because there are different interpretations from the judges who examine the case resulting in inconsistencies in the interpretation of the clarity of simple evidence.

Basically, the form of bankruptcy case is included in the category of request. Even though bankruptcy cases are in the form of request, the law itself stipulates that

[36] Putriyanti dan Tata Wijayanta, 2010, Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi. Jurnal Mimbar Hukum Volume 22 edisi 3. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta. Hal 483.

the court will provide justice in the form of a decision. According to Prinst[37], bankruptcy decisions actually have serious legal consequences for debtors. The debtor on this decision can submit legal remedies and the possibility of such bankruptcy decision is canceled. Legal remedies can be taken by one of the parties who feel that the court's decision is not as expected, so that according to the purpose of the legal remedy, which is to request an annulment of the decision of court in the lower level to a court in the higher level.

In fact, the Commercial Court is a special court to examine and decide cases in the commercial sector. The competence of the Commercial Court to examine and decide on cases of bankruptcy and postponement of debt payment obligations, HAKI and other commercial cases stipulated by government regulations.

Basically, bankruptcy decisions at the Commercial Court are immediate and constitutive, which is eliminating circumstances and creating new legal conditions. Based on the provisions of Article 8 paragraph (5) of Law No. 37 of 2004, the judge's decision at the Commercial Court must be completed within 60 (sixty) days of submiting the bankruptcy request.

Anticipating this situation, the Supreme Court in one of its circular letters stated that judge's decisions are only intended for the parties concerned, thus as a result the justice system has no public accountability, as the public cannot evaluate decisions made by the judges. Besides that, it can lead to dissatisfaction for justice seekers and the public towards the court institution itself.

According to Mochtar Kusumaatmadja there are at least 6 (six) factors underlying the community's dissatisfaction with the judicial process so far. These factors are, as follows:

7. Delay in settlement of cases;
8. An impression that the judge is not really trying to decide cases seriously based on his legal knowledge;
9. Frequent cases of bribery or attempts to bribe judges cannot be proven;
10. The case being examined was outside the judge’s knowledge concerned, due to the problem complexity and the judge's sluggishness to refer to the reference book;
11. Unprofessional lawyers act on behalf of clients;

[37] Prinst, D,2002, Strategi Menyusun dan Menangani Gugatan Perdata.Citra Aditya Bakti. Bandung.

12. Justice seekers misjudge the judicial process which is only identical as a means of winning cases rather than a place to seek justice.[38].

The Bankruptcy Law should strictly regulate its own procedural law, especially in relation to the evidentiary process. In fact, Article 2 paragraph (1) of Law Number 37 of 2004 has regulated a simple evidence process for granting a request for a bankruptcy stipulation, which is: Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt with a court decision, either at his own request or at the request of one or more of his creditors.

Likewise with the Elucidation of Article 8 paragraph (4) of the Bankruptcy Law No. 37 of 2004, it is actually an elaboration of a simple evidentiary process, which explains that what is meant by "facts or circumstances that are proven in a simple way are the fact that there are two or more Creditors and the fact that debts are past due".

Application of the simple evidence principle in practice in court turns out to lead to different perspectives which also result in different decisions of the Panel of Judges of the Commercial Court, both at the same level and at the higher level, in examining cases of bankruptcy requests. This difference is due to the lack of similarities between the Panel of Judges in interpreting something, for example the definition of debt, the definition of maturity debt and the definition of creditors, and so on.

The efforts made by the Commercial Court to deal with problems in applying the simple evidence principle in imposing bankruptcy decisions so far have basically summoned and heard the Experts. The main reasons for the appointment are due to several reasons, including:

c) there are still unclear things.
d) the only way that is considered to clarify is mostly based on reports or information from experts who are really competent to give opinions or thoughts regarding the cases being disputed according to their specialization.

Basically the reason for summoning and hearing experts is because the case in dispute is beyond the reach of the knowledge and experience of the judge or the

[38] Muhammad A. Asrun, 2004, Krisis Peradilan Mahkamah Agung Di Bawah Soeharto Cetakan Pertama. ELSAM- Lembaga Studi Dan Advokasi Masyarakat. Jakarta Hlm 24.

parties to the case, so that information is required from a competent and experienced person in that field.

In fact, evidence in civil procedural law arises when there is a conflict of interest that is resolved through the courts. The task of the court is to receive, examine and decide who is entitled to the dispute. The court or judge who examines the dispute may not only have to rely on his own convictions, but in accordance with the arguments of the evidence put forward by both parties to the dispute.

In practice, a simple evidence (*sumir*) process uses special civil procedural law, while complex evidence (not simple or complex) tends to use ordinary civil procedural law, which is often used to settle ordinary debt cases by filing a lawsuit in district court. Based on this reality, the concept of a simple evidentiary (*sumir*) system needs to be regulated firmly and clearly both separately and in civil procedural law in the future. It is expected that clear and strict regulation for simple evidence (*sumir*) will not cause new problems and inconsistent interpretation of the panel of judges in every dispute that is submitted to the court.

In the end, simple evidence (*sumir*) which thus far uses specific civil procedural judges of which regulation have been minimal all this time. Apart from that, simple evidence (*sumir*) is spread across civil procedural law and bankruptcy procedures themselves, thus more specific regulation is required which should be considered and reviewed by the legislators to amend so as not to cause overlapping of simple evidentiary regulation. In fact, the momentum for discussion of the new Civil Procedural Law is the starting point for a breakthrough in efforts to clearly and decisively regulate the status of simple evidence (*sumir*) in laws and regulations. Simple evidentiary regulation (*sumir*) should ideally only be regulated and sourced from one legal provision and not not spread all over, so as not to give rise to different interpretations.

4) *Ius Constituendum* Simple Evidence (*Sumir*) Based on Civil Procedural Law

The basic regulation regarding evidence in civil cases are generally regulated in the Civil Code, which in Articles 1865 to Article 1945. The provisions of Article 1865 of the Civil Code explain that every person who feels that he has the right or designates an event to strengthen his rights or refute a right of another person, is obliged to prove the existence such right. The meaning of this evidentiary article is that everyone can strengthen the rights they have based on the collected facts.

In addition, the principle of evidence in civil law is regulated in Article 163 Herzien Inlandsch Reglemen (HIR), which states "whoever claims to have rights over an item, or designates an event to confirm his rights, or denies the rights of another person, then that person must prove it."

Evidence in the Civil Procedural Law does not adhere to a *stelsel negative* evidentiary system according to the law, but in the civil court process only seeks formal truth. The principle of evidence is that it gives the burden of evidence to the plaintiff to prove the argument or events that can support the argument put forward by the plaintiff, while for the defendant, the judge is obliged to give a burden of evidence to prove his rebuttal to the argument put forward by the plaintiffs.

The process of verification in commercial cases in Indonesia is closed and restricted and as a result, the disputing parties are not liberated to submit types and forms of evidence, while on the other hand, the law has determined what is legal and valuable as evidence. Apart from that, the judge's decision in the current development already refers to jurisprudence, on the other hand, the judge's decision is bound by jurisprudence only applies to the Angli-Saxon justice system or the common law legal system, which is the binding force of precedent. Judge's decision referring to the decision above or jurisprudence according to Sudikno Mertokusumo[39] is considered the judge's conviction or the *persuasive force of precedent*. Furthermore, Sudikno Mertokusumo[40] stated apart from that, the judge's decision must follow and understand the legal values living in society.

In its development in Indonesia, when judges will make decisions, they sometimes also look at other regulations, which is jurisprudence. It cannot be stated that Indonesian judges are bound by jurisprudence as it applies in the common law justice system, which is the binding force of precedent. The judge's orientation towards the decision he followed was in accordance with his belief that the decision was correct as the persuasive force of precedent[41].

Sudikno Mertokusumo[42] stated that even though we do not adhere to (the binding force of precedent) as adhered in England, the judges are bound or oriented

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[39] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115

[40] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta.

[41] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115

[42] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta. Hlm

as they are sure that the decisions they follow regarding similar cases convince them that the decision is correct (the persuasive force of precedent). They must follow and understand the legal values that live in society.

According to Nelson Kapoyos[43], in civil evidence the judge must admit the truth of the incident in question which can only be obtained through the evidentiary process to make a fair decision, so the judge must recognize the events of which truth has been proven. This was also emphasized by Elizabeth Butarbutar[44], who stated that proving in procedural law has a juridical meaning of which evidence only applies to the parties to the case. Evidence in law is historical in nature, meaning that evidence tries to establish what has happened concretely.

The fourth book of *Burgerlijk Wetboek*/Civil Code contains all the basic rules in civil law and evidence in BW is solely related to cases. The benefit of this evidence is to define the existence of a fact or to postulate an event.

Evidence is required in a case that tries a dispute before the court as well as in cases of application that result in a decision. Thus the meaning of evidence is the whole rule regarding evidence that uses valid evidence as a tool with the aim of obtaining the truth of an event through a decision or judge's stipulation.

In essence, the best and most appropriate implementation of civil law is when it is carried out voluntarily or peacefully by the parties. Civil procedural law is intended to enforce civil laws expressed and enforced by courts. Courts must be able to give decisions that are intended to resolve cases in nature, which are in accordance with the legal awareness of society, so as to create peace in society.

When referring to procedural law regulations in general regarding simple evidence set forth in Herzein Inlandsch Reglement (H.I.R) article 83 f in its explanation relating to minor cases before the court, which are cases that fall under the authority of the Landraad of which examination in the General Court Session is in sumir, both implementation of the law as well as about the evidence. However, in H.I.R there is no explicit explanation regarding this sumir evidence.

At the present the number of PKPU and bankruptcy request filing has increased, it can cause legal uncertainty which has an impact on the emergence of

[43] Nelson Kapoyos, 2017, Konsep Pembuktian Sederhana Dalam Perkara Kepailitan. Jurnal Yudisial Vol. 10 No. 3 Desember. Jakarta. Hal 334-335.
[44] Elizabeth Butarbutar, (2010). Arti pentingnya pembuktian dalam proses penemuan hukum di peradilan perdata. Jurnal Mimbar HukumEdisi 22 Volume 2. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta.Hal 356.

negative investor sentiment towards the investment sector. From a macro perspective this phenomenon will have implications for the level of ease of doing business in Indonesia[45].

The Constitutional Court's decision Number 23/PUU-XI/2021 on the case of reviewing the constitutionality of Article 253 Paragraph (1), Article 293 Paragraph (1), and Article 295 Paragraph (1) of Law No 37/2004 on Article 28D of the 1945 Constitution of the Republic of Indonesia changed the functioning norms of Institutions PKPU. On the one hand, the Constitutional Court's decision states the *a quo* is a reflection of human rights, on the other hand, the Constitutional Court's decision states the *a quo* creates distortions for the PKPU institution in resolving business disputes.

Explicitly, UUK-PKPU does not provide a definition of what is called PKPU, both in corpus of law and its explanation. Article 222 Paragraph (2) and Paragraph (3) UUK-PKPU only stipulates that:

c) Debtors who are unable or predict that they will not be able to continue paying their debts which are due and collectible, may apply for a PKPU, with the intention of submitting a settlement plan which includes an offer to pay part or all of the debt to creditors;
d) Creditors who estimate that the debtor cannot continue to pay his debts which are due and collectible, can request that the debtor be given PKPU, to allow the debtor to submit a settlement plan which includes an offer to pay part or all of it to his creditors.

In following up on the Constitutional Court Decision Number 23/PUU-XIX/2021 regarding the material review of Article 235 paragraph (1) and Article 293 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Obligations for Payment of Debt, the draft law will certainly be made later concerning Amendments to Law Number 37 of 2004 on Bankruptcy and Suspension of Obligations for Debt Payments, it is necessary to make adjustments. In addition, the correlation between general civil procedural law and specific bankruptcy procedural law is regulated more clearly in the Bankruptcy Law. It is also important that judges

[45] Anita Apriana Teguh Tresna Puja Asmara, Isis Ikhwansyah, 2019, Easy of Doing Business: Gagasan Pembaharuan Hukum Penyelesaian Sengketa Investasi di Indonesia. Law Jurnal Volume 4 No 2 University of Bengkulu. Hal 120

who examine commercial cases must have the courage to make legal findings in the event that the law is not clearly regulated in laws and regulations.

To this date, most of the Civil Procedural Law has not been regulated in the form of national laws. In the provisions of Article 10 (1) Law No. 48 of 2009 on Judicial Power which states that the court (judge) may not refuse to examine and decide on a case submitted to him even if the legal pretext is unclear or unavailable. Therefore the judge must still accept to examine and decide on a case submitted to him even though there is no law, for this reason the judge must make legal finding.

Previously, Article 5 (1) Law No. 48 of 2009 on Judicial Power states that judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. Even if the law is unclear or unavailable, the judge must try to find the law, as the judge decides a case based on law which consists of written law (statute) and unwritten law (legal values that live in society).

At the present the Government of the Republic of Indonesia is currently working to embody the codification of civil procedural law which is national unification, as a national legal system. In order to build a national legal system, it is necessary to rearrange the material of civil procedural law which is spread out in various laws and regulations. In addition to rearranging the material for civil procedural law, it is also important to make an inventory of substances related to civil procedural law to meet the development needs of the community. One of the ways is by adding norms or reinforcing existing regulation.

Structuring of norms in the civil procedural law includes, among other things, the examination of cases by quick proceedings, the evidence of which is carried out by means of simple evidence. In simple evidence on the argument for a claim that is acknowledged and/or denied by the defendant, there is no need for evidence, except if the argument for the claim is refuted, it requires an evidentiary examination to carry out.

The draft Civil Procedural Law is very significant given the rapid development of society and the influence of globalization which demands a judiciary that can resolve disputes in the civil field in a more effective and efficient way.

In general, the Draft Law on Civil Procedural Law is even more urgent to be formed at this time, as it is expected that it will be able to become a comprehensive formal law in resolving disputes in the fields of business, trade and investment. Apart from that, the Draft Law on Civil Procedural Law can provide legal certainty for

investors and the business field. The Law Number 11 of 2020 on Job Creation must also be followed by formal law which is used as a means of defending material law.

Sources of civil procedural law that are spread in various regulations create difficulties in practice, which is the problem of inconsistency in the practice of civil procedural law. In addition, there are still various legal vacuums, including the difficulty in interpreting the simple evidentiary process between the Commercial Court and the Supreme Court. Moreover, there is difficulty in the fast, simple and low-cost judicial process, expansion in proofing evidence, and simplification the filing of lawsuits and execution.

It can be said that the drafting of the Civil Procedural Law is very urgent to carry out in order to deal with the current problems, as well as in the future. The simplification of laws and regulations, like the law on job creation, requires legal instruments that produce the best solution as soon as possible. In addition, business development must be immediately followed by developments in national law, including in the field of procedural law which can thoroughly resolve problems including inconsistencies in the application of bankruptcy law.

The draft Civil Procedural Law should be brought forth according to the current and urgent needs and not based on the interests of certain groups. Regulation for simple evidence (*sumir*) in the Draft Civil Procedural Law must receive serious attention to maintain continuity and protect businessmen from legal uncertainty itself. As a result, the public trust in the world of justice has been failed, especially in the handling of cases in commercial courts. This public distrust has a further impact, which is there is no longer reverence or respect for the court which is the last resort to seek justice.

In the end, simple evidence (*sumir*) regulation in commercial court cases in the Draft Civil Procedural Law are absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition, efforts to reform the PKPU Law have become a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future. The vision of forming such a law is not an easy task, but at least there must be earnestness to carry out better reforms.

E. Conclusion

In accordance with the explanation above, it can be concluded that the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially civil courts, is not as simple as one might imagine as in reality there are inconsistencies in the panel of judges in examining cases. The simple process of evidence (*sumir*) has developed very rapidly and is no longer dependent on the legal system (*civil law and common law*) and the judicial system adopted by a country, including Indonesia. For this reason, simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition to renewing the PKPU Law, it is a starting point in reformulating regulation of simple evidentiary law (*sumir*) in the Draft Civil Procedure Code which will later become the Civil Procedure Code that applies in the future.

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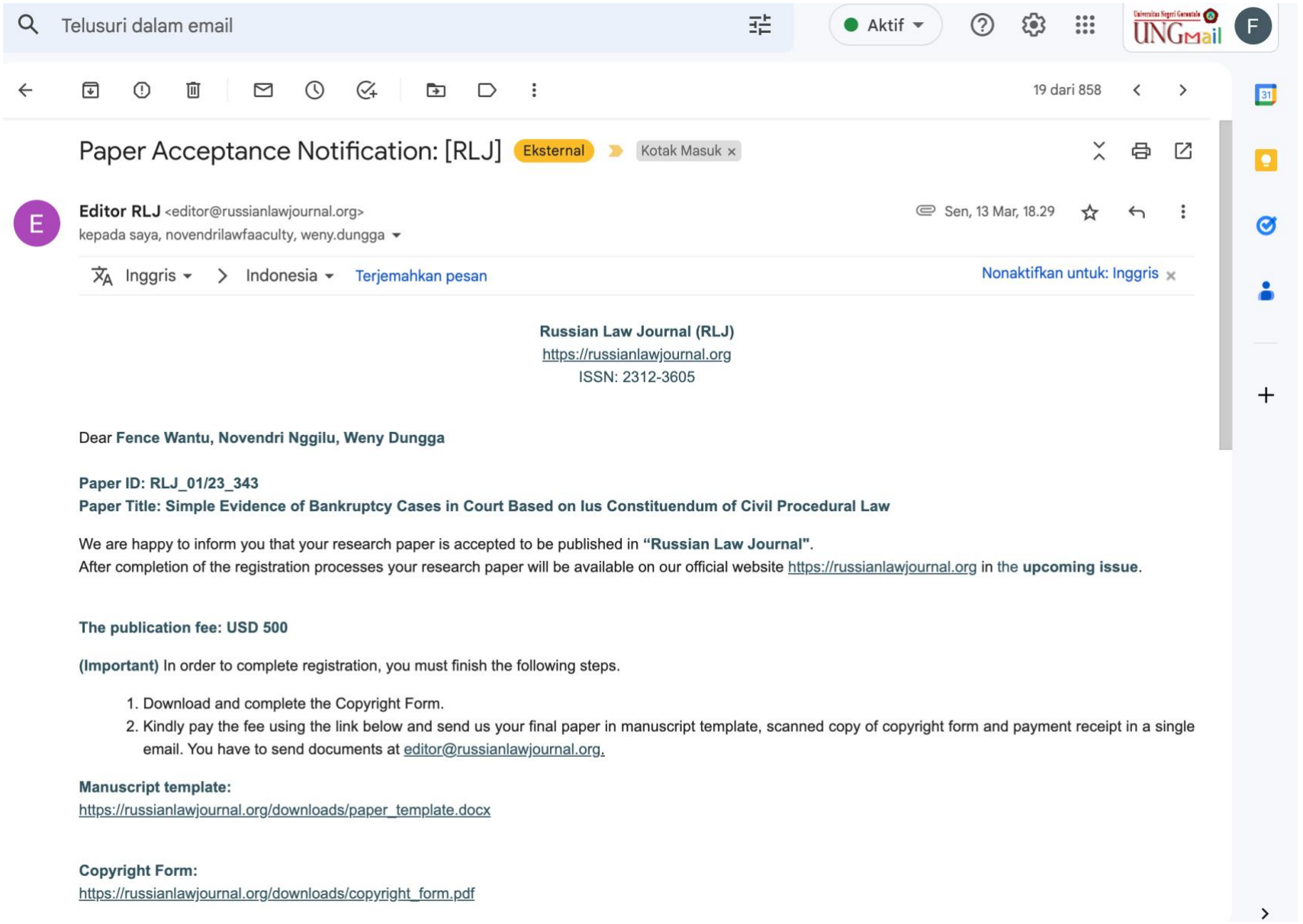

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Review and Acceptance Letter

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Review Decision 1: Accepted

1. Originality: 91%
2. Article scope: 88%
3. Understandable: Yes
4. References: Cited Properly
5. Result: Satisfactory

---------- REVIEW 2 ----------
Review Decision 2: Accepted

1. Originality: 87%
2. Article scope: 75%
3. Understandable: Yes
4. References: Cited Properly
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Final Decision: Accepted

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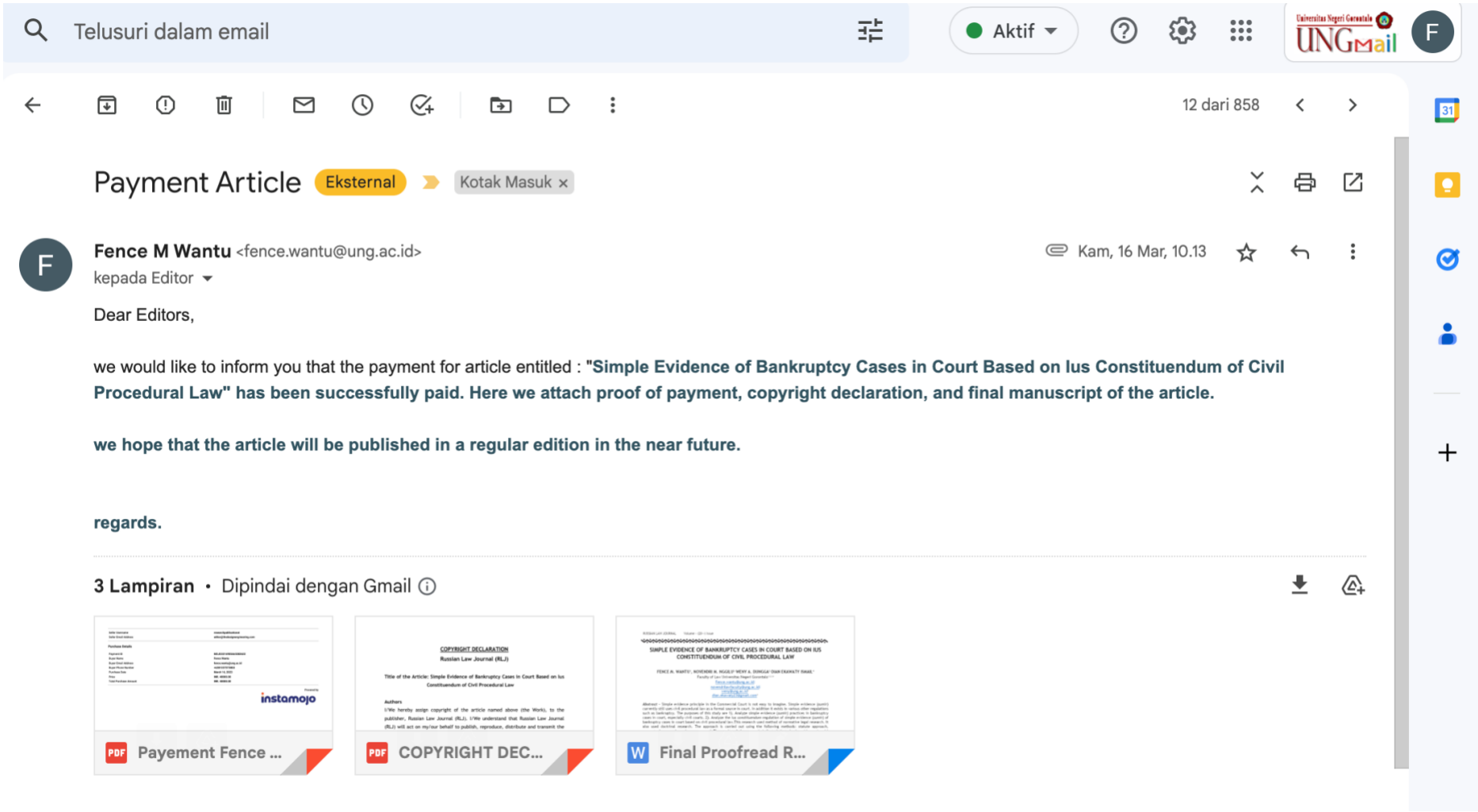
5. PENYAMPAIAN BUKTI PEMBAYARAN PUBLIKASI ARTIKEL (16 Maret 2023)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SIMPLE EVIDENCE OF BANKRUPTCY CASES IN COURT BASED ON IUS CONSTITUENDUM OF CIVIL PROCEDURAL LAW

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Abstract - Simple evidence principle in the Commercial Court is not easy to imagine. Simple evidence (*sumir*) currently still uses civil procedural law as a formal source in court. In addition it exists in various other regulations such as bankruptcy. The purposes of this study are 1). Analyze simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts. 2). Analyze the *ius constituendum* regulation of simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law.This research used method of normative legal research. It also used doctrinal research. The approach is carried out using the following methods: statute approach, conceptual approach, and case approach.The results of the research indicated that simple evidence (*sumir*) practices in bankruptcy cases in court, especially civil courts, are not as simple as one imagine because in reality there are inconsistencies in the panel of judges in examining cases. Afterward, the *ius constituendum* regulation for simple evidence (*mumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining the case.

Keywords: *Evidence, Bankruptcy, Court, Ius Constituendum, Civil Procedural Law*.

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INTRODUCTION

Ideally, as a rule of law, judicial power (judiciary) occupies a strategic position as stipulated in the constitution of the 1945 Constitution, which is "the state of Indonesia is based on law (*rechtstaat*), rather than based on mere power" (*machtstaat*)[1]. One of the duties of the judiciary is to oversee the course of the judicial process. In order to conduct the judicial process, the judicial power must be independent from the interference of any power[2].

This is also confirmed in the provisions of Article 1 of Law No. 48 of 2009 on Judicial Power, it is stated that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila for the sake of the implementation of the legal state of the Republic of Indonesia.

The authority and credibility of the court institution must be properly maintained in the public, as the court institution is a place for justice seekers to seek the truth. There is a growing opinion that

[1] Fence M. Wantu, 2011, Idee Des Recht: Legal Certainty, Justice and Expediency (Implementation in Civil Court Process). Pustaka Pelajar. Yogyakarta. Hlm 6
[2] Article 24 paragraph (1) of the 1945 Constitution.

the judiciary is often said to be the last bastion of law and order. This also applies to the judicial process in Indonesia, including civil courts.

In general, the duties of the civil court are as stated by Fence M Wantu[3] which is provide legal certainty and protection in the field of civil or private relations to anyone who is in a dispute not to take the law into their own hands (*eigenrichting*).

A true and just judicial process will contribute to the truth and enlighten people's behavior gracefully. Furthermore, a correct and wise court decision will prevent the emergence of vigilante actions and distrust of the court institution.

In the process of proceedings in court, evidence plays a very vital role, so that many opinions state that proving when a case occurs is a complex part. According to M. Yahya Harahap[4], evidence is a complex part as it proves something related to the ability to construct events that have occurred as truth.

In practice within the court, the process of proving itself is determined by the legal system adopted by each country. In this regard, Satjipto Rahardjo[5] stated that there are two different legal systems, which is, First, the Roman-German Legal System or *Civil Law System* and, Second, Common Law System.

Basically, evidence in civil procedural law can be distinguished from bankruptcy cases. In civil procedural law, evidence is clearly regulated in Article 1865. Meanwhile, in bankruptcy cases regarding evidence, there is a specificity, which is the use of simple evidence. The meaning of simple evidence can be interpreted as the ability of both the debtor and the creditor to prove the event of:

a) Debtor who has more than one creditor;
b) Debtor does not pay off the due and collectible debts;
c) Has been declared bankrupt based on a court decision either voluntarily or directly from creditors.

The legal basis for simple self-proofing is regulated in Article 8 paragraph (4) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, hereinafter referred to as UUK-PKPU. The provisions of Article 8 paragraph (4) of the UUK-PKPU emphasize that a request for a declaration of bankruptcy submitted voluntarily by the Debtor or submission by the Creditor must be granted by the Panel of Judges if there are facts or circumstances that are proven simply, relating to the requirements for submitting a bankruptcy request in Article 2 paragraph (1).

In the course of practice simple evidence (*sumir*) of bankruptcy cases turns out to be problematic. It can be viewed from the different interpretations by the judges examining the case, one example of which is the receipt of a request for a complicated debt[6].

Based on this description, it would be very interesting to conduct research on this matter, especially in relation to efforts to establish civil procedural law in the future. As it is known at the moment, the government has already submitted a draft civil procedural law and is just waiting for approval. In the future, what the evidentiary regulation will be like in the draft civil procedural law, including evidence in bankruptcy cases, will be explained later.

1. Problem Research

Based on the description above, the problems in this study are as follows:

1. What is the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially in civil courts?
2. What is the *ius constituendum* regulation for simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law?

2. Research Methodology

This research used the type of doctrinal research, which is research on laws and regulations as well as literatures related to the discussed material by providing a systematic explanation of legal norms

[3] Fence M. Wantu, 2011, Opcit. Pg. 10
[4] M. Yahya Harahap, 2004, Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan, Sinar Grafika Group, Jakarta. Hal 496.
[5] Satjipto Rahardjo. 1991, Ilmu Hukum.: PT Citra Aditya Bakti, Bandung. Hal 235
[6] Sutan Remy Sjahdeini, 2016, Sejarah, Asas, dan Teori Hukum Kepailitan, Prenada Media Group, Jakarta. Hal 265.

that become a certain category and analyzing the relations of legal norms, explaining the difficult fields and is expected to predict the development of these norms.

The approach using the following methods:

a) Statute approach (statutory approach)[7], which is the approach taken by examining all relevant laws and regulations and other regulations related to the addressed legal issues.
b) Conceptual approach[8], which is the approach taken by studying the views and doctrines in the field of law.
c) *Case approach*[9], which is the approach to the problem formulation through existed cases in the field of work related to the addressed topics.

The employed sources of legal materials consist of primary legal materials, secondary legal materials and tertiary legal materials. Whereas the analysis used a descriptive technique and comparative technique in this study.

3. Practice of Simple Evidence (Sumir) in Bankruptcy Cases

The history of mankind indicates that the better the laws and courts of a nation, the higher the quality of the nation's civilization. A transparent, logical, independent and fair trial process will make a positive contribution to moral truth, and enlighten the thinking and behavior of a society of grace. Courts bear the burden of great responsibility in resolving every case as it is in the process of proofing to examine cases submitted to court.

The practice of countries that adhere to a civil law system which is identical to the Continental European justice system states that the binding power of law is embodied in regulations in the form of systematic laws in the form of codification or compilation. The teachings of this system are that judges in examining cases are not bound by precedent or the *stare decicis* doctrine, as they refer more to laws as their main source. In addition, judges are active in finding legal facts and careful in assessing evidence, so that the main value of the purpose of law is legal certainty.

Whereas it is different with the countries adhering to the common law system which is practiced in the Anglosaxon justice system, the source of law is not based on written regulations let alone in the form of codification. The unwritten source of law refers to customs and through judge's decisions are made legally enforceable. According to Nurul Qomar[10], the features or characteristics of the Common Law legal system or the Anglosaxon justice system are first, jurisprudence. Second, the Stare Decicis Doctrine or System of Precedents; Third, Adversary System.

Verification process in civil courts in Indonesia, as it is known, refers to the Continental European justice system, that judges examine cases based on the law. The tendency of the process of verification to the Continental European justice system is consequently to be unliberated as it is bound by law.

In contrast, in the common law justice system, as adopted by Singapore, judges form the law. Furthermore, in the common law justice system, judges can think liberally, so that their decision in certain circumstances can serve as a new law. Singapore's common law legal system is characterized by the doctrine of judicial precedent (or stare decisis). This doctrine stated that the law was built and developed continuously by the judges through previous events.

In Singapore courts judges are only required to apply acceptable reasons or considerations in making decisions (*ratio decidendi*) at a higher court in the same hierarchy. Furthermore, *ratio decidendi* can be found in the decisions of judges at Singapore courts for appeals which are directly binding, both at the Singapore High Court (High Court/Court of Appeals), the District Court and the Magistrate's Court[11].

The interesting thing in Singapore is that as a former British colony, the court decisions are not bound by decisions of British courts or Commonwealth countries. Other judicial statements (*obiter dicta*) for which there is a High Court decision do not directly affect the final outcome of a lower court decision or or in other words can be disregarded[12].

[7] Pieter Mahmud Marzuki, 2006, Penelitian Hukum. Kencana Prenada Media Group. Jakarta. Hal 93.
[8] Ibid. Hal 94
[9] Ibid. hal 95
[10] Nurul Qamar, 2010, Perbandingan Sistem Hukum dan Peradilan Civil Law System dan Common Law System. Pustaka Refleksi. Makassar. Hal 47
[11] Reference to Singapore Laws, The Singapore Legal System, chapter 1. Diakses pada tanggal 12 Agustus 2022.
[12] Ibid

Basically, civil court, including the process of proofing in bankruptcy cases, uses a separate procedural law which raises pros and cons regarding the material truth produced by a commercial court decision. This can be viewed through the limited trial time, while on the other hand, bankruptcy issues are so complicated.

Based on the actual procedure, bankruptcy cases require quite a long time. It is based on simple logic that bankruptcy cases are not only regulated in civil law and commercial law, but also involve other areas of law.

In fact, the simple verification as stated by Ricardo Simanjuntak[13] restricts the authority of the Commercial Court in proving whether a debtor is in a state of bankruptcy and has debts that are due to be collectible, and the debtor can pay off debts that are due that are collectible. Simple evidence (*sumir*) has very close relationship with efforts to prove whether or not the conditions referred to in Article 1 paragraph 1 of Law Number 4 of 1998 amended by Article 8 paragraph 5 of Law Number 37 of 2004 on Bankruptcy and Suspension of Liability Debt Payment (PKPU) must have been decided no later than 30 days from the date the bankruptcy request was registered. In other words, the principle of being quick and transparent and effective in resolving debt problems referred to by the PKPU Law makes it a measure that a debtor can be declared bankrupt if it is proven that he is in a state of discontinuing paying his debts.

In fact, if one looks at it further, the simple evidence (*sumir*) procedure in bankruptcy cases is not specifically regulated in UUK-PKPU. Based on the provisions of Article 8 paragraph (4) UUK-PKPU it is interpreted that the procedure for simple evidence (*sumir*) in Bankruptcy cases is as follows:

a) The Petitioner proves that the Debtor has two or more Creditors;
b) The Petitioner proves that the Debtor has not paid in full at least one debt that is due and collectible;
c) The Petitioner proves that he has the capacity to file a Bankruptcy Request.

Thus the evidence of the three elements above is proven through evidence adapted to the Civil Code which takes into account other provisions in the UUK-PKPU, that is Article 299 which states unless otherwise specified in the UUK-PKPU, the applicable procedural law is civil procedural law, thus evidence in Bankruptcy to prove the 3 simple elements evidence refers to Article 1866 of the Civil Code, which is evidence in the form of First, written evidence; Second, witness evidence; Third, presumption; Fourth, oath; and Fifth, confession. In judicial practice in bankruptcy cases what is often used is only documentary evidence and witnesses.

In fact, Law Number 37 of 2004 does not provide a detailed explanation of how a simple evidence is carried out so that the implementation and interpretation is fully carried out by the panel of judges who examine and decide on the bankruptcy case in question[14]. Simple evidence in practice in a commercial court is not as simple as meant in Article 8 paragraph (4) of the Bankruptcy Law. This happens because there are different interpretations from the judges who examine the case resulting in inconsistencies in the interpretation of the clarity of simple evidence.

Basically, the form of bankruptcy case is included in the category of request. Even though bankruptcy cases are in the form of request, the law itself stipulates that the court will provide justice in the form of a decision. According to Prinst[15], bankruptcy decisions actually have serious legal consequences for debtors. The debtor on this decision can submit legal remedies and the possibility of such bankruptcy decision is canceled. Legal remedies can be taken by one of the parties who feel that the court's decision is not as expected, so that according to the purpose of the legal remedy, which is to request an annulment of the decision of court in the lower level to a court in the higher level.

In fact, the Commercial Court is a special court to examine and decide cases in the commercial sector. The competence of the Commercial Court to examine and decide on cases of bankruptcy and postponement of debt payment obligations, HAKI and other commercial cases stipulated by government regulations.

[13] Ricardo Simanjuntak, 2004, The Essence of Simple Proving In Bankruptcy Emmy Yuhassarie (ed), Bankruptcy Law and Its Development. Pusat Pengkajian Hukum. Jakarta. Hal 52.
[14] Putriyanti dan Tata Wijayanta, 2010, Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Perkara Kepailitan Asuransi. Jurnal Mimbar Hukum Volume 22 edisi 3. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta. Hal 483.
[15] Prinst, D,2002, Strategi Menyusun dan Menangani Gugatan Perdata.Citra Aditya Bakti. Bandung.

Basically, bankruptcy decisions at the Commercial Court are immediate and constitutive, which is eliminating circumstances and creating new legal conditions. Based on the provisions of Article 8 paragraph (5) of Law No. 37 of 2004, the judge's decision at the Commercial Court must be completed within 60 (sixty) days of submiting the bankruptcy request.

Anticipating this situation, the Supreme Court in one of its circular letters stated that judge's decisions are only intended for the parties concerned, thus as a result the justice system has no public accountability, as the public cannot evaluate decisions made by the judges. Besides that, it can lead to dissatisfaction for justice seekers and the public towards the court institution itself.

According to Mochtar Kusumaatmadja there are at least 6 (six) factors underlying the community's dissatisfaction with the judicial process so far. These factors are, as follows:

1. Delay in settlement of cases;
2. An impression that the judge is not really trying to decide cases seriously based on his legal knowledge;
3. Frequent cases of bribery or attempts to bribe judges cannot be proven;
4. The case being examined was outside the judge’s knowledge concerned, due to the problem complexity and the judge's sluggishness to refer to the reference book;
5. Unprofessional lawyers act on behalf of clients;
6. Justice seekers misjudge the judicial process which is only identical as a means of winning cases rather than a place to seek justice.[16].

The Bankruptcy Law should strictly regulate its own procedural law, especially in relation to the evidentiary process. In fact, Article 2 paragraph (1) of Law Number 37 of 2004 has regulated a simple evidence process for granting a request for a bankruptcy stipulation, which is: Debtors who have two or more creditors and do not pay off at least one debt that is due and collectible, are declared bankrupt with a court decision, either at his own request or at the request of one or more of his creditors.

Likewise with the Elucidation of Article 8 paragraph (4) of the Bankruptcy Law No. 37 of 2004, it is actually an elaboration of a simple evidentiary process, which explains that what is meant by "facts or circumstances that are proven in a simple way are the fact that there are two or more Creditors and the fact that debts are past due”.

Application of the simple evidence principle in practice in court turns out to lead to different perspectives which also result in different decisions of the Panel of Judges of the Commercial Court, both at the same level and at the higher level, in examining cases of bankruptcy requests. This difference is due to the lack of similarities between the Panel of Judges in interpreting something, for example the definition of debt, the definition of maturity debt and the definition of creditors, and so on.

The efforts made by the Commercial Court to deal with problems in applying the simple evidence principle in imposing bankruptcy decisions so far have basically summoned and heard the Experts. The main reasons for the appointment are due to several reasons, including:

a) there are still unclear things.
b) the only way that is considered to clarify is mostly based on reports or information from experts who are really competent to give opinions or thoughts regarding the cases being disputed according to their specialization.

Basically the reason for summoning and hearing experts is because the case in dispute is beyond the reach of the knowledge and experience of the judge or the parties to the case, so that information is required from a competent and experienced person in that field.

In fact, evidence in civil procedural law arises when there is a conflict of interest that is resolved through the courts. The task of the court is to receive, examine and decide who is entitled to the dispute. The court or judge who examines the dispute may not only have to rely on his own convictions, but in accordance with the arguments of the evidence put forward by both parties to the dispute.

In practice, a simple evidence (*sumir*) process uses special civil procedural law, while complex evidence (not simple or complex) tends to use ordinary civil procedural law, which is often used to settle ordinary debt cases by filing a lawsuit in district court. Based on this reality, the concept of a simple evidentiary (*sumir*) system needs to be regulated firmly and clearly both separately and in civil

[16] Muhammad A. Asrun, 2004, Krisis Peradilan Mahkamah Agung Di Bawah Soeharto Cetakan Pertama. ELSAM- Lembaga Studi Dan Advokasi Masyarakat. Jakarta Hlm 24.

procedural law in the future. It is expected that clear and strict regulation for simple evidence (*sumir*) will not cause new problems and inconsistent interpretation of the panel of judges in every dispute that is submitted to the court.

In the end, simple evidence (*sumir*) which thus far uses specific civil procedural judges of which regulation have been minimal all this time. Apart from that, simple evidence (*sumir*) is spread across civil procedural law and bankruptcy procedures themselves, thus more specific regulation is required which should be considered and reviewed by the legislators to amend so as not to cause overlapping of simple evidentiary regulation. In fact, the momentum for discussion of the new Civil Procedural Law is the starting point for a breakthrough in efforts to clearly and decisively regulate the status of simple evidence (*sumir*) in laws and regulations. Simple evidentiary regulation (*sumir*) should ideally only be regulated and sourced from one legal provision and not not spread all over, so as not to give rise to different interpretations.

4. Ius Constituendum Simple Evidence (Sumir) Based on Civil Procedural Law

The basic regulation regarding evidence in civil cases are generally regulated in the Civil Code, which in Articles 1865 to Article 1945. The provisions of Article 1865 of the Civil Code explain that every person who feels that he has the right or designates an event to strengthen his rights or refute a right of another person, is obliged to prove the existence such right. The meaning of this evidentiary article is that everyone can strengthen the rights they have based on the collected facts.

In addition, the principle of evidence in civil law is regulated in Article 163 Herzien Inlandsch Reglemen (HIR), which states “whoever claims to have rights over an item, or designates an event to confirm his rights, or denies the rights of another person, then that person must prove it.”

Evidence in the Civil Procedural Law does not adhere to a *stelsel negative* evidentiary system according to the law, but in the civil court process only seeks formal truth. The principle of evidence is that it gives the burden of evidence to the plaintiff to prove the argument or events that can support the argument put forward by the plaintiff, while for the defendant, the judge is obliged to give a burden of evidence to prove his rebuttal to the argument put forward by the plaintiffs.

The process of verification in commercial cases in Indonesia is closed and restricted and as a result, the disputing parties are not liberated to submit types and forms of evidence, while on the other hand, the law has determined what is legal and valuable as evidence. Apart from that, the judge's decision in the current development already refers to jurisprudence, on the other hand, the judge's decision is bound by jurisprudence only applies to the Angli-Saxon justice system or the common law legal system, which is the binding force of precedent. Judge's decision referring to the decision above or jurisprudence according to Sudikno Mertokusumo[17] is considered the judge's conviction or the *persuasive force of precedent*. Furthermore, Sudikno Mertokusumo[18] stated apart from that, the judge's decision must follow and understand the legal values living in society.

In its development in Indonesia, when judges will make decisions, they sometimes also look at other regulations, which is jurisprudence. It cannot be stated that Indonesian judges are bound by jurisprudence as it applies in the common law justice system, which is the binding force of precedent. The judge's orientation towards the decision he followed was in accordance with his belief that the decision was correct as the persuasive force of precedent[19].

Sudikno Mertokusumo[20] stated that even though we do not adhere to (the binding force of precedent) as adhered in England, the judges are bound or oriented as they are sure that the decisions they follow regarding similar cases convince them that the decision is correct (the persuasive force of precedent). They must follow and understand the legal values that live in society.

According to Nelson Kapoyos[21], in civil evidence the judge must admit the truth of the incident in question which can only be obtained through the evidentiary process to make a fair decision, so the judge must recognize the events of which truth has been proven. This was also emphasized by Elizabeth

[17] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115
[18] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta.
[19] Sudikno Mertokosumo, 2007, Mengenal Hukum Suatu Pengantar, Liberty Yogyakarta. Hlm 115
[20] Sudikno Mertokosumo, 2006, Hukum Acara Perdata Indonesia, Edisi Ketujuh Cetakan Pertama Liberty Yogyakarta. Hlm
[21] Nelson Kapoyos, 2017, Konsep Pembuktian Sederhana Dalam Perkara Kepailitan. Jurnal Yudisial Vol. 10 No. 3 Desember. Jakarta. Hal 334-335.

Butarbutar[22], who stated that proving in procedural law has a juridical meaning of which evidence only applies to the parties to the case. Evidence in law is historical in nature, meaning that evidence tries to establish what has happened concretely.

The fourth book of *Burgerlijk Wetboek*/Civil Code contains all the basic rules in civil law and evidence in BW is solely related to cases. The benefit of this evidence is to define the existence of a fact or to postulate an event.

Evidence is required in a case that tries a dispute before the court as well as in cases of application that result in a decision. Thus the meaning of evidence is the whole rule regarding evidence that uses valid evidence as a tool with the aim of obtaining the truth of an event through a decision or judge's stipulation.

In essence, the best and most appropriate implementation of civil law is when it is carried out voluntarily or peacefully by the parties. Civil procedural law is intended to enforce civil laws expressed and enforced by courts. Courts must be able to give decisions that are intended to resolve cases in nature, which are in accordance with the legal awareness of society, so as to create peace in society.

When referring to procedural law regulations in general regarding simple evidence set forth in Herzein Inlandsch Reglement (H.I.R) article 83 f in its explanation relating to minor cases before the court, which are cases that fall under the authority of the Landraad of which examination in the General Court Session is in sumir, both implementation of the law as well as about the evidence. However, in H.I.R there is no explicit explanation regarding this sumir evidence.

At the present the number of PKPU and bankruptcy request filing has increased, it can cause legal uncertainty which has an impact on the emergence of negative investor sentiment towards the investment sector. From a macro perspective this phenomenon will have implications for the level of ease of doing business in Indonesia[23].

The Constitutional Court's decision Number 23/PUU-XI/2021 on the case of reviewing the constitutionality of Article 253 Paragraph (1), Article 293 Paragraph (1), and Article 295 Paragraph (1) of Law No 37/2004 on Article 28D of the 1945 Constitution of the Republic of Indonesia changed the functioning norms of Institutions PKPU. On the one hand, the Constitutional Court's decision states the *a quo* is a reflection of human rights, on the other hand, the Constitutional Court's decision states the *a quo* creates distortions for the PKPU institution in resolving business disputes.

Explicitly, UUK-PKPU does not provide a definition of what is called PKPU, both in corpus of law and its explanation. Article 222 Paragraph (2) and Paragraph (3) UUK-PKPU only stipulates that:

a) Debtors who are unable or predict that they will not be able to continue paying their debts which are due and collectible, may apply for a PKPU, with the intention of submitting a settlement plan which includes an offer to pay part or all of the debt to creditors;
b) Creditors who estimate that the debtor cannot continue to pay his debts which are due and collectible, can request that the debtor be given PKPU, to allow the debtor to submit a settlement plan which includes an offer to pay part or all of it to his creditors.

In following up on the Constitutional Court Decision Number 23/PUU-XIX/2021 regarding the material review of Article 235 paragraph (1) and Article 293 paragraph (1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Obligations for Payment of Debt, the draft law will certainly be made later concerning Amendments to Law Number 37 of 2004 on Bankruptcy and Suspension of Obligations for Debt Payments, it is necessary to make adjustments. In addition, the correlation between general civil procedural law and specific bankruptcy procedural law is regulated more clearly in the Bankruptcy Law. It is also important that judges who examine commercial cases must have the courage to make legal findings in the event that the law is not clearly regulated in laws and regulations.

To this date, most of the Civil Procedural Law has not been regulated in the form of national laws. In the provisions of Article 10 (1) Law No. 48 of 2009 on Judicial Power which states that the court (judge) may not refuse to examine and decide on a case submitted to him even if the legal pretext is

[22] Elizabeth Butarbutar, (2010). Arti pentingnya pembuktian dalam proses penemuan hukum di peradilan perdata. Jurnal Mimbar HukumEdisi 22 Volume 2. Fakultas Hukum Universitas Gadjah Mada. Yogyakarta.Hal 356.
[23] Anita Apriana Teguh Tresna Puja Asmara, Isis Ikhwansyah, 2019, Easy of Doing Business: Gagasan Pembaharuan Hukum Penyelesaian Sengketa Investasi di Indonesia. Law Jurnal Volume 4 No 2 University of Bengkulu. Hal 120

unclear or unavailable. Therefore the judge must still accept to examine and decide on a case submitted to him even though there is no law, for this reason the judge must make legal finding.

Previously, Article 5 (1) Law No. 48 of 2009 on Judicial Power states that judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. Even if the law is unclear or unavailable, the judge must try to find the law, as the judge decides a case based on law which consists of written law (statute) and unwritten law (legal values that live in society).

At the present the Government of the Republic of Indonesia is currently working to embody the codification of civil procedural law which is national unification, as a national legal system. In order to build a national legal system, it is necessary to rearrange the material of civil procedural law which is spread out in various laws and regulations. In addition to rearranging the material for civil procedural law, it is also important to make an inventory of substances related to civil procedural law to meet the development needs of the community. One of the ways is by adding norms or reinforcing existing regulation.

Structuring of norms in the civil procedural law includes, among other things, the examination of cases by quick proceedings, the evidence of which is carried out by means of simple evidence. In simple evidence on the argument for a claim that is acknowledged and/or denied by the defendant, there is no need for evidence, except if the argument for the claim is refuted, it requires an evidentiary examination to carry out.

The draft Civil Procedural Law is very significant given the rapid development of society and the influence of globalization which demands a judiciary that can resolve disputes in the civil field in a more effective and efficient way.

In general, the Draft Law on Civil Procedural Law is even more urgent to be formed at this time, as it is expected that it will be able to become a comprehensive formal law in resolving disputes in the fields of business, trade and investment. Apart from that, the Draft Law on Civil Procedural Law can provide legal certainty for investors and the business field. The Law Number 11 of 2020 on Job Creation must also be followed by formal law which is used as a means of defending material law.

Sources of civil procedural law that are spread in various regulations create difficulties in practice, which is the problem of inconsistency in the practice of civil procedural law. In addition, there are still various legal vacuums, including the difficulty in interpreting the simple evidentiary process between the Commercial Court and the Supreme Court. Moreover, there is difficulty in the fast, simple and low-cost judicial process, expansion in proofing evidence, and simplification the filing of lawsuits and execution.

It can be said that the drafting of the Civil Procedural Law is very urgent to carry out in order to deal with the current problems, as well as in the future. The simplification of laws and regulations, like the law on job creation, requires legal instruments that produce the best solution as soon as possible. In addition, business development must be immediately followed by developments in national law, including in the field of procedural law which can thoroughly resolve problems including inconsistencies in the application of bankruptcy law.

The draft Civil Procedural Law should be brought forth according to the current and urgent needs and not based on the interests of certain groups. Regulation for simple evidence (*sumir*) in the Draft Civil Procedural Law must receive serious attention to maintain continuity and protect businessmen from legal uncertainty itself. As a result, the public trust in the world of justice has been failed, especially in the handling of cases in commercial courts. This public distrust has a further impact, which is there is no longer reverence or respect for the court which is the last resort to seek justice.

In the end, simple evidence (*sumir*) regulation in commercial court cases in the Draft Civil Procedural Law are absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition, efforts to reform the PKPU Law have become a starting point in reformulating simple evidence (*sumir*) law regulation in the Draft Civil Procedural Law which will then become the Civil Procedural Law that applies in the future. The vision of forming such a law is not an easy task, but at least there must be earnestness to carry out better reforms.

CONCLUSION

In accordance with the explanation above, it can be concluded that the practice of simple evidence (*sumir*) in bankruptcy cases in court, especially civil courts, is not as simple as one might imagine as in reality there are inconsistencies in the panel of judges in examining cases. The simple process of evidence (*sumir*) has developed very rapidly and is no longer dependent on the legal system (*civil law and common law*) and the judicial system adopted by a country, including Indonesia. For this reason, simple evidence (*sumir*) of bankruptcy cases in court based on civil procedural law is absolutely necessary to prevent inconsistencies in interpretation between the panel of judges examining cases at the commercial court level and the panel of judges examining cases at the next level, including at the Supreme Court. In addition to renewing the PKPU Law, it is a starting point in reformulating regulation of simple evidentiary law (*sumir*) in the Draft Civil Procedure Code which will later become the Civil Procedure Code that applies in the future.

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