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Legal Protection of Secured Creditors in Contemporary Bankruptcy: A Comparative Study of Positive Law and Islamic Law

Abstract: This article examines the legal protection of secured creditors in contemporary bankruptcy, particularly concerning the execution of collateral during insolvency and the scope of their preferential rights. Under Article 55(1) of Law No. 37 of 2004 on Bankruptcy, secured creditors are granted an exception to the principle of general attachment (*sita generalis*). The central issue addressed is the extent to which these execution rights may be restricted in practice and how judicial decisions establish legal precedents regarding the sale of collateral. The study employs a normative legal research method combined with a comparative approach, analysing Indonesian positive law alongside Islamic law. Data were obtained through an extensive review of statutory regulations, court decisions, and classical and contemporary Islamic jurisprudence. The findings indicate that although secured creditors hold preferential rights, these rights are not absolute. Unilateral auction sales conducted without curator involvement may be deemed unlawful, as they conflict with the principle of general attachment and undermine the curator's authority in managing the bankruptcy estate, thereby disadvantaging other creditors. Accordingly, the research underscores the importance of coordination between secured creditors and curators to safeguard the collective interests of all creditors. The article's academic contribution lies in its comparative analysis, which integrates Indonesian positive law with Islamic law's ethical and justice-oriented principles. By addressing legal certainty and humanitarian values, the study provides fresh insights into protecting secured creditors in bankruptcy. Ultimately, it contributes to the broader discourse on developing fairer, more inclusive, and socially responsive bankruptcy regulations within Indonesia's plural legal framework.

Keywords: Bankruptcy, Creditor, General Attachment (*Sita Generalis*), Islamic Law.

INTRODUCTION

Bankruptcy is a legal instrument designed to balance the interests between debtors and creditors in the modern financial system. Among the interested parties, separatist creditors—those who have the right to guarantee the debtor's assets—play an essential role in ensuring the certainty of debt repayment while maintaining the sustainability of the financing system.¹ However, in contemporary practice, this issue is increasingly complex because bankruptcy is not just about the private relationship between debtors and creditors, but is also closely related to national and global economic stability.² The 2008 financial crisis, marked by the collapse of Lehman Brothers, showed how failure to protect the interests of creditors can have far-reaching systemic impacts, while the COVID-19 pandemic showed that a wave of corporate bankruptcies across borders demanded a legal framework that could provide balanced protection for all parties.³

In a positive legal framework, separatist creditors acquire privileged status through preferential rights guaranteed by law. However, this position is not absolute because it is often limited by public policies, restructuring mechanisms, and new regulations to safeguard broader economic interests. This phenomenon can be seen in the case of Garuda Indonesia's debt restructuring, where the interests of international creditors, including separatist creditors, must be renegotiated through a debt repayment deferral mechanism (PKPU).⁴ Meanwhile, the perspective of Islamic law places the protection of creditors not only as a contractual issue, but also as a moral obligation rooted in the principles of justice ('*adl*), the fulfilment of contracts ('*uqūd*), and the prohibition of usury. The concept of *taflīs*

¹ Nelson Sobrinho, "Bankruptcy Technology, Finance, and Entrepreneurship1," IMF Working Papers, IMF Working Papers 2017, no. 188 (2017), <https://doi.org/10.5089/9781484314210.001.A001>.

² Charles Mooney, "The (Il)Legitimacy of Bankruptcies for the Benefit of Secured Creditors," *University of Illinois Law Review*, 1 Januari 2015, https://scholarship.law.upenn.edu/faculty_scholarship/1392.

³ Suwinto Johan dan Ariawan Ariawan, "Corporate Liability for Creditors' Losses during the Covid-19 Pandemic," *Jurnal Media Hukum*, 1 Juli 2021, 15–28, <https://doi.org/10.18196/jmh.v28i1.10566>.

⁴ Widya Sari Amalia dkk., "Restrukturisasi Utang Pt Garuda Indonesia, TBK. Sebagai Upaya Penundaan Kewajiban Pembayaran Utang Kepada Kreditur," *MIMBAR YUSTITIA: Jurnal Hukum Dan Hak Asasi Manusia* 6, no. 2 (2022): 108–117, <https://doi.org/10.52166/mimbar.v6i2.3658>.

discussed by the jurists shows that bankruptcy must be managed by balancing the rights of creditors with the protection of debtors to achieve more comprehensive social justice.⁵

Some previous studies have reviewed the position of separatist creditors in bankruptcy, such as the study by Siti Artanti et al., which examined Decision No. 560 K/Pdt.Sus-Parilit/2021⁶, Muhammad Nurohim's research, which explores the rights of separatist creditors in PKPU and bankruptcy through Decision No. 12/21 PKPU/Bankruptcy of the Semarang District Court⁷, and a study by Udin Silalahi et al., which discussed the position of collateralised creditors in the bankruptcy process.⁸ Although they make essential contributions in understanding legal protections for creditors, such studies tend to be limited to concrete case analysis and are purely juridical-formal. The study has not touched much on the comparative aspects between positive law and Islamic law, especially in testing the conformity of the principle of creditor protection with the values of justice and benefit. In addition, very few studies highlight the dynamics of creditor protection in two critical phases, namely PKPU and bankruptcy, as well as its practical implications in court. Thus, research gaps at the normative, comparative, and implementive levels still require further thorough exploration.

This research offers novelty by integrating the analysis of court decisions, normative studies of positive law, and Islamic legal principles based on *maqāṣid al-sharī'ah* in one comparative framework. In contrast to previous studies that were limited to specific judgments, this study specifically compared the protection mechanisms of secured creditors in the PKPU and bankruptcy phases. It examined the extent to which the effectiveness of such protection is in line with or even contrary to Sharia principles. In addition, this study

⁵ L. D. Nugroho, "Comparison of At Taflis Wal Hajr in Islamic Law and Bankruptcy in Positive Law," *International Joint Conference on Science and Technology* 2, no. 1 (2020): 144–148.

⁶ Siti Artanti dkk., "Perlindungan Hukum Atas Kedudukan Kreditor Separatis Dalam Kepailitan (Analisis Putusan Nomor 560 K/Pdt.Sus-Pailit/2021)," *Jurnal IKAMAKUM* 1, no. 02 (2021): 462–482.

⁷ Muhammad Nurohim, "Kedudukan Kreditor Separatis Atas Hak Jaminan Dalam Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (PKPU) (Studi Kasus Putusan No. 12/Pdt.Sus-PKPU/2020/PN.Smg Jo No 21/Pdt.Sus-Pailit/2020/PN.Smg)," *Jurnal Pendidikan Tambusai* 7, no. 2 (2023): 13042–13049, <https://doi.org/10.31004/jptam.v7i2.8461>.

⁸ Udin Silalahi dan Claudia Claudia, "Kedudukan Kreditor Separatis Atas Hak Jaminan Dalam Proses Kepailitan," *Masalah-Masalah Hukum* 49, no. 1 (2020): 35–47, <https://doi.org/10.14710/mmh.49.1.2020.35-47>.

adds an empirical perspective through implementation analysis in the field to bridge the gap between theory and practice of justice. Another novelty lies in formulating a harmonised creditor protection model that not only emphasises legal certainty in a positive system, but also incorporates the value of justice, protection of property rights, and benefits as taught in Islamic law. With this approach, this research is expected to provide academic contributions and practical recommendations for bankruptcy policy reform in Indonesia.

The main question of this research is how legal protection for separatist creditors in contemporary bankruptcy is viewed from the perspective of positive law and Islamic law. This research is essential because it not only enriches the academic discourse on the interaction of the two major legal systems but also makes a practical contribution to developing bankruptcy regulations that are more adaptive to the challenges of the times. By learning from contemporary cases, this research is expected to strengthen protections for creditors, increase legal certainty, and, at the same time, maintain the principles of social justice in the global bankruptcy system.

METHOD

This study uses a normative legal research method with a comparative legal approach.⁹ The normative legal method was chosen because the primary focus of this study is to examine the legal norms that govern the protection of separatist creditors in bankruptcy, especially regarding the right to execute guarantees, limitations on their implementation, and the role of curators in the management of bankruptcy. The comparative approach is used to comprehensively analyse the provisions of Indonesia's positive law as stipulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations with Islamic legal principles derived from the Qur'an, hadith, classical jurisprudence literature, and the views of contemporary scholars.

This study's primary and secondary legal materials are primary and secondary. Primary legal materials include relevant laws and regulations, decisions of commercial courts and Supreme Courts, as well as authoritative fiqh books. Secondary legal materials

⁹ Dr Rukin M.Si S. Pd, *Metodologi Penelitian Kualitatif* (Yayasan Ahmar Cendekia Indonesia, t.t.).

include law books, academic journal articles, fatwas, and the views of Islamic and legal experts who help provide conceptual understanding. These legal materials were obtained through literature studies by searching for printed documents and credible electronic sources.¹⁰ Data analysis was carried out qualitatively by focusing on systematic interpretation of legal norms, evaluation of judicial practices, and comparison with Islamic legal principles. The analysis process is carried out through three main stages, namely the identification of legal norms regarding the position of separatist creditors, the evaluation of restrictions on the right of execution, especially related to unilateral sales and curatorial authority, and comparative synthesis to formulate a legal protection model that is more equitable and in line with the values of social inclusivity. Thus, this method allows research to produce analyses that are not only descriptive, but also critical and solutive in the context of separatist creditor protection in the contemporary era.

RESULTS AND DISCUSSION

The Position of Separatist Creditors in Indonesian Bankruptcy Law

The position of separatist creditors in Indonesian bankruptcy law is one of the fundamental issues in business practice and financial law. Separatist creditors hold property security rights such as dependents, mortgages, or fiduciaries. Unlike concurrent creditors, they can execute collateral objects to settle their receivables. This privilege is affirmed in Article 55 paragraph (1) of Law Number 37 of 2004, which states that the rights of separatist creditors are not automatically deleted even if the debtor is declared bankrupt. This arrangement shows the state's recognition of the importance of material guarantees as an instrument of protection for lenders. Such protection is particularly relevant considering that creditors are generally reluctant to provide financing without substantial collateral. With collateral, creditors can reduce the risk of default, while the existence of privileges in bankruptcy further strengthens their legal position. This, in turn, impacts interest rates, credit terms, and the general investment climate. However, the position of separatist creditors is not absolute. Although it has the right of execution over the object of the

¹⁰ Albi Anggito Setiawan Johan, *Metodologi penelitian kualitatif* (CV Jejak (Jejak Publisher), 2018).

guarantee, its execution is still subject to the principle of generalist confiscation and curatorial supervision. In other words, separatist creditors cannot act arbitrarily without regard for the rights of other creditors. The bankruptcy system is designed not solely to protect certain creditors, but to create a fair distribution of assets for all receivable parties to the debtor.¹¹

In judicial practice, the Supreme Court, through several decisions, emphasised the limits of the position of separatist creditors. One can be seen in the Supreme Court Decision Number 321 K/Pdt.Sus/2008, where the judge emphasised that the right of execution is indeed granted, but it must not sacrifice other creditors' interests in bankruptcy. This decision reflects the court's role in maintaining a balance between protecting individual rights and the principle of collective justice. In addition to court rulings, legal doctrine affirms that separatist creditors' rights are limited. Bankruptcy law experts argue that the bankruptcy system should not give the guarantor's creditors absolute power. If this is left unchecked, bankruptcy will no longer be a fair distribution forum, but an arena for asset grabs by the party with the strongest guarantees. Therefore, the position of separatist creditors must be understood as a privilege that remains limited by collective interests.¹²

The position of separatist creditors can be seen in the right to *parate executie* against the object of collateral, especially the rights of dependents and fiduciaries. However, this right can only be exercised to the extent that it does not conflict with the bankruptcy provisions. If the object of the guarantee is included in the bankruptcy estate, the curator remains authorised to supervise the execution process. For example, in the case of a dispute over the execution of the right of dependency at the Central Jakarta Commercial Court, the auction was forced to be suspended because the creditor did not coordinate with the curator. This kind of case shows that execution cannot be carried out unilaterally. From an

¹¹ Andreas S. Y. Saud, "Penangguhan Eksekusi Hak Kreditor Separatis Menurut Undang-Undang Nomor 37 Tahun 2004," *LEX PRIVATUM* 10, no. 1 (2022), <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/38071>.

¹² Adilah Dea Sentika dan Raden Besse Kartoningrat, "Kedudukan Kreditor Separatis Dalam Mengeksekusi Objek Jaminan Saat Terjadi Kepailitan," *PERSPEKTIF: Kajian Masalah Hukum Dan Pembangunan* 25, no. 1 (2020): 63-73, <https://doi.org/10.30742/perspektif.v25i1.751>.

economic point of view, the protection of separatist creditors has far-reaching implications. With the guarantee of a strong legal position, financial institutions feel safer in distributing credit. Explicit legal protections encourage the banking system's stability and maintain investor confidence. However, if this protection is too absolute, concurrent creditors may lose the opportunity to obtain fair repayment. Therefore, the law seeks to maintain a balance so that individual and collective interests remain in line.¹³

Compared to international practice, the position of separatist creditors in Indonesia aligns with global trends. In the United States, for example, the Uniform Commercial Code (UCC) stipulates that creditors with *security interests* have priority over certain assets belonging to the debtor. This comparison shows that Indonesia does not stand alone, but also adopts universal standards in providing legal protection for separatist creditors. However, Indonesia still adjusts to the local context through the supervision of curators as managers of bankruptcy assets. The perspective of Islamic law also offers a similar view. In Islamic law, creditors who hold material guarantees are given priority to repayment, but the principle of distribution is still considered. Islam teaches that the rights of all parties to the debt are not ignored, even if there are parties who have stronger guarantees. This alignment between positive law and Sharia principles shows that the protection of separatist creditors can be developed within the social justice framework.

Limitations of Enforcement Rights in Bankruptcy Proceedings

The right of execution of separatist creditors is recognised in Indonesian bankruptcy law, but its existence is not absolute. Law No. 37 of 2004 provides space for separatist creditors to execute guarantees even if the debtor has been declared bankrupt, but these rights can be limited in the interests of the bankrupt boedel. This restriction is intended to ensure that bankruptcy does not turn into a mechanism that only benefits certain creditors, but instead becomes a fair distribution forum for all parties who are debtors to the debtor. One form of restriction of the right of execution can be seen in

¹³ Ramadhan Muhammad, "Perlindungan Hukum Terhadap Kreditur Separatis Menurut Undang Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang," *Jurnal Analisis Hukum* 1, no. 2 (2018): 187-201, <https://doi.org/10.38043/jah.v1i2.2691>.

Article 56 of the Bankruptcy Law, which stipulates a period of suspension of execution for 90 days from when the bankruptcy decision is rendered. During this period, separatist creditors cannot immediately sell the collateral object. This suspension allows the curator to conduct an inventory of the debtor's assets, regulate the governance of the bankruptcy bank, and ensure that no assets are executed unilaterally without considering the interests of other creditors.¹⁴

In addition to the suspension period, restrictions also appear to be on the obligation of separatist creditors to coordinate with curators. This is important considering that the curator is the party that has full authority over the management of the bankruptcy estate. If the separatist creditor continues to execute without the curator's knowledge, then his actions can be sued and declared invalid by the commercial court. This practice often leads to legal disputes, especially when creditors interpret their rights as absolute. The Supreme Court's jurisprudence emphasises the importance of this limitation. In one case, the court rejected an auction application submitted by a separatist creditor because it did not go through a curatorial mechanism. The judge argued that although the separatist creditors had preferential rights, the unilateral execution could harm other creditors who should have received a portion of the bankruptcy bond. The ruling affirmed that the protection of separatist creditors must be placed within common interests, not solely individual interests.¹⁵

Limitations on enforcement rights are also necessary to avoid conflicts between creditors. In bankruptcy situations, there is often more than one separatist creditor holding different guarantees for the same or related assets. Without a restriction rule, the potential for a fight for execution will be huge and cause legal uncertainty. With a curator as a mediator, execution can be carried out more orderly, fairly, and transparently. From an economic perspective, restricting the right of execution has important implications. If the

¹⁴ I. Made Teguh Adinata dan I. Made Dedy Priyanto, "Perlindungan Hukum Kreditor Separatis Terhadap Hak Jaminan Yang Diagunkan Oleh Debitor Pailit," *Journal Ilmu Hukum* 7, no. 10 (2019), https://ojs.unud.ac.id/index.php/kerthanegara/article/view/54601?utm_source=chatgpt.com.

¹⁵ Talita Taskiyah dan Gunawan Djajaputera, "Kedudukan Jaminan Kebendaan Yang Dibebeani Hak Tanggungan Milik Pihak Ketiga Selaku Pemberi Jaminan Dalam Kepailitan," *Syntax Literate ; Jurnal Ilmiah Indonesia* 7, no. 12 (2022): 17120-17129, <https://doi.org/10.36418/syntax-literate.v7i12.10492>.

separatist creditor is allowed to execute the guarantee indefinitely, the concurrent creditor will lose the opportunity to obtain repayment.¹⁶ This can potentially undermine the principle of justice in the bankruptcy system. Conversely, financial institutions' trust in material guarantees will decline if separatist creditors are too restricted. Therefore, bankruptcy law tries to maintain a balance between the two interests.

Comparisons with other legal systems show the same pattern. In the United States, for example, even though creditors with security interests have preferential rights, they are still subject to the automatic stay provisions in bankruptcy proceedings. This provision is like the suspension period in Indonesian law. This similarity shows that the restriction of enforcement rights is not a weakness, but rather an international standard adopted to maintain fairness in the bankruptcy process. From the perspective of Islamic law, the restriction of the right of execution also has a philosophical basis. The principle of distributive justice taught by Islam emphasises that debt repayment must pay attention to the rights of all parties. Creditors with collateral have the right to take precedence, but they must not act to the detriment of others. For example, if the execution is carried out unilaterally and ignores the poor creditors who are also receivable, then the action is contrary to the value of Sharia justice.¹⁷

A concrete example of applying this restriction can be seen in the case of a dispute between a bank as a separatist creditor and several concurrent creditors in the bankruptcy of a property company in Jakarta. The bank attempted to auction the collateralised land without involving a curator. However, the court rejected the action because the curator was authorised to ensure that the auction process was conducted openly and that the proceeds

¹⁶ Nida Najla Kurniawan dkk., "Analisis Kekuasaan Eksekutorial Di Indonesia Dalam Eksekusi Objek Jaminan Yang Dibebani Hak Tanggungan (Putusan MA Nomor 3418 K/Pdt/2019)," *Diponegoro Private Law Review* 5, no. 2 (2023): 116–131.

¹⁷ Lambok Marisi Jakobus Sidabutar, "Hukum Kepailitan dalam Eksekusi Harta Benda Korporasi sebagai Pembayaran Uang Pengganti," *Integritas: Jurnal Antikorupsi* 5, no. 2 (2019): 75–86, <https://doi.org/10.32697/integritas.v5i2.474>.

were used to pay all creditors according to their respective portions. This case shows the importance of limitations on execution in real practice.¹⁸

The Role of the Curator in the Execution of Guarantees

Curators play a central role in every bankruptcy process in Indonesia. After the bankruptcy judgment is rendered, the court appoints the curator to take care of and settle all bankruptcy estates. This function supervises all debtors' assets, including those pledged to separatist creditors. Thus, the role of the curator is not only administrative, but also strategic in maintaining a balance of interests between separatist, concurrent, and preferred creditors. The curator is an independent manager who ensures that all bankruptcy proceedings follow the law. In the context of collateral execution, the curator ensures that the execution is carried out legally, transparently, and without harming other parties. Without the role of curators, separatist creditors have the potential to unilaterally execute guarantees that can cause injustice, especially for concurrent creditors who do not have material guarantees.¹⁹

Apart from being a supervisor, the curator also has the authority to postpone the execution of guarantees carried out by separatist creditors. This is in accordance with the provisions of the suspension period as stipulated in Article 56 of the Bankruptcy Law. With this authority, the curator can ensure that the debtor's assets are not immediately lost from the bankruptcy estate without being recorded, assessed, and distributed. This function is key in maintaining the integrity of the bankruptcy process. In practice, curators also often mediate between separatist and other creditors. In many cases, separatist creditors want to execute quickly, while concurrent creditors demand justice in the distribution. The curator is in the middle of balancing these conflicting interests. An example can be seen in the bankruptcy case of one of the large textile companies in Bandung, where the curator

¹⁸ Angga Yuristian, "Hak Kreditor Separatis Dalam Mengeksekusi Jaminan Kebendaan Dari Debitor Pailit Yang Berasal Dari PKPU," *Jurist-Diction* 5, no. 6 (2022): 2051-2068, <https://doi.org/10.20473/jd.v5i6.40066>.

¹⁹ Martunas Sianturi dkk., "Tugas, Peran Dan Tanggung Jawab Kurator Dalam Kepailitan," *Co-Value Jurnal Ekonomi Koperasi Dan Kewirausahaan* 14, no. 6 (2023): 751-760, <https://doi.org/10.59188/covalue.v14i6.3945>.

managed to arrange the execution of land assets pledged to the bank while setting aside part of the proceeds to pay debts to workers who were preferred creditors.²⁰

The role of the curator is also crucial in assessing the legitimacy of separatist creditors' actions. For example, when a creditor auctions an asset unilaterally without notice, the curator can sue for the action in a commercial court. That way, curators not only become passive managers but also play an active role in enforcing the law and protecting collective interests. This active role makes the curator a decisive figure in every stage of bankruptcy. Curators have professional responsibilities that are regulated by law. They are obliged to work independently, transparently, and accountably. He can be prosecuted if the curator acts beyond his authority or cooperates with a particular creditor for a one-sided benefit. In some cases, creditors raise objections to the curator's actions that are considered non-neutral, and the court acts as a supervisor to assess whether the curator has carried out his duties according to the rules.²¹

From an economic perspective, the role of a curator is essential to maintain stability and trust in the bankruptcy system. Both separatist and concurrent creditors will have more faith in the bankruptcy mechanism if the curator can work fairly. Without a curator, creditors may compete to execute the debtor's assets individually, which can ultimately cause distribution chaos and harm many parties. Therefore, the existence of a curator is a guarantor of the orderly execution process. Compared to the international legal system, the role of a curator in Indonesia is similar to that of a *trustee* in the United States bankruptcy system. The trustee functions to supervise the debtor's assets, delay the execution of creditors, and ensure that the distribution of assets is carried out fairly. This comparison shows that the curatorial function is not a typical Indonesian concept, but part of a universal practice in modern bankruptcy law.²² From the perspective of Islamic law, the

²⁰ Moh Saleh dkk., "Kurator Sebagai Eksekutor Dalam Penyelesaian Kasus Kepailitan," *Jurnal Risalah Kenotariatan* 2, no. 1 (2021), <https://doi.org/10.29303/risalahkenotariatan.v2i1.51>.

²¹ Alma Safira, "Perlindungan Hukum terhadap Kurator dalam Melakukan Pemberesan Harta Pailit," *Syntax Idea* 3, no. 5 (2021): 996–1106, <https://doi.org/10.46799/syntax-idea.v3i5.1191>.

²² Comodor Erfisen Sinaga dkk., "Efektivitas Pemberesan Boedel Pailit Oleh Kurator Dan Perlindungan Hak Terhadap Kreditur Separatis Bank," *Action Research Literate* 8, no. 11 (2023): 3103–3118, <https://doi.org/10.46799/ar.v8i11.2351>.

role of curators can be analogous to the concept of *amīn* or trust managers. Islam emphasises that the debtor's assets must be managed so as not to harm the debtor party. Creditors with collateral are still entitled to repayment first, but the implementation must be fair and transparent. Thus, the role of curators is in line with the values of justice and trust taught in Islam.

Protection of Separatist Creditors in Indonesia's Positive Legal Perspective

Indonesia's positive law provides strong protection for separatist creditors, primarily through the provisions in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. This protection can be seen from recognising the right to execute the guarantee that remains attached even if the debtor is declared bankrupt. This means that the Indonesian legal system puts separatist creditors in a privileged position compared to concurrent creditors who must compete proportionally in distributing bankruptcy assets. Article 55, paragraph (1) of the Bankruptcy Law expressly states that separate creditors have the right to execute their guarantees without bankruptcy. This provision provides necessary legal certainty for creditors, especially financial institutions, because it guarantees that their rights are not lost when the debtor goes bankrupt. This protection makes collateral-based lending attractive and safe for banks and investors.²³

However, such protection is not absolute. Articles 56 to 59 of the Bankruptcy Law provide strict restrictions on the execution of executions, including the suspension period of execution and the obligation to coordinate with the curator. Thus, Indonesia's positive law provides protection with the principle of balance, which recognises the rights of separatist creditors but still pays attention to other creditors' interests. Jurisprudence in Indonesia shows consistency in interpreting separatist creditor protection. In several commercial court rulings, separatist creditors have always been granted preferential rights, but the courts have also asserted that execution must go through legitimate bankruptcy procedures. For example, in a ruling involving Bank X against a bankrupt property

²³ Hakim Harismawan Mubarak dan Dona Budi Kharisma, "Perlindungan Hukum Terhadap Kreditor Separatis Dalam Eksekusi Harta Boedel Pailit Apabila Dihadapkan Dengan Sita Perkara Tindak Pidana Korupsi," *Jurnal Privat Law* 11, no. 2 (2023): 255–264, <https://doi.org/10.20961/privat.v11i2.49272>.

company, the judge rejected the implementation of a unilateral auction because it was considered contrary to the curator's authority. This ruling shows that the protection of separatist creditors goes hand in hand with the protection of the bankruptcy system.²⁴

In addition to the provisions in the Bankruptcy Law, Indonesia's positive law also protects guaranteed legal instruments. The Law on Dependents, the Fiduciary Law, and mortgage provisions provide legal certainty for the existence of the right of guarantee. This means that separatist creditors have a double legal basis in terms of guaranteed and bankruptcy laws. This layered protection makes their position even stronger in the Indonesian legal system. Regarding legal doctrine, many experts consider protecting separatist creditors an essential factor in maintaining national economic stability. Creditors who feel secure with legal guarantees will be more encouraged to distribute financing. Without this kind of protection, credit risk will increase dramatically and ultimately reduce the liquidity of the financial markets.²⁵ Therefore, protecting separatist creditors is considered a legal instrument supporting economic growth.

However, this protection also raises criticism. Some consider separatist creditors too privileged in Indonesia's bankruptcy law. As a result, concurrent creditors are often in a very weak position because they only receive the remaining assets after the priority and preferred creditors have been repaid. This criticism highlights the need to reform bankruptcy law so that the principle of distributive justice is better reflected in practice. In international practice, the protection pattern for separatist creditors is also applied, albeit with variations. For example, in European countries, separatist creditors retain preferential rights, but bankruptcy courts are often stricter in restricting executions to protect the interests of workers and small creditors. This comparison shows that the protection of

²⁴ Mr Sularto, "Perlindungan Hukum Kreditur Separatis Dalam Kepailitan," *OLD WEBSITE OF JURNAL MIMBAR HUKUM* 24, no. 2 (2012): 241-253, <https://doi.org/10.22146/jmh.16128>.

²⁵ Sri Redjeki Slamet, "Perlindungan Hukum Dan Kedudukan Kreditor Separatis Dalam Hal Terjadi Kepailitan Terhadap Debitor," *Forum Ilmiah* 13, no. 01 (2016), <https://ejurnal.esaunggul.ac.id/index.php/Formil/article/view/1394>.

separatist creditors is not unique to Indonesia, but part of a global trend in bankruptcy law.²⁶

Protecting separatist creditors in Indonesia's positive law can also be attributed to justice, certainty, and legal utility. Certainty is provided through the recognition of the right of execution, justice is enforced through restrictions on implementation, and benefits are achieved through financial system stability. Thus, protecting separatist creditors does not solely serve individual interests but also maintains a balance in the national legal and economic system.²⁷ Protecting separatist creditors in Indonesia's positive law can be seen as a compromise between individual protection and collective interests. Although they have strong preferential rights, their execution must still be subject to the rules of bankruptcy law and supervised by the curator and the courts. In this way, Indonesia's positive law seeks to create a bankruptcy system that protects certain creditors and upholds the principle of justice for all parties involved.

Islamic Law's Perspective on Separatist Creditor Protection

From the perspective of Islamic law, the concept of separatist creditors is not as explicitly known as in modern positive law. However, the principles underlying the relationship between creditor and debtor, particularly regarding the right to guarantee (rahn), can be seen as relevant equivalents. Islam recognises that the lending party has the right to obtain a guarantee to protect their rights, as affirmed in the Qur'an Surah Al-Baqarah verse 283. This verse emphasises the ability to take dependent goods when a person makes a debt and receivables transaction with a specific grace period. The principle of balance between the lender's and the debtor's interests governs creditors' rights in Islamic law. On the one hand, Islam guarantees the rights of creditors so that they are not harmed; on the other hand, Islam also prohibits unjust practices that harm the debtor. For example,

²⁶ Indri Adelia Putri, "Perlindungan Hukum Bagi Kreditor Separatis Dalam Pembagian Dan Pemberesan Harta Pailit," *Jaksa : Jurnal Kajian Ilmu Hukum Dan Politik* 2, no. 2 (2023): 299–305, <https://doi.org/10.51903/jaksa.v2i2.1702>.

²⁷ Andy Gustaf Hutabarat dkk., "Perlindungan Kreditur Separatis Terhadap Jangka Waktu Eksekusi Objek Hak Tanggungan Dalam Proses Insolvensi," *Binamulia Hukum* 14, no. 1 (2023): 173–186, <https://doi.org/10.37893/jbh.v14i1.1007>.

the Prophet PBUH emphasised that delaying debt payments even though they can pay is a form of tyranny. This Islam not only provides legal protection for creditors, but also regulates that protection so that it does not cause social injustice.²⁸

In classical fiqh, scholars explain the concept of *rahn* as a contract that holds goods as collateral for debts. The pledged goods can be executed if the debtor fails to fulfil his obligations. This shows that creditors who hold collateral have a preferential right because they can pay off their receivables from the proceeds of executing the goods. Thus, the basic principle of separatist creditors has existed in the Islamic legal tradition since the beginning. However, Islamic law does not give absolute rights to the creditors of the guarantors. The fuqaha emphasised that the sale of collateral must be carried out fairly and not harm debtors excessively. In fact, if the sales exceed the amount of debt, then the excess must be returned to the debtor. This principle emphasises that in Islamic law, the protection of separatist creditors is always balanced with the protection of debtors' rights.²⁹

In contemporary practice, this concept is developed in the Islamic banking system through murabahah contracts with guarantees or financing musyarakah mutanaqisah. If the customer fails to fulfil its obligations, the bank, as a creditor, has the right to execute the guarantee. However, Islamic financial institutions usually apply the deliberation and restructuring mechanism first, per the *islah* (peace) principle, before taking the execution route. This shows a difference in a more humanist approach compared to positive legal practice, which tends to be formalistic. A clear example can be seen in the DSN-MUI fatwa, which regulates the execution of guarantees in Sharia financing. The fatwa emphasises that execution can only be done after the customer has completely failed to pay and efforts have been made to settle peacefully. In fact, in some cases, religious courts that handle Sharia economic disputes emphasise the importance of mediation between Islamic banks and

²⁸ Runarianu Rachmat dan Suherman Suherman, "Perlindungan Hukum Terhadap Kreditor Pemegang Jaminan Fidusia Terhadap Harta Debitor Yang Dinyatakan Pailit," *ADIL: Jurnal Hukum* 11, no. 1 (2020), <https://doi.org/10.33476/ajl.v11i1.1446>.

²⁹ Hendri Jayadi, "Hak Dan Kewajiban Kreditor Memiliki Hak Retensi Dalam Pembagian Harta Pailit Berdasarkan Hukum Perdata Indonesia," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 4, no. 2 (2022): 741-750, <https://doi.org/10.37680/almanhaj.v4i2.3346>.

customers before the guaranteed auction is held. This shows a balance between legal certainty and social justice values.³⁰

On the other hand, the principle of *maqāṣid al-syarī'ah* (sharia goals) is also an essential basis in assessing the protection of separatist creditors. Protecting creditors' rights is part of the protection of property (*ḥifẓ al-māl*), one of the five main objectives of sharia. However, this protection should not ignore the protection of the soul (*ḥifẓ al-nafs*) and honour (*ḥifẓ al-'ird*) of the debtor. This means that Islamic law rejects the protection of creditors who cause exploitation or social destruction. In contemporary literature, scholars of Islamic law also underline the importance of applying the principle of distributive justice in bankruptcy. If, in positive Indonesian law, separatist creditors have a special right of execution, then in Islamic law these rights must be balanced with social obligations, such as the prohibition of taking excessive profits (*ribā*) and the commitment to provide grace to debtors who are in difficulty (*nadhār ilā maisarah*). Thus, creditor protection in Islam is more inclusive and pays attention to humanitarian aspects.³¹

A comparison between Islamic law and positive law shows that both recognise the rights of separatist creditors but differ in how they are implemented. Positive law emphasises legal certainty and formal mechanisms through curators and auctions, while Islamic law emphasises the moral values, ethics, and social justice in the settlement process. This difference in approach can reflect the development of bankruptcy law in Indonesia to be more humane. Ultimately, Islamic law provides a separatist creditor protection model that protects the interests of creditors and maintains social balance. By emphasising the principles of deliberation, grace and justice in the execution of sureties, Islamic law offers a more benefit-oriented paradigm. In the context of modern bankruptcy, this paradigm can

³⁰ Risma Nur Arifah dan Arman Safril Adam, "Legal Protection of Concurrent Creditors for The Debts That Are Not Guaranteed by Property Rights According to Bankruptcy Law and Islamic Law," *AT-TURAS: Jurnal Studi Keislaman* 9, no. 1 (2022): 1-19, <https://doi.org/10.33650/at-turas.v9i1.3398>.

³¹ Hirsanuddin Hirsanuddin dan Sudiarto Sudiarto, "Perlindungan Hukum Bagi Para Pihak (Kreditur Dan Debitur) Melalui Parate Executie Obyek Hak Tanggungan," *Jurnal IUS Kajian Hukum Dan Keadilan* 9, no. 1 (2021): 253-267, <https://doi.org/10.29303/ius.v9i1.890>.

be an inspiration to develop more equitable, inclusive regulations and in accordance with human values.³²

A comparison between Islamic law and positive law shows that both recognise the rights of separatist creditors but differ in how they are implemented. Positive law emphasises legal certainty and formal mechanisms through curators and auctions, while Islamic law emphasises the moral values, ethics, and social justice in the settlement process. This difference in approach can reflect the development of bankruptcy law in Indonesia to be more humane. Ultimately, Islamic law provides a separatist creditor protection model that protects the interests of creditors and maintains social balance. By emphasising the principles of deliberation, grace and justice in the execution of sureties, Islamic law offers a more benefit-oriented paradigm. In the context of modern bankruptcy, this paradigm can inspire the development of more equitable, inclusive regulations in accordance with human values.³³

Regarding legal philosophy, positive law emphasises legal *certainty*, while Islamic law emphasises substantive justice. This can be seen in Indonesian commercial courts, where decisions tend to prioritise procedural order, although they sometimes give the impression of formalism. On the other hand, in resolving Sharia economic disputes, mediation and deliberation are preferred, so the process is more persuasive and humane. This difference can also be seen from the aspect of protection for debtors. Positive law focuses more on protecting creditors so that their rights are not lost, although in practice, there is still a stay of execution mechanism to protect the debtor's interests. Meanwhile, Islamic law pays special attention to debtors who struggle with the principle of *nadhar ilā maisarah* (giving a grace period). Thus, Islamic law provides double protection, both for creditors and debtors.³⁴

³² Siti Anisah, "Studi Komparasi Terhadap Perlindungan Kepentingan Kreditor Dan Debitor Dalam Hukum Kepailitan," *Jurnal Hukum IUS QUIA IUSTUM*, 2009, <https://journal.uui.ac.id/IUSTUM/article/view/3881>.

³³ Hendri Jayadi, "Perlindungan Hukum Terhadap Penerapan Asas Pari Passu Prorata Partij Terhadap Kreditor Konkuren Dalam Perspektif Hukum Acara Perdata," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 3, no. 2 (2021): 277-282, <https://doi.org/10.37680/almanhaj.v3i2.3347>.

³⁴ Martin Anggiat Maranata Manurung dan Jawade Hafidz, "Perlindungan Hukum Terhadap Kreditor Apabila Objek Jaminan Fidusia Ternyata Hilang Dan Debitor Wanprestasi (Studi Kasus Di PT.

A concrete example of this difference can be seen in the bankruptcy case in Indonesia, where banks as separatist creditors often apply for the execution of guarantees as soon as possible. In practice, this sometimes raises objections from curators because it is considered contrary to the principle of generalist confiscation. On the other hand, in the case of Sharia financing disputes, religious courts encourage mediation efforts so that the settlement is carried out peacefully before the guarantee is executed. This shows that Islamic law provides a more gradual approach. To clarify the comparison, the following table summarises the main differences between positive law and Islamic law in protecting separatist creditors:

Table 1. Differences between positive law and Islamic law in protecting separatist creditors

Aspects	Positive Law (Law No. 37 of 2004)	Islamic Law (Fiqh, DSN-MUI, and Contemporary Practice)
Legal Basis	Article 55, paragraph (1) of the Bankruptcy Law; Commercial Court and Supreme Court Decision	Al-Baqarah: 283; Hadith on debt & rahn; Classical & contemporary fiqh
Position of Separatist Creditors	Creditors with preferential rights to the collateral object	The rahn holder has the right to take precedence over the result of the execution of the guarantee
Right of Execution	Can execute the guarantee even if the debtor is bankrupt, but subject to the curator and public confiscation	Can sell collateral if the debtor defaults, but on fair terms

Bank Perkreditan Rakyat Dinamika Bangun Arta Salatiga),” *JURNAL AKTA* 4, no. 1 (2017): 37-40, <https://doi.org/10.30659/akta.v4i1.1554>.

Restriction of Rights	There can be no one-sided auction without a curator; it must safeguard other creditors' interests.	Must not harm the debtor; the auction proceeds exceeding the debt must be returned.
Debtor Protection	Debtors are protected through a stay of execution and curatorial supervision.	The debtor is protected by the principle of <i>nadhar ilā maisarah</i> (grace period) and the prohibition of tyranny.
Philosophical Approach	Emphasising <i>legal certainty</i> and procedural regularity	Emphasising substantive justice, welfare (<i>maqāṣid al-syarīah</i>)
Dispute Resolution	Commercial Court; Curator as manager of Boedel Bankruptcy	Mediation, deliberation, and religious courts (sharia economics)
System Advantages	Provide legal certainty and formal protection for separatist creditors	More humane, flexible, and paying attention to the condition of the debtor
System Weaknesses	Tends to be formalistic, can cause social injustice	Lack of procedural law certainty, more dependent on the morality of the parties
Contemporary Relevance	It is essential to ensure business stability and investment certainty	Offering an inclusive & humanist paradigm that complements positive law

Source: Author's Interpretation

Nonetheless, the two legal systems have common ground that can complement each other. For example, the principle of legal certainty of positive law can be combined with the principle of social justice of Islamic law. In this way, the protection of separatist creditors guarantees the security of business transactions and prevents practices that create injustice on the debtor's part. This integrative approach is relevant to reforming Indonesian bankruptcy law. Furthermore, Islamic law also offers the perspective of *maqāṣid al-syarīah*

as an ethical foundation in protecting separatist creditors. The protection of property (*ḥifẓ al-māl*) is placed parallel to the protection of the human soul and dignity. This means that creditors' rights are recognised, but their implementation must align with human values and justice. Compared to the more rigid positive law, Islamic law provides flexibility in considering social and moral conditions.

This comparative analysis shows that the rights of separatist creditors are relative in both legal systems. In positive law, these rights are limited by the curator's authority and the principle of collective justice between creditors. In Islamic law, such rights are limited by moral, ethical, and social obligations to help distressed debtors. Thus, both reject the absolutism of creditors' rights, albeit on different grounds. Integrating these two legal systems is critical in Indonesia, which adheres to a pluralistic legal system. In practice, commercial courts can take inspiration from the principles of Islamic law to interpret bankruptcy rules more humanely. On the contrary, the principle of legal certainty from positive law can strengthen the legitimacy of collateral execution in Islamic financial institutions. This synergy can result in a more balanced separatist creditor protection system.

CONCLUSION

This research confirms that the legal protection of separatist creditors in bankruptcy has a strong foundation in both Indonesian positive law and Islamic law. Within the positive legal framework, Article 55 paragraph (1) of Law Number 37 of 2004 grants separatist creditors special execution rights as an exception to the principle of general confiscation. However, these rights are not absolute, as they remain limited by the curator's authority in managing bankruptcy and the principle of fairness among creditors. Unilateral auctions conducted without the curator's involvement may therefore be deemed unlawful and harmful to other creditors. From the perspective of Islamic law, protection for separatist creditors is embodied in the concept of *rahn*, which grants preferential rights to collateral holders. Nevertheless, its implementation is bound by principles of justice, transparency, and social welfare, including the obligation to return any excess proceeds

from the sale of collateral to the debtor and to provide time extensions for debtors genuinely facing hardship. The comparative analysis shows that both positive and Islamic law recognise the rights of separatist creditors but reject their absolutism. Positive law emphasises legal and procedural certainty, while Islamic law prioritises substantive justice and humanitarian considerations. Their common ground lies in affirming creditors' rights while maintaining restrictions to balance the interests of creditors, debtors, and other stakeholders. Ideally, the protection of separatist creditors should be formulated through an integrative approach that combines the legal certainty of positive law with the humanist values of Islamic law, thereby producing fair, inclusive, and responsive bankruptcy regulations that are responsive to the needs of Indonesia's plural society. Future studies may be directed toward several areas. First, a deeper analysis of recent commercial court rulings is needed to evaluate the consistency of separatist creditor protection. Second, empirical research involving judges, curators, creditors, and financial institutions could offer practical insights into the gap between normative provisions and their implementation.

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AUTHOR CONTRIBUTIONS

Yuhelson developed the research framework, formulated the research question, and analysed Indonesian positive law. He also took the lead in drafting the article's introduction, methodology, and legal analysis sections. Nur Hakim conducted the comparative analysis with Islamic law, reviewed classical and contemporary Islamic jurisprudence, and integrated the findings into a cohesive framework. He was also responsible for refining the discussion, synthesising the conclusions, and ensuring the academic rigour of the manuscript. Both authors jointly discussed the results, contributed equally to the final revision of the manuscript, and approved the version submitted for publication.

CONFLICT OF INTEREST

The authors declare no conflicts of interest, financial or otherwise, that could have influenced any part of this study. This research was conducted independently and objectively, with a commitment to uphold academic integrity and ethical standards.

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