

# Responsibility of the heirs of personal guarantee holders in bankruptcy from Islamic inheritance law and state law: A case of Indonesia

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Literature review  
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## Abstract

The responsibility of heirs of personal guarantee holders in companies facing bankruptcy is a complex and significant issue in the legal world. In the business sphere, especially in the current era of globalization and intense competition, business transactions and agreements often involve different guarantees provided by the parties involved. Personal guarantees, which require an individual to secure a company's obligations or debts, are one form of security that is commonly used. When a company given a personal guarantee faces financial difficulties or goes bankrupt, the issue of how the heirs should handle the assets left by the heir with a personal guarantee becomes very relevant. Additionally, the responsibility of heirs in this context, as viewed by Islamic law, and how it relates to applicable civil law principles, is an important aspect that needs careful examination. This article aims to comprehensively explain the concept of heir responsibility from the heirs of personal guarantee holders in two legal frameworks, namely Islamic law and civil law. We will explore the legal aspects governing the responsibilities of heirs in both legal systems, highlight the differences and similarities between the two, and provide a clear understanding of the topic.

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## **Abstrak**

Tanggung jawab ahli waris pemegang jaminan pribadi pada perusahaan yang menghadapi kebangkrutan merupakan permasalahan yang kompleks dan signifikan dalam dunia hukum. Dalam dunia usaha, khususnya di era globalisasi dan persaingan yang ketat saat ini, transaksi dan perjanjian bisnis seringkali melibatkan jaminan yang berbeda-beda yang diberikan oleh pihak-pihak yang terlibat. Jaminan pribadi yang mewajibkan seseorang untuk menjamin kewajiban atau hutang suatu perusahaan merupakan salah satu bentuk jaminan yang umum digunakan. Ketika suatu perusahaan yang diberi jaminan pribadi menghadapi kesulitan keuangan atau bangkrut, maka persoalan bagaimana seharusnya ahli waris menangani harta peninggalan ahli waris dengan jaminan pribadi menjadi sangat relevan. Selain itu, tanggung jawab ahli waris dalam konteks ini, menurut hukum Islam, dan kaitannya dengan prinsip-prinsip hukum perdata yang berlaku, merupakan aspek penting yang perlu dikaji secara cermat. Artikel ini bertujuan untuk menjelaskan secara komprehensif konsep tanggung jawab ahli waris dari ahli waris pemegang jaminan pribadi dalam dua kerangka hukum yaitu hukum Islam dan hukum perdata. Kami akan mendalami aspek hukum yang mengatur tanggung jawab ahli waris dalam kedua sistem hukum tersebut, menyoroti perbedaan dan persamaan antara keduanya, dan memberikan pemahaman yang jelas mengenai topik tersebut.

**Kata kunci:** Debitor Pailit; Ahli Waris; Jaminan Perorangan; Tanggung Jawab

## **Introduction**

The liability of heirs of personal guarantee holders in bankrupt companies is an intriguing subject in the legal field, particularly under Islamic law and civil law. A personal guarantee is an individual's responsibility to ensure the payment of debts or other commitments. When a company goes bankrupt, the question of how the heirs should manage the assets left by the heir with a personal guarantee arises. The responsibility of the heirs of the heirs of personal guarantee holders in companies facing bankruptcy is a complex and profound issue in the world of law. In the business world, especially in the current era of globalization and intense competition, business transactions and agreements often involve various guarantees provided by the parties involved. Personal guarantees, which require an individual to guarantee a company's obligations or debts, are one form of security that is commonly used. When a company given a personal guarantee faces financial difficulties or goes bankrupt, the issue of how the heirs should handle the assets left by the heir with a personal guarantee becomes very relevant. In addition, the question of how Islamic law views the responsibility of heirs in this context and how this relates to applicable civil law principles is an important aspect that needs to be carefully examined.

This article aims to provide a comprehensive explanation of the concept of their responsibility in two different legal frameworks - Islamic law and civil law. We will explore the legal aspects that govern the responsibilities of heirs in both legal systems, highlighting the similarities and differences between the two. Our research aims to provide a deeper understanding of how heirs' responsibility is seen from the perspective of Islamic law and civil law and how it impacts business actors, courts, and society. We will also analyze relevant cases and precedents in both legal systems to provide richer insights into the practical implementation of these concepts.

## **Case description**

Creditors sometimes lend money to debtors who cannot repay it on time for various reasons. As a result, the credit journey comes to a halt or gets stuck, known as a breach of contract. In such cases, a third party, known as a guarantor, commits to fulfilling the debtor's obligations to the creditor in case of default. According to Article 1820 of the Indonesian Civil Code (or *Burgerlijk Wetboek, BW*), a guarantee is an agreement in which a third party commits to fulfilling the debtor's obligations if they fail to do so. The primary objective of a guarantee agreement is to

reinforce the main agreement by ensuring that the debtor's obligations are fulfilled to the creditor.

The regulations for debt guarantee issues are laid out in the Seventeenth Chapter of the BW, spanning from Article 1820 to Article 1850. When the principal debtor, whose debt is covered by breach of contract or default, cannot pay, a new guarantor or co-guarantor can become responsible for paying the debt. If the assets of the principal debtor are confiscated and auctioned off, but the proceeds are not enough to cover their obligations, or if the primary debtor has no assets, the creditor can sue the guarantor or co-guarantor. The guarantor's primary role is to pay the debtor's debt when they cannot. This means that all the assets of the guarantor become collateral for the repayment of the debtor's debt. After the guarantor has paid off the debt, the creditor's claim rights transfer to the guarantor, who can request repayment and any associated costs. This transfer of creditor rights is also called subrogation, which occurs automatically under the law.

When a person acts as a guarantor for someone else's debt, the guarantee agreement they sign has legal implications for their heirs after they pass away. According to Article 1826 BW, "The obligations of the guarantor pass to their heirs." This statement means that all the responsibilities and commitments made by the guarantor towards the debtor's debt are legally transferred to the guarantor's heirs when they die. The provisions of Article 1826 BW are unambiguous in this regard.

According to Kartono, bankruptcy involves the seizure and liquidation of all of the debtor's assets for the benefit of their creditors (Kartono, 1974). Hadi Shuban further explains that general confiscation, as outlined in Bankruptcy Law, aims to prevent the debtor from conducting transactions that may harm their creditors by halting the use of their bankruptcy assets. The law dictates that debtors forfeit their rights to manage or own any assets included in bankruptcy, solely intended for repayment to their creditors (Shubhan, 2008).

Based on the explanation above, the guarantor responsible for the assets of an heir declared bankrupt will also lose the right to take legal action against the heir's assets if the assets are confiscated. The purpose of this study is to reconstruct the regulations and legislation regarding bankruptcy in Indonesia, precisely those relating to heirs and personal guarantees, to serve as reference material for bankruptcy cases involving personal guarantees and heirs. Until now, no similar research has examined the responsibilities of heirs of personal guarantee holders in bankrupt companies in Indonesia. The problem being studied is how the responsibilities of heirs of personal guarantee holders of bankrupt companies in Indonesia are viewed from the perspective of Islamic law and civil inheritance law.

## **Methods**

The present study employs normative juridical or doctrinal methods, which involve legal research utilizing primary, secondary, and tertiary legal materials to strengthen scientific facts. To this end, a normative juridical approach was adopted to examine the legal systematics and synchronization of relevant laws and regulations in Indonesia regarding the obligations of the Heirs of Personal Guarantee Holders in bankrupt companies.

## **Discussion**

### **The heirs' responsibility of bankrupt personal guarantee holders from Islamic law.**

Individual security rights grant creditors a superior position, as multiple debtors can be claimed. The term "superior" in this context refers to creditors who possess collateral rights (unique) or those who have a better claim than general creditors. There may be multiple debtors, either because there is a liable debtor or because a third party has bound themselves as a debtor. Such an individual guarantee can take various forms, such as a company debt guarantor, a liability agreement, or a bank guarantee.

With an individual guarantee agreement between the creditor and the debt guarantor, inevitable legal consequences arise regarding the rights and obligations of the guarantor and the

creditor. The guarantor must fulfill the performance or pay off the debt they have assumed for the creditor's benefit. However, there are also certain rights afforded to the guarantor in this legal relationship. These include (Hidayat, 2014):

- a. The right to have the debtor's assets confiscated first (Article 1831 BW)
- b. The right to share debts (Article 1836 BW)
- c. The right to file a lawsuit (Articles 1849, 1850 BW)
- d. The right to be dismissed from the insurer (Article 1848 BW).

According to Gunawan Widjaja and Kartini Muljadi, the guarantor has special rights that provide legal consequences. One of these privileges is that the guarantor is not required to pay off the debtor's obligations to the creditor until the debtor has breached their promise to sell their assets to fulfill their obligations. In this case, the guarantor will only pay off the debtor's remaining obligations that have not yet been fulfilled to the creditor. Sunarmi has stated that the guarantor cannot demand that the debtor's assets be confiscated first and sold to pay off the debt if the guarantor has waived their privileges as regulated in Article 1831 BW (Muljadi & Widjaja, 2005; Sunarmi, 2009).

In bankruptcy cases, the guarantor is responsible for ensuring payment by the primary debtor. The guarantor and the principal debtor are both debtors. If the primary debtor fails to pay their debt on time, the guarantor must pay it off to the creditor. Hence, the guarantor is also considered a debtor who can be declared bankrupt. The guarantor can be declared bankrupt when they have waived their special rights, especially when they have declared themselves jointly and severally liable with the primary debtor. Creditors can file a bankruptcy petition immediately with the following documents: a) the credit agreement letter, b) the guarantee agreement letter in which the guarantor has waived their special rights and agreed to be jointly and severally liable with the primary debtor, c) the guarantor has debts to other creditors, and d) one of the debts has matured and can be collected (Pangastuti, 2015).

When a guarantor dies after entering into a credit agreement with a creditor, the responsibility for the agreement is transferred to their heirs according to Article 1826 BW. This is known as the principle of *saisine*, which means that the heir automatically replaces the rights and obligations of the deceased without needing to take any specific action. Under Article 833 BW, heirs inherit all of the deceased's goods, rights, and receivables by law. This means the heir must use their inheritance to cover any outstanding debts the deceased leaves.

Western civil law allows heirs to accept, conditionally accept, or reject the inheritance they receive, which can determine their level of responsibility for any debts. Suppose the heir accepts the inheritance in full. In that case, they are responsible for all debts, including those left by the deceased as a guarantor (Labetubun & Fataruba, 2016; Moechthar, 2017).

The regulations regarding the responsibility of heirs of individual security holders are clearly defined in Article 1826 BW. According to this article, the guarantee obligations are automatically transferred to the heirs in case of the guarantee holder's demise. However, applying this article in bankruptcy involving heirs can lead to new legal issues. In such cases, the personal assets of the heirs may also be subject to general confiscation, in addition to their inherited assets, as per Article 1 point (1) of the Bankruptcy Law and PKPU, along with Article 21 of the Bankruptcy Law and PKPU. This situation can create problems in terms of fairness and practicality. In case a debtor is unable to pay off his debts, his assets are confiscated and sold to repay the creditors unless there is a valid reason for precedence among the creditors, as per Jerry Hoff, quoted by Purbandari (Purbandari, 2014; Widjajati, 2017).

Bankruptcy laws regarding the obligations of heirs as bankrupt debtors of bankrupt company guarantors are different and irrelevant from the perspective of Islamic inheritance laws. In Islamic legal regulations, inherited assets do not solely belong to the heirs. When someone dies, the heirs receive property and assets. However, there are obligations attached to these assets that must be paid before they are distributed to the heirs. Therefore, it is the responsibility of the heirs to pay off the debts of the deceased before the assets are distributed. Regarding the heir's responsibility, Article 175, paragraph (2) of the Compilation of Islamic Law (KHI) states that the heir's responsibility for the debts or obligations is limited to the amount or value of the

inheritance. The complete provisions of Article 175 of the Compilation of Islamic Law read as follows:

(1) "The heir's obligations to the heir are: a. take care of and complete the burial of the corpse; b. settle debts in the form of treatment maintenance, including the obligations of heirs and debt collectors; c. completing the testator's will; d. dividing inherited assets among the rightful heirs. (2) The heir's responsibility for the heir's debts or obligations is only limited to the amount or value of the inheritance."

In Islamic inheritance law, it is stated that any heir receiving inheritance must first pay off any debts or wills before receiving their share. This means it is necessary to clear all debts and follow the testator's will before distributing the inheritance. Heirs are not responsible for paying off debts that exceed the amount of inheritance. To protect the assets of Muslim heirs from individual creditors, there needs to be a revision in the Bankruptcy Law and PKPU. This revision should limit or separate the assets of heirs charged with paying off creditor debts from their assets.

To ensure that the assets of Muslim heirs are not included in the bankruptcy estate, Article 1 point (1) of the Bankruptcy Law and PKPU should be updated and explained in conjunction with Article 21 of the same law. This follows Article 175, paragraph (2) Compilation of Islamic law, which separates the assets of deceased people from the assets of their heirs. Therefore, the curator who settles the bankrupt estate should not execute the heirs who use the legal arrangements using Islamic inheritance as regulated in the Compilation of Islamic Law. The provisions for separating the personal assets of heirs from the inheritance received by the heirs are also regulated in Article 209 of the Bankruptcy Law and PKPU, but only for filing bankruptcy petitions for inherited assets that are in bankruptcy. For subjects or, in this case, heirs who are bankrupt debtors, a general confiscation applies to all their assets to be made bankrupt by the curator.

In sum, according to Islamic law, when a person passes away, their debts must be paid off with their inheritance before it is divided among their heirs. If any heirs have personal debt, part or all of their inheritance may need to be used to pay it off before distributing the remaining assets. Inheritance must be divided according to Sharia law, and debt payments should not interfere with this process. If an heir's debt exceeds the value of their inheritance, they will not receive any assets. However, they will not be responsible for paying off the remaining debt. If a person has left a will, it should be respected by the heirs, including any provisions for debt repayment. A will can be used to specify how debts should be settled.

### **The responsibility of the heirs of the heirs of bankrupt personal guarantee holders is reviewed from the Civil Inheritance Law.**

Transferring rights and responsibilities from the deceased to the heirs is known as "saisine." Essentially, the heirs obtain all the rights and responsibilities of the deceased without any specific action being required, even if the heirs are unaware of the inheritance. In the BW system, not only the assets but also the debts of the deceased are transferred to the heirs. This means that the heirs are responsible for paying off any outstanding debts. Therefore, the object of inheritance in the BW legal system includes not only the assets but also all the deceased's debts (Prodjodikoro, 1983).

As per the inheritance laws, the heirs' responsibility for the heir's debts depends on their attitude towards the inherited assets. There are three possible scenarios:

- a. If an heir rejects the inheritance, they cannot be legally burdened. Once they reject the inheritance, they are no longer considered the heir and are not entitled to it. Therefore, they are not obligated to pay the debts of the heir, either expressly or secretly.
- b. If an heir accepts the inheritance, they are solely responsible for paying off the debts of the heir. Article 1033 BW further states that the heir who has received their inheritance with the privilege of registering inherited assets must take care of the objects included in the assets as a good house owner and complete these matters as soon as possible. They are also responsible to the creditors and all recipients of testamentary gifts. This means that heirs who accept the inheritance must take care of and resolve matters related to the

inheritance as quickly as possible. They are also responsible for any debts that the heir had incurred while alive.

- c. If an heir receives a benefit, their obligation to pay the debts will be limited to the size of their inheritance. If the inheritance is insufficient to pay off the debts, they are not obligated to cover the deficiencies.

The payment or settlement of debts that the heir has to pay or debts that arise in connection with the heir are regulated in Chapter 17, Part 2, Book II BW, which concerns the payment of debts. The transfer of obligations from the heir to the heirs is based on the provisions of Article 833 and Article 955 BW. According to Pitlo and J. Satrio, inheritance transfers all assets and liabilities from the heir to the heirs when the testator dies. This transfer occurs by law. Article 833 and Article 955 BW state that all assets, both rights and obligations, such as *legaat*, are transferred to the heirs upon the death of the testator (Satrio, 1998).

As per the BW Inheritance Law, heirs must pay the deceased's debts. This applies to both legal and testamentary heirs who inherit all the rights and responsibilities of the deceased. Article 1100 BW confirms this obligation and states that heirs who accept the inheritance must share the burden of paying debts, bequests, and other obligations according to their share of the inheritance. Additionally, inherited assets may include various debts, such as testamentary gifts, burial costs, executor wages, and other expenses mentioned in the will. In some cases, heirs may be sued for the debts created by the deceased, even if they are not responsible. This happens when the heir inherits a debt that can be collected after their death, which existed when the deceased was alive. This type of debt has time provisions, so it does not conflict with Article 1351 BW.

According to Article 1826 of the BW, the heirs of individual security holders of bankrupt companies bear the same responsibilities as their predecessors. When someone passes away, their heirs inherit assets and liabilities, including all rights and obligations from guarantee agreements. In case of multiple heirs, the obligation is divided based on each heir's share of the inheritance. Although the personal guarantee of the guarantor remains even after their death, it can only be enforced against their heirs.

The heirs can also be held accountable for the bankruptcy of the guarantor who waived their privileges when signing the Personal Guarantee deed against creditors. The deed states that if the debtor breaks the contract, the insurers must be jointly responsible for the bankrupt debtor's assets without waiting for the debtor to default or their assets to be sold first. This means that the insurer can also be declared bankrupt along with the debtor if they have waived their privileges in the Personal Guarantee deed. Court decisions have established that the heir's responsibility also affects the assets of the bankrupt heir.

Article 209 of the Bankruptcy Law states that when a decision is made to declare bankruptcy, it legally separates the assets of the deceased person from the assets of their heirs. As a result, the heir's responsibility is limited only to the assets they own and not the personal assets they owned during their lifetime. However, the Bankruptcy Law does not provide legal certainty regarding legal exceptions if the heir is unwilling to accept the debts of the deceased person during their lifetime, whether in full, in part (as a beneficiary), or reject them altogether. This is based on Article 1826 BW Juncto Article 207 and Article 209 of the Bankruptcy Law. Suppose the heir is still held responsible for all the assets of the deceased person declared bankrupt. In that case, it will not be fair to burden the heir with all the debts of the bankrupt person.

The responsibility of the heirs in paying off the debts of the bankrupt person is significant because, based on Article 1 paragraph 1 of the Bankruptcy Law, bankruptcy is a general confiscation of all assets of the bankrupt debtor. If the panel of judges uses Article 1826 BW and connects it with Article 1, paragraph 1 of the Bankruptcy Law, the heirs' responsibility for all the deceased person's personal assets becomes a general confiscation. This means that the heir's assets cannot be separated from the deceased person's assets because Article 1826 BW already regulates this regarding the heir's responsibilities. Due to this, there is no synchronization of the responsibilities of heirs in Article 1826 BW with those regulated in the Bankruptcy Law, especially Article 1 paragraph 1 of the Bankruptcy Law in conjunction with Article 207 and Article 209.

## Conclusion

The results of this research conclude that first, the heirs of the heirs who hold individual guarantees, if viewed from the aspect of Islamic inheritance law, then the heirs should pay the debts of their heirs. The regulation of heir responsibility in Article 175 paragraph (2) of the Compilation of Islamic Law states that, in principle, the heir is only responsible for the heir's debts, which are determined to be limited to the amount or value of his inheritance. Second, the legal consequence for the heirs of individual security holders being bankrupted is that there cannot be a general confiscation of all assets belonging to the heirs to pay off all their creditor debts. This means that the heirs' responsibilities are limited. The heir is only responsible for paying off the debt to the extent of the heir's inherited assets. The heir is not required to cover any shortfall that arises because the inherited assets are not sufficient to pay off the debt.

As per the Civil Inheritance Law, heirs are liable to pay off the deceased's debts. This liability is quite significant because of the Bankruptcy Law, which states that during bankruptcy, all assets of the debtor are confiscated. Suppose the judges use Article 1826 BW and Article 1 paragraph 1 of the Bankruptcy Law. In that case, it will lead to the general confiscation of the personal assets of the heirs. This means that the Heir's assets cannot be separated from the Heir's assets as per Article 1826 BW. This creates an issue as the responsibilities of the heirs mentioned in Article 1826 BW are not synchronized with those in the Bankruptcy Law, particularly Article 1 paragraph 1 of the Bankruptcy Law in conjunction with Article 207 and Article 209. To address this, there is a need to change Law Number 37 of 2004 concerning Bankruptcy and PKPU. The changes must regulate the liability of the heirs of Personal Guarantee holders in the UUK and PKPU. The new regulation should include Personal Guarantees in bankruptcy and matters related to the Heir of the Personal Guarantee holder who dies before the company goes bankrupt and the Personal Guarantee holder who dies while the company is in bankruptcy proceedings.

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