

Legal Position of Criminal Confiscation Against General confiscation in Bankruptcy for the Realization of Legal Certainty

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Abstract

Law enforcement is an effort to revitalize legal norms. Where the law aims to create justice. In relation to general confiscation and criminal confiscation in bankruptcy, the law should give priority to the sense of justice in society, so that the law can be felt its usefulness which has an impact on compliance with the law. This study uses a statute approach, conceptual approach, and analytical approach. The results of the study indicate that there is no legal certainty in the case of general confiscation executions because of the length of time for a decision that has permanent legal force in criminal cases. Based on this, the author is of the view that the importance of harmonization of judicial institutions and the importance of reformulation and legal reconstruction in the case of confiscation in bankruptcy for the realization of legal certainty.

Keywords: *Criminal Confiscation, General Confiscation, Bankruptcy.*

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A. INTRODUCTION

In the preamble to Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, it is stated that the development of national law in the context of realizing a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia must be able to support and claim certainty in law, order, and justice. enforcement and protection of the law with the core of justice and truth. This means that everything that happens must be resolved through the law where the Indonesian legal system shows that the Indonesian state prioritizes legal certainty over all legal problems that occur. This can be seen from the various laws and regulations. However, sometimes there is ambiguity or there is an overlap of authority between one regulation and another so that legal certainty does not materialize. This overlap can be seen from the general confiscation carried out by the Curator under the supervision of the Supervisory Judge and the criminal confiscation carried out by investigators based on their authority. Although there is a rule that confirms that the return of evidence to the rightful must be based on a warrant and/or stipulation for the return of evidence from the investigator's superior.

Nevertheless, it appears that there is legal uncertainty from the two legal rules governing the confiscation of criminal confiscations and general confiscations which are feared to be a criminogenic factor in the occurrence of a deviation or misuse of the law.

Bankruptcy is the general confiscation of all assets of the Bankrupt Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervisory Judge as regulated in Article 1 point 1 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Obligation for Payment of Debt. Where each Creditor, Prosecutor, Bank Indonesia, Capital Market Supervisory Agency or the Minister of Finance may submit an application to the Court to place a confiscation of collateral on part or all of the Debtor's assets as long as the decision on the application for a declaration of bankruptcy has not been pronounced, in addition, all legal claims to obtain settlement of a receivable cannot be filed in a court hearing, and neither the creditor nor the third party in question is prohibited from executing or requesting confiscation of the object that becomes collateral during the period of suspension.

Based on these provisions, it can be understood that general confiscation in Bankruptcy accommodates the legal interests of each party, namely the debtor and creditor. On the other hand, the state which has the highest authority in the context of protecting, maintaining security and order for the community, which in this case is represented by the Police, is one of the functions of government, one of which is to carry out investigations and investigations. Where in the investigation process the Police have the right to confiscate. The confiscation as referred to in Article 1 number 16 of Law Number 8 of 1981 concerning the Criminal Procedure Code explains that an investigation is a series of actions by an investigator to take over and or keep under his control objects that are active or immovable, tangible or intangible for the benefit of verification in investigation, prosecution and trial. Thus it can be understood that criminal confiscation as a public law takes precedence over general confiscation in Bankruptcy where the Investigator in carrying out the confiscation must first have permission from the local Court then after the proof is complete, ideally the investigator returns the confiscated object to the Curator who is supervised by the Supervisory Judge, as stated in Article 46 of the Criminal Procedure Code, in addition to the provisions of Article 436 Rv which stipulates that it cannot be confiscated a second time for goods that have been confiscated.

However, at the level of implementation, legal protection for victims who are the actual rights owners do not get the legal protection they should. The absence of an element of state loss should have implications for the legal consequences. This situation can be understood in that state bankruptcy is the creditor who takes precedence, then in terms of confiscation carried out by the state in order to compensate victims of criminal acts as referred to in Article 39 paragraph (2) of the Criminal Procedure Code. Seeing these provisions, it can be understood that there are two overlapping legal interests, which should have a place in the national legal system that affects law enforcement, namely the structural component, the substance component and the cultural component or legal culture.

Based on the description of the background, this paper aims to find out how the legal position of criminal confiscation against general confiscation in Bankruptcy is for the realization of legal certainty. Because we all know that the impact of this

legal uncertainty has an impact on the whole community, especially the actual right owners, even though sectoral egos are ideally avoided in order to realize better law enforcement through harmonization between judicial institutions. The approach in this study uses a qualitative approach, namely a literature approach by collecting and comparing several journals that have been compiled and then selected to categorize so that accountable information is obtained.

B. METHOD

This paper uses the following approaches: statute approach, conceptual approach, and analytical approach. The technique of tracing legal materials uses document study techniques, as well as analysis studies using qualitative analysis, namely the literature approach by collecting and comparing several journals that have been compiled and then selected to categorize so that accountable information is obtained. The research specification used is descriptive analytical which describes accurately, the data used in this research is secondary data. In analyzing the study data related to the research conducted by the author, qualitative normative analysis was used (Arikunto, 2002). Normative because this research stems from existing regulations as positive legal rules and is related to problems, while qualitative because all data is arranged and presented systematically, then analyzed in the form of describing using words, and does not use calculations or mathematical formulas (Surakhmad, 1998).

C. RESULT AND DISCUSSION

1. Definition and Types of Seizure

Confiscation or confiscation has the meaning of being an act of placing the Defendant's assets in the form of disputed goods, or goods that will be used as a forcible settlement into custody during the ongoing investigation process which is carried out officially by order of a judge or court, until a court decision has permanent legal force. From this understanding, it can be seen that the nature of the confiscation is: an act carried out by force; placement of the defendant's assets in custody; carried out by order of the court; and until there is a permanent decision (Adjie, 2015).

This confiscation is distinguished in various forms, namely:

a. Confiscate revindicatoir;

Refindicatoir confiscation is a security confiscation applied not only to the Defendant's property, but also to the Plaintiff's own movable property which is in the possession of the Defendant (Mulyani, 2008). Based on the provisions of Article 226 HIR/Article 260 RBg, the characteristics of confiscated revindicatoir:

- 1). Movable goods (not fixed goods);
- 2). The movable property of the Plaintiff which is controlled or held by the Defendant;
- 3). The request must be submitted to the head of the PN;

- 4). The request can be made in writing or verbally;
 - 5). The goods must be explained clearly and in detail (Siregar, 2018).
- b. Marital confiscation
Marital confiscation is a division of joint property between husband and wife who are going to divorce. As long as the divorce process is still ongoing, a marital confiscation subpoena can be filed (Barahin, 2017). Marital confiscation of joint property in marriage has the main purpose, namely to freeze joint property owned by husband and wife in marriage through confiscation by the court so that there is no transfer of joint property to a third party during the case process for the distribution of joint property (Safithri, 2020).
 - c. Seize the conservatory
Conservatoir confiscation is a guarantee for the implementation of a civil decision by freezing the Defendant's property. The frozen goods can later be used to implement court decisions (Rorong, 2018). Conservatoir confiscation can also be carried out on movable property belonging to the defendant which is in the hands of a third party (Tambunan, 2020).
 - d. Confiscate adjustments
Adjustment confiscation means that the application for security confiscation adjusts or is aligned with the existing confiscation or collateral (Putri, 2010). Goods that have been placed under mortgage, fiduciary or pawn rights cannot be placed for confiscation of collateral, but can be placed for confiscation of adjustments. This is done for the legal certainty of the collateral holder as the preferred creditor, by placing an adjustment confiscation, the holder of the security right still takes precedence over the adjustment confiscation holder (Sujayadi & Yuniarti, 2010).
 - e. Confiscate execution
Execution confiscation is a confiscation that is determined and carried out after a case has a decision that has permanent legal force. Meanwhile, the meaning of confiscation of execution which can be summarized from Article 197 to Article 200 paragraph 1 of HIR, is the confiscation of the Respondent's/Debtor's assets after the warning period has been exceeded. The confiscation of the confiscation of punishment is intended to be a guarantee for the amount of money that must be paid by the Respondent/Debtor to the Applicant (Creditor/Bank). The way to pay off the payment of this amount of money is by selling the respondent's property which has been confiscated by auction.
 - f. General confiscation
General confiscation is a form of confiscation which is known in civil law, especially bankruptcy law which regulates the relationship between private individuals. Through jurisprudence, the Supreme Court explains the word "general confiscation" is a confiscation that is not for the benefit of one or

several creditors, but for all creditors or in other words to prevent confiscation from the punishment requested by creditors individually (Margareth, 2019).

g. Criminal confiscation

Criminal confiscation is the confiscation of land books, measuring documents or other data submitted by investigators who are used as a sense of evidence in a court of law with information on the confiscation program and receipt of the confiscated goods (Aruan, 2014). Known criminal confiscations that have the characteristics of public law which aim to regulate and protect the interests of the public have resulted in public rules having their own advantages over using private rules (Harahap, 2021).

2. Forms and Procedures for Seizure

According to Aruan (2014), the laws and regulations distinguish various forms and procedures for confiscation, namely:

a. Common confiscation and its procedures

Foreclosure in this usual form is a general rule of foreclosure. As long as it is still possible and there are no extraordinary things or circumstances that use deviations, these rules and forms of ordinary processes must be followed by the Investigator. Mujiyono revealed that the procedure for confiscation in the usual and general form can be explained as follows:

- 1). There must be a confiscation permit from the District Court;
- 2). Show or show identification (Article 128 of the Criminal Procedure Code);
- 3). Shows the object to be confiscated (Article 129 paragraph (1) of the Criminal Procedure Code);
- 4). Make an official report on the confiscation of Article 129 paragraph (2) of the Criminal Procedure Code;
- 5). Submit a derivative of the confiscation minutes (Article 129 paragraph (4) KUHAP;
- 6). Wrapping confiscated objects (Article 130 paragraph (1) of the Criminal Procedure Code) (Lukfi, 2020).

b. Confiscation in necessary and urgent situations

As an exception to ordinary confiscation based on the general law described earlier, Article 38 paragraph (2) provides for the possibility of confiscation without going through the norms influenced by Article 38 paragraph (1). This is necessary to "give leeway" to investigators to act quickly in accordance with the required conditions. In every case the investigator is required to go through a confiscation mechanism as regulated in Article 38 paragraph (1), it is likely that investigators will experience problems in searching for and finding evidence of a crime. In order to maintain the possibility of stagnation and obstacles in exclusive cases that require investigators to act immediately in "very necessary and urgent" situations, they can take the confiscation custom which is influenced by Article 41. The basis for the reasons for this deviation, is based on the criteria: "in very necessary and urgent

circumstances” (Panauhe, 2014). That the mechanism and procedure for confiscation in an urgent situation is carried out if:

- 1). Without a letter of permission from the Head of the District Court;
- 2). Confiscation in necessary and urgent circumstances is limited to movable objects only;
- 3). Obligated to immediately report confiscation actions to the Head of the local District Court to receive approval (Warni & Jufri, 2019);

c. Confiscation in a state of being caught red-handed

Being caught in the act is the arrest of a person while committing a crime, or using it immediately after the crime was committed, or a moment later it was called by the general public to be the person who did it, or if a moment ago an object was found which was strongly suspected to have been used to commit the act. the crime that shows that he means the perpetrator or has participated in or assisted in committing the crime. Confiscation of an object in a state of being caught red-handed is also an exception from ordinary confiscation. in the case of being caught red-handed, the investigator can immediately confiscate an object and equipment in the form of:

- 1). Which is used to commit a crime;
- 2). Objects and tools that are reasonably suspected to have been used to commit a crime;
- 3). Other objects that can be used as evidence (Ibrahim, 2020).

d. Indirect foreclosure

Investigators in carrying out confiscations are not exclusive and concrete in returning the confiscated objects, but are ordered to be delivered or ordered to hand over the person concerned. The procedure for implementing indirect confiscation as regulated in Article 42 means as follows:

- 1). A person who controls or holds an object that can be confiscated;
- 2). The letters that are on a person from the suspect or defendant;
- 3). If the object is a tool to commit a crime;
- 4). The investigator instructs the people who control or hold the object to hand it over to the investigator;
- 5). Investigators provide a receipt for the delivery of objects (Sumampouw, 2018).

e. Confiscation of letters or other writings

What is meant by using letters or other writings in Article 43 of the Criminal Procedure Code is a letter or writing that is stored or controlled by an exclusive person, where a certain person keeps or controls the letter, it is required to keep it secret by law (Putri et al., 2015).

3. Confiscation Purpose

The act of confiscation is an exceptional law, as a result of which it must be implemented using all considerations and caution. It must be supported by

convincing facts and evidence so that the confiscation does not cause harm to the party affected by the confiscation (Yulita, 2019).

The primary purpose of a civil confiscation is to prevent the Defendant's assets (in the bankruptcy of the Debtor) from changing hands, not being burdened with rent and not being pledged as collateral to a third party, as a result the subpoena is not empty (illusional). The second objective is the object of punishment as absolute because the Plaintiff is obliged to provide the identity of the goods to be confiscated (Nola, 2018).

The general confiscation referred to in the K-PKPU Law is a series of confiscations that include all the assets of the bankrupt debtor since the bankruptcy declaration decision was made and everything obtained during the bankruptcy (Pratiwi, Prabowo & Pradana, 2020).

4. Bankruptcy Overview

Bankruptcy is a condition in which the debtor is unable to make payments on the debts of his creditors. The condition of being unable to pay is usually due to the difficult financial condition of the Debtor's business which has experienced a setback. Meanwhile, bankruptcy is a court decision that causes general confiscation or all assets of the bankrupt debtor, both existing and future. Bankruptcy management and settlement are carried out by the curator under the supervision of the supervisory judge using the primary purpose of using the proceeds from the sale of the assets to pay all the debts of the bankrupt debtor in proportion and in accordance with the creditor structure (Shubhan, 2015).

According to Sutan Remy Sjahdeini, bankruptcy law (bankruptcy) has three general objectives, namely:

- a. Bankruptcy law secures and distributes the sale of the Debtor's assets fairly to all of its Creditors;
- b. To prevent insolvent Debtors from harming the interests of their Creditors;
- c. Provide protection to debtors who have good intentions from their creditors (Rahmani, 2018).

To be declared bankrupt, a Debtor must meet the following requirements:

- a. The debtor has two or more creditors.
- b. Failure to pay at least one due and collectible debt.
- c. At his own request or at the request of one or more creditors (Shubhan, 2015).

5. View of General Confiscation and Criminal Confiscation

There are various views on the position of general confiscation and criminal confiscation, some are of the view that general confiscation takes precedence over criminal confiscation, some are of the view that criminal confiscation should take precedence over general confiscation, while the considerations are as follows:

a. Criminal confiscation takes precedence over general confiscation

The basic considerations are:

- 1). Article 39 paragraph (2) of the Criminal Procedure Code confirms that objects that are in confiscation due to a civil case or bankruptcy can be confiscated for the purposes of investigating, prosecuting and adjudicating criminal cases as long as the provisions of Article 39 paragraph (1) of the Criminal Procedure Code are fulfilled;
- 2). Criminal confiscation is a public law domain, so it has special characteristics that can be imposed by the state and therefore takes precedence;

b. General confiscation takes precedence over criminal confiscation

The basic considerations are:

- 1). Whereas in bankruptcy, the purpose of confiscation is to protect the bankruptcy estate and to protect the rights of creditors, while criminal confiscations carried out by investigators are intended to prove;
- 2). Whereas as referred to in Article 31 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, which stipulates that the determination of a criminal confiscation cannot nullify the decision of the panel of judges in the commercial court.

6. Legal Protection

The law becomes a legislative policy, there are always fundamental principles or rationale that form the basis for customary law in laws which in actualization take the form of orders (commands), embargoes (prohibition), and permits. Orders, prohibitions, also allow them to rely on or rely on principles (Irianto, 2015).

Sudikno Mertokusumo (1991) said that the rule principle, or the principle of the rule is not a concrete rule of law but is a basic thought that is lay in nature or is the background of the origin of the real regulations contained in or behind every system of rules that are incarnated from the laws and decisions of judges who is a positive rule and can be found by looking for the general properties of the concrete rule. Referring to the provisions of the Constitutional Court Decision Number 67 of 2013 which states that: "Article 95 paragraph (4) of Law Number 13 of 2003 concerning Manpower (State Gazette of the Republic of Indonesia of 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279) is contrary to The 1945 Constitution of the Republic of Indonesia as long as it is not interpreted as follows: "Payment of wages owed to workers/laborers takes precedence over all types of creditors, including claims for separatist creditors, claims for state rights, auction offices, and public bodies established by the Government, while payments for rights rights of other workers/labourers take precedence over all claims including claims for state rights, auction offices, and public bodies established by the government, except claims from separatist creditors".

According to Satjipto Raharjo, legal protection is conveying protection for human rights that are harmed by others and that protection is given to the public so that they can enjoy all the rights granted by law (Aprita & Adhitya, 2019). Based on these provisions, we can understand that the public interest takes precedence, in the sense of the actual right holder of the confiscation. Although the purpose of criminal law which has special characteristics is to protect the public interest, in the event that it is not proven that a crime has occurred, then the object subject to criminal confiscation should be returned to the Curator under the supervision of the Supervisory Judge as referred to in Article 46 of the Criminal Procedure Code. So, based on the description above, it can be concluded that any confiscated goods will be returned to the rightful person, but if the object is deemed dangerous, it will be confiscated by the state to be destroyed or damaged so that it can no longer be used.

7. Law Enforcement

Law enforcement is the process of making efforts to enforce or function concretely the norms of the rules to guide attitudes in traffic or the correlation of legal relations in social and state life (Asshiddiqie, 2010). In law enforcement, it is important to pay attention to what is the purpose of the law, namely rule certainty, justice and legal benefits. Law enforcement that is without direction and is not based on three legal pillars namely justice, rule certainty and benefits for the community can violate the rules and even violate human rights (Wahyudi, 2012).

Positive law enforcement can be authoritative in front of citizens and the international community if justice can function and is always internalized in the body of rules. Without enforcing justice in the rules, it will lead to irregularities and abuse of anyone who holds power or authority, which will have a bad impact on the social order of the people, resulting in regional social crises that can even have international implications (Susilo, 2011).

People want the rules to no longer be a tool for the interests of the authorities, or political interests. Therefore, fair law enforcement is needed. In line with using this, the reality of law enforcement often ignores the sense of justice of the community considering that textually the substance of the rules requires more legal certainty (Ansori, 2018). Therefore, the role of law enforcement is very important in the application of a just law. This is in line with the view of Satjipto Rahardjo who stated: "the law has no function, if it is not applied or enforced for law violators, those who enforce the law in the field are law enforcement officers (Pane, 2017). In line with this, in carrying out the law it is not just black and white words from regulations, but according to the spirit and deeper meaning of the law or law. In other words, law enforcement is carried out with full determination, empathy, dedication, commitment to the nation accompanied by the courage to find other ways than what is usually done (Situmeang, Pane & Wahyudi, 2020).

D. CONCLUSION

Confiscation is a forced effort by the state which aims to keep the confiscated goods until there is a permanent legal force. In the Bankruptcy Law which is generally defined as general confiscation, but in bankruptcy other sanctions can also be applied, so that criminal confiscation is possible. In such circumstances, there are two legal interests running. Based on this, the legal position of criminal confiscation against general confiscation in bankruptcy for the realization of legal certainty is the absence of legal certainty in the case of general confiscation executions because of the length of time for a decision that has permanent legal force in criminal cases.

So, it is important that there is harmonization between judicial institutions, where in this case the goods confiscated in criminal confiscation are recorded and an official report is made with the synchronization between the Commercial Court and the District Court that examines criminal cases, but control of the goods should remain in the hands of the Curator under the supervision of the Judge. Supervisor. If the criminal case is proven and deemed dangerous, the evidence is in the public interest, then it is destroyed or damaged so that it can no longer be used. If it is proven otherwise, i.e. the criminal act is not proven, then for the sake of legal certainty the confiscated evidence is given to the person who has the right. Based on this, the author is of the view that it is important to carry out legal reformulation and reconstruction in the case of confiscation in bankruptcy for the realization of legal certainty.

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