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LEGAL CERTAINTY OF THE STATUS OF AFFILIATED INSOLVENCY ASSETS AS EVIDENCE OF CRIMINAL OFFENSE

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Abstract

The uncertainty of the status of affiliated bankruptcy debtors as evidence of criminal offenses is a classic problem that until now has not found an alternative legal solution. When a bankruptcy debtor is proven to have committed a criminal offense, resulting in the debtor's assets becoming evidence seized by the criminal, the curator will experience difficulties in the process of liquidating the debtor's assets. On the one hand, the prosecutor's office has the authority to confiscate the assets of the debtor (defendant), as well as the curator who has the authority to liquidate. The emergence of these two types of seizure is certainly intended to provide legal certainty and legal protection for the community. However, in its implementation, when the two types of seizure clash, the aspects of certainty and justice for the community will not be achieved. Therefore, it is necessary to establish regulations that can bridge or unravel the problem of attraction of seizure objects between the curator and the prosecutor's office. The research method used in this research is juridical-normative by using several research approaches, namely statute approach and conceptual approach. The use of statute approach in the research is intended to provide an overview of the construction of bankruptcy and criminal law so as to hamper the process of liquidation of bankruptcy assets. While the use of conceptual approach is intended as a basis for thinking to reconstruct the legal construction so as to create harmonious and synchronous bankruptcy and criminal regulations and can provide certainty and justice for the legal protection of creditors.

Keywords: *Insolvency Seizure; Criminal Seizure; Creditor's Protection*

1. INTRODUCTION

The legal problem of overlapping bankruptcy seizure with criminal seizure is a legal problem that until now has not found an alternative solution. The problem of overlapping bankruptcy seizure and criminal seizure is motivated by the existence of two legal remedies that are applied simultaneously in a bankruptcy case, namely bankruptcy lawsuits in the commercial court and criminal cases in the district court. The occurrence of these two legal remedies is possible if in a bankruptcy case, there is a criminal offense committed by the debtor, so that criminal proceedings can also be pursued against the criminal offense.[1]

For example, in the bankruptcy case of the Pandawa Group savings and loan cooperative (KSP) that occurred in 2017, the debtor was declared bankrupt in a commercial court decision and was also proven to have committed fraud and money laundering offenses.[2] The existence of the Pandawa bankruptcy verdict authorizes the curator to liquidate the

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[1] *Court Decision No. 37/Pdt.Sus-PKPU/2017/PN Niaga.Jkt.Pst.*
[2] *Court Decision No. 424/Pid.Sus/2017/PN.DPK.*

bankruptcy estate, while the existence of the Pandawa criminal verdict also authorizes the prosecutor's office to conduct an auction of the defendant's property which is the object of state booty. The implication arising from the two decisions with different legal dimensions is the dualism of the legal status of these assets, namely as bankruptcy assets and objects of booty. As a result of these conditions, the liquidation process of these assets cannot be carried out due to the clash of authority between the curator and the prosecutor's office to conduct liquidation.[3]

Normatively, the overlapping liquidation authority of the prosecutor's office and the curator can be seen from the following articles in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy Law) and Law No. 8 of 1981 on Criminal Procedural Code. Article 31 paragraphs (1) and (2) of the Bankruptcy Law states that all seizure orders against the bankruptcy estate must be terminated or cannot take effect after the declaration of bankruptcy is issued by the commercial court. Meanwhile, Article 39 paragraph (2) of the Criminal Procedural Code states that evidence that is subject to civil or bankruptcy seizure may also be criminally confiscated in the context of the interests of criminal justice. Then in Article 46 paragraph (2) of the Criminal Procedural Code it is stated that the judge has full authority to determine the status of evidence that has been confiscated, which can be returned to the rightful owner, confiscated for the state, destroyed or damaged, or used again as evidence in another case. With the construction of these articles, it is clearly illustrated that there is a lack of synchronization between the Bankruptcy Law and the Criminal Procedural Code, which causes the liquidation process of the bankruptcy estate to be hampered.

In this research, the researcher examines and compares previous studies that raise the topic of liquidation authority disputes involving the dimensions of bankruptcy law and criminal law. The previous studies include:

a. "Discrepancy between General Bankruptcy Seizure and Criminal Seizure in relation to the Disposal of Bankruptcy Assets Containing Criminal Elements" by Roni Pandiangan in Journal of Education and Counseling Volume 4 Issue 5 Year 2022.[4] This paper argues that Article 31 of the Bankruptcy Law and Article 39 paragraph (2) of the Criminal Procedural Code contradict each other (discrepancy). The application of general seizure should ideally take precedence over criminal seizure given the interests of creditors and also the principle of *lex posteriori derogate legi priori*. Thus, it is necessary to understand the *stakeholders* in the implementation of seizure to provide certainty, justice, and legal benefits for creditors as well as victims of the discrepancy between the two seizures.

[3] Anggar Septiadi, "Ini Aset Koperasi Pandawa yang akan Masuk ke Kas Negara," *Kontan.co.id*, April 25, 2018, https://nasional.kontan.co.id/news/ini-aset-koperasi-pandawa-yang-akan-masuk-ke-kas-negara.

[4] Roni Pandiangan, "Diskrepansi Sita Umum Kepailitan dengan Sita Pidana Dihubungkan dengan Pemberesan Harta Pailit yang Mengandung Unsur Pidana," *Jurnal Pendidikan dan Konseling* 4, no. 5 (2022): 4059, https://doi.org/10.31004/jpdk.v4i5.7254.

b. "Juridical Analysis of the Placement of Seizure in Criminal Special Seizure in KUHAP and General Seizure in UUK-PKPU" by Adhi S.P. in Simbur Cahaya Journal Volume 28 Issue 2 Year 2021.[5]
   This paper argues that general seizure cannot take precedence considering that criminal seizure is included in the dimension of public law, so public law must take precedence over private law. The existence of Article 31 paragraph (2) the Bankruptcy Law states that bankruptcy can lift all seizures, but only in the realm of civil law. As a result, seizure in criminal procedural law must take precedence.
c. "The Position of General Seizure against Other Seizure in the Bankruptcy Process" by Luthvi F.N. in State of Law Journal Volume 9 Issue 2 Year 2018.
   This paper discusses that bankruptcy seizure and criminal seizure are *lex specialis*, so that one seizure with another cannot precede. Bankruptcy seizure will become *lex specialis* if faced with all seizure in the civil sphere, so that bankruptcy seizure in this case is not authorized to lift criminal seizure.[6]
d. "Dispute over Authority in the Bankruptcy Estate Liquidation Process between Curators with the Attorney of the Republic of Indonesia" by Andrian in Justisi Volume 9 Issue 3 Year 2023.
   This paper argues that bankruptcy seizure can take precedence over criminal seizure considering that the existence of Article 31 paragraph (1) of the Bankruptcy Law. Based on Article 3 paragraph (1) of the Bankruptcy Law, the curator may sue the AGO with the following petitum removal of criminal seizure and booty against the bankruptcy estate.[7]

The novelty that researchers bring up in this research is the legal developments that have occurred in Indonesia recently, which have not been included in the previous studies above. In 2022, the Indonesian Supreme Court issued Supreme Court Regulation No. 2 of 2022 on Procedures for Settling Objections from Third Parties in Good Faith to the Decision on the Forfeiture of Goods Not Owned by the Defendant in Corruption Cases. The presence of this regulation is expected to fulfill justice for third parties whose assets are included in evidence of corruption crimes committed by debtors. This regulation can at least bridge legal certainty and justice for bankruptcy creditors in the link between bankruptcy cases and corruption crimes. The hope is that the presence of this regulation can be an example of the formation of regulations that can provide legal protection for bankruptcy creditors who are in a deadlock condition over the seizure of bankruptcy assets by the Attorney General's Office and the Curator, not only in the corruption sector, but also in the criminal sector as a whole.

Legal protection is an essential element in a state of law. Indonesia is a state of law, as stated in Article 1 paragraph (3) of the Indonesian Constitution. As such, legal protection is an essential element and consequence that must be upheld by the Indonesian Government.

[5] Adhi Setyo Prabowo, "Analisis Yuridis Peletakan Sita Pada Sita Khusus Pidana Pada Kuhap dan Sita Umum Pada UUK-PKPU," *Simbur Cahaya* 28, no. 2 (2021): 144.
[6] Luthvi Febryka Nola, "Kedudukan Sita Umum terhadap Sita Lainnya dalam Proses Kepailitan," *Negara Hukum* 9, no. 2 (November 2018): 231–232.
[7] Andrian, "Sengketa Kewenangan dalam Proses Likuidasi Boedel Pailit antara Kurator dengan Kejaksaan Republik Indonesia," *Justisi* 9, no. 3 (2023): 398–399, https://doi.org/10.33506/jurnaljustisi.v9i3.2509.

The theory of legal protection originates from the concept of recognition and protection of human rights.[8] Some experts provide their views on the theory of legal protection, as follows:[9] According to Philipus M. Hadjon, legal protection is the protection of dignity, as well as the recognition of human rights owned by each individual from arbitrariness. Legal protection is divided into two types, namely preventive and repressive. Preventive legal protection is the opportunity given to the people to submit opinions before government decisions are issued. Meanwhile, repressive legal protection is protection that aims to resolve disputes that arise. According to C.S.T. Kansil, legal protection is a legal effort provided by law enforcement officials to provide a sense of security, both in mind and physically from disturbances and various threats from any party. As for Soerjono Soekanto's view, there are five things that affect the process of legal protection, namely (1) laws; (2) law enforcers; (3) means or facilities for law enforcement; (4) society; and (5) culture. The characteristics of the *rule of law* according to A.V. Dicey consist of: the *rule* of law, equality before the law, and a constitution based on human rights.[10] The characteristics of the state of law (*rechtsstaat*) according to F.J. Stahl consist of the protection of human rights, the separation of powers, government based on legislation, and the existence of administrative justice.[11] Based on the characteristics of the rule of law, although the form of the rule of law is different, there are elements that are similar, namely the realization of human rights. The expert view above also states that legal protection is part of human rights. Thus, it is a logical consequence that Indonesia, which is a state of law and adopts human rights, must provide and facilitate legal protection for its people.

In 2023, the Indonesian government published the new Criminal Code, which replaces the Criminal Code inherited from the Netherlands. Unfortunately, the provisions on criminal seizure have not been significantly changed, so that when it is applied later, it has the potential to cause the same problems. With the recent legal developments in Indonesia, the problem of bankruptcy asset dragging between the Indonesian Attorney General's Office and the curator still cannot be resolved, except in the corruption sector. The final result of this research is the establishment of synchronous and harmonious bankruptcy and criminal regulations, so that certainty and justice for bankruptcy creditors can be protected.

2. RESEARCH METHODS

This research is a qualitative research with juridical-normative method. With juridical-normative research, research data collection is limited to legal materials, such as laws and regulations, theories, doctrines, and legal principles. There are several research approaches used in this research, among others:[12]

[8] Wahyu Simon Tampubolon, "Upaya Perlindungan Hukum Bagi Konsumen Ditinjau Dari Undang Undang Perlindungan Konsumen," *Jurnal Ilmiah Advokasi* 4, no. 1 (March 2016): 55–56, https://jurnal.ulb.ac.id/index.php/advokasi/article/view/356.

[9] Tim Hukumonline, "Teori-Teori Perlindungan Hukum Menurut Para Ahli," *Hukum Online*, September 30, 2022, https://www.hukumonline.com/berita/a/teori-perlindungan-hukum-menurut-para-ahli-lt63366cd94dcbc.

[10] Rokilah, "Dinamika Negara Hukum Indonesia: Antara Rechtsstaat dan Rule Of Law," *Nurani Hukum: Journal of Legal Science* 2, no. 1 (May 2020): 15.

[11] Zahermann Armandz Muabezi, "Negara Berdasarkan Hukum (Rechtsstaats) Bukan Kekuasaan (Machtsstaat)," *Journal of Law and Justice* 6, no. 3 (November 2017): 426.

[12] Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Jakarta: Kencana, 2022), 133–136.

1. Statute Approach
   Juridical-normative research must use the statute approach, considering that one of the mandatory legal materials used will be legislation. In this research, some of the laws and regulations studied includes Bankruptcy Law, Criminal Procedural Code, and technical laws and regulations.

2. Conceptual Approach
   This research also uses a conceptual approach as a consideration for legal formation that can protect the interests of creditors from the legal uncertainty of bankruptcy asset liquidation. The concepts used as considerations includes the concept of bankruptcy seizure, the concept of criminal seizure, and the concept of responsive law.

3. ANALYSIS AND DISCUSSION

Insolvency seizure of the debtor's assets is a seizure that occurs by law because it does not require certain actions to carry out the seizure, in contrast to seizure in civil law which is specifically carried out by a certain legal action.[13] Some expert views related to bankruptcy seizure are as follows:[14]

a. Dr. M. Hadi Subhan, S.H., M.H., C.N.
   The position of general seizure is higher than criminal seizure because of the existence of Article 31 paragraph (1) of Law Number 37 of 2004 which states that a bankruptcy verdict results in all court enforcement decisions against the debtor's property that have been initiated since bankruptcy must be stopped immediately. In addition, he also argues that the annulment of a court decision must be by a court decision as well. Criminal seizure is only a stipulation, so the implication is that criminal seizure cannot abolish a bankruptcy verdict decided by the court.
b. Dr. Freddy Harris, S.H., LL.M., A.C.C.S.
   If the general bankruptcy seizure has been determined first, then criminal seizure cannot be carried out because of the provisions in Article 201 HIR and Article 463 RV which stipulate that requests for the implementation of one or more seizures submitted at once to the debtor, only one seizure report is sufficient. The purpose of bankruptcy seizure itself is to safeguard the rights of the parties so that debtors do not embezzle or take their goods from creditors, while criminal seizure, only for evidence.

In the Bankruptcy Law, there are several provisions regarding the dimensions of bankruptcy seizure contained in the following articles.[15] Article 21 states that bankruptcy covers all of the Debtor's assets at the time the bankruptcy declaration is pronounced as well

[13] Hadi Shubhan, *Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan* (Jakarta: Kencana, 2019), 163.
[14] HRS, "Prokontra Sita Pidana vs Sita Umum Pailit," *Hukum Online*, May 3, 2013, https://www.hukumonline.com/berita/a/prokontra-sita-pidana-vs-sita-umum-pailit-lt51836ecd9bbf8.
[15] Tim Redaksi Tatanusa, *Kepailitan & PKPU: Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang* (Jakarta: PT Tatanusa, 2017), 29–30.

as everything acquired during bankruptcy. Article 31 paragraph (1) states that the declaration of bankruptcy results in the termination of all court enforcement orders against any part of the debtor's assets that have been initiated before the bankruptcy, and from then on no judgment can be executed including or also by holding the debtor hostage.

Bankruptcy seizure of the debtor's property by law nullifies all court seizures that have ever existed on bankruptcy property and suspends all executions on bankruptcy property that are individual in nature.[16] According to Yahya Harahap, if after there is a bankruptcy declaration from the panel of judges there are still individual execution rights, then the execution is automatically null and void because it is contrary to Article 31 of the Bankruptcy Law.[17] General seizure covers all of the debtor's assets, including assets acquired during bankruptcy. The debtor's wealth that is placed under general seizure is included in the bankruptcy estate which will then be sold at auction in a mass execution. The distribution of the proceeds from the sale of the bankruptcy estate is carried out in accordance with the position of each creditor, be it preferred creditors, separatist creditors, or concurrent creditors.

The power of bankruptcy seizure as stated in Article 31 paragraph (1) of the Bankruptcy Law should be able to override other seizures. With a bankruptcy verdict stating that the bankruptcy debtor's assets are included in the bankruptcy estate, all forms of seizure efforts against these assets must be stopped, including seizure orders that have been issued before the bankruptcy verdict. The bankruptcy declaration decision will have implications for the termination of all court decisions against the bankruptcy estate before bankruptcy occurs and from then on no seizure can be carried out, including the hostage-taking of the debtor.[18] It will be a logical consequence if there are other seizures after the *bankruptcy* seizure is placed on the bankruptcy estate, then these other seizures will be null and void due to the existence of Article 31 paragraph (1) of the Bankruptcy Law.

The essence of Article 31 paragraph (1) of the Bankruptcy Law needs to be studied further regarding the scope of its authority only covers private law or can also cover public law. If examined with the principle of the formation of legislation, namely *lex specialis derogate legi generali*, bankruptcy law is a *lex specialis* of corporate law. The scope of corporate law is in the dimension of civil law (trade law) and as existing in state administrative law which is reflected in legislation outside the Civil Code and the Commercial Code.[19] With the position of corporate law, it can be interpreted that corporate law covers the realm of private law, public law, and economic law.[20] Thus, as a *lex specialis* of corporate law, bankruptcy law also covers the realm of private law and public law.

Pragmatically, efforts to manage and administer the bankruptcy estate can be carried out by the Bankruptcy Estate Office (*Badan Harta Peninggalan/BHP*) or by a curator. *BHP* is a technical implementation unit under the Directorate General of General Legal

[16] Elyta Ras Ginting, *Hukum Kepailitan: Teori Kepailitan* (Jakarta: Sinar Grafika, 2018), 111.
[17] Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* (Jakarta: Sinar Grafika, 2019), 104–105.
[18] Jono, *Hukum Kepailitan* (Jakarta: Sinar Grafika, 2010), 125.
[19] Mulhadi, *Hukum Perusahaan: Bentuk-bentuk Badan Usaha di Indonesia* (Depok: Rajagrafindo Persada, 2020), 24.
[20] Andrian, "Juridical Review of the Application of Criminal Seizure and its Link with Bankruptcy Seizure" (Thesis, Universitas Katolik Indonesia Atma Jaya, 2022), 46.

Administration of the Ministry of Law and Human Rights.[21] *BHP* is part of the state apparatus or state administrative officials (Public Officials). According to Article 1 point 3 of Law Number 30 of 2014 on Government Administration, government officials are elements that carry out government functions, both within the government and other state administrators. With this authentic definition, it can be said that bankruptcy seizure is essentially also included in the realm of public seizure because its execution can be carried out by *BHP*, which is part of a public official. Thus, the view that criminal seizure takes precedence over bankruptcy seizure because it is classified as public law is invalidated, given that bankruptcy seizure can also be interpreted as part of public seizure. With the equal position of public and criminal seizure based on the analysis above, when viewed from the principle of other laws and regulations, namely the principle of *lex posteriori derogat legi priori,* bankruptcy seizure theoretically and juridically should be able to precede and override criminal seizure.[22] This is because the establishment of the Bankruptcy Law is relatively new when compared to the Criminal Code and the Criminal Procedural Code.

The next problem is if the criminal seizure in a case results in a verdict of state spoils, while the object of the spoils is also included in the bankruptcy estate, of course it will cause a deadlock condition where neither the curator nor the Prosecutor's Office can liquidate the object of the seizure dispute. Article 46 paragraph (2) of the Criminal Procedural Code states that the judge has full authority to determine the status of confiscated goods in a criminal decision, whether it is returned to the rightful owner, confiscated, or destroyed. With these provisions, dogmatically there is no gap to find a way out that can resolve disputes between criminal seizure and general seizure, because in their respective legal dimensions, criminal seizure and bankruptcy seizure have their own legal certainty.

According to its definition, seizure is the act of seizing and detaining an item by a state instrument based on a court decision until the case process is completed.[23] According to Andi Hamzah, the notion of seizure in the criminal procedure law is limited in meaning, because it is only for the benefit of evidence in the investigation, prosecution, and trial. He also argues that in order for seizure in the criminal procedure process not to violate human rights in the form of deprivation of people's property, seizure is limited in ways that have been determined by law in the form of the need for permission from the local District Court.[24][25] Here are some expert views related to the position of criminal seizure against bankruptcy seizure:

a. Prof. Dr. Edward Omar Sharif Hiariej, S.H., M.Hum.
   The position of public law takes precedence over private law. Criminal law is part of public law, therefore public law is characterized by coercion by state apparatus. If the goods to be confiscated by the investigator are already under the power of the curator, then the goods can still be confiscated considering the character of the criminal law itself. However, the goods to be confiscated by the investigator are not

[21] Article 1 point 1 *Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 7 of 2021 concerning Organization and Working Procedures of the Balai Harta Peninggalan.*
[22] Roni Pandiangan, "Diskrepansi Sita Umum Kepailitan Dengan Sita Pidana Dihubungkan Dengan Pemberesan Harta Pailit Yang Mengandung Unsur Pidana" (Dissertation, Universitas Jayabaya, 2021), 229.
[23] H. M. Fauzan and Baharuddin Siagian, *Kamus Hukum dan Yurisprudensi* (Jakarta: Kencana, 2017), 658.
[24] Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2017), 147–148.
[25] HRS, *Loc. Cit.*

automatically taken by the investigator. There are two ways that the investigator can do if this happens: (i) the goods can still be confiscated by the investigator but the control remains with the party who first confiscated it; (ii) by waiting for one of the cases to be completed.

b. Kombes Pol. Dr. W. Marbun, S.H., M.Hum.
Criminal seizure can still be carried out if an item has been placed in bankruptcy seizure first. This is due to the principle that public law takes precedence over civil law. In addition, referring to the principle of legal certainty, according to Article 39 paragraph (2) of the Criminal Procedural Code, goods that have been placed in civil seizure or bankruptcy seizure can still be confiscated for the purposes of investigation, prosecution, and trial of criminal cases. After the criminal case is over, the seized goods can be returned to the rightful owner or confiscated or destroyed in accordance with the court's decision.

In the Criminal Procedure Code itself, there are several important articles that explain seizure, among others:

a) Article 1 point 16 states that seizure is a series of actions by investigators to take over and or keep under their control movable or immovable, tangible or intangible objects for the purposes of evidence in investigation, prosecution and justice.
b) Article 39 paragraph (1) states that items that can be used as objects of criminal seizure consist of: (1) objects or bills of the defendant obtained as a result of a criminal offense; (2) objects used to commit a criminal offense; (3) objects used to obstruct the investigation process; (4) objects specifically made to commit a criminal offense; and (5) other objects that have a direct relationship with the criminal offense committed.
c) Article 39 paragraph (2) states that objects that are in seizure due to civil cases or due to bankruptcy may also be confiscated for the purpose of investigation, prosecution and trial of criminal cases, provided that the provisions of paragraph (1) are met.

In its development, in 2022, the Supreme Court issued Supreme Court Regulation Number 2 of 2022 on Procedures for Settling Objections of Third Parties in Good Faith to Decisions on the Forfeiture of Goods Not Owned by the Defendant in Corruption Cases (Perma 2/2022). In Perma 2/2022, creditors or curators can file an objection to the court against the decision to confiscate evidence in corruption crimes, which is also included in the bankruptcy estate.[26] This objection request can be submitted by the curator if the bankruptcy verdict is pronounced before the commencement of the corruption investigation process or after the corruption verdict is decided.[27] The presence of Perma 2/2022 is at least an alternative law that can prevent deadlock conditions due to bankruptcy assets that cannot be

[26] Article 3 paragraph (3) *Regulation of Supreme Court Number 2 of 2022.*
[27] Article 4 *Regulation of Supreme Court Number 2 of 2022.*

liquidated due to a conflict of authority between the Attorney General's Office and the curator, at least in the link between bankruptcy cases and corruption crimes.

Regarding the dispute over the authority to liquidate bankruptcy assets between the curator and the Attorney General's Office, the practical legal remedies can be resolved with several alternatives. *First*, the creditors, in this case represented by the curator who has been appointed in the bankruptcy decision, can file "other lawsuit" as stipulated in Article 3 paragraph (1) of the Bankruptcy Law. Based on this legal basis, the Curator can sue the Attorney General of the Republic of Indonesia to lift the seizure placed on the bankruptcy estate. Based on Article 3 paragraph (1) of the Bankruptcy Law, other legal remedies are provided when it comes to issues related to *actio pauliana*; third party resistance to seizure (*derden verzet*); creditors, debtors, curators or administrators being one of the parties in the bankruptcy estate case; and the curator's lawsuit against the directors of the company whose negligence/error caused the company to be declared bankrupt. The interpretation of other lawsuits according to Article 3 paragraph (1) of the Bankruptcy Law has more or less the same meaning as a controversial lawsuit in civil procedural law, namely that in a lawsuit application there must be a dispute and there are two parties to the dispute, namely the plaintiff and the defendant.[28] Thus, an alternative that can be done by the curator to fight for certainty and justice for creditors to get repayment of their receivables is to file a lawsuit against the Attorney General's Office of the Republic of Indonesia with the basis of the petitum lifting the determination of the seizure of bankruptcy property (bankruptcy estate).

The *second* legal remedy that can be considered is for the bankruptcy creditors, in this case represented by the Curator who has been appointed in the bankruptcy decision, to request the Supreme Court to issue a Circular Letter (*Surat Edaran Mahkamah Agung/SEMA*) which essentially states that a bankruptcy decision that has been *inkracht* before in the realm of bankruptcy law can override a forfeiture decision that has also been *inkracht* in the realm of criminal law. As a reference, the Supreme Court issued SEMA No. 03 of 2002 on Cases Related to the *Nebis in Idem* Principle. According to the SEMA, clerks of the same court and clerks of different courts must play an active role in examining case files that have the potential for *nebis in idem*. If it is proven that a case has been decided in the same or different court, then the clerk is obliged to report it to the relevant Chief Justice. After reporting to the President of the relevant court, the relevant court is obliged to report to the Supreme Court about the existence of cases related to the principle of *nebis in idem*.

In the event that the decision of each court has obtained permanent legal force, both the curator and the Indonesian Attorney General's Office can request a decision from the Supreme Court in terms of the authority to execute the bankruptcy estate. Article 28 of Law Number 14 of 1985 on the Supreme Court, the duties and authority of the Supreme Court include examining and deciding: (1) cassation applications; (2) disputes about the authority to adjudicate; and (3) requests for review of court decisions that have obtained permanent legal force. With the existence of the article *a quo,* the Supreme Court should be able to provide a decision regarding the authority to hear a dispute. It is hoped that with the existence of this article, the Supreme Court can decide that there is only one dispute resolution

[28] Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2017), 48.

mechanism to be used, be it the bankruptcy mechanism in the commercial court, or the criminal mechanism in the district court. Ideally, the dispute resolution is carried out in the realm of bankruptcy through the commercial court. This is based on the consideration that in the dimension of bankruptcy law, the mechanism for liquidating or managing the bankruptcy estate, as well as the distribution of proceeds to creditors, is clearly and clearly regulated in the Bankruptcy Law. Meanwhile, regarding the mechanism for distributing auction proceeds from state spoils or restitution mechanisms, neither the law nor its implementing regulations clearly regulate the liquidation mechanism and the distribution of liquidation proceeds to victims. It is hoped that this consideration can prevent further legal loopholes that can be utilized by law enforcement officers who may have bad intentions towards the victims' rights to the assets of debtors/perpetrators of criminal acts.

In fact, in 2018, the National Law Development Agency published an academic paper on the amendment of the Bankruptcy Law. One of the material changes in the academic paper is the issue of the discrepancy between criminal seizure and bankruptcy seizure. The drafters of this academic paper realize that when bankruptcy assets are also included in the object of criminal seizure, then later bankruptcy seizure will face criminal seizure, so that it will then raise the question of which seizure should take precedence. Both criminal seizure and bankruptcy seizure are essentially intended to protect the interests of the public or interested parties.[29] Therefore, according to the drafter of this academic paper, coordination between interested institutions is needed, so that when bankruptcy assets have been used in criminal proceedings, they can be returned to the curator.

In order to harmonize the seizure provisions in the Bankruptcy Law and the Criminal Procedural Code, it is necessary to consider aspects of the overall public interest and the benefits of its regulation. The effort offered by the drafter for the *ius constituendum* of the Bankruptcy Law is to prioritize the coordination process in resolving insolvency. The provision in Article 31 paragraph (2) also needs to be amended to stipulate that all seizures that have been made are nullified, and if necessary the Supervisory Judge can order their removal, except for seizures in the context of criminal proceedings. If the bankruptcy process is conducted prior to the criminal seizure, then the implementation of the criminal seizure must obtain prior permission from the supervisory judge or judge examining the bankruptcy case. In addition, it is also recommended that in the *ius constituendum* of the Bankruptcy Law it is necessary to regulate the prioritization of criminal seizure in cases that only include extraordinary crimes.[30] With the regulation that the investigator must first request permission from the bankruptcy supervisory judge to conduct seizure, it is hoped that legal certainty will arise for creditors regarding the return of their receivables. In addition, legal certainty will also arise for the curator when carrying out his duties, namely to manage and liquidate the bankruptcy assets, without any obstacles in the form of pulling assets with the prosecutor's office.[31]

[29] Ministry of Law and Human Rights, *Academic Paper of Draft Law Concerning Amendments to Law of the Republic of Indonesia Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations* (Jakarta: National Legal Development Agency, 2018), 117–118.
[30] *Ibid.,* 120–121.
[31] *Ibid.,* 161.

The phenomenon of disputes over the authority to liquidate objects of general seizure and criminal seizure between the curator and the Prosecutor's Office illustrates that at the time of the formation of each law, be it the Bankruptcy Law, or the Criminal Procedure Code, the legislature did not pay attention to aspects of legal certainty as a whole. That attention to the aspects of justice and expediency towards the formation of these policies should be appreciated, but if in the end there are problems at the implementation stage, then the formation of the law will be in vain. In fact, it can be described that legal uncertainty has resulted in the aspects of expediency and justice that are mandated by the two laws above not being fulfilled. Thus, the solution that will resolve legal uncertainty in the process of executing bankruptcy assets and criminal assets is to establish regulations that can bridge the two regulations, either by forming a new regulation or by revising each law, in which this time the legislators must balance the aspects of legal certainty, usefulness, and justice in forming/revising the law *a quo*.

In the end, if we look from the perspective of the concept of responsive law, the legal products formed must reflect the legal politics behind it and the legal needs of the community. Responsive law is an inclusive system, linking itself with non-law sub-systems, including aspects of power (politics). In order for the law to function and be useful in serving society, the law must be responsive, embracing all social forces that can sustain its vitality in responding to the aspirations and social needs to be served.[32] Responsive Law, according to Nonet-Selznick, is an effort to answer the challenge to synthesize legal science and social science.[33] To make legal science more relevant and more alive, integration between legal theory, political theory and social theory is needed, where in the end the law is required to be functional, pragmatic, purposeful and rational.

The insolvency mechanism is present with the spirit of providing legal certainty to the process of paying debtors' debt bills to creditors collectively without violating the legal protection aspects of each party. This means that the process of liquidating assets to pay these bills has been clearly and clearly regulated in the Bankruptcy Law. When there is an intervention by the prosecutor's office when the curator is doing his job to liquidate the bankruptcy assets, the spirit of the bankruptcy law is not fulfilled. As a result, legal protection for creditors is also not fulfilled. Therefore, it is necessary to synchronize and harmonize the Bankruptcy Law and Criminal Procedural Code by conducting legal reconstruction.

Considering that in 2023 the Government of Indonesia has issued the new Criminal Code which replaces the Criminal Code inherited from the Netherlands, then to fix the problem of overlapping liquidation authority, the formation of seizure regulations can be carried out in the *ius constituendum* of the Criminal Procedural Code. Based on the above analytical study, according to the researcher, to prevent the phenomenon of double seizure between general seizure and criminal seizure happening in the future, it is necessary to amend Article 39 paragraph (2). According to Article 39 paragraph (2) of the Criminal Procedural Code stipulates that "objects that are in seizure due to civil cases or due to bankruptcy can also be confiscated for the purpose of investigating, prosecuting, and trying criminal cases".

[32] Bernard L. Tanya, Yoan N. Simanjuntak, and Markus Y. Hage, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi* (Yogyakarta: Genta Publishing, 2013), 188.
[33] *Ibid.,* 185.

According to the author, the phrase "bankruptcy" in the formulation of the article needs to be removed. The logical consequence if the phrase is removed is that evidence in criminal cases that is already included in the bankruptcy estate cannot be placed under criminal seizure. Thus, systematically, Article 46 paragraph (2) of the Criminal Procedural Code which gives freedom to the panel of judges to return, destroy, and/or seize evidence in a case becomes limited in its application and will not have an impact on evidence that is already included in the bankruptcy estate. As for the Bankruptcy Law, some adjustments also need to be made, especially in Article 31 which is the root of the position of bankruptcy seizure. To achieve legal certainty and justice for the legal protection of creditors, Article 31 needs to add several paragraphs stating the following:

(1) Investigators or prosecutors when carrying out seizure of evidence included in the bankruptcy estate must obtain prior permission from the supervisory judge in the event that the bankruptcy asset has been requested/has been confiscated based on a bankruptcy decision;
(2) When the criminal investigation has been completed, the bankruptcy assets that the supervisory judge allowed to be seized by the criminal, are handed back to the curator to continue the liquidation process;
(3) In the event that a criminal seizure has been issued prior to the bankruptcy seizure, all of the confiscated bankruptcy assets must be handed over to the curator upon completion of the criminal proceedings.

With the addition of the provisions in the *ius contituendum* of the Bankruptcy Law, it is expected that the Criminal Procedural Code and Bankruptcy Law will be harmonized and synchronized.

4. CONCLUSION

Legal issues regarding the seizure of bankruptcy assets between the Indonesian Attorney General's Office and the curator occur due to the link between bankruptcy cases and criminal acts committed by debtors. Both criminal confiscation and bankruptcy confiscation are legal ideas promulgated by the legislator in order to fulfill legal certainty and legal protection for the community. However, this legal certainty is not fulfilled due to the overlapping implementation of asset liquidation. The curator has the authority to liquidate bankruptcy assets, as well as the prosecutor's office which is authorized to confiscate evidence owned by the defendant. The existence of Article 31 of the Bankruptcy Law gives absolute power to bankruptcy confiscation, so that other confiscations cannot be applied to the bankruptcy estate. However, the existence of Article 39 of the Criminal Procedural Code is not in line with the provisions of Article 31 of the Bankruptcy Law, considering that criminal confiscation can still be applied to objects placed under bankruptcy confiscation. Likewise, Article 46 of the Criminal Procedural Code provides full discretion and authority for the court to determine the status of criminal seized objects, whether they are confiscated, destroyed, returned, or reused in other cases. Therefore, both criminal confiscation and bankruptcy confiscation normatively have their own legal certainty at this time.

The presence of Perma 2/2022 is a glimmer of justice for bankruptcy creditors whose assets are trapped as evidence of corruption. Through this regulation, creditors/curators can file an objection to the court against asset forfeiture orders in corruption verdicts. Thus, in the nexus of bankruptcy cases and corruption crimes, the problem of pulling assets between the Attorney General's Office and the Curator should not occur. However, the link between bankruptcy cases and criminal offenses other than corruption is certainly still a legal problem. The presence of the Criminal Code of 2023 does not provide an answer to this problem, so we can maximize the hope of law formation on the *ius constituendum* of the Criminal Procedural Code. It is hoped that in the new Criminal Procedure Code, Article 46 on criminal confiscation can be given an exception to evidence that has become a bankruptcy estate in a bankruptcy decision. Likewise, the *ius consituendum* of the Bankruptcy Law must emphasize the position of bankruptcy confiscation in Article 31. With this provision, the existence of Perma 2/2022 can also be revoked, so that creditors or curators do not need to file objections, because automatically, assets that are included in the bankruptcy estate will not be determined and executed as evidence of criminal acts. Coordination between institutions is needed, in this case the investigator or prosecutor's office when conducting criminal confiscation of the defendant's assets that have become the bankruptcy estate, needs to ask permission from the supervisory judge. If the criminal process has been completed, the assets are returned to the curator to continue the liquidation process.

REFERENCES

Andrian. "Juridical Review of the Application of Criminal Seizure and its Link with Bankruptcy Seizure." Thesis, Universitas Katolik Indonesia Atma Jaya, 2022.

Andrian. "Sengketa Kewenangan dalam Proses Likuidasi Boedel Pailit antara Kurator dengan Kejaksaan Republik Indonesia." *Justisi* 9, no. 3 (2023): 389–401. https://doi.org/10.33506/jurnaljustisi.v9i3.2509.

Fauzan, H. M., and Baharuddin Siagian. *Kamus Hukum dan Yurisprudensi*. Jakarta: Kencana, 2017.

Ginting, Elyta Ras. *Hukum Kepailitan: Teori Kepailitan*. Jakarta: Sinar Grafika, 2018.

Hamzah, Andi. *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, 2017.

Harahap, Yahya. *Hukum Acara Perdata.* Jakarta: Sinar Grafika, 2017.

Harahap, Yahya. *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*. Jakarta: Sinar Grafika, 2019.

HRS. "Prokontra Sita Pidana vs Sita Umum Pailit." *Hukum Online,* May 3, 2013. https://www.hukumonline.com/berita/a/prokontra-sita-pidana-vs-sita-umum-pailit-lt51836ecd9bbf8.

Tim Hukumonline. "Teori-Teori Perlindungan Hukum Menurut Para Ahli." *Hukum Online*, September 30, 2022. https://www.hukumonline.com/berita/a/teori-perlindungan-hukum-menurut-para-ahli-lt63366cd94dcbc.

Jono. *Hukum Kepailitan*. Jakarta: Sinar Grafika, 2010.

Marzuki, Peter Mahmud. *Penelitian Hukum: Edisi Revisi.* Jakarta: Kencana, 2022.

Ministry of Law and Human Rights. *Academic Paper of Draft Law Concerning Amendments to Law of the Republic of Indonesia Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations*. Jakarta: National Legal Development Agency, 2018.

Muabezi, Zahermann Armandz. " Negara Berdasarkan Hukum (Rechtsstaats) Bukan Kekuasaan (Machtsstaat)." *Journal of Law and Justice* 6, no. 3 (November 2017): 421–446.

Mulhadi. *Hukum Perusahaan: Bentuk-bentuk Badan Usaha di Indonesia*. Depok: Rajagrafindo Persada, 2020.

Nola, Luthvi Febryka. " Kedudukan Sita Umum terhadap Sita Lainnya dalam Proses Kepailitan." *Negara Hukum* 9, no.2 (November 2018): 217–234.

Pandiangan, Roni. "Diskrepansi Sita Umum Kepailitan dengan Sita Pidana Dihubungkan dengan Pemberesan Harta Pailit yang Mengandung Unsur Pidana." *Jurnal Pendidikan dan Konseling* 4, no. 5 (2022): 4047–4060. https://doi.org/10.31004/jpdk.v4i5.7254.

Pandiangan, Roni. (2021). "Diskrepansi Sita Umum Kepailitan Dengan Sita Pidana Dihubungkan Dengan Pemberesan Harta Pailit Yang Mengandung Unsur Pidana." Dissertation, Universitas Jayabaya, 2023. Repository Universitas Jayabaya.

Prabowo, Adhi Setyo. "Analisis Yuridis Peletakan Sita Pada Sita Khusus Pidana Pada Kuhap dan Sita Umum Pada UUK-PKPU." *Simbur Cahaya* 28, no. 2 (2021): 131–145.

Rokilah. "Dinamika Negara Hukum Indonesia: Antara Rechtsstaat dan Rule Of Law." *Nurani Hukum: Journal of Legal Science* 2, no. 1 (May 2020): 12–22.

Septiadi, Anggar. "Ini Aset Koperasi Pandawa yang akan Masuk ke Kas Negara." *Kontan.co.id*, April 25, 2018. https://nasional.kontan.co.id/news/ini-aset-koperasi-pandawa-yang-akan-masuk-ke-kas-negara.

Shubhan, Hadi. *Hukum Kepailitan: Memahami Undang-Undang No.37 Tahun 2004 Tentang Kepailitan*. Jakarta: Kencana, 2019.

Tanya, Bernard L., Yoan N. Simanjuntak, and Markus Y. Hage. *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta: Genta Publishing, 2013.

Tim Redaksi Tatanusa. *Kepailitan & PKPU Undang-undang Nomor 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang*. Jakarta: PT Tatanusa, 2017.

Tampubolon, Wahyu Simon. " Upaya Perlindungan Hukum Bagi Konsumen Ditinjau Dari Undang Undang Perlindungan Konsumen." *Jurnal Ilmiah Advokasi* 4, no. 1 (March 2016): 53–61. https://jurnal.ulb.ac.id/index.php/advokasi/article/view/356.