

## GENERAL CONFISCATION OF BANKRUPTCY VS CRIMINAL CONFISCATION IN THE PERSPECTIVE OF LEGAL BENEFIT

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*Abstract: This study aims to obtain information regarding general confiscation of bankruptcy Vs criminal confiscation in the perspective of legal benefit and general confiscation of bankruptcy prior to criminal confiscation in the same perspective, namely legal benefit. The research method used is qualitative by conducting a literature study on various sources with themes related to research. The data obtained will then be analyzed in depth so that it is known that general confiscations have the benefit of returning creditor rights as debt repayments according to their proportions. While the benefits of criminal confiscation are to facilitate and speed up the criminal court process for the perpetrator or defendant. It doesn't stop here, if there is a case of two confiscations at the same time, you can prioritize general confiscation so that creditors can immediately receive their rights from bankruptcy assets and stabilize the economy on a small or large scale, but a curator must be able to place the state as the creditor holding the rights. Privilege to always take precedence in fulfilling its obligations.*

*Keywords: Bankruptcy General Confiscation, Criminal Confiscation, Legal Benefit*

### 1. INTRODUCTION

Prosperous life is the desire of many people, so that each human being always strives in earnest to achieve his goals (Faizah, 2020). That is to live well. Currently, not a few symbolize prosperity with the many assets owned as an economic aspect (Wildan, 2018), With this, humans do various ways to continue to increase their wealth, such as making a business, working and so on. One way that can be used to increase income or advance the business in which they are involved is to borrow funds from creditors.

Actually, the matter of accounts payable is a natural thing because many people have the same thing. Nevertheless, the problem is the ability to pay debts which could be in the middle of the payment process instead experiencing difficulties or other problems that fall into aspects of criminal law or civil law.


The components of bankruptcy law, including the confiscation and sale of debtor assets are included in criminal and civil law. The frequency of curator meetings with Polri investigators and/or the Attorney General's Office regarding the illegal confiscation of bankrupt assets indicates this.

Bankruptcy occurs when the debtor (borrower) cannot repay the creditor per the applicable loan terms or credit agreement (Vanly et.all, 2021). This is due to debtor companies experiencing financial difficulties (financial distress), especially a decrease in revenue due to the company's recent defeat. Meanwhile, bankruptcy is defined as a court decision resulting in the confiscation of all of the debtor's assets, both existing and those that will arise in the future.

However, laws and regulations, especially Law Number 37 of 2004 concerning UUK, provide a further understanding of bankruptcy, namely general confiscation that applies to all bankrupt debtor assets whose management or a curator carries out the settlement and under his supervision. From a supervising judge (Lie et.all., 2018).

The purpose of bankruptcy law is to fairly distribute the debtor's assets to all creditors by confiscating the debtor's assets. Bankruptcy is seen as an expression of various principles, including *paritas creditorium* and *pari passu porate parte* (Jhosua, 2018) within the legal framework of the asset regime.

Articles 1131 and 1132 of the Civil Code are devoted to the principle of creditorium parity which is widely adopted in Indonesian society. According to Article 1131 of the Civil Code, every



person's actions in the field have implications for their assets, which can be in the form of profits (credits) or reductions (debits) (jeffrey, 2022). Article 1132 of the Civil Code stipulates that each creditor has the right to fulfill obligations on the debtor's assets on a *pari passu* basis (getting repayment together without prioritization or priority), and on a *pro rata* basis if a legal relationship is determined regarding the property. has more than one liability (proportion to its debt amount) (Jamilah, 2017).

The commercial court has the final decision on bankruptcy cases, which will serve as a statement that the debtor loses all authority over his assets, including bankruptcy assets, after filing a bankruptcy petition. Bankruptcy is a process in which the debtor's assets are completely confiscated to protect the rights of creditors who have bills against the debtor and thus suffer losses due to the bankruptcy. As an added advantage, it can stop the execution of assets initiated by the debtor or creditor to cover outstanding debts. Bankruptcy assets can be fully collected by foreclosure of public assets. Thus, the bankruptcy process has reached its goal, and the curator who works under the supervision of the supervisory judge will settle all of the debtor's assets that have been publicly confiscated.

Where this is recognized in civil law, as in the context of private bankruptcy, foreclosure is commonly understood as a sort of forfeiture of assets. Confiscation is a topic familiar to them from their study of public law, also known as criminal law, specifically the Indonesian Criminal Procedure Code (KUHP). In this context, confiscation is called *inbesilagneming* (seizure) in Dutch. Articles 38 to 46 Chapter V of the Criminal Code regulate confiscation, with some additional instructions from Chapter XIV.

For the purposes of investigation, prosecution or trial, Article 1 Number 16 defines confiscation as a series of steps taken by investigators to take over and/or store various objects, both movable and immovable, tangible or intangible. A confiscation can also be seen as an act of "forced recourse" by investigators. As such, it can include humiliation, rape and other practices against human decency standards. On the other hand, it serves the public interest when it is used to settle criminal cases where statutory confiscation provisions cannot be justified. This is due to the fact that "forced measures" can violate basic human freedoms. According to Article 38 (1) of the Criminal Procedure Code, investigators must obtain permission from the District Court to confiscate evidence. However, paragraph (2) of the same article explains that if an investigator is in an essential and urgent situation, it is impossible to obtain permission beforehand, so that the Criminal Procedure Code makes an exception in this case.

Article 39, paragraphs 1 and 2 of the Criminal Procedure Code regulate what investigators can confiscate. Investigators may follow the guidelines set out in these rules for seizing property in civil proceedings or during criminal investigations, prosecutions and trials. Paragraph 2 of Article 39 of the Criminal Procedure Code authorizes the confiscation of property that can be confiscated for universal bankruptcy. However, this is contrary to paragraph 2 of article 31 UUK-PKPU which stipulates that the debtor's assets will be confiscated and destroyed after the confiscation is carried out, with the approval of the supervisory judge if necessary.

Based on the above, it is clear that Article 31 paragraph 2 UUK-PKPU contradicts Article 39 paragraph 2 of the Criminal Procedure Code. While Article 436 Rv states that confiscated goods cannot be reclaimed, this does not apply to goods taken into custody. This shows how difficult it is to synchronize broad seizures with specific seizures for criminal purposes. Because general seizures and criminal seizures are contradictory, it is not clear which one should apply in the case of concurrent seizures. In addition, there are two ways of solving a case or law carried out by citizens, and in the settlement there must be legal benefits that can be shared, namely general confiscation and criminal confiscation. Given this problem, researchers are interested in finding out more about general confiscation of bankruptcy vs. criminal confiscation in the perspective of legal benefits. This research aims to obtain information about general confiscation of bankruptcy Vs criminal confiscation in the perspective of legal expediency and general confiscation of bankruptcy prior to criminal confiscation in the same perspective, namely legal benefit.

## 2. METHODOLOGY

This research was conducted with a descriptive qualitative type through a normative juridical approach, namely by examining various laws or regulations that have relevance to the theme of this research, such as the 1945 Constitution, the Civil Code, the Criminal Procedure Code, Law No. 37 of 2004 concerning bankruptcy and suspension of obligations debt payments, and so on. The focus of this research is general confiscation of bankruptcy and criminal confiscation in the perspective of legal expediency. Data collection techniques were carried out through literature studies on various research results regarding general confiscations and criminal confiscations, which would then be analyzed in depth to find out the research results and convey them to the general public. In more detail, the steps in this study are as follows:

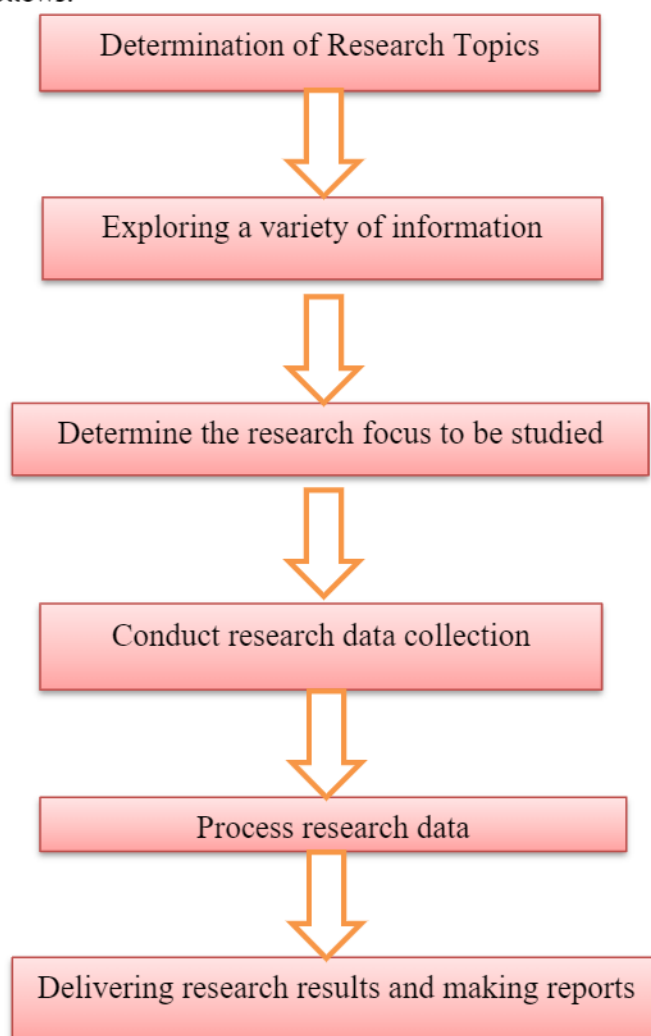


Figure 1: Research flow

By following the research flow above, it is expected to be able to present research results that are systematic and easily understood by every reader.

## 3. RESULT AND DISCUSSIONS

### 3.1 GENERAL CONFISCATION OF BANKRUPTCY VS CRIMINAL CONFISCATION IN LEGAL EXPEDIENCY

General confiscation applies to all assets owned by a debtor, both existing and future as long as the assets are obtained in the bankruptcy process (Ruswati, 2022). The assets owned by the debtor are joint guarantees for the creditors which will later be used as a return of rights in accordance with their respective proportions at the same time, unless one of the creditors proposes to take precedence for valid reasons (Safrudin, 2016).





General confiscation and criminal confiscation are two interrelated laws that even intersect with one another because each confiscation benefits every human being.

General confiscation of bankruptcy has ties with creditors where this confiscation is private (Luthvi, 2019) while criminal confiscation has a relationship with the state and is public. Actually, the benefits of these two confiscations are not much different, that is, they are both to save the situation so that the economy remains stable. It's just that the level or nature is different. Bankruptcy general confiscation is used as a guarantee of justice under the law that applies to creditors if the debtor does not have the ability to fulfil his obligations, both obligations arising from agreements or other obligations arising from the Law (Lambok, 2019). This is as stated in the bankruptcy law regarding the principle of creditorium parity where the obligations referred to in it are obligations that are in assets alone and are not included in family law obligations. so that the guarantee is only limited to the rights contained in the field of assets, not in the field of family law.

Each creditor also has the same right to obtain repayment of the receivables given, the confiscated debtor's assets will then be executed and the money generated from the sale will be distributed to the creditors in accordance with the proportion by the curator (Elly, 2022).

The benefit of the law in general confiscation of bankruptcy is to ensure that creditors will obtain their rights in accordance with the proportion of receivables made between creditors and debtors. In addition, it also guarantees debtors not to commit various acts that are detrimental to their creditors and to stop traffic transactions for bankruptcy assets carried out by debtors that may harm their creditors. It does not stop here, with a general confiscation of bankruptcy, a debtor will not be contested by his creditors, such as creditors who execute assets independently so that it can harm the debtor or other creditors. With this, justice can be enjoyed together and no party feels disadvantaged because they have received their rights in accordance with the proportion they have, the debtor has security over himself and feels relieved because he has fulfilled his obligations according to his abilities.


While a criminal confiscation is a confiscation carried out on goods, either movable or immovable, owned by a person and used for the purposes of proof in a criminal case (Tri, 2022), confiscation is a series of actions taken by investigators to take over or keep assets under their control to be used as evidence of a crime. Investigators can only carry out confiscation with permission obtained from the local district court as stated in Article 7 paragraph (1) of the Criminal Procedure Code which states that investigators have the authority to confiscate. The purpose of having a letter issued from the district court is so that no expropriation process results in human rights violations.

In carrying out law enforcement, of course, one must consider the existence of legal benefits. The benefits of law in criminal confiscations include: preventing the destruction of evidence for criminal proceedings carried out by suspects or defendants and to speed up the criminal trial process because the evidence is clearly owned. In addition, with a permit from the court, the rights of the accused or suspect as human beings can still be granted because confiscation is carried out using procedures not through deprivation which can violate human rights.

It is hereby known that every confiscation has legal benefits, be it general bankruptcy confiscation or criminal confiscation. Bankruptcy general confiscation benefits creditors in receiving their rights according to the proportion and the debtor does not get harmful pressure from creditors because the assets owned are already included in the bankruptcy assets as a result of a commercial court decision. Criminal confiscation provides legal benefits in criminal court proceedings so that evidence is not lost and court proceedings can proceed quickly and accurately.

### 3.2 GENERAL BANKRUPTCY CONFISCATION PRECEDES CRIMINAL CONFISCATION IN THE PERSPECTIVE OF LEGAL EXPEDIENCY

Legal expediency is a principle that accompanies the principles of justice and legal certainty. This is because it is better to consider the principle of expediency in applying the principles of justice and legal certainty. The principle of expediency is defined as the result given for an action to provide broad benefits for the benefit of society, nation and state.



Therefore, there are still clashes regarding the general confiscation of bankruptcy prior to criminal confiscation. This is as explained in Article 31 paragraph 2 of the KPKPU Law and Article 39 paragraph 1 of the Criminal Procedure Code. This is because Article 31 paragraph 2 of the KPKPU Law states that the decision on a bankruptcy statement will result in all confiscation of bankruptcy assets being deleted. However, Article 39 paragraph 2 of the Criminal Procedure Code provides information if an asset or object is in confiscation (including due to bankruptcy confiscation) under the authority of investigators to be used as one of the tools for carrying out investigations, prosecutions and trials related to criminal cases.

If a criminal confiscation and general confiscation collide at the same time as happened in several companies in Indonesia, it is better if the criminal confiscation takes precedence because it concerns the public interest compared to the general confiscation of a private bankruptcy. This is also in line with the opinion expressed by Edward Omar Sharif Harief as a Professor at Gajah Mada University who stated that the position of criminal confiscations takes precedence over general confiscations, because the character of criminal seizures which are public law has a higher position than private law on confiscations. General bankruptcy (Sita, 2016).

With this, a curator will certainly have more work to do in managing confiscated assets. Nevertheless, because criminal confiscations have high public law and are related to the benefit of the community, nation and state, a curator must wisely resolve general bankruptcy confiscations by synergizing with investigators to resolve the case or problem being handled. This criminal confiscation has the aim of proving a criminal act. So, if this process is complete, of course the evidence will be given back to those who are entitled, and in the bankruptcy estate. Then, it will be given to the curator to make arrangements.

However, if you want to prioritize general confiscation of bankruptcy, a curator must be able to provide guarantees to the state for the completion of criminal cases. This is in accordance with the results of a study conducted by Siti Hapsah Isfardiyana which stated that a general bankruptcy confiscation can precede a criminal confiscation in carrying out bankruptcy estates because creditors must obtain their rights as soon as possible and the state does not need to worry because the curator will certainly provide guarantees to the state placed as privileged creditors who must take precedence in fulfilling their obligations. This is also in line with what was disclosed by the Directorate General of General Legal Administration of the Ministry of Law and Human Rights, Freddy Haris, who stated that if a general confiscation of bankruptcy has occurred, then a criminal confiscation can no longer be carried out, because the law prohibits double or multiple confiscations in one confiscated object. If two or more requests for implementation are submitted simultaneously to a debtor, it is sufficient to make a report on the confiscation procedure. This is because general confiscation aims to safeguard the rights of creditors so that debtors do not embezzle goods from creditors. Likewise with criminal confiscation. In fact, there is not much difference between these two confiscations, it's just that the confiscation of debtor assets aims to add to the bankrupt debt and protect concurrent creditors. Meanwhile, criminal confiscation is only used to prove. He also argues that the confiscation as stated in Article 39 paragraph (2) of the Criminal Procedure Code does not mean bringing the confiscated goods to place his authority under the investigator, but the investigator as a savior can also register his interests with the curator. That is, investigators as saviors of state interests can be positioned as creditors with preferences like taxes (Sita, 2016).

The same thing was conveyed by M. Hadi Subhan, a lecturer in bankruptcy law at the Faculty of Law, University of Airlangga, who stated that general confiscations have a higher position than criminal seizures. This is because the essence of bankruptcy law is a general confiscation of all assets the debtor owns. The general confiscation of bankruptcy is a judge's decision, while the criminal confiscation is a judge's decision so that the determination of a criminal confiscation cannot cancel the decision of the panel of judges in a commercial trial.

Prof. Sudiko Merokusuma gave a statement in the law enforcement process that must pay attention to three elements: legal justice, legal certainty and legal benefits. This research examines the element of expediency only or referred to as *zweckmassigkeit* which is defined as the provision of benefits or uses to the community for law enforcement carried out. The preliminary reasons for



general confiscation of bankruptcy compared to criminal confiscation are: the interest held by a creditor will be obtained more quickly and can be fulfilled on bankruptcy assets. With this, problems regarding debts and receivables can be resolved quickly and fairly as well as having an impact on a stable economy both on a small or large scale with the guarantee that the curator can place the state as a creditor holding privileges to always take priority in fulfilling its obligations. However, suppose the curator cannot provide guarantees in such a way. In that case, criminal confiscation should take precedence over general confiscations for bankruptcy to ensure the security of the confiscated goods as evidence of a crime.

#### 4. CONCLUSION

General confiscation of bankruptcy is included in civil law, while general criminal confiscation is included in criminal law, where the Civil Code regulates general confiscation of bankruptcy and the Criminal Procedure Code regulates criminal confiscation. The legal benefits of these two confiscations are: The general confiscation of bankruptcy provides benefits to creditors in receiving their rights in accordance with the proportions and the debtor does not get harmful pressure from creditors because the assets owned are already included in bankruptcy assets as the result of a commercial court decision. Meanwhile, criminal confiscation provides legal benefits in criminal court proceedings so that evidence is not lost and court proceedings can proceed quickly and accurately. Whereas in the general confiscation aspect of bankruptcy prior to criminal confiscation it can be carried out with the benefit that the interests owned by a creditor will be obtained more quickly and can be fulfilled for bankruptcy assets. With this, problems regarding accounts payable can be resolved quickly and fairly and have an impact on a stable economy, both on a small or large scale with the guarantee that the curator can place the state as a creditor holding privileges to always take priority in fulfilling its obligations. The researcher hopes that the results of this study can contribute ideas to readers, the government and creditors in carrying out activities in the future either in making policies or in conducting further research.

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