



**CURRENT COMMENTARY & CASE NOTE**

**STRIKING A BALANCE BETWEEN LEGAL  
CERTAINTY, JUSTICE AND UTILITY TO  
END THE CLASH BETWEEN BANKRUPTCY  
AND CRIMINAL PROCEEDINGS IN COURT  
DECISION NO. 11/PDT.SUS-GUGATAN  
LAIN-LAIN/2018/PN.JKT.PS AND NO. 3  
K/PDT.SUS-PAILIT/2019**

Febby Mutiara Nelson<sup>1</sup>, Esther Melinia Sondang  
<sup>1,2</sup> Faculty of Law, Universitas Indonesia, Depok, Indonesia

 febymutiara.n2@gmail.com

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**ABSTRACT**

The clash between bankruptcy and criminal proceedings is one of the obstacles which has been long faced by law enforcement officials. One of many examples of the intersection of the two proceedings is the case between the Bankruptcy Trustees of KSP Pandawa Mandiri

Group dan Nuryanto with Depok District Attorneys. The case caused issues with the confiscated assets that were the objects in the bankruptcy and criminal court decisions. It stemmed from the conflict between provisions in Indonesian Bankruptcy Act and Criminal Procedure Code. This Note was conducted to analyze the judges' judicial decision-making concerning the three aspects of legal certainty, justice and utility as one way to resolve the conflict of norms. Generally, the Commercial Court and Supreme Court decisions have complied with the regulations of the prevailing laws and legal principles. However, the judgments are still not comprehensive and not quite right in the decisions. The Panel of Judges should not only stick on the legal certainty aspect but also the justice and utility aspects. Concerning the three aspects, the bankruptcy assets in the case should be handed over to the Bankruptcy Trustees.

**Keywords:** Legal Certainty; Justice; Utility; Bankruptcy Proceeding; Criminal Proceeding

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## INTRODUCTION

IN LAW ENFORCEMENT, there are often situations in which two legal norms clash, making it seemingly impossible to conform to both norms at the same time. Conflict of norms is encountered many times, including in settlement of bankruptcy cases when the enforcement of bankruptcy law intersects with criminal law enforcement. This issue has become a major obstacle faced by law enforcement officials to resolve problems within the framework of upholding the law. The case between Tim Kurator KSP Pandawa Mandiri Group dan Nuryanto (the “Bankruptcy Trustees” of KSP Pandawa Mandiri Group and Nuryanto) with Kejaksaan Negeri Depok (the “Depok District Attorneys”) is one of many examples of the intersection between bankruptcy and criminal procedural law. The Panel of Judges on the bankruptcy case had rendered their decision before the criminal court judges stated the forfeiture of bankruptcy assets from KSP Pandawa Mandiri Group and Nuryanto. The imposition of the criminal court verdict caused issues with the confiscated assets that were the objects in the two decisions.

One way to resolve the conflict of norms is to analyze other aspects than legal certainty, namely justice and utility. First, this Note addresses the facts about the KSP Pandawa Mandiri Group and Nuryanto as the Bankrupt Debtor or Criminal Defendant and provide a brief explanation regarding the lawsuit by the Bankruptcy Trustees of KSP Pandawa Mandiri Group and Nuryanto against Depok District Attorneys. Second, this Note discusses the basics or general overview regarding conflict of norms that originated from the bankruptcy and criminal procedural law provisions regarding asset confiscation and forfeiture. Third, this Note also analyzes the judges' judicial decision-making on the lawsuit, both in the Commercial Court, namely Decision No. 11/Pdt.Sus-Gugatan Lain-lain/2018/PN.Jkt.Pst, and in the Supreme Court, namely Decision No. 3 K/Pdt.Sus-Pailit/2019, concerning the aspects of legal certainty, justice, and utility.

## FACTS & PROCEDURAL POSTURE OF THE CASE

ON JUNE 20, 2017, Pengadilan Niaga pada Pengadilan Negeri Jakarta Pusat (the “Commercial Court” at the Central Jakarta District Court) declared bankruptcy of KSP Pandawa Mandiri Group and Nuryanto as its leader. At the same time, Nuryanto and twenty-six other KSP Pandawa Mandiri Group members were named suspects, which led to the confiscation of their assets. Eventually, Pengadilan Negeri Depok's decision (the “Depok District Court”) as outlined in Decision No. 425 until 429/Pid.Sus/2017/PN. Dpk stated that Nuryanto and other members were proven to have committed banking crimes. In the criminal proceeding, the Depok District Court ruled to confiscate some of the bankruptcy assets and hand them over to the State. Thus, the Bankruptcy Trustees proceeded a lawsuit against Depok District Attorneys to the Commercial Court. The Panel of Judges granted several claims from the Bankruptcy Trustees and finally returned nineteen assets that belonged to Nuryanto and his wives, Cicik Kusnenti and Nani Susanti. Depok District Attorneys filed an appeal to this decision, but the Mahkamah Agung (the “Supreme Court”) later rejected the appeal.

In both Commercial Court and Supreme Court decisions, the Panel of Judges conveyed their judgments regarding the position of bankruptcy assets of KSP Pandawa Mandiri Group and Nuryanto against Depok District Court's verdict Decision No. 425 until 429/Pid.Sus/2017/PN. Dpk determined the asset forfeiture of confiscated objects for the benefit of the State. The Panel of Judges at the Commercial Court stated that a total of nineteen assets belonging to Nuryanto and his wives classified as bankruptcy assets that must be returned to the Bankruptcy Trustees. The reason is that Nuryanto and his wives were the Bankrupt Debtors based on Article 23 *juncto*

Article 64 Paragraph (1), (2), (3) of the Bankruptcy Act,<sup>1</sup> making the criminal verdict out to be non-executable. In line with the *judex facti*'s decision, the Supreme Court also classified the nineteen assets as bankruptcy assets. However, the Supreme Court's judgments were slightly different, where the Supreme Court believed that the assets' status was no longer belongs to KSP Pandawa Mandiri Group and Nuryanto. According to this judgment, the bankruptcy decision of KSP Pandawa Mandiri Group and Nuryanto caused them to attain the status as Bankrupt Debtors, so they no longer had ownership of the assets. Another consideration was that the bankruptcy decision had been declared first before the criminal decision, resulting in the statement that the asset forfeiture could not be executed.

## LEGAL BACKGROUND & EXISTING LAW

CONFLICT OF NORMS that occurred in the case stemmed from the conflict between provisions in Indonesian Bankruptcy Act and Criminal Procedure Code. The provision in Article 31 Paragraph (1) of the Bankruptcy Act states that the bankruptcy decision results in all judicial decisions regarding any part of the debtors' assets that have been started since they obtain the bankruptcy statuses must be stopped immediately.<sup>2</sup> On the other hand, Article 39 Paragraph (2) of the Criminal Procedure Code also states that objects that are confiscated due to civil or bankruptcy proceedings can also be seized for investigation and prosecution in the criminal proceedings.<sup>3</sup> It brings the possibility to confiscate assets in bankruptcy and criminal

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<sup>1</sup> INDONESIA, *Undang-Undang Nomor 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, LN. 131, TLN. 4443 (2004), <https://dpr.go.id/dokjdi/document/uu/38.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> INDONESIA, *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana*, LN. 76, TLN. 3209 (1981), <https://dpr.go.id/dokjdi/document/uu/755.pdf>.

proceedings simultaneously and raises an issue regarding which one should be prioritized.

Based on the Indonesian legal professionals' opinions,<sup>4</sup> as well as the results of direct interviews with a bankruptcy trustee and district prosecuting attorney,<sup>5</sup> it can be concluded that the strongest judgment to determine the position of the general bankruptcy confiscation against the criminal confiscation is the consideration of the materials and protected interests of the respective laws underlying each confiscation. Criminal confiscation contains the public interest, which has a higher position than the individual interests in the bankruptcy proceedings. Therefore, the creditors' interests must be put aside for a while to protect the public interest through criminal confiscation. By prioritizing the criminal confiscation against general bankruptcy confiscation, the court must temporarily postpone the bankruptcy proceedings. After the criminal proceedings have been entirely executed, the judges should declare a verdict that determines the status of the confiscated assets, one of which is to return the concerned assets to the bankruptcy trustees, so the court could continue the bankruptcy immediately.

However, Article 46 Paragraph (2) of the Criminal Procedure Code<sup>6</sup> and Article 39 of Indonesian Penal Code<sup>7</sup> allows judges to issue a verdict of asset forfeiture for the State. Based on these provisions, law enforcement could seize an asset for the State's benefit in general if the asset forfeiture is made possible by the statutory regulations. Some special provisions also allow and even require the asset forfeiture for the State's benefit, such as Act No. 41 of 1999 regarding

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<sup>4</sup> HRS, *Prokontra Sita Pidana vs Sita Umum Pailit*, HUKUMONLINE (2013), <https://www.hukumonline.com/berita/baca/lt51836ecd9bbf8/prokontra-sita-pidana-vs-sita-umum-pailit> (last visited Mar 22, 2021).

<sup>5</sup> Based on the Interview with Tiur Henny Monica, Attorney and Bankruptcy Trustee at MIP Law Firm on November 25, 2020, and Oktario Hutapea, District Prosecuting Attorney at Kejaksaan Negeri Balikpapan on December 3, 2020.

<sup>6</sup> INDONESIA, *supra* note 3.

<sup>7</sup> INDONESIA, *Kitab Undang-Undang Hukum Pidana*, [https://jdih.mahkamahagung.go.id/index.php/hukum-acara/download/2453/chk,36adcc5cf6795fecbb488eb918929700/no\\_html,1/](https://jdih.mahkamahagung.go.id/index.php/hukum-acara/download/2453/chk,36adcc5cf6795fecbb488eb918929700/no_html,1/).

Forestry.<sup>8</sup> Furthermore, asset forfeiture is usually carried out if the objects are categorized as the *Corpora Delicti*, or in other words, the assets are resulting from criminal acts and proven to contain elements of "detrimental to the interests of the State", including objects obtained from the corruption or money laundering. Besides, the public prosecutors or the judges could issue a claim or verdict on the asset forfeiture based on the trial's facts.

On this matter, the principles of conflict resolution cannot be applied, especially the *lex specialis derogat legi generali* principle, because the *lex specialis* provisions must be in the same legal regime as the *lex generalis*.<sup>9</sup> In this case, both forms of confiscation and decisions originated from two fields of law that have different substantive materials and protect two different interests, in which the criminal confiscation or decision that stated the asset forfeiture is in the realm of public law. In contrast, the general bankruptcy confiscation or bankruptcy decision falls within the realm of private law. Therefore, another solution that can be offered is to analyze the three aspects of law enforcement following the legal doctrine by Sudikno Mertokusumo, balancing the juridical or legal certainty aspect with the elements of justice and utility.<sup>10</sup>

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<sup>8</sup> INDONESIA, *Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan*, LN. 167, TLN. 3888 (1999), <https://jdih.esdm.go.id/storage/document/uu-41-1999.pdf>, see Art. 78 (15).

<sup>9</sup> BAGIR MANAN, *HUKUM POSITIF INDONESIA: SATU KAJIAN TEORITIK* 58 (2004).

<sup>10</sup> SUDIKNO MERTOKUSUMO, *MENGENAL HUKUM SUATU PENGANTAR* 145 (5 ed. 2005).

# ANALYSIS OF THE COMMERCIAL COURT & SUPREME COURT DECISION

## A. LEGAL CERTAINTY

PRINCIPALLY, the legal certainty aspect talks about the suitability of law enforcement practices with the applicable law. In the above mentioned case, the Commercial Court's judgments compliant with the provisions in Article 21, Article 23, and Article 64 Paragraph (1), (2), (3) of the Bankruptcy Act.<sup>11</sup> Nuryanto's assets were classified as bankruptcy assets because it could be seen clearly that Nuryanto was a bankrupt debtor based on the Commercial Court Decision No. 37/Pdt.Sus/PKPU/2017/PN.Niaga.Jkt.Pst. Meanwhile, the assets in Nuryanto's wives' names were also categorized as bankruptcy assets because there were no prenuptial agreements to separate the assets between Nuryanto and his wives. However, the Commercial Court's judgments are not comprehensive enough because the Panel of Judges did not link their considerations to the Penal Code and Criminal Procedure Code provisions. When it comes to comparing the provisions in Article 39 of the Penal Code<sup>12</sup> and Article 46 Paragraph (2) of the Criminal Procedure Code,<sup>13</sup> these judgments are not strong enough to prioritize the general bankruptcy confiscation over the criminal verdicts. Based on those provisions, the forfeiture of bankruptcy assets for the State's benefit is legally allowed, considering that the assets *a quo* were also obtained from criminal acts.

The Supreme Court's judgments are also inaccurate for several reasons. First, as a bankrupt debtor, Nuryanto still had the ownership of the assets in the case *a quo*, because Article 24 Paragraph (1) of the Bankruptcy Act states that the result of bankruptcy is the loss of the debtors' right to manage their assets, not the loss of ownership of their

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<sup>11</sup> INDONESIA, *supra* note 1.

<sup>12</sup> INDONESIA, *supra* note 7.

<sup>13</sup> INDONESIA, *supra* note 3.

assets.<sup>14</sup> Second, the stipulation of the bankruptcy decision cannot automatically determine whether the bankruptcy assets which are also confiscated in the criminal proceedings can be taken away for the benefit of the State. This reason is that the asset forfeiture can still be executed if proven to be true that the bankruptcy assets are obtained from criminal acts or meet other criteria as previously explained, even though the bankruptcy decision has been declared beforehand. However, since there was no element of detrimental to the State's interests in the criminal act *a quo*, the Supreme Court's judgments are still acceptable.

In conclusion, the legal certainty aspect is not enough to resolve the conflict of norms in the case *a quo*, because the legal provisions themselves contradict one another. Therefore, other aspects besides the juridical aspect, such as aspects of justice and utility, should have been considered in both the Commercial Court and Supreme Court judgments.

## B. JUSTICE

IN TERMS of the aspect of justice, the definition of justice itself has many meanings and connotations. However, according to L.J. Van Apeldoorn, justice should not be viewed as equalization because it does not always mean that everyone should get an equal share. Every case must have its considerations. If something is considered fair for someone, it is not necessarily fair for others. Thus, the core of justice is when law enforcement officials could consider the balance between each protected interest, in which everyone can get as much as their share.<sup>15</sup>

Applying this view to the case *a quo*, if the bankruptcy assets were handed over to the Bankruptcy Trustees and the bankruptcy settlement could quickly be executed, a balance would be achieved between the protected interests, namely the debtors' interest,

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<sup>14</sup> INDONESIA, *supra* note 1.

<sup>15</sup> L.J. VAN APELDOORN, PENGANTAR ILMU HUKUM 11 (Oetarid Sadino trans., 2000).

creditors' interest, and public interest. The creditors' interest would be fulfilled through the settlement of the receivables. The debtors' interest in paying their debts and continuing their businesses without being declared bankrupt could also be fulfilled. Not only that, but the public interest would also be fulfilled by the continuity of commerce in society. Meanwhile, if the State took away the bankruptcy assets, the proceeds from the sale of the assets would go to the State treasury. This would violate the creditors' interest and lead to the potential of lower values of repayment to their receivables, resulting in more significant losses for creditors.

### C. Utility

WHEN IT COMES to the utility aspect, society expects the benefits of the implementation or enforcement of the law. John Stuart Mill argues that something is beneficial if it can produce maximum enjoyment, prosperity, and happiness and cause a little suffering to society's interests.<sup>16</sup> Concerning this aspect, the main benefit that would be obtained if the assets *a quo* were handed over to the Bankruptcy Trustees is a balanced settlement of debtors' assets under the *pari passu prorata parte* principle. In the case *a quo*, the debtors consisted of almost all elements of society in various regions of Indonesia, amounting to more than thirty-nine thousand sixty-nine people with a total bill of more than IDR 3,332,491,684,450. The assets could at least add value to the bankruptcy bills in a hope that this would minimize losses suffered by the creditors.

Meanwhile, if the State took away the bankruptcy assets, this would increase the State income to fulfill the public interest. However, in the case of *a quo*, there was no urgency regarding the asset forfeiture of the confiscated objects for the State because the crime did not cause losses to the State finances. Moreover, the bankruptcy assets were the only source for creditors who were also victims of the debtors' criminal act to get their rights back. After all,

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<sup>16</sup> JOHN STUART MILL, UTILITARIANISM 10-11 (Oskar Piest ed., 1957).

the State still had other State income sources if they did not execute the asset forfeiture. Therefore, it would be more beneficial if the assets were given to the Bankruptcy Trustees. The assets could be sold and distributed fairly and equally to the creditors under the *pari passu prorata parte* principle.

## CONCLUSION

THE COMMERCIAL COURT and Supreme Court decisions have been complied with the regulations of the prevailing laws and legal principles, especially regarding juridical aspects or legal certainty in the context of bankruptcy law. However, as a whole, the Commercial Court and Supreme Court judgments are still not comprehensive and not quite right in the decisions. To resolve the conflict of norms that occurred, the Panel of Judges should stick on the juridical or legal certainty aspect and the aspects of justice and utility. Based on those three aspects, the nineteen assets of Nuryanto and his wives, which were categorized as bankruptcy assets, should be handed over to the Bankruptcy Trustees, Tim Kurator KSP Pandawa Mandiri Group dan Nuryanto. It is in line with the second, third, and fourth verdicts of the Commercial Court decision. As a result, the asset forfeiture in the criminal proceeding became non-executable. The legal consequences of the two decisions are the increase in bankruptcy assets of KSP Pandawa Mandiri Group and Nuryanto, and the end of the clash between bankruptcy and criminal proceedings, which would also be reached if the judgments put forward the balance between legal certainty, justice, and utility.

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"It's easier to invade a small country than to file a court document."

**Melody A. Kramer**

Why Lawyers Suck! Hacking the Legal System, Part 1

#### **ABOUT AUTHORS**

**Dr. Febby Mutiara Nelson, S.H., M.H.**, is a Lecturer at Faculty of Law, Universitas Indonesia since 2013. She teaches both undergraduate and postgraduate Program at her institution. His area of research interest concerning Procedural Law studies. Currently, Dr. Febby is the Chair of the Association of Indonesian Legal Laboratories (ALHI) from 2017-2021, Secretary of the Postgraduate Doctoral Program at the Faculty of Law, University of Indonesia, Central Board of the Indonesian Chamber of Commerce's Business Mediation Institute (Lembis Kadin), Central Board of the Indonesian National Mediators Association (MNI) and Management of the Center for the Criminal Law and Criminology Society (MAHUPIKI). Dr. Febby served as Deputy Chair of the LKBH-PPS FH UI (2004 - 2013), the Advisory Board of the LKBH-PPS FH UI (2014 - 2018), Secretary of the Department of Procedural Law Studies of FH UI (2004 - 2013), Head of the Laboratory Unit, Legal Clinic and Student Competition (2013 - 2019). In addition, Dr. Febby is also a frequent resource person regarding Legal Laboratory Governance and Module Development related to Legal Proficiency Courses, Legal Aid and the Criminal Justice System. Dr. Febby is also a reader of the Judicial Commission Member Candidate Paper and also a resource person at the Coordinating Ministerial Meeting with the Coordinating Minister for Political, Legal and Security Affairs regarding the Amendment to Law no. 35 of 2009 concerning Narcotics. Dr. Febby is also active in community service activities, together with Street Law students every semester conducting legal counseling to marginalized communities both in Indonesia and Malaysia in collaboration with the University of Malaya.

**Esther Melinia Sondang** is a graduate of the Faculty of Law, University of Indonesia.