



ALTERNATIVE RETURN FOR STATE LOSSES IN CRIME CASES

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Abstract

State financial losses can take many forms, including the expenditure of state assets that exceed what should be issued by the state, loss of state assets that exceed what should be received, and reduced revenue from sources of state wealth that should obtain. From the criminal law perspective, corruption is hazardous for society, the nation, and the state. Losses to state finances and the country's economy are real consequences that form the basis for justifying the criminalization of forms of corruption in criminal law policies. This research is normative legal research based on secondary data obtained from legal hierarchies, laws, regulations, and developments in legal issues in Indonesia. The data and information obtained by the authors were analyzed by comparing normative provisions (*das sollen*) with reality (*das sein*) that occurs in society. This descriptive and analytical writing provides an overview accompanied by systematic, factual, and accurate explanations. Return of stolen state assets (stolen asset recovery) is critical for developing countries' development because it not only restores state assets but also aims to uphold the rule of law in a society where no one is above the law.

Keywords: Law, Corruption, and State

INTRODUCTION

A country based on the law (*rechtstaat*) obligates its citizens to obey what regulate in their respective laws; however, in Indonesia, this is still far from the norm, and the law sometimes use as a tool for the authorities to protect their interests and justify an action that is contrary to the provisions of applicable law (Baharruddin Lopa, 2002).

The crime of corruption directly or indirectly harms the state's finances or the country's economy, simultaneously hurting the people. Victims (*victims*) of corruption crimes are the state and the people because, with the existence of corruption crimes, the country's finances and economy are reduced and disrupted. The corruptors make the state a victim (*victim state*) (Artidjo Alkostar, 2008). The stolen assets of the state are harmful to the state itself, the people who live there, and the state as a whole. Some corruptors received fines for their crimes, but others opted to serve their sentences in prison instead, meaning the state did not recoup all its losses. The concept of penalizing corrupt individuals with the requirement to make up for a certain amount of stolen state funds gave rise to the idea of impoverishment for unscrupulous individuals.

The formal procedural approach through the current criminal procedural law has not been able to recover state losses. At the same time, state losses caused by corruption are state assets that must save. Therefore, another way is needed to keep the country's assets, namely by returning the support of the perpetrators of corruption. Law enforcement and recovery of criminal assets are two sides in eradicating criminal acts, especially corruption. As a crime based on calculation or calculation (*crime*

of total), the management and security of the proceeds of crime is a fundamental need for white-collar criminals.

Someone will dare to commit corruption if the results obtained from crime are higher than the risk of punishment (*penalty*) faced; not even a few corruptors are ready to go to jail if they estimate that while serving their sentence, their family will still be able to live in prosperity from the proceeds. Corruption committed (Basrief Arief, 2014). For this reason, it is not enough to eradicate corruption by punishing the perpetrators, and it must balance with efforts to cut off the flow of proceeds from crime.

Confiscation of property resulting from the crime of corruption, it is hoped that the perpetrator will lose his motivation to carry out or continue his actions because the purpose of enjoying the results of his crime will hinder or be in vain. If there is an asset confiscation instrument, it is very possible, namely (Basrief Arief, 2014):

1. As little as possible, the perpetrators will think of committing a crime because it will not be profitable, or the benefits will be confiscated by the state.
2. The crime of losing independence (prison) will not be able to prevent the commission of a crime because the perpetrator can still enjoy the results/benefits of his crime.
3. Asset confiscation can increase public support and convey that the government fights crime seriously.
4. Confiscation of assets reflects supporting the conduct of the war against specific crimes.
5. Fines imposed on perpetrators so far are considered insufficient to deter perpetrators of criminal acts.
6. Asset confiscation has a role in warning those about to commit a crime.

Punishment is not enough; for this reason, with or accompanied by confiscating assets through confiscating the proceeds of crime, it will have a significant impact and influence on potential criminal offenders. They will be afraid that the state will confiscate all profits from criminal acts without going through a criminal trial. Application of the asset recovery model as an alternative for law enforcement that can carry out in cases of criminal acts of corruption, including reviewing procedures and mechanisms that allow this to be carried out in the current criminal justice system.

One of the objectives of eradicating corruption is to recover state financial losses related to Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, which states that one of the things that must be done in disclosing the occurrence of criminal acts of corruption is that it can harm the country's finances or the country's economy. Things that can be detrimental to state finances include (Basrief Arief, 2014):

1. Human actions, intentional and unintentional acts such as due to negligence, negligence, mistakes or incompetence, as well as inadequate supervision of the use of state finances
2. State financial losses due to money cutting (sintering) and monetary turmoil decrease the value of money, thereby increasing the number of state obligations.

Returning state losses is carried out through various instruments, one of which is through criminal tools by imposing compensation money; this method aims to separate convicted corruption (corruptors) because the amount of corrupted state losses must replace, mainly if fines, so that the convict's assets will drain besides of corrupted property. However, in Article 18 paragraph (3) of the law on the Eradication of Corruption Crimes, it provides tolerance that if the convict does not have sufficient assets to pay replacement money, then he will be sentenced to imprisonment, which does not exceed the maximum threat of the principal sentence. The sentence determines in a court decision.

The problem of corruption is no longer new in legal and economic matters for a country. Corruption has absorbed and slipped in various forms, or *modus operandi*, so it undermines state finances and the state economy and harms the interests of society (Rudi Pardede, 1991). In recovering state losses due to criminal acts of corruption, Indonesia prioritizes punishing perpetrators of sin rather than restitution of state losses (Abd et al., 2015). It can see in the subsidiary crimes that so far have not contained consistent measurements between one case and another, so wide disparities can create a choice for convicts to choose additional sentences rather than returning corrupted state funds (Ade Mahmud, 2018).

Law Number 15 of 2004 concerning Examination of State Financial Management and Responsibility, to be precise in Article 10, explains that regarding the calculation of state financial losses is an authority in providing access and obtaining some data which will later use to request documents related to state finances which will examine by the competent authorities (Bambang Setyo Wahyudi, 2016). Based on the perspective of laws and regulations, where the loss of state finances initially arose from actions that resulted in the violation of the law or abuse of authority owned by someone whose goal was to be able to enrich themselves or another person or a corporation ((Bambang Setyo Wahyudi, 2016).

The imposition of fines in large amounts not necessarily follow by replacement imprisonment in a time frame commensurate with the value of the penalty. Furthermore, vice versa, if the fines imposed are significant, the replacement prison sentence set needs to be balanced, even smaller than other decisions. This consequence impacts state finances, where fines that should pay can replace with alternative punishments in imprisonment or confinement. The problem is that the state will only finance the convict once the convict's sentence is complete. In this situation, state finances, which should have increased from the fines imposed, actually spent more money to carry out the penalties imposed on the convicts.

From the criminal law perspective, corruption is hazardous for society, the nation, and the state. Losses to state finances and the country's economy are real consequences that form the basis for justifying the criminalization of forms of corruption in criminal law policies (Elwi Danil, 2012). The problem statement is: (1) How is the regulation of state financial losses in positive law in Indonesia? (2) How is Asset Recovery an Effort to Recover State Losses in Corruption Crime Cases?

METHOD

This research is normative legal research by using secondary data obtained from legal hierarchies, laws, and regulations accompanied by developments in legal issues in Indonesia; the data and information the authors receive analyze by comparing normative provisions (*das sollen*) with reality (*das sein*) that occurs in society. This descriptive and analytical writing provides an overview accompanied by systematic, factual, and accurate explanations.

DISCUSSION

Regulating State Financial Losses in Positive Law in Indonesia

Indonesia has favorable laws in which written and unwritten legal rules apply and are binding in general and specifically. This positive law later uses to regulate a legal relevance in society to avoid the existence of a dynamic in social relations in Indonesia. Positive law in Indonesia also regulates in writing state financial losses contained in the PTPK Law.

Corruption in the sense of a juridical perspective and a general purpose has the same meaning. However, from a juridical standpoint, it means the offense's element and how it is a formula in laws and regulations. In general, it interprets more as an act against the law—Sudarto presupposes corruption with the meaning of damage, indicating a rotten state. Meanwhile, Robert Klitgaard et al. stated that corruption is a collection of funds related to services that are available without a fee or abusing the authority to carry out a short process that could be illegal (Bambang Waluyo, 2017).

The process of proving the existence of a state financial loss that arises due to an act of corruption has yet to have clear parameters to determine it. Article 4 of the Law on the Eradication of Criminal Acts of Corruption states that “returning state financial losses or the state's economy does not eliminate the punishment of perpetrators of criminal acts as referred to in Articles 2 and Article 3”. Returning state financial losses as a result of abuse of authority related to state money that commits by committing acts against the law. The corruptor will still be processed as regulated and specified in Article 4, confirming that state financial losses are already at the realm stage. Criminal law, so that in recovering state financial losses, it will not eliminate a criminal liability to corruptors; this does not reduce the nature of unlawful acts, which include in the elements of Article 2 and Article 3 of the PTPK Law.

The actual or new loss factor is likely to be seen as something aggravating or mitigating concerning the imposition of criminal penalties on this matter, as described in Article 4 of the PTPK Law, which presupposes this article as a mitigating factor. The regulation contained in Article 4 of the PTPK Law is that in Article 4 it states that even though the return of state financial losses carries out, the state has suffered losses which can be seen through the economic aspect if the corruptor does not commit an unlawful act that abuses his authority. What corruption can use for the benefit of the people?

Corruptors have slowed down the state from carrying out national development; therefore, indirectly, the people have suffered losses as a result of the actions of corruptors. Moreover, the state has to bear the living expenses of corruptors when the corruptors are serving a prison term; of course, this can also lead to increased state spending, which should use in PTPK to minimize the occurrence of corruption which can cause losses to state finances considering that there are elements in that article.

Many corruptors can charge under the PTPK Law, but there is a fact that applying the element of loss to state finances often causes problems in the handling process because it does not yet have clear parameters. The problem lies in the provisions contained in Article 4, whose primary purpose is to prevent acts of corruption from happening again. However, until now, corruption cases are still rife in Indonesia (Amrani et al., 2017). The application of this article cannot realize the ideals or legal objectives desired by the legislators. Therefore, it is necessary to reform the criminal law, which has something to do with the PTPK Law, so that later it can realize the objectives of forming statutory regulations and preventing corruption in Indonesia.

Asset Recovery as an Effort to Recover State Losses in Corruption Crime Cases

In eradicating criminal acts, corruption can divide into 3 (three) things, namely through preventive actions, repressive and restorative activities. Preventive measures relate to regulations for eradicating corruption in the hope that the public will not commit criminal acts. One of the therapeutic measures is returning the assets of the perpetrators of crime in illegal law actions and civil lawsuits (Bernadeta Maria Erna, 2013).

In the era of globalization, efforts to return or recover stolen asset *recovery* through criminal acts of corruption tend not to be easy. The perpetrators of corruption have extraordinary access and are difficult to reach in hiding or laundering money resulting from corruption. The role of the Prosecutor's Office in using civil law instruments related to returning or recovering state finances due to acts of corruption must be interpreted broadly, including carrying out lawsuits abroad in the context of saving and returning or recovering state assets due to criminal acts of corruption (Burhanuddin, 2013).

After the ratification of the Anti-Corruption Convention, 2003, based on Law Number 7 of 2006 concerning the United Nations Anti-Corruption Convention, the Government of Indonesia has made significant changes, namely:

1. We are drawing up a Draft Law (RUU) on Corruption (Tipikor), which includes the criminalization of specific (new) actions within the scope of criminal acts of corruption, namely, among others, illicit *enrichment*; bribery of foreign public officials or officials of international organizations (*bribery of foreign public officials and officials of public international organizations*), and bribery among the private sector (*corruption in the private sector*); abuse of authority (*abuse of function*) (Burhanuddin, 2013).

2. After the ratification of the Anti-Corruption Convention was the enactment of Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, which revoked the promulgation of the Law of the Crime of Money Laundering (2002/2003). The law has included provisions for reverse proof in two articles, namely Articles 77 and 78 and Article 81) (Romli Atmasasmita, 2014).
3. The Corruption Eradication Bill (2009) contains what is very important regarding asset confiscation. The Anti-Corruption Bill has adopted the method of confiscating assets through civil law (*in rem forfeiture*). However, the provisions stipulated in Chapter III under the title Confiscation of Assets (Article 23 to Article 25) still need to be improved from the point of view of protecting the rights of the accused and from the point of view of the use of powers by prosecutors.

The government has strengthened this legislative policy by completing the drafting of the 2008 Criminal Asset Confiscation Bill (Romli Atmasasmita, 2014). Asset recovery *is* a process of handling proceeds of crime assets that is carried out in an integrated manner at every stage of law enforcement so that the value of these assets can be maintained and fully returned to victims of crime, including to the state. Asset recovery also consists of all preventive actions to keep the asset's value from decreasing.

Stolen state assets (*stolen asset recovery*) are significant for developing countries because the return of stolen assets does not merely restore state assets but also aims to uphold the rule of law where no one is immune from the law. The principle of *asset recovery* is regulated explicitly in the Anti-Corruption Convention. Provisions of Article 51 (*article 51*) The Anti-Corruption Convention technically allows demands, both civilly (through lawsuits) and criminally, to return state assets obtained by someone through acts of corruption.

This Anti-Corruption Convention also allows for acts of appropriation of wealth without being prosecuted if the perpetrator cannot be charged on the grounds of death, running away (running away), or not being present in other similar cases. Law Number 31 of 1999 concerning Eradication of Corruption as amended by Law Number 20 of 2001 (UU PTPK) provides threats to perpetrators of corruption in the form of imprisonment, fines, and payment of replacement money. Specifically for replacement money, if the convict does not pay the replacement money, then the convict's assets or assets are confiscated. Meanwhile, a fine not paid by the convict will be subject to imprisonment as a substitute for a penalty. In addition to containing the three types of sanctions, the PTPK Law also regulates the possibility of confiscating assets or proceeds from criminal acts of corruption, as stipulated in Article 18 paragraph (1) letter a of the law (Muhammad Yusuf, 2013).

The PTPK Law provides two ways to confiscate assets resulting from criminal acts that cause financial or economic losses to the state. The two ways are confiscation through illegal channels and deprivation through civil lawsuits (Muhammad Yusuf, 2013). Seizure of assets resulting from corruption through criminal charges can be carried out, provided that the public prosecutor must be able to prove the defendant's guilt in committing the crime of corruption. The confiscated assets must

also be assets resulting from acts of corruption. To prove this, it certainly requires a public prosecutor with sufficient knowledge and diligence to verify that all seized investments result from criminal acts of corruption. Confiscation of corruption assets depends on the evidence provided by the public prosecutor in court; the public prosecutor can prove the defendant's guilt and confirm that the purchases to confiscate are assets resulting from the act of corruption charge.

The concept of confiscation of assets based on the guilt of the accused (*Conviction Based Assets Forfeiture*) means that the confiscation of a purchase resulting from a criminal act of corruption is highly dependent on the success of the investigation and prosecution of the criminal case (Muhammad Yusuf, 2013). This concept contains in Article 39 and Article 46, paragraph (2) of the Criminal Procedure Code. Article 38B paragraph (2) of the PTPK Law states that the confiscation of assets that are the result of a criminal act of corruption also includes if the defendant cannot prove that the said property was obtained not due to an illegal act of corruption so that the property deemed to have also got from a criminal act of corruption. The judge has the authority to decide that all or part of the property confiscate by the state.

If it is detailed, confiscation of assets from the path of criminal prosecution carries out through a trial process where the judge, in addition to imposing the principal sentence, can also set additional penalties. Judges can impose different punishments regarding certainty, correlating with the return of state financial losses through asset confiscation. The confiscation of these assets can be in the form of (Muhammad Yusuf, 2013):

1. Confiscation of tangible or intangible movable property or immovable property used for or obtained from criminal acts of corruption, including companies owned by the convict where the criminal act of crime commits, as well as the prices of the goods that replace these goods (CEC, 1999).
 - a. Payment of replacement money in the maximum amount equal to the assets obtained from criminal acts of corruption. If the convict pays the replacement money as referred to in paragraph (1) letter b one month after the decision has obtained permanent legal force, then his property can be confiscated by the prosecutor and auctioned off to cover the replacement money. Suppose the convict has insufficient assets to pay the replacement money, as referred to in paragraph (1) letter b. In that case, he shall sentence to imprisonment for a duration not exceeding the maximum threat of the principal sentence by the provisions of this law. The course of the sentence determines in the court ruling.
 - b. Still, concerning confiscation of assets through criminal prosecution, the PTPK Law also provides a way out of the seizure of property resulting from corruption crimes where the criminal case cannot proceed with the legal process because the defendant died after the verification process. From the examination of evidence at trial, there is evidence that is strong enough that the person concerned has committed a criminal act of corruption. Based on the

demands of the public prosecutor, the judge determines the confiscation of goods that confiscate, and the determination of the takeover, as referred to in paragraph (5), cannot be appealed. The provisions referred to in Article 38, sections (5) and (6). Thus, confiscating assets through criminal charges can be carried out by maximizing the public prosecutor's role in enforcing the corruption law. They are starting from proving the guilt of the accused and proving assets resulting from criminal acts of corruption to criminal prosecution of compensating perpetrators of crime. The next problem is at the stage of illegal execution of replacement money which often experiences difficulties. It is due to the imposition of a sentence that always subsidizes by a prison sentence of several months. So, corrupt convicts prefer to serve prison terms rather than pay criminal compensation money. Implementing asset confiscation and illegal execution of replacement money can only be carried out if the defendant has been proven guilty. This mechanism is often tricky to implement because these assets may have changed hands so that at the right time, no evidence can find to file a claim for confiscation of assets.

2. Confiscation of assets resulting from criminal acts of corruption through civil lawsuits.

Some weaknesses in applying asset confiscation through criminal channels require other routes that can use as alternatives in seizing corruptor assets. That is through the path of civil lawsuits. It can see from the provisions of Article 31 of the PTPK Law, which states that if investigators find and think that one or more elements of a criminal act of corruption do not have sufficient evidence. In contrast, the investigator immediately submits the case files if state finances are lost. The investigation is to the State Attorney's Prosecutor to carry out a civil lawsuit or submit to the disadvantaged agency to file a lawsuit. Article 31, paragraph (2) provides reasons for filing lawsuits against acquitted corruption cases (Muhammad Yusuf, 2013).

Furthermore, Article 33 of the PTPK Law also provides a legal basis for confiscating assets from criminal acts of corruption through civil lawsuits where the suspect died. At the same time, the case investigates, and these investigators found a loss of state finances. The civil suit will file against the heirs; of course, the lawsuit can direct against assets resulting from corruption or a claim for compensation for state financial losses due to the suspect's actions (Muhammad Yusuf, 2013).

Other provisions that allow for the confiscation of assets resulting from criminal acts of corruption through civil lawsuits can see in Article 34 of the PTPK Law, which stipulates that if a defendant dies during an examination at a court hearing. In contrast, if there has been a loss to the state, the public prosecutor shall immediately submit a copy of the said trial agenda file to the State Attorney's Prosecutor or submit it to the agency that has suffered a loss to file a civil lawsuit against his heirs. These provisions regulate the procedures for confiscating assets and proceeds of corruption for which criminal cases cannot proceed with the legal process.

The provisions in Article 38C of the PTPK Law regulate that it is possible to file a lawsuit against assets resulting from a criminal act of corruption whose criminal case can be processed and decided by a court with permanent legal force. However, it turns out that there are still assets or property belonging to the convict who is suspected or should suspect of also originating from the crime. Criminal corruption that has not been subject to confiscation for the state as referred to in Article 38C paragraph (2) of the PTPK Law, the condition can file a civil lawsuit against the convict and his heirs (Muhammad Yusuf, 2013).

The granting of authority to the State Attorney or agency that harms to file a civil lawsuit against the convicted person and their heirs at the appropriate time by the provisions referred to in each of these articles. Thus, through the civil lawsuit route, the state attorney's attorney can still file a lawsuit due to criminal acts of corruption if there are circumstances where the perpetrator dies, is acquitted, no elements of the crime find, but there are apparent losses to the state. It can restore state losses without going through criminal proceedings first.

The principle of recovering state financial losses is fundamental, but normatively and technically, it is highly dependent on the initiation or decision of the public prosecutor. Optimizing the recovery of state financial losses must first be assumed as an imperative matter. Even if a claim for payment of replacement money or a civil lawsuit for recovering state financial losses make, the guarantee of success is still very much dependent on the existence of the defendant's or convict's assets, which have been confiscated or confiscated or at least known to belong to the convict which can then be prosecuted (Hadi Purwadi, 2013).

The process through criminal and civil channels both require the role and function of the prosecutor as a public prosecutor in the illegal route and the prosecutor as a state attorney in civil lawsuits, who has sufficient knowledge with optimal performance from the point of view of recovering state losses in the framework of recovering state losses as a victim—corruption crime.

CONCLUSION

1. Returning state financial losses as a result of abuse of authority related to state money committed by committing acts against the law, then the corruptor will still be protected because it has been regulated and determined in Article 4 of Law Number 31 of 1999 concerning Eradication of Criminal Acts Corruption has emphasized that if state financial losses are already at the stage of the realm of criminal law, then in recovering state financial losses it will not eliminate a criminal responsibility for corruptors, this does not reduce the nature of unlawful acts which include in the elements of Article 2 and Article 3 of the Law. PTPK.
2. One of the weaknesses in applying asset confiscation through criminal channels is that it is necessary to use other routes that can operate as alternatives in seizing corruptor assets. The granting of authority to the State Attorney or agency that harms to file a civil lawsuit against the

convicted person and their heirs at the appropriate time by the provisions referred to in each of these articles. The principle of recovering state financial losses is fundamental, but normatively and technically, it is highly dependent on the initiation or decision of the public prosecutor. Optimizing the return of state financial losses, first of all, must be assumed as an imperative matter; if a demand for payment of replacement money or a civil lawsuit for the return of state financial losses make, the guarantee of success is still very dependent on the assets of the accused or convict who has been seized or confiscated or at least -at least it is known as belonging to the convict who can then prosecute.

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