

Juridical Review of the Mechanism of Asset Return in Corruption as an Effort to Recovery of State Losses

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ABSTRACT

The criminal act of corruption is one part of a special crime, in addition to having certain specifications that are different from general crimes, namely with deviations from formal criminal law or procedural law. Corruption cases in this country still occur as if dominating crimes in Indonesia. This research is a descriptive analytical research, namely a study that presents phenomena or symptoms and actual circumstances about the mechanism of financial returns and / or state assets resulting from criminal acts of corruption. Law Number 20 of 2001 concerning the criminal act of corruption which in Article 18 is explained related to additional crimes as one of the efforts to recover State finances, Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption 2003 (United Nations Convention Against Corruption 2003) which explains that the seizure of assets of perpetrators of corruption crimes can be carried out through criminal and civil channels, Another regulation is Law Number 1 of 2006 concerning mutual assistance in criminal matters which is the legal basis for the Indonesian government in requesting and/or providing mutual assistance as well as a guideline for making agreements in criminal matters with Foreign Countries. In this case, the return of assets in corruption crimes can be carried out through several channels/instruments, including through criminal, civil and administrative channels.

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1. Introduction

Corruption is one of the unique crimes that is different from ordinary crimes in several ways, including by violating formal criminal law or procedural law. Rampant corruption is a kind of legal defiance perpetrated by a select few groups or individuals who use government resources for their own personal gain by hiding behind positions of authority. (Ismail Prabowo, 1998)

As everyone realizes how rapidly human economic importance has developed in newer civilizations, many people are looking for practical solutions to meet their extremely high economic needs. Ultimately, the goal seems to be to enrich oneself by harnessing existing power. Currently, corruption is an issue in many countries in the world, including Indonesia. This is a

very modern approach to benefiting yourself.

The criminal act of corruption is a violation of the social rights and economic rights of the community, so that the criminal act of corruption can no longer be classified as ordinary crimes but has become an extraordinary crime, so that in an effort to eradicate it can no longer be carried out "normally", but "prosecuted in extraordinary ways" (extra-ordinary enforcement).(Ermansjah Djaja, 2010)

Corruption is a manifestation of the policy crisis and the lack of accountability of the public bureaucracy. The number of incidents, state financial losses, and the rate of corruption violations are all increasing in Indonesia from year to year. Corruption in Indonesia has developed in three stages, aristocratic, endemic, and systemic, like disease. Corruption continues to be a common social ill, among elites and politicians at the elitist stage. At this stage, a wide layer of society is affected by endemic corruption. When corruption reaches a critical stage and spreads throughout the system, everyone suffers from the same disease. Perhaps corruption in this country has developed to a systemic level.(Abu Fida, 2006)

From data reported by Indonesia Corruption Watch (ICW) recorded an increase in the number of cases and defendants of corruption criminal cases throughout 2020. An increase of around 200 cases heard in the Corruption Court, High Court and Supreme Court during the pandemic in 2020. ICW researcher Kurnia Ramadhana said 1,218 cases were heard in 2020, higher than 2019, which was only 1,019 cases. Similarly, the total number of defendants increased from 1,125 defendants in 2019 to 1,298 defendants.(<https://www.tribunnews.com/nasional/2021/03/22/pandemi-covid-19-icw-catat-peningkatanperkara-dan-terdakwa-kasus-korupsi-sepanjang-2020>, diakses pada tanggal 30 Mei 2023 pukul 23:34 WIB, n.d.)

The concept of State Economy has also been clarified by Law No. 31 of 1999, as amended by Law No. 20 of 2001, concerning the eradication of criminal acts of corruption. The country's economy is characterized by joint efforts based on the principle of kinship or joint business that runs independently and in accordance with the policies of the central and local governments as well as the provisions of related laws and regulations with the aim of ensuring prosperity and welfare. of everyone.

In this case, related to the eradication of corruption, the seriousness of the Indonesian government can be seen by the issuance of various regulations or policies that are directly related to tackling criminal acts of corruption.

However, it is well known that many corruption cases in this country still occur as if they dominate crimes in Indonesia. Indonesia Corruption Watch (ICW) said that from 1,218 corruption cases throughout 2020 and 1,298 corruption defendants resulted in state losses totaling Rp. 56.7 trillion. Of the total losses of the State, the replacement money returned to the State for losses in corruption cases in 2020 only amounted to IDR 8.9 trillion.

The State's losses were returned through additional criminal sentences stipulated in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, precisely in Article 18 Paragraph (1), namely regarding the return of State finances, which reads as follows :

In addition to additional crimes as referred to in the Criminal Code, additional crimes are:

- a. Confiscation of tangible or intangible movable property or immovable property used for or obtained from a corruption crime, including a company owned by the convicted person in which the corruption crime was committed, as well as from goods that replace such goods
- b. Payment of substitute money in the amount of as much as the property obtained from the criminal act of corruption;
- c. Closure of all or part of the company for a maximum of 1 (one) year;
- d. Deprivation of all or part of certain rights or removal of all or part of certain benefits,

which have been or may be granted by the Government to the convict.

Law enforcement and recovery of crime assets are two sides of the coin that cannot be separated in the eradication of criminal acts, especially corruption. As a crime based on calculation or calculation (crime of calculation), the management and security of crime proceeds is a fundamental need for white collar crime perpetrators. (Aliyih Prakarsa & Rena Yulia, 2017) It is so called because this crime was committed by intellectuals who were educationally high and well-off in good standing, in other words this crime was committed by someone who was very respectable and of high social status in his work.

The return of assets from corrupt individuals is not sought or prioritized in Indonesia's anti-corruption law, which prioritizes sanctions for those who engage in corrupt activities. Maximum treatment is needed in the return of state assets to overcome this corruption problem, both in accordance with applicable laws and regulations and law enforcement officials who must act fairly in order to have a deterrent impact on perpetrators of corruption and can be rescued again. state resources to cover the losses incurred. (Nadila Putri Belinda, 2021)

Therefore, recovery of stolen state losses (also known as recovery of stolen assets) is critical to the development of developing countries because of efforts to uphold the rule of law in an environment where no one is above the law. The return of property is thus one of the purposes of punishment in this case, which serves both as a series of procedures and as an enforcement effort through certain legal mechanisms.

Currently, Indonesia's anti-corruption law does not consistently represent the main goal of combating corruption, which is to protect state assets by compensating those who lose money due to corruption. In terms of punishing corruptors, Indonesia's anti-corruption law still follows the model of retributive justice. As a result, the punishment of corruptors is no longer motivated by anything other than retribution. (Yusona Piadi & Rida Ista Sitepu, 2019) This is in line with Article 4 of Law No. 31 of 1999 as amended by Law No. 20 of 2001 which states that the return of State financial or economic losses does not eliminate the conviction of criminal offenders as referred to in Article 2 and Article 3. In this case, it can be seen that the principles of retributive justice prioritize the punishment of the body of the perpetrator of corruption rather than focusing on recovery from the crime.

2. Materials and Methods

The approach used in this study is normative juridical. This research is descriptive analytical research namely a study that presents phenomena or symptoms and actual circumstances about the mechanism of financial returns and / or state assets resulting from criminal acts of corruption. (Mamudji, 2001) In addition, this study also seeks to reveal the constraints and technical problems of legislation that occur in the state attorney's attorney in his duty to return state finances and / or assets. This study used data sources in the form of secondary data. In data collection, researchers examine laws and regulations and literature studies. Research data that has been collected will be presented in the form of descriptions, which are descriptions of information, information and statements provided by respondents.

The laws used in this study include:

- a. Criminal Code.
- b. Government Regulation in Lieu of Law (PERPU) No. 24 of 1960 (Law No. 24 Prp. of 1960) concerning Prosecution, Prosecution and Examination of Corruption Crimes.
- c. Law Number 3 of 1971 concerning the Eradication of Criminal Acts of Corruption.
- d. Law Number 28 of 1999 concerning Clean and Free State Administration of Corruption,

Collusion, and Nepotism.

- e. Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.
- f. Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.
- g. Law Number 30 of 2002 concerning the Corruption Eradication Commission.
- h. Law Number 46 of 2009 concerning Corruption Courts.
- i. Law Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Corruption Eradication Commission.
- j. Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission.

3. Results and Discussions

1. Regulation of Corruption in Indonesia

A social phenomenon called corruption is the reality of human behavior in social interactions that are considered deviant, and endanger society and the state. Therefore, this behavior in all forms is denounced by society, even including by the corruptors themselves in accordance with the expression "corruptors shout corruptors". Public denunciation of corruption according to the juridical conception is manifested in the formulation of the law as a form of criminal act. In Indonesian criminal law politics, corruption is even considered a form of criminal offense that needs to be approached specifically, and is threatened with a fairly severe crime.(Mamudji, 2001)

Although in the Criminal Code there is no explicit use of corruption terminology in the formulation of delicacies, there are several provisions that can be captured and understood in essence as the formulation of corruption crimes. The provisions for corruption in the Criminal Code are regulated separately in several articles in three chapters, namely:(Danil, 2012)

- a. Chapter VIII concerns crimes against the general authority, namely in Articles 209, 210 of the Criminal Code.
- b. Chapter XXI on fraudulent acts, namely in Articles 387 and 388 of the Criminal Code.
- c. Chapter XXVIII on office crimes, namely in Articles 415, 416, 417, 418, 419, 420, 423, 425, and 435 of the Criminal Code.

The formulation of corruption contained in the Criminal Code can be grouped into four groups of criminal acts (delik), namely:(Danil, 2012)

- a. Group of bribery crimes; consisting of Articles 209, 210, 418, and Article 420 of the Criminal Code;
- b. Embezzlement crime group; consisting of Articles 415, 416, and Article 417 of the Criminal Code;
- c. Criminal group of gluttony (knevelarij or extortion); which consists of Article 423 and Article 425 of the Criminal Code;
- d. Criminal groups related to contractors, leveransir, and associates; which consists of Articles 387, 388, and Article 435 of the Criminal Code.

Until today, there are at least 7 (seven) special laws that are still normatively valid, and can be used to prevent and eradicate corruption. These laws include:(Danil, 2012)

- a. Law Number 31 of 1999 concerning the Eradication of Corruption as amended by Law Number 20 of 2001.(*Undang-undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi*, n.d.)
- b. Law Number 30 of 2002 concerning the Corruption Eradication Commission.(*Undang-*

- undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi, n.d.)*
- c. Law Number 46 of 2009 concerning Corruption Courts. (*Undang-undang Nomor 46 Tahun 2009 tentang Pengadilan Tindak Pidana Korupsi, n.d.)*
 - d. Law Number 28 of 1999 concerning the Implementation of a Clean and Free State from Corruption, Collusion, and Nepotism. (*Undang-undang Nomor 28 Tahun 1999 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi, dan Nepotisme, n.d.)*
 - e. Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering. (*Undang-undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang, n.d.)*
 - f. Law Number 13 of 2006 concerning Protection of Witnesses and Victims. (*Undang-undang Nomor 13 Tahun 2006 tentang Perlindungan Saksi dan Korban, n.d.)*
 - g. Law Number 7 of 2006 concerning the Ratification of the United Nations Conventions Against Corruption, 2003 (United Nations Convention Against Corruption, 2003).

According to Alfitria, in general, the emergence of corruption is driven by two motivations. First, intrinsic motivation, namely the drive to obtain satisfaction caused by acts of corruption. In this case, the perpetrator feels that he gets his own satisfaction and comfort when he succeeds in doing so. In the later stages corruption becomes a common lifestyle, habit, and tradition/culture. Second, extrinsic motivation, namely the encouragement of corruption from outside the perpetrator that is not an inherent part of the perpetrator himself. This second motivation is for example for economic reasons, ambition to achieve a certain position, or obsession to improve the standard of living or career of the position through shortcuts.

In some detail, corruption is caused by three things: (Alfitra, 2014)

- a. First, corruption by greed. This corruption happens to people who don't really need, are not economically urgent, maybe even rich. High positions, large salaries, mansions, rising popularity but unstoppable power caused him to engage in corrupt practices.
- b. Second, corruption by need is committed because of urgency in meeting basic needs.
- c. Third, corruption by chance. This corruption is carried out because of the great opportunity to commit corruption, the opportunity to get rich quickly through shortcuts, the opportunity to quickly get promoted instantly, usually this is supported by weak organizational systems, low public accountability, loose public supervision, and porous law enforcement which is exacerbated by legal sanctions that do not make a deterrent.

The modus operandi of corruption is getting more sophisticated, packaged in such a way, that it will not be known not to constitute corruption. Some common modus operandi of corruption found in Indonesia are as follows: (Rohim, 2008)

- a. Bribery.

Fraud is an unlawful act committed by people from inside and/or outside the organization, with the intention to obtain personal and/or group benefits that directly harm other parties. In general, the intensity of fraud in the aspects of planning, organizing, implementing activities, and supervision is in the category of "fraud has occurred". Significant activities in the intensity of the emergence of fraud are raising the budget in submitting activities and using state property for personal gain. The areas of activity identified in the category of "frequent acts of fraud", namely the fields of licensing, procurement of goods and services, election of regional heads of personnel, maintenance of public facilities, regional revenue receipts, supervision and accountability of regional heads.

- b. Fraud.

Extortion is the act of forcing someone to pay or give a sum of money or other goods or forms in exchange for a public official to do or not do something. Such acts may

be followed by physical threats or violence.

c. Extortion.

Extortion is the act of forcing someone to pay or give a sum of money or other goods or forms in exchange for a public official to do or not do something. Such acts may be followed by physical threats or violence.

d. Abuse of Discretion.

Abuse of position or authority is the act of using the authority possessed to carry out actions that favor or favor groups or individuals, while being discriminatory against other groups or individuals.

e. Nepotism.

In Purwadarminta dictionary, nepotism is given positions to brothers or friends only, while Jhon M. Echols categorizes it as a noun by prioritizing brothers, especially in giving office. The term nepotism comes from the Latin word nepos, which means grandson. Nepotism is used as a term to describe the act of prioritizing relatives, close friends, and like-minded members of political parties, without regard to specified requirements. So, if the family does qualify then it does not constitute nepotism in that sense.

2. Mechanism for Return of Assets Resulting from Corruption

The components of the legal system for asset recovery are extensive, efficient, inclusive and multidisciplinary. The extensive structure between countries in international legal relations, regional organizations, and institutions in each country with strength and competence in asset recovery duties and responsibilities is part of the asset return legal framework. The national, regional, and world people's understanding and attitudes about the return of illegally seized assets is another component of the legal culture of asset return. In general, society is very receptive and urges efforts to be made to return illegally acquired assets. The political will of the government of any country is one of the important and decisive parts of the legal cultural dimension of asset recovery. This element is often a hindrance to asset recovery efforts, according to a number of incidents of asset recovery initiatives.

Confiscation of assets obtained through corruption is a legal act based on the law and carried out by the authorities. The process of confiscations involves a number of persons and authorities in accordance with statutory provisions. From confiscation of property to depositing auction proceeds into the state treasury, the parties are involved in every stage of the litigation process. The following are the authorities : (Rifa, 2022)

- 1) Investigators are officials of the national police of the Republic of Indonesia or certain civil servant officials who are specifically authorized by law to conduct investigations
- 2) The Public Prosecutor is the party responsible for the examination of cases and confiscated objects that have been handed over by investigators. The Public Prosecutor who is then in accordance with the duty and authority to prosecute criminally for cases and objects that have been confiscated related to the case.
- 3) The judge is the party responsible for the examination of cases and confiscated objects in court submitted by the Public Prosecutor. The judge is also the party who will decide whether a case is convicted or not and decide whether an object that has been confiscated before is confiscated or not.
- 4) The State Confiscation Storage House (Rupbasan), is a place for objects confiscated by the State for the purposes of judicial proceedings, namely the process of examining cases at all levels of examination.
- 5) Executor Services, is a functional official authorized by law to act as an executor of court decisions that have acquired permanent legal force. For cases and goods decided to be

confiscated, including in his responsibility and authority to conduct auction sales and deposit the proceeds into the state treasury.

These provisions are contained in the 2003 KAK and other provisions outside the 2003 KAK relating to the return of assets, both as well as international, regional, bilateral conventions. The asset return mechanism consists of 3 (three) channels, namely: criminal law channels, civil law channels and through administrative/political channels. In this case it can be described as follows:

a. Return of Assets Through Criminal Channels

The first stage, asset tracking. This stage is very important and determines the next stage. The purpose of investigating or tracking these assets is to identify assets, asset storage locations, proof of asset ownership, and their relationship to the criminal act committed. This stage is also the collection of evidence. Authorities that investigate or track these assets partner with law firms and accounting firms. Conyngham developed an investigative method he called CAGE (short for: Collated, Additional information accessed, intelligence Gathered, Evidence evaluated). With this methodological approach can be known information about addresses, travel patterns, preferred jurisdictions, corporate structures used, and information about personal interests.

The second stage, freezing or seizure of assets. The success of the investigation in tracking the illegally acquired assets allows the execution of the next stage of asset return, namely freezing or seizure of assets. According to the United Nations Convention Against Corruption (UNCAC) 2003, freezing or confiscation means a temporary prohibition on transferring, converting, dispositioning or transferring wealth or is temporarily considered to be placed under guardianship or under supervision by order of a court or other competent body.

Asset confiscation is the third stage. The court or other competent authority may issue a confiscation order to deprive a corrupt person of property rights to corruptly acquired property. Usually, a confiscation order is issued by a court or other competent body of the receiving country after the imposition of punishment on the offender. If the perpetrator of the crime has died or disappeared, or if the public prosecutor is unable to bring charges, confiscation can still be made without a court order.

After the confiscation stage, assets can proceed to the fourth stage, which is the return and delivery of assets to the victim country. Both the receiving and victim states shall take legislative measures and other activities in accordance with their respective national legal bases in order for the competent authorities to carry out the return of such assets. Mutual legal assistance treaties between victim states and recipient countries typically govern the distribution of assets that have been frozen or confiscated because the majority of countries do not specifically control such provisions.

The return of state losses through criminal law is much harsher because even if the perpetrator has returned state losses during the investigation process, it will not eliminate criminal liability. This can be seen based on the description of the chart as follows:

b. Return of State Losses Through Civil

Efforts to recover State losses through civil law instruments are regulated in Article 32, 33, 34 of Law No. 31 of 1999 concerning the Eradication of Corruption and Article 38C of Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Criminal Acts of corruption committed by the State Attorney or aggrieved agencies.

Civil lawsuits for corruption thus contain specific characteristics, which are carried out after criminal efforts are no longer possible to be processed because they are faced with certain conditions as referred to in Articles 32, 33, 34, 38C of the Corruption Law, even though there have been state financial losses. Without a criminal process first, it is closed to the possibility of a civil lawsuit for corruption cases. Certain legal conditions include:

- 1) After an investigation, insufficient evidence of corruption was found (Article 32 Paragraph (1));
- 2) The defendant was acquitted (Article 32 Paragraph (2));
- 3) The suspect died during the investigation (Article 33);
- 4) The defendant died during the court hearing (Article 34);
- 5) It is suspected that there are corruption proceeds that have not been confiscated to the state even though the court decision has the force of law.

Because the Criminal Law has no definition, the Public Prosecutor almost never uses civil law instruments in practice. Efforts to recover state losses are carried out using standard civil procedures, meaning that civil cases filed against corruptors (suspects, defendants, convicts, or their heirs) must follow the usual formal legal process.

Thus, it can be estimated that to arrive at a court ruling obtaining legal force can still take years and there is no guarantee of successful victory. The law requires that the investigation of corruption criminal cases be given priority, while civil lawsuits related to corruption cases are not required to be prioritized. In addition, the corruptor

(defendant) can countersue and it is possible that he will win and the government will have to pay the corruptor's demands.

c. Return of Assets Through Administration Channels

The mechanism for returning state losses under administrative law can be seen in Article 59 of Law Number 1 of 2004 concerning the State Treasury which stipulates that: (1) Any state/regional losses caused by unlawful acts or negligence of a person must be resolved immediately by applicable laws and regulations. (2) The treasurer, non-treasurer public servant, or other official who, by his unlawful conduct or neglect of obligations imposed on him directly harms the state finances, shall compensate for such damages. (3) Every head of a state ministry/institution/head of a regional apparatus work unit may immediately make a claim for compensation, after knowing that in the relevant state ministry/institution/regional apparatus work unit there has been a state loss due to the actions of any party.

The mechanism for returning state financial losses due to someone's unlawful acts regulated in the Corruption Eradication Law with the State Treasury Law clearly has significant differences. If the Corruption Eradication Law only has potential state losses if the amount can be calculated, then the authorized official can already be convicted because the criminal act of corruption in Article 2 is formally formulated to convict a person simply by fulfilling the element of corruption offense.

In contrast to the process of returning state losses regulated in the State Treasury Law which uses administrative legal means by charging the treasurer, non-treasurer public servants or other officials who have actually committed acts detrimental to state finances to compensate state losses through a statement of ability and / or recognition that state losses are their responsibility and the letter has the legal force to carry out confiscate bail if the person concerned does not compensate the country.

4. Conclusion

The implementation of the return of assets resulting from corruption is regulated in several regulations, including Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the criminal act of corruption which in Article 18 is explained related to additional crimes as one of the efforts to recover State finances, Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption 2003 (United Nations Convention Against Corruption 2003) which explains that Asset seizure of perpetrators of corruption can be carried out through criminal and civil channels, other regulations are Law Number 1 of 2006 concerning mutual assistance in criminal matters which is the legal basis for the Indonesian government in requesting and/or providing mutual assistance as well as a guideline for making agreements in criminal matters with Foreign Countries. In this case, the return of assets in corruption crimes can be carried out through several channels/instruments, including through criminal, civil and administrative channels.

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