



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"



IMAM AS SYAFEI BUILDING
 Faculty of Law, Sultan Agung Islamic University
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD ISLAMIC UNIVERSITY
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Welcome to Participants on International Conference

"LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

SPEAKERS :

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Nagoya University, Japan
2. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
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Indonesia, September 05th 2017

WORLD ISLAMIC UNIVERSITY
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FACULTY OF LAW
Sultan Agung Islamic University

5
September
2017

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Sultan Agung Islamic University, Indonesia

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455
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AND CALL FOR PAPER
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum

NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.


Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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CORRUPTION ASSET RECOVERY THROUGH STATE CIVIL LAWSUIT

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ABSTRACT

Law Number 31 Year 1999 on the Eradication of Corruption which has been amended by Law Number 20 Year 2001 or PTPK Law has arranged the state civil lawsuit by the State Attorney or the Aggrieved Agencies against the perpetrator or his / her heir(s) in an effort to recover the corruption assets which is essential to save the state's wealth from corruption for the sake of the national development.

Many cases of corruption are terminated on process because of several reasons such as; the suspect or defendant does not meet health requirements (physical and mental), and cases which are canceled due to defendant's death while in fact the state's financial losses is real and has not been rocovered. In those cases, state civil lawsuit has not always been implemented, thus the practice of state civil lawsuit has not been fully operational.

Therefore, the author employed both doctrinal and non doctrinal methods of legal research to answer the problem of why the state civil lawsuit has not been operational. The research applied the approaches on legislations, case study on verdicts regarding state civil lawsuit, and conceptual approach by conducting interviews with officials of the related agencies and jurist.

The causes of the non-operational state civil lawsuit as an effort to recover corruption assets are; (i) the legal substance issues in this case the PTPK Law, and (ii) the legal issues in the practice of state civil lawsuit in the Court.

The findings suggest that; (i) it is necessary to issue operational technical regulations on the implementation of civil state lawsuits by State Attorney, the aggrieved agencies, or by prosecutors at the Corruption Eradication Commission (KPK); (ii) KPK Prosecutors should be authorized to file state civil lawsuit limited on cases originally handled by KPK , and (iii) that investigators should optimize foreclosure and confiscation of the suspect's assets regardless of its relation to the corruption at the investigation stage to ensure the effectiveness of the state civil lawsuit.

Keywords : asset : lawsuit : corruption.

Background

Indonesian Corruption Watch (ICW) stated that Judge Syarifudin has freed 39 corruption case defendants during his trials at the Makassar and Central Jakarta District Court

in the not too distant past¹, in 2011 the Supreme Court had terminated 40 corruption cases (10.31%) of 956 cases both from the Corruption Court and non-Corruption Court². No state civil law suit had been implemented either by the State Attorney or by the aggrieved Institution in an attempt to recover the assets of corruption. Romli Atmasasmita said that currently, the aim, purpose and mission of law enforcement in eradicating corruption is no longer clear because the state's financial recovery is not significantly successful compared to the APBN budget that has been spent for the three law enforcement agencies³.

State civil lawsuits, either by State Attorney or the aggrieved agencies to recover corruption assets, are the legal implications of the provisions of Articles 32, 33, 34 and 38 letter C of Law Number 31 Year 1999 on Corruption Eradication which has been amended by Law of Number 20 Year 2001 or abbreviated as PTPK Law. The articles in essence regulate that if in the criminal proceedings of corruption there is an evidence of a real state financial loss, state civil lawsuit shall be implemented by the State Attorney Attorney or the aggrieved Institution to the perpetrator or his/her heirs to restore the state's loss or recover the corrupted assets. However, because of the case's insufficient evidence, the defendant might be freed, or his case is stopped by law at the stage of investigation (eg, insufficient evidence) or fall by law (eg in case of death).

According to Bambang Setyo Wahyudi (Attorney General of Civil and State Administration abbreviated as Jamdatun Attorney General of Indonesia), preventive efforts to save state finances can be done through legal considerations,⁴ and through civil repressive efforts of law enforcement namely, A State Attorney to file a lawsuit or petition to a civil court as determined by law and regulation in order to maintain legal order, legal certainty and protect the interests of the State and Government and civil rights⁵.

The performance Data of Jamdatun Attorney in the Year of 2015 as shown in Table 1 below indicate that Jamdatun's performance in the prevention and law enforcement in saving public finance in general has been quite good, but there is no effort to restore state financial loss through repressive lawsuit in the form of law enforcement of state civil lawsuit as the implications of the legal process of corruption cases under the PTPK Law. The non-operational state civil lawsuits cause the recovery of corruption assets to be not optimal.

¹ Running Text TV One, dated June 3 2011.

² www.kompas.com, accessed on March 27 2012, at 08.41 of WIB.

³ <https://syafanton.wordpress.com> accessed on April 20 April 2013, at 22.41 WIB

⁴ Bambang Setyo Wahyudi, Pengembalian Kerugian Negara Melalui Tuntutan Pencucian Uang dan Gugatan Perdata, Pustaka Hanif Publisher, Surakarta, 2016, pg. 137.

⁵ Ibid , pg. 139.

Table 1
Performance of Civil Department and State Administration Division of the Attorney
General Office of 2015 (Details of Case Handling)

LAW ENFORCEMENT	CASE/ACTIVITY
Legal Aid	144 Cases/Activities
Legal Considerations	124 Cases/Activities
Legal Services	3 Cases/Activities
Other Legal Actions	16 Cases/Activities
Total	287 Cases

Although in general the state civil lawsuit by the State Attorney or the Aggrieved Institution has not been operational yet, there was a state civil lawsuit by the Attorney General's Office in Depok District Court against the heirs of the late Yusuf Setiawan with Case Register Number 02 / Pdt.G / 2010 / State Court of Depok, in which at the First level up to the level of Cassation, the verdict had granted the state civil lawsuit by the Attorney General so that one case of state loss can be recovered.

Up to present, there have not been any indications that the number of corruption cases will decrease, reflected from the large number of new corruption cases involving the Heads of Regions. According to the Minister of Internal Affairs, Tjahyo Kumolo, the latest data until December 2016 show that there are as many as 342 Governors, Regents, and Mayors who have legal issues either under the handling of the Attorney, Police, or KPK with legal issues related to the budget⁶. Previous data shows that until 2010, there were 206 regional heads involved in legal cases. In the following years, the Ministry of Internal Affairs sequentially recorded corruption cases involving 40 regional heads (2011), 41 regional heads (2012), 23 regional heads (2013), and 56 regional heads by 2014⁷. Muhamad Yusuf believes that the high level of corruption in Indonesia should be used as a study material for the authorities to change the orientation of corruption crime handling, from “follow the suspect” approach to “follow the money.”⁸ This opinion is relevant to the concept of impoverishment of corruptors, in which Mahrus Ali argues that the impoverishment of corruptors refers to the principles in economic analysis on the law used to solve criminal law problems including corruption cases⁹.

Therefore, the eradication efforts of corruption, both preventive and repressive, have very important roles that must be implemented in parallel to save the the country’s assests.

⁶ www.kompas.com, Jakarta, accessed on February 4th 2015, at 21.11 WIB.

⁷ Ibid.

⁸ Muhammad Yusuf, *Merampas Aset Koruptor, Solusi Pemberantasan Korupsi Indonesia*, Kompas, Jakarta, 2013, pg 223.

⁹ Mahrus Ali, *Hukum Pidana Korupsi*, UII Press, Yogyakarta, 2016, pg 232

Bagir Manan (2005) argued that preventing corruption as a preventive measure is not less important than combating corruption as repressive measures,¹⁰ especially when the eradication of corruption repressively through the enforcement of state civil lawsuits has not been operational, whereas it has not been able to significantly recover the assets of corruption.

Based on the above description, there is a significant legal problem that causes the state civil lawsuit by State Attorney or aggrieved institutes have not been operational as an effort to recover corrupt assets under the PTPK law.

Research Method and Approach.

The authors applied two legal research methods namely doctrinal and indoctrinal methods to answer the legal problems described in the background. As for research approach, three approaches were employed in terms of (i) legislation approach, (ii) case study approach on verdicts of state civil lawsuit by state attorney, (iii) and conceptual approach by conducting interview to law enforcement institution officers, in this case the Jamdatun Attorney General of Indonesia and jurist.

The causes of the non-operational state civil lawsuit by State Attorney or the aggrieved agencies in recovering corruption assets.

The core content of Article 32, 33, 34 and 38 letter C of the PTPK Law stipulate that the state civil lawsuit by the State Attorney or by the aggrieved Institution can be done if:

- (i) In the criminal proceedings of the corruption cases, particularly during the investigation stage, investigators find and argue that one or more elements of corruption case are insufficient of evidence, whereas in fact there has been a real state financial loss.
- (ii) The suspect dies during the time of the investigation so that the investigation of the case falls by law, while there has been a real state's financial loss.
- (iii) The defendant dies during the time of court hearing, where there has been a real state's financial loss.
- (iv) The Defendant's case is suspended during the time of court hearing because the Defendant does not meet the health requirements, while there has been an actual state financial loss.
- (v) The defendant is freed by the court, while there has been a real state financial loss.

¹⁰ Bagir Manan, Sistem Peradilan Berwibawa, FH UII Press, Yogyakarta, 2005, pg. 106.

- (vi) There are properties of the defendant which are suspected or reasonably suspected of being obtained from a corruption act known after a court decision giving a permanent legal force.

The above provisions, when related to two examples of cases related to the recovery of assets resulting from corruption, can indicate the obstacles in operationalizing the state civil lawsuit, such as in the case of the late defendant Hengky Samuel Daud who died while awaiting the decision of the Supreme Court appeal, where in this case the property seized from the Defendant was Rp 14,379,958,337, - (fourteen billion three hundred seventy nine million nine hundred fifty eight thousand three hundred thirty seven rupiah) while the state financial loss was Rp 82.646.287.549, -. (eighty two billion six hundred forty six million two hundred eighty seven thousand five hundred forty-nine rupiah). There is no state civil lawsuit filed in this case. Subsequently there is one state civil lawsuit by the Attorney General's (prosecutor) to the heir of the late Yusuf Setiawan (Defendant) who died as a Defendant in Corruption Court at Central Jakarta District Court by Indictment Number: Dak-06 / Pid.B / TPK / 2009 / Central Jakarta District Court with Case Register Number 06 / Pid .B / TPK / 2009 / PN. Central Jakarta in the corruption case of procurement of fire trucks, garbage trucks, stoom walls, Ambulance, fire trucks V 80 ASM, Aerial Platform, Dump trucks, Car ladders, Backhoe Loaders and Stoom Walls which resulted in state financial loss of Rp 44.595.065.247, - (forty four billion five hundred ninety five million sixty five thousand two hundred forty seven rupiah).¹¹

From the provisions of the laws, regulations, and case examples above, it can be identified that the causes of non-operationality of state civil lawsuit are as outlined below.

Legal Substance Problem.

1. The absence of legal certainty regarding when a state civil lawsuit should be implemented by the State Attorney or the aggrieved Institution.

Articles 32, 33 and 34 of the PTPK Law have provided alternatively that state civil lawsuits can be implemented by granting authority to State Attorney or the aggrieved agencies to file the state civil lawsuits. However, the PTPK Law does not regulate when or in what circumstances the lawsuit should be filed by the State Attorney and when or in what circumstances the state civil lawsuit should be filed by the aggrieved institution. In

¹¹ Verdict Number 02/Pdt.G/2010/PN.Depok

the practice, there has not been any state civil lawsuit filed by the aggrieved Institution, and there is a state civil lawsuit filed by the State Attorney.

2. There has not been a certainty whether state civil lawsuit filed by the state is an order, necessity or facultative in character.

The formulation of Article 32.33 and 34 of the PTPK Law related to the state civil lawsuit uses the phrase "to be filed a civil lawsuit" against his/her heirs, and the formulation of Article 38 C uses the phrase that a state civil lawsuit "may" be carried out to the convicted person or his heir.

3. There has not been any provisions related to state civil lawsuit filed against a suspect or defendant if his/her case is terminated by law because he/she does not meet the physical and / or mental health requirements, and the one that has been arranged is only for the event of death.
4. Basis for civil lawsuit claim to the heirs.

State civil lawsuits related to Articles 33 and 34 of the PTPK Law are addressed to the heirs of the accused or defendant who dies during the investigation stage or trial stage in court. In the formulation of the argument of the lawsuit and its verification in the trial, the State Attorney will face legal problems, namely for the basis of law whether the heirs of suspects or defendants can be declared to have committed unlawful acts. Such fact was seen in the arguments of the civil lawsuit filed by the Attorney General's Office to the Heirs of the late Yusuf Setiawan.

5. The absence of prosecutor's authority at the KPK to file a state civil lawsuit.

KPK, as investigator and prosecutor in the case of corruption, will directly facilitate its position as Prosecutor to file a state civil lawsuit if in the handling of the case there has been a real state financial loss. But when the case does not have sufficient evidence or void by law, such matter has not been set up by the legislations.

Legal issues in the practice of state civil lawsuit.

1. Different opinion on the substitute or Subsidair imprisonment which drop the civil state lawsuit charges.

Komariah Sapradjaja (former Supreme Court Judge) essentially argues that when the convicted person has undergone a substitute imprisonment sentence, the case is then settled, and there is no state civil right to sue for substitute payment, because it violates

human rights, and that punishment is the last resort of legal enforcement or the *ultimum remedium*¹².

BPK argues that the recovery of the state losses due to corruption can be pursued not only through criminal way but also at the demands for compensation (administrative law).¹³ The two legal channels are not mutually exclusive because each legal path has different principles relating to the state's asset recovery.

2. The implementation of state civil lawsuit as the effort for recovering corruption assets takes a long time and can not be carried out pro-actively.

Based on Articles 32, 33 and 34 of the PTPK Law, the state civil lawsuit may be conducted by the State Attorney or an aggrieved institution as an implication of the PTPK Law for criminal act related to corruption.

Thus the State Attorney Attorney can not file a lawsuit without obtaining a case file from the investigator. In addition, the practice of settling a state civil lawsuit takes a long time to arrive at the point of legal verdict which has permanent legal force..

3. The absence of asset that can be used as a basis for confiscation (*conservatoir beslag*) so that the state civil lawsuit will be effective if the lawsuit is granted.

The state civil lawsuit will be effective if accompanied by a confiscation petition (*conservatoir beslag*), but in the practice of corruption handling, there has not always been found assets of the suspect / defendant / convicted which can serve as the basis of confiscation.

4. The difficulties in proving the legal argument that there has been an act against the law conducted by the heirs of the accused / defendant.

Such case occurred in a lawsuit against late defendant Yusuf Setiawan and his heirs. Although in the case the Attorney General's lawsuit had been granted, with the legal consideration that the state civil lawsuit originating from the corruption criminal process or the PTPK Law is an exception, and that a special law overrides the general law or *lex*

¹² Interview result with Komariah Sapradjaja on July 3rd 2013 in the Supreme Court Office.

¹³ Through the Letter of BPK dated February 28, 2013 Number 64 / S / X.2 / 02/2013 regarding the answer to the request for data and information related to the payment of financial losses of the state which stated: According to Article 64 Law Number 1 Year 2004 on State Treasury stating that the criminal verdict did not release claims for compensation. Therefore, the effort to restore the state's losses due to corruption is not only through criminal lane but also at the same time the demands for compensation (administrative law). The two legal channels are not mutually exclusive because each legal path has different principles relating to the recovery of state's losses. Therefore, the substitute imprisonment to replace money lost does not recover the value of state losses in the domain of administrative law, so that the defendant can still be processed for claim of compensation (administrative law) even though he/she has undergone all criminal penalties

specialist derogat legi generali, thus no argument for the lawsuit on the act against the law was required.

Conclusion.

The causes of the non-operational state civil lawsuit by state prosecutors or by the aggrieved institutions may be concluded due to: (i) legal substance issues, in this matter, the PTPK Law and other related regulations, and (ii) legal issues in the state civil lawsuit practice.

Recommendation.

1. To issue technical operational regulations for the implementation of the state civil lawsuit as an effort to recover the assets of corruption by the State Attorney, the aggrieved Agencies, or by the Prosecutor of KPK.
2. To authorized the Prosecutor at the KPK to conduct state civil lawsuit on cases limited to those originally handled by the Corruption Eradication Commission, through a mechanism of power granting or a joint memorandum of understanding from the Attorney General.
3. To optimize foreclosure and confiscation of assets belonging to suspects regardless its relation to corruption during the investigation stage to ensure the effectiveness of the state civil lawsuit to restore the state's losses.

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