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Asset Seizure as an Effort to Recover State Financial Losses in Corruption Criminal Cases

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Abstract. *So far, criminal law has been built on the basis of a retributive paradigm, so that repressive and coercive characteristics dominate. Along with the times, the paradigm shifted towards a restorative paradigm. In the Law on the Eradication of Criminal Acts of Corruption, this is embodied through the existence of additional penalties in the form of payment of replacement money to restore state financial losses. So, the law enforcement approach used is to follow the suspect, follow the money, and follow the assets. The main problem in this study is what are the obstacles in the implementation of asset confidence in returning state financial losses in criminal acts of corruption considering that the criminal evidence system is the highest evidentiary system, namely negative wettelijk bewijs theory. And what are the ideal laws and regulations in regulating, so that efforts to recover state financial losses carried out by law enforcement officers are optimal. The research method that the author uses is juridical-normative, namely legal research conducted by examining library materials, both on primary, secondary, and tertiary legal materials. This research is descriptive analysis, which provides a clear and detailed description of an event that occurred. The method of drawing conclusions used is the deductive-inductive method. The deductive method is used as the main guide, and the inductive method as the supporting work procedure. From the results of the study, it can be concluded, there are still several factors that influence the non-maximum return of state financial losses, namely in the form of laws and regulations that still use the classical approach, have not accommodated the norms of UNCAC, there are no progressive policies, weak cooperation/coordination between institutions. and international cooperation, and the public has not been properly educated. In fact, some of these recommendations can answer the problems that have been faced so far. Therefore, it is necessary to make adjustments to the Criminal Procedure Code and the PTPK Law, which since their formation have not been prepared for asset recovery by taking into account the principle of due process of law.*

Keywords: *Asset; Corruption; Recovery.*

1. Introduction

Crimes with economic motives that are conventional in nature, such as theft, fraud, or embezzlement, have nowadays become more complex. This is because they involve educated perpetrators and are often transnational or cross-border. Due to their complexity, this type of crime often utilizes equipment, means, and infrastructure that supports the execution of the criminal acts, making it difficult for law enforcement officials to take action. The main goal of criminals with economic motives is to acquire as much wealth as possible. . Pragmatically, for criminals, wealth is the lifeblood that sustains their criminal acts, so the most effective way to prevent and eradicate these criminal acts is by confiscating the proceeds or instruments of the crime. One example of an economically motivated crime is corruption. Viewed from the severity of the crime, corruption over time is carried out more regularly and its reach extends to all aspects of society. The total financial losses to the state due to corruption continue to increase and are disproportionate to efforts to recover the state's financial losses. The economic downturn is believed to be a result of the existence of systematic and widespread corruption. The systematic nature of corruption, as part of structural crime, is deeply rooted and permanent, so that corruption has become part of the existing system. Het recht hink achter de feiten aan (the law lags behind the facts) is an appropriate adage to describe the current efforts to eradicate corruption. If examined, the construction of the current Indonesian criminal law system is still oriented towards finding the perpetrators and punishing them for their criminal acts only (follow the suspect) and punishing with criminal sanctions, either imprisonment or confinement. Efforts to seize and return assets obtained from corruption crimes always create unpredictable dynamics because each perpetrator never wants to admit to and surrender the proceeds of the crime, even though it has been legally proven that they committed corruption. As is known, perpetrators of corruption crimes are very skilled at disguising and obscuring the proceeds of their crimes, such as taking them abroad to countries that do not have Mutual Legal Assistance (MLA) with Indonesia or using cryptocurrency facilities to complicate law enforcement efforts.

2. Research Methods

That the object of this research is criminal law policy in restoring state financial losses in corruption crimes through asset seizure. The term policy can be taken from the term "policy" (English) or "politics" (Dutch). According to Barda Nawawi Arief, the term "criminal law policy" can also be referred to as "criminal law politics." Furthermore, Sudarto states that implementing "criminal law politics" means making choices to achieve the best results in criminal legislation in the sense of meeting justice and utility requirements. Implementing "criminal law politics" means efforts to realize criminal legislation that is appropriate to the conditions and situations at a given time and for the future. Efforts to tackle crime through criminal law are essentially also part of law enforcement efforts (particularly criminal law enforcement). Therefore, it is often also said that politics or criminal law policy.

1) Normative legal research is library research, which is research on secondary data, so the data used in this study is a type of secondary data collected through library research. Secondary data refers to data obtained from the study of literature or the review of various literatures or library materials referred to as legal materials. Secondary data in the field of law (viewed from the perspective of its binding power) can be distinguished into:

a. The 1945 Constitution of the Republic of Indonesia;
b. Law Number 1 of 1946 concerning the Criminal Code;
c. Law Number 8 of 1981 concerning the Criminal Procedure Code;
d. Law Number 31 of 1999 concerning the Eradication of Corruption Crimes;

e. Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes;Law Number 30 of 2002 concerning the Corruption Eradication Commission;

f. Law Number 17 of 2003 concerning State Finance; g. Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia; h. Law Number 1 of 2004 concerning the State Treasury; i. Law Number 15 of 2006 concerning the Audit Board; and j. United Nations Convention Against Corruption as ratified through Law Number 7 of 2006.

2. Secondary Legal Materials

Secondary legal materials are materials closely related to primary legal materials that can help analyze and understand primary legal materials, as follows:

a. Books used as reference studies in writing about asset seizure policies as an effort to recover state financial losses;

b. Papers and articles related to asset recovery, evidence in criminal procedural law, and corruption crimes;

c. Legal journals; and other reference materials.

3. Tertiary legal materials are writings related to the issues being researched, used to obtain a theoretical foundation and also to gather information.

Data Analysis and Conclusion Drawing Methods

The data analysis technique used in this research is deductive-inductive. The deductive method is used as the main approach, and the inductive method as a supporting procedure. Normative analysis primarily utilizes library materials as sources of research data. The stages of normative juridical analysis are as follows:

1) Formulating legal principles from both social data and written positive law data;
2) Formulating legal definitions;
3) Establishing legal standards; and formulating legal norms.

3. Results and Discussion

3.1. Inhibiting Factors in the Recovery of State Financial Losses through Asset Seizure in Corruption Crimes

The practice of corruption in Indonesia is a cliché problem that hinders the Government in realizing a just and prosperous society through sustainable national development programs. Corruption causes the resources and economic development not to fully achieve their objectives. Therefore, this practice is always under the scrutiny of society both nationally and internationally, and becomes our shared concern. Given the danger of corruption threats to the continuity and safety of global community development, the United Nations (UN), in the 55th Session of the UN General Assembly on December 6, 2000, issued Resolution Number 55/61, which essentially conveyed the need to formulate a global international legal instrument against corruption, wherein the global international legal instrument against corruption, where the instrument International law is obviously very necessary to bridge the different legal systems between countries, and at the same time to advance efforts to combat criminal acts of corruption effectively. The UN resolution was the precursor to the establishment of the United Nations Convention Against Corruption (UNCAC) in 2003. Thus, corruption is not only a domestic problem but has already become part of a global issue because, in fact, corruption still exists today in both developed and developing countries.

In the preamble, UNCAC mentions: "Concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing, sustainability, development and the rule of law."

Basically, it explains that corruption poses a threat to the sustainability of development, the values of democracy, ethics, justice, and the supremacy of law. This philosophical foundation emphasizes how serious the threat of corruption is to the continuity of development for the welfare of the global community in combating poverty. Therefore, systemic efforts are required to combat corruption with an adequate legal system, including through the enforcement of laws for the recovery of state financial losses through the seizure of assets obtained from corrupt acts as specified in Articles 51 to 59 of the UNCAC, which regulate prevention, detection of proceeds of crime transfers, measures to recover assets through international cooperation in cases of seizure, restitution, financial intelligence units, agreements, and bilateral arrangements. As stated in Law No.

31 of 1999. concerning the Eradication of Corruption Crimes which has been amended and supplemented by Law No. 20 of 2001 regarding Amendments to Law No. 31 of 1999 concerning the Eradication of Corruption Crimes, also known as the Law on the Eradication of Corruption Crimes (UU PTPK), explains that acts of corruption can cause Losses to State Finances or the State Economy, as regulated in Article 2 paragraph (1) and Article 3, which read as follows:

Article 2 paragraph (1)

“Anyone who unlawfully commits an act to enrich themselves or another person or a corporation that may harm the state finances or the state economy shall be punished with life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least IDR 200,000,000.00 (two hundred million rupiah) and at most IDR 1,000,000,000.00 (one billion rupiah).”

Article 3

"Anyone who, with the intention to benefit themselves, another person, or a corporation, abuses the authority, opportunity, or means available to them because of their position or office, which can harm the state finances or the national economy, shall be punished with life imprisonment or imprisonment of at least 1 (one) year and at most 20 (twenty) years and/or a fine of at least IDR 50,000,000.00 (fifty million rupiah) and at most IDR 1,000,000,000.00 (one billion rupiah)." However, based on Constitutional Court Decision Number 25/PUU-XIV/2016, which in essence removed the phrase "can" in Article 2 paragraph (1) and Article 3 of the Law on the Eradication of Corruption Crimes, there has been a shift in the corruption offense. Before the mentioned Constitutional Court decision, corruption offenses were understood as formal offenses, meaning that actual loss was not necessary; it was sufficient if there was a potential loss to state finances to fulfill the element. Therefore, with this decision, corruption offenses are understood to be a real consequence in this case in terms of state financial loss or state economic loss first (actual loss). In its consideration, there are at least four benchmarks that become the legal ratio of the Judges' Assembly in deciding the substance of corruption offenses. The four benchmarks are:[1]

1) There is no ne bis in idem between the a quo Constitutional Court decision and the previous Constitutional Court decision that examined the phrase "may harm the state finances or the national economy," namely Constitutional Court Decision Number 003/PUU-IV/2006;

2) The principle of legal certainty and the synchronization of national legal regulations related to corruption offenses;

[1]Fatkhurohman, Shifting Corruption Crimes in Constitutional Court Decision Number 25/PUU-XIV/2016, Constitutional Journal Volume 14, Number 1, Malang, March 2017, pp. 6-7.

3) The existence of Law Number 30 of 2004 concerning Government Administration (UU AP) which takes an administrative approach rather than a criminal approach; and

4) Alleged criminalization of Civil Servants (ASN) due to freis emmersen considered corrupt.

In response to the differing opinions as mentioned above, we can refer to the considerations in the Constitutional Court (MK) Decision Number 31/PUU-X/2012 dated October 23, 2012, which emphasized that in the context of proving a corruption crime, the Corruption Eradication Commission (KPK) can not only coordinate with the Financial and Development Supervisory Agency (BPKP) and the Audit Board of Indonesia (BPK), but can also coordinate with other agencies, and can even conduct its own evidence gathering outside of BPKP and BPK findings, for example by inviting experts or by requesting materials from the Inspectorate General or bodies that have similar functions. Even from other parties (including companies), who can demonstrate the material truth in the calculation of state financial losses and/or can prove the case being handled. After the BPK audit results are released and state losses are found, the law enforcement officials cannot immediately investigate it. A grace period of 60 (sixty) days is given to those who are:

Ministers/heads of agencies/governors/regents/mayors/directors of state-owned companies and other bodies managing state finances shall report the settlement of state/regional losses to the BPK no later than 60 (sixty) days after the occurrence of the said state/regional losses is known.

The Audit Board of Indonesia monitors the settlement of the imposition of state/regional compensation on civil servants who are not treasurers and/or other officials in ministries/agencies/regional governments.

The same thing is also regulated in the Cooperation Agreement between the Ministry of Home Affairs and the Attorney General of the Republic of Indonesia and the Indonesian National Police concerning Coordination between Government Internal Supervisory Apparatus (APIP) and Law Enforcement Officers (APH) in Handling Reports or Public Complaints Indicating Corruption in the Administration of Regional Governments Number: 119-49 of 2018, Number: B-369/F/Fjp/02/2018, and Number: B/9/II/2018 dated February 28, 2018. This indicates that the Government, before using criminal law instruments in handling acts of corruption, first used administrative instruments. This is in line with the essence of criminal law itself, namely being an ultimum remedy (the last resort in law enforcement).

3.2. Legislation That Should Regulate Efforts to Recover State Financial Losses through Asset Seizure in Corruption Cases in Order to Operate Effectively

Financial losses to the state become a consequence that will arise when acts of corruption occur; the phenomenon happening in developing countries shows that corruption has become something systematic. The direct impact of corruption that can be felt is the emergence of state losses; small-scale corruption can reduce public trust, and large-scale corruption can cause national economic conditions to become unstable, such as corruption occurring in the banking sector. No matter how small the act of corruption, it will more or less have a negative impact on the social and economic conditions where the corruption occurs. The most important part in eradicating corruption is how state losses can be returned to the state to be used for the greatest benefit of the people. As an economic crime, corruption always targets state budgets through various modus operandi to deceive law enforcers. That is why law enforcement in the eradication of corruption.

1) Losses to the state or region are the decrease in state finances in the form of money, securities, or state-owned goods from the amount and/or value that should have existed.

2) The deficiency in state finances must be real and certain in amount, or in other words, the loss has truly occurred with an amount of loss that can be determined with certainty. Thus, the state loss is not merely an indication or a potential occurrence of loss.

3) The loss results from unlawful acts, whether intentional or negligent. The element of illegality must be proven accurately.

The issue of returning financial losses to the state through criminal sentences of replacement money payments encounters difficulties when the convicted person has been given a legally binding decision but does not have good intentions to return the state or regional financial losses, using various excuses and methods. They tend to look for reasons to avoid the obligation to pay replacement money, and ultimately, the verdict requiring payment of state losses is substituted with a relatively lighter prison sentence. However, the most important part in the effort to eradicate corruption is how the losses embedded from the state are returned by the convict to the state. If the state losses are successfully recovered, it will provide greater justice and benefits for the broader society. Considering that the money should be used for the development of facilities and infrastructure for public utilities such as schools, healthcare, agriculture, and fisheries. In legal theory, as long as returning financial losses to the state through replacement money is far fair and beneficial to society. With the recovery of state financial losses, the government can put it back into the state treasury to be reallocated for development oriented towards the welfare of the people. Justice and usefulness in the enforcement of criminal law against corruption, if viewed from a philosophical perspective, will contribute to creating a welfare state. Therefore, it needs to be a priority scale for law enforcers to secure lost or reduced state funds due to corruption through replacement money. Recovering state losses through replacement money is more beneficial than having to imprison the perpetrators in correctional institutions. Prison sanctions to date have not been able to show a deterrent effect for perpetrators of corruption; in fact, more and more corruptors are being subjected to prison sanctions. In addition, imprisonment, when applied in corruption cases as the main sanction, is considered unsuitable, considering that corruption is an economic crime, where the perpetrator's orientation is on cost-benefit calculations (cost-benefit analysis theory). Before committing corruption, state officials usually first calculate the expenses that will be incurred against the money that will be received after the act is completed. Asset recovery through criminal law generally consists of provisions regarding the asset recovery process through four stages, as follows: first stage, asset tracing to track assets; second, preventive actions to stop the transfer of assets through freezing or seizure mechanisms; third, seizures. Only after going through and fulfilling these stages can the fourth stage be carried out, namely the handover of assets from the receiving state to the victim state from which the assets were unlawfully obtained. As mentioned above, one of the efforts that can be made for the criminal recovery of assets is through asset seizure. After going through the stages of evidence, the seized assets are expected to be confiscated for the state so that the losses that have arisen can be compensated. At the stage of investigating corruption crimes, investigators should have already begun efforts to recover assets by taking actions such as tracing or tracking the assets of corruption crimes and then seizing the assets. The seized assets will later be presented in court by the public prosecutor, and the link or nexus between the assets and the alleged corruption crime must be proven. Therefore, the public prosecutor must prove that the assets are indeed the result of a corruption crime. which is carried out by the defendant. , if assets are seized as instruments of corruption crimes, there must be proof that the assets are indeed instruments of corruption crimes. In terms of understanding, such evidence refers to a process related to gathering evidence, presenting evidence, up to submitting evidence in court. One of the biggest challenges in asset seizures is proving or producing evidence that connects the assets with the crime in property-based asset seizures. Furthermore, the standard of evidence in criminal cases is the highest level, namely beyond a reasonable doubt in the common law system or negative wettelijk bewijstheorie (theory of evidence in a negative manner according to the law) as adopted by Indonesian criminal procedural law and most countries with civil law systems. The success of proof requires sufficient evidence or means of proof. Evidence or means of proof that is sufficient It is prepared starting from the investigation stage, although in practice during the trial, the public prosecutor can also submit additional evidence that they have obtained. This proof generally becomes the burden of the public prosecutor. Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) stipulates that the burden of evidence lies with the public prosecutor, while the suspect or defendant is not burdened with evidence, unless specifically regulated by law, such as the Law on the Eradication of Corruption Crimes and the Law on the Prevention and Eradication of Money Laundering Crimes. Regarding the sufficiency of evidence, the KUHAP specifies a minimum of two pieces of evidence, and the judge's conviction must be supported by at least two pieces of evidence. These provisions are related to the system or theory of evidence adopted by criminal procedure law in Indonesia, namely the negative evidence theory according to the legislation. In criminal procedure law, the theory of evidence based on legislation in a negative manner is generally adopted in countries with civil law systems, whereas countries with common law systems adopt the theory of evidence beyond a reasonable doubt. Both are levels of evidence that in practice require expertise and high standards because the judge's conviction must be based on the means of evidence specified in the legislation. Apart from matters related to the theory of evidence, the return of assets through criminal means of course begins with investigation, inquiry, prosecution, to be adjudicated by the court and further. the implementation of the decision or execution by the prosecutor. This process is correlated with the process or stages of asset recovery. This criminal process depends on the process of the main criminal case, in this case, corruption. Asset confiscation for asset recovery depends heavily on proving the defendant's guilt in the trial process based on a court ruling that has permanent legal force (inkracht van gewijsde).

4. Conclusion

The conclusion from the research results or discussion is that there are several factors influencing the recovery of state financial losses conducted through asset seizures in corruption cases, making it less than optimal, namely: First, the prevailing laws and regulations have not fully accommodated an enforcement system using the follow the asset and follow the money approaches and do not yet include norms from UNCAC. Second, there is a lack of courage from national leaders to take strategic, progressive policies to accelerate the recovery of state financial leakage. Third, weak cooperation between institutions and international collaboration. Fourth, the proceeds from corruption crimes are used for further crimes, making them difficult to trace and mixed with other assets. Fifth, the knowledge and capabilities of law enforcement officers are not yet optimal. Sixth, they are not supported by adequate facilities and infrastructure. Seventh, the public is not well-educated, resulting in low participation in the prevention and eradication of corruption and potential involvement in subsequent criminal acts such as money laundering. Responsive legislation is needed by law enforcement officers to maximize the recovery of state losses, particularly in corruption crimes. However, currently, most of the substance and legal instruments still use a classical approach, commonly referred to as the retributive theory. As a result of this mistaken legal approach, the main objective of eradicating corruption, namely economic recovery, does not proceed as expected. Given this reality, the following actions need to be taken. First, expand the scope of confiscation in the Criminal Procedure Code, so that it can facilitate the process of evidence and maximize the recovery of state financial losses by using property-based asset seizures (property-based system). Second, following up on UNCAC recommendations, both mandatory offenses and non-mandatory offenses. Thirdly, using the concept of guarantee seizure, the physical control of seized goods is still held by the suspect, but the administrative ownership documents are handed over to law enforcement. Based on the above, the ideal legislation in regulating efforts to recover state financial losses through asset seizures in corruption cases is legislation that aligns with the interests of the state and law enforcement and can be implemented based on the principle of due process of law.

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