

# Model of Applying Criminal Sanctions in Overcoming Corruption Through Criminal Sanction by Substitute Money

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**Abstract**—The implementation of criminal sanctions against corruption has been a problem related to the deterrent effect for convicted people and their contribution to recover state losses. This study (1) determining the influence of criminal sanctions of substitute money in returning state financial losses due to corruption and (2) finding an ideal model of application of criminal sanctions of substitute money in overcoming corruption. This study used a normative juridical approach for examining the principles of law, norms, institutions and legal processes. Types of data used secondary data originating from primary legal materials such as corruption eradication act, Law Number 7 Year 2006 concerning Ratification of the United Nations Convention Against Corruption, Supreme Court Regulation Number 5 Year 2014 concerning Criminal Payment of Substitute money in Corruption, Jurisprudence of Supreme Court. Data collection techniques used a literature study by analyzing sources of scientific theoretical readings such as books, scientific journals accredited by Directorate of Higher Education and Reputable International Journal. The analytical method used qualitative. The results showed that the criminal sanctions for substitute money contributed to the recovery of state financial losses due to corruption, but the amount was not significant compared to the value of state losses because of judges' decisions that tend to be positivist based on Article 18 paragraph (3) of Eradication Corruption act Crimes which provides an opportunity for the convicted people to choose to pay substitute money or undergo a substitute imprisonment. The reality was that they preferred to serve a substitute imprisonment (subside) rather than pay compensation money. Consequently, substitute money which becomes the obligation of convicted people was not paid in full or only partially paid. The ideal model of the application of substitute money in overcoming corruption was to apply the concept of asset recovery through four strategic steps namely (a) asset tracing since the investigation stage to find out the existence of corruption assets, (b) asset freezing by stipulating a prohibition on transferring wealth temporarily until a court decision is made, (c) asset confiscation (d) asset returning to the state. This model is considered ideal because it is expected to be able to support the effectiveness of state losses guarantee through full substitute money that can anticipate the convicted people to avoid the obligation to pay substitute money.

**Keywords:** *criminal sanction, corruption, substitute money*

## I. INTRODUCTION

British proverb saying that money is the root of all evil seems relevant to the character of corruption. Most state officials commit corruption due to the desire to earn money even though they have to break the law. The phenomenon of corruption is always juxtaposed with heaps of illicit money obtained illegally by abusing power [1].

Corruption is a type of crime that has the dimension of extra ordinary crime, so it must be handled in extraordinary ways as well [2]. Corruption is one of problems of many other national issues [3]. One of the factors driving the continuing increase in corruption in Indonesia is the lenient punishment imposed by judges on corruptors in Indonesia, and even tends to be easily reduced and then forgiven. The challenge for law enforcement officials is how punishment given to corruptors makes them deterrent while simultaneously making others afraid of committing corruption [4]. The function of criminal sanction is not merely imprisonment, but also emerges a sense of deterrence, shame, and fear. The deterrent effect is actually very important to reduce the number of corruption in Indonesia from year to year [5].

According to Research and Development data of Corruption Eradication Commission (KPK/Komisi Pemberantas Korupsi), the value of state losses due to corruption in Indonesia during 2009-2017 reached 153.01 trillion (one hundred fifty three point one trillion) rupiahs. While the amount of financial penalties that succeeded in recovering state losses in the form of fines, asset confiscation, and payment of substitute money only collected 18,957, 821,529,773 rupiahs or around 12.3%. The total state loss came from 2,321 cases involving 3,109 defendants. This data shows that financial penalties for convicted corruption tend to be suboptimal, lower than the state losses arising from corruption [6]. While the economic benefits obtained by convicted people reach tens to hundreds billion rupiahs, so that it does not reflect a sense of justice in a society as a victim of corruption and such sanctions do not provide a deterrent effect. Therefore, a solution is needed to find an ideal model for applying criminal sanction to provide a deterrent effect for perpetrators of corruption to reduce the number of corruption in Indonesia and,

most importantly, how criminal law enforcement is able to recover financial losses suffered by the state by optimizing the implementation of criminal payment by substitute money.

The model searching for applying sanctions aiming at recovering state losses becomes urgent to be conducted considering the state losses incurred due to corruption from year to year are increasingly alarming. State money that was seized illegally must be returned immediately for the maximum prosperity of people.

## II. IDENTIFICATION OF PROBLEMS

- How does the contribution of criminal sanction by substitute money in returning state financial losses due to corruption?
- What is the ideal model of applying criminal sanction by substitute money in dealing with corruption?

## III. RESEARCH METHOD

The approach used in this research was a normative legal. The nature of research was descriptive analytical. Data collection techniques used documentation study techniques. The data analysis method used qualitative because it did not use formulas and numbers.

## IV. DISCUSSION

### A. *Contribution of Criminal Sanction by Substitute Money in Returning State Financial Losses Due to Corruption*

The strong demands of public on the government to seriously fight corruption are responded by the government through various policies. One of them is by issuing a new anti-corruption law, Law Number 31 Year 1999 jo Law Number 20 year 2001 concerning Eradication of Corruption.

The reason the government issued the new law was because the old corruption eradication law was considered to be very weak and mild, especially in terms of criminal and criminal cases. Although this is debatable, because if we see the threat of a maximum sentence of life imprisonment for all offenses categorized as corruption, whether small, medium, or large, plus and/or a maximum fine of 30 million rupiahs, then it must be appreciated that the appearance of Law Number 31 Year 1999 is marked by a spirit of willingness to eradicate corruption much better.

One of the issues that received “more” attention in eradicating corruption is how to recover the state losses as a result of corruption, both by individuals and corporations. It is important to save state money, considering the fact that so far eradicating corruption committed by law enforcement officials can only save 10-15 percent of the total money corrupted [7].

One of the criminal law instruments that allows saving state money from corruption is by maximizing substitute money as criminal law instruments. As a sanction, this legal instrument is considered more rational to achieve the goal of eradicating corruption, which is to prevent state losses. Criminal sanction by substitute money is basically a specific additional punishment.

During 2014-2017, state financial losses recorded as a result of corruption amounted to Rp. 4,853,615,205,003 rupiahs (four trillion eight hundred fifty three billion six hundred fifteen million two hundred and five thousand three rupiahs), while those saved through criminal payment of substitute money were Rp. 1,711,830,662,761 rupiahs (one trillion seven hundred eleven billion eight hundred thirty million six hundred sixty two thousand seven hundred sixty one rupiah). This means that when compared with the loss, the difference in the value for money that managed to return to the state treasury was relatively less than the state loss due to corruption.

One of the inconsistencies between state losses and the amount of substitute money paid to the state is caused by one of the rules in Corruption Eradication Act. In Article 18 paragraph (1) letter b of Law Number 31 Year 1999 states that “the payment of substitute money in the same amount is as much as the assets obtained from corruption”.

The above provisions in practice are not fully implemented because Article 18 paragraph (2) of Corruption Eradication Act provides concessions for convicted people who cannot pay substitute money that if the convict does not pay the substitute money as referred to in paragraph (1) letter b no later than one month after the verdict obtaining permanent legal force, their property can be confiscated by the prosecutor and auctioned off to cover the substitute money.

This rule becomes the basis for the convicted people not to pay substitute money full or partially, so that the amount of substitute money paid by them does not equal the value stated in the judge’s decision. As for the substitute money that is paid partially, the remainder is replaced with imprisonment, which is calculated by the prosecutor as the executor of the judge’s decision. This situation is a problem in terms of the deterrent effect and contribution of substitute money to cover state losses because legally the rule of law allows the convict to replace it with a prison sentence.

The provision of Article 18 paragraph (2) as a subsidize rule for substitute money directly affects the efforts to recover state losses. On one side, the state expects that the losses due to corruption are returned, but on the other side, the legal rules open space for convicted to escape the obligation to pay substitute money. Conceptually, criminal sanctions for substitute money should have an effect on the perpetrators and in economic terms.

The implementation of restoring state losses through the application of criminal money in practice is influenced by three factors, namely:

- The provision of Article 18 paragraph (2) of Law concerning Eradication of Corruption which allows the convicted people to subsidize sanction for substitute money with imprisonment,
- The limitations of executor prosecutor in the execution because the convict prefer to replace them with imprisonment.
- The difficulties of investigators to trace the existence of convict’s properties allegedly due to corruption.

Based on the study of the imposition of criminal sanction by substitute money has contributed to the recovery of state losses, but the value is not significantly equal because what has been returned is around 25%. This figure shows that criminal sanction by substitute money is lower than the value of state losses. This fact becomes the basis for evaluating the application of criminal sanction by substitute money because it has not been succeeded in recovering state losses. The amount of difference between substitute money and state losses is a warning that criminal sanctions that are financial in nature do not yet provide a deterrent and benefit to the state as a victim.

The imposition of criminal sanction by substitute money in the future requires an ideal concept or model based on economic and criminal principles providing a deterrent effect, while at the same time benefiting the state because criminal sanctions for corruptors are not only sufficient for imprisonment, but for successful state losses returned through substitute money. The basic idea of substitute money comes from the concept of asset recovery which relies on the basic principle of "Give to the country what is on its side". In the rights of the state, it is contained obligations that become the rights of individual citizens, so that the principle is equivalent to the principle of "Give to the people what is on their rights". This concept is based on the principles of social justice that give duties and responsibilities to state institutions and legal institutions to be able to take back people's rights stolen by corruptors.

#### *B. Model of Applying Criminal Sanction by Substitute Money in Overcoming Corruption Crime*

Returning state losses due to corruption becomes an important issue to study to find an ideal model to be applied in the national criminal law system. Returning state money is related to the people's welfare because essentially the corrupted money will be used to finance the government's work program in providing the people's welfare. This is in line with the Utilitarianism idea put forward by Jeremy Bentham, with the principle of utility which reads the greatest happiness of the greatest number. The principle of utility becomes the norm for personal actions or government policy through the formation of law. Thus, law that gives a lot of happiness to the majority of community will be considered as a good law because the duty of law is to preserve kindness and prevent crime, meaning that maintaining utility [8].

Thomas Aquinas' view can also justify state action in regulating the return of state assets. That the rationale is related to what Aquinas thinks is general justice (*justitia generalis*). General justice is justice according to the will of the law which must be carried out in the public interest.

In connection with the aforementioned regulation of returning assets, Indonesian government has issued various regulations that can be used as a basis/foundation in the government's efforts to recover state financial losses of as a result of corruption.

In Law Number 31 Year 1999 concerning Eradication of Corruption, the recovery of state financial losses can be conducted through two legal instruments. First, civil law instruments through Article 32, 33, and 34 Law Number 31

Year 1999 and Article 38 C Law Number 20 Year 2001 conducted by the State Attorney (JPN/*Jaksa Pengacara Negara*) or the aggrieved agency. Efforts to recover state financial losses using civil instruments are fully subject to both material and formal civil law regimes, even though they are related to corruption. In civil process, the burden of proof is the plaintiff's obligation, namely by JPN or the aggrieved agency. In this connection, the plaintiff is obliged to prove, among others:

- That clearly there has been a state financial loss;
- State financial losses as a consequence or related to the actions of a suspect, defendant, or convict; and
- The assets belonging to the suspect, defendant, or convict can be used to recover state financial losses.

Second, the criminal instrument is conducted by the investigator by confiscating the property of the offender that was previously sentenced by the court with an additional criminal decision in the form of substitute money for state financial losses by the judiciary and subsequently by the public prosecutor they were prosecuted to be seized by the judge. The obligation of convict to recover state losses by paying substitute money is conceptually an ideal model, but it needs to be refined by developing strategies that can support its implementation.

The model of applying criminal sanction by substitute money must be supported by a series of pro-justice actions which must be carried out before the criminal sanction by substitute money is read out by the judge in the decision, considering that the substitute money may be subsidized with imprisonment. Therefore, it is necessary to consider a model or way so that the convict cannot avoid the obligation to pay substitute money. The question that arises is how to build an ideal model to support the application of criminal sanction by substitute money.

The answer to the aforementioned question can be found through a review of the rules related to asset recovery returns. One of them refers to Law Number 7 Year 2006 concerning Ratification of the United Nations Convention against Corruption. The Anti-Corruption Convention (KAK/*Konvensi Anti Korupsi*) has made major inroads regarding the return of corrupted state assets, including a system of prevention and detection of the results of corruption (Article 52), a direct asset return system (Article 53), an indirect asset recovery system and international cooperation for the confiscation purpose 55. The essential provisions that are of the utmost importance in this context are specifically aimed at returning corrupted assets from the custodial state to the country of origin of corrupted assets.

The strategy of returning corrupted assets is explicitly regulated in the Mukadimah KAK 2003, Article 8 which defines: "Determined to prevent, track, and hinder international transfers effectively of assets acquired illegally, and to strengthen international cooperation in returning assets, even though in practice, the provisions regarding asset return due to face obstacles in its implementation, namely due to differences

in the legal systems in countries and the political will of the asset's recipient countries resulting from corruption.

The importance of the problem of asset recovery for developing countries that suffer losses due to corruption makes this problem receive serious attention. In fact, some countries want assets to be treated as rights that cannot be erased or revoked.

The return of corrupted assets can be conducted through Criminal Asset Recovery indirectly through Criminal Recovery and the Civil Asset Recovery directly through Civil Recovery [9]. In the KAK, the model of recovering state losses can be achieved through four stages. First, Asset Tracing, a pro justitia action conducted with the aim at assets identification, proof of asset ownership, location of asset storage in the capacity of relations with criminal acts committed. Through asset tracing, law enforcement can detect the presence of assets suspected of corruption. Identifying the existence of someone's assets accused of corruption is very important to support the success of the payment of criminal sanction by substitute money.

Second, asset freezing, according to Article 2 letter f KAK 2003, is determined including a temporary prohibition to transfer, perform conversion, conduct disposition, or move wealth or temporarily bear the burden and responsibility to manage, maintain, and supervise wealth based on court or other stipulations having competent authority. This action is considered important to make it easier for law enforcers to know the asset position in a certain place and avoid moving assets from one place to another which can complicate the investigation process.

Third, asset confiscation, according to Article 2 letter g KAK 2003 is defined as revocation of assets based on a court ruling or other competent authorities. The decision to confiscate assets will make it easier for prosecutors to execute court decisions when judges sentence criminal sanction by substitute money. The prosecutor does not need to look for the existence of the convict's assets because at the investigation stage the convict's assets have been frozen and seized for the benefit of the pro justitia.

Fourth, asset returning and handover to victims is indirectly regulated in the provisions of Article 54 and 55 KAK 2003 where the asset recovery system is implemented through a process of international cooperation for confiscation. If the asset's position is in Indonesia, the process is easier because the prosecutor only has to execute the asset in accordance with the amount of substitute money that the convict must pay in the judge's decision. With the process of convict's asset freezing and confiscation is unlikely to avoid paying substitute money because the asset's position has been in the control of law enforcement and no reason to be subsidized.

After conducting those four processes, the judge as the spearhead of the eradication of corruption must impose a criminal sanction by substitute money to recover the corrupted state money. In an effort to give a verdict fulfilling a sense of justice, a judge must prioritize justice and truth [10]. One of the punishment problems in Indonesia is the enormous and varied disparities. The Indonesian Criminal Code (*KUHP/Kitab Undang-Undang Hukum Pidana*) has given great authority for

judges in imposing criminal sanction [11]. Nevertheless, judges are led by conscience to make decisions that consider state losses as one aspect that must be recovered with a criminal sanction by substitute money. The verdict must be followed by subsequent decisions even though the Indonesian legal system does not adhere to the principle of the binding of precedent. This is solely to make the law serve humanity, not serve itself [12].

The imprisonment as criminal sanction by substitute money consistently between defendants is a form of legal certainty to provide detention and at the same time close the opportunity for the convict to prefer the imprisonment to return state money. Perpetrators of corruption see that the consequences of law violation are as risks, not as he accepted consequence. Thus, the economic and mathematical profit side becomes the main consideration for committing corruption [13]. According to Robert Cooter and Thomas Ulen, the imposition of inefficient imprisonment requires high social costs and must be borne by the state [14], so that the imposition of sanctions must be oriented towards economic aspects.

## V. CONCLUSIONS

The criminal sanction by substitute money have contributed to the recovery of state financial losses due to corruption, but the amount is not significant compared to the value of state losses due to judge's decisions that tend to be positivist based on Article 18 paragraph (3) of Law Number 31 Year 1999 concerning Eradication of Corruption providing an opportunity for the convicted person to choose to pay compensation or undergo a substitute imprisonment. The reality is that the convicted person prefers to serve a substitute imprisonment (subsidize) rather than pay a compensation money. Consequently, criminal sanction by substitute money which becomes the obligation of the convicted person is not paid in full or only partially paid.

The ideal model of applying criminal sanction by substitute money in dealing with corruption is to apply the concept of asset recovery through four strategic steps that guarantee the effectiveness of substitute money, namely (a) asset tracing since the investigation stage to find out the existence of corrupted assets, (b) asset freezing by stipulating a prohibition on the transfer of assets temporarily until a verdict is made, (c) asset confiscation aiming at facilitating the prosecutor in carrying out the execution if the asset is proven as corrupted asset, (d) asset returning to the state. This model is considered ideal because it is expected to be able to support the effectiveness of guarantees for the state recovery through full substitute money that can anticipate the convicted person to avoid the obligation to pay compensation money.

## VI. RECOMMENDATION

Efforts to conduct asset recovery, judges are faced with juridical problems (Article 18 paragraph (3) of Corruption Eradication Act which allows them to subsidize criminal sanction by substitute money in lieu of imprisonment and, in the reality, the convicted person prefers criminal subsidies rather than having to return state financial losses. To overcome this problem, it is suggested that the judges carry out

progressive punishments by conducting a legal discovery (*rechtsvinding*) or rule breaking to overcome positive legal rigidity based on honesty, usefulness, and economic justice for justice seekers (*justitia belen*).

The success of applying criminal sanction by substitute money depends on law enforcement efforts starting from the investigation to the judge's decision. Therefore, it is better for the attorney and the Corruption Eradication Commission (KPK/*Komisi Pemberantas Korupsi*) to implement the ideal asset recovery model by taking steps to track, freeze, confiscate, and return assets. The act of returning assets is carried out through a judge's decision that imposed a criminal sanction by substitute money which is preceded by confiscating assets to ease the Prosecutor to execute substitute money and deposit it to the state in full according to the value of the loss.

#### REFERENCES

- [1] E. Setiadi and R. Yulia, *Hukum Pidana Ekonomi*, Graha Ilmu, Yogyakarta, 2010.
- [2] M. Fuady, *Bisnis Kotor, Anatomi Kejahatan Kerah Putih*, Bandung: PT Citra Aditya Bakti, 2004.
- [3] A. Mahmud, "Dinamika Pidana Uang Pengganti Akibat Tindak Pidana Korupsi", 3 *Jurnal Hukum Mimbar Justitia*, 2017.
- [4] Y. Anwar, *Pembaharuan Hukum Pidana*, Jakarta: PT Gramedia Widiasarana Indonesia, Jakarta, 2008.
- [5] M. Mas, *Pemberantasan Tindak Pidana Korupsi*, Bogor : Ghalia Indonesia, 2015.
- [6] Z. Zainudin and A. Samad, Jakarta: Ufuk Publishing, 2012.
- [7] I. Ismansyah, "Penerapan dan Pelaksanaan Pidana Uang Pengganti Dalam Tindak Pidana Korupsi," *Jurnal Demokrasi*, vol. VI, no. 2, 2007.
- [8] Nashriana, *Asset Recovery Dalam Tindak Pidana Korupsi*: Rajawali Press, 2011.
- [9] P. M. Yanuar, *Pengembalian Aset Hasil Korupsi (Berdasarkan Konvensi PBB Anti Korupsi 2003) Dalam Sistem Hukum Indonesia*, Alumni, Bandung, 2007.
- [10] A. Rifa'i, *Penemuan Hukum Oleh Hakim*, Jakarta: Sinar Grafika, 2014.
- [11] E.A. Zulfa, *Pergeseran Paradigma Pidanaaan*, Bandung: Lubuk Agung, 2011.
- [12] M. Ali, *Membumikan Hukum Progresif*, Yogyakarta : Aswaja Press, 2013.
- [13] F. Munzil dkk, "Kesebandingan Pidana Uang Pengganti dan Pengganti Pidana Uang Pengganti dalam Rangka Melindungi Hak Ekonomi Negara dan Kepastian Hukum," *Jurnal Ius Quia Iustum*, vol. 1, no. 22, Januari 2015.
- [14] R. Cooter dan T. Ulen, *Law and Economics*, Addison Welsey United State, 2000.