

Confiscation of Assets Resulting from Corruption in Criminal Law and Islamic Law

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Abstract—Confiscation of assets resulting from corruption is a separate problem in eradicating corruption because the assets returned are less than the losses to the state. This study uses a normative approach with secondary data support. research results show that the integration of asset confiscation in criminal law and Islamic law can be explained as follows. The confiscation of assets in Indonesian criminal law is conceptually divided into 2 (two) namely (a) the concept of confiscation of assets through criminal charges against movable and immovable objects (b) the concept of confiscation of assets using a civil lawsuit by the Prosecutor against assets that have not been confiscated after a court decision, while in *fiqh jinayah* or Islamic criminal law asset seizure is qualified as one type of sanction from *jarimah takzir*, namely crime whose type of punishment is not described in the Qur'an and the Hadith of the Prophet Muhammad however to the judge in a fair manner and pays attention to the benefit of the people.

Keywords—integration, of the concept of forfeiture, corruption

I. INTRODUCTION

The crime of corruption in Indonesia currently has become a serious crime which is conducted systematically and has a wide impact on people's live [1]. Corruption causes funds that should be used to carry out government's obligations to the people are not optimally channelled [2]. This crime makes society more distress to obtain prosperity in the middle of an economical pressure which make the condition worse.

Eradicating corruption is not only speaking about perpetrator's condemnation, but also it is about how the state saving or restoring the state finances loss or national economy through the tool of law enforcement. In essence, the return of assets is a kind of law enforcement system carried out by the state of Tipikor's perpetrator to revoke, seize, eliminate rights of Tipikor assets result from Tipikor perpetrator through the sequence of process and mechanism in civil and criminal law aspect [3].

Preventing and eradicating corruption as an organized and transnational crime are not enough by conventional methods, such as penalize the suspect (follow the suspect), because provide less chary effect. Therefore, a new breakthrough must

be used namely with "the follow the money" method following and knowing wealth track record from original crime [4]. After that, it is continued with assets deprivation, the wealth which produced by criminal act seized so that the perpetrator cannot relish the result of his crime.

Corruption matters which is faced today not only categorized as national matters in the state, however already become an international matter. Corruption that has occurred has entered the across national border so that it could be possible the assets resulting from the crime are stored abroad, then identification and tracking are needed to every perpetrator's asset.

Assets deprivation according to corruption eradication law has become a part of criminal sanctions which are developing continuously in a row with enhancement of corruption typology as economic crime, then the sanction should direct to economic because this type of crime intersects with economic activities.

Assets deprivation result of corruption has long been applied in national criminal law. However, the results are not significant, most people are pessimistic about effort to assets recovery from corruption because there's an imbalance between assets which succeed to be returned to the state with state loss value plus processing costs itself.

According to previous data, as long as 2016-2019 state finances loss caused by corruption reach Rp. 4.853.615.205.003,- (four trillion eighty hundred fifty-three billion six hundred fifteen million and two hundred fifty-three rupiah) whereas which succeed to be saved through criminal substitute money are Rp. 1.711.830.662.761,- (one trillion seven hundred eleven billion eight hundred thirty million sixty-two seven hundred and sixty-one rupiah). It means money which return more way diminutive compared to state loss value.

Assets recovery from crime concept, is known not only in criminal law but also in *fiqh jinayah* which configuring specifically about *jarimah* matters. Corruption in *fiqh jinayah* is conceptualized as *jarimah ta'zir*, which is an act whose legal sanctions are not specified in the Qur'an and Hadith, so that the

determination of sanctions for perpetrators of corruption is left to the judge to determine [5]. According to some Muslim theologian, corruption sanction as *jarimah tazir* could be given in a form of death sentence, whip punishment, prison punishment, forfeit punishment and wealth deprivation also other sanctions which is determined by *ulil amri* in order to the goods of people.

Assets resulting from corruption in conception of *jarimah ta'zir* concept should be completely returned to those entitled and authority sides to receive it (the state), the perpetrator should ask for forgiveness to the people and do a repentance. Imam al Nawawi in Syarh Syahih Muslim said that repentance has three conditions, namely, pulling oneself from sin, regretting the sins and promising to never do similar sin for a long time.[6] If the disobedience is related to the rights (property) of the individual/state, then there is an additional fourth requirement, which is to return the right to the owner or ask for sincerity. Thus, academically there is room to unify the law (integration of criminal law and criminal jurisprudence) to get the ideal concept of asset confiscation in the future considering that so far no research has tried to integrate the concept of asset confiscation as a result of corruption from the two laws.

Departing from the above explanation, the effort to integrate the concept of asset confiscation from the perspective of criminal law and criminal jurisprudence is an urgent idea to conduct an assessment through a systematic in -depth research process using measured scientific methods. This research is believed to be able to produce the concept of criminal law reform that is inspired by the rules of Islamic law but effectively restores the country's financial losses and is able to achieve the purpose of punishment that provides a deterrent effect.

II. IDENTIFICATION OF PROBLEMS

- How is the implementation of the confiscation of assets as a result of corruption crimes in Indonesia?
- What is the concept of confiscation of assets as a result of corruption in Indonesian criminal law and *fiqh jinayah*?

III. RESEARCH METHODS

This study uses a normative juridical approach that examines the rule of law in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, Law No. 7 of 2006 concerning Ratification of the United Nation Convention Against Corruption as a source of criminal law. and conduct an assessment of the provisions in the Qur'an and Hadith as well as the rules of *fiqh jinayah* which explain the return of the proceeds of crime. This approach is in accordance with the trend of current research which no longer only uses one approach or method, because researching legal and social

phenomena often requires a combination of various research methods [7].

The technique of checking the validity of the data in this study uses multiple methods or better known as triangulation, which reflects efforts to gain a deeper understanding of the phenomenon being studied [8].

IV. DISCUSSION

A. *Implementation of Confiscation of Assets Proceeds from Corruption Crimes in Indonesia*

Asset deprivation is a forced effort by the state to seize the assets of a criminal act based on a court decision without punishment of the perpetrator. Asset confiscation is a series of actions by the competent authorities to seize state assets (either movable or immovable objects, tangible or intangible) [9].

According to Brenda Grandtland the definition of asset forfeiture which in English is asset deprivation is a process whereby the government permanently takes property from the owner without paying fair compensation, as punishment for violations committed by the property or owner [10]. Thus, asset seizure or asset seizure is a court action through its decision to legally take ownership or control of one party to be handed over to another party.

Seizing assets that are under the authority of corrupt perpetrators is a challenge because perpetrators use various ways to hide the origin of assets resulting from corruption so as not to be caught by law enforcement, so to overcome this problem the implementation of asset confiscation goes through 4 (four) stages consisting of:

1) *Asset tracking*: Tracking is the first phase to find information on the existence of assets, finding the location of assets is looking for an initial step that will determine the next step. In this phase, investigators need to carry out an investigative process for the development of relevant intelligence sources which are expected to add information that will convince the target of the right sources for law enforcement purposes. At the end of the investigation all elements of data and information will be tested for their suitability as evidence according to law. At this stage the investigator must prioritize finding various information as follows:

- The place where the assets are located is within or outside the jurisdiction of Indonesia.
- Evidence showing that these assets are the proceeds of criminal acts of corruption.

These two things play a very important role in determining the position of assets controlled by the perpetrators of criminal acts for further confiscation efforts. Tracking is carried out not only on property objects located in the country but also on assets abroad. Various information found during the asset tracing process must be analysed to construct legal facts which

will later be strengthened by evidence showing the existence of corrupted funds stored in certain places.

2) *Asset freezing*: Asset freezing is the second step after the asset tracking/tracking process. Freezing is a temporary prohibition on transferring, converting, transferring assets to other parties by financial institutions on orders from courts or other law enforcement officials such as the Police, Attorney General's Office and the Corruption Eradication Commission (KPK). To freeze assets, at least two important requirements must be met, namely: (a) the freezing order must have a reasonable basis so that the institution receiving the order believes there are sufficient reasons for freezing, especially if the freezing order is addressed to overseas banks. (b) law enforcement officials who issue freeze orders have a clear basis of legal authority and assets that requested to be frozen is the object of an order issued by the competent authority.

The freezing order is very important to secure assets during the investigation process so that assets are not transferred or transferred to other parties so as to shorten the asset tracing flow, asset freezing also functions to prevent assets from being used by perpetrators to commit other criminal acts that will cause more victims and more losses.

3) *Confiscation of assets*: Confiscation is the act of an investigator to take over and or keep under his control movable or immovable objects, tangible or intangible for the purpose of proof in investigation, prosecution and trial. If we look at the definition of confiscation contained in Article 1 point 16 of Law No. 8 of 1981 concerning the Criminal Procedure Code above, the investigator's actions in taking over and storing objects belonging to a suspect are part of a forced effort. The investigator's actions are justified by law as long as they are in accordance with the provisions of the legislation. In the Criminal Procedure Code, confiscated objects and confiscated goods are two different objects, but in the same object. Confiscated objects are objects that are confiscated for the purposes of investigation, prosecution, or trial based on Article 39 of the Criminal Procedure Code, while confiscated goods are objects that are declared confiscated by a court decision for the state, as explained in Article 46 paragraph (2) of the Criminal Procedure Code [11].

In corruption cases, the objects that can be confiscated are objects suspected of being the result of corruption in the form of movable and immovable objects such as land, buildings, vehicles, jewelry, including shares included as capital in a securities company. In Indonesian criminal law, confiscation must obtain permission from the Head of the local Court, but this provision is not absolute because in certain conditions that are urgent and force investigators to immediately carry out the confiscation without prior permission from the Court. Confiscation of assets resulting from corruption in practice is intended to be a guarantee that if the defendant is subject to sanctions for returning state losses, the assets that have been frozen and confiscated will be confiscated by the state.

4) *Return of assets*: The act of returning is the final stage of the implementation of asset confiscation, this step is carried out by the Prosecutor who is authorized to carry out executions of court decisions ordering the confiscation of assets in the form of movable and immovable objects. If the asset is located in another country, the country where the asset is stored and the victim country must take steps according to the principles of their respective national laws. The Prosecutor's Office is an executor in implementing court decisions, among others, through its power to execute auction sales of objects related to criminal proceedings. So if the asset is in the form of objects, the Prosecutor conducts an auction, but if it is in the form of money, the Prosecutor will deposit it into the state treasury through the Ministry of Finance and be included in the category of Non-Tax State Income (PNBP).

The various descriptions of the implementation of asset confiscation above illustrate that the process of recovering state losses in criminal acts of corruption must take a long process and have challenges at every stage. This is a separate problem for law enforcers to find effective solutions so that funds from corruption can be fully returned with a fast process without violating applicable legal provisions.

B. The Concept of Confiscation of Assets Proceeds from Corruption in Indonesian Criminal Law and Fiqh Jinayah

The eradication of corruption in Indonesian criminal law today has undergone developments, initially the perpetrators of corruption were only sentenced to imprisonment and fines but along with the development of corruption crimes the conception of punishment has also shifted towards asset confiscation. The concept of confiscation of assets resulting from criminal acts of corruption is carried out based on the mechanism of the criminal justice system, the mechanism is based on Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (UU Tipikor).

Article 18 letter (a) of the Anti-Corruption Law which states: "The confiscation of tangible or intangible movable goods or immovable goods used for or obtained from a criminal act of corruption, including the company owned by the convict where the corruption crime was committed, as well as the price of the goods that replace those goods."

Based on the article, the act of confiscation of assets has been regulated and used as a sanction against perpetrators of criminal acts of corruption as an effort to return the proceeds of the crime. This regulation is the basis for law enforcement officers to track, freeze and confiscate assets resulting from corruption and return them to the state so that state losses can open and close opportunities for criminals to enjoy the proceeds.

The concept of expropriation of assets in the Indonesian criminal justice is not only done using criminal law but can take advantage of a civil lawsuit as provided in Article 38C of Corruption Act which provides that:

"If the court decision has obtained permanent legal force, it is known there is still any property belong to the convicted person suspected or should also be suspected of criminal act of corruption that has not been subject to confiscation for the state as referred to in Article 38 B paragraph (2), the state may file a civil lawsuit against the convict and/or his heirs."

This civil lawsuit is intended as an anticipation if the confiscation of assets through the criminal route does not succeed in seizing the assets from the defendant's hands, thus giving the prosecutor the authority to sue through the civil route so that the assets are confiscated. Civil lawsuits play an important role in anticipating the failure to return state losses through replacement money, even though they are unpredictable because they can be accepted or rejected by the judge, so the public prosecutor must carefully prepare evidence that convinces the judge that the defendant's assets originate from the proceeds of corruption which must be confiscated and returned to the court. Country.

In line with Indonesian criminal law, there are also international legal instruments adopted to strengthen efforts to confiscate assets from corruption, such as UNCAC which was ratified by the Government of Indonesia into Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption on 18 April 2006 [12]. In addition, Indonesia has also regulated "mutual legal assistance" where one of the basic principles is the principle of reciprocity [13].

Criminal forfeiture and NCB asset forfeiture in the United States have long been used to recover assets resulting from criminal acts. Initially, NCB Asset forfeiture was applied on a domestic scale, namely filing a civil lawsuit to confiscate or take over assets resulting from crimes that were located in the country; some countries that used domestic NCB asset forfeiture applied extra territoriality.

In Islamic law, a judge who is in charge of deciding a case must consider it with common sense and belief and the need for deliberation to create justice for the victim and for the accused. As the word of Allah SWT in Surah an-Nisa verse 58:

"...and if you determine the law among humans, you should be fair."

Based on the verse above, in giving a punishment sentence, a judge must take into account the considerations in his way of deliberation.

In *Jinayah fiqh*, there are no texts or 'nash' that specifically record clearly the sanctions for acts of corruption. Then in imposing sanctions, the author categorizes criminal acts of corruption as *jarimah* whose elements approach the elements in the criminal act of corruption committed by the defendant.

The author tends to view corruption as a *jarimah gholul*, because the characteristics of the perpetrators are people who have positions to manage the state treasury. Because a corrupt person takes the property entrusted to him to be managed, he cannot be punished with cutting off his hand, as the hadith of the Prophet Muhammad SAW:

"From Jabir bin Abdullah, indeed the Messenger of Allah said, A traitor, looter and pickpocket do not cut off his hand"

Takzir punishment is punishment that has not been set by the syara' and handed over to the judge to set one up. In determining the sentence, the judge only determines globally. This means that legislators do not stipulate punishments for each takzir, but only stipulate a set of punishments from the lightest to the most severe. The implementation of takzir punishment, whether the type of prohibition is determined by text or not, whether the act involves the rights of Allah or the rights of individuals, the punishment is left entirely to the judge. As the word of Allah in Surah an-Nisa verse 58:

"Indeed Allah commands you to convey the mandate to those who are entitled to receive it, and (orders you) when determining the law between humans so that you judge fairly. Verily, Allah has taught you the best. Verily, Allah is All-Hearing, All-Seeing."

Takzir punishments in *jinayah fiqh* are grouped into:

- Takzir punishments aimed at the body, for example the death penalty and *jilid* (flogging);
- Penalties relating to a person's freedom, such as imprisonment and exile;
- Takzir penalties relating to assets, such as fines, participation or confiscation of property and destruction of goods;
- Other punishments determined by *ulil amri* for the public good.

In the context of returning assets resulting from criminal acts of corruption in Islamic law, assets that are corrupted must be returned entirely to those who are entitled and authorized to receive them. The return of the assets resulting from corruption must be carried out by the perpetrator who has received a sentencing decision. In addition, the perpetrators are obliged to apologize to all people who are directly affected by corruption. By apologizing, the perpetrator has repented or is aware and sorry for the wrong act and intends to correct the deed.

Starting from the explanation above, the author considers that before the judge makes a decision on the return of assets, he must consider the things contained in the defendant, this is in accordance with Islamic law, before the judge passes the sentence, he must consider the good or bad things that exist. the defendant in order to achieve benefit and justice and also not harm many people. With the return of the proceeds of corruption, it is expected to reduce state financial losses due to corruption.

V. CONCLUSIONS

- The confiscation of assets resulting from corruption is carried out in 4 (four) stages, namely: (a) tracking of assets is aimed at finding the location of assets and evidence. evidence that shows the relationship between

assets and corruption (b) freezing as a temporary prohibition to transfer or transfer assets to other parties (c) confiscation in the form of expropriation of assets under the authority of investigators and public prosecutors for the benefit of the judicial process (d) return of assets by the Prosecutor's Office to the state treasury in this case is the Ministry of Finance but if the assets are in the form of immovable objects, an auction will be carried out through the State Auction Office and the results are deposited as Non-Tax State Opinion (PNBP).

- Conceptual confiscation of assets in criminal law can take criminal charges against movable and immovable assets as well as demands for payment of compensation equivalent to the value of state losses, while in *fiqh jinayah* sanctions for perpetrators of criminal acts of corruption are left to the judge but the form of sanctions in the decision is mandatory. Prioritizing the benefit of the people who are oriented towards recovering state losses.

VI. RECOMMENDATION

- It is recommended to law enforcement, especially investigators to optimize the tracking stage to find assets belonging to suspects who are in the country or in other countries, because this stage is the beginning of an asset investigation that determines whether or not assets can be confiscated to restore state losses.
- Law enforcers should apply the concept of asset confiscation through criminal prosecution to confiscate all assets resulting from criminal acts of corruption and avoid civil lawsuits because it takes time and high costs

and there is no guarantee that the lawsuit will be granted by the panel of judges.

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