Optimization of Asset Recovery from the Results of Criminal Acts of Corruption Towards the Value of State Financial Losses

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Abstract. Corruption must indeed be recognized as a scourge and a serious threat to the life of the nation and state. The existence of corruption as an extra-ordinary crime can later be implied as a crime whose settlement is carried out specifically. Various ways of handling corruption cases have been implemented in Indonesia, starting from preventive measures by instilling an anti-corruption mentality from an early age in children and legal counseling among adults to repressive measures by taking action against perpetrators of corruption. However, from the various ways of handling these corruption cases, there is a fact that the return on state financial losses is not commensurate with the losses incurred from acts of corruption. State financial losses caused by a criminal act of corruption, it is not certain that it can be recovered by returning state financial losses or confiscation of the convict's property as a substitute for state financial losses, the value of which is only limited to the assets obtained by the convict. This certainly leads to the essence of recovering state financial losses as the goal of eradicating corruption. Disproportionate or disproportionate losses to state finances and returns to state financial losses have led to perceptions of ineffectiveness in eradicating corruption. This view is the focus of the theory of economic analysis of law, as stated by Robert Cooter and Thomas Ullen "The punishment's extent should be proportional to the seriousness of the crime. Disproportionate punishment is wrong". If asset recovery is an obligation of the perpetrators of corruption against state losses caused by their actions, then the disproportionate condition in returning state financial losses to state financial losses is an erroneous punishment. Meanwhile, the increase in the eradication of criminal acts of corruption shows that the expected effect of Article 18 of the Law on Corruption Eradication has not been optimal.

Keywords: Asset Recovery, Corruption, State Financial Losses

1. Introduction

Corruption must indeed be recognized as a scourge and serious threat to the life of the nation and state. The existence of corruption as an extra-ordinary crime can later be implied as a criminal act whose resolution is carried out specifically.[1]

The term corruption itself comes from one word in Latin, namely corruptio or corruptus which is copied into various languages. For example, copied in English

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becomes corruption or corrupt, and in Dutch it is copied into the term coruptie (korruptie). Presumably from the Dutch language was born the word corruption in Indonesian.[2] Coruptie which is also copied into corruptiën in Dutch means corrupt acts, bribery.[3] In Indonesia, corruption is described according to RI Law Number 20 of 2001 concerning Amendments to RI Law Number 31 of 1999 as enriching oneself or another person or a corporation that harms state finances or the state economy, abusing the authority, opportunity or means available to it because of position, and the element of offense in amending Article 5 to Article 12 as stated in Article 1 of RI Law Number 20 of 2001.[4] This law classifies corruption as an extraordinary crime, so its eradication must be carried out extraordinarily. Because based on the essence of a crime can be classified based on seriousness, and punishment can be based on the seriousness of the crime. But this does not mean that the punishment of a criminal act is merely in retaliation.[5] Today the nature of retaliation in sentencing still exists but in a small facet. Other, more important facets are reassuring a society that has been shaken by criminal acts.[6]

The urgency of returning state financial losses caused by corruption crimes received firm attention from Indriyanto Seno Adji through the following: Return of state losses due to the proceeds of corruption is a law enforcement system that requires a process of eliminating rights to perpetrators' assets from victim countries by means of confiscation, freezing, seizure both in local, regional and international competencies so that wealth can be returned to the state legitimate (victims)".[7]

The problem regarding the implementation of the recovery of state financial loss assets from corruption actors lies in the laws and regulations that regulate, namely in the provisions of Article 18 of RI Law Number 20 of 2001 concerning Amendments to RI Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, being a problem in the return of state financial losses with the following substance of the problem:

a. Asset seizure from corruption perpetrators can be carried out after the court decision has obtained permanent legal force There is a provision that the confiscation and seizure of assets can only be carried out after the criminal act committed legally and convincingly is proven in court. Thus, this condition is clearly a "prohibition" for law enforcement to confiscate when the perpetrators of corruption crimes are still in the process of being investigated. The implication that followed from the ban was the freedom for suspects to hide assets resulting from corruption crimes to other parties such as family, close relatives or confidants both domestically and abroad. This then led to the development of various modes of perpetrators of corruption crimes in hiding assets resulting from corruption crimes; and

b. Alternative to imprisonment if unable to pay substitute money: For convicts, the choice to take a prison sentence instead of paying substitute money becomes a kind of rationality that will economically benefit the convict because for the perpetrators of corruption crimes, the actions committed by them are carried out with rationality of economic calculations. Imprisonment

whose length does not exceed the maximum threat of the principal crime, will be very beneficial for these perpetrators.[8]

Meanwhile, in the perspective of the state as a victim of corruption, namely in the perspective of economic analysis of law, the problem of recovering assets of corruption related to criminal enforcement, including in relation to the recovery of assets resulting from criminal acts of corruption. Related to the issue of efficiency Posner defines efficiency as "The allocation of resources where value is maximized, having limitations as an ethical criterion of social decision making".[9]

The calculation of state financial losses and the country's economy is the calculation of opportunity lost. Although this calculation is not allowed, real costbased calculations contain one other very important thing, namely the possibility of applying the principle of benefits through economic calculations to obtain efficiency in legal decisions as stated in the theory of economic analysis of law. The use of the benefit principle is the benefit that will be obtained from the objectives to be achieved when an allocation is determined. In this connection, the basis for calculating civil lawsuits is not only the value of state losses, but the calculation of the "time value of money" of all state losses and the costs that have been incurred by the state for the settlement of the Sudjiono Timan case must be included in the accumulation of state losses.[10]

This opinion is based on the theory of economic analysis of law (Economic Analysis of Law) to analyze the amount of state financial losses that must be returned by perpetrators of corruption crimes. Furthermore, it will be useful because in the current reality, the process of calculating the amount of state losses still often causes differences in interpretation both by the Prosecutor's Office, the Audit Board (BPK), the Financial and Development Supervisory Agency (BPKP), and the Court.[8]

The disproportionate return of state financial losses to state financial losses in both data is an indication of disproportion or disproportion between state financial losses and returns of state financial losses which creates an ineffective perception of eradicating corruption. It is this view that highlights the theory of economic analysis of law, as stated by Robert Cooter & Thomas Ullen, "The punishment's extent should be proportional to the seriousness of the crime. Disproportionate punishment is wrong".[5] If asset recovery is an obligation of the perpetrator of corruption to the state losses incurred by his actions, then the disproportionate condition of returning state financial losses to state financial losses is a wrong punishment.

Discussing the calculation of state financial losses which often become a polemic in the community, in the legal system in Indonesia there is an institution authorized to declare state financial losses, namely BPK. This is further explained by the Supreme Court (MA) through the Supreme Court Circular (SEMA) Number 4 of 2016.

The SEMA regulates the implementation of the formulation of the results of the 2016 Supreme Court Chamber Plenary Meeting as a guideline for the implementation of duties for the Court. One of the points is the formulation of the

criminal chamber (special) which states that only the Audit Board (BPK) is constitutionally authorized to declare state financial losses.

But so far, public prosecutors often use the results of calculating state financial losses from two institutions to prove elements of state financial losses in corruption cases. The two institutions in question are BPK and the Financial and Development Supervisory Agency (BPKP). This raises questions about how the procedure for calculating state financial losses carried out by the BPK relates to the handling of corruption cases carried out by the Prosecutor's Office.

Based on this description, the author is interested in conducting research contained in the form of legal writing with the title: Optimization of Asset Recovery from the Results of Criminal Acts of Corruption Towards the Value of State Financial Losses.

2. Problems

The formulation of problems is made with the aim of solving the main problems that arise clearly and systematically. Problem formulation is intended to further emphasize the problem to be studied, making it easier to work on and achieve the desired target. Based on this background description, the formulation of problems in writing this law is formulated as follows:

a. How is the mechanism for recovering state financial losses as referred to in Article 18 of Law of the Republic of Indonesia Number 31 of 1999 jo. Law of the Republic of Indonesia Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption?

b. What is the mechanism for asset seizure that has added value outside of the value of state losses incurred in corruption crimes determined by BPKP?

3. Method

State the objectives of your manuscript and explain how to get the result. Explore your approach, specification dan analysis method in the perspective of law or social science.
Legal research is a process to find legal rules, legal principles, and legal doctrines to answer the legal issues faced. Legal research is carried out to produce arguments, theories or new concepts as prescriptions in solving the problems faced.[11] This legal research is carried out descriptively intended to provide as thorough data as possible about humans, conditions or other symptoms. The purpose is to accurately describe the characteristics of an individual, certain conditions, symptoms, or groups, or to determine whether there is a relationship between a symptom and other symptoms in society.[12]

The data collection technique that the author uses in this study is a literature study by examining the substance or content of a legal material in the form of books, laws and regulations, documents, and other library materials related to the problem

that the author is researching. The analysis technique that the author uses in this study is to use the deduction method which stems from the submission of a major premise (general statement), then a minor premise is proposed, from both premises then a conclusion is drawn.

4. Discussion

4.1. The mechanism for recovering state financial losses as referred to in Article 18 of Law of the Republic of Indonesia Number 31 of 1999 jo. Law of the Republic of Indonesia Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption

In the provisions of Article 18 of Law No. 31 of 1999 paragraph (1) stipulates that: In addition to additional crimes referred to in the Criminal Code as additional crimes are: 1) confiscation of tangible or intangible movable goods immovable goods used for those obtained from corruption crimes, including companies owned by convicted persons where corruption crimes were committed, as well as the price of goods that replace such goods. 2) payment of substitute money in the amount as much as possible with property obtained from corruption crimes.

Asset Recovery

The underlying legal theory regarding the recovery of state financial loss assets resulting from corruption is based on the function of law in providing protection to the community to achieve a prosperous society. The basic principle of this theory is "give to the state what is rightfully state, and give to the people what is rightfully due to the people". Corruption is an act that has robbed the state of wealth, which has made it difficult for the state to realize welfare for the community. With corruption, people lose their right to live a prosperous life".[13]

Meanwhile, the relationship between asset recovery and corruption was stated by Bernadeta Maria Erna who reviewed it from the eradication of corruption, namely: The essence of eradicating corruption can be divided into 3 (three) things, namely through preventive, repressive and restorative actions. Preventive actions related to the regulation of eradicating criminal acts of corruption with the hope that the public will not commit criminal acts of corruption. Restorative actions, one of which is the recovery of assets of perpetrators of corruption crimes in the form of criminal legal actions and civil lawsuits.[14]

Meanwhile, the Prosecutor's Office of the Republic of Indonesia, views the issue of asset recovery as a strategic goal in eradicating corruption. For this reason, the Attorney General's Office of the Republic of Indonesia has issued an Attorney General Regulation, namely PERJA Number PER-013/A/JA/06/2014 jo. PERJA Number PER027/A/JA/10/2014 jo. PERJA Number PER-9/A/JA/1 1/2019 concerning Asset Recovery Guidelines. The substances stipulated in the regulation are as follows:

a. The purpose of Asset Recovery includes traceability, security, maintenance, seizure and return of assets which also includes the elimination and destruction of assets;

b. To realize good governance, asset recovery must be carried out effectively, efficiently, transparently and accountably;

c. That criminal law enforcement, in essence, does not only aim to punish the perpetrator of a criminal act (crime / offense) to be a deterrent or not repeat his actions, but aims to recover the losses suffered by the victim financially as a result of the perpetrator's actions, all this according to the principle of dominus litis is the responsibility of the prosecutor; and

d. The Prosecutor's Office as a State Attorney / State legal advisor (soliciur / barrister / government lawyer) has the duty and responsibility to provide legal consideration, legal assistance, legal services and legal protection as well as law enforcement of the civil rights of the State or the general public from other parties, especially against financial/material losses, which must be restored to their original position.

In Law 31/1999 jo Law 20/2001 has provided space in the eradication of corruption that can be carried out through criminal procedures and civil procedures for asset recovery. Regarding this issue, Lilik Mulyadi explained that in essence, the aspect of returning assets for corruption through criminal procedures can be in the form of criminal punishment to the perpetrators such as fines or convicts sentenced to pay substitute money. In addition to these factors, the return of assets for corruption crimes can also be through civil lawsuits in the District Court. In corruption cases as per Law Number 31 of 1999 jo Law Number 20 of 2001 regulated regarding the return of assets resulting from corruption crimes both through civil procedures in the form of civil lawsuits and criminal procedures. The return of assets (asset recovery) of perpetrators of corruption crimes through civil lawsuits in a series is regulated in the provisions of Article 32, Article 33 and Article 34 and Article 38 of Law Number 31 of 1999 jo Law Number 20 of 2001. Then through criminal channels as stipulated in Article 38 paragraph (5), Article 38B paragraph (6) and Article 38B paragraph (2) with the process of confiscation and confiscation.

The provisions as mentioned above authorize the State Attorney or aggrieved agency to file a civil lawsuit against the convicted person and/or his heirs either at the level of investigation, prosecution or examination at a court hearing. If detailed, the return of assets from this criminal route is carried out through a trial process where the judge in addition to imposing the principal crime can also impose additional crimes. If detailed, additional penalties may be imposed by the judge in his capacity correlated with the return of assets through the criminal procedure.

State Financial Losses

State financial losses in the context of criminal acts are more associated as a result of corruption. Black's Law Dictionary defines corruption as an act committed with the intent to provide an advantage that is incompatible with the official obligations and

rights of others, falsely using his position or character to obtain an advantage for himself or for others, along with his obligations and the rights of others.[15]

Ideas about corruption are found in many academic literatures. One of them is from Romli Atmasasmita who argues that "corruption is also related to power because with that power the ruler can abuse his power for personal, family and crony interests".[16]

State financial losses are related to Article 2 paragraph (1) and Article 3 of Law 31/1999 jo Law 20/2001 which states that one of the elements that must be met in disclosing the occurrence of corruption crimes is that it can harm state finances or the state economy. The definition in Law 31/1999 jo Law 20/2001 is not a clear and unequivocal formulation of what is called state financial loss, although in the explanation of Article 32 it is stated that what is meant by state financial loss is a loss that can be calculated based on the findings of the authorized agency or appointed public accountant.

The vagueness is related to the determination of the authorized agency to determine the loss of the country in question. If referring to the prevailing laws and regulations, the authorized agency or appointed public accountant includes at least three government agencies, namely BPK, BPKP and Inspectorate at the central and regional levels. The explanation of state financial losses, which is an elaboration of the formulation of state financial losses in Law 31/1999 jo Law 20/2001, is as stated by Eddy Mulyadi Soepardi, regarding the form of state financial losses, as follows:

a. Expenditure of a source / wealth of the country / region (can be in the form of money, goods) that should not be spent;
b. The expenditure of a country/region's resources/wealth is greater than it should be according to applicable criteria;
c. Loss of resources/wealth of the country/region that should have been received (including receipts with counterfeit money, fictitious goods);
d. Revenue of resources/wealth of countries/regions is smaller/lower than what should be received (including receipt of damaged goods, inappropriate quality);
e. The emergence of a state/regional obligation that should not exist;
f. The emergence of a state/regional obligation that is greater than it should be;
g. Loss of a state/regional right that should be owned/accepted according to applicable rules; and
h. The rights of the state/region received are smaller than they should be received.[17]

Based on the thinking of Eddy Mulyadi Supardi, the State's financial losses occur in the event of an increase in the entity's liabilities, not producing future economic benefits or if as long as future economic benefits do not qualify, or no longer qualify, to be recognized in the balance sheet as assets. In the context of state finance, state financial losses occur due to the existence of a state/regional obligation

that should not exist, debts to third parties related to the fictitious purchase or procurement of state assets or the existence of state/regional obligations that are greater than they should be. From the foregoing, it can be concluded that losses occur simultaneously with the recognition of an increase in liabilities or a decrease in assets. Losses are immediately recognized in the balance sheet in the event that the expenditure does not result in future economic benefits or if as long as future economic benefits do not qualify, to be recognized in the balance sheet as assets. Thus, state financial losses according to law are in line with the definition of state financial losses according to accounting so that in calculating state financial losses can use techniques commonly used in accounting and auditing.

4.2. Asset grabbing mechanism that has added value outside of the value of state losses incurred in corruption crimes

Assets resulting from crime are the weakest point of the crime chain, whereeveryone is not entitled to enjoy assets proceeds of crime. Currently, there are two mechanisms for implementing asset seizure in Indonesia which are taken in the process of returning assets resulting from corruption crimes. First, by tracking, then assets that have been successfully tracked and known to exist are then frozen. Second, assets that have been frozen are then confiscated and seized by the authorized institution in the country where the assets are located, to be returned to the country where the assets were taken through a certain mechanism as stated in the Academic Paper of the Draft Law on the Confiscation of Assets from Criminal Acts.

Asset recovery at the same time will have a preventive impact on the development of crime motivated by profit in the form of proceeds of crime. The first preventive impact occurs in the absence of assets controlled by criminals so that perpetrators lose resources to commit other crimes. Second, by striking directly at the motives of the perpetrators' crimes, there is no longer any chance or hope of enjoying the assets of the proceeds of crime is eliminated, at least it can be minimized. The return of that asset eliminates the purpose for which the motive for the crime was committed by the perpetrator of the crime. Third, with the return of assets, a strong message can be given to the wider community that there is no safe place in the world for criminals to hide the proceeds of crime, while also giving a strong message that no one can enjoy assets resulting from crime as the doctrine of "crime does not pay"". These things will be able to weaken the desire of citizens, especially potential perpetrators, to commit crimes. Perpetrators of criminal acts will also always move the wealth obtained from a criminal act, the amount of which is getting bigger day by day, in order to disguise or hide the proceeds of crime.

Seeing the reality of what has been caused by the criminal act of corruption, extraordinary efforts are needed in terms of overcoming and eradicating it. One of the efforts that can avoid Indonesia's decline due to corrupt practices is to make efforts to return assets resulting from corruption crimes. For this reason, the Indonesian government has made several efforts to make recoveries to be free from the downturn that occurred as a result of corrupt practices.

Those who engage in unlawful activities should not be allowed to profit from their crimes. The proceeds of crime must be seized and used for compensation to the

victim, whether it is the state or an individual. Second, it is an attempt to have a deterrent effect on anyone who violates the law. The act of expropriation is carried out to ensure that the asset will not be used for further criminal purposes, and also serves as a preventive measure, in the sense that assets obtained from any unreasonable civil cause can become objects of asset seizure. In criminal acts "crimes does not pay" is a principle that asserts that a violator of the law does not benefit from the unlawful acts he committed, so that any profits or assets obtained from violations of the law can be used as objects of asset seizure. The seizure of criminal assets can also be used to control any profits obtained from a criminal act so that it can function as a mechanism that causes a "deterrence effect" and demotivation for other criminals. This principle is the basis for determining that seized assets are assets related or related to a crime. M ekanism of asset seizure that has added value outside of the value of state losses incurred in corruption crimes that have been determined by BPKP where the seizure of assets that have added value outside of the value of state financial losses incurred in corruption crimes can be confiscated based on the economic analysis of law approach With the method of calculating the time value of money where the future value is the value of losses at the beginning of the criminal act committed plus the number of years the new criminal act is revealed multiplied by the bank compound interest or by the formula:

NK. S = NK. A + (Jt. x (NK. A x 5%))

Information:

NK. s= current state loss value

NK. A= The value of the country's loss when the incident occurred

Jt= Number of Years.

5%= Average Compound Interest Per Year

Example:

The value of state financial losses arising from corruption crimes committed in 2016 amounted to Rp. 100,000,000.00 then the case was revealed in 2020 so based on the provisions of the theory of calculating the time value of money obtained:

NK. S= NK. A + (Jt. x (NK. A x 5%))

= Rp. 100,000,000.00 + (4 x (Rp. 100,000,000.00 x 5%))

= Rp. 100,000,000.00 + (4x Rp. 5,000,000.00)

= Rp. 100,000,000.00 + Rp. 20,000,000.00

= Rp. 120,000,000.00.

So the value of state financial losses that must be paid by convicts in 2020 is Rp. 120,000,000.00 with the principle that criminal offenders must not get or enjoy profits from the results of corruption crimes committed.

5. Conclusion

From the discussion described in the previous chapter, the following conclusions can be drawn:

a. The mechanism for recovering state financial losses carried out by investigators in an effort to recover assets by confiscating assets owned by convicts; and

b. The seizure of assets that have added value outside of the value of state financial losses incurred in corruption crimes can be confiscated based on the economic analysis of law approach with the time value of money calculation method.

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