

The Recovery of State Losses through Corruption Asset Confiscation: Policies and Obstacles

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Abstract

The success of eradicating corruption is measured not only by the success rate of convicting perpetrators, but also by the rate of recovering state losses. The purpose of this article is to explain the government's legal policies regarding the recovery of state losses through the confiscation of corruption assets, as well as the various obstacles to its implementation. This normative/doctrinal study analyzes secondary data in the form of legal materials using conceptual and statutory approaches. A qualitative-prescriptive narrative is used to present the analysis. In general, the Indonesian government has issued a number of regulations that can be used to recover state losses caused by corruption. This is asserted, among other things, in the Criminal Code, the UNCAC, which the Indonesian government has ratified, and Corruption Laws, which stated that the recovery of state losses can be accomplished through both criminal and civil law procedures. However, the existing policies still face some obstacles, both in terms of unclear legal substance, the ability and commitment of law enforcement officials, to the limitations of facilities and infrastructure.

Keywords:

legal policy; corruption; asset recovery

Introduction

The "rule of law" becomes only a statement if law enforcement is weak. The law also becomes meaningless if what the law aims at is not carried out with real actions through law enforcement. Conceptually, law enforcement contains three main elements that must be considered in achieving legal order in society, namely: legal certainty, legal benefits, and justice.¹

Law enforcement against corruption is one of the main focuses of the Indonesian government. Various efforts have been made to both prevent and eradicate corruption

¹ Arliman, L. (2019). Mewujudkan Penegakan Hukum Yang Baik Di Negara Hukum Indonesia. *Dialogia Iuridicia: Jurnal Hukum Bisnis dan Investasi*, 11(1).

simultaneously by the holders of executive, legislative, and judicial powers. Starting from additional criminal prosecution strategies such as revocation of political rights,² to the establishment of an independent institution in the anti-corruption sector.³ The crime of corruption is not only detrimental to the state's finances but has also violated the social and economic rights of the community, so that it is categorized as an extraordinary crime.⁴

The confiscation and return of assets resulting from criminal acts of corruption has occupied an important position in eradicating corruption. This means that the success of eradicating corruption is not only measured by the success of convicting the perpetrators of corruption but also determined by the success rate of restoring state assets that have been corrupted.

In the judicial practice of corruption crimes, some examples of cases of recovering state losses that are still open to the public hearing are the cassation decision, which aggravated the sentence of defendant Angelina Sondakh with additional penalties in the form of payment of compensation in the amount of Rp. 12.58 billion and US\$ 2.35 million (approx. IDR 27.4 billion). In the Anggie case, in the *judex factie* decision (TIPIKOR Jakarta High Court) with the defendant Irjend Pol Djoko Susilo, the decision to improve the *judex factie* decision (TIPIKOR Court at the Central Jakarta District Court), granted the indictment/demand of the Commission Eradication Corruption (KPK) prosecutor, which sentenced the defendant to 18 years and confiscated all of the defendant's assets in the past before the subject of the case being faced by the defendant.

However, based on data from Indonesia's Corruption Watch (ICW), only about 12–13 percent of state money can be recovered from the total losses due to corruption. In 2020, for example, 1,218 corruption cases were heard in the Corruption Court, the High Court, and the Supreme Court, with a total state loss of Rp 56.7 trillion. Meanwhile, the replacement money

² Ramadani, R., & Mamonto, M. A. W. W. (2019). Legalitas Sanksi Pidana Pencabutan Hak Politik Bagi Terpidana Korupsi: Perspektif Hak Asasi Manusia. *Petitum*, 7(2 Oktober), 63-71.

³ Ramadani, R., & Mamonto, M. A. W. (2018). Independency of the Corruption Eradication Commission of the Republic of Indonesia (KPK RI) in Indicators of Independent Regulatory Agencies (IRAs). *Substantive Justice International Journal of Law*, 1(2), 82-94.

⁴ Riyadi, S., & Santiago, F. (2021, December). Implications of Applying Criminal Money Substitutes to Coordination in Corruption Crimes as an Effort to Restore State Finances. In *2nd International Conference on Business Law and Local Wisdom in Tourism (ICBLT 2021)* (pp. 486-492). Atlantis Press.

returned to the state treasury for losses in the corruption case only amounted to Rp. 8.9 trillion.⁵

Efforts to seize assets in a country certainly require the political will of the state from the parliament, government, and judicial institutions. The political will of the parliament is related to the desire of the parliament to prepare legal instruments in an effort to confiscate assets from the beginning so that assets originating from criminal acts can be returned to the rightful parties. On this basis, this article seeks to analyze and explain the government's legal policy on recovering state losses through the return of assets resulting from corruption, as well as identify the obstacles faced by the policy.

Methods

This is a normative/doctrinal legal research study, which is a research model that examines law as a system of norms by referring to established principles, doctrines, theories, and legal concepts.⁶ The Normative Study uses secondary data consisting of primary legal materials that include relevant laws and regulations, as well as secondary legal materials in the form of literature and journals. The data were then analyzed qualitatively and descriptively.⁷

Results and Discussion

A. Legal Policy In Corruption Asset Recovery/Confiscation

In general, the return of assets resulting from a crime or what is commonly referred to as "criminal asset seizure" has been recognized in Indonesian criminal law through Article 10 b (additional punishment) of the Criminal Code (KUHP) and is further regulated in Articles 39–42 of the Criminal Code. The legal concept of confiscation of assets according to Indonesian criminal law is an additional crime that can be imposed by a judge, together with the main crime (in the United States and the Netherlands it can also be imposed separately by a

⁵ Toriq, A. P. (2021). *Tinjauan Yuridis Pelaksanaan Pengembalian Aset (Asset Recovery) Dalam Tindak Pidana Korupsi Sebagai Upaya Pemulihan Kerugian Negara (Studi Kasus Putusan Nomor 17/Pid. Sus-TPK/2020/PN. Sng)* (Doctoral dissertation, Universitas Islam Sultan Agung Semarang).

⁶ Benuf, K., & Azhar, M. (2020). Metodologi penelitian hukum sebagai instrumen mengurai permasalahan hukum kontemporer. *Gema Keadilan*, 7(1), 20-33.

⁷ Ramadani, R., Hamzah, Y. A., & Mangerengi, A. A. (2021). Indonesia's Legal Policy During COVID-19 Pandemic: Between the Right to Education and Public Health. *JILS (Journal of Indonesian Legal Studies)*, 6(1), 125-156.

judge). Article 39 paragraph (1) of the Criminal Code regulates any assets (goods) that can be confiscated, namely items belonging to the convict obtained from the crime or intentionally used to commit a crime can be confiscated.

The term "criminal act assets" is also reformulated in Article 1 paragraph (2) of the Draft Law (RUU) for the confiscation of assets, which are all movable or immovable objects, both tangible and intangible, that have economic value obtained or suspected to be derived from criminal acts. criminal. The draft Asset Confiscation Law itself is intended to pursue criminal assets, not against criminals.⁸ The formulation in the Draft Bill on Asset Confiscation is not the same as the types of assets that can be confiscated in Article 1 part 16 of the Criminal Procedure Code which includes assets used to commit criminal acts. Even assets that are suspected to be used to commit criminal acts.

In the context of dealing with corruption, the existing legal politics reflects a paradigm shift from punishment and deterrence to an emphasis on returning assets resulting from corruption. According to Sudarto, legal politics is the policy of the state through the competent bodies to establish the desired regulations, which are expected to be used to express what is contained in society and to achieve what is aspired to.⁹ The paradigm shift in the legal politics of dealing with corruption is in line with the desire or value of reform in the administration of the State, as well as the United Nations (UN) Convention Against Corruption (UNCAC), 2003), which regulates asset recovery. In the convention, it has been regulated that how to return assets resulting from criminal acts of corruption is a fundamental principle, and participating countries must make the widest possible efforts to cooperate and provide assistance in efforts to save assets.¹⁰

In relation to the regulation of the return of assets or state financial losses mentioned above, the Indonesian government has issued or made various regulations that can be used as the basis or basis in the government's processes and efforts to recover state financial losses as a result of corruption. These efforts are regulated in Law No. 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption; Law No. 31 of 1999 as

⁸ Saputra, R. (2017). Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia. *Integritas: Jurnal Antikorupsi*, 3(1), 115-130. p. 118

⁹ Kenedi, J. (2017). Kebijakan Kriminal (Criminal Policy) dalam Negara Hukum Indonesia: Upaya Mensejahterakan Masyarakat (Social Welfare). *Jurnal Pemerintahan dan Politik Islam: Al-Imarah*, 2.

¹⁰ *Ibid.*

amended by Law No. 20 of 2001 concerning the Eradication of Corruption Crimes (Corruption Law); Law 15 of 2002 as amended by Law No. 25 of 2003 concerning the Crime of Money Laundering (UU TPPU); and Law No. 1 of 2006 concerning Mutual Assistance in Criminal Matters.

In the sector of handling corruption, the politics of criminal law in Indonesia has ratified UNCAC 2003 with Law Number 7 of 2006 concerning Ratification of the Convention Against Corruption. The UNCAC 2003 has been adopted by the UN General Assembly in its resolution No. 58/4 dated October 31, 2003, and is open for signature in Mexico from December 9 to December 11, 2003, regarding illicit enrichment, which is a criminal offense that stands alone. Although limited to the element of self-benefit, the spirit of criminalization is an element of 'state loss' in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on the Eradication of Corruption Crimes. In UNCAC 2003, it is no longer an important element (see Article 3 point 2 regarding scope and application), which stipulates that:

“for the purpose of implementing this convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property”.

The scope of the imposition of law in the form of recovery of state losses or replacement money, in principle, is not limited to Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999 alone. In the body of Law No. 20 of 2001, there are many articles that are scattered and have coherence to the firm efforts of law enforcement so that the defendant can return the state's finances. One of them is proof of the reverse burden by the defendant.

Furthermore, the Corruption Law also explicitly stipulates that the return of state financial losses can be carried out through two legal remedies, namely criminal and civil handling.¹¹ Criminal handling is carried out by investigators by confiscating property belonging to the perpetrator, which has previously been decided by the court, with an additional criminal decision in the form of money to replace state financial losses by the judge. While the handling of civil matters (through Articles 32, 33, and 34) of Law No. 31 of 1999 and Article 38 C of Law No. 20 of 2001, which were carried out by the State Attorney (JPN) or the agency that was harmed. The process or procedure for criminal instruments is specifically contained in the two laws, while for civil law instruments it uses the usual provisions

¹¹ Jamillah, J. (2015). Pertanggungjawaban Hukum dalam Pengembalian Aset Hasil Korupsi di Indonesia. *Jurnal Mercatoria*, 8(2), 163-175.

contained in the Civil Code and its procedural law. Furthermore, there are specificities in the use of criminal instruments, which include:

1. The defendant is obliged to provide information regarding all of his assets, his wife's assets, her husband's assets, and the assets of other parties suspected of having a relationship with the act of corruption that he is accused of;
2. If the defendant is unable to prove that his assets (which are disproportionate to his income) do not originate from corruption, then his assets are deemed to have been obtained from acts of corruption (illicit enrichment) and the judge has the authority to confiscate them;
3. In the event that the defendant dies before the judge's verdict is handed down and there is strong evidence that the defendant committed an act of corruption, the defendant's property can be confiscated by the judge..

Efforts to recover corrupt assets are also supported by the existence of state finance audit institutions such as the Indonesian Financial and Development Audit Agency (BPKP) and the Indonesian Financial Supervisory Agency (BPK), which have attributive authority to calculate state losses. In terms of proof, the government only needs to calculate how much income is appropriate for the perpetrator, then compare it with the assets owned. If the assets owned exceed the amount of income, the perpetrator is obliged to prove that the assets were obtained legally.¹²

B. Obstacles to Corruption Asset Recovery/Confiscation

Law enforcement on the return of "stolen" state assets (stolen asset recovery) from the proceeds of criminal acts of corruption, does not escape various obstacles. In principle, Soerjono Soekanto suggests seven factors that hinder law enforcement: 1) weak political will and political action of state leaders; 2) Legislation that reflects the political interests of the authorities rather than the interests of the people; 3) Low moral integrity, credibility, professionalism and legal awareness of law enforcement officers; 4) The lack of facilities and infrastructure as well as facilities that support the smooth process of law enforcement; 5) society's legal culture is still low and lacks respect for the law; 6) The law enforcement

¹² Kennedy, A. (2006). Designing a civil forfeiture system: an issues list for policymakers and legislators. *Journal of Financial Crime*. p. 38

paradigm that is still positivist-legalistic which prioritizes the achievement of formal justice rather than substantial justice; and 7) The policies taken by the relevant parties (stakeholders) in overcoming the problem of law enforcement are still partial, patchy, not comprehensive and systematic.¹³

The same factors also affect efforts to recover state losses through the confiscation of assets resulting from corruption. Ridwan Arifin, et al. stated that in terms of the legal system, a number of obstacles in the recovery of corrupt assets include those related to legal substance. The obstacles found are inadequate laws and regulations. Although Indonesia has ratified UNCAC, the mechanism for asset recovery has not yet been regulated more clearly and in more detail; 2) the legal structure in this case, law enforcement officers, is also an obstacle. The lack of capacity of law enforcement officers, especially the judge's decision, which does not mention the amount of assets to be seized and where they are located, is a separate obstacle.¹⁴

In terms of policies and infrastructure, the confiscation of corrupt assets is becoming increasingly difficult because the safe haven for the proceeds of these crimes extends beyond national borders. For developing countries, it will be difficult to penetrate the various problems of asset recovery that touch the legal provisions of large countries. Especially if the developing country does not have a good cooperative relationship with the country where the stolen assets are stored. Not to mention the very limited technological capabilities of developing countries.¹⁵

In general, perpetrators of criminal acts will try to hide or disguise the origin of assets resulting from criminal acts in various ways so that the assets at the origin of the crime are difficult to trace by law enforcement officials. As Dutcher once stated, white collar crime is almost related to the circulation of money, which does not only involve one party, but is organized with various types of actions such as fraud, inflating, and even money laundering.

The perpetrators of criminal acts of corruption have access that is quite broad and difficult to reach in storing and laundering money (money laundering) the results of criminal

¹³ Soerjono Soekanto. Faktor-Faktor yang Mempengaruhi Penegakan Hukum di Indonesia. PT Raja Grafindo Persada : Jakarta. 2004. hal. 11-68.

¹⁴ Arifin, R., Utari, I. S., & Subondo, H. (2017). Upaya Pengembalian Aset Korupsi Yang Berada Di Luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi Di Indonesia. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 1(1), 105-137.

¹⁵ Pakpahan, R. H., & Firdaus, A. (2019). Pembaharuan Kebijakan Hukum Asset Recovery: Antara Ius Constitutum dan Ius Constituendum. *Jurnal Legislasi Indonesia*, 16(3), 369-378.

acts of corruption.¹⁶ A similar statement was also revealed by an international institution, the Basel Institute on Governance, the International Center for Asset Recovery, stating that asset recovery is a complex issue to explore, which includes banking problems and is related to the position or influence attached to perpetrators of corruption.

In fact, the confiscation of assets resulting from criminal acts of corruption as an effort to recover state losses has encountered many other obstacles, such as:¹⁷

1. Replacement money that has not been paid to the state > Rp. 10 Trillion (although there are improvements, for example with the formation of a Task Force at the Attorney General's Office);
2. Laws that support the return of assets have not been optimally used, for example the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, provisions regarding reverse proof of unnatural wealth (Articles 77-78 of money laundering offenses and 38 B Corruption);
3. Tracking, securing, and confiscation of assets have not been carried out optimally;
4. There are weaknesses in law enforcement practices (typing errors, no nexus, procedures not being followed, etc.);
5. The small amount of replacement money.

Conclusion

Corruption has resulted in huge losses to the state, both from an economic and social perspective. On that basis, the orientation of legal policy towards dealing with corruption shifts from punishment to the recovery of state losses. This effort is carried out with a series of legal policies that legitimize law enforcement officers to confiscate assets resulting from corruption, both through criminal and civil channels. However, a number of existing legal policies still face obstacles both at the level of norms and in their implementation. For this reason, a great commitment from the government and law enforcement officials is needed to maximize the seizure of corrupt assets through the formulation of better legal norms, support

¹⁶ Nainggolan, J., Suganda, A., & Makbul, A. (2021). Upaya Penegakan Hukum Terhadap Terpidana Tindak Pidana Korupsi Sebagai Upaya Pengembalian Kerugian Negara. *Jurnal Penelitian Hukum Legalitas*, 15(1).

¹⁷ Husein, Y. (2017). Pengembalian Aset Hasil Tindak Pidana (Asset Recovery) Dan Corporate Criminal Liability. Bahan Presentasi di STHI Jentera, Jakarta 22 Februari 2017.

for international and cross-sectoral cooperation, as well as budgetary and technological support as needed.

References

- Arifin, R., Utari, I. S., & Subondo, H. (2017). Upaya Pengembalian Aset Korupsi Yang Berada Di Luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi Di Indonesia. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 1(1), 105-137.
- Arliman, L. (2019). Mewujudkan Penegakan Hukum Yang Baik Di Negara Hukum Indonesia. *Dialogia Iuridicia: Jurnal Hukum Bisnis dan Investasi*, 11(1).
- Benuf, K., & Azhar, M. (2020). Metodologi penelitian hukum sebagai instrumen mengurai permasalahan hukum kontemporer. *Gema Keadilan*, 7(1), 20-33.
- Hiariej, E. O. (2013). Pengembalian Aset Kejahatan. *Jurnal Opinio Juris*, 13, 2-3., hlm. 4
- Husein, Y. (2017). Pengembalian Aset Hasil Tindak Pidana (Asset Recovery) Dan Corporate Criminal Liability. Bahan Presentasi di STHI Jentera, Jakarta 22 Februari 2017.
- Jamillah, J. (2015). Pertanggungjawaban Hukum dalam Pengembalian Aset Hasil Korupsi di Indonesia. *Jurnal Mercatoria*, 8(2), 163-175.
- Kenedi, J. (2017). Kebijakan Kriminal (Criminal Policy) dalam Negara Hukum Indonesia: Upaya Mensejahterakan Masyarakat (Social Welfare). *Jurnal Pemerintahan dan Politik Islam: Al-Imarah*, 2.
- Kennedy, A. (2006). Designing a civil forfeiture system: an issues list for policymakers and legislators. *Journal of Financial Crime*.
- Latifah, M. (2016). Urgensi Pembentukan Undang-Undang Perampasan Aset Hasil Tindak Pidana Di Indonesia (The Urgency Of Assets Recovery Act In Indonesia). *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan*, 6(1), 17-30.
- Nainggolan, J., Suganda, A., & Makbul, A. (2021). Upaya Penegakan Hukum Terhadap Terpidana Tindak Pidana Korupsi Sebagai Upaya Pengembalian Kerugian Negara. *Jurnal Penelitian Hukum Legalitas*, 15(1).
- Pakpahan, R. H., & Firdaus, A. (2019). Pembaharuan Kebijakan Hukum Asset Recovery: Antara Ius Constitutum dan Ius Constituendum. *Jurnal Legislasi Indonesia*, 16(3), 369-378.

- Ramadani, R., & Mamonto, M. A. W. (2018). Independency of the Corruption Eradication Commission of the Republic of Indonesia (KPK RI) in Indicators of Independent Regulatory Agencies (IRAs). *Substantive Justice International Journal of Law*, 1(2), 82-94.
- Ramadani, R., & Mamonto, M. A. W. W. (2019). Legalitas Sanksi Pidana Pencabutan Hak Politik Bagi Terpidana Korupsi: Perspektif Hak Asasi Manusia. *Petitum*, 7(2 Oktober), 63-71.
- Ramadani, R., Hamzah, Y. A., & Mangerengi, A. A. (2021). Indonesia's Legal Policy During COVID-19 Pandemic: Between the Right to Education and Public Health. *JILS (Journal of Indonesian Legal Studies)*, 6(1), 125-156.
- Riyadi, S., & Santiago, F. (2021, December). Implications of Applying Criminal Money Substitutes to Co-ordination in Corruption Crimes as an Effort to Restore State Finances. In *2nd International Conference on Business Law and Local Wisdom in Tourism (ICBLT 2021)* (pp. 486-492). Atlantis Press.
- Saputra, R. (2017). Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia. *Integritas: Jurnal Antikorupsi*, 3(1), 115-130. hlm. 118
- Siahaya, M. J. C. (2015). Pengembalian Kerugian Keuangan Negara Dalam Tahap Penyidikan Tindak Pidana Korupsi. *Lex Crimen*, 4(2).
- Sosiawan, U. M. (2020). Penanganan Pengembalian Aset Negara Hasil Tindak Pidana Korupsi Dan Penerapan Konvensi PBB Anti Korupsi di Indonesia. *Penelitian Hukum De Jure*, 20.
- Toriq, A. P. (2021). *Tinjauan Yuridis Pelaksanaan Pengembalian Aset (Asset Recovery) Dalam Tindak Pidana Korupsi Sebagai Upaya Pemulihan Kerugian Negara (Studi Kasus Putusan Nomor 17/Pid. Sus-TPK/2020/PN. Smg)* (Doctoral dissertation, Universitas Islam Sultan Agung Semarang).