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Norm of Recovery of State Financial Loss Because of Criminal Act of Corruption in Indonesia

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Abstract

Corruption is a crime that causes the state financial loss. Against the state financial losses, it makes Law no. 31 of 1999 which has been amended by Law no. 20 of 2001 and may even be incorporated by Law no. 08 of 2010, sets policy that the state financial loss must be repaid or reimbursed by corruptor (Asset Recovery). Reimbursement of state financial losses requires clear law and regulation regarding the expropriation of the asset of convict of corruption and accompanied by evidence to avoid violating existing laws or regulations. The asset cannot be taken away without regarding the rights of suspects or defendants or convict. In Article 17, 18, 19, 26 and Article 28 of the Corruption Law, it is explained that the asset of the convict that is confiscated is a asset derived from the corruption or at least that has to do with the criminal act of corruption. Similarly, in Article 38 and 39 of the Criminal Procedure Code (KUHAP), it is explained that the goods which may be confiscated or seized are goods used or related to a crime. The process of law enforcement must be carried out in accordance with the ideals of law, the most important is how the establishment of justice, the existence of legal certainty and advantage. In enforcing the law, the Investigator or Public Prosecutor and Judge should not violate the law. Corruptors should be punished in accordance with the existing legal norms, but by prioritizing justice and keeping human rights.

Keywords: Corruption, Criminal Act, State Finance, Law Enforcement, Corruptor.

A. Introduction

Corruption is one type of crime with an economic motive which in its mode of implementation is very complex. The complexity of that criminal act can be seen from the development of the mode used in committing the crime, such as the easy to flee the money from the result of crime, it can be done by using a computer, internet network, without having to go abroad and only takes a moment. The main purpose of the perpetrators of crime with economic motives is to get as much wealth as possible. Logically, asset for criminals is the blood that sustains the crime, so the most effective way to eradicate and prevent crime with economic motive is to kill the life of the crime by robbing the proceeds and instruments of that criminal act.

In Indonesia, corruption is an unheard word so that political direction of law in the reform era nowadays, the government focused on efforts to combat corruption and acceleration of implementation of bureaucratic reform. Regarding the crime of corruption is very detrimental to the joints of life of society and state, and therefore efforts to combat corruption must be done systematically so it does not give the slightest opportunity for corruption to deprive the people's rights. One element in the criminal act of corruption is the state financial loss. According to the law (Act) no. 1 of 2004 concerning State Treasury, CHAPTER I Article 1 Number 22 states that what is meant by the loss of the state/ region is lack of money, securities and goods which are real and certain in number as a result of unlawful actions either intentionally or negligently. State financial losses can occur in 2 (two) stages, ie at the stage of funds will go to the state treasury and at the stage of funds will be out of the state treasury. At the stage of the funds that will go into the state treasury, losses can occur through

a tax conspiracy, a conspiracy of fine penalty payments, additional criminal enforcement conspiracies (state financial reimbursement due to losses) and smuggling.

The reimbursement of state finances due to corruption is the most important thing today and its implementation is very difficult because in general corruption both on a small scale and on a large scale are carried out in highly secret, veiled, involve many parties with strong solidarity to protect or cover each other criminal act of corruption through legal manipulation. The wealth of proceeds of crimes committed by corruptors, the ownership rights has often been transferred to third parties, to obscure the origins of the wealth. Thus, great state assets resulting from criminal acts of corruption are darkened so as not to be tracked by the law enforcement apparatus. In addition, the implementation of state financial reimbursement due to corruption crime is also not necessarily can be done. In addition, to wait for reimbursement from convict of corruption cases that require a long time, reimbursement to the state treasury cannot be done immediately. This is because there must be a bureaucratic procedure that is passed, so it takes time to reimburse the state finance to the state treasury so that it can be immediately used for the welfare of the people. Criminal threats in the provisions of Law Number 31 Year 1999 on corruptors can be in the form of imprisonment and also a fine. In the Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning the Eradication of Corruption in Article 18 Paragraph (1) letter b regulates the payment of replacement money in the amount that is equal to the amount of asset obtained from corruption criminal act. The article is an additional criminal form that can be imposed on the defendant of corruption. The main punishment which is accompanied by additional criminal is specified in Article 2 and Article 3 of Corruption Eradication Act which in its element of complaint mentions about detrimental to state finance or state economy. The deterrent effect of punishment is generally applied to two aspects, namely the self-perpetrators in the individual scope and the deterrent effect that can be applied in the general scope[1]. The main purposes of punishment/ impacts for the perpetrator are[2]: 1. The ownership of the right of material and the comfort of the perpetrator; 2. freedom / independence of acts upon the activities of the perpetrator; 3. the reputation or social status of the perpetrator; 4. the relationship / social interaction of the perpetrator; 5. spiritual and prosperity of the perpetrator.

The imposition of imprisonment as a money for substitute of criminal in consistent way between the defendants is a form of legal certainty and the consideration to impose money for substitute of criminal, minimum and maximum limitation can be given, in order to provide guarantees and at the same time close the opportunity for the convicted person to choose a substitute for imprisonment rather than choosing to return the state money. The determination of the minimum and maximum limits on replacement of replacement money criminal in the form of additional imprisonment shall use measurable parameters with the same perception among law enforcers, for example by considering the position, existence and contribution of the defendant in a criminal act of corruption.[3] Scheduling of payment of replacement money that is mentioned in the Law of Eradication of Corruption within a month, then the next stage is the expropriation of assets of the convict, did not set out clearly the time required to complete the search/ asset tracking of convict and the time required to process the auction of such assets after the assets of the convict obtained by the state.[4] Act states that the Eradication of Corruption[5], if the convicted person does not pay compensation not later than 1 (one) month after the court decision that has obtained permanent legal force, then his asset can be seized by prosecutors and auctioned to cover the compensation. If the asset is insufficient to pay the replacement money, then the Convict shall be punished by imprisonment whose duration does not exceed the maximum threat of the principal penalty in accordance with the provisions of this law and the duration of the criminal sentence has been determined in the court decision.[6]

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[1]*Fontian M., Imas RW., dan Sukendar. Kesebandingan Pidana.*

[2]Christopher Harding, Richard W. Ireland, *Punishment Rhetoric, Rule, and Practise*, First Published, Routledge, New York USA, hlm. 118

[3]Mario J. Rizzo, *Economic Cost, Moral Costs or Retributive, The Cost of Crime* (editor Charles M. Gray), Volume 12, Sage Publication, Inc, Londong, England, 1979, hlm. 277

[4]Pasal 18 ayat (2), UU No. 31 Tahun 1999 sebagaimana telah diubah dengan UU 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi.

[6]Pasal 18 Ayat (3), UU No 31 Tahun 1999 sebagaimana telah diubah dengan UU 20 Tahun 2001 tentang Pemberantasan

Based on the explanation above it is expected that every decision of judgment in Court is not just to end the two-party disputes, or more, it gives the right on the one hand and imposes a duty on the other hand, punish the guilty or acquit the innocent. The judge's verdict may also be the beginning of a dispute, the continuation of injustice, the beginning of a new calamity for the punishment of an act which he has never committed or an inhuman punishment, therefore the judge's verdict may not necessarily bring happiness, it may even present the suffering and unbelief that is very wide. Suffering and distrust in judges' verdict are not only triggered by unfair processes and decisions but also because of disparities between one or more relatively similar cases, both process disparities, legal interpretation disparities, treatment disparities, and disparities in final decision. The disparities of judge's verdict, especially criminal judgments, are one of the classic problems of criminal court anywhere, which has made many countries pay special attention to this aspect because it involves fate, rights, reputation and even human life. The disparity of this judge's verdict will be fatal, when associated with the administration of the guidance of the convict. Convict after comparing the offense that charged him and that imposed on others, and then feel like a victim of uncertainty or irregularity of court will make the convicted person does not respect the law, but an appreciation of the law is one of the results that wants to be achieved within the tujuan pemidanaan. Therefore, there is a need for a new policy to create a clear law and regulation that regulates in detail on the confiscation of asset owned by convict of corruption which is not obtained from corruption in order to reimburse the state finance due to losses.

B. Research Method

Research method which is used in this study is the approach method that is normative juridical, specification of this research is analytical descriptive and use the analysis which is qualitative juridical. In the normative juridical approach, research is focused on reviewing the implementation of rules or norms in positive law and to identify the concepts and legal principles used in law enforcement of corruption, especially the financial loss of the state as one of the elements of corruption. Then the research specification is analytical descriptive so the approaches are statute-approach, analytical approach and the comparative approach and it uses its analysis that is qualitative juridical.

This research is a literature law research, so the type of data used is secondary data that comes from bibliography. The secondary data are primary legal materials (ie binding legal materials), secondary legal materials (which provide an explanation of primary legal material) and tertiary legal materials (which provide guidance as well as explanations of primary and secondary legal materials).[1]

Primary legal material is a legal material consisting of legal rules sorted by hierarchy starting from the Constitution of 1945, laws, Government Regulations, and other rules under the law, as well as foreign legal material[2] as a comparison of existing legal materials were analyzed to see the setting and implementation of the confiscation of asset that is not derived from the corruption to reimburse the finance of state due to losses, so it can serve as a basic reference and legal considerations which are useful in the arrangement of law of asset deprivation of of corruption criminal act then.

Secondary law materials are legal materials obtained from textbooks, foreign journals, scholars' opinions, legal cases, and symposia by experts related to corruption, while tertiary legal materials such as legal dictionaries, encyclopedias and others, another is a legal substance that provides guideline or meaningful explanation and/ or gives meaning to a concept that has not been clearly understood, either in primary legal material or through secondary legal material.

Tindak Pidana Korupsi

[1]Robert E.Rodes, Jr., & Howard Pospesel, *Premises and Conclusion, Symbolic logic for Legal Analysis*, Prentice Hall, Upper Saddle River, New Yersey, 1997, hlm. 7.

[2]Jhonny Ibrahim, *Teori dan Metode Penelitian hukum Normatif*, Malang: Bayumedia Publishing, 2005, hlm. 391. Lihat juga: Berdnard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum*, Bandung: Mandar Maju, 1997, hlm. 127.

Primary legal materials and secondary legal materials are collected based on the topic of problems that have been formulated based on snowball system and are classified according to source and hierarchy to be reviewed comprehensively. The legal material obtained in the study of literature, law and regulation, and articles are described and linked in such a way, so that they are presented in more systematic writing to answer the problems that have been formulated.

C. Results And Discussion

In the case of corruption as Law No. 31 Year 1999 jo Law No. 20 of 2001 set about return assets from corruption either through civil (civil procedure) in the form of a civil suit or criminal procedure. Return on assets (asset recovery) of perpetrators of corruption through civil suit orderly regulated in the provisions of Article 32, Article 33 and Article 34 and Article 38C of Law No. 31 of 1999 jo Law No. 20 of 2001. Then, through criminal procedure as the provisions of Article 38 Paragraph (5), Article 38 paragraph (6) and Article 38B paragraph (2) with the process of seizure and confiscation. The provisions above authorize the State Attorney-prosecutor or an aggrieved institution to file a civil lawsuit against the convicted person and/ or his heirs whether at the investigation, prosecution or trial level of the court. Then in the Criminal Procedure Code explained that in order to be able to be deprived, the asset must be the result of an offense or crime.

Regarding the asset deprivation mechanisms which are based on Article 18 (a) Corruption Act states: "The deprivation of movable goods that are tangible or intangible or immovable goods used for or derived from corruption, including company owned by the convict of corruption criminal acts where corruption done, as well as the price of the goods that replace the goods." Based on that Article, so the act of deprivation of assets has been regulated and made as sanction against the perpetrators of corruption, in the case of efforts to return the proceeds of the crime. Furthermore, the Corruption Act places asset deprivation actions not only as criminal sanction, in the matter of asset deprivation can be done in the term of that the defendant dies before a verdict is imposed against him or her with sufficient evidence that he or she has committed a criminal act of corruption, so the judge with the indictment of the prosecutor shall determine the act of confiscation to the goods which have been seized previously (Article 38 Figure (5) Corruption Law).

The provision of civil law procedure is based on Article 32 Paragraph (1) of Corruption Law that decides: "In the term that that investigators find and state that one or more elements of corruption meaning that there is not enough evidence, while obviously there are losses of the finance of state, then investigators immediately hand over the case file of the results of such investigation to the State Attorney to file a civil suit or submitted to the aggrieved institution to file a lawsuit". "Paragraph (2) determines:" Verdict of acquittal in corruption case does not eliminate the right to demand losses of finance of state, "and Article 33 of the Law on corruption decides: "In the case that a suspect die during the investigation, while obviously there are losses of the finance of state, then investigators immediately hand over the case file of the results of such investigation to the State Attorney to file a civil suit or submitted to the aggrieved institution to file a civil lawsuit to his heirs." Article 34 of the Corruption Law decides:" In the matter that a defendant dies when in a court trial, whereas obviously there has been a loss of the state, the prosecutor shall immediately submit a copy of the hearing to the State Attorney or be handed over to the aggrieved institution to file a civil lawsuit to his heirs." and Article 38 C of the Corruption Act determines" If after the judgment has obtained a permanent legal force, it is known that there are still assets of the convict that are allegedly or reasonably suspected that those are from acts of corruption which has not been imposed with the deprivation of the state referred to Article 38C Paragraph (2), so the state can file a civil suit against the convict and/ or his or her heirs."

Act number 20 of 2001 regarding the amendment of the Act Number 31 of 1999 through a civil lawsuit, and the provision of Article 38 Paragraph (5) determines: "In the matter that the defendant die before verdict is decided and there is enough evidence that the person has committed a corruption, the judge with the demand of the public prosecutor determines the deprivation of goods

that have been confiscated." Article 38 Paragraph (6) determines: "Determination of deprivation referred to paragraph (5) can not be applied for an appeal." Article 38B Paragraph (2) determines: "Where the defendant cannot prove that the asset as referred to subarticle (1) is obtained not from corruption, the asset is deemed to be obtained from corruption and the judge is authorized to decide that all or part of the asset is confiscated for the state. "The provisions which are mentioned above authorize the State Attorney or an aggrieved institution to file a civil lawsuit against the convict and/ or his or her heirs either at the level of investigation, prosecution or hearing in court.

Theoretically, some people agree that punishment increases adherence and suppresses antisocial behavior only for a short period after the penalty is applied.[1] Corruption is an extraordinary crime that damage social values of society gradually and take economic interest of the country. The economic right of the state is the right that should be gained economically as a result of activities in the form of development in the field of economy by the state, which will create economically added value for the state. Added value economically such as the procurement of public facilities such as markets or construction of infrastructure such as public street. The wider community must get protection so that their rights are not lost due to the corruption. The economic value that will be created by the state directly or indirectly for the interest of the wider community will be delayed / lost due to the criminal act of corruption. Criminal imposition is worth to use guidance, for example in the form of tabulation to establish consistency among judges and provide legal certainty for the defendants and avoid wide disparities between defendants.

Payment of replacement money are additional criminal in corruption laws in Indonesia.[2] Criminal addition cannot be imposed itself but it was imposed together with the main criminal. Payment of replacement money is an attempt to restore the state's financial condition as it was for the state losses or the state's economy created by corruption. Compensation is an additional criminal punishment sentence against the defendant of corruption mentioned in Article 18 of Law paragraph (1) letter b together with the main criminal punishment sentence in Article 2 and Article 3 of Corruption Act. Violations of law in Article 2 and Article 3 of Corruption Act are dominated in cases of procurement of goods and services aimed at developing the economy directly or indirectly.

Other actors in the matter of compensation of replacement money is including the calculation of the time value of money in which that result of the calculation after added with losses of state that have to be paid, it is expected to be equal to the loss of the economic value of the development by the state in that period. The theory of retaliation is often characterized as a responsibility of justification of punishment which sees on past conditions/ situations in which are contrary to prevention theory, and also theoretical reform, which really look to the future.[3] Prevention may also be done indirectly by providing deterrent effect, in which the effect can be effective against the party that is potential or intend to commit a crime.[4] Wright and Walgrave said that providing infliction that is directly imposed by law enforcer. Meanwhile, Daly and Duff said, that penalty is as something that is considered by the perpetrator to be a burden. In addition, another notion stated by Barton and Dignan, which is to adopt a very broad idea that penalty is as every act imposed to the perpetrator.[5] The theory of retaliation according to writer can be defined / interpreted as a consequence given by the law-grounded state, which has set a legal effect and the important thing is the conformity / equality between the act and the penalty imposed. Implication of penalty is defined as infliction from the harsh treatment by state authorities to a person for his mistake in respecting the law. The calculation of loss of money of state should be calculated in detail by considering the time span up to the money of the country can be returned by convict of corruption. The process of investigation, trial, prosecution until the process in the court has the potential to spend a long time to the level of cassation, especially if the crime is only revealed after a few years later. The money of state corrupted by the defendant within the time span (legal process) makes the money/ fund of the country becomes futile, especially regarding the crime

[1] *Ibid* **28** Jurnal Hukum IUS QUIA IUSTUM NO. 1 VOL. 22 JANUARI 2015: 25 – 53
[2] Ted Honderich, *Punishment*, *The Supposed Justifications*, Cambridge, USA, 1989, hlm. 51
[3] Pasal 18 ayat (1) huruf b, UU No. 31 Tahun 1999 sebagaimana telah diubah dengan UU 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi.
[4] Jurnal Hukum ius quia iustum no. 1 vol. 22 januari 2015: 25 – 53
[5] Joel Feinberg, *The Expressive Function of Punishment*, State University of New York Page, Albany, 1972, hlm. 25

that has just started its investigation after a long time happened. Replacement of money of the state in such time span is illustrated as if the funds are deposited / invested in other Banks / financial institutions, where practically the fund will grow with the addition of which comes from the interest element calculation. The calculation of the loss of money of state by calculating the interest rate of Bank (time value of money) in the form of compensation value, will deliver justice for the society where rights of economic enjoyment is delayed due to the corruption.

Essentially, the asset recovery of perpetrator of the criminal act of corruption is very important in its existence. If it is described more systematically then there are some arguments as a theoretical justification and practice of why asset recovery of perpetrator of the criminal act of corruption is an important in its existence with a starting point:

a. Philosophical Justification.

In this aspect, the asset return of corruption criminal acts may consist of fixed objects or movable objects or may also be money of corruption both in the country (Indonesia) and abroad. From this dimension, the asset is essentially money of the state *in casu* which is coming from public fund. In developing countries, on one hand as dimension of Stolen Asset Recovery Initiative is that stolen assets every year are about 20-40 Billion US $. Then on the other hand, in developing countries there is a barrier due to the absence of regulations that regulate the confiscation of asset without going through the process of criminal justice (non-conviction base) so that it needs arrangement of non conviction base of stolen asset recovery which regulates the legal mechanisms of freezing, seizure and confiscation of asset without the need to be proven that it is involved in a criminal case where this process in the Draft of Law of Asset Seizure of Corruption Criminal Act of Indonesia Year 2008 there are actions such as searching, frisking, blocking, confiscation and seizure which is in the form of *In Rem* and criminal confiscations. Logically, by the asset recovery it is expected to have a direct impact to restore the state's finances or the state's economy which ultimately boils down to the welfare of society. If the point is the legislation policy, essentially the corruption occurs systemically and widespread and also has violated the social and economic rights of the wider community. Logical consequence is to realize equitable, affluent and prosperous society, there must be an action continuously and the effort that also cannot be excluded is effort which is preventive, repressive eradication of corruption and restorative approaches. Preventive action means to build public perception that there is no safe place in the world for corruptor to hide their assets. Then repressive action is interpreted on how the perpetrator was imposed criminal based on justice and criminalization principles that are proportional based on the degree of mistake. Restorative action that one of them is the asset recovery of the perpetrator of criminal acts of corruption in the form of criminal law acts, civil lawsuit in the form of *In Rem* seizure which is an action of the state in taking over the assets through a court decision in a civil case based on the stronger evidence that the asset is allegedly from a criminal act or used for a criminal act or international cooperation in mutual assistance in criminal matters between the corruption victim state or country of origin and the state that keeps the assets of corruption or custodial state.

b. Sociological Justification.

Reviewed from the perspective of the provisions of Law on corruption eradication then the aspirations of the people to eradicate corruption and other forms of irregularities are increasing. In fact, corruption has caused great losses to the state, which has resulted in crisis in various fields. Strictly speaking, based on data loss of state finances it can be said that Indonesia as a country of corruption victims. Therefore, efforts to prevent and eradicate corruption need to be intensified and intensified by continuing to rise high human rights and public interest. In addition, with the eradication of corruption, one of them through asset recovery will have a wide impact on the community. Concretely, the public will see and assess the seriousness of law enforcement on the eradication of corruption by upholding the principle of presumption of innocence, the principle of equality before the law and the principle of legal certainty (*recht zekerheids*). In addition, this sociological justification is a concrete manifestation and the role of legislation and application policies to provide wider space for

cooperation between law enforcement officers and community participation as mandated by Article 41 Act number 31 of 1999 jo Law number 20 year 2001.

c. Sociological Justification.

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d. Practical Juridical Justification

Provision of Act of the eradication of corruption provides wider space and dimension for law enforcement, society and all layers to be more comprehensive in tackling the effects and impacts of corruption. Therefore, legislation policy provides space in the eradication of corruption that can be done through criminal procedure and civil procedure. Essentially, the aspect of the asset recovery of corruption through criminal procedure can be a criminal punishment to the perpetrator such as a fine or the defendant is punished to pay the replacement money. In addition, the asset recovery of corruption can also be done through civil suit in the District Court. If this path will be pursued essentially, the success of asset recovery is expected to be relatively higher because of evidence of civil law merely for formal truth *(formeele waarheid*). With the existence of combination of two actions in the criminal act of corruption in the form of asset recovery of the perpetrators of corruption by criminal acts and civil action then it is expected that community justice can be achieved. This aspect must be understood more deeply because of the criminal act of corruption as an extraordinary crime so that its eradication cannot be done partially but is integral. With the existence of the cooperation which is integral, it is expected later that the corruption is relatively getting results as optimal as possible.

D. Conclusion

The conclusion of this study is the norm of reimbursement of state finance or replacement money should be done by prioritizing a sense of justice and does not conflict with the existing rule of law, not because they want to impoverish the corruptors, the existing norms are violated. Therefore, efforts to prevent and eradicate corruption need to be increased and intensified by upholding human rights and public interest. In addition, by the existence of the eradication of corruption through the return of assets so it will have a broad impact on society that the public will see and assess the seriousness of law enforcer on eradicating corruption by upholding the principles of presumption of innocence, equality before the law and the principle of legal certainty (*recht zekerheids*).

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