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## A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory

### Article

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### Abstract

This paper critically examines stolen assets recovery in Indonesia, employing Gustav Radbruch's legal philosophy, which asserts that justice is the purpose of law and any rule failing to promote justice is invalid, along with Lawrence Friedman's sociological theory. The aim is to illuminate Indonesia's challenges and opportunities in recovering ill-gotten assets, an issue intertwined with corruption, transnational crime, and international cooperation. Radbruch's formula serves as the moral and ethical basis for evaluating asset recovery. It prioritizes justice in legal systems, insisting that just laws are the only legitimate ones. This paper applies Radbruch's formula to assess Indonesia's legal frameworks and processes for asset recovery, emphasizing principles like fairness, equity, and legitimacy within this context. Furthermore, this study incorporates Friedman's sociological theory, which examines how law evolves in response to social norms and values. It explores how sociocultural factors in Indonesia influence the development of legal mechanisms, public attitudes, and enforcement strategies regarding asset recovery. These perspectives offer valuable insights into Indonesia's asset recovery challenges. They underscore the need for a holistic approach that integrates ethics, law, and sociology to enhance fairness and effectiveness. International collaboration is also emphasized due to the transnational nature of illicit financial flows. This paper contributes to a nuanced examination of Indonesia's stolen assets recovery. By bridging legal philosophy and sociological theory, it provides a comprehensive framework for policymakers, legal professionals, and scholars engaged in pursuing justice and asset recovery in Indonesia and beyond.

**Keywords:** *Stolen Assets Recovery; Justice; Legal Certainty.*

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## INTRODUCTION

Corruption, in all its manifestations, has emerged as a ubiquitous adversary, transcending borders to afflict not only the people of Indonesia but also communities, nations, and governments worldwide. In contemporary times, corruption is recognized as a transnational organized crime, possessing characteristics that render it an extraordinary threat. It is asserted that corruption is no longer confined to local boundaries; instead, it has evolved into a transnational phenomenon,

exerting its impact on societies and economies globally. Consequently, fostering international collaboration is imperative to both prevent and control this pervasive menace.<sup>1</sup>

No country or nation remains impervious to the scourge of corruption, and Indonesia is regrettably no exception. Corruption has transformed into a transnational challenge, necessitating cooperative efforts on an international scale for prevention, asset recovery, and addressing the diverse actors involved in corrupt practices.<sup>2</sup> The eradication of corruption demands robust inter-state cooperation, underscoring the interconnectedness of nations in the shared pursuit of a corruption-free world.<sup>3</sup>

Eliminating corruption and envisioning a world free from its shackles may appear insurmountable, yet the commitment to unite and combat corruption persistently evolves daily. The collective aspiration to achieve this shared goal remains steadfast, even if the journey proves to be lengthy.<sup>4</sup> In Indonesia, the battle against corruption is not only a priority but is also positioned as a central adversary, influencing the country's law enforcement and developmental agendas. Despite being ranked 118<sup>th</sup>, Indonesia's efforts in this regard are continually on the rise.<sup>5</sup>

- <sup>1</sup> Ridwan Arifin, Indah Sri Utari, and Herry Subondo. "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, No. 1 (2017): 105-137. See also Ridwan Arifin, "Analisis Hukum Internasional dalam Perampasan Aset di Negara Kawasan Asia Tenggara Berdasarkan United Nations Convention Against Corruption (UNCAC) dan ASEAN Mutual Legal Assistance Treaty (AMLAT)." *Jurnal Penelitian Hukum Gadjah Mada* 3, No. 1 (2016): 37-55; Ridwan Arifin, *International Law Perspective on Mutual Legal Assistance Treaty in the Context of Assets Recovery*. (Semarang: BPFH UNNES, 2019).
- <sup>2</sup> Sugeng Wahyudi, "Penal Policy on Assets Recovery on Corruption Cases in Indonesia." *Journal of Indonesian Legal Studies* 4, No. 1 (2019): 45-72. See also Philippa Webb, "The United Nations convention against corruption: Global achievement or missed opportunity?." *Journal of International Economic Law* 8, No. 1 (2005): 191-229.
- <sup>3</sup> Ridwan Arifin, Sigit Riyanto, and Akbar Kurnia Putra. "Collaborative efforts in ASEAN for global asset recovery frameworks to combat corruption in the digital era." *Legality: Jurnal Ilmiah Hukum* 31, No. 2 (2023): 329-343; Rini Rumiati, "The Extradition Agreement Between Indonesia and Australia: Case of Adrian Kiki Iriawan Extradition". *The Digest: Journal of Jurisprudence and Legisprudence* 2, No. (2021): 1-32. <https://doi.org/10.15294/digest.v2i1.48631>.
- <sup>4</sup> The Global Organization of Parliamentarians Against Corruption (GOPAC) is an international network comprising members of parliaments with the aim of achieving good governance and enhancing the supervisory functions vested in parliaments. It stands as the sole parliamentary organization/network with the singular objective of eradicating corruption globally. GOPAC's involvement in the United Nations Convention against Corruption (UNCAC) commenced with its participation in the signing ceremony in Merida, Mexico, in October 2003. GOPAC's membership represents 90 countries across various regions worldwide. Currently, GOPAC has several regional representatives and National Chapters/ National Task Forces in several countries (akin to groups of parliamentarians dedicated to the anti-corruption movement at the national level). In the Southeast Asian region, GOPAC is represented by the South East Asia Parliamentarians against Corruption (SEAPAC). See William A. Callahan, "Political Corruption in Southeast Asia." *Party Finance and Political Corruption*. (London: Palgrave Macmillan UK, 2000), pp. 163-198; Olli Hellmann, "The historical origins of corruption in the developing world: a comparative analysis of East Asia." *Crime, Law and Social Change* 68, No. 1 (2017): 145-165; Fadli Zon, and Muhammad Tri Andika. "Indonesian leadership in the global organization of Parliamentarians Against Corruption (GOPAC) and its impact on the institutionalization of Open Parliament in Indonesia." *Journal of International Studies* 17, No. 1 (2021): 81-100; Sherly Mevitasari, Jonny Simamora, and Herlambang Herlambang. "Legality of Financial Rights of State Administrators Suspected of Corruption: Can it be Qualified as an Unlawful Act?." *Bengkoelen Justice: Jurnal Ilmu Hukum* 13, No. 1 (2023):49-61.
- <sup>5</sup> Indra Soeharto, and Nugroho Nugroho. "Are we culturally corrupt? Revisiting the relationship between cultural dimensions and Corruption Perception Index." *Asia Pacific Fraud Journal* 2, No. 2 (2018): 143-149; Muhamad Ferdy Firmansyah, "Impact of Political Institution Role to Anti-Corruption Perception Index: An Experience from Indonesia." *International Journal of Community Service & Engagement* 2, No. 1 (2021): 20-41; Ridwan Arifin, Rodyah Rodyah, and Fitria Puspita. "A Comparative Analysis of Indonesia's KPK and Hong Kong ICAC in Eradicating Corruption". *Jambe Law Journal* 2, No. 2 (2020): 163-79.

A contrary condition shows us how strange the law enforcement is, especially on corruption activities. Even based on the anti-corruption act, there are some conducts by individuals or corporations which are either against the law and/or abuse the power, explained by Rimawan Pradiptyo, may inflict losses to economy or national budgets is considered as a corruption.<sup>6</sup> Other sides, the maximum fine does not cover the cost or money that was corrupted, and the maximum prison is only twenty years.<sup>7</sup> Rimawan Pradiptyo<sup>8</sup> ever said that there are various acts in Indonesia, and since Indonesia follows civil law, it is compulsory that each act states clearly the intensity of punishment for those who violate the law. In the Banking Act in 2004 for instance the maximum fines for offenders was Rp100 billion rupiah. On the other hand, the anti-corruption act stated that the maximum fines worth only Rp1 billion rupiah. Obviously, the differences in the intensity of punishment between some acts create opportunity to prosecutors and judge to extort money from defendants in exchange to charge with less intensive punishments.

Furthermore, corruption eradication issue is not only stuffed at the preventive and curative (law enforcement) but also extends to assets recovery. It means that assets forfeiture and assets recovery is also one of the most important components in corruption eradication effort. Because of this asset recovery, it is now used as one of the main strategies on corruption eradication especially on the impoverishing the corruptor.<sup>9</sup>

Experience provides numerous examples and data of corruptor who save and run away their assets at other countries. Gayus Tambunan, the corruptor in the taxation mafia case, that his assets stayed in at least four countries besides the USD 74 billion in gold, the U.S. dollar, and Singapore dollar, as the General Attorney said. In other case, Nazaruddin on some ministries corruption

<sup>6</sup> The definition of corruption within the Anti-Corruption Act is specifically confined to the misallocation of public funds. Notably, the scope of offenses outlined in the Indonesian Anti-Corruption Act is more limited compared to the provisions set forth in the UN Convention Against Corruption of 2003, to which Indonesia is a ratified party. An important distinction arises as the Anti-Corruption Act in Indonesia does not address corruption within the private sector. Additionally, it fails to recognize money politics as an integral component of corruption. This situation is somewhat paradoxical, given that Indonesia's Criminal Code (KUHP) explicitly designates money politics as a criminal offense. Unfortunately, despite this clarity in the Criminal Code, the Anti-Corruption Act does not categorize money politics as part of its definition of corruption. See Rimawan Pradiptyo, "A certain uncertainty; Assessment of court decisions in tackling Corruption in Indonesia." In *Corruption, Good Governance and Economic Development: Contemporary Analysis and Case Studies*. (Munich: Munich Personal RePEc Archive, 2015), pp. 167-215.

<sup>7</sup> Numerous instances highlight a significant discrepancy between the maximum fines and prison sentences stipulated by the legal system and the amounts of money unlawfully obtained through corrupt practices. In essence, the penalties imposed on corrupt individuals often fall short of adequately reflecting or deterring the magnitude of financial gain amassed through their illicit activities. The statement emphasizes the inadequacy of legal penalties, such as fines and imprisonment, to effectively address and counteract the scale of corruption. It suggests that the punitive measures outlined in the legal framework are not proportionate to the financial gains achieved through corrupt activities, thereby underscoring a potential gap in the legal system's capacity to act as a deterrent against corruption. See Rifqi S. Assegaf, "Manoeuvring mandatory minimum sentences: Judicial decisions on corruption." *Crime and Punishment in Indonesia*. (London: Routledge, 2020), pp. 240-275; Fristia Berdian Tamza, "Prison Penalty in Providing a Determination Effect for Criminal Actions of Corruption." *Corruptio* 3, No. 2 (2022): 87-100.

<sup>8</sup> Pradiptyo, "A certain uncertainty; Assessment of court decisions in tackling Corruption in Indonesia."

<sup>9</sup> See also Muhammad Chairul Huda, and Budi Ispriyarso. "Contribution of Islamic law in the discretionary scheme that has implications for corruption". *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 19, no. 2 (2019): 147-167; Moh. Iqra Syabani Korompot, Sholahuddin Al-Fatih, David Pradhan. "The Principle of Equality Before the Law in Indonesian Corruption Case: Is It Relevant?". *Journal of Human Rights, Culture and Legal System* 1, no. 3 (2021): 135-146; Satria Unggul Wicaksana Prakasa, Asis Asis, Mualimin Mochammad Sahid. "Reduce Corruption in Public Procurement: The Effort Towards Good Governance". *Bestuur* 10, no. 1 (2022): 33-42.

case has the assets of USD 5 million, 2 million Euro, 3 million dollar Singapore that hide off on Singapore. Hendra Rahardja, on the Indonesian Bank liquidity assistances (BLBI) case, has not less of USD 493.647 in Australia. Another case, Robert Tantular on Century Bank case, said that Bank Century assets of Rp. 6 trillion were suspected rushed by Robert Tantular to Hongkong.<sup>10</sup> Moreover, the Soeharto's asset that was predicted to be between USD 13-35 billion which were saved on many other countries still cannot return to Indonesia.<sup>11</sup>

The assets recovery procedure, although the United Nations Convention Against Corruption (UNCAC) 20013 does not explain clearly the definition of assets recovery that caused of none definition was accepted together as standard definition about that; the assets recovery effort is directly regulated on the provision of article 53 UNCAC.<sup>12</sup> Basically, the provision of article 53 UNCAC, the assets recovery system directly could be done in three ways; **first**, there is obligation for every states member to provide legal assistance to the other state when civil action is requested to the court of that country, asserting ownership on the assets resulted from corruption, as regulated in that convention. This aspect was regulated specifically by the limitation on provision of article 53 (a) UNCAC. **Second**, it involves granting permission to the court of the country that asks the corruptor to compensate the other state which suffered from the effects of corruption, as explained in article 53 (b) UNCAC. **Third**, doing an initiative acts to authorized the court of the country or the authoritative boards to recognize the third party as the rightful owner of assets that would be confiscated.

The theory of asset recovery is a legal framework that elucidates the legal mechanisms involved in the recovery of assets. Rooted in the principles of social justice, this theory empowers the state and legal institutions with the task and responsibility of safeguarding and facilitating opportunities for individuals within society to achieve well-being. The foundational principle guiding this theory is akin to the adage “*give to the state what belongs to the state.*” This is underlined by the understanding that the state carries responsibilities, which are inherent rights of the people, aligning with the reciprocal principle of “*give to the people what belongs to the people.*”<sup>13</sup> Asset recovery,

<sup>10</sup> Damaida Hatina, et al. “SP3 KPK atas Kasus SKL Blbi dalam Perspektif Hukum Progresif.” *Jurnal Indonesia Sosial Sains* 2, No. 12 (2021): 2081-2090; Sodik Adi Endarto, “Strategi Indonesia dalam Upaya Meningkatkan Kerjasama Ekstradisi dengan Australia (Kasus Penangkapan) Koruptor BLBI”. *Thesis* (Yogyakarta: Universitas Gadjah Mada, 2008).

<sup>11</sup> H. R. Mufti, and B. Kanumayoso. “KPK and the commitment of the Indonesian government to eradicate corruption (2004–2014).” *Cultural Dynamics in a Globalized World* (2018): 29-37; Adriana Pakendek, et al. “Recent understanding of the causes, impacts and deterrent of corruption in Indonesia.” *British Journal of Criminology, Law & Justice* 1.3 (2022): 206-218; Hasbullah Hasbullah. “Analysis of Corruption Settlement for Obligor Deviations of Bank Indonesia Liquidity Assistance (BLBI).” *IJCLS (Indonesian Journal of Criminal Law Studies)* 4, No. 1 (2019): 15-28.

<sup>12</sup> Each State Party shall, in accordance with is domestic law: (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention; (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation, damages to another State Party that has been harmed by such offences; and (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention. *See* United Nations Convention against Corruption (UNCAC) Art. 53.

<sup>13</sup> Muh Yusuf Mustari, Muh Akbar, and Moh Yusuf Hasmin. “Kewenangan Kejaksaan sebagai Jaksa Pengacara Negara dalam Pengambilan Aset dalam Pengambilan Aset Hasil Korupsi melalui Instrumen Hukum Perdata.” *Jurnal Kolaboratif Sains* 5, No. 5 (2022): 256-264; Teuku Isra Muntahar, Madiasa Ablisar, and Chairul

in this context, serves as a means to address the impoverishment resulting from corruption, acting as a deterrent to dissuade potential corrupt individuals.

Corruptor impoverishment basically was known in other legislation on anti-corruption, even assets recovery itself. However, the fine cost was too low compared to the money that was corrupted by the corruptor, so the deterrence effect cannot occur. Meanwhile, this cost (the money that was corrupted) should give the people free facilities like immunization, free education, and even building some streets and homes. At least, this is according to what Danny Leipziger<sup>14</sup> has said that developing countries (including Indonesia) should look and learn from the corruption cases that happened. Every USD 100 billion corrupted (which is saved abroad) that can be returned could build about 240 kilometers of streets, immune about 4 billion babies, and give clean water to 250 thousand houses in Indonesia freely.

Hence, the significance of asset recovery extends beyond merely serving as a method of impoverishment; it also plays a crucial role in delivering justice to the people. In this context, the process of impoverishment through asset recovery is scrutinized and evaluated through the legal principles encapsulated in Radbruch's formula—which comprises justice or fairness, legal certainty, and benefit—intricately linked to Friedman's Theory of legal sub-system, encompassing legal substance, legal structure, and legal culture.

However, certain cases illuminate the inherent tension between legal certainty and justice, as these principles may sometimes be conflicting. This dichotomy underscores the complexity of the interplay between justice and legal certainty.<sup>15</sup> Therefore, this paper seeks to analyze the process of impoverishment through asset recovery by employing Radbruch's formula and Friedman's theory, aiming to foster a comprehensive understanding that considers diverse perspectives and nuances.

## RESEARCH METHODS

The methodology for the paper "*A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory*" involves a comprehensive approach. It begins with an in-depth literature review to understand the legal landscape of stolen assets recovery, justice, and legal certainty in Indonesia. The analysis extends to specific case studies, examining legal proceedings and judgments through Radbruch's formula and Friedman's Theory. Interviews with legal experts and practitioners provide practical insights,

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Bariah. "Perampasan Aset Korupsi Tanpa Pemidanaan Dalam Perspektif Hak Asasi Manusia." *Iuris Studia: Jurnal Kajian Hukum* 2, No. 1 (2021): 49-63; Ahmad Qisa'i, "Sustainable Development Goals (SDGs) and Challenges of Policy Reform on Asset Recovery in Indonesia." *Indonesian Journal of International Law* 17, No. 2 (2019): 231-252.

<sup>14</sup> Arifin, et.al., "Upaya Pengembalian Aset Hasil Korupsi yang Berada di Luar Negeri dalam Penegakan Hukum Pemberantasan Korupsi di Indonesia".

<sup>15</sup> The struggle between legal certainty and equity is old as the law itself. Only the labels changed: while formerly discussion proceeded in terms of *ius strictum* and *ius aequum*, the expressions currently preferred, especially in Germany, are "legal certainty" and "justice (in individual case)." Read Paul Heinrich Neuhaus, "Legal certainty versus equity in the conflict of laws." *Law and Contemporary Problems* 28, No. 4 (1963): 795-807. The ongoing tension between legal certainty and equity has persisted throughout the evolution of legal systems. Though the terminology has evolved, with historical discussions framed in terms of *ius strictum* and *ius aequum*, contemporary discourse, particularly in Germany, employs the terms "legal certainty" and "justice (in individual cases)" to convey similar conceptual conflicts within the legal domain. See Hermann Lange, "Ius aequum und ius strictum bei den Glossatoren." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 71, No. 1 (1954): 319-347.

while document analysis of statutes and regulations scrutinizes their alignment with the theoretical frameworks. A comparative analysis against international standards offers a broader context, and the development of a conceptual framework integrates the principles of justice and legal certainty into the stolen asset recovery process. Thematic coding is employed to categorize qualitative data, and if possible, empirical data is collected for quantitative insights. Ethical considerations guide the research process, ensuring confidentiality in dealing with sensitive legal cases. The synthesis of findings leads to a conclusion with implications for improving the alignment between legal principles and the practical outcomes of stolen assets recovery in Indonesia, accompanied by recommendations for further enhancement.

## ANALYSIS AND DISCUSSION

### Stolen Assets Recovery in the Perspective of Justice

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory, however elegant and economical, must be rejected or revised if it is untrue; likewise, laws and institutions, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society cannot override.<sup>16</sup>

On the other hand, the meaning of justice is always linked to law enforcement. Soedarto said that law enforcement is the attention and effort of enforcing every action against the law that really happened (*onrecht in actu*) or the action against the law that will happen (*onrecht in potentie*).<sup>17</sup> Other definition might provide additional insights, emphasizing the significance of authoritative institution as a reflection of justice. Satjipto Rahardjo said that law enforcement is the process to create and gain the legal desires to become real. The legal desires mean that are the thoughts of the legal institutions which are formulated in law itself.<sup>18</sup>

Gustav Radbruch's Formula, in this case only justice that would be explored, said that positivism is incapable of establishing the validity of statutes. It claims to have proved the statute's validity simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the "must" of compulsion, it never serves as a basis for the "ought" of obligation or for legal validity.<sup>19</sup>

Radbruch then went on to offer two different elaborations on his formula. *First*, the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people unless the conflict between statute and justice reaches such an intolerable degree that the statute, considered as "flawed law," must yield to justice. *Second*, in case where there is not even an attempt at justice, where equality-the core of justice-is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law,"; it completely lacks the very nature

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<sup>16</sup> Jhon Rawls, *A Theory of Justice* (Cambridge Massachusetts USA: The Belknap Press of Harvard University Press, 1999) p. 6.

<sup>17</sup> Soedarto Soedarto, *Selekta Hukum Pidana* (Bandung: Alumni Press, 1986) p. 111.

<sup>18</sup> Ali Masyhar, *Pergulatan Kebijakan Hukum Pidana dalam Tatanan Masyarakat* (Semarang, UNNES Press, 2008) p. 5.

<sup>19</sup> Brian H. Bix, "Radbruch's Formula and Conceptual Analysis." *The American Journal of Jurisprudence* 56.1 (2011): 45-57.

of law. According to Radbruch, law, including positive law, cannot be defined otherwise than as a system and institution whose very meaning is to serve justice.<sup>20</sup>

Justice, on the other case, often looked like the norms or legal norms. In one sense, legal norms cannot be truly 'neutral'. It is not even easy to tell what a 'neutral' norm would be. Indeed, in every system, the norms fit the structure of that system. Even assuming that there are such things as eternal rules of justice or morality, no legal system can be made up only of these jewels. One cannot build a legal system solely from ethical tradition or common sense. An income tax code has to be put together from coarser stuff; this is true for Saudi Arabia, with a legal system based on the sacred law of Islam, the United States with its eighteenth-century Bill of Rights, as well as for every other modern nation. The legal system today must contain many purely instrumental rules (some would say all), and these rules necessarily make choices; they lean toward this or that group—favoring children over adults, pedestrians over drivers, employers over workers, druggists over customers, and so on, for the sake that norms are 'neutral' or 'fair', is neutral or fair within some value conception, or measured against some standard.<sup>21</sup>

It means that justice or fairness is neutral and cannot be equal to all conditions. May be for someone, this is looked as justice but for others, it is not. But in this case, justice has to be seen as the purpose of law itself. Even, justice is not always blind<sup>22</sup> because sometimes is often affected by various factors such as religion, race, nationalism, or profession.

Therefore, the law enforcement process is not more than the process to run the uniformity of legal systems well. Cause law which is never run has stop as the law.<sup>23</sup> According to this argument, Friedman<sup>24</sup> stated more that legal systems consist of legal sub-systems that form legal substance, legal structure, and legal culture. All the legal system unsure was very important and affected whether the legal system could be run well or not.

Aristoteles described justice as a political virtue; by the rules of it, the state is regulated, and these rules are the criterion of what is right.<sup>25</sup> Mill also explained justice as the idea that supposes two things; a rule of conduct and sentiment which sanctions the practice. The first must be considered to be common to all mankind and intended for their good; the sentiment is a desire that punishment maybe suffered by those who infringe the rule.<sup>26</sup> Even, Eugen Ehrlich said that justice has always weighted the scales solely in favor of the weak and persecuted. A justice decision is a decision based on grounds which appeal to disinterested person.<sup>27</sup>

<sup>20</sup> Bix. p. 46.

<sup>21</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence): Termasuk Interpretasi Undang-Undang (Legisprudence)* (Jakarta: Kencana, 2012), pp. 231-232.

<sup>22</sup> Bennett Capers, "Blind Justice." *Yale Journal of Law and the Humanities* 24, No. 1 (2012): 179-189; Holger Spamann, and Lars Klöhn. "Justice is less blind, and less legalistic, than we thought: Evidence from an experiment with real judges." *The Journal of Legal Studies* 45, No. 2 (2016): 255-280; Jonathan Baron, "Blind justice: Fairness to groups and the do-no-harm principle." *Journal of behavioral decision making* 8.2 (1995): 71-83.

<sup>23</sup> Satjipto Rahardjo, *Hukum dan Masyarakat* (Bandung: Angkasa Press, 1984), p. 69.

<sup>24</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russel Sage Foundation, 1975) p. 11.

<sup>25</sup> Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence): Termasuk Interpretasi Undang-Undang (Legisprudence)*. See also Andrei Marmor, *Interpretation and Legal Theory*. (London: Hart Publishing, 2005); Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*. (Oxford: Oxford University Press, 2020).

<sup>26</sup> Ali

<sup>27</sup> Ali, p. 218

## **1. Substance: Understanding Justice on its Substance**

Legal substance based on Friedman's Theory was associated with legal material or substance of legislations. Legal substance, in this case, assets recovery, related to legal material like constitution, statutes, treaties, or legislations which is clearly stated and explained in chapter, articles or verses on those legislations.

These substance elements have to look other legal approaches aspect in area of criminal law, civil law, taxation law, corporate law, etc. Besides that, have to look the international law development too, especially international conventions on anti-corruption, transnational crimes, and international law instruments.

On this case, legal substance maybe can be said as one of factors that give contribution to the corruption practices today. This condition happened because of legal substance was created when corruption became an easy work. Legal substance was designed in such a manner so it was easier for them too to elusory from punishment. In the simple meaning that condition was created that make legal norms unclear on that runaway. Even there is legislation about anti-corruption eradication acts but in this case, asset recovery, was not clearly stated on every acts that we have.

Unclearness of legal substance not only easy to do corruption, but also give vast chance to law enforcement officers to frizzing accord with each importance. For this condition, rule that unclear can be used to enmesh corruptor who benefitted legal rules that unclear. Meanwhile for law enforcement officers who want to get financial profit, legal substance like that will be commercial with them who handle corruption case. In my point, that our legal substance was very weak on this case. We have not any legislation about assets recovery until now, and legislations we have about anticorruption were many poisoned by any political interests.

Some cases showed how weak our legal substance, like bribe case Artalyta that Urip prosecutor frizzing case BLBI (liquidity aids of Indonesian Bank) to get financial profit. Though, not certain yet that the case was done Urip prosecutor to importance himself but can be certain that Urip prosecutor bravery appeared because he knows exactly the weakness on BLBI case. In another case, we cannot return Soeharto's assets from abroad because of the legal substances themselves. Even the compensation which must be paid by the corruptor as the money compensation was still lower than the money that they were corrupted.

Moreover, the inherent deficiencies within the legislation become more apparent upon closer examination of its provisions. For instance, as previously elucidated, the discrepancy between the maximum financial penalties or prison sentences stipulated and the actual amount of corruptly acquired funds underscores a fundamental inadequacy. This study underscores the inherent frailty of our legal framework in addressing instances of corruption. Consequently, this facet can be characterized as a manifestation of justice within the legal substance, drawing attention to the critical issue of legislative shortcomings that not only create opportunities for legal abuse but also highlight the irrationality and lack of alignment with the concept of justice itself, which remains a subject of ongoing debate.

## **2. Structure: Justice at Law Enforcement Officers**

The component called structure is institutional and created by legal systems like district courts and administrative courts, which have a function to support the legal system itself. These components made it possible to give a service and carry out the legal system consecutively. In this



case, the condition today decreased authority and society belief and international society to court body. Belief and authority decrease court to cause the weakness of leadership, weakness of internal control, and low ability of judge.

Legal structure is very related to law enforcement officers too. In many cases, we saw our law enforcement officers were even involved in many criminal acts, such as corruption, gratification, or other actions related to the corruption issue. Besides that, our law enforcement officer's capacities and capabilities are still limited in assets recovery, especially to return the assets from abroad.

Numerous instances underscore the apparent weaknesses within our legal institutions, a paradigm exemplified by the case of Artalyta, who received a five-year jail sentence. This sentencing, in our perspective, seems disproportionate when considering the gravity of the offense against the nation. Therefore, we posit the imperative need for a comprehensive reform of our judicial institutions, involving fundamental changes such as the restructuring of administrative judges and an enhancement in the quality of appointed judges. It is crucial to undertake a reformation that extends beyond mere institutional and procedural mechanisms, addressing the core elements of the judicial system. This encompasses not only institutional and procedural reforms but also initiatives aimed at shaping the ethos and work culture of judicial personnel and optimizing the role of the legal community. Another essential element in the reform of judicial institutions involves the meticulous recruitment process for law enforcement officials, particularly judges. Prioritizing progressive law enforcement methods becomes indispensable, especially in complex cases involving corruption. If sustained without progression, the existing systematic approach may inadvertently create an environment conducive to corrupt practices. Consequently, implementing progressive legal actions require law enforcement personnel characterized by high levels of integrity and morality.<sup>28</sup>

The structure of the corruption eradication focused on asset recovery as the impoverishment strategy for corruptors who involved some institutions like the Commission Corruption Eradication (KPK), National Police (*Polri*), and even General Attorney (*Kejagung*). The concept of justice for the legal structure was considered equality power on the corruption eradication between the legal institutions based on the rules. Justice here means that every institution has the power to respond some illegal activities, especially on corruption, supporting each other, and not as the enemy one for others. For the practice, the struggling power between them sometimes occurred, but the justice here is given to them as same as their power based on the legislation, rules, or constitutions. Out the weaknesses of our legal institution and the capabilities of legal enforcers, they have to be given the chance and opportunity on their justice.

### 3. Culture: Justice on Our Living Cultures

Friedman, for the first introduces the social force as the legal culture. Further, he said that social force is constantly at work on the law-destroying here, renewing there, invigorating here, deadening there; choosing what parts of the law will operate, which part will not, what substitute,

<sup>28</sup> Fardillah Ariati, "Kerentanan Kejaksaan Agung Terhadap Korupsi dalam Perspektif Routine Activities Theory." *Jurnal Kriminologi Indonesia* 6, No. 2 (2012); Ramelan Ramelan. "Anotasi Putusan Perkara Tindak Pidana Korupsi AN Terdakwa Artalyta Suryani Alias Ayin." *Jurnal Hukum Prioris* 3, No. 2 (2013): 95-124; Wahyu Noviacahyani, and Elly Sudarti. "Dasar Pertimbangan Hakim dalam Menjatuhkan Pidana Pelaku Tindak Pidana Korupsi". *PAMPAS: Journal of Criminal Law* 3, No. 3 (2022): 264-282. Guslan, Odie Faiz. "Maladministration in Corruption Case: A Study of Limitation on the Criminal Action." *IJCLS (Indonesian Journal of Criminal Law Studies)* 3, No. 2 (2018): 147-156.

detours, and by passes will spring up; what changes will take place openly or secretly. For a better term, we can call some of these forces the legal culture. It is the element of social attitude and value.<sup>29</sup>

For the simple meaning that law is not simply a tool that can be benefited to certain purpose, but forms a part of sets of equipment tradition, object exchange value that not neutral from influence social and culture. Law can be seen as a whole system. The sociology of law is a value system formed a part of sub-system from social system. The function of culture looked as the normative framework in our people's lives. In this case, legal culture influential in the effectiveness and success of law enforcement.

The concept of legal culture is dichotomized into two distinct dimensions: Internal Legal Culture and External Legal Culture. The transformation of a legal culture characterized by individual-liberal tendencies into one that is collective-social-religious poses a formidable challenge. It cannot be expedited within a brief timeframe. Altering legal culture necessitates a comprehensive understanding of ingrained values, traditions, habits, and prevailing attitudes across various aspects of life. The intricate nature of contemporary existence, coupled with the pervasive influence of Western values eroded by globalization, has eroded indigenous values. Effecting a conscious shift towards inculcating collective-social-religious values is best achieved through initiatives centered on character building, religious education, and fostering a sense of nationalism.<sup>30</sup>

Effectively combating corruption is imperative for the future well-being of our country. However, the current circumstances demand targeted measures to prevent corruption for the upcoming generation, necessitating affirmative action. The Corruption Eradication Commission (KPK) has embarked on this journey, providing exemplary instances, and demonstrating a genuine commitment to eradicating corruption. It is evident from the outset that various crimes, including corruption, often stem from minor infractions within the financial sector, characterized by small-scale and low-quality transgressions. The proliferation of such *viruses* is exacerbated in environments marked by poor conditions, particularly a lack of integrity and inadequate legal oversight. The prevailing legal culture reflects a concerning negativity, as in certain Javanese sayings such as *kriwikan dadi grojokan*, conveying the idea that minor individual transgressions can swiftly escalate into more enormous collective crimes. If the current negative trajectory remains unchecked, it poses a significant risk of leading our society, nation, and state toward destructive outcomes.<sup>31</sup>

<sup>29</sup> Lawrence M. Friedman, *Op.cit.* p. 193.

<sup>30</sup> Rasdi Rasdi, et al. "When students fight corruption: A portrait of anti-corruption education for elementary school students." *The Indonesian Journal of International Clinical Legal Education* 3, No. 1 (2021): 111-124; Maggie Amaliza Wijayanti, "Prevention of Corruption Crimes Through Anti-Corruption Education and Pancasila Morals." *Journal of Creativity Students* 4, No. 1 (2019): 27-48; Nur Rizal, "Pancasila Value Education as a Corruption Prevention Solution." *Jurnal Scientia Indonesia* 4, No. 1 (2018): 47-68; Rudolf Johannes Hasoloan, et al. "The Spirit of the Anti-Corruption Movement in the Campus Environment Through Various Community Creativity Social Media Movements." *Journal of Creativity Student* 7, No. 2 (2022): 283-310.

<sup>31</sup> Murniyanti Murniyanti, Sahuri Lasmadi, and Tri Imam Munandar. "Kewenangan Penuntutan Komisi Pemberantasan Korupsi Terhadap Kasus Tindak Pidana Pencucian Uang". *PAMPAS: Journal of Criminal Law* 3, No. 2 (2022):163-173; El Firsta Nopsiamti Ar, and Dessy Rakhmawati. "Dasar Pertimbangan Hakim dalam Menjatuhkan Pidana Terhadap Pelaku Tindak Pidana Korupsi Yang Dilakukan Bersama-Sama ". *PAMPAS: Journal of Criminal Law* 4, No. 2 (2023): 184-190; Nabil Abduh Aqil, "Strategi Dalam Pemberantasan Tindak Pidana Korupsi di Lingkungan PT Waskita Karya". *The Digest: Journal of Jurisprudence and Legisprudence* 3, No. 1 (2022): 59-72

Therefore, it is highlighted that the justice in the framework of legal culture emphasize the concept that justice has to give to all people, whatever their background is. In this case, justice means that impoverishment for corruptor which money or even assets that their corrupted was at least proportional for the loses of people. At the simple meanings that: all things that people belong to that should be returned to the people.

### Stolen Assets Recovery in the Perspective of Legal Certainty

Radbruch argued that there were three elements in idea of law: justice, expediency or suitability for a purpose, and legal certainty.<sup>32</sup> Radbruch said that it is more important that the strife of legal views be ended than that it be determined justly and expediently. A legal order's existence is more important than its justice and expediency.<sup>33</sup> Radbruch seemed to assert that the third element, legal certainty, was the most important, at least within the idea of law.

This view then leads Radbruch, in that early work, to say the following about the role and duties of judges about unjust laws:

*However unjust the law in its content may be, by its very existence... it fulfills one purpose, viz., that of legal certainty. Hence, the judge, while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he remains the servant of legal certainty. We despise the parson who preaches contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right.<sup>34</sup>*

<sup>32</sup> Brian H. Bix, "Radbruch's Formula and Conceptual Analysis." *The American Journal of Jurisprudence* 56, No. 1 (2011): 45-57.

<sup>33</sup> Stanley L. Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?." *Oxford Journal of Legal Studies* 15, No. 3 (1995): 489-500.

<sup>34</sup> Brian Bix, "Robert Alexy's Radbruch Formula, and the Nature of Legal Theory." *Rechtstheorie* 37 (2006): 139-149. It is further emphasized that Gustav Radbruch, addresses the relationship between positive law (written or enacted law) and justice. Radbruch formulated this concept in the context of a post-World War II Germany, grappling with the atrocities committed under the Nazi regime and the subsequent legal implications. Radbruch's Formula posits a hierarchy between statutory law and justice. The formula asserts that when there is a conflict between a positive law and the principles of justice, justice should prevail. However, it is essential to understand the historical context that influenced Radbruch's formulation. The Formula emerged as a response to the legal positivism that prevailed during the Nazi era, where the regime utilized the law to perpetrate gross injustices. Radbruch, reflecting on the horrors of that period, argued that strict adherence to positive law, without considering justice, could lead to legal outcomes that are morally reprehensible. In other words, Radbruch's Formula emphasizes the primacy of justice over formal legal rules when the application of such rules would result in manifestly unjust outcomes. While Radbruch's Formula has been influential in legal philosophy, it has also sparked debates and criticisms. Some argue that it may be too subjective and open to interpretation, potentially leading to inconsistency in legal decision-making. Despite the critiques, Radbruch's Formula has contributed significantly to discussions on the interplay between law and justice in legal theory. See also Brian H. Bix, "Radbruch's Formula, Conceptual Analysis, and the Rule of Law." *Law, Liberty, and the Rule of Law*. (Dordrecht: Springer Netherlands, 2013), pp. 65-75; Miodrag Jovanovic, "Legal Validity and Human Dignity—On Radbruch's Formula." *Archiv für Rechts-und Sozialphilosophie-Beihefte* 137, No. 2013 (2013): 145-167; Seow Hon Tan, "Radbruch's Formula Revisited: The Lex Injusta Non Est Lex Maxim in Constitutional Democracies." *Canadian Journal of Law & Jurisprudence* 34, No. 2 (2021): 461-491. For further discussion in Indonesian context, also see Muhammad Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)." *Legalitas: Jurnal Hukum* 4, No. 1 (2017): 130-152; Bambang Sutiyoso, "Mencari Format Ideal Keadilan Putusan dalam Peradilan." *Jurnal Hukum Ius Quia Iustum* 17, No. 2 (2010): 217-232; E. Fernando M. Manullang, "Misinterpretasi Ide Gustav Radbruch Mengenai Doktrin Filosofis Tentang Validitas Dalam Pembentukan Undang-Undang." *Undang: Jurnal Hukum* 5, No. 2 (2022): 453-480.

Further, legal certainty, in many cases, is very close to the juridical dogmatic-normative-legalistic-positivism, simply meaning that this concept (legal certainty) is often related to the legal positivism, which sees the law only in certainty of rules or laws, see the law as something independent. Achmad Ali<sup>35</sup> emphasized that argument by saying that for legal positivism, legal purpose is only to achieve legal certainty, which can be perceived as the certainty of law. Bryan A. Garner<sup>36</sup> explained the legal positivism as follows:

*legal positivism, n.* The theory is that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in each society, not because they are grounded in morality or natural law. *Legal positivism* has been espoused by such scholars as H.L.A. Hart. See *positive law*. Cf. *Logical positivism*.—*legal positivist, n.*

“[I]t will be helpful to offer some comparisons between legal positivism and its counterpart in science. Scientific positivism condemns an inquiry projecting itself beyond observable phenomena; it abjures metaphysics and renounces in advance any explanation in terms of ultimate causes. Its program of research is to chart the regularities discernible in the phenomena of nature at the point where they become open to human observation without asking—as it were—how they got there. In the setting of limits to inquiry, there is an obvious parallel between scientific and legal positivism. The legal positivist concentrates his attention on law at the point where it emerges from the institutional processes that brought it into being. The finally made law itself furnishes the subject of his inquiries. How it was made and what directions of human effort went into its creation are for him irrelevancies.” Lon L. Fuller, *Anatomy of the Law* 177-178 (1968)

All positivists share two central beliefs: **first**, that what counts as law in any particular society is fundamentally a matter of social fact or convention (the social thesis); **second**, there is no necessary connection between law and morality (the separable thesis).<sup>37</sup> It is clear enough that the principle of legal certainty has several aspects or sub-principles: **first** legislation shall not be enacted retroactivity, **second** legitimate expectations, **third** clarity of statutes, **fourth** legislation should solve matters conclusively, **fifth** *vacatio legis*,<sup>38</sup> and **sixth**, only published laws have legal effect.<sup>39</sup> Different aspects of the principle of legal certainty should guarantee the stability of a legal system. It means the stability for an individual. An individual should be able to plan their life accordingly. In contrast, the legislation should guarantee the stability in regard to decisions made by an individual concerning their everyday life.<sup>40</sup>

<sup>35</sup> Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence): Termasuk Interpretasi Undang-Undang (Legisprudence)*. In the original texts he said that: bagi penganut aliran ini tujuan hukum hanya semata-mata untuk mewujudkan ‘legal certainty’ (kepastian hukum), yang dipersepsikan hanya sekadar “kepastian undang-undang”.

<sup>36</sup> Bryan A. Garner, *Black’s Law Dictionary Eight Edition* (USA: Thomson West 2004) p.915. This is the original text from the dictionary.

<sup>37</sup> Jules L Coleman and Brian Leiter, *Legal Positivism* on Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory 2<sup>nd</sup> Edition* (UK: Blackwell Publishing Ltd., 2010) p.228.

<sup>38</sup> *vacatio* (ve-kay-sheeh-oh). *Civil law*. Exemption; immunity; privilege; dispensation. Bryan A. Garner, *Black’s Law Dictionary*, p.1584. Maybe the *vacatio legis* means that law have to be has the immunity for itself, and it privilege. This principle means that people or entities should be given enough time to comply with changes made in law. What is a reasonable time? This depends on the scope of the changes and who is affected.

<sup>39</sup> See Adam Kasprzyk, “Vacatio legis Institution—Sense and Meaning.” *Teka Komisji Prawniczej PAN Oddział w Lublinie* 9, No. 1 (2016): 59-72; Marzena Myślińska, “The Principle of Determinacy of Legal Rules as an Element of The Principle of Competent Legislation.” *Comparative Legilinguistics* 5, No. 1 (2017): 125-141.

<sup>40</sup> Kasprzyk.

## 1. Substance: Corruptor Impoverishment between Legal Certainty on its Rules and Facts

Legal substance based on Friedman's Theory is no more than all rules of law, legal norms, and legal principles, although it's written or unwritten law, even the court judgment included to this legal substance. It means that the legal certainty is the certainty of its rules. In this case, on assets recovery as the corruptor impoverishment, we can find many acts.

Indonesia has many legislations that regulate corruption and asset recovery itself. The basic law underlying asset recovery efforts could be seen on Act No.20/2001 jo. Act No.31/1999 about Corruption Eradication, Act No.7/2006 on the Ratification of the UNCAC in 2003, the UN Convention against Corruption 2003, Act No.1/2006 on Mutual Assistance in Criminal Matters, Act No.8/2010 about Money Laundering, Criminal Code, and Criminal Procedure Code as well.

The Act No.1/2006 about the ratification of the UNCAC, the primary goals are: *first*, improve and empower all actions to prevent and eradicate corruption more efficiently and effectively; *second*, enhance, facilitate, and support the international cooperation and technical aid on preventing and eradicating corruption, included the assets recovery. It also to improve the integrity, accountability, and managing the problems and public wealth carefully.<sup>41</sup> That acts at least guided us to understand how asset recovery was regulated, and the most important is in practical area, it always related by international scope on the role or the assistance on assets recovery.

The certainty of the corruptor impoverishment by assets recovery was regulated by the anti-corruption acts or many acts that related to this. But, if we say that certainty, was the concept where the legislation shall not be enacted retroactivity, legitimate expectations, clarity of statutes, legislation should solve matters conclusively, *vacatio legis*, or even only published laws have legal effect, the assets recovery act doesn't have the clear certainty on its substance (legal) itself. Although Indonesia has any acts for this case, but in the facts that acts do not explain clearly enough about the procedure of assets recovery itself.

This condition, according to Soerjono Soekanto has ever been said that acts (on the material meaning) is are the written rules which are conducted commonly and made by authoritative central power or local government.<sup>42</sup> Further, Soekanto<sup>43</sup> stated that the factors that can be influenced by law enforcement in this case *inter alia*: (1) the principles on the certain conduction law are not followed well, (2) there are not implementing rules which very important to regulated that act, and (3) ambiguity on the main texts of that acts which are affected to the confusion of the explanation and implementation of the law.

Point of this case, legal certainty on the legal substance of the corruptor impoverishment was the acts that regulated as the strategy on corruption eradication even the assets recovery itself. Certainty means that justice is based on the law and all the acts or even the court judgments, like anti-corruption act, UNCAC, and some court judgments.

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<sup>41</sup> Law No.1 of 2006 concerning the Ratification of the United Nation Convention against Corruption (UNCAC) 2003.

<sup>42</sup> Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*. (Jakarta: PT Rajawali 1983)

<sup>43</sup> Ika Darmika, "Budaya Hukum (Legal Culture) dan Pengaruhnya Terhadap Penegakan Hukum di Indonesia." *To-Ra 2*, No. 3 (2016): 429-436; Rosdalina Bukido, "Paradigm and Reality of Law Enforcement in Indonesia." *Jurnal Ilmiah Al-Syir'ah* 4.1 (2016); Yazid Bustomi, "The Relevance of Behavior of Law Theory to Law Enforcement in Indonesia." *Jurnal Hukum Prasada* 9, No. 1 (2022): 53-64.

## **2. Legal Structure: Tools for Corruptor Impoverishment, Is There Any Powers?**

Legal structure, according to Friedman's Theory, was always related to the institutions, legal enforcers, special boards, or even some commission or legal institutions. For this case, certainty on the legal structure means that clearness of the institution that handle the case, especially for assets recovery as the corruptor impoverishment.

Generally, we have some legal institution for the assets recovery, such as National Police (Polri), Commission Corruption Eradication (KPK), Center for Reporting and Analytical of Financial Transaction (PPATK), Central Authority of Ministry of Law and Human Rights, General Attorney (Kejagung), even Directory of Politics and Area Security of Ministry of Foreign Affairs (Polkamwil). They all have the important roles on the assets recovery, especially for the foreign assets recovery; for the local or national we have the special court of corruption (Pengadilan Tipikor).

The certainty itself must be based on the legislation that was regulated before. We could see for this on some acts or decisions. General Attorney has their special task force on assets recovery based on the Decision Letter (SK) of Minister of Politics, Law, and Security (Menkopohukam) Number: Kep-54/Menko/Polhukam/12/2004 on December 17<sup>th</sup> 2004 about the establishment of special task force on tracking the corruptor, and the renew with SK Menkopulhukam Number: Kep-21/Menko/Polhukam/4/2005 on April 18<sup>th</sup> 2005 about the special task force on tracking the criminal and suspected on the corruption case. It is then renewed again with SK Menkopulhukam Number: Kep-23/Menko/Polhukam/02/2006 on February 28<sup>th</sup> 2006 about the special task force on tracking the criminal and suspected on the corruption case and their assets.<sup>44</sup> Later, this special force not only worked by the staff of Kejagung but also together with KPK, Polkamwil, Menkopulhukam, PPATK, Central Authority Kemenkumham, and even Polri. The last, have special boards related to international cooperation, not only for tracking the corruptors but also other transnational organized crimes, is the National Central Bureau International Police (NBC Interpol) Indonesia.

I would emphasize that certainty here related to the institutions that support the corruptor impoverishment on the corruption eradication also on assets recovery. It means that legal certainty on the legal structure has been achieved by the certainty with the institution itself, although not perfectly and not special board, which is an independent board like in the United Kingdom with her ARA (Assets Recovery Agency).

## **3. Legal Culture: Certainty on Impoverishment, Money for Whom?**

Sometimes, it is difficult to explain the certainty on legal culture, especially about corruptor impoverishment, because of our acts that we can see in many acts implemented were clearly stated that the fine cost for corruptor is regulated by law. But sometimes, court judgment decided the fine cost was less than the money that was corrupted. It is a dilemma for us; on one side, we want the certainty and justice, and the other hand, our acts are regulated like that.

Here, the legal culture, I mean that always related to the people's activities, how the people obey and why the people do not obey, and even the effectiveness of the law itself. But according

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<sup>44</sup> Arifin, "Upaya Pengembalian Aset Korupsi Yang Berada di Luar Negeri (Asset Recovery) dalam Penegakan Hukum Pemberantasan Korupsi di Indonesia."

to legal certainty that all acts have to be regulated by law or looked on the court judgments, as Friedman<sup>45</sup> said as follows:

*We define legal culture as attitudes, values, and opinion held in society, regarding law, the legal system, and its various parts. So defined, it is the legal culture that determines when, why, and where people use law, legal institutions, or legal processes; and when they use other institutions or do nothing. In other words, cultural factors are an essential ingredient in turning a static structure and as static collection of norms into a body of living law. Adding the legal culture to the picture is like winding up a clock or plugging in a machine. It sets everything in motion.*

Based on Friedman's opinion that legal culture always related to the values, norms, attitudes, or even opinion in society, in this case, on assets recovery as the corruptor impoverishment on the legal certainty framework can be seen from the attitudes of corruptors as the criminal, the legal officers as the law enforcers, and other countries as the international society that affected to the assets recovery itself. Certainty in this case, for the example of the international cooperation, often related to the diplomatic culture or even bargaining position of the country, including the mutual legal assistance as the cost of help they given to certain country. For the local or national case, the values or attitudes for the legal officers were regulated by law itself, even on practice, sometimes the officers must have the initiative measure and progressive actions.

### **Stolen Assets Recovery in the Perspective of Benefit of Law**

The legal benefit is always related to the concept of utilitarianism by Jeremy Bentham, with his motto said that the legal purpose is for *the greatest happiness of the most significant number*.<sup>46</sup> Related to this, Curzon (1979: 93-94) wrote that *utilitarianism is a moral philosophy that defines the rightness of an action in terms of its contribution to general happiness and considers ultimate good to be the greatest happiness of the greatest number*.<sup>47</sup>

The doctrine of utilitarianism from Bentham basically could be concluded into three stressing points as described by Curzon<sup>48</sup> as follows:

- a. The principle of utility subjects everything to these two forces:
  - 1) Utility is the property or tendency of an object to produce benefit, good, or happiness or to prevent mischief, pain, or evil;
  - 2) The utility principle allows us to approve an action according to its tendency to promote oppose happiness.
- b. Pleasure maybe equated with good, pain, or evil.
- c. A thing is said to promote the interest, or to be for the interest, of an individual when it tends to add to the total of his pleasure; or, what comes to the something, to diminish the total of his pains.

<sup>45</sup> Lawrence M. Friedman, *The legal System: A Social Science Perspective*. (London: Russell Sage Foundation, 1975); Friedman, Lawrence M. "Legal culture and social development." *Law and Society Review* (1969): 29-44.

<sup>46</sup> Jeremy Bentham, *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. (London: Clarendon Press, 1996). See also Pratiwi, Endang, Theo Negoro, and Hassanain Haykal. "Teori Utilitarianisme Jeremy Bentham: Tujuan Hukum Atau Metode Pengujian Produk Hukum?." *Jurnal Konstitusi* 19, No. 2 (2022): 268-293.

<sup>47</sup> Pratiwi, et.al.

<sup>48</sup> Peter Curzon, *Jurisprudence Lecture Notes*. (London: Routledge, 1998).

Further, the legal benefit, as the *basiy* after considering rigidity (*rechmatigheid*) of his activities, and then considered its benefits (*doelmatigheid*).<sup>49</sup> The simple meaning called as the benefits after the activities.

### 1. Substance: Benefits from Law

Legal substance, as explained before, that related to the laws, acts, or legislation implemented by government. In this case, we can see that the benefits of anti-corruption acts, like Act No.20/2001 jo. Act No.31/1999 about Corruption Eradication, Act No.7/2006 on the Ratification of the UNCAC in 2003, the UN Convention against Corruption 2003, Act No.1/2006 on Mutual Assistance in Criminal Matters, Act No.8/2010 about Money Laundering, Criminal Code, and Criminal Procedure Code as well, give some beneficial not only for our government but also for our people.

For the example, the Act No.20/2001 jo. Act No.31/1999<sup>50</sup> about the Corruption Eradication stated that *corruption is the activities with the legal opposition with the purpose to enrich themselves or another person (individual or corporation) that could disadvantage the financial or state's economic*. So, the unsure that must be fulfilled for the activity to be called as corruption are: (1) legal oppose, (2) enrich themselves or others, and (3) could be disadvantaged the financial or states' economic. This act gives the benefit on the legal substance for us that corruption today is not only related to the person, but also corporation.

Another example, on the corruptor impoverishment by assets recovery, the legal substance on its benefits can be seen from Article 53 United Nations Convention against Corruption (UNCAC) 2003, which stated as follows:<sup>51</sup>

Each State Party shall, in accordance with domestic law:

- (a) Take such measures as may be necessary to permit another State Party to initiate a civil action in its courts to establish title to or ownership of property acquired through the commission of an offense established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation, damages to another State Party that such offences have harmed; and
- (c) Take such measures as may be necessary to permit its courts or competent authorities, when deciding on confiscation to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offense established in accordance with this Convention.

The Article 53 UNCAC explains the benefits of the system of assets recovery that can be done in three ways, those are: **first**, there are the obligations to every state member of the convention to serve the legal facilities to the other state to ask the civil action to the court of the state and define the ownership to the assets that got from the corruption activities based on this convention; **second**, permitting the state court to order the criminal of the corruption case to pay the compensation or indemnity to the other state that lost caused of that activities; **third**, doing or bring the action to permit the states court or authoritative institution to claimed of the ownership for the assets that will

<sup>49</sup> Sudikno Mertokusomo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Cahaya Atma Pustaka, 2010).

<sup>50</sup> Law No.20 of 2001 jo. Law No.31 of 1999 concerning the Corruption Eradication (Anti-Corruption Act)

<sup>51</sup> United Nation Convention against Corruption (UNCAC) 2003



be a seizure. In this case, the benefit of the legal substance was the benefit of the legal itself that affected the process of assets recovery, even for corruptor impoverishment.

## 2. Structure: Benefits of Legal Institutions

Structure, in this case, is always related to the legal institution, legal officer, or even court itself. Structure on the corruption eradication, especially on corruptor impoverishment, we have Polri, KPK, Kejaksaan, PPATK, Menkopolkam, Polkamwil Kemenlu, and even the Central Authority of Kemenkumham.

The General Attorney with the special task for assets recovery, together with other legal institutions showed us the benefit of the legal structure itself. Further, Commission Corruption Eradication (KPK) has international cooperation with other special institutions among international society. KPK was the role of international collaboration on Southeast Asia Parties against Corruption (SEA-PAC). Cooperation SEA-PAC is a group of anti-corruption agencies in the countries of Southeast Asia, namely: Anti-Corruption Bureau (ACB) of Brunei Darussalam, the Corruption Eradication Commission (KPK) Indonesian, Malaysian Anti-Corruption Commission (MACC), Corrupt Practices Investigation Bureau (CPIB) Singapore, the Anti-Corruption Unit (ACU) Cambodia, the Office of the Ombudsman (OMB) Philippines, the National Anti-Corruption Commission (NACC) of Thailand, Vietnam Government Inspectorate (GIV), and the State Inspection Authority (SIA) Laos, which has a mission to combat corruption that operate cross-country.<sup>52</sup>

The Indonesian National Police (Polri) with National Central Bureau (NCB) Interpol Indonesia also has a legal structure that gives us some benefits, like cooperation among law enforcers, inter-institutional relationships, and even informal approach to asset recovery. At the scope of ASEAN, Polri and other countries among ASEAN have ASEANAPOL (ASEAN Police) and International Foreign Law Enforcement Community (IFLAC) which function as a forum of law enforcement official chiefs in Indonesia.

Other institutions, like Polkamwil Kemenlu, PPATK, and others have the function on the diplomatic relationship among other state on this case. Therefore, the benefits of law on the legal substance emphasized some functions of the legal institution itself, like giving the ease to the asset recovery with formal or informal cooperation or even institutional relationship.

## 3. Culture: The Beneficial of International Culture

Legal culture is always related to values, attitudes, opinions, or norms in the society. Based on this case, corruptor impoverishment as the strategy to eradicate corruption where the legal culture emphasizes international cooperation. The international norms implied to all the nations that

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<sup>52</sup> See Leslie Gielow Jacobs, and Benjamin B. Wagner. "Limits to the Independent Anti-Corruption Commission Model of Corruption Reform: Lessons from Indonesia." *Global Business & Development Law Journal* 20, No. 2 (2007): 327-332; Dhiyathad Prateppornnarong, "Fighting corruption while having hands tied: A case study of Thailand's public sector anti-corruption commission." *Journal of Asian and African Studies* 56, No. 2 (2021): 320-334; Simon Butt, "Anti-corruption reform in Indonesia: an obituary?." *Bulletin of Indonesian Economic Studies* 47, No. 3 (2011): 381-394; Ahmad Khoirul Umam, et al. "Addressing corruption in post-Soeharto Indonesia: The role of the corruption eradication commission." *Journal of Contemporary Asia* 50, No. 1 (2020): 125-143. Vani Kurnia, Sahuri Lasmadi, and Elizabeth Siregar. "Tinjauan Yuridis Terhadap Tugas Dan Kewenangan Jaksa Sebagai Penyidik dalam Perkara Tindak Pidana Korupsi". *PAMPAS: Journal of Criminal Law* 1, No. 3 (2021):1-11.

corruption looked like the common enemy and also main issue on international issue. International culture that also has changed in relationship, togetherness, and cooperation makes a great benefit on this case.

The cultural perspective on the punishment of corrupt individuals is deeply intertwined with societal norms, as fraud and corruption are widely perceived as negative and morally reprehensible in our cultural ethos. This cultural stance not only condemns corrupt behavior but also provides a supportive backdrop for the impoverishment of corrupt individuals, viewing it as a strategic measure for eradicating corruption. Therefore, the legal culture concerning the advantages of legal measures, particularly the asset recovery process for combating corruption, aligns with prevailing norms, values, and attitudes within the society. This cultural and legal alignment is not only reflected at the national level but also extends to international cooperation and relationships in the collective effort to combat corruption.<sup>53</sup>

## CONCLUSION

This study highlighted and concluded that justice is a nuanced concept, extending beyond mere fairness and intricately shaped by diverse factors. In the legal realm, efforts to combat corruption through measures like the impoverishment of corruptors underscore the importance of effective deterrents, yet legislative inadequacies create room for abuse. Asset recovery plays an important role in corruption eradication, emphasizing the significance of solid law enforcement and institutional frameworks. Despite the need for a dedicated institution for asset recovery, such an entity currently needs to be present. Legal certainty is vital in all respects and is closely tied to laws, regulations, and enforcement procedures. Addressing corruptor impoverishment through acts like anti-corruption legislation and UNCAC establishes a foundation, albeit with procedural gaps. Legal structures, including institutions like KPK and special corruption courts, contribute to certainty by tracking criminals and their assets. International cooperation, shaped by diplomatic values, extends legal culture globally. Benefits derived from legal actions align with societal norms, values, attitudes, and opinions supporting legal activities, with anti-corruption acts and UNCAC yielding advantages in corruption eradication. Institutions like KPK, PPATK, and Menkopolkam exemplify the beneficial aspects of legal structures, and international cooperation against corruption reflects a shared perception of corruption as a common enemy, fostering collaboration on a global scale.

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<sup>53</sup> Arifin, Ridwan. "Democracy on Indonesian Legal Reform: How Can People Participate on Laws and Regulations Establishment Process." *Journal of Indonesian Legal Studies* 2, No. 2 (2017): 155-158.

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