Urgency of Asset Seizure (Non-Conviction Based) in Corruption Crimes Achieving Legal Certainty

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Abstract

Corruption crimes as extraordinary crimes. Law No. 31 of 1999 on the Eradication of Corruption Crimes, as amended by Law No. 20 of 2001 on Amendments to Law No. 31 of 1999, in Articles 17 and 18, states that the confiscation of movable property, whether tangible or intangible, or immovable property used for or obtained from corruption crimes, including property belonging to the convicted person as well as property replacing such items, is mandated. Payment of replacement money equal to the value of the embezzled assets. The government has proposed a Civil Forfeiture Bill that is in rem. This is a legal action against the assets themselves, not against individuals (in personam) as in criminal cases. Legal policy through the creation of new laws is expected to support national growth and development in the future. The formulation of the Asset Forfeiture Bill, which allows for the return of criminal assets without a court decision in criminal cases, provides an opportunity for the state to seize any assets suspected of being proceeds of crimes and other assets likely to be used or already used as instrumentalities for committing crimes.

Keywords: Legal Policy, Asset Forfeiture, Legal Certainty

Introduction

Corruption is one of the greatest threats faced by a nation and state. The impact of corruption includes hindering national welfare, damaging government structures, and obstructing overall development. Corruption poses a significant threat to a nation due to actions taken to enrich oneself by exploiting one's position, opportunities, and available chances.

In Indonesian criminal law, corruption is considered a form of crime that requires special attention, as it violates both economic and social rights of the public, and is categorized as an extraordinary crime.

According to Atmasasmita, corruption in Indonesia is classified as an extraordinary crime because it is deeply ingrained in national life, has rapidly developed, and constitutes not only a legal issue but also a violation of the economic and social rights of Indonesian society.

According to Prof. Sudarto (1986:3), Indonesian Law No. 31 of 1999, as amended by Law No. 20 of 2001 on the Eradication of Corruption Crimes, is classified as a special criminal law. Prof. Sudarto concludes that a "special criminal law" refers to laws other than the Crime Code (KUHP), which is the primary criminal law regulation. The central role of the Crime Code is due to its inclusion of general provisions of criminal law in Book I, which also apply to crimes outside the KUHP, unless otherwise specified by law (Sudarto, 1986:64). Thus, special criminal law can be understood as legal rules that deviate from general criminal law concerning specific acts and individuals. These deviations may occur in the general part, which includes general principles of criminal law, or in the procedural criminal law related to investigation, prosecution, and trial proceedings.

Based on categorizing corruption as a special extraordinary crime, one element of corruption is the action causing harm to state finances. Thus, in law enforcement, efforts are made to recover state assets taken or enjoyed unlawfully by corrupt actors as a means of restoring state losses.

Based on Article 4 of Law No. 31 of 1999 as amended by Law No. 20 of 2001 on the Eradication of Corruption Crimes and its explanation, "the return of state financial losses or state economic losses does not absolve the perpetrator of corruption crimes as referred to in Articles 2 and 3 of the Law from criminal liability." In practice, the return of state financial or economic losses does not eliminate the perpetrator's accountability but may be considered a mitigating factor by the judges in sentencing, potentially leading to a lighter sentence for the perpetrator.

In accordance with Article 4 of Law No. 31 of 1999, as amended by Law No. 31 of 1999 concerning the Eradication of Corruption Crimes, efforts to maximize the recovery of state financial losses by the Attorney General's Office have been carried out based on the Circular Letter (SE) from

the Deputy Attorney General for Special Crimes No. B-2185/F/Ft.1/10/2009 dated October 15, 2009, regarding the recovery of state financial losses during the prosecution/trial stage.

Referring to Erlyn Indarti's view, there is a close relationship between legal theory and legal practice. Specifically, there is a connection between legal philosophy, legal theory, legal science, and legal practice. This relationship provides a comprehensive understanding of how legal practice in the criminal justice system can be interpreted as a process that extends to the realm of philosophy.

Corruption has become an extraordinary crime and, therefore, its handling must employ extraordinary measures. Considering that one element of corruption under Articles 2 and 3 of Law No. 31 of 1999, as amended by Law No. 20 of 2001 on the Eradication of Corruption Crimes, is the element of state financial loss, this implies that combating corruption is not only aimed at deterring corruptors through heavy prison sentences but also at recovering state finances affected by corruption, as emphasized in the considerations and general explanations of the Corruption Eradication Law. The failure to recover assets from corruption can undermine the effectiveness of punishing corruptors. Difficulties in asset recovery may diminish the impact of legal penalties on these individuals. Therefore, this paper aims to analyze the Urgency of Non-Conviction-Based Asset Forfeiture in Corruption Cases to Achieve Legal Certainty.

Research Methodology

This research uses a normative juridical method (legal research) and an empirical juridical approach (field research). The empirical approach involves applying the research at the levels of police and courts, while the normative approach addresses issues based on government initiatives.

The research employs a descriptive-analytical approach. This type of study aims to describe legal issues, legal systems, legislation, and analyze them in accordance with reality. The legal events occurring at a specific time are highly dependent on the evolving situation and dynamics of society. Analysis and conclusions are drawn using qualitative data analysis methods.

Discussion

Legislative Regulations on Asset Recovery in Criminal Offenses

The Indonesian government, in achieving public welfare, requires regulations concerning the confiscation of assets related to criminal offenses. Law enforcement against corruption perpetrators by the court may result in sentences, which can include:

Death Penalty

Anyone who unlawfully engages in acts that enrich themselves, others, or a corporation, which can harm the state’s finances or economy, and commits corruption under certain conditions, may be sentenced to death.

Imprisonment

Imprisonment may be imposed if the defendant is proven to have committed corruption in accordance with the provisions of Article 2 paragraph (1), Article 3, and Article 13.

Additional Penalties

Referring to Article 4 of the Republic of Indonesia Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 and its explanation, it is stated that "the recovery of state financial losses or the state’s economy does not eliminate the criminal liability of perpetrators of corruption as referred to in Article 2 and Article 3 of the said law."

Law No. 31 of 1999 on the Eradication of Corruption Crimes, as amended by the Republic of Indonesia Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 on the Eradication of Corruption Crimes, specifies in Articles 17 and 18 that the confiscation of movable property, whether tangible or intangible, or immovable property used for or acquired from corruption, including companies owned by the convicted where the corruption took place, as well as property that replaces these items, is required. Additionally, payment of replacement money equivalent to the value of the corrupted assets is mandated.

Linking the provisions on principal and additional penalties that can be imposed on corruption offenders in terms of returning the proceeds of crime as additional criminal penalties: In practice, asset confiscation through criminal proceedings can only occur if the court has rendered a final and binding decision (inkracht). Therefore, if the court decision has not yet attained legal finality, additional penalties such as asset confiscation and replacement money cannot be executed.

In addition to the provisions in the legislation governing asset confiscation, such as Article 10 letter b number 2 of the Criminal Code (KUHP) concerning "confiscation of certain items," which is classified as an additional penalty. The placement of "confiscation of certain items" within the

regulations on additional penalties results in characteristics and consequences that differ from those of the principal penalties themselves. According to PAF Lamintang and Theo Lamintang, the difference between principal and additional penalties is described as follows:

Additional penalties can only be imposed on a defendant alongside a principal penalty, meaning additional penalties cannot be given independently but must always be imposed together with a principal penalty. There is an exception in Article 40 of the Criminal Code (KUHP), which allows judges to impose the confiscation of property without a principal penalty in cases involving minors, where the judgment is returned to the child's parents, guardians, or caregivers. Additional penalties are facultative, meaning that judges have the discretion to impose them or not; they may be imposed, but they are not mandatory. In the imposition of additional penalties such as the confiscation of certain items, only specific items can be seized. This is because criminal law no longer recognizes the confiscation of the entire assets of the convicted person, which was previously known as general confiscation.

Article 39 of the Criminal Code (KUHP) specifies the circumstances under which confiscation may be carried out. There are two types of items that can be confiscated:

Items owned by the convicted person that were obtained through crime, such as counterfeit money obtained from currency counterfeiting, money obtained from bribery, and so on. These items are referred to as *corpora delicti* and can always be confiscated as long as they belong to the convicted person and are derived from criminal activity;

Items owned by the convicted person that were intentionally used to commit a crime. These items are referred to as *instrumenta delicti*.

Regarding asset confiscation using criminal forfeiture, the reference is Article 10 in conjunction with Article 39 of the Criminal Code, which serves as a general rule and is mutatis mutandis applicable to handling Money Laundering cases using criminal law instruments. For asset confiscation using non-criminal instruments (civil forfeiture/in rem asset forfeiture), the relevant provisions are found in Article 67 of the Money Laundering Law in conjunction with PERMA No. 1 of 2013. As for asset confiscation using administrative instruments (administrative forfeiture), it is covered in Articles 34 to 36 of the Money Laundering Law in conjunction with Government Regulation No. 99 of 2016 concerning the Bringing of Cash and/or Other Payment Instruments Into or Out of the Indonesian Customs Area.

Other provisions related to the seizure and confiscation of assets from criminal offenses are referenced in the Criminal Procedure Code (KUHAP). The KUHAP stipulates that before any legal action such as confiscation can be taken, the object or item to be confiscated must first be seized by the investigator. Legal actions related to the seizure of assets from criminal offenses in the KUHAP are regulated under Articles 38, 39, 42, 44, and 45. Meanwhile, asset confiscation is regulated under Article 46 paragraph (2). Court decisions regarding evidence can be found in Article 46 paragraph (2) and may include the following stipulations:

If the case has been decided, the items that have been seized and used as evidence will be returned to those most entitled to receive them according to the court's decision.

There is a decision stating that evidence will be confiscated in the interest of the state. This type of decision can be found in cases involving economic crimes, smuggling, narcotics, and others. Evidence that is considered dangerous will be destroyed, while evidence deemed non-dangerous will be auctioned, with the proceeds from the auction becoming state property. Confiscation of assets is classified as an additional penalty. In addition, Article 39 paragraph (1) of the Criminal Code (KUHP) and Article 18 of Law No. 31 of 1999 on the Eradication of Corruption Crimes cover this.

Article 4 of the Republic of Indonesia Law No. 20 of 2001 on Amendments to Law No. 31 of 1999, along with its explanation, states that "the recovery of state financial losses or the state's economy does not eliminate the criminal liability of perpetrators of corruption as referred to in Article 2 and Article 3 of the said law."

Then, the explanation of Article 4 of Law No. 31 of 1999 states as follows:

> "*In cases where the perpetrators of corruption as referred to in Article 2 and Article 3 meet the elements of the specified articles, the recovery of state financial losses or the state's economy does not eliminate the criminal liability of the perpetrators. The recovery of state financial losses or the state's economy is only one factor that may mitigate the penalty*."

Emphasizing Article 4 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on the Eradication of Corruption Crimes, law enforcement generally holds that if the perpetrators of corruption as referred to in Article 2 and Article 3 meet the elements of those articles, the recovery

of state financial losses or the state's economy does not eliminate their criminal liability. According to Article 4, the recovery of state financial losses or the state's economy does not remove the criminal liability of the perpetrators. Even if the corruption perpetrator returns the state funds they have embezzled before the court's verdict is issued, the legal process will continue because the crime has already occurred. However, the return of the state funds enjoyed by the suspect/defendant may serve as a mitigating factor when the judge imposes the sentence. Such a return signifies a good faith effort to rectify the wrongdoing and reduces the burden on the state in terms of cost, time, effort, and thought. It is also considered an acknowledgment of guilt by the suspect/defendant.

Procedures for Confiscation of Assets Obtained from Corruption Crimes
Confiscation of Assets Through Criminal Channels

Investigation

Asset Tracing

The definition of asset tracing, as stated in the Attorney General of the Republic of Indonesia Regulation No. PER-027/A/JA/10/2014 dated October 1, 2014, is a series of actions to search for, request, obtain, and analyze information to determine or uncover the origin, location, and ownership of assets. Asset tracing activities need to be preceded by asset tracing planning, which involves meticulous preparation for carrying out the asset tracing activities. This preparation outlines everything that will be done by the asset tracing implementers to ensure that valid information and data are obtained.

Blocking

To secure assets suspected of being obtained from corruption, such as bank deposits, during the investigation, prosecution, or court trial, investigators, public prosecutors, or judges may request the bank to block the suspect's or defendant's accounts suspected of being derived from corruption, as stipulated in Article 29 paragraph (4) of Law No. 31 of 1999 on the Eradication of Corruption Crimes.

Seizure

Legal action in the form of asset seizure is conducted by investigators with prior permission from the Chair of the District Court, as stipulated in Article 38 paragraph (1) of the Criminal Procedure Code (KUHAP). However, in urgent cases involving movable items, seizure may be carried out before obtaining permission from the Chair of the District Court, but it must be reported immediately to the Chair of the District Court to obtain subsequent approval. This procedure is also regulated in Article 47 paragraph (1) of Law No. 30 of 2002 on the Corruption Eradication Commission. According to Article 38 paragraph (1), it is stated: "Seizure may only be carried out by investigators with a permit from the Chair of the District Court."

Asset Confiscation Based on Court Verdict

Asset confiscation in the eradication of corruption crimes is of significant importance. According to Muhammad Yusuf: "Experience in Indonesia and other countries shows that uncovering crimes, finding perpetrators, and imprisoning them (following the suspect) is not sufficiently effective in reducing crime rates if not accompanied by efforts to seize and confiscate the proceeds and instruments of the crime." Asset confiscation from corruption crimes through criminal channels (in personam forfeiture/conviction-based asset forfeiture), as previously described, is an additional penalty regulated under Article 18 paragraphs (1) and (2) of Law No. 31 of 1999 on the Eradication of Corruption Crimes, as amended and supplemented by Law No. 20 of 2001 on Amendments to Law No. 31 of 1999. Asset confiscation must be based on a court decision, which includes the ruling on additional penalties such as payment of replacement money and confiscation of the defendant's assets if the defendant fails to pay the replacement money.

Confiscation of Assets Obtained from Corruption Crimes through Civil Channels (Lawsuit)

Confiscation of assets obtained from corruption crimes through civil channels (in rem forfeiture/civil forfeiture) or civil lawsuits has specific characteristics. It can only be pursued when criminal measures are no longer feasible for recovering state losses. Asset or property confiscation of corruption perpetrators through civil law is carried out based on the provisions of Articles 32, 33, and 34 of Law No. 31 of 1999 and Article 38 C of Law No. 20 of 2001 on Amendments to Law No. 31 of 1999.

Confiscation of Assets of Perpetrators Not Obtained from Corruption Crimes

The confiscation of assets from perpetrators of corruption crimes primarily targets property obtained through corruption. This is outlined in several articles as described above. However, it is also possible to seize property owned by the perpetrator when the source of the assets is unclear,

whether or not they were obtained from corruption. The Law on the Eradication of Corruption Crimes grants the right to the accused to prove that they did not commit corruption, while also imposing the obligation on the accused to demonstrate that some or all of their assets, including those of their spouse, children, or others, are not obtained from corruption.

Confiscation of assets owned by a convicted person that are not obtained from corruption can also be carried out based on Article 18 paragraph (2) of Law No. 31 of 1999 on the Eradication of Corruption Crimes. In this case, the judge issues a decision including an additional penalty of paying replacement money equivalent to what the defendant enjoyed. If the defendant does not pay the replacement money within one month after the final court decision, the assets of the convicted person are seized by the prosecutor and auctioned to cover the replacement money.

Formulation of Asset Recovery (Non-Conviction Based) Related to Corruption Crimes in Achieving Legal Certainty

The proposed Asset Forfeiture Bill is expected to facilitate the confiscation of assets derived from crimes more easily. The Bill adopts a non-conviction based concept, or the application of asset forfeiture without criminal charges. In other words, the Asset Forfeiture Bill submitted by the government to the Parliament does not rely on a criminal conviction or sentence, meaning it allows for asset confiscation without the need for a criminal case or judicial verdict.

Regulations on Asset Forfeiture for Criminal Offenses aim to provide specific guidelines for tracing, blocking, seizing, and confiscating assets derived from crimes as part of law enforcement within the country. The approach to combating crime through Asset Forfeiture aligns with the principles of swift, simple, and low-cost justice by using civil procedures. It allows for the recovery of criminal proceeds regardless of the success or failure of prosecuting and adjudicating the offenders in criminal court.

Some key subjects covered in the draft Asset Forfeiture Bill include:

a. Procedure for Tracing, Blocking, Seizure, and Forfeiture of Criminal Assets;
b. Authority to file a petition for asset forfeiture and the authority of the court to adjudicate civilly represented by the State Prosecutor;
c. Asset management carried out based on the principles of professionalism, legal certainty, transparency, efficiency, and accountability by the Attorney General;
d. Compensation for parties affected by the blocking or seizure, and
e. Protection for bona fide third parties.

Gustav Radbruch, in Langen Richard's “Strafrechtsreform, Reform im Dilemma,” states: “To reform criminal law does not mean to improve criminal law, but to replace it with something better.” Legal reform (not just formal or material law) does not merely mean improving criminal law but must also replace it with something better.

Gustav Radbruch's view outlines 4 (four) fundamental aspects related to the meaning of legal certainty: First, that positive law means legislation; Second, that law is based on facts, meaning it is based on reality; Third, that facts must be formulated clearly to avoid misinterpretation, in addition to being easy to implement; Fourth, positive law should not be easily changed.

Gustav Radbruch's opinion is based on the view that legal certainty is the certainty of law itself. Legal certainty represents the application of law, or more specifically, legislation. Radbruch further argues that law must encompass three fundamental values: Justice (philosophical aspect), Certainty (juridical aspect), and Utility (sociological aspect). Every legal regulation must be validated by these three fundamental values.

Applying these three fundamental values is not easy; often, legal certainty is prioritized first, followed by justice, and then utility. Conflicts of interest sometimes make it difficult to make decisions when faced with concrete issues, because legal certainty, justice, and utility do not always align. When the emphasis is on maintaining legal certainty, it is often necessary to sacrifice justice and its benefits. Similarly, prioritizing justice can sometimes require sacrificing legal certainty and its utility.

Similarly, when prioritizing utility, it may sometimes require sacrificing legal certainty and justice. Therefore, to ensure that the three principles—legal certainty, justice, and utility—can work together, the enforcement of the law should focus on justice while also considering the principles of legal certainty and utility. These three legal goals cannot always be pursued simultaneously because, in practice, conflicts often arise between legal certainty and utility, or between justice and legal certainty, or between justice and utility.

The Asset Forfeiture Bill, which has not yet been enacted, serves as a basis for prioritizing legislative reform. This is due to the fact that substantive law often lags behind developments in social (societal) aspects of law. Legal reform and law-making should be forward-looking; the creation of laws must not only address current needs but also anticipate potential future developments.

The theory of criminal law reform anticipates that law-making should result in legislative products with optimal effects, aligning the *das sollen* (ideal rules) with the *das sein* (actual situation) to achieve legal certainty and justice.

Asset forfeiture in criminal cases is a coercive measure by the state to seize control and/or ownership of criminal assets based on a court decision that has acquired legal force, without relying on the conviction of the perpetrator. This involves a process of tracing through a series of actions to search, request, obtain, and analyze information to identify or reveal the origin, existence, and ownership of criminal assets. The Draft Law on Asset Forfeiture represents a new regulation that allows for the recovery of criminal assets without a criminal court decision. Through this mechanism, the state has the opportunity to seize assets suspected of being derived from criminal activities (proceeds of crimes) and other assets likely used or intended to be used as instruments to commit crimes.

The new legal policy through Asset Forfeiture in Criminal Cases is expected to reduce crime, provide legal certainty, and ensure legal protection in Indonesia. Asset forfeiture, which cannot be legally proven, can also prevent the allocation of economic resources obtained from criminal activities by perpetrators. It is crucial to expedite the enactment of the Asset Forfeiture Bill.

Conclusion

Asset forfeiture related to corruption crimes is a complex legal action involving various institutions, and its mechanisms are not separately regulated but are part of the Anti-Corruption Law, the Law on Prevention and Eradication of Money Laundering, the Criminal Procedure Code (KUHAP), and others. Given the complexity of the asset forfeiture mechanism, it is necessary to establish a separate regulation. Current anti-corruption efforts focus not only on arresting and penalizing perpetrators but also on recovering financial and economic losses to the state by seizing assets or property of corruption offenders. Thus, anti-corruption measures are not just about "follow the suspect," but also about "follow the money/asset."

The Asset Forfeiture Law for Criminal Offenses is expected to introduce new legal provisions that provide legal certainty and ensure protection in Indonesia. It aims to enhance public trust, especially among investors, to invest and develop business activities in the country. The concept of non-conviction based asset forfeiture involves seizing assets or wealth that significantly exceeds the legal sources of income and originates from criminal activities, without requiring a criminal conviction. The draft Asset Forfeiture Bill addresses the legal gap concerning Non-Conviction Based Asset Forfeiture.

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