

## Asset Recovery of Detrimental to The Finances of The State From Proceeds of Corruption in The Development of National Criminal Law System<sup>1</sup>

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### Abstract

Asset Recovery resulting from corruption in Law 31/1999 in conjunction with Law 20/2001 is difficult, besides that Indonesia, which has ratified UNCAC 2003, is still experiencing difficulties resulting in a low amount of repayment of state financial losses compared to its own financial losses. Problems in asset recovery originate from Article 18 of Law 31/1999 in conjunction with Law 20/2001, which can only be done after a court decision has permanent legal force. UNCAC 2003 has the concept of non conviction base forfeiture (in brake system) to overcome these weaknesses. The formulation of optimizing punishment is generated by asset recovery with an economic analysis of law approach using the time value of money as a determinant of calculation

**Keywords:** asset recovery; detrimental to the finances of the state; corruption; national criminal law system.

### Abstrak

Pemulihan aset hasil tindak pidana korupsi dalam UU 31/1999 jo UU 20/2001 sulit dilakukan, selain itu Indonesia yang sudah meratifikasi UNCAC 2003, masih mengalami kesulitan sehingga berdampak kepada rendahnya jumlah pengembalian kerugian keuangan negara dibandingkan dengan kerugian keuangan negaranya itu sendiri. Permasalahan dalam pemulihan aset berasal dari Pasal 18 UU 31/1999 jo UU 20/2001, yang hanya bisa dilakukan sesudah adanya putusan pengadilan berkekuatan hukum tetap. UNCAC 2003 memiliki konsep non conviction base forfeiture (in rem system) untuk mengatasi kelemahan tersebut. Formulasi optimalisasi pemidanaan dihasilkan dengan pemulihan aset dengan pendekatan economic analysis of law menggunakan nilai waktu dari uang sebagai determinan perhitungan.

**Kata kunci:** pemulihan aset; kerugian keuangan negara; korupsi; sistem hukum pidana nasional.

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## Introduction

Law of the Republic of Indonesia Number 20 of 2001 Concerning Alteration of Law Number 31 of 1999 Concerning the Eradication of Corruption has categorized the act of corruption as an act of crime which its eradication requires extreme measures as it is also stated that corruption is an outrageous criminal offence. According to Cooter & Ullen “Crimes can be ranked by seriousness, and punishments can be by severity, The more severe punishment typically are attached to the more serious crimes” (Cooter & Ullen, 2004). In contrast to Cooter and Ullen’s argument, the act of corruption in Indonesia proved otherwise. This is visible from the comparison between the amount of the state’s financial

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loss with the amount of restitution of the state's financial loss from the performers of corruption shown in the table below:

**Table 1.** The Data of The Corruption Eradication Commission (KPK) on Solving the Act of Corruption Year 2014 -2017

KPK	2014	2015	2016	2017	Total
Act of Corruption (number of cases)	34	30	35	44	143
State Financial Loss (in bilion)	2,19	1,1	0,164	0,210	3,664
Restitution of the State Financial Losses (in bilion)	0,110	0,212	0,532	0,237	1,901

Source: Annual Report of The Corruption Eradication Commision Year 2014-2017

The table shown above signifies these following indications:

1. Throughout the year 2014 to 2017 the accumulated number of corruption cases is 143 with 2014 as the base year, in 2015 the corruption cases declined by 12%, in 2016 corruption cases increased by 3% and in 2017 it rose up significantly by 29%. The average number of corruption case growth rate throughout 2014-2017 is recorded at 7%. The number of corruption cases managed to be solved by The Corruption Eradication Commission (KPK) throughout the year 2014-2017 is relatively low.
2. The amount of the state financial loss during the four year period is Rp. 3,664 Trillion. This amount, if compared with the 143 corruption cases solved by The Corruption Eradication Commission signifies that for each single act of corruption has resulted Rp 25,622 billion worth of state financial loss. The annual state financial losses as result of corruption from 2014-2017 if distributed into numbers is as these followings; Rp 64,411 billion in 2014, Rp. 36,667 billion in 2015, Rp. 4,686 billion in 2016 and Rp.4,773 billion in 2017.
3. In 2016, Indonesia's per capita income was recorded at Rp.47,96 million (Kusuma, 2017), while in the same year the amount of state financial loss was Rp. 4,686 billion (Rp.164 billion/ 35 corruption cases) if the comparison of these two economic numbers converted into an index, it implies that in 2016 itself the index of state financial loss from each corruption cases is 98 times higher than the amount of per capita income which Indonesia had earned in the same year. This clearly shows that for each single corruption case, the perpetrator has detriment the state equivalent to 98 times of Indonesia's per capita income.
4. Based on the data shown above, it is also visible that the amount of restitution of the state financial loss by performers of corruption is Rp.1,901 billion which is equal to only 29,78% from the total amount of the state financial loss, if calculated from each year during 2014-2017 period the amount of restitution relativity is as these following; 5,02% in 2014, 19,27% in 2015, 324,39% in 2016, 112,86% in 2017. In 2016-2017 the amount of restitution is greater than the amount of loss, it is seemingly as a result of restitution to the state financial loss in 2015 was paid in 2016 and 2017.

These similar phenomenon were also found in the data acquired from the The Republic of Indonesia General Attorney Office on solving corruption cases, as shown in Table 2.

**Table 2.** The Data of The Republic of Indonesia General Attorney Office (Kejaksaan) on Solving the Act of Corruption Year 2016-2018

<b>Republic of Indonesia General Attorney Office (Kejaksaan)</b>	<b>2016</b>	<b>2017</b>	<b>2018 (until November 2018)</b>	<b>Total</b>
Act of Corruption (number of cases)	1.819	1.672	965	4.456
State Financial Loss (in Trillion)	0,949	4,4	0,678	6,027
Restitution of the State Financial Losses (in Trillion)	0,349	0,734	0,522	1,605

Source: The Republic of Indonesia General Attorney Office, Year 2018

The table shown above signifies these following indications:

1. Throughout the year 2016 to November 2018 the accumulated number of corruption cases is 4.456 with 2016 as the base year, in solving corruption cases from 2016-2017 the number of corruption declined by 0,08%, in 2018 the number of corruption cases continues to decline by 46,95%. From the three year period corruption cases has declined by 23,52%.
2. The amount of the state financial loss during the three year period was Rp. 6.027 billion . This amount, if compared with the 4.456 corruption cases solved during the period signifies that for each single act of corruption has resulted Rp 1,352 billion worth of state financial loss. The annual state financial losses as result of corruption from 2016-2018 if distributed into numbers is as these followings; Rp 949 billion in 2016, Rp. 4.400 billion in 2017, Rp 678 billion in 2018.
3. Still using the 2016 per capita index figure of Rp.47.96 million with the amount of state financial loss per one corruption case for 2016 of Rp.521.72 million (Rp.949 billion/1819 cases), the ratio of total state financial losses per case to per capita income in 2016 is 11 times. This means that for each corruption case handled in the Prosecutor's Office, a suspect/defendant/convicted person has harmed state finances by 11 times the income per capita of Indonesian citizens.
4. Based on the data shown above, it is also visible that the amount of restitution of the state financial loss by performers of corruption is Rp.1,605 trillion which is relatively equal to only 26,63% from the total amount of the state financial loss, if calculated from each year during 2016-2018 period the amount of restitution relativity is as these following; 36,78% in 2016, 16,68% in 2017, 76,99% in 2018 (as of November 2018).

The asset recovery issue has emerged since the the president issued Presidential Instruction Number 5 of 2004 concerning The Acceleration of Corruption Eradication. Asset recovery has become one of the primary aspects that gained serious attention in

eradicating corruption since Indonesia government stipulated Law Number 7 of 2006 Concerning *United Nations Convention Against Corruption* (UNCAC), 2003. Before UNCAC 2003 was adopted and entered into force, in the implementation of international trade specifically foreign investment between countries, some risk indicators which present in one of the countries was used to asses possible country risks. Since 1995, the Transparency International added the country risk assessment with what later known as Corruption Perception Index which ranks countries in the world based on public perception on corruption in public and political position.

On international relation scope, due to some misunderstanding, the Corruption Perception Index was later used to measure a nation's success and failure in their attempt to solve corruption cases, which is shown in the following table.

**Table 3.** Corruption Perception Index (CPI) and Indonesia's Rank in CPI (Year 2014-2017)

Year	Corruption Perception Index	Rank
2014	34	107 <sup>th</sup> of 175
2015	36	88 <sup>th</sup> of 168
2016	37	90 <sup>th</sup> of 176
2017	37	96 <sup>th</sup> of 180

Source: *Transparency International*, 2017.

The table displayed above showed that Indonesia's Corruption Perception Index from 2014 to 2016 was constantly increasing, however there was a stagnation in 2017 where Indonesia received the same CPI as in 2016.

Based on the data movement, it is evident that when the Corruption Perception Index (CPI) increases it should implies major decline in both corruption cases and state financial loss it caused, however the absence of correlation between the Corruption Perception Index with the data of corruption cases as explained earlier, reinforces the suggestion that CPI is not a parameter to measure the progress in resolving and eradicating corruption cases.

The root of the problem which had prompted the hindrance in the asset recovery of state financial loss as a result of act of corruption originally comes from the regulation itself, which is Law Number 31 of 1999 jo Law of 2001. Article 18 Law Number 31 of 1999 jo Law Number 20 of 2001 which regulates asset recovery obstructs law enforcement in the eradication of corruption specifically in the context of restitution to the state financial loss, the law defines that seizure orders from the defendant is only possible under court ruling with permanent legal force and the substitute of imprisonment if the defendant is unable to retribute the loss he had caused. The regulation of asset recovery can also be found in Article 32, 33, 34 and 38 of CUU 31/1999 in conjunction with UU 20/2001 which has the concept of segregation between civil law and criminal law. Essentially, the regulation comprised in those laws is addressed at deceased defendants unable to serve their sentences in prison, but civil lawsuit is still possible to be implemented. In addition, the

purpose of seizure orders of the corruptors assets is to prevent any economic gain from their acts of crime (Eddyono, 2010).

Ideally, asset check should begin during the stage of investigation. During this phase, law enforcers such as the police, general attorney, and KPK had already determined the names of the suspect involved in a corruption case, the parties who had control of the properties gained through corruption and their accomplices who allegedly involved in the act of corruption, and the gathered evidences are closely linked to the names of the suspects (Arjaya, 2016) however the formal procedural approach through the current criminal procedure laws has not been made possible to recover the state losses even though state financial losses caused by corruption are state assets that must be saved (Prakarsa & Yulia, 2017).

The two issues which had caused by the regulations stated in Article 18 Law 31 of 1999 in conjunction with Law 20 of 2001 The two problems caused by the regulation in Article 18 of Law 31/1999 in conjunction with Law 20/2001, from the perspective of the law are seen to be one of the main causes of the eradication of corruption so far said to have no deterrent effect, however in accordance to Van Hamel's argument cited by Utrecht asserted that every form of punishment must consist scare factors to restrain any vicious intentions (Utrecht, 1987) therefore asset recovery intended to compensate the state financial losses is essentially a fearful element written in Law Number 31 of 1999 in conjunction with Law 20/2001, for the development of criminal law from the national legal system, the regulation on asset recovery from UNCAC 2003 is a new paradigm for the effectiveness of corruption eradication in Indonesia.

In Article 54 Section (1) UNCAC 2003 has enacted the NCB Asset Forfeiture which stated that it is unnecessary to wait for the court decision to confiscate the valuable assets from the defendant. M. Adi Toegarisman (2014) in his dissertation gives further explanation regarding the issue from the economic perspectives. M. Adi Toegarisman's argument is based on Economic Analysis of Law theory to analyze the amount of the state financial loss which the defendants must retribute. Toegarisman believes that restitution is far more effective than the programs to impoverish the defendants of corruption which could possibly violates human rights to live decently. The theory of economic analysis of law can be used to formulate the formulation of legal efficiency which is described more specifically based on the theory of cost benefit analysis. A number of published research papers on asset recovery and restitution of the state financial losses was cited as reference to maintain the originality of this research and to negate the assumption of plagiarism of previous published research papers, it is imperative to disclose some of the titles from previous research. These are some of the titles from the previous research:

1. Eduard Dixon Pattinasarany, *Conservatoir Beslag* (Sita Jaminan) Sebagai Upaya Penyelamatan Keuangan Negara dihubungkan dengan Pasal 18 Undang-Undang Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantas Tindak Pidana Korupsi, *Disertasi*, Bandung, Program Studi Doktor Ilmu Hukum Universitas Pasundan, 2017.

2. M.Adi Toegarisman, “Konsep Kerugian Keuangan Negara dihubungkan dengan Pertanggungjawaban Pidana dalam Undang-Undang Nomor 20 Tahun 2001 tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi” *Disertasi*, Bandung, Program Pascasarjana Program Studi Doktor (S3) Ilmu Hukum Universitas Padjadjaran, 2014.
3. Haswandi, “Pengembalian Aset Tindak Pidana Korupsi Pelaku Dan Ahli Warisnya Menurut Sistem Hukum Indonesia”, *Disertasi*, Padang, Program Pascasarjana Program Studi Doktor (S3) Ilmu Hukum Universitas Andalas, 2016.

The disparity of content found in this research if compared to previous published research papers is its approach in exploring the proposition where this research utilizes assessment approach by using deeper investigations and finding legal values for the effectiveness of asset recovery which help minimize the state financial losses as a result of act of corruption. In addition to the aforementioned research papers, this research also reviews the case of PT. Bank Syariah Mandiri Cimahi City Branch Office , Sudjiono Timan and Hendra Rahardja as its reference.

## Research Problems

Based on the introduction part of this article, this article is going to explain about *first*, how is the asset recovery arrangement resulting from corruption in Law 31/1999 in conjunction with Law 20/2001 and UNCAC 2003? and the *second* is how is the modeling for optimizing criminal justice produced by recovering assets (assets recovery) resulting from criminal acts of corruption in the development of the national criminal law system?

## Research Methods

This research is an juridical normative research focusing on reviewing the implementation of positive law norms using statute approach to understand whole legal regulations specifically concerning Act of Corruption in Indonesia and case approach to learn the implementation of law norms applied in the practice of law. This research utilizes secondary data, which is reading materials namely legal documents and academic books. The data retrieval utilized in this research is literature review from research papers, academic magazines, scientific journals, academic bulletins, etc. The data retrieved from the aforementioned resources is then analyzed with normative qualitative method. The definition of normative implies that this research starts from existing regulations as positive law, while the definition of qualitative implies that this research starts with the attempt to find a law by interpreting and constructing the provisions contained in legislation. The specification of this research is analytic descriptive aimed to give deep, systematic and thorough details concerning issues in the process of asset recovery by describing current effective regulations linked with law theories and the practice of positive law enforcement concerning asset recovery.

## Discussion

### **The Arrangement of Asset Recovery Resulted from Act of Corruption in Law 31 of 1999 In conjunction with Law 20 of 2001 and UNCAC 2003**

One of the effectiveness indicator of corruption eradication from the perspective of law is that the perpetrator of corruption is punishable by law, while from the economic perspective is the recovery of the state financial loss are balanced with the amount of the state financial loss, if this were then considered as a failure then it should be suspected that one of the predominant factors is feebleness in Indonesia's law implementation whereas disharmony of the legislation rules should be seen as a crucial issue. Feebleness in the implementation of the legislation rules is seen to create opportunities for more advanced crimes including asset hiding in both domestic or overseas countries, fleeing to foreign countries along with the properties gained through corruption and other potentials which helped the occurrence of such crimes, in order to analyze the issues within the context of asset recovery in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 and UNCAC 2003, two of the most relevant corruption cases with these issues are the case of Sudjiono Timan and Hendra Rahardja, which is suitable in describing the use of weaknesses of Law 31/1999 in conjunction with Law 20, both in the jurisprudence and the defendants of corruption for evasion in asset recovery.

The Sudjiono Timan case is one of several deviation cases in Bank Indonesia Liquidity Assistance Fund scandal. Sudjiono gained some personal benefits from the argumentation of Majelis Hakim PK using the Constitutional Court Verdict No.003/PUU-IV/resulting the case is then considered not an act against formal law instead an act against material law. The verdict from the Constitutional Court was implemented to annul Section 1 Subsection a UU 3/1971 which clearly states the the act of corruption is both against formal law and material law, therefore without the obligation of verification process, Sudjiono Timan is eligible to be charged with Article 34 of UU 3/1971, therefore the sole purpose of the implementation Constitutional Court verdict No.003/PUU-IV/2006 is clearly to annul Article 1 Section 1 Subsection a UU 3/1971 which has formal and material definition by limiting the definition of act of corruption as an act against formal law. Based on Supreme Court of the Republic of Indonesia Verdict Number 996 K/Pid/2006 dated 16 August 2006 and Supreme Court of the Republic of Indonesia Verdict Number 1974 K/Pid/2006 dated 13 October 2006, by using the interpretation of the law as if the two Supreme Court decisions only focused on actions against material law, in this context the Judicial Panel Decision of the PK that did not make the Supreme Court Decision Number 996 K/Pid/2006 dated August 16, 2006 and the Supreme Court Decision Number 1974 K/Pid/2006 dated October 13, 2006 as a legal reference is deviation of interpretation to formal law sources implemented in Indonesia, thus corruption solving in the case of Sudjiono Timan should be categorized as an act against the law which had prompted state financial losses resulted from abuse of power in the process of Bank Indonesia Liquidation Assistance fund distribution, in the meantime Judicial Review Panel of Judges verdict asserted Sudjiono Timan misdeeds is identified as the domain of civil law. The domain

shifting from criminal law to civil law was conducted Judicial Review Panel of Judges deliberately ignoring the regulations of Article 1365 KUH Perdata. Legal breakthrough in the civil lawsuit filing process addressed at Sudjiono Timan beneficiaries intended to fulfill the sense of justice in the community will be intricate in its implementation reckoning Article 38 C UU 31/1999 in conjunction with UU 20/2001 which asserted "property of the convicted person who is allegedly or reasonably suspected to have originated from a criminal act of corruption that has not yet been subjected to appropriation, the state may file a civil suit against the person". The phrase "allegedly" or "reasonably suspected" is an instruction which asserted the state attorney as the litigant must be able to legally verify that the properties belonging to the defendant is gained through corruption, if the litigant lawsuit is only based on allegation or assumption then Article 38 C UU UU 31/1999 jo UU 20/2001 as the article which determines UU 31/1999 jo UU 20/2001 has no legal power in the process of civil lawsuit.

The normative measure to determine the occurrence of legal resistance in an act of corruption based on Article 2 Paragraph (1) of Law 31/1999 in conjunction with Law 20/2001 is legality principle in criminal law that is "not convicted if there are no mistakes (*Actus non facit reum nisi mens sir rea*), in the case of Sudjiono Timan the principle of legality of Article 2 Paragraph (1) of Law 31/1999 in conjunction with Law 20/2001 should be not mutually exclusive with the provisions of Article 1365 of the Civil Code, based on this matter, then Sudjiono Timan in his capacity as a state official, namely the Managing Director of BUMN BPUI must be held accountable for his actions which have caused significant state financial losses, since these actions meet the conditions of the "unlawful acts" stated in Article 1365 of the Civil Code, Article 35 of Law 17/2003 and Law 31/1999 in conjunction with Law 20/2001.

Decision of Judicial Review Panel of Judges which released and discharged Sudjiono Timan from all convictions clearly violated the basic principles of criminal law in relation to criminal acts. The Sudjiono Timan case has the substance of error in making an interpretation of the definition of state financial losses. The mistake of the PK judges was their consideration of the state financial loss in the Sudjiono Timan case, as not in behalf of his name but on behalf of the corporation (PT BPUI), in that connection, it was seen that the judges of the Judicial Review judges had made a fundamental error in their decision by merely following the formulation formal acts as corporate actions, while the material actions, namely the element "every person" in the formulation of a criminal act of corruption are shifted into joint actions as corporate actions. SOE Company, which has violated the principles of propriety in the management of SOE Limited Liability Entity as stated by Law Number 40 of 2007 concerning Limited Liability Entity

Another consideration stated by the Panel of Judges of the PK in releasing Sudjiono Timan was an error in deducing conclusion that the element of "causing state financial losses" due the funds transferred to these companies is still in the process of restructuring and negotiation. Systematic financial losses in the country the Sudjiono Timan case is a thesis where the antithesis is the result. The tangible consequence of these occurrences is



"it might cause harm to both the country's finances and country's economy", when the country suffers losses, its people will also be affected. Assuring public welfare which is the responsibility of the state will be affected because the state funds also known as the State Budget (APBN) has diminished.

The Hendra Rahardja case is a case that has gone out of court through an absent court ruling at the Central Jakarta District Court. The defendant had fled the country until his death in the foreign country where the defendant was hiding from the pursuit of the authorities has made corruption in this case difficult to disclose despite BPK's finding and calculation claimed the amount of state financial losses stolen from BLBI funds was estimated roughly at Rp 2.659 trillion and the court's decision in absentia against the defendant was life imprisonment, then the legal analysis of the BLBI corruption criminal case from Hendra Rahardja will be directed only to the juridical aspects of asset recovery of his heirs so that state financial losses should be withdrawn from his heirs, referring to Law 31/1999 jo Law 20/2001, a civil lawsuit is the most submitted to the heirs of Hendra Rahardja, using an alternative regulated in Law 31/1999 in conjunction with Law 20/2001 which prompted six lawsuits commanding restitution of state financial losses, relating to a file a civil claim against Hendra Rahardja beneficiaries, what could be is a civil suit using Article 34 of Law 31/1999 in conjunction with Law 20/2001, which is a civil suit in the case of the defendant's death, and Article 38C of Law 31/1999 in conjunction with Law 20/2001, namely a civil claim against criminal acts of corruption that have permanent legal force as the excuse for a lawsuit. Hendra Rahardja in his legal status has deceased, and with the decision of the court in absentia has been sentenced with life imprisonment, then the legal status of Hendra Rahardja is undoubtedly as a defendant. The main issues of the provisions of Article 38C of Law 31/1999 in conjunction with Law 20/2001 which states that the litigant must be able to prove legally that the assets of the defendant gained through criminal acts of corruption, with the existence of the court verdict in absentia, meaning the assets of the defendant, in this case the assets Hendra Rahardja whom is in the mastery of his beneficiaries no longer needs to be proven that the property came from corruption.

The issue of recovering assets from acts of corruption that occurred in Indonesia mainly divided into two groups: assets resulting from corruption located found in Indonesia and assets resulting from corrupt assets found abroad. The opportunity to take swift action on asset recovery resulting from corruption from Hendra Rahardja is aligned with Law 7/2006 which is a ratification of UNCAC 2003, in this convention it is realized that the interest in being able to withdraw assets gained through corruption found abroad is practically only possible in international cooperation framework. UNCAC 2003 as a reference for international law regulates the act of asset recovery from criminal acts of corruption, in the following articles:

- a) Article 52 UNCAC 2003: Prevention and detection of transfers of proceeds of crime
- b) Article 53 UNCAC 2003: Measures for direct recovery of property
- c) Article 55 UNCAC 2003: Returning assets gained through corruption from custodial state to its country of origin

UNCAC 2003 has regulated that asset recovery resulting from corruption can be done indirectly through Criminal Recovery and civil procedures directly through Civil Recovery. The indirect return of assets is regulated in the provisions of Article 54 and 55 of UNCAC 2003, where the asset recovery system is carried out through an international cooperation process to confiscate, in the case of Hendra Rahardja, because the convicted person has been deceased, the most possible procedure asset recovery action is by using Article 54 and Article 55 of the 2003 UNCAC, based on the provisions of Article 51 of the 2003 UNCAC which obliged the countries participating in UNCAC 2003 to provide one another the broadest possible cooperation and assistance in relation to returning assets resulting from corruption, the head of countries where Hendra Rahardja presumably hide his assets, may not refuse any requests from the Government of the Republic of Indonesia to withdraw assets from Hendra Rahardja's convicted corruption case as stipulated in Article 1 Paragraph (2) of UNCAC 2003.

UNCAC 2003 has also stipulated the obligation to adopt or must consider adopting the provisions which become the substance of the 2003 UNCAC regulations in efforts to prevent and eradicate corruption, in which one of them is about illicit enrichment as regulated in Article 20 of UNCAC 2003, which stipulates it as a crime, if done intentionally, the act of enriching oneself, in a sense, an increase in the wealth of the public official which the suspected person unable to give reasonable explanation regarding the sources to his legitimate income. The need for asset recovery for illicit enrichment stated in Article 20 of UNCAC 2003, in the UN convention known as asset confiscation without conviction (non conviction based forfeiture) as stated in Article 54 Paragraph (1) letter c of UNCAC 2003 which explicitly requested the countries to take any required and necessary measures in the confiscation of assets without criminal conviction in cases where the offender cannot be prosecuted as a result of death, or disappearing or being involved in other cases, based on the provisions of the UNCAC, it appears that assets confiscation without penalties is the rightful form of punishment imposed on the perpetrators of criminal offenses where the assets can be seized by the state without the person being sentenced to imprisonment and / or given fines, regarding the confiscation of assets without the conviction.

Article 54 Paragraph (1) letter c of 2003 UNCAC declares that confiscation of the asset shall be imposed on an asset that cannot be proven by the defendant with the inverse expense, without criminal conviction. The case of corruption committed by Hendra Rahardja cannot be proven in the judicial process because the defendant has escaped and deceased, which means the asset recovery of the state financial loss due to the corrupt convict can be carried out by referring to Article 54 Paragraph (1) letter c UNCAC 2003.

Based on the perspective of international law, UNCAC 2003 has regulatory substance which includes a system of prevention and detection of the results of criminal acts of corruption (Article 52); system of direct asset recovery (Article 53); the indirect asset retrieval system and international cooperation for the purpose of confiscation (Article 55). A very important essence of these articles is the regulation of returning assets resulting from corruption from the custodial state to the country of origin of corruption

assets, returning assets resulting from corruption can be carried out indirectly through the Asset Recovery. through Criminal Recovery and Civil Asset Recovery directly through Civil Recovery.

Related to the case of Sudjiono Timan and Hendra Rahardja, the most important thing about the provisions that can be used to carry out asset recovery for both defendants and their beneficiary is the provisions arranged in UNCAC 2003 through civil procedures, is as the following:

1. Take any necessary actions to permit competent authorities to enforce seizure orders issued by courts in Indonesia.
2. Take any necessary actions to permit competent authorities, where they have jurisdiction to order the confiscation of assets originating from Indonesia under possession of the two defendants of corruption in accordance with the court's decision for the crime of concealing their assets in the country, as in their jurisdiction or with other procedures based on national law.
3. Specifically for the Hendra Rahardja case, take possible actions which allows the process of assets confiscation without prosecution as the convict is already deceased.

Recovery of state financial losses suffered by the state as a victim becomes the responsibility of the prosecutor's office as a state attorney, in the Hendra Rahardja case the prosecutor's office should carry out its duties and responsibilities in accordance with the principle of *dominus litis* in executing asset recovery against state financial losses through state civil rights or through MLA against countries suspected as hiding places for the assets gained through corruption conducted by Hendra Rahardja, for Indonesia that adopts a civil law system, in the context of asset recovery against both defendants of corruption, it is possible to execute an asset forfeiture, practically a court ruling which has permanent legal force has been decided on the two decided of the criminal act of corruption, Supreme Court Regulation Number 1 of 2013 concerning Procedures for Settling Requests for Handling Assets in the Criminal Act of Money Laundering or Other Criminal Acts (hereinafter referred to as Perma 1/2013), in Perma 1/2013 it is stated that this Perma 1/2013 replaces the legal absence for the implementation of Article 67 of Law Number 8 Year 2010 concerning Prevention and Eradication of Money Laundering ("TPPU Law") which governs the procedural law for handling assets, although it is a minor procedural law for Article 67 of Law Number 8 of 2010, but by using the principle of jurisprudence. The regulation can also be used to replace the legal absence on the implementation of Article 54 Paragraph (1) letter c 2003 UNCAC.

### **Modeling of Crime Law Optimization Produced by Asset Recovery as a Result of Corruption in the Development of the National Criminal Law System**

State financial losses related to Article 2 Paragraph (1) and Article 3 of Law 31/1999 in conjunction with Law 20/2001 which states that one of the elements that must be available in disclosing the occurrence of criminal acts of corruption is that it proved

detrimental to the country's finances or the country's economy. The definition of state financial loss in Law 31/1999 in conjunction with Law 20/2001 is obscure and comprised of numerous explicit formulation. The impact of corruption on state financial losses is in accordance with Law 17/2003 leads to the provision that the determination of asset recovery is based on the calculation of losses state finances on the basis of the nature of real and definite state financial losses. The calculation is intended to achieve the balance of economic value of state financial losses compared to the value of returning state financial losses, therefore during the calculation of asset recovery for corruption committed by both Sudjiono Timan and Hendra Rahardja, the cardinal determinant is that the state should not lose its economic utility to boost the welfare of its people as a result of the corrupt practices of the two defendants.

Along with the development of criminal law legislation, regarding how to eradicate criminal acts, especially related to criminal offenses which affects the economy such as money laundering, a paradigm shift has begun from Follow The Suspect to Follow The Money, thus emphasizing how to restitute state funds in major amount (Asset Recovery) and impoverishes the perpetrators and not only criminalizes the defendants, which hopefully provides deterrent effect for the defendants and others (**Wiarti, 2017**).

M. Adi Toegarisman's dissertation used as a reference for this research states that in calculating opportunity loss it should be based on the concept of time value of money with the present value formula using a discounting factor in the form of bank deposit interest. The concept of time value of money is very appropriate, especially as a factor for recovery of state financial losses due to time factors. The calculation of opportunity loss which applies the principle of benefit is an advantage that will be obtained from the objectives to be achieved when an allocation is determined, in this context, the basis for calculating a civil suit is not only the amount of state financial losses, but the calculation of "time value of money" of all state financial losses and costs incurred by the state for the resolution of the Sudjiono Timan and Hendra Rahardja cases must be included in the accumulation of state losses. The economic calculation for asset recovery is in accordance with the purpose of prompting a deterrent effect in eradicating corruption, namely by minimizing the utility that has been obtained from corrupt practices until a value is reached at the minimum level of welfare. The concept of time value of money and the opportunity loss calculation is a foundation for the calculation model that uses the economic analysis of law approach to several cases in this study.

The theory of economic analysis of law is the notion of Richard A. Posner which discusses legal issues relating to classical economic theories about the conflicting relationship between price and output, alternative costs and alternative resources to draw from lower values to values. The theory emphasized the issue of the state obligation to create welfare for its society using a paradigm to maximize its welfare (Wealth Maximization) which is an elaboration in the economic analysis theory of law, by applying the principles of efficiency, which Posner define as "allocation of resources where value is

maximized, has limitations as an ethical criterion for social decision making ” (Posner, 1992).

Therefore Posner's theory can be used to formulate a formula regarding legal efficiency which is spelled out more specifically based on efficiency theory and cost benefit analysis. Efficiency in Posner's argument relates to increasing one's wealth without causing harm to other parties, in addition to efficiency issues, the discussion on economic analysis of the law centers on cost-benefit analysis. This theory is an analytical tool for decision making. A decision of the choices to be made, can be seen from the costs (costs) that may arise or be a consequence if the decision has been made, on the other hand, the benefits that may be obtained from these decisions can also be calculated. Both can then be compared, whether greater expenses or benefits will be obtained, through this approach, cost benefit analysis can be seen widely used in economic analysis of the law. Based on that, Posner explained that the term "cost benefit analysis" has various meanings and uses, in general, benefit cost analysis related to economic welfare, which is used economics at the normative level, on the other hand, the notion of cost benefit analysis in general refers to the use of the Kaldor-Hicks efficiency concept as stated "... cost-benefit analysis in the Kaldor-Hicks sense is both a useful method of evaluating the common law and the implicit method" (Posner , 2000).

Posner said that the Kaldor-Hicks criterion was an improvement if economy agents who survived and fortunate enough from changes could pay compensation to economic ac who suffered great losses and the magnitude of the benefits obtained was greater than the compensation paid called the compensation criteria. An economic approach on law is the notion of using economic science as an approach in understanding behavior that is based on the assumption that individuals have goals and tends to choose the best path to achieve those goals. The tendency of the individual's behavior has implications for the incentive response in his surroundings, if the conditions around the individual change and make the individual can increase his personal interests by choosing alternative options, then the individual will definitely perform it (if a person's surroundings change in such a way that he could increase his satisfaction by altering his behavior, he will do so) (Posner, 1992), based on this, the economic analysis theory on law focused on how the economic system works based on legal perspective and behavior based on rational choice as result limited resources with unlimited human needs.

Efficiency is related to two things, firstly whether the actions to be solved with criminal law do not require much cost to solve them so that the benefits to be gained from them are greater and secondly, whether the criminal sanctions imposed are greater/heavier than the benefits the offender has achieved from committing a criminal offense. If criminal sanctions are more severe than the costs that must be incurred by the offender, it is certain that the offender will avoid committing crimes in the future (Ali, 2008).

Optimal criminal law enforcement in the economic analysis of criminal law must be within the tolerable limits that, so as not to cause what is called over-enforcement. Excessive law enforcement occurs when the total number of criminal sanctions imposed

on violators exceeds the optimal number of prevention efforts. Excessive law enforcement can also occur when the loss to be incurred by the offender exceeds the expected preventive effort from imposing sanctions on him (Bierrschbach, 2005).

The economic theory of law is used to formulate a formula regarding legal efficiency that can be elaborated more specifically based on the theory of efficiency and cost benefit analysis on that basis, the issue of state financial losses as a result of criminal acts of corruption can be examined its advantages and disadvantages in terms of economic efficiency, so that in the end a formulation of efficient law will be obtained by using the theoretical approach.

Regarding rational crime, the economic analysis approach to the law is based on the assumption that rational individuals will try to maximize their economic benefits and will be reluctant commit crimes if they predict that they will generate small economic benefit. This theory of economic analysis view of the law "is implemented in the form of a comparison between the costs and benefits of a policy with the principle of efficiency which requires that criminal sanctions imposed on perpetrators of crimes must be more severe than profits obtained by perpetrators" (Posner, 1992), thus this efficiency principle outlines the implications for optimal law enforcement. If the concept of rationality is associated with criminal law, the assumption deduced is that a criminal is an economic rational being that weighs the costs incurred from committing a crime with the benefits to be gained. When "profits are greater than the costs incurred, the perpetrators will commit crimes" (Miles, 2005), on the contrary if the benefits obtained are less than the costs to be incurred, the perpetrators will discourage themselves from committing crimes. In other words, individuals behave rationally to "maximize the benefits they get (individuals behave rationally to maximize their utility)" (Kahan, 1997).

This cost and benefit analysis is very important in relation to efforts to solve crime. The problem of dealing with crime is closely related to "available budget allocations, while the analysis of costs and benefits is also related to how much resources must be allocated to tackle the crime" (Kornhauser, 2000). Gary Becker expressed his thoughts related to the concept of rationality connected with criminal law, first, the optimal criminal law policy (the optimal criminal justice policy). This notion is related to cost and benefit analysis, which implies an attempt to obtain an optimal allocation of resources in society in fighting crime. The assumption of the theory that is built is, "if the existing criminal sanctions are severe enough, every criminal will surely avoid the possibility of being arrested, and this will reduce crime" (Barnes, 1999). Second, the individual's decision in relation to criminal activity (the individual's decision about criminal activity), in this case, the criminal is a rational actor who weighs the costs and benefits, as well as the time and resources allocated between criminal activity and non-criminal activities, so that it is known which one can bring the most profit, in other words, all people (not just criminals) are rational actors who by subjectivity weigh the costs and benefits of the activities carried out. Some people choose activities labeled as criminals, because for them the benefits derived from these activities exceed the costs that must be incurred, to prevent them from committing

a crime, which must be taken is to increase the costs to be incurred, therefore the benefits obtained are much smaller than expected. The trick is to increase the number of crime punishment that will be dropped or the opportunity to be arrested and tried, at the same time, the social costs that must be borne from law enforcement must be reduced in such a way that it is at a minimum position. That is, the costs of law enforcement should not exceed social losses that would be prevented through law enforcement facilities. In short, to minimize the social costs that must be borne is to increase criminal penalties are quite severe and increase the number of criminals who are arrested; and third, the existence of the criminal category (the existence of criminal category). This problem is related to "analysis of substantive criminal law and trying to explain to what extent the presence of criminal law is indeed necessary" (Barnes, 1999). Economic analysis of law states that "the crime should be published to the extent that it maximizes social welfare" (Cooter & Ullen, 2004) (crime must be punished for maximizing social welfare). The statement from the teachings of economic analysis of law is actually an "entry point" for economic analysis of law stating that a theory which is suitable for the criminalization of a crime that causes damage to attempts to maximize social welfare is a retributive criminal theory.

The main principle in optimal criminal law enforcement is based on the thought of maximizing social welfare (Garoupa & Klerman, 2002). Governments in designing policies, including policies prohibiting certain acts (in abstracto), must pay attention to the maximum profit to be gained. In the context of economic analysis of criminal law, social welfare can be pursued by taking into account the amount of profits obtained by the perpetrators from carrying out prohibited acts, less losses caused by those acts, and expenditures incurred in law enforcement (Garoupa & Klerman, 2002). as a result of this crime includes social losses incurred, costs incurred by potential victims to prevent themselves from becoming victims, and losses directly experienced by victims (Cohen, 2000), meanwhile, costs of criminal law enforcement include costs of prevention, disclosure, arrest, and the imposition of criminal sanctions (Cohen, 2000). All of these must be measured and compared with the amount of profit obtained by the perpetrators from committing criminal offenses, if losses due to criminal acts (after being cashed) and the costs to be incurred by the government to tackle criminal offenses through law enforcement officers it turns out to be greater than the amount of profit that the perpetrators receive from committing a crime, then the optimization of law enforcement will not be realized, as there will be fewer people encouraged to commit criminal acts, and as such, less expenses will be spent in solving crime and finance the operationalization of law enforcement. This is reciprocally with the possibility of being charged with a serious crime that exceeds the profits of the offender, because with that, the offender will pay all the costs of his actions. This idea is referred to as efficient punishment (Friedman, 1993).

The calculation model utilizes the economic analysis of law approach as the optimization of punishment with the formulation of the additional value of the state financial loss as a consequence of the time period from the perpetrators of the crime to the judicial process = The amount of the state financial loss that has been calculated by

the Supreme Audit Agency (BPK) x Interest Factor with a level the interest stipulated in the State Gazette Number 22 of 1948, on that basis, the issue of state financial losses as a result of criminal acts of corruption can be examined the advantages and disadvantages in terms of economic efficiency, so that in the end a formulation of the law which has a deterrent effect will be obtained by using an approach theory. The essence of the theory of economic analysis of law aimed at creating efficiency in every legal decision. This efficiency problem is not just to compare the rationality of the calculation of the costs of handling corruption from the start of investigation to the average prosecution, but more importantly is in handling corruption, the state does not experience an increase in the amount of state financial losses due to the time value of money and lost opportunity (opportunity lost) to achieve community welfare due to the cost of sacrifice lost as a result of corruption.

An example in calculating the concept of time value of money is the calculation for the Sudjiono Timan case with act of corruption committed in 1998, and the submission of a PK against the case submitted by Sudjiono Timan in 2012, and until 2018 a civil suit against Sudjiono Timan had not yet been filed by JPN, with such a long time period, raised the following question from an economic perspective, is it still feasible if the amount of state financial losses until 2018, calculated in accordance with the state financial losses calculated in 1998?

The calculation of opportunity loss in the Sudjiono Timan case is as follows:

1. Case tenor which has occurred to date = 1998-2018 = 20 years.
2. Total state financial losses of Rp120 billion and USD 98.7 million (Assuming an exchange rate of USD-14,500, the total amount of USD 98.7 million is the same as the rupiah value of Rp. 1,431 Trillion. Thus the amount of state financial losses in corruption conducted by Sudjiono Timan = IDR 1,551 Trillion.
3. By using the provisions stipulated in State Gazette Number 22 of 1948, the reference interest used in this calculation is 6% per annum.
4. Interest factor = Future Value for 6% interest and 20-year tenor = 3.2071 (Shim & Siegel, 1987).
5. Future Value for a tenor of 20 years from the value of state financial losses in the corruption case Sudjiono Timan = Rp. 1,551 Trillion x 3.2071 = Rp. 4,974 Trillion.
6. Therefore, the total amount of state financial losses that must be returned by Sudjiono Timan is Rp.4,974 trillion.

In addition to reinforce and compare of the above calculation, the calculation of the value of state financial losses and the repayment of state financial losses in the Corruption Case at PT. Bank Syariah Mandiri (BSM) Cimahi City Branch which in 2011 gave the People's Business Credit (KUR) to PT. My Interntional Salon, as follows:

1. The case has caused losses to the state which occurred in 2011 in the amount of Rp.11,500,000,000, - The case was finally solved in 2018 with the restitution of the state financial loss being completed in the amount of Rp.11,500,000,000, in perspective of the time value of money, the settlement period of the case is 7 (seven) years.



2. Recovering state financial losses are conducted in 3 (three) stages, namely:
  - a. Year 2014: Confiscation at the investigation stage was Rp.2,000,000,000, from the perspective of the time value of money for 2014 to the completion of the 2018 case, which was 4 years.
  - b. Year 2015: Confiscation at the investigation stage of Rp.7,000,000,000, from the perspective of the time value of money for 2015 to the completion of the 2018 case, is 3 years.
  - c. Year 2018: Confiscation at the prosecution stage was Rp.2,500,000,000, from the perspective of the time value of money for 2015 to the completion of the 2018 case, was 3 years.
  - d. Movements in the time value of money from the flow of funds.
  - e. By using the provisions stipulated in State Gazette Number 22 of 1948, where the reference interest used in this calculation is 6% per year, the interest factor for the time value of money for losses of state finances and repayment of losses of state finances in the case of Bank Syariah Mandiri is :
    - 1) In 2011-2018, for a period of 7 years with a bank interest of 6% the interest factor was 1.5036, thus the value of state financial losses during the period 2011-2018 was  $\text{Rp.11,500,000,000} \times 1,5036 = \text{Rp.17,291.400, -}$ .
    - 2) In 2014-2018, the seizure stage 1 until the case was completed for a period of 4 years, with a bank interest of 6% interest factor was 1.2625. The amount of money in stage 1 is Rp.2,000,000,000, thus the value of returning the state financial loss for the period to the settlement of the case is  $\text{Rp.2,000,000,000} \times 1.2625 = \text{Rp.2,525,000,000}$ .
    - 3) In 2015-2018, the confiscation stage 2 until the case was completed for a period of 3 years, with a bank interest of 6% interest factor was 1.1910. The amount of money in this stage 2 is Rp.7,000,000,000, thus the value of returning state financial losses for the period to the settlement of the case is  $\text{Rp.7,000,000,000} \times 1,1910 = \text{Rp.7,833,700,000}$
    - 4) In 2018, the confiscation stage 3 when the case is completed for a period of 1 year, with a bank interest of 6% interest factor is 1.0600. The amount of money in this stage 3 is Rp.2,500,000,000.- Therefore, the value of returning the state financial loss for the period to the settlement of the case is  $\text{Rp.2,500,000,000} \times 1,0600 = \text{Rp.2,650,000,000}$ .
    - 5) After calculating using the time value of money for the period 2011-2018, the outstanding state financial losses are: Amount 1- (Amount2 + Amount3 + Amount4) =  $\text{Rp.17,291,400,000} - \text{Rp.13,008,700,000} = \text{Rp 4,282,700,000}$ .

The calculation of both restitution on state financial losses shows that the defendant Sudjiono Timan is obliged to retribute the country's financial loss of Rp.4,974 trillion, while the convicted in the case of Bank Syariah Mandiri in the Cimahi City Branch amounting to Rp. 15,782,700,000, using the calculation as shown the example above, then the asset recovery action for the defendants of will be considered much heavier compared with the

assets gained through corruption. This is intended to achieve the implications of the deterrent effect through optimal law enforcement with the principle of economic balance in the calculation of asset recovery, by implementing an economic analysis approach to the law to realize the deterrent effect.

## Conclusion

The regulation on asset recovery resulting from corruption in Law 31/1999 in conjunction with Law 20/2001 and UNCAC 2003 is Law 31/1999 in conjunction with Law 20/2001 performed using criminal law and civil law mechanisms. The criminal law mechanism is regulated in Article 18, Article 38, Paragraph (5), Article 38B Paragraph (2) and Article 38B Paragraph (6). The civil law mechanism is regulated in Article 32, Article 33, Article 34 and Article 38 C of Law 31/1999 in conjunction with Law 20/2001. UNCAC regulates the recovery of assets (asset recovery) resulting from criminal acts of corruption in Chapter V Article 51 to Article 58. The criminal mechanism in Law 31/1999 in conjunction with Law 20/2001 performed after a court ruling has obtained permanent legal force. These provisions become weaknesses in the implementation of asset recovery. The availability of a civil law mechanism in Law 31/1999 in conjunction with Law 20/2001 is also arduous to implement in the recovery of assets obtained from criminal acts of corruption because the civil law process involves a formal evidence system which its practice can be more difficult than material evidence. UNCAC 2003 has the concept of non-conviction base for future (in rem system) to overcome weaknesses in conducting asset recovery as a result of corruption.

The formulation of optimizing criminal punishment is generated by recovering assets obtained through corruption in the development of the national criminal law system with changing the recovery of these assets from additional punishment to the primary punishment as a consequence of corruption as an extraordinary crime. The formulation of the optimization of criminal punishment is the use of the economic analysis of law approach, which uses the time value of money as a determinant of the calculation in accordance with the philosophy of retaliation contained in retributive penalties against perpetrators of corruption.

## Suggestion

Based on the discussion above, there are two suggestions as solutions to the problems raised. *First*, from practical aspects, the government and the House of Representatives (DPR) need to make alteration to the Corruption Eradication Act by adopting relevant regulations from UNCAC 2003 into the amendment law and for the formulation of optimization of crimes resulting from asset recovery (asset recovery) the results of criminal acts of corruption, using a calculation model using the economic analysis of law approach with the formulation of  $FV_r, n = Po [FVIF (r, n)]$  as a reference model for prosecutors in the judicial process.

*Second*, From a theoretical aspect, for input in the process of drafting the Asset of Appropriation Law Draft, the National Law Development Agency (BPHN) of the Ministry of Law and Human Rights must develop and strengthen cooperation across law enforcement agencies and institutions of higher education studies to conduct scientific research on asset recovery (asset recovery) is based on an economic of law analysis in anticipation of the increasing quantity and quality of corruption that increases the financial losses of the state.

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