

Reconstruction Guarantee Confiscation As An Alternative Approach To Maximize The State-Losses Recovery

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Abstract

In addition, the argument for violating human rights is also inappropriate to reject the idea of guarantee confiscation. The limitation of a right to law enforcement is justified by the 1945 Constitution and control of the confiscated objects is still given to the suspect. Speaking of option of legal efforts that can be accessed by the suspect, pretrial is one of the option available. Pretrial can assess the validity of the confiscation by looking at the letter of determination from the local district court and the urgency of carrying out the action. The proposed change in procedural law in handling corruption cases is actually in line with a restorative approach. This has also been pushed by the government, at least through President Joko Widodo's statement regarding the urgency of recovering state financial losses in handling corruption cases. However, changes in legislation of course do not only rely on the executive, but also on the legislative side. Up to now, the legislative products that support the agenda of eradicating corruption have not been prioritized by legislators, such as Bill on Asset Confiscation, Bill on Limitation of Currency Transactions, as well as the Revision of the Anti Corruption Law. Therefore, this study must also be followed up by the awareness from the government and the parliament about the current stagnation of law enforcement to eradicate corruption.

Key words; Corruption, stagnation of law enforcement, State Loss Recovery

Introduction

The case handling of corruption in Indonesia has not been fully oriented towards recovering state financial losses. There is a huge gap between state financial losses and the imposition of penalties for paying compensation. For this reason, legal breakthroughs must be made to overcome these problems. One of them is by adopting the concept of guarantee confiscation into the regulations related to corruption case handling. The urge to apply the confiscation of guarantees in handling corruption cases is actually not the first time being discussed. In 2013, the Supreme Court had a chance to discuss this.¹ Unfortunately, the discussion never produced a solid concept to be implemented. However, beyond that, at least one of the stakeholders in law enforcement, the judicial power agency, has paid more attention to the issue of the low recovery of state financial losses. Basically, the concept of guarantee confiscation is not known in criminal law. This action is only listed in the civil law, particularly

¹ Supreme Court Initiates the Guarantee confiscation for Corruption Cases
<https://www.hukumonline.com/berita/baca/lt51d5853ccc40b/ma-gagas-sita-jaminan-untukperkara-korupsi/>



through Article 227 paragraph (1) of the Herzien Inlandsch Regulation (HIR)². Taking a closer look on that, confiscation of guarantee has a number of important elements. First, there is a reasonable suspicion from the debtor. This has a very thick subjective nuance where allegation is made from the feeling or mental state of the debtor that the creditor has the potential to find a way to embezzle or take their assets. Later, the allegation must be explained and proven in court. The judge has the authority to accept or reject the confiscation application submitted by the debtor. Thus, the debtor in this case is active to see all the potential that might occur to their assets while they are still in the control of the creditor and convey that concern in court. Second, judges make confiscations to protect the rights of someone who submits a confiscation request. This is intended so that the lawsuit is not illusionist and certainly, what is requested by the debtor can be fulfilled by the creditor. Because, if this is not done, it is possible that creditors hidden or transferred their assets to other parties and this has implications for decisions that are difficult to execute. However, the application for guarantee confiscation is not an obligation, rather, the right of the debtor that can be submitted for their own interest.

In line with the above concept, Yahya Harahap explained that the purpose of guarantee confiscation was solely to prevent the assets for being embezzled or exiled by creditors during the trial process.³ In addition, Sudikno Mertokusumo also stated that the guarantee confiscation is a preparatory action from the plaintiff in the form of an application to the Head of the District Court to guarantee the implementation of a civil decision by cashing or selling the debtor's confiscated goods to fulfill the plaintiff's demands. Thus, the act of confiscation is not to be submitted and owned by the debtor, but as a guarantee so that the creditor is able to pay off their debt payments. This is not intended to create or give new rights, but to protect the rights of the debtor if later the panel of judges wins the lawsuit. There is a significant difference between confiscation in criminal law and guarantee confiscation. As regulated in Article 39 paragraph (1) of the Criminal Procedure Code, confiscation can only be imposed on goods that have a direct connection with a crime. Meanwhile, guarantee confiscation is oppositely different, the assets belonging to the creditor can be confiscated entirely to ensure that their debts can be repaid. In addition, confiscated goods are in the control of the state through law enforcement. In contrast to the guarantee confiscation, the confiscated goods can still be used or controlled by the creditor during the trial process. Hence, the confiscation of collateral is only limited to administrative documents of ownership of an asset. The confiscation action is needed to strengthen the sumption of law enforcement against the perpetrator's mistakes and as evidence in court. The orientation of guarantee confiscation is to

² Article 227 HIR: If there is a reasonable suspicion that a person who owes a debt, while a decision has not been rendered on th emor as a decision against them cannot be executed, is seeking reason to embezzle or take their goods, both variable and fixed, with the intention of taking the goods away from the debt collector, then at the request of a person with an interest, the chairman of the district court may give an order that the goods be confiscated in order to protect the rights of the person who submitted the request, and the requester must be notified that they will appear before a trial, the first district court after that to advance and strengthen their claim.

³ Mertokusumo, Sudikno – Indonesian Civil Procedure Law, Page 339.



secure assets as a guarantee that the defendant is able to pay off the debt. In handling corruption cases, there are serious problems that are also related to recovering state financial losses. However, the problem that occurs is not at the end, but within the legal process, especially in confiscation. In the investigation process, law enforcers, whether the Corruption Eradication Commission, the Prosecutor's Office or the Police, have the authority to confiscate by adhering to the provisions of Article 39 paragraph (1) of the Criminal Procedure Code. This means that law enforcement can only confiscate items related to criminal events. On the other hand, when later the case has entered the trial process and the defendant is legally and convincingly proven to have committed a crime of corruption, followed by an additional penalty of compensation, law enforcers will confiscate the assets belonging to the defendant. However, the difference is that this final stage of confiscation is not limited only to assets related to criminal events, rather, to entirely pay off the sentence of compensation. Based on the explanation above, a crucial question arises, what if the assets or assets belonging to the defendant have been transferred to another party during the investigation process? Will it result in law enforcement not being allowed to reconfiscate? In this condition, if it turns out that the compensation cannot be paid off by the defendant and their assets are also not sufficient to pay the additional penalty, then they will be charged with a substitute imprisonment.

As a result of the defendant being sentenced to a substitute imprisonment, the orientation of the sentence became totally different with the intention behind the imposition of fines, which is to be more focused on the aspect of recovering state financial losses. Unfortunately, a substitute imprisonment sentence is not an ideal option. This is because in reality there is still a disparity between decisions and the average sentence that is extremely low, practically only one-year imprisonment. For this reason, reformulation of the concept of confiscation is needed that is focused on the orientation towards recovering state losses. One alternative option is to adopt a concept of guarantee confiscation

The Challenge Of The Implementation Of Guarantee Confiscation In Handling Corruption Cases

Efforts to recover stolen state assets (stolen asset recovery) caused by corruption tend not to be easy. The perpetrators of corruption have broad access and are difficult to reach when they are hiding or laundering the proceeds of corruption. Asset Recovery is becoming increasingly difficult because the safe haven for the proceeds of the crime is beyond the borders of where the crime of corruption itself is committed⁴. The above conditions require significant improvements, in addition to the quality of law enforcement, also includes procedural law reform. This study offers the

⁴ Isra, Saldi – Asset Recovery for Corruption Crimes through International Cooperation https://www.saldiisra.web.id/index.php?option=com_content&view=article&id=80:asset-recoverytindak-idana-korupsi-melalui-kerjasama-internasional&catid=23:makalah&Itemid.



concept of guarantee confiscation to be adopted in handling corruption cases. Although there are a number of people who think that the idea has violated human rights, especially as written in the Article 28G paragraph (1) of the 1945 Constitution (UUD 1945)⁵. To answer this question, there are at least three arguments that can be considered. First, in general, for the sake of law enforcement, especially morals and public order, a person's rights can be limited as stated in Article 28J paragraph (2) of the 1945 Constitution. Especially considering that the type of crime committed is also an inseparable part of the aspect of human rights violations. Second, the confiscated goods that are the object of the guarantee confiscation are still in the possession of the suspect, since the guarantee confiscation is only justified on the administrative documents of ownership, not in possession of the object. This is done as a guarantee for the state that the suspect can pay for the losses that they gained from corrupt practices. Third, the check and balance mechanism as the main element before law enforcement conduct guarantee confiscation. This is also part of the realization of the concept of due process of law in law enforcement and reduces the discretion or subjective views of law enforcers. Investigators will be required to first explain the reasons for guarantee confiscation to the judges at the district court. If the judge considers that the assets that have been confiscated previously are sufficient enough, then the application for guarantee confiscation can be rejected. There are parties who argue that the guarantee confiscation is no longer needed since there is already provided by the Article 28 paragraph (1) of the Anti Corruption Law⁶.

In general, it must be understood that the article has a different orientation from the guarantee confiscation. Article 38 paragraph (1) of the Anti Corruption Law focuses more on confiscation of assets using the method of reversing the burden of proof, while guarantee confiscation is intended to secure the assets of the perpetrators.

⁵ Article 28G paragraph (1) of the 1945 Constitution: Everyone has the right to personal protection, family, honor, dignity and property under their control, and has the right to a sense of security and protection from the threat of fear to do or not do something which is a human right.

⁶ Article 38 B paragraph (1) of the Anti Corruption Law: Everyone who is accused of committing one of the criminal acts of corruption as referred to in Article 2, Article 3, Article 13, Article 14, Article 15, and Article 16 of Law Number 31 of 1999 on Corruption Eradication Articles 5 to 12 of this Law are required to prove otherwise against their property which has not been indicted, but is also suspected of originating from a criminal act of corruption.



Furthermore, the seizure of assets as mentioned in the article above can only be used when the case has entered the trial process. This certainly does not significantly solve the problem and still open up the opportunities for perpetrators to transfer their assets during the investigation process. Whereas, if using the concept of guarantee confiscation, the perpetrator's assets to cover the amount of loss can be secured since the investigation took place.

Gustav Radbruch states that there are three basic legal values that must be contained in a legal product, they are: justice, expediency, and certainty. If it is associated with the concept of guarantee confiscation for handling corruption cases, all these aspects have been fulfilled. First, the guarantee confiscation focuses on justice for the victim or in this case, the state itself. With the regulation of the guarantee confiscation, the recovery of state financial losses can be maximized and used as much as possible for the community. Second, the guarantee confiscation is a legal tool that will be useful to overcome any problem related with confiscation. As explained in this study, the confiscation regulated in Article 39 paragraph (1) of the Criminal Procedure Code has raised a number of concerns. Such as, the potential transfer of assets by the corruptors during the case handling process. If the convict is subject to additional compensation charge, the recovery of state financial losses will not be maximized. By imposing the guarantee confiscation, the certainty of recovery of state financial losses in handling corruption cases can be achieved. Law enforcers are given the authority to confiscate the assets of the perpetrators even though they are not directly related to criminal acts. This action is done solely to concretely execute the court's decision. With all the dynamic regarding the guarantee confiscation, how about the protection, especially the legal countermeasures, that a suspect can take? In this case, the pretrial institution plays an important role in ensuring that the implementation of the guarantee confiscation does not violate and in line with the due process of law. There are at least two potential problems during the guarantee confiscation process that can be cancelled through a pretrial trial. First, the act of guarantee confiscation is carried out without a letter of determination from the local district court being included. This is important to ensure that there is a check and balance mechanism before the guarantee confiscation can be carried out by law



enforcement. Second, the assets that will be subjected to confiscation have exceeded the results of the previous confiscation. This action cannot be justified, because the purpose of holding a guarantee confiscation is only to ensure that the case handling process is not illusory, if the confiscation is sufficient, then the guarantee confiscation is no longer relevant to execute. Option of legal efforts that can be taken by suspects are important to be regulated as mitigation of the abuse of power from law enforcement.

Conclusion

Corruption is known in many terms: extraordinary crime, white collar crime, even including transnational crime. This is reasonable, especially if we refer to the considerations section of Law Number 31 of 1999 as amended to Law Number 20 of 2001 (Anti Corruption Law), it is stated that corruption is very detrimental to state finances and hinders national development. Hence, the corruption has an impact on multiple sectors of people's lives, corruption is closely related to the economy, and corruption requires extraordinary actions from stakeholders. The problem with law enforcement related to criminal acts of corruption in Indonesia lies in the orientation of punishment against perpetrators, both from the point of view of legislation and the performance of law enforcement officers. Currently, all legal substances and instruments still use the classical approach or what is commonly called the retributive theory. Thus, due to the narrow perspective in the legal approach, the main goal of eradicating corruption, especially to recover state financial and economical losses, did not work as expected. Based on ICW's monitoring described in this study, the achievement of recovery through the criminal mechanism of additional compensation is inversely proportional to the amount of state financial losses. Therefore, a fundamental change is needed in the scope of regulation and the perspective of law enforcement officials to achieve the restorative goal.

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