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Confiscation of Corruption Asset in The Indonesian Legal System: A Study of Criminal Law in Aceh

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Abstract: Confiscation of individual assets for criminal acts of corruption is important in handling corruption cases because it is a means of recovering state losses. The confiscation of wealth aims to minimize state losses, not only must it be carried out from the start of handling the case by freezing and confiscation, but it also absolutely must be carried out in cooperation with other countries, where the proceeds of crime are located. This article examines legal policies related to asset confiscation and their alignment with criminal objectives. This research aims to analyze the rules and principles that exist in legal science. This research uses normative juridical research methods, specifically studying legal systematics to understand the fundamental aspects of criminal law. The data collection technique used was a document study in the form of laws and other legal regulations, then interviews with judges in Banda Aceh. The findings reveal that the policy of confiscating assets from individuals engaged in corrupt practices can be pursued through criminal procedures, such as asset tracing, freezing, confiscation, and return. Furthermore, civil proceedings carried out by state attorneys can also facilitate the asset confiscation process. The confiscation of assets is fundamentally aligned with the purpose of punishment. It is essential to trace the assets obtained through corruption starting from the investigation stage, in order to impose restitution as an additional penalty on the perpetrators. However, obstacles arise in the actual implementation of asset confiscation. For instance, assets may have been transferred abroad by the perpetrators after being incarcerated by the court. Therefore, new legislation is required to deal with this problem.

Keywords: Asset confiscation, corruption crime, state loss, criminal law

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Abstrak: *Perampasan harta kekayaan individu tindak pidana korupsi merupakan hal terpenting dalam penanganan perkara korupsi, karena merupakan sarana pemulihan kerugian negara. Perampasan kekayaan tersebut bertujuan untuk meminimalisir kerugian negara tidak hanya harus dilakukan sejak awal penanganan perkara dengan cara pembekuan dan penyitaan, tetapi juga mutlak harus dilakukan melalui kerjasama dengan negara lain, dimana harta hasil kejahatan berada. Artikel ini mengkaji kebijakan hukum terkait penyitaan aset dan keselarasan dengan tujuan pemidanaan. Penelitian ini bertujuan menganalisis kaidah dan prinsip yang ada dalam ilmu hukum. Penelitian ini menggunakan metode penelitian yuridis normatif, khususnya mempelajari sistematika hukum untuk mengetahui aspek-aspek mendasar dari hukum pidana. Teknik pengumpulan data yang digunakan adalah studi dokumen berupa undang-undang dan aturan hukum lainnya, kemudian wawancara dengan hakim di Banda Aceh. Hasil temuan menunjukkan bahwa kebijakan penyitaan aset individu yang melakukan praktik korupsi dapat dilakukan melalui prosedur pidana, seperti penelusuran aset, pembekuan, penyitaan, dan pengembalian. Selain itu, proses perdata yang dilakukan oleh kejaksaan juga dapat memudahkan proses penyitaan aset. Penelusuran terhadap harta kekayaan hasil tindak pidana korupsi perlu dilakukan mulai dari tahap penyidikan, agar dapat dikenakan restitusi sebagai sanksi tambahan bagi pelakunya. Namun, kendala muncul dalam pelaksanaan penyitaan aset secara nyata. Misalnya, aset telah dipindahkan ke luar negeri oleh pelaku setelah ditahan oleh pengadilan. Oleh karena itu diperlukan undang-undang baru untuk mengatasi masalah ini.*
Kata Kunci: *Penyitaan aset, tindak pidana korupsi, kerugian negara, hukum pidana*

Introduction

The issue of returning assets (asset recovery) to minimize State losses is a factor that is no less important in efforts to eradicate corruption in addition to convicting perpetrators with the most severe punishments. Steps to minimize state losses must not only be carried out from the start of handling the case by freezing and confiscating, but also absolutely must be carried out through cooperation with other countries, where the proceeds of crime are located. For this reason, the orientation of law enforcement regarding the return of assets needs to be sharpened, especially in cooperative relations with other countries, either through the exchange of financial intelligence information facilitated by PPATK, coordination with the Corruptor Hunter Team, as well as mutual legal assistance cooperation between the Indonesian government and the governments of other countries,[1] considering that criminal acts of corruption are categorized as

[1]Daniel González Uriel, "Money Laundering, Political Corruption and Asset Recovery in the Spanish Criminal Code," *International Annals of Criminology* 59, no. 1 (2021). Sandra

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extraordinary crimes and are very likely to become transnational crimes, the United Nations General Assembly (UN) unanimously adopted the 2003 United Nations Convention Against Corruption on September 30 2003.

The United Nations Convention Against Corruption was opened to signing at a High-Level Political Conference with the aim of signing the United Nations Convention Against Corruption in Merida, Mexico, 9 to 11 December 2003. The United Nations Convention Against Corruption is one of the results and efforts of the international community in terms of eradicating criminal acts of corruption[2] The Indonesian government actively participated from the first session until the seventh (final) session which ended on October 1 2003.[3] There are 127 participating countries in the 2003 United Nations Convention Against Corruption, of which 99% have expressed their willingness to sign the convention.[4] The basis for considering Indonesia's participation in signing the convention is regarding the legal implications of ratifying the convention into the national legal system.

According to Matthew H. Flemming[5] in the international world there is no mutually agreed definition of asset return, Flemming himself did not put forward a definition formula, but explained that asset return is the process by which criminals are revoked, confiscated, deprived of their rights from the proceeds of criminal acts and/or from the means of criminal acts. The United Nations Convention Against Corruption does not explicitly state whether confiscation is a punishment/penalty as defined in the Convention on Laundering, Tracking,

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Oliveira e. Silva, "Regulation (EU) 2018/1805 on the Mutual Recognition of Freezing and Confiscation Orders: A Headlong Rush into Europe-Wide Harmonisation?," *New Journal of European Criminal Law* 13, no. 2 (2022). Yulia Chistyakova, et.al., "The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK," *European Journal on Criminal Policy and Research* 27, no. 4 (2021), Aditya Wirawan and Acwin Hendra Saputra, "Public Benefit of Economic Consideration of Asset Management from Corporate Corruption in Indonesia," *Journal of Legal, Ethical and Regulatory Issues* 23, no. 5 (2020). RomIi Atmasasmita, *Pengkajian Hukum Tentang Kriminalisasi: Pengembalian Aset* (Jakarta: Departemen Hukum dan Hak Asasi Manusia, Kerja Sama Intemasional dalam Konvensi PBB, Badan Pembinaan Nukum Nasional, 2008), p. 9–10.

[2]Tommaso Trinchera, "Confiscation And Asset Recovery: Better Tools To Fight Bribery And Corruption Crime," *Criminal Law Forum* 31, no. 1 (2020), Paola Maggio, "A Critical Analysis of Corruption and Anti-Corruption Policies in Italy," *Journal of Financial Crime* 28, no. 2 (2020). Purwaning M. Yanuar, *Pengembalian Aset Hasil Korupsi: Berdasarkan Konvensi PBB Anti Korupsi 2003 Dalam Sistem Hukum Indonesia* (Bandung: Alumni, 2007), p. 134.

[3]birkah Latif Et Al., "United Nations Convention Against Corruption As A Tool To Overcome Cases Of Environmental Corruption," *Russian Law Journal* 11, no. 3 (2023).

[4]Sebastián Rioseco, "Conferences of the Parties beyond International Environmental Law: How COPs Influence the Content and Implementation of Their Parent Treaties," *Leiden Journal of International Law* 36, no. 3 (2023).

[5]Matthew H. Fleming, *Asset Recovery and Its Impact on Criminal Behavior, An Economic, Taxonomy, Draft for Comments* (London: University College, 2005), p. 1.

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Confiscation and Confiscation of the proceeds of crime from the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CLSCPC) and the Council of Europe.[6]

Several statutory provisions or our positive law have not placed assets or proceeds from obtaining criminal acts of Corruption as legal subjects that can be accounted for both criminally and civilly, but only as a means to commit criminal acts and as assets resulting from criminal acts that can be used as objects of confiscation. . The subject of property law is more related to corporate activities.[7] Regarding the mechanism for returning assets resulting from corruption, according to UNCAC itself, the return of assets resulting from corruption is divided into four stages, namely: 1) Asset tracking stage; 2) Stage of preventive measures to stop the transfer of assets through freezing and confiscation mechanisms; 3) Asset confiscation stage; 40 The stage of handing over assets and the recipient country to the victim country where the assets were obtained illegally. [8]

The above phenomena show the importance of carrying out academic research and studies related to the confiscation and confiscation of assets of Corruption convicts according to the Indonesian legal system, starting from several decisions in Corruption Crime Cases at the Class IA Banda Aceh District Court, which imposed additional penalties, namely paying replacement money. In Decision Number: 2/PID.SUS/TPK/2022/PN-Bna adjudicating and declaring that Defendant MSA has not been legally proven and is convinced that he is guilty of committing a criminal act of corruption jointly, sentencing Defendant MSA to imprisonment for 2 (two) year and a fine of IDR. 50,000,000. - (fifty million rupiah) with the provision that if the fine is not paid it will be replaced by imprisonment for 1 (one) month, punishing the Defendant to pay compensation in the amount of IDR. 1,385,629,050, - (One billion three hundred eighty-five million six hundred twenty-nine thousand and fifty rupiah), no later than one month after this decision becomes legally binding if you do not pay, your assets will be confiscated and auctioned off by the Prosecutor for cover the replacement money with the provision that if the convict does not have sufficient assets, he will be punished with imprisonment for 1 (one) year, in Decision Number: 20/Pid.Sus-TPK/2020/PN.Bna.

Defendant DAA was proven legally and convincingly guilty of committing criminal acts of corruption together, punishing DAA for this reason with imprisonment for 6 (six) years and a fine of IDR. 200,000,000 (two hundred

[6]*Council of Europe, Convention on Laundering, Scarech, Seizure and confiscation of the Proceeds from Crime, Strasbourg,* 8, XI, 1990. Article 1 (d).

[7]H.P. Panggabean, *Pemulihan Aset Tindak Pidana Korupsi Teori-Praktik Dan Yurisprudensi Di Indonesia* (Bhuana Ilmu Populer, 2020), p. 210.

[8]*Council of Europe, Convention on Laundering, Scarech, Seizure and confiscation of the Proceeds from Crime, Strasbourg,* 8, XI, 1990. Article 1 (d).

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million rupiah) with the provision that if the fine is not paid, it will be replaced by imprisonment for 3 (three) months, punishing the Defendant to pay compensation in the amount of IDR. 639,232,727,- (six hundred thirty-nine million two hundred thirty-two thousand seven hundred and twenty-seven rupiah), no later than 1 (one) month after this decision becomes legally binding, if you do not pay, your assets will be confiscated and auctioned by the Prosecutor to cover the replacement money with the provisions that if the Defendant does not have sufficient assets then he will be punished with imprisonment for 6 (six) months, in Decision Number: 23/PID.SUS/TPK/2017/PN Bna Defendant HDY is proven legally and convincingly guilty of committing a criminal act of corruption which was carried out jointly in a continuous manner as stated in Primair's indictment, sentenced Defendant HDY to imprisonment for 8 (eight) years with a fine of IDR 200,000,000 (two hundred million rupiah) with the condition that if The unpaid fine is replaced by imprisonment for 3 (three) months, punishing the defendant to pay compensation in the amount of Rp. rupiah sixty-four cents) provided that if the convict does not pay replacement money no later than 1 (one) month after the court's decision has permanent legal force, then his property can be confiscated by the prosecutor and auctioned off to pay replacement money and with the provisions in the event that the convict does not have sufficient assets to pay the replacement money, then imprisonment for 5 (five) years, in Decision Number: 46/Pid.Sus-TPK/2021/PN-Bna.

Defendant SHA was legally and convincingly proven guilty of committing criminal acts of corruption jointly as in the first primary indictment of the Public Prosecutor, sentencing Defendant SHA to imprisonment for 7 (seven) years and a fine of IDR. 300,000,000, - (three hundred million rupiah) with the provision that if the fine is not paid it will be replaced by imprisonment for 2 (two) months, punishing the Defendant to pay compensation in the amount of IDR. 803,527,187 (eight hundred three million five hundred twenty-seven thousand one hundred and eighty-seven rupiah) no later than one month after this decision becomes legally binding, if you do not pay, your assets will be confiscated and auctioned off by the Prosecutor to cover the replacement money with provisions if the convict does not have sufficient assets, he will be punished with imprisonment for 4 (four) years and in Decision Number: 85/PID. SUS/TPK/2022/PN. Bna, Defendant JRS was legally and convincingly proven guilty of committing criminal acts of corruption which were carried out continuously. Sentenced the Defendant to imprisonment for 4 (four) years and a fine of IDR. 1,434,156,791.00 (one billion four hundred thirty-four million one hundred fifty-six thousand seven hundred and ninety-one rupiah), minus cash deposited by the Defendant in the amount of IDR. 294,040,000, - (two hundred ninety-four million forty thousand rupiah) which was compensated as payment of replacement money, so that the remaining replacement money that must be paid by the Defendant is IDR. 1,140,116,791.00 (one billion one hundred forty million one hundred sixteen thousand seven

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hundred and ninety-one rupiah), no later than one month after this decision becomes legally binding, if you do not pay, your assets will be confiscated and auctioned off by the Prosecutor to cover replacement money provided that if the convict does not have sufficient assets, he will be punished with imprisonment for 1 (one) year and 6 (six) months.

Of the four cases above, up to the last 4 cases which were decided in 2022 by the Panel of Judges at the Banda Aceh Class IA District Court, not a single corruptor was willing to pay compensation for the crime he committed. With the behaviour of corruptors who are reluctant to pay replacement money, their behaviour causes significant financial losses to the state. Added to this are the weak laws and regulations in Indonesia which do not explicitly have laws that emphasize that confiscation and return of state assets is mandatory and not an option for corruptors who have harmed state finances. In this way, it is hoped that there will be a conceptual concept to resolve this legal vacuum.

The main problem discussed in this research is criminal law policy regarding confiscation of assets in the Indonesian legal system and confiscation of assets of perpetrators of criminal acts of corruption related to the purpose of punishment. The research method used is normative juridical with a type of legal research that examines legal systematics.[9] The data collection technique used was document study in the form of laws and other legal regulations, then interviews with judges in Banda Aceh.

Legal Policy Regarding Confiscation of Assets for Criminal Acts of Corruption

One of the elements in a criminal act of corruption is the loss of state finances. Regarding the state's financial losses, the Corruption Law, both the old Law Number 3 of 1971 and the new Law Number 31 of 1999 in conjunction with Law Number 20 of 2001, stipulates a policy that state financial losses must be returned. or replaced by the perpetrator of corruption (Asset Recovery). In connection with the arrangements for the return of assets mentioned above, the Indonesian government has issued various regulations which can be used as a basis/foundation for the government's efforts to recover state financial losses as a result of criminal acts of corruption. These efforts are regulated in:

1. Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes (Corruption Law)
2. Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption (Anti-Corruption Convention)
3. Law Number 15 of 2002 as amended by Law Number 25 of 2003 concerning the Crime of Money Laundering (TPPU Law)
4. Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters.

[9] Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2006.

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In the Corruption Law, recovery of state financial losses can be carried out through two legal instruments, namely criminal instruments and civil instruments. Criminal instruments are carried out by investigators by confiscating property belonging to the perpetrator which has previously been sentenced by the court with an additional criminal decision in the form of replacement money. Meanwhile, efforts to recover state financial losses using civil instruments are fully subject to material and formal civil law discipline, even though they are related to criminal acts of corruption. In contrast to the criminal process which uses a material evidence system, the civil process uses a formal evidence system which in practice can be more difficult than material evidence.

In criminal acts of corruption, especially apart from the public prosecutor, the defendant also has the burden of proof, namely the defendant is obliged to prove that his property was not obtained due to corruption. The burden of proof on the defendant is known as the principle of Reversal Burden of Proof. This principle implies that the suspect or defendant is deemed guilty of committing a criminal act of corruption (Presumption of Guilt). The application of the principle of presumption of guilt refers to the system of examination of suspects carried out by law enforcers in America using the Crime Control Model system, so that from the time the suspect is arrested and detained, he was considered guilty or declared war on the country by hiring mercenaries, namely Advokad.[10] In practice, civil case processes take a long time, and can even drag on. There is no guarantee that civil cases related to corruption cases will receive priority. The importance of the issue of asset recovery for developing countries that experience losses due to criminal acts of corruption, sees this problem as something that must receive serious attention. In fact, several countries want the return of assets to be treated as a right that cannot be erased or revoked.

The return of assets resulting from corruption can be carried out through the criminal route (Asset Recovery) indirectly through Criminal Recovery and the Civil route (Asset Recovery) directly through Civil Recovery. Through the criminal route, the process of returning assets can usually be carried out through 4 stages, namely:

1. Asset Tracing (Asset Tracing) with the aim of identifying assets, proof of asset ownership, location of asset storage in a capacity related to the crime committed;

[10]Jerry H. Ratcliffe et al., "The Philadelphia Foot Patrol Experiment: A Randomized Controlled Trial of Police Patrol Effectiveness in Violent Crime Hotspots," *Criminology* 49, no. 3 (2011). Konstantin Vladimirovich Skoblik, "Coping with the Undesired Consequences of Jury Reform: How Does the Russian Criminal Justice System Control an Acquittals Spike over the Reform 2018-2020?," *Onati Socio-Legal Series* 12, no. 4 (2022). Romli Atmasasmita, *Perbandingan Hukum Pidana* (Bandung: Alumni, 1998), p. 23. Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer* (Jakarta: Kencana Prenadamedia, 2010). Andi Hamzah, *Sistem Pidana Dan Pemidanaan Indonesia*, Revisi (Jakarata: Pradnya Paramita, 1993).

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2. Freezing or confiscation of assets where according to Chapter I Article 2 letter f of the 2003 KAK this aspect is determined to include a temporary prohibition on transferring, converting, dispositioning or moving assets or temporarily bearing the burden and responsibility for managing, maintaining and supervising assets based on a court order. or other determination that has competent authority;
3. Confiscation of assets, which according to Chapter I Article 2 letter g of the 2003 KAK is defined as the forfeiture of assets forever based on a decision by a court or other competent authority;
4. Return and hand over of assets to victims. In the justice system there are many related theories, some use a dichotomy approach or a trichotomy approach.

Then, one of the efforts that can be made to recover state losses from corruption is to include a formulation of additional criminal threats in imposing criminal acts of corruption. Regarding the regulation of compensation for state losses, Law Number 31 of 1999 is also provided with additional penalties, this is as regulated in Article 17 in conjunction with Article 18 Article 17 in conjunction with 18 letter b of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, which reads "In addition to being subject to criminal penalties as intended in Article 2, Article 3, Article 5 to Article 14, the defendant may be sentenced to additional criminal penalties as intended in Article 18."

Confiscation of Assets of Corruption Crime Perpetrators in Aceh

One of the purposes of punishment is to have a deterrent effect on criminals. Punishment as referred to in this research is the application of criminal sanctions (straf) to perpetrators of criminal acts without exception. The application of criminal sanctions in punishment is a punishment so that the perpetrator of a criminal act does not repeat his actions in the future, and is not committed by someone else.

According to Jan Remmelink, the application of criminal sanctions focuses more on acts of retaliation or suffering imposed by the authorities on someone who violates a crime. So far, criminal law enforcement (both material and formal), especially in criminal acts, has not made recovery from the impact of crimes resulting from criminal acts as part of the substance of criminal law enforcement. In other words, recovery from the impacts caused as a result of criminal acts is not an integral part of the criminal system (material and formal) or criminal law enforcement.

The act of confiscation of assets in the Indonesian legal system is contained in Article 10 (b) of the Criminal Code, as a form of additional punishment. Based on these provisions, confiscation is carried out on the basis of a court decision or determination from a judge, regarding certain items. This

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confiscation is carried out in a limited manner in accordance with the provisions in the Criminal Code, namely items owned by the convict that were obtained from a crime or were intentionally used in committing a crime.[11] This confiscation can be replaced by imprisonment if the confiscated items are handed back to the convict, the duration of imprisonment is at least 1 day and a maximum of 6 months.

The provisions in the Criminal Code, as well as in the Criminal Procedure Code, when studied more deeply, actually there is no article that regulates what if goods/assets taken/stolen by the perpetrator of a crime cannot be returned intact to the victim of the crime because the perpetrator has already enjoyed some or all of them. or the confiscated goods/assets have shrunk from their original condition as a result of a prolonged legal process. This is something that will need to be regulated in a limited way in the future, because up to now there has been no regulation at all.

Confiscation of assets resulting from crime in a scientific framework must first be seen from philosophical, historical and sociological aspects so that later an in-depth understanding can be obtained. Philosophically, the 1945 Constitution has set goals and aspirations to achieve people's welfare. These goals and ideals can only be realized by achieving law enforcement. As a country based on law, the government is obliged to synergize law enforcement efforts based on the values of justice with efforts to achieve national goals to realize general welfare for society.

Historically, the return of assets from criminal-based forfeiture is an old method that has been implemented since the Dutch inherited Criminal Procedure Law (*Het Herziene Inlandsch Reglement*) until the promulgation of the Criminal Procedure Law Number 8 of 1981. Recent developments have been successfully implemented in developed countries in an effort to return assets resulting from crime through civil-based forfeiture. Juridically, the text of the Draft Law (RUU) concerning Confiscation of Indonesian Criminal Assets, the seventh draft (9 September 2008), does not include civil based forfeiture asset confiscation, because from Chapter I to Chapter VIII it consists of None of the 44 (forty-four) articles regulate the civil model of asset confiscation.[12]

The draft text of the bill is no different from the mechanism for confiscation of criminal assets based on the Criminal Procedure Code (through criminal charges), with additional substance regarding special procedural law for confiscation of assets that deviates from the Criminal Procedure Code. The absence of a paradigm shift from criminal asset confiscation to civil asset confiscation is likely to face serious obstacles in enforcing the law on criminal asset confiscation, including procedural problems that are relatively long

[11]Article 39 Criminal Code (KUHP)
[12]Article 39 Criminal Code (KUHP)

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compared to civil asset confiscation. The above philosophical and historical aspects animate the method of formulating the articles in the draft law on confiscation of criminal assets. The juridical aspect of preparing a draft law text must take into account the legal principles that underlie the purpose of forming a law, the formulation of norms that must fulfil the principles of lex stricta (clear) and lex certa (certain)[13] as a general principle for the formation of statutory regulations and which institutions are suitable to carry out the task of implementing these legal principles and norms. The Indonesian government through the Department of Law and Human Rights cq. Since 2008, the National Legal Development Agency has drafted a Draft Law on Confiscation of Criminal Assets, the background to which the Draft Law exists is because there is a real need for a system that allows for the confiscation and forfeiture of the proceeds from the instruments of criminal acts on a regular basis. effective and efficient.

Confiscation of assets is regulated in Article 10 letter b number 2 of the Criminal Code (KUHP) which is called "confiscation of certain items" which is classified as an additional crime. The location of "confiscation of certain items", which is within additional criminal regulations, gives rise to different characteristics and consequences compared to the main crime itself.

According to PAF Lamintang and Theo Lamintang, the difference between basic crimes and additional crimes is:[14]

1. Additional punishment can only be imposed on a defendant accompanied by a main sentence, meaning that additional punishment cannot be given separately, but must always be imposed together with a main sentence. There is an exception in Article 40 of the Criminal Code where in this article the judge may impose confiscation of goods without a principal penalty for the criminal offense of a minor whose decision is to be returned to their parents, guardian or guardian.
2. The additional punishment is facultative, so the judge is free to use or not use this option, meaning it can be imposed, but does not have to be.

When imposing additional crimes in the form of confiscation of certain items, only certain items can be confiscated, because the criminal law no longer recognizes confiscation of all of the convict's assets, which was previously

[13]Marjanne Termohuijsen, "*The Principle Legality*"; Course Materials Netherlands Lecturer pada Refreshing Course of Criminal Law, "Same Root, Different Development"; Co-organized and supported by: Faculty of Law, Padjadjaran University, Aspehupiki, Alumni Postgraduate Programme of Criminal Law, Faculty of Law, Padjadjaran University, Bandung, April 19-21 Tahun 2006.

[14]PAF Lamintang dan Theo Larnintang, *Hukum Penitensier Indonesia*, II (Jakarta: Sinar Grafika, 2010), p. 83. Hamzah, *Sistem Pidana Dan Pemidanaan Indonesia*, p. 59.

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referred to as general confiscation.[15] Article 39 of the Criminal Code determines in what cases confiscation can be carried out. There are two types of goods that can be confiscated, namely:

1) Items belonging to the convict that were obtained as a result of a crime, such as counterfeit money obtained from the crime of counterfeiting money, money obtained from the crime of 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 originate from a crime;
2) Items belonging to the convict that were intentionally used to commit a crime. These items are called instruments of delicti.

The Criminal Procedure Code (KUHAP) also regulates provisions regarding the confiscation and confiscation of assets resulting from criminal acts. The provisions of criminal procedural law stipulate that before legal action in the form of confiscation is carried out, the object or goods to be confiscated must first be confiscated by an investigator. Legal action in the form of confiscation relating to assets resulting from criminal acts in the Criminal Procedure Code is regulated in Articles 38, 39, 42, 44 and Article 45. Meanwhile, asset confiscation is regulated in Article 46 paragraph (2). Court decisions relating to evidence can be found in Article 46 paragraph (2) and may contain the following determinations:

1) When the case has been decided, the objects that have been confiscated and used as evidence will be returned to those most entitled to receive them according to the judge's decision.
2) There is a decision which states that evidence will be confiscated in the interests of the state, this decision can be found in economic crimes, smuggling, narcotics and others, while the confiscated evidence will be destroyed if the evidence is deemed dangerous, and will be auctioned off. If the goods are not dangerous, the auction proceeds will belong to the state.

Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, as amended and supplemented by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, has also regulated the method of returning assets using a lawsuit mechanism civil.[16] The mechanism for returning assets by filing a civil lawsuit against the perpetrator or his heirs is carried out when investigators find and are of the opinion that in a criminal case of corruption there is sufficient

[15]Jan Remmelink, *Hukum Pidana, Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Pudanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Jakarta: Gramedia Pustaka Utama, 2003), p. 499.

[16] Asa'ari Asa'ari, "Considering Death Penalty for Corruptors in Law on Corruption Eradication from the Perspective of Maqāṣid al-Syarī'ah," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 7, No. 2 (2023). Mustafa A. Rahman, "The Discursive Construction of Strategies for Implementing Anti-Corruption Education at State Islamic Higher Educational Institutions," *Journal Ilmiah Peuradeun* 10, No. 3 (2022).

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evidence of real financial losses to the state. So, the investigator can submit the case files resulting from the investigation to the State Attorney or agency that suffered the loss to file a civil lawsuit. The court's decision to confiscate the confiscated assets of the deceased defendant cannot be appealed.

Tabel 1: The Banda Aceh District Court Decision Data regarding Corruption Crimes from 2015 to 2019

No.	Defendant	No. Court ruling	Verdict	Replacement Money	Prison (confinement) sentence
1	Drs. DI	Nomor 44/Pid.Sus-TPK/2019/PN Bna	4(four) years, 6 (six) months	IDR. 595.000.000,-	3 (three) months
2	TJ Bin TT	Nomor 59/Pid.Sus-TPK/2019/PN Bna	14 (fourteen) years	IDR. 10.629.728.636,-	5 (five) years 6 (six) month
3	JM	Nomor.9/Pid.Sus-TPK/2019/PN Bna	9 (nine) years	IDR. 4.605.000.000,-	4 (four) years 6 (six) months
4	EBD	Nomor 08/Pid.Sus-TPK/2015/PN Bna	6 (six) years	IDR. 1.195.817.200,-	4 (four) years
5	MYH	Nomor 16/Pid.Sus-TPK/2016/PN Bna	8 (eight) years	IDR. 1.466.194.000,-	1 (one) years
6	NMA	Nomor15/Pid.Sus-TPK/2016/PN Bna	5 (five) years 6 (six) months	IDR. 560.175.000,-	1 (one) year
7	Ir. GW	Nomor16/Pid. Sus/TPK/2020?PN. JKT.PST	10 (ten) years	IDR. 250.000.000,-	3 (three) months
8	TW	Nomor 20/Pid.Sus-TPK/2020/PN.Jkt. Pst.	13 (thirteen) years	IDR.63.602.055.454,00	6 (six) years
9	Drs. KA	Nomor 46/Pid.Sus-TPK/2019/PN.Mdn	5 (five) years	IDR. 12.030.000.000	3 (three) years
10	Ir. M. RN	Nomor 70/Pid.Sus-TPK/2019/PN.Mdn	3 (three) years	IDR. 308.423.353,35	1 (one) year

From the table above, it can be seen that in practice it is very difficult for law enforcement officers to confiscate assets resulting from criminal acts that have been controlled by criminals. There are many difficulties encountered in

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efforts to confiscate assets resulting from criminal acts, such as the lack of instruments in efforts to confiscate assets resulting from criminal acts, the absence of adequate international cooperation, and a lack of understanding of the mechanism for confiscating assets resulting from criminal acts by law enforcement officials, as well as the length of time required. is required until the assets resulting from criminal acts can be confiscated by the state, namely after obtaining a court decision that has permanent legal force, so that the impact is that the defendant prefers imprisonment rather than paying a fine (replacement money).

In the international world, there are legal developments which show that the confiscation and seizure of the proceeds and instruments of criminal acts is an important part of efforts to reduce crime rates.[17] This is done while still paying attention to the values of justice and not violating individual rights. In addition, perpetrators of criminal acts have been deemed to have fraudulently and contrary to legal norms and provisions, taken personal advantage at the expense of the interests of other people or the interests of society as a whole. Soerjono Soekanto stated, for the law to function well, harmony is needed in the relationship between four factors, namely: 1) the law or regulation itself; 2) the mentality of officers who enforce the law; 3) facilities expected to support the implementation of the law; and 4) legal awareness.[18]

The absence of a formulation regarding rules/guidelines for confiscation of assets in laws outside the Criminal Code that specifically include them in the formulation of the offense will cause problems in its implementation. Soerjono Soekanto's opinion illustrates that the success of law enforcement must be carried out comprehensively starting from the legislative aspect, the mental aspect of law enforcers, the aspects of facilities and infrastructure in law enforcement and public legal awareness. The concept of criminal law in eradicating crime is a link between legislative policy or formulation (legislative policy, especially penal policy) with law enforcement policy and criminal policy.[19]

So, according to researchers, weaknesses in criminal law formulation policies will influence criminal law enforcement and crime prevention policies. Viewed from all stages of crime prevention policies with criminal law, the policy formulation stage is the most strategic stage. It is at this formulation stage that all planning for crime prevention using the criminal law system is prepared. The

[17]Pusat Perencanaan Pembangunan Hukum Nasional BPHN, *Naskah Akademik Rancangan Undang-Undang Tentang Perampasan Aset Tindak Pidana* (Jakarta: Badan Pembinaan Hukum Nasional Kementrian Hukum dan Hak Asasi manusia Republik Indonesia, 2012), p. 13.

[18]Soerjono Soekanto, *Beberapa Permasalahan Hukum Dalam Kerangka Pembangunan Di Indonesia* (Jakarta: UI Press, 1983), p. 36.

[19]Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana Prenada Media Group, 2011), p. 214.

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entire criminal law system designed essentially covers three main problems in criminal law, namely the problem of formulating criminal acts (criminalization), criminal responsibility, criminal regulations and punishment.[20]

The criminal system holds a strategic position in efforts to overcome criminal acts that occur. The criminal system is a statutory regulation that relates to criminal sanctions and punishment. If the definition of the criminal system is interpreted broadly as a process of administering or imposing punishment by a judge, then it can be said that "the criminal system includes all statutory provisions that regulate how criminal law is enforced or operationalized concretely until finally someone is sentenced to criminal (legal) sanctions.".[21] Regarding the judicial system, it cannot be separated from the legal system that applies in a country. This is normal because the justice system is one of the sub-systems of the overall national legal system adopted by a country. For this reason, Eddy O.S Hiariej is of the opinion: "every country in the world has a judicial system, which, although broadly speaking, is almost the same, has its own character which is adapted to the social, cultural and political conditions adopted by society".[22]

From the description above, it can be said that punishment cannot be separated from the types of crimes regulated in the positive law of a country. Punishment carried out by an organized society against criminals can take the form of eliminating or paralyzing the perpetrators of criminal acts, so that the perpetrators are deterred and will no longer be a nuisance in the future. In relation to the criminal legal system, of course it must have a function in the context of integrative law enforcement, meaning that punishment must have the function of protecting as well as maintaining the balance of the various interests of society, the state, perpetrators of criminal acts and victims of criminal acts. This view needs to be developed as a scope to expand the development of criminal law and criminology, namely that attention is not only focused on crimes and the perpetrators, but also on people other than the perpetrators, in this case of course the victims, perhaps even being extended to other members of society who are affected by it. there is a crime.

[20]Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, p. 214.

[21]Ekaputra, Mohammad, and Abul Khair, *Sistem Pidana Di Dalam KUHP Dan Pengaturannya Menurut Konsep KUHP Baru* (Medan: USU Press, 2010), 13.

[22]Eddy O.S Hiariej, "Criminal Justice System In Indonesia, Between Theory and Reality," in *Asian Law Review* (Korean Legislation Research Institute, 2005), p. 25. Ian D. Marder, "Mapping Restorative Justice and Restorative Practices in Criminal Justice in the Republic of Ireland," *International Journal of Law, Crime and Justice* 70 (2022). Dedy Sumardi, et.al., "Restoratif Justice, Diversi Dan Peradilan Anak Pasca Putusan Mahkamah Konstitusi Nomor 110/PUU-X/2012," *LEGITIMASI: Jurnal Hukum Pidana Dan Politik Hukum* 11, no. 2 (2022), p. 248–265.

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According to Dahlan,[23] the payment of replacement money as an additional punishment in the form of payment of replacement money can be imposed if the main sentence is imposed and it is impossible to impose an additional penalty without the main sentence being imposed, the additional punishment is intended to increase the main sentence so it cannot be imposed alone. Additionally Eti Astusi confirms,[24] The most important thing to pay attention to in relation to additional punishment is that the additional punishment is imposed in addition to the main punishment imposed, therefore if the main punishment is deemed sufficient to compensate for state losses then additional punishment does not need to be imposed, but if it is with the main punishment (fine) imposed is not sufficient to compensate for state losses, the court (the judge who examines criminal acts of corruption) must really consider the need to impose additional punishment in the form of additional payment of compensation money, this is of concern to all of us because of the maximum threat of a fine in Law Number 31 1999 in conjunction with Law Number 20 of 2001 is not necessarily enough to restore state losses lost due to criminal acts of corruption.

Confiscation of Assets of Perpetrators of Criminal Acts of Corruption in Relation to Criminal Purposes

In practice, there are various possibilities that can hinder the completion of such enforcement mechanisms, for example the failure to find or die or the presence of other obstacles which result in the criminal being unable to undergo examination in court, or sufficient evidence not being found to file a lawsuit in court and also for other reasons. -other reasons, for example in cases of theft, the stolen items can no longer be found, so there is no recovery of assets to the victim.

Recovery measures for crime victims will not be realized if steps are not taken first to seize or confiscate the assets belonging to the perpetrator of the crime. To understand this, it is necessary to first study asset confiscation, which has a different meaning from the meaning of asset return. The Criminal Procedure Code in Article 1 number 16 does not provide a definition of seizure and forfeiture (confiscation) but only provides a definition of confiscation as follows: "Confiscation is a series of actions by investigators to take over and/or keep under their control movable or immovable objects, tangible or intangible for evidentiary purposes in investigations, prosecutions and trials." The provisions of this article that need to be observed and understood are that confiscation matters can only be carried out by an investigator, then the confiscation action is only referred to as taking over or placing it under his control. This is of course different if it is under

[23]Interview with Dahlan, The Judge of Criminal Act of Corruption, at the Banda Aceh District Court, November 2, 2020.

[24]Interview with Eti Astusi, The Judge of Criminal Act of Corruption, at the Banda Aceh District Court, November 2, 2020.

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his control, whereas the assets/goods confiscated are used for evidentiary purposes, not investigation or prosecution. Based on the definition of the term confiscation according to the Indonesian Criminal Procedure Code, this legal action provides very broad and unlimited discretion because it is wrong to differentiate between the terms power and control.

Basically, the criminal law policy which is applied in a formulative policy determines that the regulation of ownership of assets of perpetrators of criminal acts of corruption can be carried out through 2 (two) routes, namely criminal law through a criminal court decision and through civil law, namely through a civil lawsuit (civil procedure). The urgency of regulating the return of assets resulting from criminal acts in order to ensure the protection of victims is based on the consideration that current theories of punishment have only concentrated on perpetrators of criminal acts so that they can return to society and not repeat their crimes in the future.

Existing theories of punishment have never discussed the victim's wealth or assets that have been stolen or confiscated from the perpetrator of the crime. As stated by Jerme Hall, who in his development received a lot of criticism, he stated that punishment must: First, be given in the name of the state; second, there is coercion through violence; third, punishment is given in the name of the state; fourth, punishment requires the existence of regulations, actions; fifth, given to violators who are proven to have committed the act; sixth, the level or type of punishment related to the crime, aggravated or mitigated by looking at the personality of the offender, his motives and incentives.[25] The opinion above clearly shows that the priority of punishment is solely directed at the perpetrators of criminal acts, and does not discuss victims of criminal acts at all. In line with the opinion above, Pellegrino Rossi stated that: "punishment must be directed at repairing something that is damaged in society and preventing generations".[26]

The law that applies internationally as an effort to return assets in eradicating criminal acts has recognized two types of asset confiscation actions, namely: asset confiscation using civil law mechanisms (civil forfeiture, non-conviction based forfeiture or in rem forfeiture) and criminal asset confiscation (criminal forfeiture or in personam forfeiture).[27] These two types of confiscation

[25]Adam R. Pearce, "Evaluating Wrongness Constraints on Criminalisation," *Criminal Law and Philosophy* 16, no. 1 (2022). Ellen G. Cohn, et.al., "Changes in the Most-Cited Scholars in 20 Criminology and Criminal Justice Journals Between 1990 and 2015 and Comparisons with the Asian Journal of Criminology," *Asian Journal of Criminology* 16, no. 3 (2021).

[26]Victor Tadros, "Criminalization: In and Out," *Criminal Law and Philosophy* 14, no. 3 (2020).

[27] Trinchera, "Confiscation And Asset Recovery: Better Tools To Fight Bribery And Corruption Crime."; Ariadna Helena Ochnio, "The Tangled Path From Identifying Financial Assets to Cross-Border Confiscation. Deficiencies in EU Asset Recovery Policy," *European Journal of Crime, Criminal Law and Criminal Justice* 29, no. 3 (2021), Anna Sakellaraki, "EU Asset Recovery and Confiscation Regime Quo Vadis? A First Assessment of the Commission's

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have several fundamental differences in terms of procedures and implementation in carrying out efforts to confiscate assets that are the result of a criminal act. Both types of asset confiscation have the same two goals. First, those who violate the law are not allowed to profit from their violations of the law. The proceeds and instruments of a criminal act must be confiscated and used for the victim (state or legal subject). Second, preventing law violations by eliminating economic profits from crime and preventing criminal behaviour.[28] The following is a theoretical explanation regarding the classification of the two asset confiscations as described by Greenberg, Theodore S., Linda M. Samuel, Wingate Grand, and Larissa Gray in stolen asset recovery, which has been freely translated, namely: 1. Asset confiscation as a form of recovery against crime victims using in personam procedures 2. Confiscation of assets as a form of recovery for crime victims using in rem procedures.[29]

As a basis for making laws and regulations regarding the recovery of assets resulting from crime, it is necessary to link them to criminal law norms, especially regarding the purpose of punishment, because the purpose of punishment is the legal process of implementing the crime or the entire provisions/regulations containing how to carry out the judge's decision against someone who has the status of a convicted person. In a simple sense, it is part of positive criminal law, namely what determines the type of criminal sanctions for violations, the severity of the sanctions, the length of sanctions that can be felt by violators and the manner and place where the sanctions are implemented. Sanctions are in the form of punishment or in the form of an action which constitutes a system.

Based on research results, the motives used by corruptors are becoming more and more powerful and sophisticated. So, providing evidence at trial and providing a deterrent effect for corruptors is important so that it can be an example for other state officials to be careful in administering government and remind public officials and policy makers to always be introspective.

The essence of eradicating criminal acts of corruption can be divided into 3 (three) things, namely through preventive action, repressive and restorative action. Preventive measures are related to regulations to eradicate criminal acts of corruption with the hope that the public will not commit criminal acts of corruption. Restorative action, one of which is returning the assets of perpetrators

Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?," *New Journal of European Criminal Law* 13, no. 4 (2022).

[28]Chistyakova, Wall, and Bonino, "The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK."

[29]Theodore S. Greenberg et al., *Stolen Asset Recovery A Good Practices Guide for Non-Conviction Based Asset Forfeiture"* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2009), p. 13–18.

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of criminal acts of corruption in the form of criminal legal action and civil lawsuits.[30]

In the era of globalization, efforts to return/recover stolen state assets (stolen asset recovery) through criminal acts of corruption tend not to be easy to carry out. Perpetrators of criminal acts of corruption have extraordinary and difficult access to hide or launder money resulting from criminal acts of corruption. Confiscation of assets owned by corruptors will completely provide a deterrent effect and fear for corruptors to repeat their actions. Because so far the corruptors have not been afraid of the criminal punishment given to them. So, there should be a new breakthrough to create a deterrent for corruptors and scare others through asset confiscation so that it becomes an example for other public officials.

Conclusion

The policy of confiscating the assets of perpetrators of criminal acts of corruption in positive law can be pursued through criminal or civil channels. Through the criminal route, the process of returning assets can usually be carried out in four stages: asset tracing, freezing or confiscation of assets, confiscation, return, and handover of assets to the victim. Through civil channels, the state attorney general is responsible for carrying out this process. Confiscation of assets from perpetrators of criminal acts of corruption is in accordance with the purpose of punishment. Tracing assets resulting from corruption is important to initiate from the investigation stage in order to determine the amount of assets resulting from corruption that are under the control of the suspect. The results of tracing these assets are the basis for determining the amount of replacement money that will be charged to the convict at a later date, as stated by the PTPK Law in Article 18, paragraph (1) letter b, which specifies that the amount of replacement money should ideally be equal to the assets enjoyed by the defendant. This complies with the Criminal Justice system which aims to enforce criminal law, punish perpetrators of criminal acts, and ensure the implementation of the law. However, there are obstacles in the implementation of confiscating and/or seizing assets, such as when the assets have already been concealed or taken abroad by the perpetrator. This paper contributes to confirm the essential loophole current criminal justice system in terms of asset confiscation in criminal crime and fully support the new law for this purpose.

[30]Bernadeta Maria Erna, "Peranan Jaksa Dalam Pengembalian Aset Negara," in *Seminar Nasional Optimalisasi Kewenangan Kejaksaan Dalam Pengembalian Aset Hasil Korupsi Melalui Instrumen Hukum Perdata, Bandung 26 Oktober 2013* (Bandung: Paguyuban Pasundan, FH Universitas Pasundan, 2013), p. 2. Syahiruddin Latif and Rizki Ramadani, "The Recovery of State Losses through Corruption Asset Confiscation: Policies and Obstacles," *IAPA Proceedings Conference*, 2022.

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Interviews

Interview with Dahlan, The Judge of Criminal Act of Corruption, at the Banda Aceh District Court, November 2, 2020.
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