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CRIMINAL LAW REFORM TOWARD DEPRIVATION OF PROPERTY RESULTING FROM CORRUPTION CRIMINAL ACTS: A CRIMINOLOGICAL PERSPECTIVE

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A b s t r a c t

Criminal law reform is part of criminal law policy and is closely related to law enforcement policies, criminal policies and social policies. One of the forms of national legal development reform is the Reform of the Criminal Justice System (SPP) which is an integral part of a sub-system, namely legal substance, legal structure, and legal culture. Corruption as an organized crime in Indonesia is categorized as extra ordinary crimes that have an impact on the creation of injustice in society. One of the injustices referred to is related to the non-return of state losses stolen by corruptors. Whereas efforts to recover state losses are closely related to legal instruments in force in a country. In Indonesia, the Criminal Code and the Law on the Eradication of Corruption places the confiscation of proceeds of corruption only as an additional punishment and does not have a clear formula for the mechanism of deprivation of properties, resulting in un-clarity/obscurity of norms. This condition should not occur, therefore it is necessary to reform the criminal law immediately by studying the criminal perpetrators of a criminological perspective, which is related to the factors that cause people to commit criminal acts of corruption. This article is a study of the author concerning the importance of making legal arrangements regarding the deprivation of properties from the proceeds of corruption to mitigate the state losses. This article is compiled by applying normative legal research using statutory approaches, historical approaches, conceptual approaches and comparative approaches. It is concluded that there must be immediate reform of criminal law in Indonesia, especially regarding the deprivation of properties from the criminal act of corruption based on the development of criminal behavior (criminology) and the development of international criminal law concerning corruption.

1. Introduction

The Criminal Code (KUHP) in force in Indonesia cannot be properly expected and is not in accordance with current development. The current Criminal Code is a legacy product of the Dutch colonial era as the translation of Wetboek *van Strafrecht voor Nederlandsch-Indie* which is a criminal law enacted since January 1, 1918, and then promulgated and re-regulated under the Law Number 1 of 1946.

In addition to being incompatible with the development of national life, the regulation of criminal law is also incompatible with the political, philosophical and sociological situation, therefore it is necessary to reform the Indonesian criminal law.

The effort of carrying out criminal law reform is basically including in the criminal law policy and is closely related to law enforcement policies, criminal policies and social policies. Legal reform in Indonesia cannot be separated from the objective conditions of the Indonesian people who uphold the values of religious law in addition to customary law, therefore it is necessary to explore legal products that are sourced and rooted in cultural, moral and religious philosophical values (Fatoni, 2016).

One of the forms of national law development reform is related to the Reform of Criminal Court System (SPP) or what is called *Criminal Justice System (CJS)* which is essentially identical to the Law Enforcement System (SPH), for the judicial process is essentially a process of enforcing the law. It is also identical to the judicial power system, because judicial power is basically also the power/authority to enforce the law (Arief, 2009).

Furthermore, it is also stated that the criminal justice system or the so-called law enforcement system (SPH), if integrally viewed is a unit of various sub-systems (components) consisting of legal substance components (*legal substance*), legal structure, and legal culture (Arief, 2009). The term "legal culture" in the context of law enforcement, of course, is more focused on the values of legal philosophy, legal values existing in society and awareness/attitudes of legal behavior/social behavior, and education/law science (Arief, 2009).

Corruption is said to be an organized crime and in Indonesia it is categorized as an extraordinary crime because it occurs sporadically, extends to all aspects of government institutions including the executive, legislative, judiciary, and even private parties. corruption seems to be a common thing and seems to have become the culture of society. In addition to detrimental to state finances, corruption is also a violation against social and economic rights of the community which in turn obstructs the government's efforts to improve the welfare of society, thereby creating injustice.

Table 2. Indonesia's Corruption Perception Index (CPI)

	2017	**2018**	**2019**
CPI SCORE	37	38	40
RANK	96	89	85

Source: *Transparency International Indonesia (TII) Data Release*

The description concerning the occurrence of corruption practices in Indonesia is at least reflected in the corruption perception index in 2017 score of 37, ranking 96th out of 180 countries (https://databoks.katadata.co.id/datapublish/2019/01/29/naik-1-poin-indeks-persepsi-korupsi-indonesia-naik-ke-per Rank-4-di-asean, 2020) increased to a score of 40, ranked 85th out of 180 in 2019, this data shows that there is an effect of efforts to eradicate corruption in Indonesia, but it is not significant. When compared to Indonesia's score with neighboring countries such as Singapore and Malaysia, Indonesia is still far behind.

Compiled data from *Indonesia Corruption Watch (ICW)* The number of cases handled and the comparison with the amount of state losses suffered by the state can be seen in the table below:

Table 1. Data on corruption cases and state losses

	2017	**2018**	**2019**
Total cases	576 cases	454 cases	271 cases
State losses	6.5 trillion	5.6 Trillion	8.4 Trillion

Source: *Trend of prosecution for corruption cases in 2017, 2018 and 2019 Indonesia Corruption Watch (ICW)*

The data shows that the number of corruption cases prosecuted from 2017 to 2019 has decreased quantitatively, but what cause of concern is the amount of state financial losses incurred. Whereas, the amount of state losses due to corruption is very large and in 2018 it was around 8.7% (eight point seven percent). The state losses that can be returned through the additional penalty of replacement money are very low, not reaching 10%. (https://databoks.katadata.co.id/datapublish/2019/01/29/naik-1-poin-indeks-persepsi-korupsi-indonesia-naik-ke-per Rank-4-di-asean, 2020).

The public still think that the punishment given to the perpetrators of corruption is not proportional to the corruption committed, and the range of imprisonment they receive (Langkun, et.al, 2006). The public still consider that the verdict against the perpetrators of corruption has not fulfilled the public sense of justice. It is Still considered not proportional (Langkun, et.al, 2006). For this reason, the reform of criminal law through criminal aggravation and additional criminal sanctions in the form of confiscation of the proceeds of corruption is one of the steps that can be taken to provide a deterrent effect for corruptors, as well as to mitigate state losses and to provide a value of justice for society.

The measures that must be taken by the government include: restructuring the criminal law system in Indonesia, namely by structuring it and existing law enforcement agencies, including human resources who carry out law enforcement, structuring the substance of the law by reviewing the existing regulations, carrying out *revocation* (recall), *revision* (amendment) as well as the imposition of new necessary provisions and building a legal culture in accordance with the living and development law as adopted in a society (Langkun, et.al, 2006).

The punishment/penalties in Criminal Code (KUHP), can be divided into two, namely the principal and additional penalties. This arrangement is contained in Article 10 of the Criminal Code. Criminal of imprisonment is kind criminal principal which is the most popular among other principle criminal. Indeed, it is

effective give deterrent effect to the the convicted upon the criminal corruption committed. However, criminal of imprisonment does not always solve the problem, on the contrary it can rise to new problems such as *overcapacity correctional institutions, disgust* of corruptors, and the state losses are not resolved. Deprivation of certain goods is placed as an additional penalty which is optional in nature following the main crime and can only be applied if the main crime is proven.

The enactment of law No. 31 of 1999 in conjunction *with* Law No. 20 of 2001 (UU PTPK) actually has provided fresh air as a basis for eradicating criminal acts of corruption and conviction of the perpetrator of a criminal act of corruption, Article 18 of the PTPK Law, letter (a) as additional penalties are: deprivation of movable property either tangible or intangible or immovable property that is used for or obtained from a criminal act of corruption, including the company owned by the convicted where the criminal act of corruption was committed, as well as from the items replacing the goods

Even though it has been regulated regarding the confiscation of goods as referred to in article 18 of the PTPK Law, the problem is that the regulation of confiscation is still within the framework of an additional punishment that is optional in nature, it can only be applied if the main crime is proven, namely an act which has been proven to have committed a criminal act of corruption. and materially there has been a loss to the State due to criminal acts of corruption (Yusuf, 2013). Until now, there is no statutory regulation that specifically regulates the implementation mechanism for confiscating the properties as the proceeds of corruption.

The concept of purpose of punishment that is developing so far is considered to have various weaknesses, particularly since it is considered to provide no sense of justice for the victim, namely the State and Society. The applicable criminalization in Indonesia, especially those regulated the Criminal Code (KUHP) and the Corruption Eradication Act (PTPK Law) still use the paradigm. *retributive* that is, law enforcement which emphasizes more on punishing the perpetrators, apparently this retroactive paradigm cannot fulfill its purpose in providing a deterrent effect to the perpetrators of criminal acts due to the fact that the quantity and quality of corruption has not significantly decreased.

According to John O Haley, *restorative justice* is an integrated approach to the retributive model that offers a much more effective and efficient alternative to the achievement of the objectives of punishment, namely the improvement of victims, perpetrators and prevention of crime (Haley , 2011):

I would only add that as broadly defined an integrated approach to restorative justice offers an alternative to the retributive models that far more effectively and efficiently achieve each of the three principal aims of criminal justice, victim reparation, offender correction, and crime prevention.

The idea of a criminal system that is oriented towards restoring losses and suffering experienced by victims is known as the conceptual approach of restorative justice (*restorative justice)*. One of the forms of application of the restorative justice concept in cases of criminal acts of corruption is the application confiscation and sentencing on property confiscation originating from the proceeds of corruption.

Humans/ individuals as the subjects of criminal law *(natuurlijke person)* in the criminal act of corruption, of course, are related to the issue of criminal responsibility as andagium *geen starf zonder schud* that is, a criminal law subject committing a criminal act can only be convicted if the element of guilt is fulfilled, according to the formulation in the Law. This element is closely related to the ability to be responsible, actions committed deliberately or negligently and there is no excuse for forgiveness.

Regarding the legal subject of the criminal act of corruption, an individual legal subject will be examined in the perspective of criminology, which is related to the factors causing corruption and how to overcome them.

Conducting studies from a criminological perspective to the criminal acts of corruption cannot be separated from the development of society where there are prevailing social values which are ultimately linked to cultural patterns existing in society. On the other hand, every member of society has basic desires affecting their behavior patterns through cultural standards learned as well as individual experiences in interacting with community members (Suharti , 2000).

According to the social control theory, that the motivation to commit crime is part of humanity and studies the ability of social groups and institutions to make their rules effective and finally to find out the answers why people do not commit crimes (Swardhana , 2020).

Based on the description described above, the author is interested in legal writing focusing on the problem of criminal law reform regarding the confiscation of properties from the criminal act of corruption in a criminological perspective. The formulations of the problems that can be drawn are (1) What is the arrangement of the criminal law against confiscation of properties resulting from criminal acts of corruption in Indonesia? 2 How is the

criminal law reform of confiscation of properties result from the criminal act of corruption in a criminological perspective?

2. Research Methods

This type of legal research uses objects in the form of legal norms carried out through the process of finding legal rules, legal principles, and legal doctrines in order to answer legal issues at hand (Marzuki, 2008). As a type of normative legal research (*normative law research*), namely legal research examining written law from various aspects, including aspects of theory, history, philosophy and comparison.

Normative research uses a statutory approach (*statute approach*), historical approach, a comparative approach (*comparative approuach*), and the conceptual approach (Marzuki, 2008). Legal materials used in this research can be primary legal materials, namely statutory regulations, secondary legal materials derived from literature in the form of books or results of research. Legal materials are collected through library research, and are used to study the existing problems.

The writing of this research is analytical descriptive, namely research that is intended to describe, elaborate and describe a state of an object or event as well as to draw a conclusion related to the object of research, namely regarding the confiscation of corruptors' property in a criminological perspective.

3. Results and Discussion

3.1. Legal Regulations for Deprivation of Properties from Corruption Proceeds.

In Indonesia, the latest developments related to the prevention and eradication of corruption, namely there has been a paradigm shift in law enforcement. The original paradigm only focused on pursuing and punishing perpetrators of criminal acts (*follow the suspect*) with corporal punishment, and it has also developed by pursuing wealth *(follow the money)*.

Confiscation of properties obtained by illegal means (violating of law), the punishment is regulated in the Corruption Eradication Law, namely Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning amendments to Law No. 31 of 1999.

Actually, the Criminal Code has regulated the confiscation of objects related to a criminal act, which is a continuation of the act of deprivation. However, deprivation as regulated in the PTPK Law and the Criminal Code is placed as an additional crime that is optional in nature following the main crime and can only be carried out after the perpetrator of the criminal act is found guilty of committing a criminal act and the verdict has permanent legal force (*inkracht van gewijsde*).

The PTPK Law provides two ways with regard to deprivation of the proceeds of a crime causing financial or economic losses to the State. The two routes referred to are confiscation through criminal channels and confiscation through civil lawsuits. Confiscation of properties as the proceeds of corruption through criminal charges can be carried out provided that the public prosecutor must be able to prove the defendant's guilt for committing a criminal act of corruption.

The confiscated properties must be the assets generated and associated with corruption. Therefore, to prove this relationship, the public prosecutor must have sufficient knowledge and expertise and must have the expertise to prove the relationship of all assets confiscated with the criminal act committed, or the properties were used to commit a criminal act.

The success of the property or asset confiscation is very dependent on the public prosecutor having the capability to prove the defendant's guilt and also prove that the properties to be confiscated are properties resulting from the corruption accused. This concept is called confiscation of properties based on the fault of the defendant (*Conviction Based Assets Forfeiture)*. Deprivation of assets from the criminal act of corruption through the criminal law mechanism as *criminal forfeiture*, must be able to prove that there is an element of guilt from the criminal act perpetrator. *Criminal forfeiture* is also known as deprivation in persona is confiscation committed through the criminal law mechanism.

The criminal forfeiture confiscation mechanism has been implemented, but until now it has not shown any significant results. It was proven in 2018 the amount of state losses that can be returned was only 8.7 percent. One of the reasons for this ineffectiveness is that the norms governing the deprivation are unclear.

Apart from confiscation which is an additional and optional punishment, it turns out that in Article 18 paragraph (1) of the PTPK Law there is no more detailed explanation of the mechanism for the implementation of confiscation, this condition shows that there is a lack of clarity in legal arrangements resulting in ineffective repayment of state losses**.**

Another problem is that confiscation of assets resulting from criminal acts of corruption through civil channels in the PTPK Law, is only an alternative way, it can only be done if handling through criminal channels cannot be carried out for the reasons of

law, namely the suspect/accused passes away, to provide access for confiscation due to the death of a suspect/accused eliminates the authority to prosecute (article 77 of the Criminal Code).

The conditions as described above hamper the effectiveness of recovering state losses because law enforcers are not required to confiscate the proceeds of corruption for it is an alternative crime as well as obstacles to the obscurity of laws and regulations.

The criminal law enforcement process is interrelated with criminology, because criminology can provide input to criminal law, especially why people commit crimes and the factors causing them and what efforts must be made so that law enforcers do not violate the law. For this reason, an analysis of the causes of corruption is needed and at the same time overcoming it in the form of formation of legal substance so that the criminal law enforcement process is implemented based on the values of justice and does not violate individual rights.

3.2. Criminal Law Reform toward Deprivation of Properties Resulting from Criminal Acts of Corruption, a Criminological Perspective

Criminal law reform is an effort to review and reassess the main points of thought or basic ideas or socio-philosophical, socio-political and socio-cultural values underlying criminal policies and criminal law enforcement policies so far. Criminal law reform shall be formulated with a policy-oriented approach, as well as a value-oriented approach. Therefore, criminal law reform should be based on the basic ideas of Pancasila, which is the basis for the values of national life that are aspired to and explored for the Indonesian nation.

The Republic of Indonesia as a welfare state where the state actively strives for welfare, the community is very disturbed by the corrupt behavior of the corruptors, which hinders the realization of public welfare. Therefore, the authors argue that the deprivation of properties resulting from the criminal act of corruption shall always be applied to every resolution of corruption and must be supported. with legal instruments that are certain and just. Jhon Rawls states that justice as *fairness* is to view various parties in the original position (the position of original equality) as rational and equally neutral, requiring equality in the application of basic rights and obligations, and social and economic inequality only to the most disadvantaged of society. That it is unfair if some people have to be deficient, so that others can enjoy prosperity (Rawls , 2011).

Criminology studies the cause and effect, improvement and prevention of crime as human symptoms that can gather input from various sciences (Soedjono, 1979). Sutherland Cressey stated *criminology is the body of knowledge regarding crime as a social phenomenon.* Criminology is a body of knowledge that implies crime as a social phenomenon. This phenomenon is reflected in law enforcement carried out by law enforcement officials from police, prosecutors, courts to the execution level (Edywarman, 2012). The cause of the criminal act of corruption in the perspective of criminal psychology consists of internal factors, which are related to aspects of individual behavior, namely greedy, morale that is not strong enough, and a consumptive lifestyle (Yuwanto, 2015). Yuwanto added that one of the internal factors driving corrupt behavior is the values of the individual (Yuwanto, 2015).

External factors are related to (Supratman, et., Al., 2017):

1. Apart from being slow, law enforcement against perpetrators of corruption also does not cause a deterrent effect and is considered a normal case.
2. Gaps in the payroll and welfare system in the form of political risk and economic risk as budget support, material facilities on duty and inadequate family welfare of employees, employees who are not worthy of the minimum standard of living needs so that they become potential elements of corruption.
3. The inherent feudal culture, with upetism, premodialism and nepotism emphasizing their family or cronies, encourages corruption.
4. The existence of poverty and unemployment, which are structured in people's lives, accompanied by discrimination in legal treatment for perpetrators of corruption and ordinary crimes by means of abuse of authority and power which become opportunities for the proliferation of corrupt behavior.

These opinions are true, but the main thing is mental factors, namely that an unhealthy mental factor is more dominant to encourage acts of corruption. Even if other factors are present in a person, if he has a healthy mind, he will not commit any acts of corruption. Therefore, crimes are not only committed by people who are poor, or lacking education, but can also be committed by people who have high social, economic and political positions, such as crimes of corruption or manipulation. Emile Durkheim's anomie theory is in line with this opinion emphasizing that the weakening of social supervision and control affects the occurrence of moral decline which causes individuals to find difficulties for adjustment (Atmasasmita, 2010).

In contrast to what was conveyed by Edwin H. Sutherland in his book *Principles of Criminology* as *differential association*

theory which emphasizes that all (criminal) behavior is learned, nothing is passed on parental inheritance, it can be clearly said that evil behavior patterns are not inherited but are learned through intimate association where the process of learning criminal behavior through social interaction (Swardhana, 2020). Based on theory *differential association* that the perpetrators of crimes committing crimes are not a continuation of delinquency that was committed during childhood or adolescence, but are influenced by a bad work environment that causes bad behavior for themselves as well.

The author argues that corruptive behavior is caused by internal factors of the perpetrator, namely the weak self-control of the perpetrator who cannot withstand the impulse of lust to gain wealth quickly, weak faith, honesty and low morality values, in addition to the external factors such as weakness and lack of an attitude of fairness, leadership, working conditions and social communication and interactions.

Law enforcement in the criminal act of corruption must be carried out in extraordinary ways, considering that this crime is classified as an extra ordinary crime. The idea continues to this day is whether the model of punishment given to corruptor is sufficient only with corporal punishment (prison)? The ideas for increasing effectiveness of action to return the properties resulting from the criminal action of corruption is a general idea therefore it is important to create a strong legal basis as for confiscation the proceeds of corruption to bring about restorative justice *(Restorative Justice)* as the purpose of punishment. Sentencing based on the concept of restorative justice shall provide a more sense of justice, because the law is not implemented rigidly as retaliation by imprisoning the perpetrator of a criminal act with the objective of giving deterrent effect, but more than that, punishment shall be to restore balance and bring a sense of peace in society as well as to provide a deterrent effect and restore the dignity of the perpetrator to become a better human being.

As a criminal law reform in confiscating properties as the proceeds of corruption, then *follow the money approach* is an approach that complements the conventional approach *follow the suspect* namely the approach in pursuing and punishing the perpetrator of a criminal act. This *follow the money* approach has advantages and breakthroughs in disclosing crimes, pursuing the results of crimes and proving them in court.

The *follow the money* approach can be implemented using the concept of deprivation *non conviction based asset forfeiture (NCB)*. Deprivation of NCB also known as civil appropriation, *in rem appropriation*, or appropriation of objects, is an act against the assets itself, and not against an individual. This is an act that is separate from any criminal justice process and requires evidence that the properties are involved (i.e. property is the result or instrument of a criminal act).

Indonesia has ratified the United Nations Convention Against Corruption in 2003 (United Nation Convention Against Corruption / UNCAC, 2003) which has been ratified under the Law Number 7 of 2006. One of the important parts of the UN conventions is the existence of arrangements relating to the tracing, confiscation and deprivation of proceeds and instruments of criminal acts including international cooperation in the framework of returning the proceeds and instruments of criminal acts between countries, but Indonesia does not yet have laws and regulations that are in line with the confiscation of assets based on these international conventions. This is one of the considerations regarding the importance to draft a separate Law particularly applied to confiscate the properties related to criminal acts.

4. Conclusion

The provisions in the Penal Code, Penal Code Procedures (KUHAP) and PTPK Law as well as several criminal provisions concerning the eradication of corruption, confiscation of property that can only be carried out after the perpetrator of the criminal act is proven in court legally and convincingly committing a criminal act constitutes a type of criminal confiscation in person (Personam) or as *criminal forfeiture*. Corruptive behavior is caused by the perpetrator's internal factors, namely the weakness of self-control of the perpetrator which causes a decrease in moral value, in addition it is also influenced by external factors such as weak working conditions and lack of social supervision and control affecting the occurrence of moral decline, therefore criminal law reforms must be carried out immediately in accordance with the paradigm shift in society and international criminal law which places more emphasis on restoring the balance prior the occurrence of criminal acts as the concept of *restorative justice*.

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