



Barriers to the Implementation of the State Attorney Attorney's Authority in Conducting a Civil Lawsuit in Returning Assets of Corruption

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Abstract

Assets or assets resulting from corruption are assets or assets of the state that should be used for Indonesia's national development, welfare and prosperity of the Indonesian people fairly and evenly in all fields. The welfare and prosperity of the Indonesian people is the responsibility and purpose of the country. Efforts to recover state financial losses that use civil instruments are fully subject to material and formal civil law discipline, even though they are related to corruption. The criminal process uses a material substantiation system while the civil process adheres to a formal evidentiary system which can be more difficult than material substantiation. In the criminal act of corruption in addition to the public prosecutor, the defendant also has the burden of proof, that is, the defendant is obliged to prove that his assets were obtained not from corruption. The burden of proof on this defendant is known as the Reversal principle.

Keywords: *Barrier; Implementation; State Attorney; Authority; Civil Lawsuit; Asset; Corruption*

A. Introduction

The Government of Indonesia has issued various regulations which can be used as a basis / foundation in the government's efforts to recover state financial losses as a result of corruption. These efforts are regulated in:

1. Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption (Corruption Law);
2. Law Number 7 of 2006 concerning Ratification of the *United Nations Convention Against Corruption*;
3. Act Number 15 of 2002 as amended by Act Number 25 of 2003 concerning Money Laundering (TPPU Law) and finally amended by Law No.8 of 2010.
4. Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Matters.

In the corruption law, the recovery of state financial losses can be done through two legal instruments namely criminal and civil instruments. The criminal instrument is carried out by the prosecutor by confiscating the assets of the perpetrators who have previously been sentenced by the court with additional criminal decisions in the form of money to compensate the state's financial losses. While civil instrument can be carried out through Articles 32, 33, 34 of Law No.31 of 1999 concerning Eradication of Corruption and Article 39C of Law No.20 of 2001 concerning Amendments to Law No.31 of 1999 concerning Eradication of Corruption conducted by the State Attorney (JPN) or the injured institution¹.

In connection with legal assistance, JPN acts for and on behalf of the state or government in special cases or civil cases or state administration². As an institution that administers state power, the Attorney General has the authority in the field of prosecution of a case, as well as other authorities based on the law. Law Number 16 of 2004 in lieu of Law Number 5 of 1991 concerning the Attorney General's Office of the Republic of Indonesia regulates the position, duties and authority of the Prosecutor's Office³. In the civil litigation process the burden of proof is the plaintiff's obligation, in this case it is by the JPN or the aggrieved agency. In this connection, the plaintiff is obliged to prove, among others:

- a. That clearly there has been a state financial loss;
- b. State financial losses as a result of or related to the actions of a suspect, defendant, or convict who allegedly originated from the results of corruption.
- c. The assets belonging to the suspect, defendant or convict can be used to recover state financial losses.

The legal arrangements which are the basis of the authority of the existence of state attorneys in the justice system are contained in several laws and regulations, namely:

1. Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia. Article 30 paragraph (2) which states that "In the field of civil law and state administration, prosecutors with special powers can act both inside and outside the court for and on behalf of the state or government." based on this article it can be interpreted that the prosecutor's office, which in this case is aimed at prosecutors, can act for and on behalf of the state both inside and outside the court in the civil and administrative fields based on the existence of a special power of attorney. Namely a letter containing the granting of power of attorney carried out only for one or more specific interests in which the actions are explained by the recipient of the power of attorney⁴.

¹ Article 32 states as follows: (1) In the event that an investigator finds and believes that one or more elements of a criminal act of corruption cannot have sufficient evidence, whereas there is clearly a state financial loss, the investigator immediately submits the case file of the investigation result to the State Attorney for civil lawsuits or submitted to the injured agency to file a lawsuit. (2) An acquittal in a corruption case does not nullify the right to sue for losses to the state finances. Article 33 states as follows: "In the event that the suspect dies at the time of the investigation, while there is clearly a state financial loss, the investigator immediately submits the case file of the investigation to the State Attorney Attorney or submitted to the aggrieved agency for a civil suit against heirs ". Article 34 states as follows: "In the event that the defendant dies during an examination in a court of law, while there is clearly a state financial loss, the public prosecutor shall immediately submit a copy of the minutes of the hearing to the State Attorney or submitted to the aggrieved agency to be carried out civil lawsuit against heirs ".

² *Himpunan petunjuk Jaksa Agung Muda Perdata Dan Tata Usaha Negara (JAM DATUN)*, XXII, Penerbit: Kejaksaan Agung R.I. p. 2

³ Yusril Ihza Mahendra, 2012, *Kedudukan Kejaksaan Agung dan Posisi Jaksa Agung Dalam Sistem Presidensial di Bawah UUD 1945*, Kencana Prenada, Media Group, Jakarta, p. 6

⁴ Referring to Law Number 16 of 2004 which replaces Law Number 5 of 1991 concerning the Attorney General's Office of the Republic of Indonesia, the Attorney General's Office as one of the law enforcement agencies is required to play a greater role in upholding the rule of law, protecting public interests, upholding human rights, and eradicating Corruption, Collusion and Nepotism (KKN). In this new Prosecutor's Law, the Attorney General's Office of the Republic of Indonesia as a state institution carrying out state power in the field of prosecution must carry out its functions, duties and authorities independently, independent

2. Presidential Regulation Number 38 of 2010 concerning the Organizational Structure and Working Procedures of the Republic of Indonesia Attorney General's Office. Based on Article 24 of Presidential Regulation No. 38 of 2010 it can be seen that the authority of the prosecutor's office can act for and on behalf of the state in the field of civil and state administration, namely to save, restore state assets, enforce the authority of the government and the state in the form of law enforcement actions, legal assistance, legal considerations, and other legal actions. In carrying out the level of implementation of the duties, authorities and functions of the Deputy Junior Attorney General and State Administration (JAMDATUN) above carried out by the State Attorney Attorney or abbreviated as JPN.
3. KEPPRES Number 55 of 1991 concerning the duties and authority of the prosecutor's office in the field of Civil and State Administration.
4. Regulation of the Attorney General of the Republic of Indonesia Number: 040 / A / J.A / 12/2010 concerning Standard Operating Procedures (SOPs) for the Implementation of Duties, Functions and Authority of Civil and State Administration. In the regulation of the attorney general, almost all articles discuss the duties of the prosecutor in the field of state administration, especially regarding the authority of the prosecutor as a state lawyer. Article 24 paragraph (2) which states that "the scope of the civil and administrative fields as referred to in paragraph (1) includes law enforcement, legal assistance, legal considerations and other legal actions to the state or government, including state institutions / agencies, agencies central / regional government, State-Owned Enterprises (BUMN) / Regional-Owned Enterprises (BUMD) in the field of civil and state administration to save, restore state wealth, uphold government and state authority and provide legal services to the public ".

To carry out the civil lawsuit is certainly not easy, there are things that can be blocked include the following that in Article 32, 33 and 34 of Law No. 31 of 1999 there is a formula "there have actually been state losses". Elucidation of Article 32 states that what is meant by "obviously there has been a state financial loss is a state loss which has been calculated in amount based on the findings of the competent agency or public accountant. The definition of "real" here is based on the existence of state losses that can already be counted by the authorized agency or public accountant. In the legal system in Indonesia, only Judges in a court hearing have the right to declare something proven or not proven. The calculation of the authorized agency or public accountant in court hearings is not binding on judges. The judge will not necessarily accept the calculation as a correct calculation because the judge will verify it with the facts revealed in court. Likewise, the defendant (suspect, defendant or convict) can also reject it as a valid or valid calculation. Furthermore, who is meant by the "authorized agency" is also not explicit. what is meant is BPKP or BPK. Regarding public accountants also did not explain who appointed the public accountant? Plaintiff, defendant or court?

The plaintiff (JPN or the institution that was harmed) must be able to prove that the defendant (suspect, defendant or convict) has harmed state finances because of an act without rights or acts against the law (*onrechmatige daad, factum illicitum*)⁵.

Civil process as described above in the technical-judicial return of assets there are still some difficulties that will be faced by the State Attorney in conducting civil lawsuits because the civil procedural law used today is still subject to colonial-era civil procedural law which still adheres to the

of the influence of governmental powers and other powers of influence. What is meant by independence is in carrying out its functions, duties and authority regardless of the influence of governmental power and the influence of other powers.

⁵ If the assets of the defendant (suspect, defendant or convict) have been confiscated, this will make it easier for the plaintiff (State Attorney or injured institution) to trace it back and then can be requested by the plaintiff so that the Judge conducts a confiscation (*conservatoir beslag*) or confiscated equality However, if the defendant's assets have not been confiscated or it has never been confiscated, it will be difficult for the plaintiff to track him down, it is likely that the proceeds of corruption have been secured in the name of another person or in other effective ways.

principle of formal proof where the burden lies the proof lies in the party that postulates (JPN or the aggrieved agency as the plaintiff must prove), the principle of equality of the parties and so on while the JPN or the aggrieved agency as the plaintiff must prove clearly that there has been a state loss namely the state financial loss due to a criminal act of corruption as well as the assets of the defendant (suspect, defendant, or convict) that can be used to recover state financial losses and the immeasurable the amount of time needed until the case has permanent legal force even though the Supreme Court has issued circular No. 3 of 1998 dated September 10, 1998 which was updated with the Supreme Court Circular No. 2 of 2014 dated March 13, 2014 Concerning the Limitation of the Time of the Trial Process at the First, Appeal and Cassation Levels, but in reality many civil cases were protracted and some even took advantage of Judicial Review (PK) for up to two times⁶.

The path of ordinary civil lawsuits requires a relatively long time until the verdict can be executed, not to mention obstacles because at the time of execution there will be claims of resistance or rebuttal from third parties on the assets to be executed. From the other side, the obstacle is because the process of proving that the person who claims something is right has the obligation to prove his rights⁷. This will complicate the process of civil law enforcement because the state as the plaintiff must have strong evidence to prove the defendant is a criminal offense of corruption as well as proof of how much the state loss due to corruption.

This will be even more difficult if the culprit dies before being decided by the court and his heir firmly makes a statement before the District Court refusing to be the heir⁸ or the corrupt assets are hidden abroad or hidden through agents, notaries, lawyers, family or close people with the perpetrators of these criminal acts of corruption known in the legal world as the "Gate Keeper".

Another weakness in the current corruption law related to the return of assets or assets of the perpetrators of corruption is the provision of Article 18 paragraph (3) which states as follows:

In case the convict does not have sufficient property to pay the replacement money as referred to in paragraph (1) letter b, the sentence shall be a prison term whose duration does not exceed the maximum threat of the principal in accordance with the provisions of this law, the duration of the criminal sentence has been determined in a court decision.

Based on the provisions of Article 18 paragraph (3) above, the judge in his decision will subsidize the payment of compensation money with imprisonment for a period determined in the decision. As a result, many convicts prefer to carry out a substitute imprisonment rather than pay or return the corrupt money to the state for successfully hiding the corrupt assets.

Civil law enforcement that is carried out in line with the enforcement of criminal law against perpetrators of corruption in order to maximize the return of assets or losses to the state from perpetrators of corruption must be upheld. The regulation of the legislation of the law needs to be strengthened, especially the laws and regulations concerning the return of assets and the wealth of the state resulting from corruption from the perpetrators of corruption and heirs, which are not only limited to the return of assets as in criminal law enforcement, but more than that, namely the return of assets as much as wealth the corrupted state and the profits from the assets resulting from corruption that are within the scope of civil law.

⁶ Civil law process in Indonesia so far takes a long time, even tends to drag on. The absence of restrictions and criteria for using legal remedies is one of the causes. There is no guarantee that civil cases related to corruption cases will receive priority so for this reason a new breakthrough is needed in the framework of and efforts to recover assets resulting from corruption.

⁷ Article 1865 Civil Code and Article 163 HIR and Article 283 Rbg.

⁸ Article 833 paragraph (1) Civil Code jo Article 1057 Civil Code jis Article 1058 Civil Code

To make it easier in practice, these rules must be made in a codification of anti-corruption legislation and it should be avoided making partially separate because overlapping rules can occur which can undermine its implementation. The regulation is important as a harmonization of the implementation of the United Nations anti-corruption convention which has been ratified by Indonesia⁹. The significance of the ratification of the UN anti-corruption convention as mentioned above is¹⁰:

1. Increase international cooperation, especially in tracking, freezing, confiscating, and returning assets resulting from criminal acts of corruption placed abroad
2. Increasing international cooperation in realizing good governance
3. Increasing international cooperation in the implementation of extradition treaties, mutual legal assistance, inmate submission, transfer of criminal proceedings, and law enforcement cooperation
4. Encouraging technical cooperation and information exchange in the prevention and eradication of corruption under the umbrella of legal development cooperation and technical assistance in the scope of bilateral, regional and multilateral.
5. Harmonization of national legislation in the prevention and eradication of criminal acts of corruption in accordance with the convention.

To avoid arbitrary law enforcement by law enforcement officials which can lead to human rights violations, law enforcement must be carried out without breaking the law. The importance of returning assets resulting from corrupt acts from perpetrators or their heirs is based on the fact that corruption has disrupted the country's economy and national development in Indonesia.

It needs to be regulated separately regarding the provisions of material law and formal law as the basis for civil lawsuits against perpetrators of corruption and heirs because of the main rules governing and the evidentiary system and its proceedings according to the current legal provisions have not specifically regulated but still emphasize verification to the plaintiff which in this case is the State Attorney Attorney or the injured institution. In this regard, the author believes that because the crime of corruption is an extraordinary crime and is detrimental to many people as victims, a lawsuit can not only be filed by the State Attorney or the injured institution must also open opportunities in a statutory regulation to file a lawsuit by the public as victims who have been harmed by the corrupt act through a *class-action* lawsuit or by a non-governmental organization that is concerned with law enforcement on corruption provided that the compensation money must go to the state treasury or the local government treasury concerned, so that the people no longer suffer losses in enjoying the fruits of development that they could have enjoyed.

The civil claim to recover this state's loss is to fulfil the sense of justice of the community as a result of the illegal acts committed by the perpetrators. One of the criteria for acts against the law is if the act is contrary to obligations under the law. This means that it is contrary to a general binding regulation issued by an authorized authority.

This provision can be a provision within the scope of public law, including criminal law regulations and within the scope of private law, including civil law. Therefore a criminal act is not only

⁹ Law Number 7 of 2006 concerning Ratification of the United Nations Convention on Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Against Corruption, 2003).

¹⁰ *Loc-cit*

against the law (*werdere rechtelijk*) in criminal law but in certain circumstances can be against the law (*onrechtmatig*) in terms of civil law¹¹.

B. Formulation of the Problem

Based on the description on the background of the research above, several problems can be raised as follows:

- What is the barriers to the implementation of the State Attorney Attorney's Authority in Conducting a Civil Lawsuit in returning assets of corruption?

C. Discussion

Overview of the Definition of Corruption and Assets

The term *corruption* comes from the Latin "*corruption*" or "*corruptus*" which means; damage or depravity¹². At first the public's understanding of corruption by using the language of the dictionary, which comes from the Latin Greek "*corruption*"¹³ which means actions that are not good, bad, cheating, can be bribed, immoral, deviating from holiness, violating religious, mental and legal norms.

Corruption in the *Black's Law Dictionary* is "an act carried out with a view to providing an advantage that is not in accordance with the official obligations and rights of other parties, wrongly using his position or character to obtain an advantage for himself or for someone others, along with their obligations and the rights of other parties"¹⁴.

In another sense, corruption can also be seen as behavior that does not obey the principle, meaning that in making decisions in the economic field, whether carried out by individuals in the private sector or public officials, deviating from applicable regulations¹⁵. The nature of corruption based on World Bank research results is "*An Abuse of Public Power for Private Gains*"¹⁶, the abuse of authority / power for personal gain.

This understanding is a very simple understanding, which cannot be used as a benchmark or standard for corrupt acts as a criminal act, which Lubis and Scott in their view that: in the sense of the law of corruption is behavior that benefits oneself at the expense of others, by officials a government that directly violates the legal boundaries of that behavior; whereas according to government norms it can be considered corruption if there is a violation of the law or not, but in business the action is despicable¹⁷.

According to Hermien HK, the term corruption originates from the word "*corrupteia*" which in Latin means seduction or bribery. *Bribery* is giving or handing it to someone to make that person benefit. While *seduction* means something interesting that makes a person deviate¹⁸. Robert Klitgaard defines

¹¹ Setiawan, *Empat Kriteria Perbuatan Melawa Hukum dan Perkembangan Dalam Yurisprudensi*, dalam buku *Penemuan Hukum dan Pemecahan Masalah Hukum*, Reader III, Jilid I, Penerbit Tim Pengkajian Hukum Mahkamah Agung RI, 1991, p. 122.

¹² Focus Andrea dalam M. Prodjohamidjoyo, *Memahami Dasar-Dasar Hukum Pidana Indonesia*, Pradnya Paramita, Jakarta, 2001, p. 7.

¹³ The term "corruption" comes from the word "corruptore" from Old Latin, which means:: damaging.

¹⁴ Black, Henry Campbell, *op-cit*.

¹⁵ Vito Tanzi, *Corruption, Governmental Activities, and Markets*, IMF Working Paper, August 1994.

¹⁶ World Bank, *World Development Report – The State in Changing World*, Washington, DC, World Bank.

¹⁷ M. Lubis dan J.C. Scott, *Korupsi Politik*, Yayasan Obor Indonesia, Jakarta, 1997, p. 19.

¹⁸ Hermien HK, *Korupsi di Indonesia dari Deik Jabatan ke Tindak Pidana Korupsi*, Citra Aditya Bhakti, Bandung, 1994, p. 32.

corruption as *one of the foremost problems in the developing world and it is giving much greater attention as we reach the last decade of the century*¹⁹.

In the scientific discipline, the definition and definition of assets are notions that are generally known in activities related to economics, the translation of assets in particular is derived from economics, namely the accounting system. Expressed by Paton²⁰:

"That the definition of assets as wealth either in physical form or other forms that have value for a business entity".

The word "asset" comes from English, namely asset, which means n 1. mutable person or quality, 2. thing owned, esp property, that can be sold to pay I debt²¹. According to the Big Indonesian Dictionary, assets are n 1. Something that has a capital exchange value²². The word "asset" in Indonesian is synonymous with the word "capital, wealth"²³.

According to the Black's Law Dictionary, "asset" means "1. *An item that is owned and has value.* 2. *The entries of property owned, including cash, inventory, real estate, accounts receivable, and goodwill.* 3. *All the property of a person (esp. A bankrupt or deceased person) is available for paying debts.*" Meanwhile, according to Telly Axis, et al, assets are capital; wealth; for example company assets, personal assets, national assets, and others²⁴.

Further in the broad definition of assets given by the Government Accounting Standards, are²⁵:

"Economic resources controlled and / or owned by the government as a result of past events and from which future economic and / or social benefits are expected to be obtained, both by the government and society, and can be measured in monetary units, including non-resource funds needed to provide services to the general public and resources maintained for historical and cultural reasons.

Article 2 letter (d) UNCAC states:

Property shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing the title to or interest in such assets. (UNCAC, assets are defined as, "any economic advantage from criminal offenses, includes property of any description, whether corporeal or incorporeal, movable or immovable, tangible or intangible, legal document or instrument evidencing title to, or interest in such property.

Barriers to the implementation of the State Attorney's Authority in Conducting a Civil Lawsuit in returning assets of corruption

a. Unclear Concepts and Rules of Civil Laws Intended.

¹⁹ Robert Klitgaard dalam Achmad Ali, *Keterpurukan Hukum di Indonesia*, Ghalia Indonesia, Jakarta, 2002, p. 15.

²⁰ Paton dalam Eddy Mulyadi Supardi, *Memahami Kerugian Keuangan Negara Sebagai Salah Satu Unsur Tindak Pidana Korupsi*, Ceramah Ilmiah. Bogor: FH Pakuan, 24 Januari 2009. p. 6.

²¹ Ferry Aries Suranta, *Peranaan PPATK dalam Mencegah Terjadinya Praktik Money Laundering*, Gramaia Publishing, Depok, 2010, p. 52.

²² Tim Penyusun Kamus Pusat Bahasa, Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, Edisi Ketiga, Balai Pustaka, Jakarta, 2003, p. 70.

²³ Zein Badudu, *Kamus Umum Bahasa Indonesia*. Pustaka Sinar Harapan. Jakarta, 2001. p. 83.

²⁴ Black, Henry Campbell, *Black's Law Dictionary*, Edisi VI, West Publishing, St. Paul Minnesota, 1990. p. 71.

²⁵ Bambang Mudjiono, *Teori Akuntansi: Aset (Aktiva)*. Jakarta: PPBA UMB, 2009, p. 2.

The state has the right to make a civil claim against the convicted and / or heirs of the assets obtained before the court's decision to obtain permanent legal force, whether the decision is based on provisions before the coming into force of the TIPIKOR Law or after the enactment of the Act. The civil lawsuit for recovering state financial losses contained very strong meanings to fulfill a sense of justice as a result of unlawful actions carried out by convicted or heirs who deliberately hid assets obtained from the results of corruption which had harmed state finances, as explained in Article 38C of the PTPK Law.

Based on the descriptions above shows that the specific characteristics of civil lawsuits filed after a crime is no longer possible, because it is faced with certain conditions as intended in Article 32, Article 33, Article 34, Article 38C of the PTPK Law. Without regulation in the PTPK Law it is not possible to make a civil suit. Following the logic of the PTPK Law, it can be argued that if it is not regulated by the Law, it is not justified to conduct a civil suit, especially in the context of things that cause "*the abolition of the authority to prosecute criminal*" and "*the cessation of investigation or prosecution*", as stipulated in Article 77, Article 109 paragraph (2) and Article 140 paragraph (2) letter a Criminal Procedure Code.

The Criminal Code or the Criminal Procedure Code actually does not prohibit civil lawsuits for the occurrence of things that cause "*abolition of the authority to prosecute criminal*" or the occurrence of "*termination of investigation or prosecution*", but does not regulate the provisions regarding the process or legal procedure for civil lawsuits relating to criminal offenses. This is in line with the provisions regarding "Merger of Laws for Indemnification" as regulated by Article 98-101 of the Criminal Procedure Code. However, what needs to be considered in a civil suit in a corruption case must be based on the principals involved therein, namely: First, the conditional principle. This principle means that civil lawsuits cannot always be filed in corruption cases, limited to certain conditions. Second, the principle of civil lawsuits for types of criminal acts of corruption is detrimental to the country's finances. This principle shows that civil lawsuits do not cover all types of criminal acts of corruption regulated in the PTPK Law. Civil lawsuits are only limited to criminal acts of corruption that cause state financial losses, as stipulated in Article 2 paragraph (1) and Article 3 of the PTPK Law. And third, the principle of civil lawsuits as a complement to the appropriation procedure for the state. Based on the provisions of Article 38C of the PTPK Law, it is possible to carry out a special civil suit for the results of corruption which has not yet been carried out for the state.

However, as a procedural law mechanism, a civil lawsuit in this case is carried out to take assets resulting from a criminal act of corruption controlled by a criminal act of corruption and still go through a process of adjudication to obtain a court decision (civil) determined by the judge. Of course it still has some weaknesses that exist such as the mechanism of appropriation of assets based on criminal decisions.

Related to efforts to recover state finances, the PTPK Law regulates through civil channels consisting of 2 (two) things, namely:

- a. Civil lawsuit to recover real state financial losses as regulated in Articles 32, 33, 34 of the PTPK Law;
- b. Civil lawsuit against assets suspected of originating from criminal acts of corruption that have not been charged, returns to the state, as stipulated in Article 38 C of the PTPK Law;

Real state financial losses are material requirements for civil lawsuits to be filed. Limitative real state financial losses are found in the formulation of the provisions of Article 32 paragraph (1) of the PTPK Law states that:

In the event that an investigator finds and believes that one or more elements of a criminal act of corruption do not have sufficient evidence, while there is clearly a state financial loss, the investigator immediately submits the investigation result file to the State Attorney for a civil lawsuit or submitted to the agency that disadvantaged to file a civil suit.

Elucidation of Article 32 paragraph (1) states that what is meant by "significantly harming state finances" is the amount of state losses that can be calculated based on the findings of the authorized agency or appointed public accountant.

Observing the provisions of Article 32 paragraph (1), the selection of civil lines in handling the problem of corruption requires the existence of material conditions, that is, if one or more elements of a criminal act of corruption do not have sufficient evidence, in addition there has also been a real loss of state finances.

Civil lawsuits under Article 33 and Article 34 therefore require two things:

1. The suspect or defendant dies during the process of investigation or examination of a court hearing;
2. Obviously there has been a state financial loss.

The provisions of Articles 33 and 34 of the PTPK Law indicate that in any way the state's financial losses must be returned even if the suspect or defendant dies. Conditions such as making a lawsuit can be addressed to his heirs. The PTPK Law explicitly, in addition to including material conditions in the form of state financial losses and acts against the law, also determines formal requirements. The formal requirements in a civil suit relate to the state's position as a plaintiff. The government in the context of organizing welfare, the protection of its citizens has the right to bring a civil suit to court (*Government Legal Standing*).

Because it is related to the criminal act of corruption, there is what is called the State Attorney representing the state to claim rights. This is confirmed in the provisions of Article 32 paragraph (1), Article 33 and Article 34 of the PTPK Law which in essence states that the effort to file a civil claim is the right of the state in this matter can be represented by the Prosecutor as a state lawyer or a disadvantaged agency. The state as the aggrieved party is even affirmed in Article 38 C of the PTPK Law namely "... the state can make a civil suit ...".

The meaning of the word "can" in Article 38 C of the PTPK Law has implications for a civil lawsuit to be something that is not mandatory, meaning that it is carried out or not carried out depending on the will of the state or the government or the State Attorney. Civil mechanism in the technical-judicial return of assets there are several difficulties that will be faced by the state attorney in conducting a civil claim. Among other things, the civil procedural law used is fully subject to the ordinary civil procedural law which, among other things, adheres to the principle of formal proof. The burden of proof lies with those who postulate (the state attorney's attorney must prove) the equality of the parties, the obligation of the judge to reconcile the parties, and so on. Whereas the state attorney's attorney (JPN) as the plaintiff must prove clearly that there has been a state loss. Namely, state financial losses due to or related to the actions of a

suspect, defendant, or convict; the assets belonging to the suspect, defendant, or convict can be used to recover state financial losses. In addition, as is generally the case with civil cases, it takes a very long time until there is a legal decision that has permanent legal force²⁶.

These obstacles must be overcome immediately to optimize the return of state losses through the making of special civil procedural law on corruption cases, which emerge from the standards of conventional procedural law. Civil lawsuits need to be placed as the main legal remedies besides criminal efforts, not merely facultative or complementary to criminal law, as regulated in the Corruption Eradication Act²⁷.

As described above, based on Law No.31 of 1999 jo. Law No. 20/2001, the recovery of state financial losses can be done through two legal instruments namely criminal and civil instruments. The criminal instrument is carried out by the investigator by confiscating the property of the perpetrator and subsequently the prosecutor is demanded to be seized by the judge who is realized by the judge through an additional criminal decision in the form of payment of compensation money to the state. While civil instruments (through Articles 32, 33, 34) Law no. 31 of 1999 and Article 38 C of Law No. 20 of 2001) conducted by the State Attorney (JPN) or the aggrieved agency. Efforts to recover state financial losses that use civil instruments are fully subject to material and formal civil law discipline, even though they are related to corruption.

In contrast to criminal proceedings that use a material substantiation system, the civil process follows a formal evidentiary system which in practice can be more difficult than material substantiation. In the criminal act of corruption, especially in addition to the public prosecutor, the defendant also has the burden of proof, that is, the defendant is obliged to prove that his possessions were obtained not because of corruption. The burden of proof on this defendant is known as the *Reversal Burden of Proof principle*. This principle means that the suspect or defendant is already considered guilty of committing a criminal act of corruption (*Presumption of Guilt*)²⁸, unless he is able to prove that he did not commit a criminal act of corruption and does not cause financial losses to the state.

In civil proceedings, the burden of proof is the plaintiff's obligation, namely by the JPN or the aggrieved agency. In this connection, the plaintiff is obliged to prove, among others:

- a. That clearly there has been a state financial loss;
- b. State financial losses as a result of or related to the actions of a suspect, defendant, or convict
- c. The assets belonging to the suspect, defendant or convict can be used to recover state financial losses.

Considering that the evidence in a civil case is formal, it is difficult to conduct a civil suit because²⁹:

²⁶ Mujahid A Latief, Opini, Pengembalian Aset Korupsi via Instrumen Perdata, http://www.komishukum.go.id/index.php?option=com_content&view=article&id=71%3Apengembalian_set-korupsi-via-instrumen-perdata&catid=38%3Aartikel&Itemid=44&lang=in, accessed October 1, 2014.

²⁷ *Ibid.*

²⁸ The validity of the guilty presumption refers to the system of examining suspects conducted by law enforcers in the United States with the Crime Control Model system, so that since the suspect was arrested and detained, he has been considered guilty or declare war on the country by hiring mercenaries, namely Advocates. (Romli Atmasmita, *Perbandingan Hukum Pidana*, Alumni, Bandung, 1998, p. 23).

²⁹ *Ibid.*

- (1) In Article 32, Article 33 and Article 34 of Law no. 31 of 1999 there is a formula "there have been obvious losses to the state". Elucidation of Article 32 states that what is meant by "*obviously there has been a state financial loss is a state loss which has been calculated in amount based on the findings of the authorized agency or Public accountant*". In the legal system in Indonesia, only Judges in a court hearing have the right to declare something proven or not proven. The calculation of the authorized agency or public accountant in court proceedings is not binding on judges. Judges will not necessarily accept these calculations as true, legal and therefore binding. Likewise, the defendant (suspect, defendant or convict) can also reject it as a valid or valid calculation. Who is meant by "*authorized agency*" is also unclear. Maybe what is meant is BPKP or BPK. Regarding public accountants also did not explain who appointed the public accountant? Plaintiff, defendant or court?
 - (2) The Plaintiff (JPN or institution that has been injured) must be able to prove that the defendant (suspect, defendant or convict) has harmed state finances by committing acts without rights (*onrechmatige daad, factum illicitum*). This burden is indeed not light, but the plaintiff must succeed to be able to claim compensation.
 - (3) If the assets of the defendant (*suspect, defendant or convict*) have been confiscated, this will make it easier for the plaintiff (JPN or the injured institution) to trace it back and then can be requested by the plaintiff to have the Judge make a confiscation (*conservatoir beslag*). But if the defendant's assets have not or (*never been confiscated*), it will be difficult for the plaintiff to track him down, it is likely that the proceeds of corruption have been secured on behalf of someone else.
 - (4) Article 38 C of Law No. 20 of 2001 states that if after a court decision has obtained legal force, it remains known that there are still assets belonging to the convicted person which is allegedly or reasonably suspected to also originate from a criminal act of corruption that has not been subject to seizure for the state, then the state can make a civil suit against the convicted and or his heirs. . With the provision of "*alleged or reasonable*" just the plaintiff (*JPN or the injured institution*) will definitely fail to sue the defendant's property (*convict*). The plaintiff must be able to prove legally that the assets of the defendant originate from criminal acts of corruption; "*Alleged or suspect*" has absolutely no legal force in civil proceedings.
 - (5) The civil litigation process in practice takes a long time, it can even be protracted. There is no guarantee that civil cases related to corruption will get priority. In addition, as is the general observation that a Civil Judge's Decision is unpredictable.
- b. The unpreparedness of law enforcement institutions
- One inhibiting factor in returning assets from corruption to Indonesia is poor coordination. In the case of returning assets resulting from corruption, in fact under Swiss law, the provision of Reciprocal Legal Aid can be given even though there is no Reciprocal Legal Assistance agreement between the two countries. In fact, an account freeze can be done automatically if the owner of the asset is found guilty of corruption or is involved in a corruption case. In the Neloe case, the Swiss government cooperatively frozen Neloe's assets through a letter requesting the freezing of assets that the Attorney General sent to the Swiss Government, but in reality in early 2010 these assets were no longer blocked or confiscated³⁰.

³⁰ After the report on Neloe's assets in Switzerland was known by PPATK as an institution that was indeed authorized to investigate the entry and exit of financial transactions, PPATK then immediately reported the matter to the Attorney General's Office of the Republic of Indonesia, as an institution that would and had the authority to investigate and investigate it. Then

In this case, although Neloe has been tried and jailed, the inability of the Indonesian Government to disclose and prove the flow of Neloe's funds in Switzerland is a problem for Swiss authorities to return assets to Indonesia. In this case it is clearly seen that the lack of readiness of the public authorities authorized to prove the case is a problem in the process of returning this asset. Then, expertise and Human Resources at the three main spearheads in the return of assets are considered lacking. The Attorney General's Office, the Corruption Eradication Commission (KPK) and the TPK (Corruption Hunters Team) should be able to collaborate well with the PPATK (Financial Transaction Reports and Analysis Center) and the Indonesian Police and the Ministry of Law and Human Rights, so that they can provide the best results for returning assets, the results of corruption abroad.

Thus, the "return of assets" resulting from corruption cannot be fully carried out if it solely relies on the existing authority regarding international cooperation, particularly in the fields of investigation, investigation and prosecution. "Return of assets" generally can only occur through a court decision, whether criminal or civil, directly or within the framework of mutual assistance in the legal field. Returns of assets resulting from corruption are regulated in Chapter V, Articles 51 to 60 of UNCAC 2003. This chapter is a chain of provisions concerning international cooperation in the prevention and eradication of corruption.

More precisely the provisions of the convention in this matter contain international cooperation specifically in returning assets resulting from criminal acts of corruption. Meanwhile, general international cooperation is regulated in Chapter IV of this convention. Therefore, the provisions of the conventions in this chapter are not directly related to the reality of the need for legal instruments to recover corrupt assets that are still in Indonesia. The need for reform of the criminal law of corruption in Indonesia on the one hand is actually the search for breakthrough legal procedures that can overcome difficulties, especially in returning assets resulting from corruption still in Indonesia. Both of the suspects, defendants who have been tried and who cannot be tried like former President Suharto. The process of managing the proceeds of corruption deposited into the state treasury to date has not been carried out transparently and can be widely held accountable to the public, unless sufficient with the annual report of the Ministry of Finance.

In the context of the 2003 UN TOR, corruption assets are in the "*gray area*" because the convention provides a strong legal loophole for third parties to submit claims for a portion of these assets as their own. Understanding assets in the context of a convention is not a private property. state (*state-property*) (read Article 3 paragraph 2).

The legal consequences of the definition of such assets are, first, the element of "adverse (financial / economic) state" listed in Article 2 and Article 3 of Law No. 31 of 1999 which has been amended by Law No. 20 of 2001, is no longer an absolute element that can be used as one

through the Indonesian Attorney General in 2006, Indonesia sent an official letter to the Swiss Attorney General to freeze Neloe's account in Switzerland. The reason is that the Government of Indonesia has an interest in these assets, and Neloe is being charged with a corruption case in Indonesia that is suspected to be detrimental to the trillions of rupiah. In response to this, the Swiss government asked the Government of Indonesia to produce a request for Reciprocal Legal Aid, which must specify in detail what forms of assistance the Government of Indonesia would request, such as requests for blocking, confiscation, or the identity of the parties involved. Furthermore, the Indonesian government also formed an Integrated Search Team Convicts and Corruption Suspects or also commonly referred to as the Corruption Hunters Team (TPK), which is a cross-departmental work unit under the coordination of Deputy Attorney General. The Integrated Team Membership consists of elements of the Attorney General's Office, the Coordinating Ministry for Politics, Law and Security (Deputy III / Menko Polhukam for Law and Human Rights), the Ministry of Law and Human Rights (Directorate General of General Law Administration and Directorate General of Immigration), Police Republic of Indonesia (Bareskrim and NCB Interpol Indonesia), Ministry of Foreign Affairs (Directorate General of Politics, Law, Security and Territorial), and Elements of PPATK.

measure to occur a criminal act of corruption³¹. The second consequence, there needs to be a review of the understanding of state finances and or state losses in the State Finance Law or the State Treasury Law. In addition, it is also necessary to review the implementation of the Law on Non-Tax State Revenues that apply because the intent and purpose of this Act is only aimed at revenues coming from the public service sector such as licensing in various public sectors and the public business sector.

c. The ineffectiveness of the 2003 UNCAC Ratification in Indonesian criminal law

The ratification of UNCAC 2003, particularly related to the provisions regarding the return of assets resulting from corruption, still faces a number of obstacles, including juridical constraints regarding the readiness of positive law. In the case of Indonesia as the "country requested" to return assets directly, for example, it remains to be discussed about the possibility of the *legal standing* of the requesting party which incidentally is a country. In Indonesian civil procedural law, a lawsuit can be filed against a person or legal entity residing / domiciled in Indonesia or in the case of a dispute over assets in Indonesia. Either by the plaintiff who is a citizen / Indonesian citizen or a foreigner. In this case the basis of the lawsuit is the existence of acts against the law (*onrechtmatigedaad*) as determined in Article 1365 of the Civil Code (BW).

Moreover, a separate study is needed in the case that the claimant is "a country". Whereas Article 53 of UNCAC 2003 requires a country to develop its national legal construction, which allows other countries to file civil claims, claim damages, and place confiscations, in the courts of that country, in the context of returning assets resulting from corruption that are located or placed in the country directly, not in the framework of *government to government cooperation* (G to G).

Meanwhile, a civil suit to recover state financial losses due to a criminal act of corruption is a special civil suit governed by the criminal law of corruption, and not a lawsuit against the law in general. In this case the civil mechanism regulated in criminal (procedural) law. There is a *lex specialis* characteristic in Article 32 of Law No. 31 of 1999 when faced with Article 1365 BW which is *lex generalis*. Unfortunately, this is precisely what the State Attorney Attorney does not understand who is currently suing former President Suharto and the foundations he founded.

In addition, also when Indonesia is "the requested country", Indonesian courts may reject the lawsuit, because in Indonesian criminal law corruption, a civil suit can be made in the event of state financial losses but the perpetrators' actions do not meet the element of action criminal corruption, can only be done by the State Attorney or other relevant agencies. There is absolutely no precedent if the lawsuit is carried out by a "foreign country" against acts of corruption that occur in other countries as well. Thus, UNCAC 2003, not only had an impact on the necessity to reform criminal law (corruption), even further various provisions in civil law, both material and formal (events).

Meanwhile, when Indonesia was a "country that requested" the return of assets from corruption also still had juridical constraints. In view of the provisions of Article 6 letter c, Article 12 paragraph (1) letter h, Article 38 and Article 41 of Law No. 30 of 2002 in conjunction with Article 7 paragraph (2) of the Criminal Procedure Code, the KPK has the authority to conduct international cooperation for the purpose of confiscation. In this case using the authority of the KPK to conduct investigations, investigations and prosecutions, which includes the authority to seize or block (temporarily) assets. However, this cannot be done in the case of returning assets in the form of "permanent confiscation" or "return" which is allegedly the result of a criminal act of corruption. Both the assets of the results of corruption in Indonesia and those abroad.

³¹ Romli Atmasasmita, Pengembalian dan Pengelolaan Aset Korupsi, dimuat pada http://www.unisosdem.org/article_detail.php?aid=9217&coid=3&caid=31&gid=3. Accessed November 30, 2014

Conclusion

The conception of returning assets of corruption in the Indonesian legal system is currently experiencing a paradigm error because it only relies on money to replace corruption crimes contained in Article 18 and claims based on the provisions of Article 39 C of Law Number 31 of 1999 concerning Eradication of Corruption Crimes as already amended by Law Number 20 of 2001, in which the return of assets or assets is only directed at perpetrators of corruption, whereas the mode of hiding assets resulting from corruption is usually by using relatives, close relatives or trusted persons, including their heirs. Without the provisions in the Corruption Eradication Act it is not possible to make a civil lawsuit.

Civil lawsuits based on Article 33 and Article 34 therefore require two things: (1) the suspect or defendant dies during the investigation or examination of the court, (2) there has been a clear loss of state finances. The provisions of Articles 33 and 34 of the PTPK Law indicate that in any way the state's financial losses must be returned even if the suspect or defendant dies. Conditions such as making a lawsuit can be addressed to his heirs but in reality the provisions of Article 32, Article 33 and Article 34 of the PTPK Law are merely a gateway to sue heirs of perpetrators of corruption because there is no norm in the Civil Code. For this reason, it is necessary to formulate norms about acts against the law to sue the heirs of corruption perpetrators because the provisions of Article 1365 of the Civil Code up to Article 1379 of the Civil Code have not been able to ensnare heirs of perpetrators of criminal acts of corruption unless the heirs are involved in collaboration in corruption.

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