

Summary of Study
The Urgency of Guarantee Confiscation in Handling Corruption Cases

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Abstract

Deterrent effect for corruptors is not enough if it only relies on imprisonment. The anti-corruption system must begin to focus on the confiscation of criminal assets owned by corruptors. This concept can accommodate the purpose of punishment in the modern era, including justice for victims (restorative justice) and no longer focus only on retaliation (retributive justice). Thus, handling corruption cases is not enough by punishing the corruptors, yet must look at the aspects of recovery for victims, including state and society, in the context of economy and financial.

Unfortunately, the effort to change the orientation of punishment has not been supported by adequate laws and regulations. Based on the Anti Corruption Law, recovery of state financial losses can only be pursued through two ways, criminal compensation and imposition of fines. Instead of being achieved, based on ICW's monitoring of the trial of corruption cases, the state losses in 2020 reached IDR 56.7 trillion, while the penalty for compensation was only IDR 19.6 trillion. The fines were also low, around IDR 156 billion.

Likewise, the Criminal Code (KUHP) still places the penalty of confiscation of certain goods in an additional criminal group. With such an arrangement, the confiscation of criminal assets cannot stand alone, rather, must be attached to main punishments, such as imprisonment and imposition of fines. In handling corruption cases, this concept contradicts Article 54 point 1 of UNCAC which mandates each state party to adopt the concept of freeze or seizure asset *without* must be followed by punishment.

Meanwhile, the package of draft legislation that supports the state loss recovery program by confiscation of assets (the Bill on Asset Confiscation) is not included in the government's priority political agenda. In fact, many other countries have succeeded in utilizing these legal instruments. For example, the Philippines managed to take over the assets of former President Ferdinand Marcos as much as USD 658 million which was hidden in the Swiss Bank by using the approach of asset seizure without punishment¹.

In addition to legislative issues, the performance of law enforcement officials in the effort to recover state financial losses is relatively poor. One of the benchmarks that can be used is the criminalization of perpetrators using Law Number 8 of 2010 (Law on Money Laundering). Throughout 2020, there were only 20 defendants (out of a total of 1,298 defendants) who were charged with the Law on Money Laundering, both by the Attorney General's Office and the Corruption Eradication Commission. In fact, the Money Laundering Law can be an entry point to maximize the freeze or seizure of criminal assets that directly related to corruption.

The low value of confiscation of assets cannot be separated from the confiscation efforts carried out by law enforcement. This issue concerns the

¹ Report on the Result of Alignment of Academic Papers on the Bill on the Confiscation of Assets for Corruption Cases, Page 127

extent to which law enforcement has tracked down the assets of the alleged corruptors that is connected to their crimes. Because, if it is not optimal, it will affect the return of state financial losses caused by corruption.

Confiscation in handling corruption cases has a number of objectives, including to ensure the benefits of a crime are not being transferred to another party by the corruptor. However, if you look at existing regulations, such as the Criminal Procedure Code (KUHAP), it is noticeable that law enforcement officers will find difficulties to maximize the return of state financial losses. This is because the definition of confiscation in the Criminal Procedure Code is still limited especially on the asset gained from corruption crime that is transferred by the corruptor to another party or in other forms during the case handling process. In fact, the key to the successful execution of the decision on compensation and fines lies in the ability to track and confiscate assets.

Therefore, in order for the state to be able to prevent the transfer of assets gained from corruption crimes, it is important to formulate a policy framework that regulates the mechanism for guarantee confiscation in handling corruption cases.

Key Words: Corruption, State Loss Recovery, Guarantee Confiscation

CHAPTER I
PREFACE

1. Purpose of the Study

This study aims to formulate alternative public policies in eradicating corruption, which emphasizes efforts to increase the effectiveness of state loss recovery by applying the provisions of guarantee confiscation as a clearer legal basis for law enforcement.

2. Methodology

The methodology of this study is normative legal study. To complement the materials, ICW conducted a series of activities, ranging from focus group discussions, interviews with experts, and expert meetings. The speakers of those activities were: Agustinus Pohan, S.H., M.A., Dr. Luhut Pangaribuan, S.H., LL.M., Irene Putri, S.H., M.Hum., Dr. Akhmad Budi Cahyono, S.H., M.H., Dr. Maradona, S.H., LL.M., dan Dr. Mahmud Mulyadi, S.H., M.Hum.

CHAPTER II
EMPIRICAL OVERVIEW OF CORRUPTION ERADICATION

1 Problems of Corruption Cases' Handling

In the criminal justice system, there is a functional differentiation principle. In general, functional differentiation is an affirmation of the division of tasks of authority between law enforcement officers in an institutional manner². From there, it is hoped that an integrated criminal justice system will be built, so that law enforcement can work without overlapping authorities between institutions. However, beyond that, an integrated criminal justice system is also expected to produce a common perspective between law enforcers in acting against a crime, especially corruption.

a Limitation of Supporting Regulations for Eradicating Corruption

In terms of quantity, the regulations for eradicating corruption in Indonesia appear to be adequate. However, there are various aspects of the substance that have not been accommodated. At the same time, the crime of corruption is always transformed along with the times. Simply put, if there is a new criminal act that has not been stated in the regulations, then, based on the principle of legality, the act cannot be prosecuted and the perpetrators cannot be held criminally responsible (*nullum delictum nulla poena sine praevia lege poenali*).

There are a number of regulations that have not been lawfully regulated in Indonesia, including the accommodation of UNCAC agreement (trading in influence, illicit enrichment of wealth, and corruption in the private sector), the Bill on Asset Confiscation and the Bill on Limitation of Currency Transactions. In addition, support through Mutual Legal Assistance has not been widely carried out by the government. Amendments to the Anti Corruption Law are also urgently needed to be carried out immediately as it pertaining to critical issues such as the disparity in punishment between articles, the low imposition of fines, and more detailed arrangements regarding additional criminal penalties.

b The Blurry Portrait of Law Enforcement

Monitoring conducted by ICW on the trial of corruption cases in 2020 came up with one conclusion, law enforcers have not fully implemented the deterrent effect on corruptors. Not only in terms of imprisonment, however, the recovery of state financial losses is also very low. As previously mentioned, efforts to offset the amount of state financial losses are still far apart. Of the total IDR 56 trillion, practically the additional penalty for compensation is only IDR 19 trillion. In the future, the orientation of recovery from losses should be the main focus of law enforcement in eradicating corruption.

² Harap, Yahya. Principles of Criminal Procedure Code, Page 47

c The Impartiality of the Judicial Powers' Institution

In 2020, ICW managed to collect 1,218 verdicts in corruption cases with a total of 1,298 defendants. This data was compiled from all Corruption Courts throughout Indonesia using primary and secondary sources. For the primary source itself, it was taken from two channels, namely the Case Search Information System (SIPP) at each court and the Directory of Supreme Court decisions.

In the above-mentioned monitoring, throughout 2020, the average imprisonment sentence for corruptors was only 3 years and 1 month. If it is associated with the assessment categorization, then the number is fairly light (0 - 4 years). Although there was an increase compared to the previous year (2 years 7 months), it was still considered not significant. Apart from that, the imposition of fines is also very low. If all of them are combined, the fines imposed on the 1,298 defendants only reach the amount of IDR 156 billion while the average fine for the defendants verdicted by the panel of judges was only IDR 131 million. Unfortunately, of all the defendants, practically only six people were sentenced to a maximum fine of IDR1 billion. The difference between state financial losses and compensation is very far apart. The compensation which throughout 2020 was only IDR 19.6 trillion, meanwhile the state losses, as stated in the previous section was up to IDR 56 trillion.

The monitoring also looked at the extent to which judges place substitute imprisonment sentences in a sentencing decision. From a total of 549 defendants who were sentenced to a substitute imprisonment, the average sentence was only 1 year and 1 month in prison. Therefore, it is seemed common for the corruptors to transfer their assets to another party, and to serve imprisonment rather than to pay compensation.

2. Confiscation in Law Enforcement

a. Confiscation Actions in General Law Enforcement

Confiscation is basically an authority given by law to law enforcers in the interest of proving a crime at every step of case handling, whether investigation, prosecution, or trial. The act of confiscation intersects with human rights, especially private property rights as stated in Article 28 H paragraph (4) of the 1945 Constitution which cannot be taken over arbitrarily by anyone. However, in the context of law enforcement, as long as it can be proven that the assets that confiscated are related to a criminal act, then the confiscation can be justified. Meanwhile, confiscation in the context of civil law is regulated in Article 1131 of the Civil Code. Essentially, the regulation stated that the debtor's assets, both existing and future ones, serve as guarantee for the engagement between the creditor and the debtor. Hence, goods that can be confiscated are not only limited to agreement documents, but also documents outside of the agreement. The interpretation of "outside of the agreement" is an engagement that arises because of an unlawful act.

d Confiscation in Handling Corruption Cases

From the point of view of impact of corruption, an extraordinary measure is needed from the aspect of law enforcement in order to reach all perpetrators of crime. Since pattern and mode of corruption continues to transform which sometimes makes it difficult for law enforcement officials to dismantle it. In addition to the transformation of crimes, within the scope of criminology, it has also been explained that the perpetrators of crimes will literally always try to avoid punishment by any means, including through transferring their assets³. Therefore, to mitigate this, ICW recommends that the provisions for guarantee confiscation that have been regulated in civil code can be accommodated to be included in the criminal code.

³ Report on the Result of Alignment of Academic Papers on the Bill on the Confiscation of Assets for Corruption Cases, Page 26 - <https://www.bphn.go.id/data/documents/PENYELARASAN-NASKAH-AKADEMIK-PERAMPASAN-ASET.PDF>

CHAPTER III
**GUARANTEE CONFISCATION AS AN ALTERNATIVE APPROACH TO MAXIMIZE
THE STATE-LOSSES RECOVERY**

The case handling of corruption in Indonesia has not been fully oriented towards recovering state financial losses. There is a huge gap between state financial losses and the imposition of penalties for paying compensation. For this reason, legal breakthroughs must be made to overcome these problems. One of them is by adopting the concept of guarantee confiscation into the regulations related to corruption case handling.

The urge to apply the confiscation of guarantees in handling corruption cases is actually not the first time being discussed. In 2013, the Supreme Court had a chance to discuss this⁴. Unfortunately, the discussion never produced a solid concept to be implemented. However, beyond that, at least one of the stakeholders in law enforcement, the judicial power agency, has paid more attention to the issue of the low recovery of state financial losses.

Basically, the concept of guarantee confiscation is not known in criminal law. This action is only listed in the civil law, particularly through Article 227 paragraph (1) of the Herzien Inlandsch Regulation (HIR)⁵. Taking a closer look on that, confiscation of guarantee has a number of important elements. First, there is a reasonable suspicion from the debtor. This has a very thick subjective nuance where allegation is made from the feeling or mental state of the debtor that the creditor has the potential to find a way to embezzle or take their assets. Later, the allegation must be explained and proven in court. The judge has the authority to accept or reject the confiscation application submitted by the debtor. Thus, the debtor in this case is active to see all the potential that might occur to their assets while they are still in the control of the creditor and convey that concern in court.

Second, judges make confiscations to protect the rights of someone who submits a confiscation request. This is intended so that the lawsuit is not illusionist and certainly, what is requested by the debtor can be fulfilled by the creditor. Because, if this is not done, it is possible that creditors hidden or transferred their assets to other parties and this has implications for decisions that are difficult to execute. However, the application for guarantee confiscation is not an obligation, rather, the right of the debtor that can be submitted for their own interest.

⁴ Supreme Court Initiates the Guarantee confiscation for Corruption Cases
<https://www.hukumonline.com/berita/baca/lt51d5853ccc40b/ma-gagas-sita-jaminan-untuk-perkara-korupsi/> Accessed on 22 September 2021, 10.09 Western Indonesia Time.

⁵ Article 227 HIR: *If there is a reasonable suspicion that a person who owes a debt, while a decision has not been rendered on their behalf as a decision against them cannot be executed, is seeking reason to embezzle or take their goods, both variable and fixed, with the intention of taking the goods away from the debt collector, then at the request of a person with an interest, the chairman of the district court may give an order that the goods be confiscated in order to protect the rights of the person who submitted the request, and the requester must be notified that they will appear before a trial, the first district court after that to advance and strengthen their claim.*

In line with the above concept, Yahya Harahap explained that the purpose of guarantee confiscation was solely to prevent the assets from being embezzled or exiled by creditors during the trial process⁶. In addition, Sudikno Mertokusumo also stated that the guarantee confiscation is a preparatory action from the plaintiff in the form of an application to the Head of the District Court to guarantee the implementation of a civil decision by cashing or selling the debtor's confiscated goods to fulfill the plaintiff's demands. Thus, the act of confiscation is not to be submitted and owned by the debtor, but as a guarantee so that the creditor is able to pay off their debt payments. This is not intended to create or give new rights, but to protect the rights of the debtor if later the panel of judges wins the lawsuit.

There is a significant difference between confiscation in criminal law and guarantee confiscation. As regulated in Article 39 paragraph (1) of the Criminal Procedure Code, confiscation can only be imposed on goods that have a direct connection with a crime. Meanwhile, guarantee confiscation is oppositely different, the assets belonging to the creditor can be confiscated entirely to ensure that their debts can be repaid. In addition, confiscated goods are in the control of the state through law enforcement. In contrast to the guarantee confiscation, the confiscated goods can still be used or controlled by the creditor during the trial process. Hence, the confiscation of collateral is only limited to administrative documents of ownership of an asset. The confiscation action is needed to strengthen the presumption of law enforcement against the perpetrator's mistakes and as evidence in court. The orientation of guarantee confiscation is to secure assets as a guarantee that the defendant is able to pay off the debt.

In handling corruption cases, there are serious problems that are also related to recovering state financial losses. However, the problem that occurs is not at the end, but within the legal process, especially in confiscation. In the investigation process, law enforcers, whether the Corruption Eradication Commission, the Prosecutor's Office or the Police, have the authority to confiscate by adhering to the provisions of Article 39 paragraph (1) of the Criminal Procedure Code. This means that law enforcement can only confiscate items related to criminal events. On the other hand, when later the case has entered the trial process and the defendant is legally and convincingly proven to have committed a crime of corruption, followed by an additional penalty of compensation, law enforcers will confiscate the assets belonging to the defendant. However, the difference is that this final stage of confiscation is not limited only to assets related to criminal events, rather, to entirely pay off the sentence of compensation.

Based on the explanation above, a crucial question arises, what if the assets or assets belonging to the defendant have been transferred to another party during the investigation process? Will it result in law enforcement not being allowed to re-confiscate? In this condition, if it turns out that the compensation cannot be paid off by the defendant and their assets are also not sufficient to pay the additional penalty, then they will be charged with a substitute imprisonment.

⁶ Mertokusumo, Sudikno – Indonesian Civil Procedure Law, Page 339.

As a result of the defendant being sentenced to a substitute imprisonment, the orientation of the sentence became totally different with the intention behind the imposition of fines, which is to be more focused on the aspect of recovering state financial losses.

Unfortunately, a substitute imprisonment sentence is not an ideal option. This is because in reality there is still a disparity between decisions and the average sentence that is extremely low, practically only one-year imprisonment. For this reason, reformulation of the concept of confiscation is needed that is focused on the orientation towards recovering state losses. One alternative option is to adopt a concept of guarantee confiscation.

Various methods being used in Indonesia by the corruptors to hide the assets gained from their crime:

1. Real Estate/Immovable Assets

Corrupt officials or criminals who make a lot of money tend to use spend their money to buy immovable property in the name of the real owner. Also, by including a third party in the name of a relative or an ally. Property transactions can be manipulated to use visible capital to disguise the illicit funds.

2. Purchase of Valuable Goods

Fund collected from corrupt practices can be used to buy valuable goods or items such as expensive cars, precious metals, and jewelry. It makes the investigators and prosecutors must determine the ownership, value, and source of funds used to purchase those goods.

3. Domestic Shares

Publicly listed domestic shares can be bought and sold by a stockbroker. Orders are placed with brokers looking for partners to trade shares with clients. If two parties agree to buy and sell shares, the order is countersigned by both parties. After the transaction is agreed upon, one document is registered on the stock exchange. The document contains details regarding the buyer and seller, and the terms and conditions of the sale and purchase. There is also a separate deed of sale signed by the seller. The fair commission paid to broker is 1.5% of the total selling price, and it also may come with tax. Shareholders will issue a receipt to both the buyer and seller specifying the details of the transaction. The documentation involved in this process includes a detailed profile of buyers and sellers. These details include the nature, address, signature, title, telephone number and names of the father and grandfather. The company maintains a detailed record of its shareholders⁷.

⁷ Sadeli H, Wahyudi – Thesis on the Implications of Asset Confiscation to Third Parties related to Corruption Cases

Guarantee confiscation are divided into two types, namely, guarantee confiscation against the defendant's property (*conceratoir beslag*) and guarantee confiscation against the plaintiff's property (*rivindircatoir beslag*). If we talk about corruption or include it in the criminal law, then what is more possible is *conceratoir beslag*. This is because the object of confiscation does not belong to the plaintiff, but is part of the state's rights that have been confiscated by the perpetrators of the crime by corrupt practices they have committed to. The word "*conceratoir*" itself comes from "*concerveren*" which means to save, while "*beslag*" is a translation of the word *confiscation*. Thus, when those two words are combined, become "*conseratoir beslag*" refers to the meaning of confiscation with the intention of saving someone's rights.

By accommodating the provisions for confiscation of guarantees, law enforcement can maximize the recovery of state financial losses since there is an expansion of the object of confiscation, not only using the basis of Article 39 paragraph (1) of the Criminal Procedure Code. Law enforcement can confiscate all assets belonging to the suspect, even if it is not related to a crime. However, in the use of this authority, a check and balance mechanism must proportionally conduct. When the guarantee confiscation is being implemented, law enforcement must obtain a permit from the local district court. Of course, in the process of requesting a permit, law enforcers are asked to explain the reasons of guarantee confiscation before the judges.

There are several things that must be considered by law enforcement before executing the guarantee confiscation. First, investigators must have the ability to trace the assets of the suspect, with hope by maximizing that, law enforcement can map the assets of the suspect which will be subject to confiscation. Second, law enforcers must have the ability to prove the urgency of the guarantee confiscation in order to obtain permission from the local district court. In this case, the court certainly has the authority to reject the application if law enforcement is unable to provide adequate reasons of the requested guarantee confiscation.

It is important to immediately change the concept of confiscation. Especially if we reflect on several cases, the recovery of state financial losses is hampered because the defendant is unable to pay off the compensation. For example, the corruption case involving the former Mayor of Manado, Jimmy Rimba Rogi. At that time Jimmy was sentenced to five years in prison along with the obligation to pay compensation of IDR 64.13 billion for being involved in corruption of Manado's regional budget. It was stated in the decision that if the compensation was not paid, Jimmy was obliged to serve a substitute imprisonment for 2 years⁸. However, based on the data ICW obtained, the prosecutor from Corruption Eradication Commission was only able to execute compensation with a total of IDR 6.2 billion which is very far from covering the state's financial losses as much as IDR 70 billion.

There are at least three issues that often occur in the imposition of additional compensation money, including: 1) the convict transfers assets to another party

⁸ Regional Budget Corruption, Manado Mayor Sentenced to 5 Years in Prison - <https://news.detik.com/berita/d-1180517/korupsi-apbd-walikota-manado-divonis-5-tahun-penjara> Accessed on 22 September 2021, 09.54 Western Indonesia Time.

during the case handling process; 2) the mindset of the judges who still considers the compensation as an additional type of punishment for corruption of state losses; 3) obstacles during execution; 4) when unable to pay compensation, the imposition of substitute imprisonment is not followed by clear arrangement. If this problem is not resolved immediately, then the orientation of punishment will continue to struggling on the retributive aspect or 'revenge-based' action without furtherly formulate the deterrent effect for corruptors.

For the asset recovery, it is common for law enforcers to experience challenges, including: 1) asset tracking/tracing has not been carried out since the early stages, so that when it enters the execution process, the asset is no longer able to be found; 2) law enforcement does not immediately freeze or seizure asset *non corpora delicti/instrumental delicti* assets; 3) there is a limitation to conduct confiscation under the Criminal Procedure Code; 4) proof of nexus between asset *nominee* and corruption; 5) an illusional decision because there was no confiscation of assets, even thugh the state's financial losses have been proven.

Changes to the provisions governing criminal law are commonly referred to as *Penal Policy Reform*. There are at least three points that become the urgency of reforming the criminal law. First, an evaluation of the current legislation. Second, the extent to which current laws and regulations can be used by law enforcement to reduce crime rates. Third, whether the current legislation has provided a deterrent effect on the perpetrators of corruption⁹. Based on those urgencies and its relation to the current situation, the provisions for confiscation in the Criminal Procedure Code must be changed.

Regulatory reform has actually been carried out by legislators when they expanded the definition of evidence, which ultimately included an electronic format (Article 26 of the Anti Corruption Law). At that time there was a special need considering that corrupt practices were increasingly transforming along with the times and law enforcers often found it difficult to uncover these crimes. Hence, with the current condition, there should be no obstacle for legislators to immediately regulate the guarantee confiscation in corruption case handling.

Adopting guarantee confiscation can also be considered in line with UNCAC recommendations. Article 31 paragraphs (1) and (5) of UNCAC provide that: Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offence established in accordance with this Convention. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

⁹ Mahmud Mulyadi's opinion during the expert meeting held by ICW, 17 September 2021

In addition, the urgency of asset recovery is affirmed by the UNCAC's article on the asset recovery, especially as stated in Article 54 paragraph (1) letter c: Each State Party must consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Following the private law and then linked to the public law, corruption convicts are seen as creditors who have debts in terms of the obligation to pay compensation to the debtor, which is the state is the victim. On that basis, based on sufficient preliminary evidence, corruption suspects who are known to have harmed state finances or hold assets gained from crimes must be viewed as creditors. Thus, there is an obligation for the creditor to pay off or pay for the losses suffered by the debtor. To ensure that the creditor can recover the debtor's loss, the creditor also has the right to apply for a guarantee confiscation to the court. With this logic, the concept of guarantee confiscation in handling corruption cases will be easier to be understood.

In conclusion, there are at least four arguments why it is important to regulate the guarantee confiscation in corruption case handling. First, the guarantee confiscation is carried out to prevent the suspect or defendant from transferring their assets to another party. Second, a guarantee confiscation is proposed to ensure that the outcome of the trial is concrete. This is because it often happens when the defendant admits that they do not have the ability to pay the compensation and prefer to take the substitute imprisonment instead. Third, the concept of renewal of confiscation follows or is in line with the implementation of the concept that define corruption as an *extraordinary crime*. Thus, various legal changes in handling corruption cases must be seen as an effort by the government and the parliament to implement *extraordinary measures*. Fourth, it is believed that the guarantee confiscation will contribute to increase the state financial losses' recovery.

CHAPTER IV

THE CHALLENGE OF THE IMPLEMENTATION OF GUARANTEE CONFISCATION IN HANDLING CORRUPTION CASES

Efforts to recover stolen state assets (stolen asset recovery) caused by corruption tend not to be easy. The perpetrators of corruption have broad access and are difficult to reach when they are hiding or laundering the proceeds of corruption. Asset Recovery is becoming increasingly difficult because the safe haven for the proceeds of the crime is beyond the borders of where the crime of corruption itself is committed.¹⁰

The above conditions require significant improvements, in addition to the quality of law enforcement, also includes procedural law reform. This study offers the concept of guarantee confiscation to be adopted in handling corruption cases. Although there are a number of people who think that the idea has violated human rights, especially as written in the Article 28G paragraph (1) of the 1945 Constitution (UUD 1945)¹¹. To answer this question, there are at least three arguments that can be considered. *First*, in general, for the sake of law enforcement, especially morals and public order, a person's rights can be limited as stated in Article 28J paragraph (2) of the 1945 Constitution. Especially considering that the type of crime committed is also an inseparable part of the aspect of human rights violations.

Second, the confiscated goods that are the object of the guarantee confiscation are still in the possession of the suspect, since the guarantee confiscation is only justified on the administrative documents of ownership, not in possession of the object. This is done as a guarantee for the state that the suspect can pay for the losses that they gained from corrupt practices. Third, the check and balance mechanism as the main element before law enforcement conduct guarantee confiscation. This is also part of the realization of the concept of *due process of law* in law enforcement and reduces the discretion or subjective views of law enforcers. Investigators will be required to first explain the reasons for guarantee confiscation to the judges at the district court. If the judge considers that the assets that have been confiscated previously are sufficient enough, then the application for guarantee confiscation can be rejected.

There are parties who argue that the guarantee confiscation is no longer needed since there is already provided by the Article 28 paragraph (1) of the Anti Corruption Law¹².

¹⁰ Isra, Saldi – Asset Recovery for Corruption Crimes through International Cooperation https://www.saldiisra.web.id/index.php?option=com_content&view=article&id=80:asset-recovery-tindak-idana-korupsi-melalui-kerjasama-internasional&catid=23:makalah&Itemid. Accessed on 3 November 2021, 14.54 Western Indonesia Time.

¹¹ Article 28G paragraph (1) of the 1945 Constitution: Everyone has the right to personal protection, family, honor, dignity and property under their control, and has the right to a sense of security and protection from the threat of fear to do or not do something which is a human right.

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

In general, it must be understood that the article has a different orientation from the guarantee confiscation. Article 38 paragraph (1) of the Anti Corruption Law focuses more on confiscation of assets using the method of reversing the burden of proof, while guarantee confiscation is intended to secure the assets of the perpetrators. Furthermore, the seizure of assets as mentioned in the article above can only be used when the case has entered the trial process. This certainly does not significantly solve the problem and still open up the opportunities for perpetrators to transfer their assets during the investigation process. Whereas, if using the concept of guarantee confiscation, the perpetrator's assets to cover the amount of loss can be secured since the investigation took place.

The concept of guarantee confiscation was actually stated in the Supreme Court's decision Number 2190 K/Pid.Sus/2010 on behalf of the defendant Drs Fathor Rasjid. The panel of judges through this decision affirmed that one of the confiscated assets, which was a house including the land in Surabaya, was subject to guarantee confiscation in order to recover state losses caused by corruption. In more detail, the house that confiscated was actually bought by the defendant before the crime took place. At a first glance, this precedent seemed like violation of the Article 39 paragraph (1) of the Criminal Procedure Code, but since it is done to ensure the recovery of state financial losses, it can be considered correct. Such a progressive step is certainly not enough, the concept of guarantee confiscation must be incorporated into the legislation.

The origin of corruption is closely related to the economic interests of an individual or a group. Derived from that, then the act against the law is considered 'right' to reap the maximum profit. Hence, every substance of legislation inside the Anti Corruption Law must be directed through economic approach. However, up to this point, law enforcement officials still referring to the ancient concept of punishment in the form of a retributive approach and in the context of legislation it is still far from a restorative orientation, especially in terms of the economy. This can be proven from a very huge gap between state financial losses and additional criminal penalties, as mentioned earlier in this study.

The performance of retributive approach as seen so far from the law enforcement officers have serious impact on two crucial things. First, the recovery of losses caused by corruption was not achieved. Second, the prison sentence without being followed by the imposition of substitute imprisonment actually adds to the burden on the country's economy to finance prisoners in correctional institutions. Thus, one of the instruments that supports the recovery of state financial losses, especially regarding the certainty and ability of payments, is the mechanism of guarantee confiscation. With the adoption of the guarantee confiscation in the Anti-Corruption Law, the confiscation of the assets of the perpetrators of corruption will become more progressive.

Adopting guarantee confiscation into positive law that regulates corruption eradication is the same as incorporating civil law instruments into criminal law. This is not a barrier, though, previously there were a number of civil law provisions that had been included in the criminal law. For example, Article 98 of the Criminal

Procedure Code which regulates the merger of compensation claims cases. As understood, the concept of a claim for compensation which is known in civil law and has been accepted as an integral part of criminal law. Thus, there is no significant problem if the guarantee confiscation being adopted to the criminal law.

Gustav Radbruch states that there are three basic legal values that must be contained in a legal product, they are: justice, expediency, and certainty. If it is associated with the concept of guarantee confiscation for handling corruption cases, all these aspects have been fulfilled. First, the guarantee confiscation focuses on justice for the victim or in this case, the state itself. With the regulation of the guarantee confiscation, the recovery of state financial losses can be maximized and used as much as possible for the community. Second, the guarantee confiscation is a legal tool that will be useful to overcome any problem related with confiscation. As explained in this study, the confiscation regulated in Article 39 paragraph (1) of the Criminal Procedure Code has raised a number of concerns. Such as, the potential transfer of assets by the corruptors during the case handling process. If the convict is subject to additional compensation charge, the recovery of state financial losses will not be maximized. By imposing the guarantee confiscation, the certainty of recovery of state financial losses in handling corruption cases can be achieved. Law enforcers are given the authority to confiscate the assets of the perpetrators even though they are not directly related to criminal acts. This action is done solely to concretely execute the court's decision.

With all the dynamic regarding the guarantee confiscation, how about the protection, especially the legal countermeasures, that a suspect can take? In this case, the pretrial institution plays an important role in ensuring that the implementation of the guarantee confiscation does not violate and in line with the due process of law. There are at least two potential problems during the guarantee confiscation process that can be cancelled through a pretrial trial. First, the act of guarantee confiscation is carried out without a letter of determination from the local district court being included. This is important to ensure that there is a check and balance mechanism before the guarantee confiscation can be carried out by law enforcement. Second, the assets that will be subjected to confiscation have exceeded the results of the previous confiscation. This action cannot be justified, because the purpose of holding a guarantee confiscation is only to ensure that the case handling process is not illusory, if the confiscation is sufficient, then the guarantee confiscation is no longer relevant to execute. Option of legal efforts that can be taken by suspects are important to be regulated as mitigation of the abuse of power from law enforcement.

CHAPTER V CONCLUSION

Corruption is known in many terms: extraordinary crime, white collar crime, even including transnational crime. This is reasonable, especially if we refer to the considerations section of Law Number 31 of 1999 as amended to Law Number 20 of 2001 (Anti Corruption Law), it is stated that corruption is very detrimental to state finances and hinders national development. Hence, the corruption has an impact on multiple sectors of people's lives, corruption is closely related to the economy, and corruption requires extraordinary actions from stakeholders.

The problem with law enforcement related to criminal acts of corruption in Indonesia lies in the orientation of punishment against perpetrators, both from the point of view of legislation and the performance of law enforcement officers. Currently, all legal substances and instruments still use the classical approach or what is commonly called the retributive theory. Thus, due to the narrow perspective in the legal approach, the main goal of eradicating corruption, especially to recover state financial and economical losses, did not work as expected. Based on ICW's monitoring described in this study, the achievement of recovery through the criminal mechanism of additional compensation is inversely proportional to the amount of state financial losses. Therefore, a fundamental change is needed in the scope of regulation and the perspective of law enforcement officials to achieve the restorative goal.

With such reality, this study offers the concept of guarantee confiscation as regulated by civil law to be applied to criminal law, especially in handling corruption cases. Because so far, the use of confiscation regulation based on the Article 39 paragraph (1) of the Criminal Procedure Code has become a separate obstacle to recovering state financial losses. The limitations of the object of confiscation open up the opportunities for perpetrators to transfer their assets during the investigation process. Thus, when the panel of judges imposes an additional penalty in the form compensation money, executor prosecutor will difficult to confiscate the assets belonging to the perpetrator (Article 18 paragraph (2) of the Anti-Corruption Law). This certainly has an impact on the achievement of state financial losses recovery.

Based on the problems above, the assets belonging to the perpetrators, even though they are not gained from criminal acts, must be confiscated using the concept of guarantee confiscation. However, the control of the confiscated goods is not given to law enforcement, but is still physically controlled by the suspect while the ownership administration file is submitted to the law enforcement. To ensure the existence of a check and balance mechanism, investigators are required to first request permission from the local district court to obtain a determination as the basis for conducting guarantee confiscation.

Incorporating concept between civil law and criminal law is actually not the first move that ever conducted. Previously, there were rules for merging the compensation

claims in Article 98 of the Criminal Procedure Code which previously was only known as an entity from civil law. The concept of guarantee confiscation is also considered to reflect the value of justice, certainty, and benefits for law enforcement, especially to recover state financial losses.

In addition, the argument for violating human rights is also inappropriate to reject the idea of guarantee confiscation. The limitation of a right to law enforcement is justified by the 1945 Constitution and control of the confiscated objects is still given to the suspect. Speaking of option of legal efforts that can be accessed by the suspect, pretrial is one of the option available. Pretrial can assess the validity of the confiscation by looking at the letter of determination from the local district court and the urgency of carrying out the action.

The proposed change in procedural law in handling corruption cases is actually in line with a restorative approach. This has also been pushed by the government, at least through President Joko Widodo's statement regarding the urgency of recovering state financial losses in handling corruption cases. However, changes in legislation of course do not only rely on the executive, but also on the legislative side. Up to now, the legislative products that support the agenda of eradicating corruption have not been prioritized by legislators, such as Bill on Asset Confiscation, Bill on Limitation of Currency Transactions, as well as the Revision of the Anti Corruption Law. Therefore, this study must also be followed up by the awareness from the government and the parliament about the current stagnation of law enforcement to eradicate corruption.