Normative construction of restorative justice implementation in accelerating state losses return in corruption crimes

Arip Zahrulyani*, Faculty of Law, Universitas Krisnadwipayana, Jakarta, Indonesia
M. Iman Santoso, Faculty of Law, Universitas Krisnadwipayana, Jakarta, Indonesia
Irfan Ridwan Maksum, Faculty of Law, Universitas Krisnadwipayana, Jakarta, Indonesia
Siswantari Pratiwi, Faculty of Law, Universitas Krisnadwipayana, Jakarta, Indonesia

*Email for Correspondence: arifrutukansa@gmail.com

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**ABSTRACT**

The objective of this study is to explore the philosophical foundation for the application of restorative justice approaches in cases of corruption in Indonesia. The study aims to examine and analyze the success related to efforts to reclaim and take back state financial reimbursement due to corruption based on the provisions of Article 18 of Law Number 31 of 1999 concerning eradication of corruption crimes, which is mainly carried out by the process of confiscating the assets of the suspect's wealth which are found to have a relationship and link and match relationship with the suspect and his corruption crime. The research is intended to explore and discuss the shortcomings and challenges, both substantive and formal, in asset seizure for state recovery, as well as the analysis of the success of recovering substitute money in combating corruption crimes. Based on the research, it is concluded that the philosophy of Pancasila as a source of values derived from its five principles to guide the enforcement of law in Indonesia can be employed to examine Indonesian law.

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**INTRODUCTION**

As one of the primary objectives in the fight against corrupt practices, the endeavor to mitigate financial losses incurred by the state as a result of corruption should be construed as a pivotal benchmark for assessing the efficacy of anti-corruption endeavors. Drawing on empirical findings from the Indonesia Corruption Watch for the year 2017, which scrutinized 1,249 instances of corruption involving 1,381 accused perpetrators, it was ascertained that the aggregate financial prejudice inflicted upon the state amounted to Rp. 29.41 trillion. However, the restitutionary quantum through reimbursement of state losses was confined to a mere Rp. 1.44 trillion. Interpreting these empirical revelations, the rate of recoupment of state funds attributable to corruption, facilitated through indemnification mechanisms and asset forfeiture, scarcely attains 49.1% of the total fiscal detriment sustained by the state (Septiadi, 2018).

The persistently inadequate rate of state loss recovery resulting from corrupt practices is a matter of grave concern, necessitating urgent remediation efforts. Given that endeavors to recoup state losses due to corruption carry moral and social dimensions aimed at restoring the economic and financial entitlements of the citizenry depleted by corrupt acts, this consensus must be anchored in the overarching objectives of anti-corruption initiatives (Atmoko & Syauket, 2022). Its foundation lies not solely in the legal objective of prosecuting corrupt actors but, paramountly, in the imperative of repatriating public funds to the state’s coffers, thereby reallocating misappropriated resources for the welfare of the populace.

Lawrence M. Friedman once posited that a legal system comprises three essential elements: legal norms or substance, enforcement or legal structure, and culture or legal behavior, constituting a unified legal system that significantly determines and influences each other (Friedman, 1975). Indonesia, as a country adhering to a combination of two criminal legal systems within its penal law, can fundamentally reform its penal system towards a hybrid approach, while still considering the fundamental rights of all parties and the principles and tenets of penalization with comprehensive criminal accountability. This approach transcends mere offender-oriented punishment and focuses on holistic criminal responsibility. This rationale underpins
the necessity for a novel resolution concept beyond the conventional corruption penalization paradigm that has been embraced thus far.

As a novel concept and mechanism of penalization, restorative justice is perceived as a more apt approach for resolving state losses, emphasizing the creation of justice and balance for both victims and perpetrators of criminal acts (Afif, 2015). For many nations, this punitive model is more readily accepted as an alternative dispute resolution method, including within the realm of criminal law.

The adoption of a novel punitive approach in combating corruption crimes inherently necessitates a robust legal foundation and analysis to mitigate anticipated responses, such as the concern that state restitution might obviate custodial sentences. Such measures, if perceived as contradicting the principles of justice and penalization, could be construed as granting clemency to corrupt offenders or rendering imprisonment redundant upon the restitution of state funds. Addressing these critical inquiries entails a focus on the philosophical underpinnings and the reconstruction of substantive and procedural legal norms concerning corruption crimes as a basis for implementation. This facilitates the expeditious recovery of state losses while identifying impediments and ideal forms, as well as appropriate procedural mechanisms, within the prevailing anti-corruption legal framework.

This research is intended to examine and discuss the success related to efforts to reclaim and take back state financial reimbursement due to corruption based on the provisions of Article 18 of Law Number 31 of 1999 concerning eradication of corruption crimes, which is mainly carried out by the process of confiscating the assets of the suspect’s wealth which are found to have a relationship and link and match relationship with the suspect and his corruption crime. The research aims to investigate and analyze the effectiveness of reclaiming state financial reimbursement due to corruption. It specifically focuses on the application of Article 18 of Law Number 31 of 1999, which concerns the eradication of corruption crimes. The primary method examined is the confiscation of assets belonging to suspects, particularly those assets that are directly linked to the suspect and the corruption crime. The contribution lies in evaluating the success of these legal provisions and processes in recovering misappropriated state funds.

METHOD

Based on the aforementioned variables, this writing leans towards the type of normative legal research (doctrinal). The study on restorative justice utilizing normative research aims to view restorative justice as one of the legal practices whose legality must be regulated within Indonesian legal norms. Therefore, this research is conducted by choosing the normative (doctrinal) research type.

RESULTS AND DISCUSSION

The Philosophy of Implementing Restorative Justice in Corruption Crimes

When philosophically contemplating, understood as the cognitive endeavors (thought processes) to scrutinize the essence of reality for discerning the value (substance) of a particular object, each object attained through philosophical inquiry culminates in an existential statement. Critical thinking encompasses both analytic and synthetic, practical and theoretical, as well as logical and empirical dimensions.

To discuss Philosophy within the context of scientific inquiry, the researcher cites Zeynep Soysal’s assertion that philosophy can construct a bridging conduit between various research disciplines, enabling a broader perspective of the world, “I think there are basic clarifications that philosophers make, and they can be helpful in solving problems. They can have a big effect on how people view thinking and rationality” (McGarvey, 2019). Zeynep’s statement implies that in order to perceive the world more comprehensively, the conceptual framework must be multi-perspective, utilizing rational thinking and rigorous reasoning testing.

For Indonesia, Pancasila is recognized as the foundation of the state and the national ideology. The values embodied within the five principles of Pancasila encompass both material and immaterial dimensions of personal life as well as the life of the state. As a philosophical foundation, Pancasila possesses the epistemological, ontological, and axiological dimensions necessary to elucidate how these principles should be implemented. Pancasila, as a field of knowledge, can be employed to examine Indonesian law by constructing Pancasila as a source of values derived from its five principles to guide the enforcement of law in Indonesia. The values of Pancasila must serve as a reference in every policymaking process in the legal domain of our country.

The primary focus of this study is to explore the philosophical foundation for the application of restorative justice approaches in cases of corruption in Indonesia. Furthermore, to develop the necessary legal constructs and paradigm shifts, it is crucial to identify the obstacles that hinder asset forfeiture and seizure related to the recovery of state losses due to corruption. By understanding these impediments, the study aims to formulate the most ideal and feasible regulatory frameworks and implementation strategies for restorative justice that align with the current developments in the legal system for combating corruption and the future prosecution of corruption offenses.
The analysis of the philosophical foundation for the application will be examined based on the legal theory of Pancasila as the nation’s underlying philosophy. The paradigmatization of Pancasila as a law that emerges and evolves from this theory is inclined towards the selection of values of wisdom in beliefs and convictions as the highest values held by society as a general consensus on the parameters of the common good.

The concrete essence of Pancasila as a practical guideline in the life of the Indonesian nation and state aligns with the daily realities, context, conditions, and time (Salam, 1988). Pancasila becomes both axiomatic and scientific within the measure of the collective consensus of the Indonesian people. The five principles of Pancasila constitute an ideological and philosophical system that is scientifically logical, serving as the fundamental legal basis (grundnorm) and thus representing the source of all sources of law (Arinanto & Triyanti, 2011).

As a legal theory, Pancasila is a legal framework that is based on the values of Pancasila as its ontological, epistemological, and even axiological foundation (Kusumaatmadja & Sidharta, 2013). Pancasila serves as the fundamental value used to evaluate mechanisms, including legal mechanisms, that align with and are based on its values. Mochtar Kusumaatmadja and Bernard Arief Sidharta express views on the principles of law grounded in Pancasila, which inherently adhere to the narrative of virtues within the principles of Pancasila, asserting that all citizens have equal rights and obligations before the law (Kusumaatmadja & Sidharta, 2013).

The utilization of the restorative justice approach, which is currently evolving across various parts of the world, has been adopted as a resolution mechanism within the legal domain, including in Indonesian criminal law. This approach is acceptable, appropriate, and consistent with the values of Pancasila that we uphold. It has implications for justice and legal utility and aligns with the objectives of anti-corruption law in Indonesia.

From a legal structure perspective, John Austin views legal order as a legal theory that considers law to be independent of morality. The influence of this theory has impacted scholars like David Campbell, who regards Austin as the progenitor of jurisprudential analysis (Campbell, 2011), and Richard Nobles et al., who identify Austin’s theory as pioneering positivism (Penner et al., 2002). Austin posits a distinction between what truly constitutes law and what does not. For law to be distinguished from non-law, it must be expressed in texts and/or documents. These legal texts and documents must be crafted by a recognized authority, namely the government, which also holds ultimate sovereignty. Generally, Austin’s positivist thought is founded on two key components: sovereignty and command (Austin, 1995).

The term legitimacy is situated as an instrument to ensure that legal regulations have a foundation, enforceability, and obligatory adherence. Examination of legitimacy theory addresses several aspects such as elucidating the understanding of legitimacy, how to formulate the concept and meaning of legitimacy from one or several differing ideas. Thus, a critical approach is needed towards normative legitimacy to differentiate between the processes and values produced. Normative legitimacy that is considered ‘valid’ is seen as inherent in the process by which legal norms are created, while ‘justice’ is inherent in the legal norms themselves (Hartika et al., 2022).

The presence of the restorative justice approach, based on legal resolution that prioritizes the broad restitution of victims’ losses from crime, has been regarded as a mechanism for legal dispute resolution that brings victims closer to a sense of justice, involving joint resolution patterns between perpetrators and crime victims based on reconciliation and/or mediation within the realm of criminal law when associated with legitimacy theory necessitates efforts for its enactment in the criminal law system for the prosecution of corruption offenses we adhere to, as legal accountability will also function as authorization and/or legalization of its application, thus believed to bring about greater justice and legal utility in the enforcement and eradication of corruption in Indonesia.

In both theoretical and practical legal contexts, the notion of legal liability refers to the accountability for damages resulting from the actions of legal subjects, whereas the term responsibility pertains to political accountability (HR, 2014). To elucidate the accountability of corrupt actors, the utilization of criminal liability theory is also necessary to assess whether the accountability of corruption perpetrators is diminished, contradicted, or even strengthened by the implementation of restorative justice mechanisms. Indonesia, as a country that adheres to the theory of combined punishment or modern theory, views the purpose of punishment as pluralistic, as it combines relative (goal-oriented) and absolute (retributive) principles into a unified framework. Meanwhile, its goal-oriented character lies in the idea that the aim of this moral critique is the reformation or behavior change of the convicted individual in the future.

Van Bemmelen, an adherent of the combined theory, asserts that punishment aims to both redress wrongdoing and safeguard society, with actions intended to secure and uphold these objectives. Therefore, punishment and action, both aim to prepare the convicted individual for reintegration into society (Hamzah, 1986). In general, the explanation of combined punishment theory, when associated with punishment for
corruption offenses, can be understood as a legal theory that prioritizes the objectives of combating corruption while still considering retribution towards offenders. From the perspective of combating corruption, retribution aims to eradicate corrupt behavior within society. However, from its own objective standpoint, it can be understood as aiming to salvage and recover state financial losses resulting from the corruption offense itself.

Our legal system’s adoption of the combined punishment theory actually bears similarities and aligns with the objectives and mechanisms of restorative justice, which emphasize the recovery of losses incurred by victims or the community affected by corruption crimes. Its usage could be modified solely to optimize the recovery of state losses as victims of crime, while still considering punishment or retribution against the perpetrators of corruption crimes. The objective of punishment, namely the recovery of state losses, also aligns with the perspectives of Muladi and van Bemmelen, who view punishment not only as retribution for the offender’s wrongdoing but as a means to achieve beneficial goals for protecting society towards community welfare. Moreover, it should also aim to secure and uphold societal objectives (Koeswadji, 1995).

Corruption Offenses as Criminal Policy

Acts characterized by corruption manifest in various forms and types, as noted by U Myint, as the formulation of corruption can vary depending on the emphasis and approach, whether from political, sociological, economic, or legal perspectives. From this understanding, examples of corrupt behavior may include: (a) bribery, (b) extortion, (c) fraud, (d) embezzlement, (e) nepotism, (f) croniness, (g) asset misappropriation and public property for personal use, and (h) peddling influence.

The forms and types of corruption, also classified as criminal acts of corruption in Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001 concerning the Eradication of Corruption, are distinguished into two categories: active forms, which unlawfully enrich oneself or others or a corporation at the expense of financial interests or economic conditions, aiming to abuse their authority, opportunity, or means of their position, including giving gifts or promises by considering power, authority, or position; while passive corruption includes accepting gifts or promises due to actions or omissions, accepting delivery or allowing fraud, accepting gifts or promises and any gift or promise given to move towards doing something, and accepting gratuities related to their position.

Atmasasmita (2004) states that corruption as a crime has perspective, massive, and systemic impacts. Supreme Court Justice Alkostar (2013) adds that corruption in Indonesia has become systemic as it has infiltrated the executive, legislative, and judicial systems in Indonesia. Similarly, Muladi (2006) asserts that corruption is more systemic, pervasive, ingrained, and blatant, causing economic and mental losses.

Although experts argue so by referring to the International Consensus of the Rome Statute of 1998, even though the signed agreements are only related to genocide, crimes against humanity, war crimes, and aggression crimes that meet the threshold of the most serious crimes (Jha, 2014). Specifically, to date, Indonesia has not yet developed an integrated criminal policy concept that designates corruption as a very serious and widespread crime. From Gustav’s perspective, the normative seriousness of anti-corruption legal enforcement seems to be further strengthened by anti-corruption law designers in Indonesia.

The restorative justice approach can also be seen from the perspective of the indigenous wisdom of Indonesian society, which is characterized by religious-magical elements (Budianto et al., 2022). This is concretely manifested in the legal products of local communities, known in legal anthropology as customary law, folk law, indigenous law, unwritten law, or unofficial law, and in the Indonesian context, referred to as adat law (adatrecht).

The reimbursement of state financial losses resulting from corrupt acts, whether in the form of assets or compensatory funds, in the anti-corruption law, is primarily conducted through additional penalties as stipulated in Article 18 of Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001 concerning the Eradication of Corruption. This is achieved by seizing the suspect’s assets and executing the reimbursement of state financial losses, which can only be carried out after the perpetrator has been lawfully proven and convicted of a criminal offense. Wealth restitution through asset confiscation is also pursued. However, regarding the accountability of other parties outside the convicted individual, recourse can only be taken through civil lawsuits by the Public Prosecutor on behalf of the state, and this is applicable only in certain circumstances.

This reality indicates that, in terms of asset confiscation and wealth recovery resulting from corrupt acts to restore state financial losses from corruption eradication, success has not been fully achieved. However, the primary goal of corruption eradication is to restore state losses. The formulation of the state loss element in corruption offenses entails that corruption eradication aims not only to deter corruptors with imprisonment but also to restore state finances affected by corruption, as affirmed in the preamble and general provisions of the aforementioned anti-corruption law (Mahmud, 2018).
Although anti-corruption laws also recognize efforts to recover state losses through civil proceedings, the recovery process through this avenue has not yet been established as a primary legal recourse. It is only intended as a supplementary effort in specific and exceptional circumstances. Therefore, a new legal concept is needed regarding responsive yet progressive mechanisms and methods for reclaiming state finances, aligned with the comprehensive implementation of internationally agreed asset recovery mechanisms aimed at exploring negotiated solutions between countries that are mutually beneficial on an international scale. Unfortunately, the government is deemed unresponsive to the mandate of the United Nations Convention against Corruption, which calls on party states, including Indonesia, to amend anti-corruption laws within one year of ratification (Kulsum, 2008).

Since 2003, the international community has recognized the need for a global framework explicitly regulating criminal demonstrations typically referred to as “middle-class offenses.” The global obligation to combat corruption is evidenced by the introduction of the United Nations Convention Against Corruption, 2003 (UNCAC 2003), acknowledged by the United Nations General Assembly (UNGA) on October 31, 2003, through UN Resolution A/58/4. This resolution declared the convention open for signature by United Nations members at an extraordinary session in Merida, Mexico, from December 9 to 13, 2003. To date, 140 countries have signed the convention, and 107 have ratified it. The convention came into force on December 14, 2005, representing the first legally binding global anti-corruption agreement among participating nations (Amrullah & Naramiharja, 2020).

The Utility Aspect of Anti-Corruption Law Enforcement

The legal aspect of utility in Bentham’s teachings emphasizes the ethical utility within social and political law, which can promote broader happiness. Bentham is oriented towards the benefits of ethical practices rather than idealistic matters. Therefore, the most important thing for Bentham is utility (the outcome or consequence of actions) rather than idealized concepts: Regard Justice as a subservient aspect of utility. These philosophers do not recognize autonomy or freedom as necessary to Justice, but the practicality of ethics and politics in the promotion of the ‘greatest happiness for the greatest number’. Therefore, the state and all its organs must be judged based on its utility (outcomes, consequences) and not idealism. Similarly, legislation and policies should maximize utility for the public (Beauchamp & Childress, 2001).

The concept or legal doctrine of restorative justice primarily emerged alongside a growing awareness of the need for legal utility and the protection of victims’ rights. In Indonesia, it has been adopted in a limited manner under specific circumstances and regulations. To date, it has been limitedly adopted based on Law Number 11 of 2012 concerning the Juvenile Justice System, Joint Agreement Notes of the Chief Justice of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of the Indonesian National Police Number: 131/KMA/SKB/X/2012, Number: M.HM-07: HM.03.02 Th.2012, Number: Kep-06/8/EJP/10/2012, Number: B/39/X/2012 dated October 17, 2012 regarding the Implementation of the Limitation of Minor Offenses and the Amount of Fines, Quick Examination Procedure, and the Implementation of Restorative Justice, Decree of the Director General of the General Court Number: 1691/DJU/SK/PS.00/12/2020 dated December 22, 2020 concerning Guidelines for the Implementation of Restorative Justice Approach in the General Court Environment, including the Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and the National Police Chief Regulation Number 8 of 2021 concerning Case Handling Based on Restorative Justice.

Several foreign jurisdictions have made progress by implementing restorative justice mechanisms, including in cases of corruption, to expedite the return of state finances. The achievement of restorative justice has been embraced in the Foreign Corrupt Practices Act of 1997. Under the FCPA, companies involved in bribery (such as Monsanto and the Innospec case) are subject to administrative fines determined by the US Department of Justice, the Securities and Exchange Commission, and do not necessarily face imprisonment. This process is known as “injunction” (Husin, 2020).

When we examine the regulation of restorative justice approach in the Decree of the Director-General of the General Courts No: 1691/DJU/SK/PS.00/12/2020, restorative justice is considered within the realm of formal legal arrangements rather than substantive law, although in these guidelines, certain legal norms are encouraged to be resolved through restorative procedural mechanisms.

The restorative justice approach, as a component of criminal procedural law concerning specific norms or offenses of criminal acts, was actually formulated by the Supreme Court during the National Working Meeting (Rakernas) of the Supreme Court in 2011, which resulted in significant decisions that later became Supreme Court jurisprudence, namely Decision No. 1600K/Pid/2009 regarding considerations of restorative justice emphasizing the need for restitution of victims’ losses (subsequently known as Decision Case No. 1600 of 2009).
Quoted from various laws and regulations that form the basis for the application of the restorative justice approach currently in force, there are several aspects that constitute new points as restorative values being accommodated by the criminal justice system. These include the reconciliation between the perpetrator and the victim of a criminal act, involving the families of the perpetrator and other relevant parties, community leaders related to the case, with or without compensation. The peace agreement is documented in a written and binding report for the parties involved, and the agreement in restorative justice does not apply to repeat offenses in accordance with the provisions of the legislation. Additionally, the Prosecutor executes court decisions with permanent legal force.

Based on the discussion and analysis, the researcher can propose a model for its application that is both formally and materially acceptable, integrated, and has legal strength and legitimacy within the current criminal justice system for corruption. This model can be legally implemented and utilized, particularly to maximize efforts to recover financial losses to the state due to corruption, as discussed by Anwar Husin (Husin, 2020). The research employs normative methods and a qualitative descriptive analysis approach, targeting jurisprudence, principles, and synchronization as the basis for its application.

Barda Nawawi Arief posits that the strategy for eradicating corruption should extend beyond merely addressing the act of corruption itself, but should focus on eliminating the root causes and conditions that foster corrupt practices. The enforcement of criminal law to combat corruption addresses only the symptomatic manifestations. In contrast, effectively addressing the causative factors and conditions necessitates the deployment of auxiliary instruments and cross-sectoral approaches, particularly those related to oversight and regulatory frameworks. Furthermore, it requires the enhancement of all sectors that have been complicit in or have facilitated the proliferation of corrupt activities (Arief, 1998).

The restorative justice approach is not intended as a preventive measure against criminal events, given that historically, restorative justice has been employed as a means of resolving legal disputes based on agreements between the parties involved as a result of criminal acts. Nonetheless, this research concurs generally on the applicability of restorative justice mechanisms in cases of corruption.

This study shares a perspective on the feasibility of penal mediation as a potential method that the government or law enforcement can utilize to recover state finances lost due to corrupt behavior. This provision is grounded in the ratification of Article 37, paragraphs (1), (2), and (3) of the UNCAC 2003 by the Indonesian government through Law No. 7 of 2006.

Regarding the utilization of this approach, Sherman et al. (2015), along with several colleagues, conducted a study titled “Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences.” The study provides an overview of experimental trials of reconciliation measures within restorative justice programs across various countries. The findings from these trials have become a benchmark for modern policy development and serve as exemplars of restorative justice grounded in precise instruments and evidentiary mechanisms.

Internationally, the recovery of assets obtained through corrupt practices is conducted via two primary mechanisms. The first mechanism is criminal forfeiture, known as Convicted-Based Asset Forfeiture. The second mechanism is civil forfeiture, referred to as Non-Convicted Based Asset Forfeiture or more commonly as Civil Forfeiture. Civil forfeiture, or in rem forfeiture, is employed when criminal proceedings followed by asset confiscation cannot be pursued (Kennedy, 2007).

The United States Supreme Court has consistently ruled that assets derived from criminal activities can be seized without considering the asset owner’s involvement in the crime (Cassella, 2013). Generally, in the United States, the use of civil forfeiture through civil proceedings is more effective in recovering assets stolen by corrupt individuals compared to criminal proceedings. This effectiveness stems from the fact that civil forfeiture has procedural advantages, such as a lower burden of proof required in court compared to the higher standard of proof necessary in criminal proceedings (Kennedy, 2007).

The application and implementation of civil forfeiture vary from country to country. Initially applied on a domestic scale, civil forfeiture involved filing civil lawsuits to seize or take over assets derived from criminal activities within the country’s jurisdiction. For instance, in the United Kingdom, under the Proceeds of Crime Act 2002, s 316 (4), it is stated that the civil forfeiture model adopted in the UK applies to all properties or assets regardless of their location (Kennedy, 2007).

Unlike the United Kingdom, in the United States, pursuant to 28 USC 1355 (b) 2, if the subject of forfeiture or asset seizure is located outside the country, a civil forfeiture lawsuit can be filed in the District of Columbia District Court. However, although this extraterritorial application of civil forfeiture is not without various challenges, especially in the absence of effective cooperation with foreign governments, for developed nations, it is not a barrier to reclaiming assets taken out of the country. To address challenges such as the lack of bilateral agreements or mutual legal assistance treaties with foreign countries concerning civil forfeiture.
The United States enforces 18 USC 981 (k), which adopts provisions allowing US courts to issue orders for the seizure of assets located abroad, including funds deposited in foreign banks in the form of US dollars. Although this regulation is still considered controversial, it is deemed effective in recovering assets derived from criminal activities in the United States that have been taken abroad (Cassella, 2006).

The restitution of state financial losses in the anti-corruption law should be directed towards: Firstly, preventing larger state financial losses resulting from corruption. Secondly, enhancing the effectiveness and efficiency of law enforcement in combating corruption while also preventing the recurrence of corrupt practices. Thirdly, fostering public trust, both domestically and internationally, in the enforcement of anti-corruption laws in Indonesia.

In practice, the circumstances above, particularly regarding the law of proof in corruption cases, are perceived to impose a dual burden on corruption investigators and prosecutors. On one hand, they are obliged to prove the elements of the perpetrator’s corruption offense, while on the other hand, they must also prove that the seized assets in the investigation process, suspected to be proceeds of or related to corruption crimes, must be confiscated and auctioned as reimbursement for the state’s financial losses. However, corruption, being an extraordinary crime, should ideally be followed by extraordinary regulations and enforcement.

Corruption offenses in practice sometimes result in significant financial losses to the state, but there are also cases where the losses are minimal. The application of investigation, proof, and punishment mechanisms that must be uniformly applied in practice can also lead to legal injustice, including financial wastage by the state, considering that the financial losses to the state from successfully salvaged corruption crimes are not commensurate with the costs of eradication borne by the state.

Enforcement of anti-corruption laws cannot be separated from the policies made by the state to uphold anti-corruption rules for the common good. Thus, criminal corruption policy is often considered part of corruption law enforcement policy (Bey, 2016).

The renewal, reconstruction, or reformulation, as well as the amendment of criminal law regulations at both the statutory and subordinate levels, deemed necessary by the dynamics and development of the times, including evaluations of the failure of existing legal systems, are imperative and viewed as efforts to improve legal substance, which ultimately will significantly impact the subsystem and the success of criminal law enforcement itself.

The crucial role of the government in the context of combating corruption is closely related to the various types of corruption offenses themselves. The primary goal of all government assignments is to employ various means to achieve the welfare of the people and the sovereignty of the state. This formulation guides behavior in general to ensure that actions that undermine the welfare of the people are impossible and impermissible. The principle of the welfare of the people serves as a reference for legal norms, so reviews of legal norms often use standards of welfare and state sovereignty as abstract testing tools. In this principle, the government plays a very significant role, not only in creating and upholding the law but also, more broadly, in promoting the public interest in realizing the welfare of the people (Purbopranoto, 1985).

The government has at least three roles: the political state, driven by the legislative bodies at the regional and national levels; the legal state, driven by the four pillars of law enforcement institutions, namely the Police, Public Prosecution, Judiciary, and Legal Counsel; and the administrative state, propelled by the executive institutions at the national and regional levels (Lubis, 2008). The government plays a significant role in promoting the process of penal mediation through mediation institutions that emphasize mutual consultation to seek the best resolution for both disputing parties. Regarding the finances or economy of the state, this is because the sources of disputes over state finances involve disputes between the state and individuals, entities, or possibly other legal entities and stem from disputes within the realm of criminal law, commonly referred to as penal mediation in legal practice.

The researcher suggests that the resolution of state financial losses through mediation forums represents a type of restorative justice approach that is not only consistent with the principles of more efficient, expedited, straightforward, and cost-effective adjudication but also in reclaiming state losses in corruption cases compared to the uncertain legal procedures of seizure and asset forfeiture under criminal law. Consequently, the objective of returning state financial losses as one of the goals of corruption eradication will be maximized, ultimately bringing about justice and the utility of law enforcement.

As the primary material regulation for combating corruption, Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001 determines the responsibility for returning state losses in the category of additional criminal or non-criminal penalties. However, the main consequence of the crime of corruption is indeed the occurrence of state losses. Additional penalties are sanctions that supplement the primary penalties imposed and cannot stand alone except in specific circumstances involving the confiscation of certain items. These additional penalties are facultative, meaning they can be imposed but are not mandatory.
The concept of reconstructing legal norms formally and materially by incorporating restorative justice mechanisms as one of the instruments for returning state losses has been supported and reinforced by Pancasila as a meta-theory. This value system reinforces the idea of implementing restorative justice mechanisms based on formal mediation and conciliation between perpetrators of corruption, the state as a victim of corruption, law enforcement as state actors, and expert community members. Secondly, the issue of using law as a tool to safeguard citizens’ rights, not as an option for accountability that ultimately violates citizens’ rights. The reconstruction of norms that places responsibility for returning state financial losses as a primary criminal offense is a tangible manifestation of using the law as a tool for social justice.

In the last paragraph, the concept of restorative justice in combating corruption is also supported by the thoughts of Gustav Radbruch, known for his relativism and the meaning of justice. Regarding Austin’s thought, the author argues that within the framework of restoring the rights of citizens affected by corruption, substantive justice should be placed in the position of the state as a victim rather than on the corrupt actors.

The substantive legal aspect consists of regulations that serve as the basis for state financial losses and are the reference points for law enforcement in the process of combating corruption and money laundering crimes, primarily relying on seizure provisions including asset seizure in criminal acts, especially based on the seizure provisions in Article 1 point 16 and Article 39 of the Criminal Procedure Code, which is a legal action in the investigation process carried out by investigators to legally control an item, both movable and immovable, which is suspected to be closely related to the ongoing criminal act (Hartono, 2012).

The concept of seizure as described necessitates investigators to prove or at least present the existence of a legal relationship in the form of factual connections between the assets subject to seizure and the criminal acts under investigation. Establishing this connection is suspected to be the primary obstacle in asset seizure, considering that corruption crimes typically occur long before suspicious arise, and in this era of technological advancement, perpetrators can easily conceal or transfer their assets or the proceeds of their crimes through various means into legitimate financial channels or even abroad.

These circumstances make the seizure of corruption proceeds and related assets difficult to execute. The disguising and laundering of assets resulting from corruption or related to corruption can easily be accomplished, including by purchasing assets or wealth in someone else’s name or by depositing corrupt proceeds under family members’ or third parties’ names into financial channels or legitimate payments based on seemingly valid transactions.

Prosecuting and proving the connection of assets to criminal acts alongside proving the guilt of corruption suspects in a corruption trial requires investigators and prosecutors to prove both the suspect’s guilt and the results and consequences of their actions, such as the state’s losses. The high standard of proof in corruption cases, coupled with an offender-oriented sentencing system that places the recovery of state losses at the end of a corruption trial (post-adjudication), sometimes leads to the neglect of state loss recovery, seen as not being the primary goal of anti-corruption efforts.

Investigating corruption crimes often involves complex and sophisticated business, financial, and technological systems, as well as high-level offenders capable of concealing and even hiding their ill-gotten gains in complex financial systems or transferring them abroad. This demands that investigators and prosecutors possess high-level skills to trace the money or assets hidden in these systems and to be able to prove and seize these assets.

The execution of substitute money aimed to cover the state’s financial losses, which is deemed insufficient or has not reached the amount of losses suffered by the state, despite efforts to seize assets during the investigation stage of corruption cases, can only be carried out by the prosecutor at the latest within one month after the case becomes legally binding, while the convicted person is unwilling to pay the substitute money, or if their seized assets are found to be inadequate (in proportion to the obligation to pay the substitute money). In practice, the calculation, execution, or withdrawal of money or assets as substitute money in corruption cases is never optimal. This lack of optimization in executing substitute money is primarily due to the lack of clear regulations regarding the execution of substitute money for state losses in corruption cases.

This provision also contradicts Article 18 paragraph (2), which states that if within one month after the final and legally binding verdict, the defendant fails to pay the substitute money or their assets are insufficient to be used as payment for the substitute money, their assets can be seized by the prosecutor and then auctioned publicly, with the proceeds used to pay the state’s losses.

The seizure of assets suspected to be related to and have a legal connection with a corruption case is primarily based on the seizure rules in Article 1 point 16 and Article 39 of the Indonesian Criminal Procedure Code (KUHAP), as well as the rules on confiscating the wealth of suspects or convicts as substitute money in Article 18 of the Law on the Eradication of Corruption Crimes. However, these provisions are currently seen by many as facing obstacles and challenges and have been proven to be insufficient in maximizing the recovery of state losses resulting from corruption crimes.
The discussion regarding the weaknesses and challenges, both substantive and formal, in asset seizure for state recovery, as well as the analysis of the success of recovering substitute money in combating corruption crimes, indicates the need for a new legal approach that is responsive, more efficient, simpler, and capable of keeping up with legal developments. This approach should also strengthen efforts for optimal recovery and protection of state financial losses due to corruption crimes.

The most fundamental normative obstacle related to the recovery of state losses lies in the obligation for state loss recovery, including as an additional penalty rather than a principal penalty in combating corruption. Until now, no reasons have been found as to why the drafters and formulators of anti-corruption laws have established the obligation to pay substitute money for state losses as an additional penalty, despite the fact that alongside the recovery and protection of state losses being one of the objectives of combating corruption, the confiscation of corruptors’ assets is also expected to deter further corruption and eliminate the corruption itself.

Upon deeper analysis of the provision in Article 18 paragraph 1 letter (a), it further emphasizes that confiscation can only be limited to items obtained from corruption crimes and/or items used to commit criminal acts. With the narrative “items obtained,” there is a systematic limitation that prohibits investigators from confiscating other items suspected to be related but not directly obtained or resulting from corrupt activities.

The restrictive limitation also closes the possibility of employing a combination approach, including the application of restorative justice and value-based approaches within the framework of recovering substitute money equal to the value of assets obtained from corruption crimes. Therefore, it often requires a long time and complex calculations to determine the total value of seized assets and the convicted individual’s wealth that could potentially be confiscated to fulfill the state’s compensation for losses incurred.

The reconstruction of criminal law regarding the provisions of asset confiscation and substitute money for state losses in this study is intended to overhaul and adjust the existing normative framework, then rebuild it into a new unified set of norms that align with the mechanisms of restorative justice, especially concerning the recovery of state losses. The old normative structure is deemed inadequate to resolve increasingly complex legal issues. Thus, the new normative framework designed or formulated by the researcher aims to become a unified legal norm that can realize the goals of law, namely justice and utility, particularly in the context of recovering state losses as victims of corruption crimes.

The choice of civil law mechanisms in recovering state losses in the form of substitute money due to corruption offenses is considered highly justified by researchers for several reasons: First, corrupt acts that harm the state’s finances are undoubtedly unlawful. From a civil law perspective, such acts render the perpetrator liable to be sued in civil court for being obliged to compensate the state for their actions. The litigation process leading to a civil court judgment does not in any way preclude the state’s right to pursue the wrongdoer criminally. Second, the choice of a civil law route in the effort to recover state losses is also highly appropriate because the formal aspect of state financial losses, especially concerning substitute money for corruption offenses, is closely related to the civil law concept of financial losses in financial audits. This allows for negotiation and mediation among the disputing parties, which is the core of the restorative justice approach to fairness.

Corruption offenses constitute a part of special criminal law, known as ius singulare, ius speciale, or bijzonder strafrecht, as stipulated by positive law, ius constitutum, regulated under Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, alongside Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, hereinafter referred to as the UUTPK (Rizal et al., 2013). To determine whether an act is deemed unlawful, the following elements are necessary: (a) The act is contrary to law; (b) There must be fault on the part of the perpetrator; (c) There must be harm incurred (Tuanakotta, 2009).

Corruption as an unlawful act is not explicitly stated in the anti-corruption law. However, by applying the principle-based approach, corruption can be deemed an unlawful act based on the principle of legality. Quoting Barkatullah & Prasetyo (2005):

1) The doctrine of formal unlawfulness. Formal unlawfulness occurs when the definition of an offense stipulated by law is met. Formal unlawfulness is a prerequisite for an act to be punishable. According to this doctrine, if an act fulfills all the elements outlined in the definition of a criminal offense, the act is considered a crime. If there are justifications, these must also be explicitly stated in the law.

2) The doctrine of material unlawfulness. Material unlawfulness refers to an unlawful act that is not only defined in written law but must also be evaluated against the prevailing unwritten legal principles. The unlawfulness of an act can be negated based on statutory provisions as well as unwritten rules.

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**Normative construction of restorative justice implementation in accelerating state losses return in corruption crimes**
The Implementation of Restorative Justice as an Effort to Strengthen Restitution

The implementation of a restorative justice approach in the eradication of corruption offenses necessitates a normative reconstruction or a limited amendment of the provisions concerning the recovery of state losses through compensatory damages, as well as the judicial authority and procedural application thereof. This reconstruction aims to establish a legal foundation and legitimacy for the enforcement of these provisions, ensuring justice and legal certainty, while also providing a basis for the authority in law enforcement.

The primary focus of this normative reconstruction should be on the provisions related to compensatory damages and state financial losses as stipulated in Articles 4, 18, and 37 of Law Number 31 of 1999 on the Eradication of Corruption Crimes. Moreover, this normative reconstruction must also address the provisions of the law related to the judicial proceedings for corruption cases by the Corruption Court, specifically regarding the authority of the Corruption Court to examine and adjudicate claims for the recovery of state losses as regulated in Articles 5, 6, and 29 of Law Number 46 of 2009 concerning the Corruption Court.

The proposal to apply a restorative justice approach in corruption cases necessitates a revision of the prosecution scheme by the Public Prosecutor. This panel hearing is aligned with the concept in the Draft of the Criminal Procedure Code, which introduces the Preliminary Examining Judge (Hakim Pemeriksa Pendahulur, HPP) who conducts preliminary examinations limited to formal aspects, effectively replacing pretrial hearings. This panel trial model has already been employed by the Supreme Court in examining breaches of the code of ethics or judicial ethics trials. A similar concept is intended to be adopted as an instrument for implementing the restorative justice mechanism specifically for resolving state losses.

The application of the restorative justice resolution mechanism for recovering state losses in corruption cases is to be conducted by the Investigator or Prosecuting Investigator through a Panel of Judges. This Panel of Judges is tasked with examining the compensation claims filed by the Prosecutor concerning alleged state financial losses purportedly resulting from a corruption case. The suspect or the party deemed responsible, or their legal representative, who becomes the respondent, is also summoned to the panel hearing to provide responses, rebuttals, and favorable testimony through direct evidence.

Panel hearings employing a restorative justice approach provide ample opportunity for the defense by the offender’s legal counsel. This concept even allows the legal counsel of the offender or suspected offender to present expert testimony that may counter the allegations. This law enforcement process is also seen as capable of generating new legal discoveries, which fundamentally align with the core principles of Indonesian legal philosophy—deliberation and consensus to achieve collective resolution. The legal foundation of deliberation and consensus is derived from the teachings of Pancasila. When juxtaposed with modern legal theories and traditions, it fits within the criteria of a hybrid legal system, blending elements of both civil law and common law in its enforcement.

According to researchers, the fundamental principles of resolving criminal law issues based on restorative justice can also be applied in the settlement of financial disputes involving compensatory damages between the state, represented by investigators and/or public prosecutors in corruption cases, and the parties suspected of committing corruption offenses that have caused state losses as victims of their crimes. The application of a restorative justice approach in recovering state losses due to corruption can be limited solely to the recovery of these losses, without the intention of halting the investigation or prosecution of the corruption offenses. This is considered appropriate given the lengthy nature of our corruption criminal proceedings, which tend to be overly focused on imprisonment and less attentive to the recovery and restitution of state financial losses, which is also a goal of eradication efforts.

The stakeholders involved in the application of the restorative justice mechanism for the accountability of state loss recovery due to corruption offenses consist of four major groups: the state represented by law enforcement investigators/prosecutors of corruption offenses, the suspects/accused/perpetrators, other interested parties deemed involved, and mediators including legal experts and state auditors/financial experts. These groups are further elaborated as follows:

The process of filing a quasi-criminal civil lawsuit for the recovery of state losses through compensatory damages can be initiated as soon as the police or prosecutor’s investigators complete their investigation and receive the audit report on state financial losses from state auditors, such as the Audit Board of Indonesia (BPK) or the Financial and Development Supervisory Agency (BPKP). This approach places the effort to recover state losses at the pre-adjudication phase (rather than at the end) of the corruption criminal proceedings. This can be carried out simultaneously by the police investigators/prosecutor investigators while they finalize the case files and prosecution of the corruption offense.

The output of the restorative justice approach related to the recovery and protection of state losses, through the panel hearing system during the preliminary hearing, does not result in a final judgment but rather produces a legal assessment and recommendations. These legal assessments and recommendations by
the panel hearing judges serve as the basis and consideration for the judge’s decision in the plenary/ final hearing, specifically concerning the recovery of state losses in corruption trials.

There are four possible assessments that the panel judges might provide: First, the panel may find that the request by the investigators/prosecutor investigators is justified and there is strong evidence of state financial losses, with the respondents/defendants and involved parties being held responsible for compensating these losses. Second, the panel may determine that the respondents/suspected parties/defendants are willing to accept an offer to compensate the state financial losses they have caused, with a specific nominal amount agreed upon. Third, the panel may conclude that the request by the investigators/prosecutor investigators is unfounded and there is no strong evidence of state financial losses, hence the respondents/defendants are not liable for compensating the alleged losses. Fourth, the panel may find that the panel hearing for the recovery of state financial losses has been conducted in accordance with applicable rules and procedures, and state that the results of the hearing can be used as considerations in the final judgment of the corruption trial (plenary hearing).

Given that the assets of the suspects/convicts are under the control of the investigators/prosecutors during the investigation and trial period, and the defendants cannot provide evidence to the contrary, once the corruption court’s judgment becomes legally binding, the prosecutors can immediately execute the judgment by auctioning off these assets and depositing the proceeds as compensatory damages for the state financial losses incurred.

The judgments rendered through the panel system employing a restorative justice approach, specifically concerning the recovery of state losses, will obtain final and binding legal force (in kracht van gewijsde) in accordance with the corruption court’s plenary trial decision. If the defendant appeals the substantive case, the panel hearing judgment regarding the recovery of state financial losses remains final and binding and can only be contested at the High Court, similar to pretrial judge rulings as known in the current legal system.

CONCLUSION

The restorative justice approach in corruption cases aims to optimize the recovery of state losses, based on Pancasila, the Indonesian legal theory. It promotes negotiation between parties to jointly solve issues related to corruption, embodying the Fourth Principle of democracy. However, traditional challenges in recovering state losses include material legal barriers like compensation provisions, seizure rules, and lack of clear regulations. Procedural barriers like limited time for asset tracing and seizure, high standards of proof, and placement of state loss recovery efforts in the post-adjudication phase of the corruption trial process further hinder recovery. Implementing the restorative justice approach can be achieved by making limited changes to compensatory payments provisions and expanding judicial authority in corruption courts.

REFERENCES


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