

An Investigator's Discretion in State Assets Confiscation Criminal Action Case of Corruption

Adi Wiratmoko^{*)}, Amin Purnawan^{**)} and Siti Ummu Adillah^{***)}

District Attorney in Temanggung, E-Mail: wiratmoko182@gmail.com

^{** & ***}) Faculty of Law, Universitas Islam Sultan Agung, Semarang

Abstract.

This research aims to discuss the concept of investigators' discretionary power in applying their powers and authorities in confiscation of state assets and shifting the terms of discretion from Act No. 14 of 2014 concerning Government Administration to Act No. 11 of 2022 concerning Job Creation. This discussion aims to provide clarity on the concept of discretionary power of investigators in confiscation of state assets which is still controversial from various aspects so that the concept of discretionary power is not only acceptable in terms of power, but also legally and morally/ethically acceptable. This writing uses a doctrinal (juridical-normative) approach, namely research on criminal law norms contained in Indonesian criminal legislation. Based on the results of the study, it was concluded that in principle the application of the investigator's discretionary power to confiscate state assets in corruption cases is a must because the spirit of eradicating corruption is to restore lost state assets. This discretionary power must also be balanced with improving the quality and integrity of investigators, in particular.

Keywords: Assets; Confiscation; Discretion; Investigator.

1. Introduction

The Indonesian nation and state is a nation that was born "by the grace of Allah the Almighty", and this recognition is officially stated in the highest document of the Preamble to the 1945 Constitution, and Belief in One God is included in Chapter XI concerning Religion Article 29 paragraph (1) of the Constitution NRI 1945.¹

Corruption is an act that can cause harm to many parties and can even affect the existence and development of the progress and welfare of the people of a country. According to Fockema Andrea, the word corruption comes from the Latin *corruptio* or *corruptus* (Webster Student Dictionary: 1960).²

Corruption in Indonesia is a recurring or very urgent problem that has been faced by the Indonesian nation today, from time to time over a relatively long period of time. So, the special court for corruption is expected to be able to resolve a number of corruption crimes in the past to avenge state losses borne by the perpetrators of criminal acts.³

¹Sri Endah Wahyuningsih. "Urgensi Pembaharuan Hukum Pidana Materiel Indonesia Berdasarkan Nilai-Nilai Ketuhanan Yang Maha Esa". *Jurnal Pembaharuan Hukum*. Vol 1 No.1, (2014). p.17, url: <http://jurnal.unissula.ac.id/index.php/PH/article/view/1457/1128> accessed on 15 April, 2022

²Hulman Siregar. "Rumusan Pidana Dan Pemidanaan Tindak pidana Korupsi Yang Merugikan Keuangan Negara Serta Permasalahan Dalam Penerapannya". *Jurnal Daulat Hukum* Vol. 1. No.1 March (2018) ISSN:2614-560X. url <http://jurnal.unissula.ac.id/index.php/RH/article/view/2626/1975> accessed on August 14, 2022

³Sri Endah Wahyuningsih, Agus Sunaryo. "The Role of Prosecutor Office in the Eradication of Corruption Criminal Acts in Indonesia". *Jurnal Pembaharuan Hukum*. Vol 4 No.2, (2017). p.244, url: <http://jurnal.unissula.ac.id/index.php/PH/article/view/1701/pdf> accessed on 4 June, 2022

Law enforcers involved in eradicating corruption are investigators, prosecutors and judges. The final determinant in eradicating corruption is the judge. However, judges cannot act actively outside the context of cases brought to court by the prosecutor (Public Prosecutor). Actors who are actively conducting investigations and prosecutions are prosecutors. Therefore, it is not an exaggeration if until now the eradication of corruption is considered a failure or has not been successful, or at least not yet optimal. Therefore, the Prosecutor's Office is considered to have failed, or has not been successful.⁴

However, the success or failure of handling cases of criminal acts of corruption is not only the conviction of the perpetrators of crimes, but also the return of state financial losses that have been taken by the perpetrators of the crime of corruption. Not only at the time of the investigation, it is also usually returned to the level of prosecution and even the level of execution.

In rescuing state financial losses, Corruption Crimes cannot be separated from the Calculation of State Financial Losses. Proof of elements of state financial losses in handling cases of criminal acts of corruption that are detrimental to the state in the criminal justice system is the most dominant activity, starting from the stages of research, investigation, prosecution to examination of cases in court sessions, the main target is to prove that corruption is detrimental The state has occurred and the perpetrator is the suspect/defendant who is supported by evidence. This evidence will later serve as a guide and judge's consideration in deciding a corruption case, especially a corruption crime that is detrimental to the State in imposing a criminal, both principal and additional crimes.⁵

The calculation of state financial losses is influenced by the concept and formulation of the notion of state finance. In accordance with the development of state finance, there are several definitions and formulations of state finance according to experts, namely understanding in a broad sense and understanding in a narrow sense. In addition, there are several methods of calculating state losses whose calculation results differ by using one method to another. This can lead to differences in the calculation of state financial losses in the same corruption case between the expert auditor proposed by the investigator and the expert auditor who relieves the defendant.⁶

To calculate state losses, investigators must of course make forced efforts, one of which is the confiscation of objects related to losses due to corruption. Both in the form of documents, securities, money and also insurance policies. Not a few parties then questioned the confiscation by investigators, which often made it difficult for investigators to collect evidence for calculating state financial losses.

Considering that coercion is a form of limitation of rights, then any act of coercion can be challenged in the form of a pretrial lawsuit, regarding the validity of the coercive measure. Therefore, coercive measures must be based on a warrant, have legal reasons and be carried out under procedural law. However, in practice, not all legal actions carried out by investigators are regulated in detail in the procedural law, therefore in its implementation investigators must base the

⁴Ibid. p. 245

⁵Hulman Siregar. Op.cit

⁶Ibid. p. 127

principles of general law law in law enforcement, namely sufficient subjective and objective reasons based on a warrant and equipped with with the administration in the form of an official report on the implementation of the forced action.⁷

Article 50 of Act No. 1 of 2004 states that any party is prohibited from confiscation of state assets. This is certainly very counterproductive to the purpose of confiscation, namely for the sake of proof, especially as evidence before a court trial. Possibly without evidence, the case cannot be brought to court.⁸

Article 50 of Act No. 1 of 2004 will certainly create obstacles for investigators to enforce the law because it is contrary to the investigator's seizure authority in Article 39 of the Criminal Procedure Code. Confiscation of valuable objects or state assets that may prove that the suspect is guilty or valuable assets that investigators should be able to save is often hampered because Article 50 of the State Treasury Law is used by parties who are potential suspects to fight back against investigators who think that the act of confiscation against state assets "contrary to the law" and declared "illegitimate".

Meanwhile, in law enforcement itself, there are three main elements that must be considered in law enforcement to achieve legal order in society, namely: legal certainty, legal benefits and justice.⁹

Act No. 11 of 2020 concerning Job Creation which amends several provisions in Act No. 30 of 2014 concerning Government Administration which regulates discretion. The discretionary power/authority provides an opening for investigators to deviate from Article 50 of Act No. 1 of 2004 concerning the State Treasury.

This paper discusses the concept of investigators' discretionary power in applying their powers and authorities to confiscate state assets protected by Act No. 1 of 2004 concerning the State Treasury and the shift in discretionary requirements from Act No. 14. 2014 concerning Government Administration which was later reduced in Act No. 11 of 2022 concerning Job Creation. This discussion aims to provide clarity on the concept of discretionary power of investigators in confiscation of state assets which is still controversial from various aspects so that the concept of discretionary power is not only acceptable in terms of power, but also legally and morally/ethically acceptable.

2. Research Methods

The approach and legal materials used in this paper are adapted to the background and problem formulation described previously. Research to support this writing is a normative research by examining library materials or secondary data. The nature of this research is classified as descriptive-analytical, where in this study the author describes the theory of discretionary law that can be applied by investigators in confiscation of state assets in corruption cases.

⁷Kristiana, Yudi, (2018) *Tehnik Penyidikan dan Pemberkasan Tindak Pidana Korupsi*, Yogyakarta ; Thafa Media. p. 185

⁸ Harahap, M Yahya, (2013), *Pembahasan Permasalahan dan Penerapan KUHAP*, Jakarta : Sinar Grafika. p. 265

⁹ Rahardjo, Satjipto. (2009), *Penegakan Hukum Suatu Tinjauan Sosiologis*, Yogyakarta : Genta Publishing, p. 13

The data used is secondary data in writing this law, namely primary legal materials, including Act No. 8 of 1981 concerning Criminal Procedure Law, Act No. 31 of 1999 concerning Eradication of Corruption Crimes, Act No. 1 of 1999. 2004 concerning the State Treasury. Secondary legal materials consist of, among others: the results of scientific works in the form of theses and dissertations related to state finances and corruption, books on confiscation according to the Criminal Procedure Code, discretion, state finances and state losses, scientific works in the form of writings in scientific journals and print media related to discretion, confiscation and proof of criminal acts of corruption, state finances and state losses. Tertiary Legal Materials, among others, consist of: Big Indonesian Dictionary, Legal Dictionary. The writing of this paper is carried out using normative legal research that uses secondary data as the main data in analyzing the problem. The data collection technique used in this research is a literature study by collecting primary, secondary and tertiary legal materials obtained from library materials in the form of legislation, books, magazines and articles that are relevant to the subject matter discussed.

3. Results and Discussion

The term discretion used here is a synonym for the term discretion. The concept of discretion used here is the concept of power (in English it is called discretionary power and in French it is called *pouvoir discrétionnaire*). As above, the intrinsic meaning of discretion always contains the connotation of power. Power here is interpreted in the form of a relationship between the ruling party and the ruled party. One party giving orders and one party being given orders.¹⁰

Discretionary power is a specific type of government power and makes sense not only in terms of power, but also juridically and philosophically. From an analytic perspective, the expansion of government functions in responding to the increasing demands of society on the government is the basis for the birth of the concept of discretionary power as government freedom.

Meanwhile, from a juridical perspective, discretionary power is a must because of the inadequate legislative scheme from legislators to be implemented by the government or in other words the existence of fuzzy rules and gaps as a form of juridical power, the government as the maker of discretionary actions has immunity from these actions.

As for the perspective, discretionary power is purposeful power, not blind power. The axiological aspect of discretionary power is the pursuit of the most fundamental life goal of the state, namely the public good. The fundamental understanding of the state, namely the principle of legality, is a means in the framework of the public good. Therefore, in public good, the principle of legality cannot be ruled out (the goal should not be ruled out by the means).¹¹

The theoretical basis of discretion is a consideration of the development of situations and conditions. Changes in situations and conditions are a necessity.

¹⁰Budiarjo, Miriam, (1984), *Aneka Pemikiran Tentang Kuasa dan Wibawa*. Jakarta : Sinar Harapan, p. 35

¹¹Krishna D. Darumurti. (2012). *Kekuasaan Diskresi Pemerintah*. Bandung : PT. Citra Aditya Bakti, p. 103

Meanwhile, changes to regulations are not certain to occur immediately. In this context, Clement Fatovic gives the following rules:

“Designed for the ordinary and the normal, law cannot always provide for such extraordinary occurrences in spite of its aspiration to comprehensiveness”¹²

Which means that changes in situation and conditions are a necessity, while changes in regulations cannot happen immediately.

The nature of discretionary power in the government shows its function in terms of:

- Resolve various complicated problems that require fast handling.
- Resolve critical problems that arise suddenly and for which there are no settlement rules.¹³

Government discretionary power in the sense of freedom of action of the government According to NM Spelt & JBJM ten Berge has two forms, namely:

- Freedom of Policy (beleidsvrijheid) Freedom of policy (discretionary authority in a narrow sense) exists when laws and regulations give certain powers to government organs while those organs are free to use them even though the conditions for their legal use are met.
- Freedom of judgment (beoordelingsvrijheid) Freedom of judgment (discretionary authority not in the real sense) exists when according to law it is left to government organs to independently and exclusively assess whether the conditions for the legal exercise of an authority have been met.¹⁴

The freedom of action of investigators will raise our minds about the existence of a picture of the power of the apparatus, whether the Prosecutor, Police or KPK, who make a decision that seems not in accordance with the laws and regulations, or the apparatus acts to enforce positive laws that should be enforced.

From the legal point of view, law is identified with law. The legal system is seen as a logical closed structure. Not contradicting each other, the law is seen as a set of rules that members of society are expected to obey. The application of the assessment model in society, only looks and assumes that the existing law in the community has been accommodated by adequate legal norms, and the law has been equipped with established legal and juridical technical equipment, if the apparatus does something that is contrary to the regulations. The law is considered a patient. The law here is considered to be a cure for all kinds of diseases that violate the norms of society, so that none of the problems in society are not resolved.

So it is not surprising that the legal life often experiences incompatibility with existing realities or has not even been made by the legislature so that it is not impossible that there is a discrepancy or even conflict, either partially or completely, because of this juridical legality thinking pattern. investigators have been ingrained for years so that the view of formal criminal law becomes very narrow, they often don't even dare to reveal cases because before conducting an investigation it has

¹²Fatovic, Clement, (2009) *Outside the Law: Executive and Emergency Power*. Baltimore : The John Hopkins University Press. p. 2

¹³Saut P. Panjaitan, *Makna dan Peranan Freies Ermessen dalam Hukum Administrasi Negara*. Surabaya: Yuridika. p.107

¹⁴Philipus M. Hadjon, (1992), *Pemerintahan menurut hukum (Wet-en Rechtmatig Bestuur)*, Surabaya: Yuridika.p.6

been thought that it is difficult to obtain evidence, especially in cases of corruption involving state assets where the goal is not only arrest and imprison perpetrators but also save state assets. Even afraid to make coercive efforts because the result is that pretrial efforts can be carried out by the perpetrators of the crime.

The above situation is certainly not in line with the purpose of the Law on corruption, namely saving state financial losses, so the law is required to follow these developments, but in reality the law is very slow and even contradicts or contradicts.

The freedom of action of investigators of corruption crimes is now clearly not in accordance with such a mindset (legality), for that investigators are required to be one step ahead of criminals by using a discretionary mindset. Because the discretionary mindset is a mindset that adjusts the reality of the life process with the principles and broader legal politics so that the slogan "law is for the community, not the community for law" can really be applied by law enforcement officials and the benefits are felt by the community.

Therefore, investigators of corruption cases can quickly carry out the task of acting to be able to fulfill the necessity of how to stop, imprison, and take the wealth of the perpetrators of the crime of corruption. This initiative is known as freedom of action or discretion.

The legal basis for this discretion is reflected in the 1945 Constitution of the Republic of Indonesia, Article 22 paragraph 1, that in matters of compelling interest, the President has the right to stipulate government regulations in lieu of law. In Article 22 paragraph 1 there is an element of freedom to act by the government, specifically the President as the person in charge of the nation and the Unitary State of the Republic of Indonesia in terms of creating conditions that can benefit the people so that the President is given the freedom to determine a form of policy called a Perpu as an anticipation of conditions which suddenly arises without having to wait for orders from state bodies entrusted with legislative tasks/functions. Specifically in the context of regional autonomy, Article 18 of the 1945 Constitution as a rule which also becomes a policy in the context of improving people's welfare, which was then followed up with more concrete regulations (under the 1945 Constitution), one of which was Act No. 32 of 2004 as has been replaced by Act No. 23 of 2014 concerning Government Administration which was amended by Act No. 11 of 2020 concerning Job Creation.

Basically any government intervention must be based on the applicable laws and regulations as a manifestation of the principle of legality, which is the main joint of the rule of law. However, due to the limitations of this principle or because of the weaknesses and shortcomings contained in the legislation, the government is given the freedom of *freies Ermessen*, namely the independence of the government to be able to act on its own initiative in solving social problems.¹⁵

Freies Ermessen (discretionary) is one of the means that provide space for law enforcement officials to take action without being fully bound by the law. In practice, *Freies Ermessen* opens up opportunities for conflicts of interest between government institutions or government institutions and citizens. Investigators in confiscating state assets, especially in realizing the goals of eradicating corruption,

¹⁵Ridwan HR, (2007), *Hukum Administrasi Negara*, Jakarta : PT Raja Grafindo Persada.p. 241

does not mean that investigators can act arbitrarily, but the attitude of the act must be held accountable. This means that although the intervention of investigators in the lives of citizens is a certainty in the conception of the welfare state, accountability for every government action is also a must in a legal state that upholds the values of truth and justice. These values of truth and justice are the basis for acting by investigators in the administration of government as a manifestation of the General Principles of Good Governance.

Investigators of criminal acts of corruption in terms of carrying out their authority, namely carrying out forced confiscation efforts as regulated in the Criminal Procedure Code from Article 38 to Article 48. Objects that can be confiscated are regulated in the legal basis for confiscation of Article 39 of the Criminal Procedure Code, namely, objects belonging to suspects suspected of being obtained from criminal acts, objects objects used for criminal acts, objects used to hinder investigations, objects specifically intended for criminal acts, and other objects that have a direct relationship with the criminal acts that have been committed. On the basis of Article 39 of the Criminal Procedure Code, it is actually very clear to legitimize investigators to be able to thoroughly investigate and confiscate as much as possible what is suspected/alleged to be objects used/obtained from criminal acts of corruption. However, the authority of investigators to confiscate state assets is in conflict with Article 50 of Act No. 1 of 2004 concerning the State Treasury which reads:

"Any party is prohibited from confiscation of: a. money or valuables belonging to the state/region either in the possession of a government agency or with a third party; b. money that must be deposited by a third party to the state/region; c. movable goods belonging to the state/region that are in the hands of government agencies or third parties; d. immovable property and other property rights belonging to the state/region; e. goods belonging to third parties controlled by the state/region that are needed for the implementation of government duties."

In the article it is clearly explained that prohibited objects are also needed by investigators to uncover a crime or save state assets. This is what is made possible by investigators, especially corruption crimes in confiscating state assets because it is clear that if a state asset is confiscated, the confiscation can be considered "illegitimate".

The prohibition for anyone to confiscate state assets is regulated in Act No. 1 of 2004 concerning the State Treasury Chapter VIII concerning the Prohibition of Confiscation of State/Regional and/or State-controlled Money and Property, Article 50 which reads "Any party is prohibited from confiscation of"

- money or securities belonging to the state/region, whether in the possession of a government agency or with a third party;
- money that must be deposited by a third party to the state/region;
- movable goods belonging to the state/region, both those in government agencies and with third parties;
- immovable property and other property rights belonging to the state/region;
- goods belonging to third parties controlled by the state/region that are needed for the implementation of government duties.

With this article legally, investigators are prohibited from seizing state assets even though the purpose is to prove or save state financial losses so that if the article is counter-productive with the aim of eradicating corruption.

One of the ways for investigators to avoid the "illegitimacy" of confiscation is discretion. The current discretion is regulated in Act No. 11 of 2020 concerning Job Creation which amends several provisions of Act No. 30 of 2014 concerning Government Administration.

Based on Article 175 number 1 Job Creation Act which amends Article 1 point 9 of Law 30/2014, discretion is a decision and/or action that is determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation.

The word discretion can be found in Article 6 paragraph (1) of Act No. 30 of 2014 concerning Government Administration where the article explains that government officials have the right to exercise authority in making decisions and/or actions, one of which is discretion. The rights in question are explained in Article 6 paragraph (2) point (e) namely using discretionary power in accordance with its objectives, namely the independence of the government to be able to act on its own initiative in solving social problems.

Article 1 point 3 of Act No. 30 of 2014 concerning Government Administration explains the definition of authorized officials, namely government agencies and/or officials are elements that carry out Government Functions, both within the government and other state administrators. The Investigating Prosecutor in this case is included in the category of other organizers so that the Investigating Prosecutor is included in who is referred to in the Article.

Every use of discretion by government officials certainly has its own purpose. The purpose of discretion is regulated in Act No. 14 of 2020 in Article 22 Paragraph (2), Every use of discretion by government officials certainly has its own purpose. The purpose of the discretion is

- Streamlining government administration;
- Filling legal voids;
- Provide legal certainty;
- Overcoming government stagnation in certain circumstances for the benefit and public interest

The scope of self-discretion is regulated in Article 23 of Act No. 30 of 2014 concerning Government Administration, the scope of discretion is;

- making decisions and/or actions based on the provisions of laws and regulations that provide a choice of decisions and/or actions;
- making decisions and/or actions because the laws and regulations do not regulate;
- making decisions and/or actions because the laws and regulations are incomplete or unclear; and
- decision-making and/or action due to government stagnation for the wider interest.

There are six legal requirements for discretion to be exercised, namely, the objectives that have been discussed, do not conflict with the laws and regulations (in accordance with Article 19 of the Anti-Corruption Law), in accordance with the General Principles of Good Governance in accordance with Article 10 of Act No. 30 of 2014 concerning Administration. Governance, namely, legal certainty; expediency, impartiality, accuracy, not abusing authority, openness, public interest and good service.

The requirements that must be met by government officials to be able to exercise discretion according to Act No. 23 of 2014 concerning Government Administration as amended by Article 175 which amends Article 24 of Act No. 11 of 2020 concerning Job Creation, which are:

- in accordance with the purpose of the Discretion as referred to in Article 22 paragraph (2);
- in accordance with AUPB;
- based on objective reasons;
- does not create a Conflict of Interest; and
- done in good faith

The investigator's discretionary power to confiscate the state assets, although the investigator himself can independently and exclusively assess whether the conditions for the legal exercise of an authority have been fulfilled or to solve urgent and critical problems, there are discretionary restrictions regulated in Act No. 23 of 2014 concerning government administration, Article 22 (2) concerning the purpose of discretion, Article 23 which regulates the scope and Article 24, namely the legal requirements for a discretionary act. In short, if the action by the investigator in conducting the confiscation is not in accordance with the purpose, scope and terms of discretion, then the action can be said to be an abuse of authority and even against the law.

There is an update of the legislation on the discretionary regulations given by Act No. 11 of 2022 which removes point (b) from Article 24 of Act No. 23 of 2014 concerning Government Administration, namely there is the phrase "not contrary to the provisions of the legislation". This phrase is not in accordance with the nature of the discretion said by Saut P Panjaitan, namely, to solve various complicated problems that require quick handling, to solve urgent problems that arise suddenly and for which there are no settlement regulations.

The presence of changes in the conditions for the implementation of discretion which can then sharpen the discretionary function according to the discretionary objective, namely the independence of the government to be able to act on its own initiative in solving social problems.

The shift in discretionary point of view in Act No. 14 of 2014 concerning Government Administration to a discretionary point of view in Act No. 11 of 2022 concerning Job Creation, although it only eliminates one point, in fact it can provide independence for investigators to be able to exercise discretion, especially the confiscation of state assets by investigators.

Changing the conditions for discretion is not a problem solving because the essence of discretion is to resolve urgent and fast problems and there are no regulations, so it will look ridiculous and unreasonable if discretion is carried out

continuously on the same problem, namely every investigator will confiscate assets against state assets suspected of being a means to commit criminal acts. So that the phrase should be changed in Article 50 of Act No. 1 of 2004 concerning the State Treasury, which provides specialties (exceptions) for investigators to confiscate state assets.

4. Conclusion

In principle, the act of forced confiscation is the spirit of the purpose of the investigation, namely finding evidence and suspects. The confiscation of state assets suspected of being a means of committing acts of corruption is an act of saving state losses and disclosure of criminal acts of corruption by investigators. The application of the investigator's discretionary power, especially in carrying out confiscation of state assets in cases of criminal acts of corruption, is a must because the spirit of eradicating corruption is to restore lost state assets. Parties with good intentions do not need to object because Article 19 of Act No. 31 of 1999 as amended by Act No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption accommodates the rights of third parties with good intentions who are harmed.

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