

## Conference Paper

# The Recovery of State Assets Due to Bankruptcy in State-owned Enterprises

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**Abstract.**

This research intended to examine the elements of state loss on Indonesian corruption regulations and to assess the effort of asset recovery concerning state loss, resulting from corruption based on Indonesian law. This was normative legal research employing the statutory approach, the conceptual approach, the fact approach, and the case approach. The study revealed that the components of state loss consist of actual shortages of cash, securities, and goods; it was caused by illicit actions, either intentionally or negligently; and losses whose amount can be calculated based on the findings of the authorized agency or appointed public accountant. In the Indonesian legal system, asset recovery initiatives can be analyzed through the lens of both criminal and administrative laws. According to criminal law, asset recovery can occur in multiple stages of the criminal justice system, whereas under administrative law, asset recovery must comply with Article 34 of Government Regulation No. 48 of 2016 on the procedures for imposing administrative sanctions on government officials.

**Keywords:** bankruptcy, state assets, state-owned enterprises

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## 1. INTRODUCTION

Corruption is a widespread problem throughout the globe. Corruption in Indonesia is nothing new; however, every so often, new corruption cases with new suspects emerge. Corruption is a pervasive and persistent problem in Indonesia that undermines the rule of law, retards economic development, exacerbates social inequality, and distorts the country's global competitiveness.[1] The government has enacted numerous laws and regulations to combat corruption, but they are ineffective in addressing the issue. The United Nations Convention Against Corruption (UNCAC) was established in 2003 in response to the worldwide problem of corruption.[2]

Therefore, the nations must collaborate to eradicate corruption worldwide. As one of the nations that ratified the United Nations Convention Against Corruption (UNCAC) through Law No. 7 of 2006, Indonesia is obligated to contribute to global efforts to

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eradicate corruption. The Corruption Perception Index of Indonesia, according to Transparency International Indonesia, received a score of 38 out of 100 and a classification of 96 out of 190.[3] Indonesia's score has increased by one point since 2020. The public sector score ranges from 0 to 100, with 0 indicating that the country is severely corrupt and 100 indicating that the country is very clean. Depending on the number of countries included in the index, the country's ranking may also alter. In 2021, the Anti-Corruption behavior Index had a value of 3.88, which is slightly higher than in 2020, when it reached 3.84. The public sector score ranges from 0 to 100, with 0 indicating that the country is severely corrupt and 100 indicating that the country is very clean. Depending on the number of countries included in the index, the country's ranking may also alter.[4]

In Indonesia, state loss is one of the most significant justifications for a criminal act of corruption. This state loss is partially attributable to the abuse of authority by government officials and/or employees. Article 2 of "Law No. 31 of 1999 Concerning the Eradication of the Criminal Act of Corruption" (hereinafter UU PTPK) and Article 3 of the UU PTPK, which emphasizes the criminal act of corruption related to abuses of authority, generally define the criminal act of corruption. In addition,[5] the "Decision of the Constitutional Court of Indonesia No. 25/PUU-XIV/2016" emphasizes that criminal acts of corruption are no longer formal but are material crimes that must prove with certainty the state loss (actual loss) that occurred, even if there were acts against the law by enriching oneself, others, and/or corporations. Therefore, the element of state loss must be proven in order to conclude that a criminal act of corruption has been committed.[6]

The emphasis on combating corruption has compelled law enforcement to return state funds. The Asset Recovery procedure is an endeavor to recover state losses attributable to corruption's root cause. Asset Recovery is a recognizable component of the criminal justice system. There is currently no specific definition of its significance in the legislation. However, the mechanism for returning state assets has been governed by a number of criminal, civil, and administrative regulations. As is the case with the procedures for confiscation and confiscation of state assets as outlined in the Criminal Procedure Code and the UU PTPK in the criminal justice system, asset monitoring, blocking, and confiscation can be implemented.[7]

However, law enforcement officials have been unable to effectively recover corruption-related state losses. This is due to the inability of those convicted of corruption offenses to pay replacement money and their preference for imprisonment instead. On the basis of the theory of causality, criminal responsibility is assigned to a matter involving the causes and effects of a series of actions that can result in criminal

acts. Corruption is closely related to the element of authorized government officials or employees causing state losses; therefore, it is also related to state administrative law.[8]

The resumption of state losses may also affect the legal ramifications of an act he has committed. Therefore, the recovery of state losses should be an option for settling criminal acts of corruption, beginning with the investigation, prosecution, and court examination stages. One of the issues with law enforcement procedures is the overcapacity of correctional institutions; as a result, they cannot accommodate the large number of convicted individuals. Based on the information displayed by the Correctional Database System (SDP) of the Directorate General of Corrections on January 22, 2022, the total number of prison inmates in Indonesia is 272,869, while the available capacity is 132,101, resulting in an 185% overcapacity. Therefore, it is intriguing to investigate further whether a return of state funds prior to the trial can eradicate the illegal act of a person suspected of committing a criminal act of corruption by emphasizing a more effective reimbursement of state losses.[9]

However, Article 4 of the UU PTPK stipulates that the return of the state's loss does not result in the criminal's release from detention. However, the Attorney General of the Republic of Indonesia has a policy stating that state losses under IDR 50 million may be administratively resolved by returning state losses, as stated by Sanitiar Burhanuddin from the Attorney General's Office at a joint working meeting with the Commission III DPRD, as well as several Court Decisions with permanent legal force (*Eintracht*) that decide on the return of state financial losses prior to an investigation, thereby eliminating looting. The concept of asset return is associated with Aristotle's theory of justice, in which distributive justice requires each party (in this instance, the state) to receive their due proportionately, as well as the presence of corrective justice (remedial), which focuses on correcting any wrongdoing. In other words, efforts to recover assets become imperative in both criminal and administrative corruption cases. The emergence of trends in asset recovery from state losses has shifted the traditional paradigm of punishment from retributive imprisonment to an effort to recover assets resulting from transnational corruption.[10]

This paradigm shift is detailed in Chapter V of "the United Nations Anti-Corruption Convention 2003," which was ratified by Law No. 7 of 2006 regarding the Ratification of the United Nations Convention against Corruption. Consequently, it is essential to examine the non-punitive efforts to recover assets lost by the state as a result of corruption from the perspectives of criminal law and administrative law. [11] Asset Recovery should be the foundation of every law enforcement officer's effort to recover

state losses following the corruption typology. In practice, however, asset recovery has not been accomplished effectively, as identifying instances of corruption involves technological obstacles and barriers that pose significant and diverse challenges. This Conference Paper addresses the conflict of legal norms in which the return of assets resulting from a criminal act of corruption can eliminate the nature of criminal law, and the restoration of the situation to its original state by a restorative court can eliminate the nature of criminal law for the perpetrators.[12]

## 2. METHODOLOGY/ MATERIALS

Using normative legal research, the current issues were investigated. In order to provide a solution to a problem, normative legal research emphasizes law and literary studies. This investigation employed the legislative method, the conceptual method, the fact method, and the case method. The information was gathered from study documents and published works. This article utilized descriptive research with the intent of presenting a systematic, factual, and accurate description. In addition, legal argumentation and interpretation as a qualitative legal analysis were utilized in this study.[13]

## 3. RESULTS AND DISCUSSIONS

The State losses are one of corruption's most crucial aspects. State losses are governed by law, specifically "Article 1 number 15 of Law No. 15 of 2006 regarding the Supreme Audit Agency (hereinafter referred to as the BPK Law), Article 1 number 22 of Law No. 1 of 2004 concerning the State Treasury (hereinafter referred to as the State Treasury Law), and Elucidation of Article 32 paragraph (1) of Law No. 31 of 1999." Article 1 point 15 of the BPK Law and Article 1 point 22 of the State Treasury Law define "State/Regional Losses" as a shortage of cash, securities, and goods resulting from intentional or negligent illegal acts. The definition of "state financial losses" in the Explanation of Article 32 paragraph (1) of the PTPK Law is "losses whose amount can be calculated based on the findings of the authorized agency or appointed public accountant." [14]

According to "Article 1 Number 1 of Law Number 17 of 2003 Concerning State Finance", "State finance is all state rights and obligations that can be valued in money, as well as everything in the form of cash or goods that can be owned by the state in connection with the implementation of these rights and obligations." Furthermore, according to M. Ichwan, state finance is a quantitative activity plan, with monetary amounts signifying future (typically annual) activities. In addition, according to Goedhart, state finances

are “a series of periodically enacted laws that authorize the government to make expenditures for a specific period of time and identify the means of financing required to cover these expenditures. There was no regulation regarding the procedures for calculating state losses, particularly in cases of fraud.”[15]

Since “Decision of the Constitutional Court No. 25/PUU-XIV/2016” (henceforth referred to as Decision No. 25/PUU-XIV/2016), the definition of state losses is restricted to actual losses and is not founded on procedures or authorities to calculate state losses. Different effects of Decision No. 25/PUU-XIV/2016 According to the Constitutional Court’s ruling, “state loss” is the most crucial aspect of corruption. Certain parties are permitted to calculate state losses, thereby enabling the term “actual losses” to be used. There are two distinct definitions regarding the Supreme Court and the Constitutional Court. According to SEMA 4/2016, the Supreme Court is the “only institution authorized to declare state losses, namely the Supreme Audit Agency.”[16]

This case is unique due to Constitutional Court Decision No. 31/PUU-X/2012, which provides the KPK the option of not relying on BPK or BPKP audit results. Article 23 E, paragraph 1, of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) states: “A free and independent Audit Board of the Republic of Indonesia is held to examine the management and accountability of state finances.” This provision highlights the fact that the Supreme Audit Agency, or BPK, is the only institution that assesses the administration and accountability of state finances in a nonpartisan manner. In addition, in accordance with Article 1 Number 1 of Law Number 15 of 2006 concerning the State Audit Board (hereinafter referred to as the Audit Board Law), the BPK issues an Audit Results Report as part of its responsibility to assess state losses. Per BPK Regulation No. 1 of 2007 (Appendix VI, point 3).[17]

Constitutionally, the BPK is responsible for overseeing state finances and determining state losses; it is a singular, autonomous agency. Since the publication of “Government Regulation Number 60 of 2008 and Presidential Decree Number 192 of 2014, however, the Audit Board of the Republic of Indonesia has been established. The Financial and Development Supervisory Agency (BPKP) serves the same purpose as the BPK as a component of the Government Internal Supervisory Apparatus (APIP). Article 1 Number 4 of 2008 Government Regulation No. 60 Consequently, the BPKP is subordinate to the executive branch, unlike the BPK, and is tasked with supervising the administration of state finances; consequently, the BPK has more authority than the BPKP. The BPKP’s authority is limited to the internal oversight of the administration of state finances by the government.”[18]

State losses in Indonesia are defined as “lack of money, securities, and real goods; caused by an illegal act, whether committed intentionally or accidentally; and losses whose amount can be calculated based on the findings of the competent authority or the appointed public accountant.” BPK, the “Financial and Development Supervisory Agency”, also known as BPKP as part of the “Government Internal Supervisory Apparatus”, is an institution with the authority to supervise state finances.[19]

## 4. CONCLUSION AND RECOMMENDATION

Based on the foregoing, the scope of this research is limited to state financial losses and non-punitive return of state financial losses, both from a criminal and administrative law perspective. The conclusion of this study is that the elements of state loss are a real shortage of money, securities, and goods; it is caused by illegal actions, either intentionally or negligently; and losses whose amounts can be determined based on the findings of the authorized agency or appointed public accountant. In the Indonesian legal system, asset recovery initiatives can be investigated from both a criminal law and administrative law perspective. From the perspective of criminal law, the return of the proceeds of corruption to the defendant is viewed as something that relieves the defendant but does not eradicate the illegal nature of the crime. Non-penal efforts in the effort of asset recovery could be undertaken, however, if the suspect or defendant has restored the state’s financial loss and satisfies conditions such as the state factor not being harmed by the public interest being served, and the defendant does not receive the benefits outlined above; therefore, the trait of illegality against the law can be eliminated.

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