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Penal Policy on Assets Recovery on Corruption Cases in Indonesia

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Abstract

*Corruption is an extraordinary crime whose impact on actions can undermine a country, corruption is increasingly becoming increasingly common. Even though not a few of the former state officials or state officials until all the villages have felt how fierce the law enforcers, especially the KPK arrested them all, either hand-grabbing operations or the development of public reporting, impressed by them all were endless corruptors kept appearing , Law enforcement in this modern era is not only concerned with prosecution and prevention, in this case corruption is regulated by the return of state losses as asset recovery, which in turn will maximize the return of state losses from corruptors. As for the problems of this study are: 1. Why is the politics of criminal law (*strafrechtpolitiek*) in the framework of restoring state losses not significant with the real State losses due to criminal acts of corruption? 2. How is the politics of criminal law ideally (*strafrechtpolitiek*) implemented so that the maximum return on state losses due to corruption? The benefits of research consist of theoretical benefits and practical benefits. Theoretical benefits are expected to contribute to theoretical thinking in criminal law, especially concerning the politics of criminal law in the context of eradicating criminal acts of corruption. Practical benefits are expected to be able to provide information scientifically to the public both in general and specifically. This study uses a descriptive legal approach that is supported by primary, secondary and tertiary data obtained from documentation and literature studies then analysed using qualitative descriptive analysis methods. The results showed that the Politics of Criminal Law in the Framework of Returning State Losses due to Corruption in Indonesia was not maximal, as evidenced by the lack of maximum or no maximum return on state losses for corruption, therefore recommendations on simplifying regulations in terms of early prevention or since In the beginning of corruption cases which caused a lot of damage to the state's financial need, there was a special formulation so that the handling could be maximized to restore state losses in corruption.*

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INTRODUCTION

CORRUPTION is an extraordinary crime whose impact on actions can undermine a country, corruption is increasingly becoming increasingly common. Even though not a few of the former state officials or state officials until all the villages have felt how fierce the law enforcers, especially the KPK arrested them all, either hand-grabbing operations or the development of public reporting, impressed by them all were endless corruptors kept appearing . Law enforcement in this modern era is not only concerned with prosecuting prevention as well as in prevention, in this case corruption is regulated as a return on state losses as asset recovery, which in turn will maximize the return of state losses from corruptors (Nashriana 2010).

The politics of criminal law in the framework of returning state losses due to criminal acts of corruption needs to be stressed so as not to get out of its main goal, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today.

Article 18 of Law Number 31 of 1999 concerning Eradication of Corruption Crime states:

(1) In addition to additional criminal offenses as referred to in the Criminal Code, as additional crimes are:
   1. Seizure of tangible or intangible movable or immovable property used for or obtained from criminal acts of corruption, including convicted companies where corruption is committed, as well as from goods replacing these items;
   2. Payment of as much as possible substitute money with property obtained from criminal acts of corruption.
   3. Closure of the whole or part of the company for a maximum of 1 (one) year;
   4. Revocation of all or part of certain rights or the elimination of all or part of certain benefits, which have been or can be given by the Government to the convicted person.

(2) If the convict does not pay the replacement money as referred to in paragraph (1) letter b no later than 1 (one) month after the court decision has obtained permanent legal force, then the prosecutor can confiscate his property and be auctioned to cover the replacement money.

(3) In the event that the convict does not have sufficient assets to pay the replacement money as referred to in paragraph (1) letter b, then the sentence of imprisonment that does not exceed the maximum threat of the principal is in accordance with the provisions in this Law and the duration of the sentence has been determined in court decisions.

State losses due to corruption are a consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption. In considering the letter (a) and letter (b) of Law No. 31 of 1999 concerning Eradication of Corruption Crime, affirmed:

a. that corruption is very detrimental to state finances or the country's economy and hampers national development, so it must be eradicated in order to create a just and prosperous society based on Pancasila and the 1945 Constitution.
b. b. that the consequences of criminal acts of corruption that have occurred so far in addition to harming the state's finances or the country's economy, also hamper the growth and sustainability of national development which demands high efficiency.

The Law on Eradicating Corruption Crime implies 2 (two) things. First, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. Second, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

In accordance with the predicate given to corruption as an extraordinary crime, achieving the goal (political) of criminal law so that there is no state loss if corruption occurs, it is not easy. Since corruption was regulated separately as a special offense outside the Criminal Code in 1957 (1957 was recorded as the era of enactment of the Military Regulations from 1957 to 1958. Initially corruption was regulated in the Criminal Code, with the development of the situation corruption was specifically regulated in Law its own law), following Law No.24/Prp/1960 concerning Investigation, Prosecution and Corruption Criminal Investigation, Law No. 3 of 1971 concerning the Eradication of Corruption Crime, and finally Law No. 31 of 1999 concerning Eradication of Corruption Crimes amended by Law No. 20

of 2001 concerning changes to Law No. 31 of 1999 which is still valid; the return of state losses due to corruption has never been maximized.

Changes after changes to the regulation of criminal acts of corruption in addition to marking the sincerity and determination of the Indonesian people to eradicate corruption is not a crime, also marking efforts to improve the substance of the regulation against corruption in order to be empowered to save a qualified state finances, for example, regarding interpretations or terminology of corruption, elements against the law and types of criminal sanctions. Law No. 31 of 1999 concerning Eradication of Corruption Crime formulates the terminology of corruption as: ... actions enriching oneself or others or corporations against the law (*wederrechtelijkeheid*) in formal terms (*formale wederrechtelijkeheid*) and material (*materiel wederrechtelijkeheid*).

The meaning of resisting formal or material law is that even if the act is not regulated in the laws and regulations, but if it is deemed despicable because it is not in accordance with the sense of justice or norms of social life in society, then it can be punished. In this provision the word "can" before the phrase "detrimental to state finances or the economy of the country" indicates that the crime of corruption is a formal offense, namely the existence of corruption is enough to fulfill the elements of action that have been formulated not with the emergence of consequences (Prayudi 2007). For the types of criminal sanctions the Law on Eradicating Corruption Crime is considered to be preparing very heavy criminal sanctions, ranging from capital punishment, additional criminal penalties as referred to in the Criminal Procedure Code and article 18 of Law No. 31 of 1999.

In practice, the application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

In addition to these social facts, there are quite a number of empirical facts and legal facts related to the maximum returns on state finances in practice so far. An example of the 2014 corruption eradication trend, the total state loss for 2014 for alleged corruption cases which were under investigation was Rp. 5.29 trillion, while the return on state finances for the first semester of 2015 is only 9% (nine percent). Furthermore, Indonesian Corruption Watch (ICW) released the refund of state losses for the first semester of 2015 as follows:

> The total state loss during the first semester of 2015 due to corruption was Rp. 691,772 billion out of 161 cases, but those who were decided to pay for replacement money were only Rp. 63,175 billion, Out of 161 cases found in the value of state losses, only 99 cases were decided to pay substitute money. Of the 193 cases and

> 230 defendants who were tried in the Corruption Court, at least 185 defendants were required to pay a fine with varying amounts.

In addition to the state losses, Indonesia Corruption Watch also indicated that arrears in alleged corruption cases at the High Prosecutor's Office and Regional Police with an accumulative state loss of at least Rp. 5.16 trillion during 2010-2014. ICW also emphasized the condition of corruption cases in Indonesia, as follows:

> ICW found that at least ten High Prosecutor's Office (*Kejaksaan Tinggi,* Kejati) which also oversee the District Attorney General's Offic and have dozens of cases of alleged corruption that are stagnant at the investigation level and with state losses of tens to hundreds of billions. The area is East Java (64 cases, Rp. 269 billion); South Sulawesi (56 cases, Rp. 97 billion); North Sumatra (51 cases, Rp. 1.28 trillion); West Java (46 cases, Rp. 325 billion); NAD (46 cases, Rp. 338 billion), Riau (45 cases, Rp1.5 trillion); NTT (40 cases, Rp. 609 billion); Jambi (39 cases, Rp. 64 billion); Maluku (34 cases, Rp. 36 billion); and Central Java (29 cases, Rp. 111 billion).
> While the Regional Police, which also oversees the Resort Police, has at least ten areas that are stagnant in handling cases of alleged corruption with state losses from tens to hundreds of billions. The area includes North Sumatra (30 cases, Rp. 94 billion); East Java (22 cases, Rp. 14.8 billion); NAD (21 cases, Rp. 133 billion); South Sulawesi (18 cases, Rp. 34 billion); Central Java (16 cases, Rp.22 billion); Bengkulu (15 cases, Rp. 15 billion); West Java (15 cases, Rp. 15 billion); East Kalimantan (11 cases, Rp.122 billion); NTT (11 cases, Rp. 7.5 billion) and North Sulawesi (11 cases, Rp. 42 billion).

Regarding the success of returning state losses, for example in the period of 2014, the state money saved by the KPK reached Rp 2.8 trillion. This figure far surpasses that saved by the Indonesian Police, which is only Rp. 67.7 billion and the Attorney General's Office is Rp. 792 billion.

When compared to the mode of corruption in Indonesia, the success of the return on state finances mentioned above is not significant. As shown in table 1 the mode of corruption which ranks first (80.63%) is a mode of harming state finances and / or misusing authority, following bribes (15.63%) and embezzlement in positions and gratuities of 1.25% respectively.

The above figures show that politics or the objectives to be achieved by criminal law (especially the Law on the Eradication of Corruption Crime) has not been significant enough, if not wanted to be said to fail to restore state finances. The ratio between the real losses of the country and those that were successfully returned is still very far away. The condition is further exacerbated by the performance of KPK corruption investigations which have been declining lately. In the period of 2010-2014, the KPK on average investigated 15 corruption cases with a state loss of Rp. 1.1 trillion. But in the first semester of 2015, the KPK only investigated 10 corruption cases with state losses and bribes of Rp. 106.4 billion (Makawimbang 2014).

The decline in the performance of KPK investigations in the first semester of 2015 occurred because this institution experienced a very strong counter-attack this semester. The attacks included the criminalization of leaders and investigators, pretrial, terror and revision of the KPK Law. This counterattack has changed the constellation, psychology and motivation of all levels of the KPK so that it has an impact on the ability of the investigation.

LONG HISTORY OF COMMITMENT ON ERADICATING CORRUPTION IN INDONESIA

THE LONG History of the commitment to eradicating corruption is an important milestone in the governance of a country. In Indonesia, almost every election of the head of state does not escape the seriousness of looking at what commitments are given by prospective heads of state to eradicate corruption. Inevitably this happens because corruption continues to erode people's rights to state wealth. Abundant state wealth, almost nothing left for people's welfare.

Commitment to eradicating corruption is indeed hard to do. Various efforts to eradicate corruption are proclaimed in each period of the country's administration. Some references state that juridical corruption eradication only began in 1957, with the issuance of Military Rulers Regulation Number PRT/PM/06/1957. The regulation known as the Regulation on Eradicating Corruption was made by the military authorities at that time, namely the Army and Navy Military Rulers.

The government issued Presidential Decree No.28 of 1967 concerning the Establishment of the Corruption Eradication Team. In its implementation, the team cannot eradicate corruption to the maximum, it can even be said to be almost non-functioning. This regulation even triggered various forms of protest and demonstration starting in 1969 and its peak in 1970 which was then marked by the establishment of Commission IV which was tasked with analyzing problems in the bureaucracy and issuing recommendations to overcome them.

The new order was arguably the most issued regulation because the New Order period was quite long. But unfortunately there are not many regulations made that are effective and make corruption slightly reduced from the Indonesian earth. Continuing his speech on Indonesian Independence Day on August 17, 1970, the Soeharto government issued Law No.3 of 1971 concerning the Eradication of Corruption Crimes. This rule imposes maximum life imprisonment and a maximum fine of Rp. 30 million for all offenses categorized as corruption.

Complementing the law, the state documents of the General Guidelines for State Policy (GBHN) which contain one of them are the willingness of the people to eradicate corruption. However, the implementation of the GBHN was leaked because the state management was characterized by a lot of state budget fraud and leakage in all sectors without any control at all.

State organs such as parliament which have a supervisory function are weakened. The DPR's budget is determined by the government so there is no oversight function. The judiciary was made similar by the New Order regime, so that there was no power left to be able to prosecute corruption cases independently. The strength of civil society was spelled out, the New Order authorities slowly limited the movement of society and intervened to maintain their power.

The following are some of the regulations that were issued in the New Order era relating to eradicating corruption:

1. 1973 GBHN concerning Development of Authority and Clean Apparatus in State Management;
2. The 1978 GBHN concerning Policies and Measures in Order to Control State Apparatuses from Problems in Corruption, Abuse of Authority, Leakage and Waste of State's Wealth and Finance, Illegal Levies and Various Other Types of Misappropriation that Inhibit Development Implementation;
3. Law No.3 of 1971 concerning Corruption Crime;
4. Presidential Decree No. 52 of 1971 concerning Tax Reporting of Officials and Civil Servants;
5. Presidential Instruction Number 9 of 1977 concerning Operation of Control; and
6. Law Number 11 of 1980 concerning Bribery Crimes.

The long journey to eradicate corruption is like getting a fresh breeze when a state institution emerges that has clear duties and authority to eradicate corruption. Although previously, this was said to have been missed from the agenda mandated by the provisions of Article 43 of Law Number 31 Year 1999 as amended by Law Number 20 Year 2001, the discussion of the KPK Bill could be said to be a form of government seriousness in eradicating corruption. The delay in the discussion of the bill was motivated by many reasons. First, changes in the constitution of money implicate in changes to the constitutional map. Second, legislative heavy tendencies in the DPR.

Third, the tyrannical tendency of the DPR. The delay in the discussion of the KPK Bill was also caused by an internal problem that hit the political system in Indonesia in the reform era.

POLITICS OF LAW ON ERADICATING CORRUPTION

Law is a very complex entity, including a pluralistic reality of society, has many aspects, dimensions, and phases (Sidharta 1999). When likened to an object it is like a gem, which each slice and angle will give a different impression to everyone who sees or looks at it.

Departing from the complexity of the law, since ancient Greece, law has always attracted attention and become a discourse that is constantly debated among scholars. The complexity of the law causes the law to be learned from various perspectives (Rahardjo 1991). The birth of various legal disciplines in addition to legal philosophy (Philosophy of Law) and legal science (Science of Law), such as legal theory (Theory of Law), legal history (History of Law), legal sociology (Sociology of Law), legal anthropology (Anthropology of Law), comparative law (Comparative of Law), legal logic (Logic of Law), legal psychology (Psychology of Law), and now growing legal politics (Politic of Law), are irrefutable proof of the truth of statements in above (Machmudin 2001).

The history of the emergence of legal politics, inevitably, we will talk about the background, when, where, and who initiated this discipline for the first time. To answer that question is not easy because the supporting literature is very minimal, we might say there is nothing (Rahardjo 1991). Even if there is one, it is very limited and only seems to be explained at a glance, so that at a certain level, our knowledge of the historical aspects of legal political discipline is very limited.

Satjipto Rahardjo explained, in the 19th century in Europe and America (Rahardjo 1985), individuals were the center of legal regulation, while the highly developed legal field was civil law (material rights, contracts, illegal acts). Legal expertise is determined by technical skills or craftsmanship (legal craftsmanship) (Ali 2002).

People also feel that by treating the law above, by assuming law as an institution and an independent force in society, then the attitude that all can be fulfilled by themselves is complete. Law, legal discipline, legal analysis methods, all do not need help and cooperation with other disciplines.

Normative and dogmatic analysis is the only way that is considered to be the most adequate and no other method and approach is needed to assist with legal assessment. Such normative and dogmatic methods are considered self-sufficient, while law is increasingly becoming an esoteric field (Rahardjo 2000). Such circumstances and developments, of course, relate to the increasingly important role of the law in supporting and securing the progress of society as mentioned above, as well as greater trust in the law.

The atmosphere immediately becomes different, when the ways of looking at and working on such a law are faced with changes that occur in society due to the success of modernization and industrialization. The individual's position now begins to be rivaled by the appearance of other subjects, such as community, collectivity, and country. The fields which later became more prominent were public law, administrative law, socio-economic law. A new understanding emerged which essentially sued the establishment of the technical skills mentioned above, and replaced it with "planning", "legal experts as social architects", and so on. Now law is no longer seen as an autonomous and independent matter, but is understood functionally and seen as always interdependent in relation to other fields in society (Rahardjo 2009).

It is necessary to be fully aware of the legal reviewers in Indonesia that the various legal terms currently used in legal literature in Indonesia are adopted from various legal terms contained in the tradition of Dutch law, such as constitutional law (*staatrecht*), civil law (*privaatrecht*), criminal law (*straafrecht*), and administrative law (*administratiefrecht*) (Wignjosoebroto 2014; Thalib 1987; Soehino 1984; Kansil 1992). The same thing applies to the term legal politics.

Etymologically, the term legal politics is an Indonesian translation of the Dutch legal term *rechtitolek*, which is a form of the word *recht* and *politiek*. This term should not be confused with terms that appear behind, *politiekrecht* or political law, which was proposed by Hence van Maarseveen because both have different connotations. The latter term relates to another term offered by Hence van Maarseveen to replace the terms of constitutional law. For this purpose he wrote an essay entitled "*Politiekrecht, als Opvolger van het Staatrecht*".

The term *rechtspolitiek*, in Indonesian the word *recht* means law. The law itself comes from Arabic *hukm* (plural words *ahkam*), which means judgment (judgment, verdict, decision), provision, command, government, power (authority, power), punishment (sentence), and others (Wehr 1980).

The verb comes from the Arabic *hakama-yahkumu*, meaning to decide, judge, establish, order, govern, punish, control, and so on. The origin of the word *hakama* means controlling with one control (Mas'ud 1992). In connection with this term, until now, there has been no unity of opinion among the legal theorists about what the actual legal boundaries are.

The etymological explanation above is certainly not satisfying because it is still so simple, that in many ways it can confuse our understanding of what constitutes legal politics. Some definition of legal politics is formulated by several legal experts who have so far been sufficient to observe the development of these disciplines. Wahjono (1986) emphasized that political law (or politics of law) is a policy of state administration that is fundamental in determining the direction, form and content of the law to be formed and about what is used as a criterion to punish something. Thus according to Padmo Wahjono, legal politics is related to applicable law in the future (*ius conctituandem*).

Tueku Mohammad Radhie, stated that political law is a statement of the will of the state authorities regarding the laws that apply in their territory, and concerning the direction of legal development built (Radhie 1973). The definition of legal politics formulated by Radhie seems to have two interrelated and continuous face, *ius constituendum* and *ius contitutum*. Meanwhile, Soedarto (1986) considered that political law is the policy of the state through state agencies that are authorized to determine the desired regulations, which are expected to be used to express what is contained in society and to achieve what is aspired (Soedarto 1979). In another book, it is explained that legal politics is an attempt to realize rules that are good with circumstances and situations at a time (Soedarto 1986).

The complexity of politics of law as described by Rahardjo (1991), and for instance, emphasized that politics of law as an activity to choose and the way to be used to achieve a certain social and legal goals in society (Rahardjo 1991). According to Satjipto Rahardjo, there are several fundamental questions that arise in the study of legal politics, namely:

a. what goals are to be achieved with the existing legal system;
b. ways and which ones, which are considered the best for being able to achieve these goals;
c. when the law needs to be changed and through the ways in which the change should be carried out; and
d. can a standard and established pattern be formulated, which can help us decide on the process of selecting goals and ways to achieve these goals well (Rahardjo 1991).

Sunaryati Hartono recognized that legal politics as a tool or means and steps that can be used by the government to create the desired national legal system and with the national legal system the ideals of the Indonesian people will be realized (Hartono 1991). The statement "*creating the desired national legal system*" implies that the legal political framework according to Sunaryati Hartono is more focused on the legal dimension that applies in the future or *ius constituendum*. The same thing was stated by Garuda Nusantara (1985) that politics of national law can literally be interpreted as a legal policy (*legal policy*) that would be applied or implemented nationally by a certain state government.

POLITICS OF CRIMINAL LAW OR PENAL POLICY

THE TERM "*Politics of Criminal Law*" in this paper is taken from the term Policy (UK) or *Politiek* (Netherlands). Therefore, the term "Criminal Law Politics" can also be referred to as "Criminal Law Policy" or "Penal Policy". In many literatures, the political term of criminal law is often known by various terms, including political reasoning, criminal policy or *strafrechtspolitiek*. Many legal scholars emphasized and described some

definition and limitation of politics of criminal law or penal policy (Marpaung 2005)

Marcx Ancel stated that penal policy is a science as well as art which in the end has a practical purpose to enable positive law regulations to be better formulated and to provide guidance not only to legislators, but also to courts that apply laws and also to organizers or implementers court decision (Nawawi Arief 2011). Meanwhile, Mulder (1980) as quoted by Nawawi Arief (2011) emphasized that *strafrechtspolitiek* is a policy line to determine: (1) how far the applicable criminal provisions need to be amended or updated; (2) what can be done to prevent criminal acts; and (3) the way in which investigations, prosecutions, trials and implementation of criminal acts must be carried out.

Soerjono Soekanto stated that the politics of criminal law basically includes the act of choosing values and applying those values in reality. Politics to prevent delinquency and crime: in other words, the politics of criminal law is an attempt to rationally organize rational social reactions to organize social reactions to delinquency and crime (Nawawi Arief 1991).

Besides some of the meanings stated above, the notion of political criminal law can also be expressed based on the notion of criminal politics. Criminal politics is a rational effort to overcome crime. The politics of criminal law manifests in the form of Penal (criminal law) and Non-penal (without criminal law). Thus, as part of criminal politics, criminal law politics can be interpreted as "*a rational effort to combat crime by using criminal law*".

Starting from several descriptions of the political understanding of criminal law stated above, it can generally be stated, that the politics of criminal law is "*an attempt to overcome crime through rational criminal law enforcement, which is to fulfill a sense of justice and usability*".

As stated above, the politics of criminal law is one of the efforts to overcome crime, manifesting it in the form of rational criminal law enforcement. There are three stages in criminal law enforcement, namely:

1. *Formulation Stage*

   The formulation stage is the stage of enforcement of *in abstracto* criminal law by the legislature. In this stage, lawmakers carry out activities to select values that are in accordance with the current situation and situation that is to come. Then formulate it in the form of criminal legislation to achieve the results of criminal legislation which is best in the sense of meeting the requirements of justice and usability. This stage can also be called the Legislative Policy Stage.

2. *Application Stage*

   The application stage is the stage of criminal law enforcement (the stage of applying criminal law) by law enforcement officials from the police to the Court. In this stage law enforcement officers have the duty to uphold and implement criminal laws that have been made by law makers. In carrying out this task, law enforcement officers must cling to the values

of justice and usability. This second stage can also be referred to as the Judicial Policy Stage.

3. *Execution Stage*

Execution stage is the stage of enforcement (implementation) of criminal law in a concrete manner by officers implementing criminal law. In this stage the criminal implementing apparatus is tasked with upholding criminal legislation that has been made by law makers through the application of the criminal stipulated in the court ruling. In carrying out the punishment that has been determined in the court decision, the executing officers of this criminal conduct in carrying out their duties must be guided by criminal legislation made by legislators and values of justice and usability.

The three stages of enforcement of criminal law, seen as a rational effort or process that is intentionally planned to achieve a certain goal, clearly must be a chain of unbroken activities that derive from values and lead to criminal and criminal punishment.

Starting from the description above, it can be stated that the enforcement of a rational criminal law as a manifestation of the politics of criminal law involves at least three interrelated factors, namely the enforcement of criminal law, criminal values and laws (legislation). The division of these three factors can be attributed to the division of the three components of the legal system, namely legal substance, legal structure, and legal culture (Friedman 2009).

THEORY OF LEGAL PURPOSE: ANAYLSIS OF CRIMINAL LAW PURPOSES

GUSTAV Radbruch is a legal philosopher and a prominent legal scholar from Germany who teaches the concept of three basic legal elements. He stated these three basic concepts during the World War II era. The legal objectives stated by various experts are also identified as legal objectives. The three objectives of the law are justice, certainty, and benefit (Is Sadi 2017).

1. Justice

IN JUSTICE there are philosophical aspects namely legal norms, values, justice, morals, and ethics. Law as the bearer of the value of justice, the value of justice is also the basis of the law as law. Justice has a normative and constitutive nature for the law. Justice is a legal moral basis and at the same time a benchmark for a positive legal system and without justice, a rule does not deserve to be a law. Furthermore, Nigel Walker (1969) emphasized that the concept of justice—retributive justice, especially in Criminal Law—, divided into two types, namely: (1) pure retributive theory, which argues that

the criminal must be suitable or commensurate with the mistakes of the maker and (2) adherents retributive theory is not pure (with modification) which is divided into two types, namely: (1) limited retributive theory (the limiting retributivist) which argues that the criminal does not have to match / match the error, except that it should not exceed the appropriate / equal limit with the defendant's fault, and (2) distributive (retribution in-distribution) retributive theory, abbreviated as the "distributive" theory which argues that the criminal should not be imposed on innocent people, but the criminal does not have to be matched and limited by mistakes. The principle of "geen straf zonder schuld", no criminal without error, is respected, but it is possible for an exception for example in terms of *strict liability*.

Muchsin (2004) explains that justice is one of the objectives of the law apart from the certainty of the law itself and also the benefits of the law, while the meaning of justice itself is still a debate. But justice is related to the equitable distribution of rights and obligations. Thus the central and dominant position and role of the value of justice for the law, so Gustav Radbruch stated "*rechct ist wille zur gerechtigkeit*" (law is the will for justice) (Sisworo on Putra 2016)

Whereas Soeyono Koesoemo Sisworo as quoted by Putra (2016) defines justice as an inner and outward balance that gives possibility and protection to the presence and development of truth that has a climate of tolerance and freedom. Furthermore, the law does not exist for self and its own needs but for humans, especially human happiness.

The law has no purpose in itself. Law is a tool to uphold justice and create social welfare. Without justice as its ultimate goal, the law will fall into a means of justifying the arbitrariness of the majority or the authorities against the minority or the controlled party. That is why the main function of the law is ultimately to uphold justice.

Justice is one of the most discussed purposes of law throughout the course of the history of legal philosophy. The purpose of the law is not only justice, but also legal certainty and the benefit of the law. Ideally, the law does have to accommodate all three. Judges' decisions, for example, are as much as possible the result of all three. Even so, there are still those who argue that among the three objectives of the law, justice is the most important legal goal, and some even argue that justice is the only legal goal. In relation to this, Plato (428-348 BC) as quoted by Schmandt, et.al (2005) once stated that the ideal state if it is based on justice and justice for him is balance and harmony. Harmony here means that the community lives in line and harmonizes with the goals of the country (policy), where each citizen lives well according to their nature and social position. But on the other hand, critical thinking views justice as nothing but a mirage, like people seeing a sky that seems to be visible, but never reaching it, even never approaching it. However, it must be acknowledged that arbitrariness will occur without justice. Actually justice and truth are the most important virtues, so these values cannot be exchanged for any value. In terms of this ethical theory, legal justice is prioritized by

reducing the legal certainty and benefit of the law, such as a pendulum (pendulum) hour. Prioritizing legal justice, it will have an impact on the lack of legal certainty and benefit of the law, and vice versa.

2. Certainty

LEGAL certainty is the certainty of laws or regulations, all kinds of methods, methods, etc. must be based on laws or regulations. In legal certainty there is a positive law and written law. Written law written by an authorized institution, has strict sanctions, is legitimately marked by the announcement in State Institutions. Legal certainty is a question that can only be answered in a normative, not sociological manner. Normative legal certainty is when a rule is made and promulgated with certainty because it regulates clearly and logically.

Obviously in the sense that it does not cause doubt (multi-interpretation) and is logical in the sense that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. The norm conflict caused by uncertainty in rules can be in the form of norm contestation, norm reduction or norm distortion. Mainstream thinking assumes that legal certainty is a condition where human behavior, both individuals, groups, and organizations, is bound and within the corridor that has been outlined by the rule of law. Ethically, this view is born of concern that Thomas Hobbes once said that humans are wolves for other humans (*homo homini lupus*). Humans are violent beings who are a threat. For this reason, birth law is a guideline to avoid falling victims. Then the influence of Francis Bacon's thinking in Europe on law in the nineteenth century appeared in the law and order approach. One view in this law likens that between normative laws (regulations) can be filled with order which means sociological. Since then, humans have become a component of machine-shaped laws that are rational and quantitatively measured from the punishments that occur because of their violations. So, it can be understood that legal certainty is the certainty of the rule of law, not the certainty of actions against or actions that are in accordance with the rule of law. Because the sense of legal certainty is not able to truly describe the certainty of behavior towards the law.

3. Benefits

THE work of law in the community is effective or not. In the value of benefits, the law serves as a tool for photographing community phenomena or social reality. Law also should provide benefits or utility for the community. The followers of the utility community consider that the purpose of the law is solely to provide the maximum benefit or happiness for as many people as possible. The handling is based on social philosophy stated that every citizen seeks happiness, and law is one of his tools. One of the most radical figures of

utility flow was Jeremy Bentham (1748-1832), a philosopher, economist, jurist, and legal reformer, who had the ability to formulate the principle of usability (utility) into an ethical doctrine, known as utilitarianism or utilitarian (Ohoitimur 1997).

The principle of utility was stated by Bentham in his monumental work *Introduction to the Principles of Morals and Legislation (1789),* Bentham (1960) defines it as the nature of all objects tend to produce pleasure, goodness, or happiness, or to prevent damage, suffering, or crime, and unhappiness to those whose interests are considered. The flow of utilities considers that in principle the purpose of the law is only to create community benefit or happiness. The flow of utilities includes practical moral teachings which according to its adherents aim to provide the maximum benefit or happiness for as many citizens as possible. Bentham argues that the State and law exist solely for the true benefit, namely the happiness of the majority of the people. However, the concept of utility also gets sharp points as experienced by the first value above, so that with the criticism of the principle of the usefulness of the law, John Rawls develops a new theory that avoids many problems that are not answered by utilitarianism. The theory of criticism of utilities is called the Rawls or Justice as Fairness theory (justice as honesty) (Rawls 2009).

CORRUPTION IN THE CONTEXT OF CRIMINAL LAW ENFORCEMENT

IN VARIOUS parts of the world, corruption always gets more attention than other criminal acts. This phenomenon is understandable given the negative impact caused by this crime. The impact can touch various fields of life. Corruption is a serious problem. These crimes can endanger the stability and security of the community, endanger socio-economic development, and also politics, and can damage the values of democracy and morality because gradually these actions seem to be a culture (Hartanti 2008; Hatta 2010).

The increasing pattern of corruption in this country is a picture of the fragility of the government undermined by corruption. As the saying goes: fish rot from its head; corruption is mostly carried out by elite political parties and government. The Interior Ministry noted that from 2004 to July 2012, there were thousands of regional officials involved in corruption, starting from governors, mayors, regents to members of regional and central legislatures (Januar 2013).

Etymologically, criminal acts are juridical technical terms originating from the Dutch language *Strafbaarfeit* (Sudarsono 2007), and there are two word-forming elements, namely *strafbaar* and *feit*. *Feit* words in Dutch are

interpreted in part from reality, while *strafbaar* means punishable, so that literally *Strafbaarfeit's* words mean part of the reality that can be punished.

According to Moeljatno in Sudarto (2007) as quoted by Prayudi said that the term *Strafbaarfeit* is translated as a criminal act, the act is a condition made by someone or something done. This action refers to the consequences or consequences. So it has an abstract meaning that shows two concrete circumstances, namely the existence of certain events and the people who act, which caused the incident (Prayudi 2010). This *strafbaarfeit* become more complicated in the enforcement process especially in criminal law, because not only concerning to the criminal act and criminal responsibility, but also the concrete condition when the crimes happened.

In terminology, corruption comes from *corruptie* or *corruptus* latin languages. It is from this Latin language that it falls into various languages such as English: corruption, corrupt; French: corruption, and *corruptive*; Dutch: *Korruptie* (Hamzah & Dahlan 2007). Furthermore, it is stated that corruption itself also originates from the original word *corrumpere*, an older Latin word which means damage or depravity, other than that it is also used to indicate bad conditions or actions (Camphell 1979)

According to the Indonesian Dictionary (KBBI), corruption comes from the word corrupt, which means bad, damaged, rotten, likes to use goods (money) entrusted to it; can be bribed (use his power for personal gain). Corruption according to the terminology is fraud or misuse of state money (companies, organizations, foundations and so on) for personal or other people's benefits (BPPB 2016). Hamzah & Dahlan (2007) also said that literally, the meaning of corruption can be:

a. Crime, decay, can be bribed, immoral, depravity and dishonesty.
b. Bad actions such as embezzlement of money, receipt of bribes and so on.
c. Acts that creates a situation that is bad, evil and despicable behavior, or moral depravity, bribery and forms of dishonesty.

Definition of corruption in accordance with Law Number 20 of2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crime (Law No. 20 of 2001), namely: "*anyone who illegally commits acts of self-enrichment or other people or a corporation that can harm the State's or the country's economy*".

Corruption, in addition to being an extraordinary crime, has also become an international crime. Corruption crimes have a correlation with other forms of crime, especially organized crime and economic crime, including money laundering crimes. Corruption has also become systematic and entrenched behavior (Mardani 2009; Naning 1983).

There are so many definitions from experts who try to explain the meaning of corruption in their respective perspectives, both from a moral, religious, socio-cultural and legal perspective. From any perspective, corruption with all its forms and modus operandi is interpreted as a disgraceful act that is contrary to moral, social, cultural, religious and legal values. There is no place for corruption (Syamsuddin 2012).

The 2003 United Nations Convention against Corruption (UNCAC) Convention, describing the problem of corruption is a serious threat to the security stability of national and international communities, has weakened the values of democracy and justice and endangered sustainable development and law enforcement.

The impact of the crime of corruption itself causes the country's development process to be hampered towards a better one, namely increasing welfare and alleviating people's poverty. In addition, powerlessness before the law in the sense of financial aspects, position or closeness with officials plus the lack of commitment from the government elite is a factor why corruption still thrives in Indonesia. That all happened because the law is not the same as justice, the law comes from the human brain of the ruler, while justice comes from the heart of the people (Ayudo 2012).

Recognizing the complexity of corruption problems in the midst of multi-dimensional crises and the obvious real threats that will occur, the crime of corruption can be categorized as a national problem that must be dealt with seriously through the balance of decisive and clear steps involving all potential exists in the community, especially the government and disciplinary officials.

Corruption is an extraordinary crime, because excess corruption can damage public trust in the State, disrupt economic growth, hinder efforts to alleviate poverty, cripple investment, both foreign and local, destroy foreign trust in Indonesia, undermine APBN/APBD can threaten political stability and sustainable development.

According to international views, corruption has also become an international crime (International Crime). This is in accordance with the United Nations Convention against Corruption (UNCAC). Indonesia itself has had Law Number 1 of 2006 concerning Reciprocal Assistance for Criminal Problems and has ratified the UNCAC on April 18, 2006 with Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Anti-Corruption, 2003).

Corruption crimes correlate with other forms of crime, especially organized crime and economic crime, including money laundering crimes. Corruption in Indonesia has become systematic and entrenched behavior.

As complex as the problem of corruption, Indonesia has had several regulations concerning eradicating corruption and regulations relating to corruption crimes, such as Law Number 28 of 1999 concerning the Implementation of Clean and Free of Corruption, Collusion and Nepotism, Law No. 31 of 1999 which was later amended by Law No. 20 of 2001, Law Number 30 of 2002 concerning the Corruption Eradication Commission, Law No. 7 of 2006, Law Number 15 of 2002 *jo*. Law Number 15 of 2003 concerning Money Laundering, Presidential Instruction Number 5 of 2004 concerning the Acceleration of Corruption Eradication, and Presidential Decree Number 11 of 2005 concerning the Coordination Team for the Eradication of Corruption Crimes.

The causes of the emergence of corruption are internal and external. Internally the drive for corruption is caused by: encouragement of need (inadequate salary), encouragement of greed (greed), lack of moral strength, consumptive lifestyle, laziness (wanting a lot without effort), weak faith (not practicing the teachings religion); while the external causes of corruption are the environment (corruption has become a culture or system), opportunities (weak supervision), inadequate systems of accountability, weak legislation and law enforcement agencies, leaders who do not set an example, no right organizational culture, and others.

Some previous research stated that corruption have various modes (Ibrahim, Yusoff, and Koling 2018; Arifin, Utari, and Subondo 2016; Arifin 2016; Arifin 2014a; Arifin 2014b; Ash-shidiqqi & Wibisono 2018; Wibowo 2018) such as:

a. Extortive corruption is corruption in bribery or bribery mode carried out by employers to officials to obtain certain facilities;
b. Manipulative corruption means a person's request to a legislative or executive official to make certain regulations or regulations that can benefit the person even if it has a negative impact on the wider community;
c. Nepotistic corruption is corruption that is caused by family ties, such as having a family that is given excessive facilities or is accepted as a civil servant without any consideration or matters worthy of holding the position; and
d. Subversive corruption is the arbitrary robbery of state wealth to be transferred to foreign parties for personal gain.

The elements of criminal acts of corruption can actually be seen from the definition of corruption or offense formulation contained in the provisions of applicable laws and regulations, and some understanding and formulation of offenses for corruption as stated above. The elements of criminal acts of corruption that are inventoried in Law No. 20 of 2001 are:

a. The actions of a person or legal entity against the law;
b. This action abuses authority;
c. With the intention to enrich yourself or others;
d. Such actions are detrimental to the state or economy of the country or should be suspected of harming the country's finances and economy;
e. Giving or promising something to a civil servant or state administrator with the intention that the civil servant or the organizer of the country acts or does not do something in his position, which is contrary to his obligations;
f. Giving something to a civil servant or state administrator because or relating to something that is contrary to the obligation, carried out or not done in his position;
g. Giving or promising something to the judge with the intention to influence the case decision handed over to him to be tried;

h. Giving or promising something to someone who, according to the provisions of legislation, is determined to be an advocate to attend a court hearing with the intention of influencing the advice or opinion to be given in connection with a case submitted to the court for trial;
i. The existence of fraudulent acts or deliberately allowing the occurrence of fraudulent acts;
j. Civil servants or people other than civil servants who are assigned to run a public office continuously or for a while, intentionally embezzling or securities held for their position or allowing the money or securities to be taken or embezzled by others or assisting in conducting the deed;
k. By intentionally darkening, destroying, destroying, or not being able to use goods, deeds, letters, or lists that are used to convince or prove in advance the competent authorities, who are controlled because of their position and allow others to eliminate, destroy, destroy or register and help other people eliminate, destroy, destroy, or make unused items, deeds, letters or lists;
l. A civil servant or organizer who receives a gift or promise even though it is known or reasonably suspected, that the gift or promise is given because of the power or authority related to his position, or that in the mind of the person giving the gift or promise is related to his position.

With the existence of elements of corruption committed in the laws and regulations, then every act of a person or corporation that meets the criteria or formulation of the above offense, then he is subject to sanctions in accordance with the applicable provisions. It must be remembered and understood that the elements of criminal acts are very important to know because by not fulfilling the element of a crime, the perpetrator of crime can be free from all lawsuits and in fact causes so that a defendant of corruption is free from the fulfillment of elements that is.

STRAFRECHTPOLITIEK ON THE ASSETS RECOVERY OF CORRUPTION IN INDONESIA: PROBLEMS AND CHALLENGES

CORRUPTION, Collusion and Nepotism for developing countries, is like a disease that is difficult to avoid and seek a cure. Despite being the determination of all nations in the world to eliminate or reduce the level of intensity, quality and quantity in an effort to create clean governance and good governance, corruption is difficult to eradicate. All parties continue to aim to be able to realize a just and prosperous society, prosper in justice, and justice in prosperity in a Law State and the Welfare State that is aspired. (Sulistia & Zurnetti 2012)

Corruption is also a door for the flourishing of terrorism and violence because social inequality and injustice still continue or take place, while a small proportion of the community can live better, more prosperous, luxurious in the midst of poverty and limited society in general. The emergence of acts of terror is caused by the widening gap and injustice in society. What the perpetrators of corruption often do not realize is that corruption is a complex crime and has social implications for others because it involves the right of other people to get the same welfare. Even corruption can be called a social sin where a sin or crime is committed and affects many people and the value of sin is far greater than the personal sin (Mujiran 2004).

Commitment to eradicating corruption is an important milestone in the governance of a country. In Indonesia, almost every election of the head of state does not escape the seriousness of looking at what commitments are given by prospective heads of state to eradicate corruption. Inevitably this happens because corruption continues to erode people's rights to state wealth. Abundant state wealth, almost nothing left for people's welfare.

Some references state that juridical corruption eradication only began in 1957, with the issuance of Military Rulers Regulation Number PRT/PM/06/1957. The regulation known as the Regulation on Eradicating Corruption was made by the military authorities at that time, namely the Army and Navy Military Rulers.

Presidential Decree No.28 of 1967 concerning the Establishment of the Corruption Eradication Team. In its implementation, the team cannot eradicate corruption to the maximum, it can even be said to be almost non-functioning. This regulation even triggered various forms of protest and demonstration starting in 1969 and its peak in 1970 which was then marked by the establishment of Commission IV which was tasked with analyzing problems in the bureaucracy and issuing recommendations to overcome them.

The state document outline of the Big State Policy (GBHN) which contains one of them is the willingness of the people to eradicate corruption. However, the implementation of the GBHN was leaked because the state management was characterized by a lot of state budget fraud and leakage in all sectors without any control at all.

State organs such as parliament which have a supervisory function are weakened. The DPR's budget is determined by the government so there is no oversight function. The judiciary was made similar by the New Order regime, so there was no strength left to be able to prosecute corruption cases independently. The strength of civil society was spelled out, the New Order authorities slowly limited the movement of society and intervened to maintain their power.

The politics of criminal law in the framework of returning state losses due to criminal acts of corruption needs to be stressed so as not to get out of its main goal, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today. State losses due to corruption are a

consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption. In considering the letter (a) and letter (b) of Law No. 31 of 1999 concerning Eradication of Corruption Crime, affirmed:

a. that corruption is very detrimental to state finances or the country's economy and hampers national development, so it must be eradicated in order to create a just and prosperous society based on Pancasila and the 1945 Constitution.
b. that the consequences of criminal acts of corruption that have occurred so far in addition to harming the state's finances or the country's economy, also hamper the growth and sustainability of national development which demands high efficiency.

The Law on Eradicating Corruption Crime implies 2 (two) things. First, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. Second, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

In accordance with the predicate given to corruption as an extraordinary crime, achieving the goal (political) of criminal law so that there is no state loss if corruption occurs, it is not easy. Since corruption was regulated separately as a special offense outside the Criminal Code in 1957 (1957 was recorded as the era of enactment of the Military Regulations from 1957 to 1958. Initially corruption was regulated in the Criminal Code, with the development of the situation corruption was specifically regulated in Law its own law), following Law No.24/Prp/1960 concerning Investigation, Prosecution and Corruption Criminal Investigation, Law No. 3 of 1971 concerning the Eradication of Corruption Crime, and finally Law No. 31 of 1999 concerning Eradication of Corruption Crimes amended by Law No. 20 of 2001 concerning changes to Law No. 31 of 1999 which is still valid; the return of state losses due to corruption has never been maximized.

Changes after changes to the regulation of criminal acts of corruption in addition to marking the sincerity and determination of the Indonesian people to eradicate corruption is not a crime, also marking efforts to improve the substance of the regulation against corruption in order to be empowered to save a qualified state finances, for example, regarding the interpretations or terminology of corruption, elements against the law and types of criminal sanctions. Law No. 31 of 1999 concerning Eradication of Corruption Crime formulates the terminology of corruption as: *... actions enriching oneself or others or corporations against the law (*wederrechtelijkeheid*) in formal terms (*formale

wederrechtelijkeheid*) and material (*materiel wederrechtelijkeheid*).* Meaning against the law formal or material, even though the act is not regulated in the laws and regulations, but if it is deemed despicable because it is not in accordance with the sense of justice or norms of social life in the community, then it can be punished. In this provision the word "*can*" before the phrase "*detrimental to state finances or the economy of the country*" indicates that the crime of corruption is a formal offense, namely the existence of corruption is enough to fulfill the elements of action that have been formulated not with the emergence of consequences (Prayudi 2007). For the types of criminal sanctions the Law on Eradicating Corruption Crime is considered to be preparing very heavy criminal sanctions, ranging from capital punishment, additional criminal penalties as referred to in the Criminal Procedure Code and article 18 of Law No. 31 of 1999 (Muladi 1995; Muladi & Nawawi Arief 2010)

One of the objectives of the enactment of the Law on the Eradication of Corruption Crimes (Law No. 31 of 1999 in conjunction with Law No. 20 of 2001) is to restore state losses. Therefore, the enforcement of the criminal law prioritizes returning the loss of state money from the perpetrators of corruption. Efforts to repay losses of state money from perpetrators of corruption will be successful if there is cooperation between law enforcement officials (Police, Prosecutors, KPK) to uncover criminal acts of corruption, especially in efforts to recover state losses. Without such cooperation, it will be difficult for a state financial/economic loss to be returned. Because, there is no corruption actor who wants to return the state money but he is still put in prison. Corruption actors are willing to return state money if the criminal case is abolished.

Application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

CONCLUSION

FINALLY, it is emphasized and this paper underlined that, the implementation and spirit of returning state losses in criminal acts of corruption is not optimal because of the many political interests and far from the political objectives of criminal law. The politics of criminal law in the context of returning state losses due to criminal acts of corruption needs to be emphasized so as not to get out of its main purpose, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today.

State losses due to corruption are a consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption.

In considering the Law on the Eradication of Corruption Crime, it implies 2 (two) things. *First*, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. *Second*, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

The purpose of the enactment of the Law on the Eradication of Corruption Crime (Law No. 31 of 1999 in conjunction with Law No. 20 of 2001) is to restore state losses. Therefore, the enforcement of the criminal law prioritizes returning the loss of state money from the perpetrators of corruption. Application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

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Law Quote

"Corrupt politicians make the other ten percent look bad"

—

Henry Alfred Kissinger, Nobel Peace Prize

Source: https://www.goodreads.com/quotes/tag/corruption