



Privilege of state compensation towards corruption objects which are burdened mortgage rights

M Fatan Riyadhi, Azhari Yahya*, Muzakkir Abubakar

Faculty of Law, Syiah Kuala University, Indonesia

Abstract

The purpose of this study is to explain the regulation of the privilege of state compensation for objects resulting from corruption which are burdened mortgage rights. In addition, this study is also aimed to analyze the implementation of state privileges for money compensation based on corruption law against the objects resulting from corruption that are under mortgage rights. This research uses normative juridical method. It focuses on an inventory provisions for money replacement, confiscation, execution of corruption decisions, and civil rights on confiscated objects. The approach used in this research are legal, conceptual, and case study approach. Collected data were analyzed by using qualitative analysis. The research results show that state money compensations should legal guarantees, protection or privilege rights to avoid alleged delay in the execution of the corruption decision regarding the payment of compensation. Then the mortgage rights holder cannot prioritize his legal interests when dealing with the legal interests of the State. In short, this study proceeds for money replacement. It is recommended that the prosecutor before executing confiscation should communicate with the bank to be able to carry out the decision without the rights of other institutions attached to the object.

Keywords: privilege, state compensation, corruption, mortgage rights

Introduction

The crime of corruption in Indonesia has become a very serious crime that was carried out systematically and had a wide impact both before and after independence. Facts show that from year to year corruption grows like mushrooms in the rainy season in people's lives ^[1]. According to Mochtar Lubis, corruption will always exist in the culture of society. Generally, corruption occurs when power rests on a patrimonial bureaucracy that develops in the concept of feudalism. "It is in this structure that irregularities, corruption, theft are easy to develop." ^[2] As a result of this corruption, massive financial losses occur everywhere, state revenues are reduced, and the government structure is damaged, which in turn can have an impact on the emergence of crises in various fields ^[3]. Effort its prevention and eradication of corruption requires maximum law enforcement by upholding human rights values for the sake of the law. One thing that is of legal interest and must be recovered in every corruption case is how to recover state losses. In order for this to be carried out properly, law enforcement officers must act quickly, professionally and carefully, especially in calculating the amount of loss that arises in corruption cases and their recovery ^[4].

Law Number 31 of 1999 concerning the eradication of criminal acts of corruption, it is expressly stated that "the state seeks to eradicate and strive for the State's assets that have been corrupted to return to the hands of the State with the term asset recovery" ^[5]. Likewise, Law No. 20 of 2001 views that corruption is a violation of the socio-economic rights of the community at large ^[6]. Meanwhile, the repatriation of State Assets is attempted by applying additional penalties in the form of payment of "Criminal Money replacement in the decision on the criminal case of corruption case r" ^[7]. The settlement of the criminal penalty for money replacement can be applied to the accused of corruption to a maximum of the same as the assets obtained

from the crime of corruption ^[8].

According to Perma No. 5 of 2014 concerning the additional penalty of substitute money for corruption, regarding the benchmark for detailing the amount of money replacement, it is also possible to provide a dispensation for the imposition of substitute money or the principle of calculating money replacement. This substitute money penalty can be applied to perpetrators of corruption crimes, be they individuals or corporations ^[9]. Law enforcement against corruption cases it is felt that the implementation of the money replacement sentence is still not carried out optimally.

The main purpose of the Anti-Corruption Law "it is state administrators which include state officials at the highest state institutions, state officials at high state institutions, ministers, governors, judges, state officials and or other officials who embody strategic roles in their relations. ^[10]" The regulation of money replacement is often disrupted because the object or property of the defendant before being confiscated by the Public Prosecutor, turns out to have been in the mortgage right at the Bank ^[11]. As can be described the following case examples:

1. Supreme Court Decree No. 2701K/Pdt/2017 between PT Bank Panin Indonesia" Tbk against the Government of Indonesia. In this case, PT Bank Panin is the holder of mortgage rights to a house with a certificate of ownership. Based on the court's decision, the confiscation has been carried out because it is proven that the results of a criminal act of corruption have been carried out.
2. Manado District Court Decree No. 18/Pid-Sus-TPK/2014 / PN.Mdo regarding the corruption case in his decree explaining that the house was confiscated for the state to be auctioned off.
3. Supreme Court Decree of the Republic of Indonesia No. 1731K/Pdt/2011 related to the object of credit

guarantees that have been encumbered with mortgages that has included a mortgage certificate.

4. Decision of the Supreme Court Number 2951K/Pid/2006 found evidence was confiscated at the Investigation Stage and the Decision Order was declared confiscated for the State related to the corruption case committed by the Defendant whose Mortgage Right was still attached with the holder of the Mortgage Right, which is the Semen TONASA Employee Cooperative, domiciled in Pangkep regency.

The example of the casē above is clear, which are the conflict between *das sollen* and *das sein*. The court's determination that legal action should be an auction in order to pay off money replacement for the state. Likewise, in a court decision that has permanent legal force, its ruling states that its assets are confiscated for the State, with a decision that the auction proceeds are deposited in the State Treasury and calculated entirely with Money replacement. Therefore, state losses can be minimized or possibly eliminated^[12]

This study describes the implementation of assets confiscated by the state in the form of money replacement in order to cover losses to the state for corruption. This is considered important as in practice, the Prosecutor as the executor always encounters obstacles when confiscating and auctioning objects that are the object of confiscation with a third party, which is, the Bank as the creditor to the accused of corruption.

In the case of execution, the prosecutor has to deal with banking law rules which also have the right for the Bank to fulfill its previously bound rights on a credit agreement. Until now, the Prosecutor has not been able to confiscate and auction goods which are in the court's decision to be confiscated and make money replacement for state losses. The payment of the money replacement is carried out by the public prosecutor as the executor. For the purpose of executing State compensation money. The prosecutor as the executor will carry out the execution of the defendant's property which was confiscated by the State through a corruption decision as stated in the Criminal Procedure Code.

This issue is the subject of a legal study to determine which position is higher or privileged between money replacement to the state and the privilege of paying off the bank for collateral. In the event that the researcher will provide a review of which legal rules take precedence to be implemented, the Anti-Corruption Law and the Mortgage Law which have a special nature. This study focuses on court decisions that require property from the proceeds of corruption to be confiscated in order to cover state losses.

Based on the description above, the formulation of the research problem is how the implementation of the privilege right to money "compensation for state losses from criminal acts of corruption against objects resulting from corruption" which is under mortgage?

Research methods

This type of research uses normative juridical, namely, by taking an inventory of provisions and articles relating to the provision of money replacement, confiscation and execution of corruption case decisions, civil rights attached to confiscated objects. The approach used is the legal, conceptual and case approach. The primary legal materials

used are the Corruption Act and the Mortgage Law. The secondary legal material used is in the form of a literature review that is relevant to the problem under study. Furthermore, the data is processed and analyzed using qualitative analysis techniques.

Results and Discussion

Criminal Execution of Additional Money Compensation by the Prosecutor

The ideal law enforcement is basically a target to be achieved. This triggers the influence that in law enforcement all rights and obligations are achieved and fulfilled in addition to achieving the goals and process of law enforcement itself. The existence of material criminal law enforcement is that as long as a decision has permanent legal force, it can be implemented quickly and precisely. This is very crucial considering the authority of a decision as the end of the criminal law enforcement process lies in whether or not the contents of the judge's decision are carried out by the prosecutor as the executor^[13]. The provision of criminal in concreto has a very important meaning in law enforcement, where abstract rules are enforced into actual law enforcement. In other words, a law that is in abstracto requires a certain process to make it an in concreto law^[14].

Asset salvage is weighed from the realization of returning corruption assets deposited into the state treasury juxtaposed with the total assets seized for the state based on a court decision. One of the parameters of success is seen from the increasing number of refunds from the corrupted state. The indicator of success is depositing at least 75% of the money replacement from the corruption case decided by the court to the state treasury (especially for cases where the investigation is carried out by the Prosecutor's Office)"^[15]

In Criminal Procedure Code known as KUHAP the implementation of court decisions or executions is regulated in Chapter XIX Articles 270 to Article 276. According to the provisions of Article 270 of the Criminal Procedure Code that the implementation of court decisions that have obtained legal force is still carried out by the Prosecutor, for which the clerk sends a copy of the decision letter to him. Normatively, the Prosecutor will only execute the decision after receiving a copy of the decision from the court, but in practice it is enough with the excerpt of the decision to carry out the execution decision^[16].

Supreme Court Circular Number 01 of 2011 concerning amendments to Supreme Court Circular Letter number 02 of 2010^[17] Regarding the submission of copies and excerpts of decisions, basically it is said that copies of decisions for criminal cases must be submitted by the court within fourteen working days and excerpts of decisions are given after the verdict is pronounced. Money compensation in a criminal act of corruption legally must be returned by the convict within one month since the court's decision has permanent legal force, but in general it can be said to be unsuccessful because many convicts do not fulfill the obligations contained in the court's decision^[18].

This condition shows that the capacity of the prosecutor as the spearhead in efforts to restore state finances is very large. From the results of interviews that the author conducted with several sources at the prosecutor's office, the criminal execution process of additional money compensation by the Banda Aceh high prosecutor regarding corruption in general can be grouped into three phases,

which are the investigation phase, the prosecution phase and the execution phase of court decisions with permanent legal force.

In the execution phase of court decisions that have permanent legal force, the Prosecutor carries out confiscation of the convict's assets. This confiscation is only carried out on assets that are suspected to have been obtained "from the proceeds of corruption and or assets stated in the corruption verdict are confiscated for the state. For example, houses, letters, etc., due to the Anti-Corruption Law that does not regulate confiscation, the investigating prosecutor in carrying out the confiscation is based on Article 39 of the Criminal Procedure Code.

The prosecutor's office in confiscation takes precedence over assets in the form of land and buildings, or land certificates for houses. In carrying out a confiscation, the investigating prosecutor usually coordinates with various parties who are deemed able to help, such as the bank whether the object is encumbered with mortgage rights, BPN to track assets, houses/land owned by the suspect, also with SAMSAT and various other parties. This is necessary because convicts in corruption cases are generally educated people who understand the transfer or concealment of assets. However, when this investigation was carried out, it turned out that the assets confiscated by the Attorney General's Office were mortgaged by the defendant. So the prosecutor just found out that his assets were under mortgage.

Process of Payment of Substitution

Implementing Process of court decisions is generally regulated in Chapter XIX of the Criminal Procedure Code. Execution can only be "carried out" if the decision has permanent legal force. The execution is carried out by the Prosecutor as regulated in Article 1 point 6 in conjunction with Article 270 in conjunction with Article "30 paragraph (1) letter b of the Prosecutor Law. The penalty for paying money replacement is not regulated in the Criminal Procedure Code, which is one of the specifics of the Anti-Corruption Law. In the event that the judge imposes an additional penalty, namely "payment of money replacement, the convict is given a grace period of one month after the court's decision has permanent legal force to pay it off. If the "specified" time has expired, the prosecutor as the executor of the state can confiscate and auction the defendant's goods (Article 18 paragraph (2) of the Anti-Corruption Law).

"The prosecutor cannot extend the time limit of the convict to pay the money replacement such as the criminal fine regulated in Article 237 paragraph (2)" of the Criminal Procedure Code. The penalty for payment of compensation and a fine have different characteristics from each other. It can be seen that the substitute money penalty is an additional crime while the fine is the main crime.

According to Wiryono, although the prosecutor cannot extend the payment grace period, considering Article 18 paragraph (2) of the Anti-Corruption Law, the prosecutor can still determine the stages of paying the money replacement, but it does not exceed 1 month. Article 18 paragraph (2) states that the property can be confiscated and auctioned, meaning that here is the property belonging to the defendant which is not property resulting from a criminal act of corruption and or property belonging to the defendant which is not used to commit a crime. If it is

proven in court that the property belonging to the convict is property of corruption, then the property must be confiscated using a criminal confiscation in accordance with Article 18 paragraph (1) letter b of the Anti-Corruption Law because the sentences imposed are different.

The meaning of confiscation and auction is facultative, namely confiscation "can only be carried out in the event that the convict has not or has not paid the money replacement for the amount of money specified in the decision within the time specified as above. The confiscation of the defendant's property does not require permission from the chairman of the local district court because this confiscation is not for the purpose of investigation but for the implementation of court decisions.

In the case of confiscation of the defendant's assets, it should be guided by the confiscation procedures regulated in the implementation of the execution of replacement payments according to the Fatwa of the Supreme Court of the Republic of Indonesia number 37/T4/88/66/Pid. January 12, 1988 which includes:

- a. "The remaining items of the convict were confiscated and then sold by auction to fulfill the obligation to pay money replacement.
- b. Confiscation should be excluded for goods that are used as a support to earn a living convict and his family.
- c. Confiscation should avoid wrongful confiscation of goods that do not belong to the convict so that there is no resistance from third parties.

Article 18 paragraph (3) of the Corruption Law is stipulated "in the event that the convict does not have sufficient property to pay the money replacement within the grace period stipulated in paragraph (2), the convict is sentenced to imprisonment for a term that does not exceed the maximum threat of the principal criminal and the said crime is already stated in the decision. Additional punishment in the form of payment of compensation is a criminal policy that cannot be separated from a broader policy, namely social (social policy) which consists of policies to achieve public welfare (social welfare) and policies for community protection (social defense). Therefore, the additional penalty for paying money replacement must be withdrawn from the corruption convict so that the welfare of the community can be implemented. In other words, the motivation for the criminal payment of money replacement is the recovery of state financial losses due to the Corruption Crime ^[19].

The additional penalty of paying money replacement from the Anti-Corruption Law "is the goal in order to save the wealth or state finances that have been taken by the perpetrators of corruption in order to punish the perpetrators of corruption as severely. The additional penalty for compensation is regulated in Article 18 of the Anti-Corruption Law number 31 of 1999, as well as in the general explanation it is stated that this Law also contains imprisonment for perpetrators of corruption who cannot pay additional penalties in the form of compensation for state losses. However, in the implementation of the court's decision on substitute money, it turns out that there are many obstacles because the convict does not want to pay and chooses a substitute imprisonment or is unable to pay on the grounds that his property no longer exists. "This is important because the rule of law is a foothold for law enforcement officers in carrying out their authority." ^[20] However, in the court's decision which became the object of

this research on the money replacement or property of the defendant before it was placed for confiscation by the Public Prosecutor, it turned out that it was already in the mortgage right of the Bank, including the following cases:

Supreme Court Decision No. 2701K/Pdt/2017 between PT. Bank Panin Indonesia Tbk against the Indonesian Government. In this case PT Bank Panin is the holder of the mortgage on a house with a certificate of ownership. Based on the court's decision, the confiscation has been carried out because it is proven to be the result of a criminal act of corruption.

1. Manado District Court Decision No.18/Pid-Sus-TPK/2014/PN. Mdo related to the corruption case) in his decree asserted that the house was confiscated for the state for further auction.
2. The Supreme Court's decision Number 1731K/Pdt/2011 is related to the object of credit guarantees that have been encumbered with mortgages for which a Mortgage Certificate has been issued.
3. Supreme Court Decision No. 2951 K/Pid/2006 it was found that the evidence confiscated in the investigation stage and in the decision was confiscated for the state in the case of a corruption crime committed by the defendant still attached Mortgage with the holder of Mortgage Rights of the Semen Tonasa Employee Cooperative domiciled in Pangkep Regency”.

As from the case example, it can be explained where as field facts show that, for confiscation, it is carried out because it is proven that the goods are "the results of the criminal act of corruption of the defendant in a court decision that has permanent legal force which states that his property is confiscated for the State and provided that The auction proceeds that have been deposited into the State treasury will be fully calculated with the money replacement.

In this case, there is difficulty in paying money replacement due to the provisions regulated by Mortgage which states "that Mortgage on land and objects related to land, as referred to in Law Number 5 of 1960 concerning Basic Regulations for Agrarian Affairs. Other objects which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors". The implementation of the money replacement payment is carried out by the public prosecutor as the executor. For the purpose of executing State Compensation Money, the Prosecutor as the executor will confiscate the property belonging to the defendant if there is also the property belonging to the defendant is under Mortgage at the Bank.

This will make it difficult for the Prosecutor to carry out executions. because the Bank holding the Mortgage will also conduct an auction for the settlement of the defendant's debt, the procedure will also be through the first confiscation by the Bank of the object belonging to the debtor or defendant. On the other hand, the mortgage holder is also entitled to conduct an auction for the settlement of the defendant's debt, the procedure of which will be through confiscation by the Bank of the objects belonging to the debtor or defendant.

In the execution of the Mortgage, the Mortgage also has the same legal interest as the Corruption Court's decision because each of them has an *irah*, 'For the sake of Justice Based on the One Godhead'. This is also emphasized in the provisions of Law No. 4 of 1996 concerning Mortgage

Rights which states that, "other objects that are an integral part of the land, for the settlement of certain debts, establishing a priority position for certain creditors over other creditors”.

In the Corruption Law, the preamble to Article 38C and the explanation of the article contains the meaning which has mandated that the eradication of corruption is carried out one of them for the benefit of asset recovery from the hands of corruptors, while UUHT mandates that third parties or holders of Mortgage Rights or (Banks) have preferential rights to objects that are encumbered with the mortgage to take payment if the defendant's credit is bad or is in breach of contract.

The legal rule is that every object with a certificate of Mortgage has the main right for the holder to get repayment from the Debtor, because the rights owned by the Debtor from the object of Mortgage are interpreted legally to be transferred to the holder of the Mortgage. In the provisions of Article 13 Paragraph (1) UUHT, the mortgage must be registered, an absolute requirement for the birth of a mortgage and binding the mortgage to a third party ^[21]. The Mortgage Certificate has the same executorial power as a court decision that has permanent legal force ^[22]. The abolition of Mortgage Rights due to the abolition of encumbered land rights does not result in the write-off of guaranteed receivables ^[23].

All the decisions of the Corruption Court mentioned above which are the object of this research, until now there has been no legal certainty given by the government, whether it is to return state assets or prioritize third parties as debtors. Because after this case was deepened, the defendant only left assets that were the object of the mortgage, so that further tracking of assets could not be found.

When the panel of judges decides the case, the panel of judges does not need to know that the assets resulting from the crime of corruption to be confiscated are bound by mortgage or not. In the example of the decision above, which clearly states that it is confiscated to be confiscated by the state in order to restore state losses for the Corruption Crime that has been committed by the Defendant. So that the execution of the confiscated objects hinders the interests of third parties, namely the Bank ^[24].

According to the results of the interview, the executor, namely the Prosecutor's Office, should have consolidated to another party explaining that the confiscated objects had been confiscated by the state and thus the ownership of the objects had been transferred to the state. The consolidation is carried out so that at the time of the auction there are no more objections from other parties regarding the objects being auctioned ^[25].

Therefore, the right of the state to get a priority position or the privilege of money to compensate the state for objects resulting from corruption takes precedence in repayment, even though the object is under mortgage. Because this criminal act of corruption has an impact on the country's economy which involves the dignity of the community at large ^[26]. In addition, the bond between the community and the State as the organizer of public welfare requires legal certainty that is binding in the public legal bond.

In this case, the act in this case is a legal act that applies specifically. The prioritized rights are also different because of their private and public legal actions. Therefore, there needs to be a common ground to provide legal protection according to the norms contained in the legislation. The law

here is forced to be active, meaning that the law continues to review the field practice constraints in law enforcement in Indonesia.

Conclusion

The implementation of the privilege rights to the compensation for state losses from corruption against objects resulting from corruption that are in the Mortgage Rights, in practice shows that the existence of the mortgage is known after the executor who wants to conduct an auction. However, after the information is known by the Bank, the Bank as the holder of the Mortgage will fight or object in the trial which continues until the final stage. Therefore, it is recommended that the prosecutor in executing the court's decision to find obstacles in which the property resulting from the defendant's corruption is related to mortgage rights.

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