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Confiscation at the prosecution level, is it possible?

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Abstract
The provision of Article 38 Paragraph (1) Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), emphasize that the authority to confiscate is only owned by investigators, but at the practical level thus is not always relevant to be operationalized. Sometimes the discovery of evidence and goods related to a new criminal offense is found at the prosecution stage, hence for validity there is a need for confiscation authority at the prosecution level. This research aims to examine and analyze the legal basis of foreclosure at the level of prosecution in the criminal justice system. The research method used is normative juridical method, by examining the legal basis of confiscation during the prosecution level in the criminal justice system. The result showed that in principle, the Criminal Procedure Code has implicitly laid the basis for the authority of confiscation to be conducted at the prosecution stage. Foreclosure is closely related to the prosecution process, especially in the context of recovering criminal assets. The legal basis for confiscation during the prosecution stage is reffered to Article 18 Paragraph (2) of Law Number 8 of 1999 concerning Eradiction of Corruption, Article 30A of Law Number 11 of 2021 concerning amendments to Law Number 16 of 2004 concerning Attorney General's Office, Decree of the Head of the Supreme Court of Republic of Indonesia Number: KMA/032/SK/IV/2006 dated April 4, 2006, Regulation of the General Attorney of the Republic of Indonesia Number: PER 036/A/JA/09/2011 concerning Standard Operating Procedures (SOP) for the Prosecution of General Crime Cases, Regulating of the Prosecutor General Number Per-027/A/JA/10/2014 concerning Guidelines for the Recovery of Assets, Instruction of the General Attorney Number 8 of 2023 concerning the optimization of the prosecution of special criminal cases, and instruction of the General Attorney Number 1 of 2024.

Keywords: Confiscation, prosecution, criminal justice system

Introduction

In principle, the criminal justice system adheres to the principle of legality, namely a provision requiring the settlement of criminal cases to be through formal justice and established procedural laws [1]. This is in line with the postulate of *nullum crimen sine poena legali* which positively means that all criminal acts must be punished according to the law [2]. Hence, KUHAP as the rule of procedure strictly adheres to 3 (three) principle of legality, namely *lex certa* which means written, *lex scripta* which means clear, and *lex stricta* which means that it cannot be interpreted other than what is clearly written [3].

As means of operating criminal justice, in the Criminal Procedure Code there are provisions for the stages of resolving criminal cases, starting from the investigation stage to the *Inkracht* of the case. The investigation stage is the initial stage executed by investigators in order to collect evidence which used as a basis for determining a criminal offender as a suspect. The collection of evidence shall be carried out legally in accordance with applicable regulations, including through coercive efforts in the form of foreclosure of letter, goods, and objects related to criminal acts as tools used to commit such criminal acts.

The provision of Article 1 Point 16 of the Criminal Procedure Code states that confiscation is "A series of actions by investigators to take over and or keep under their control moveable or immovable, tangible or intangible objects for the purpose of evidence in investigation, prosecution and justice." Through the provisions of this article, the Criminal Procedure Code seems to emphasize that the authority to confiscate is only owned by investigators. This assertion is also elaborated in the provisions of Article 38 Paragraph (1) of KUHAP "Foreclosure can only be executed by investigators with the permissions of the head of the local district court."

Judging from the development of criminal justice practice, the limitation of foreclosure authority as in the Criminal Procedure Court is no longer relevant, due to in the criminal justice process many discoveries of new evidence and items related to criminal acts only appear or are obtained when the case is already at the prosecution stage or after the case is declared complete by the public prosecutor (P-21). This phenomenon is also one of the impact of the system adopted by KUHAP itself, which divides the authority to resolve criminal cases in the criminal justice sub-system of often referee to as functional differentiation [4].

The discovery of new evidence and/or goods related to a criminal offense at the prosecution stage must have the validity of its acquisition, so that it can be used to support the proof of a criminal offense, one of which is with the permission or approval of confiscation by the chairman of the court. The question is how to obtain such validity, while the case is already at the prosecution stage, the authority and responsibility for completion is already with the prosecutor.

Following up on the legal vacuum above, the Supreme Court through the Decree of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Application of Book II of the Guidelines for the Implementation of Court Duties and Administration dated April 4, 2006, stated "If in the trial the judge considers it necessary to confiscate an item, the judge's order to confiscate is addressed to the investigator through the public prosecutor". This provision shows the urgency of seizure authority to be regulated at the prosecution stage, but from

the editorial provisions of KMA 32/2006, the Supreme Court seems unwilling to break through the principle of formal legality of KUHAP, because although it recognizes the existence of seizure at the prosecution stage, it still affirms that the authority to seize is only in the hands of investigators as stipulated in Article 38 Paragraph (1) of KUHAP. This is inversely proportional to the Regulation of the Attorney General of the Republic of Indonesia Number: PER 036/A/JA/09/2011 concerning Standard Operating Procedures (SOP) for the Subscription of General Criminal Cases, in Article 23 Paragraph (1) "In the event of additional examination or examination at trial for the purpose of case settlement, the public prosecutor may conduct confiscation". With this provision, the prosecutor's office as the holder of the dominus litis mandate wants to emphasize the authority to carry out confiscation in order to prove a criminal offense that is being submitted to trial.

The divergent perspectives on confiscation authority between the 2 (two) law enforcement agencies will have a negative impact on the development of law enforcement and justice. This discrepancy between *das sein* and *das sollen* has caused legal uncertainty, and a solution must be found immediately. Therefore, an in-depth study related to the forced confiscation effort, especially regarding the legal basis for the authority of confiscation at the prosecution stage in the criminal justice system.

Research Method

Based on the formulation of the problems raised in this article, the research method used is the normative juridical method, by examining the legal basis of confiscation at the prosecution stage in the criminal justice system. Therefore, the materials used consist of primary legal materials in the form of laws and regulations, secondary legal materials in the form of literature in the form of books and scientific journals related to this article. As well as tertiary legal materials in the form of encyclopaedias and legal dictionaries. The compiled data will be analyzed using qualitative analysis.

Results and Discussion

As mentioned above, KUHAP is the main means of operating the criminal justice system in Indonesia. As a formal law or procedural law for the resolution of criminal cases, it must be able to accommodate the needs of law enforcement and justice.

In principle, the purpose of the criminal justice system is to ensure and realize the objectives of law, namely certainty, justice and benefit. In addition, the purpose of the criminal justice system is as a form of system utilization to overcome crime through both penal and non-penal means. Countermeasures through penal means are usually carried out by formulating criminal law norms which contain elements in the legal system both substantive, structural and cultural of society. The formulated norms will be applied through the criminal justice system.

The Criminal Procedure Code has regulated the flow of the process of handling criminal cases up to the execution of convicts, and also regulates the authority of the criminal justice sub-system. One of the sub-system authorities of criminal justice is the authority of coercive measures in the form of confiscation. With the authority to give legitimacy to act for legal subjects to act to do something on the basis of their authority.

In relation to authority Huuisman states "an organ of government cannot assume that it has its own governmental authority. Authority is only given by law. The legislature may grant governmental powers not only to governmental organs, but also to employees such as tax inspectors, environmental inspectors, or to specialized legal entities such as electoral boards, special courts for land lease cases or even to private legal entities [5].

One of the principles of the rule of law is that the state is subject to the law or restrictions on the freedom of citizens (by the government) must be determined in the law which is a general regulation. The law in general must provide guarantees (to citizens) against arbitrary, collusive, and various types of improper actions (of the government). The exercise of authority by the organs of government must be grounded in written law, the formal law [7].

Confiscation is one of the forms taken by law enforcement officials, in order to collect and take over goods that are suspected of having a relationship with the criminal offense that occurred to support case proof. According to J. C. T. Simorangkir that "Confiscation is a method carried out by authorized officials to temporarily control goods whether they belong to the defendant or not, but originate from or have something to do with a criminal act and are useful for proof. If it turns out later that the item has nothing to do with the alleged crime, then the item will be returned to its owner" [8]. Foreclosure is one form of coercion that can be carried out to fulfill the mechanism of the criminal proof process. Based on the provisions of Article 1 point 16 of the Criminal Procedure Code, "Confiscation is a series of actions by investigators to take over or keep under their control movable or immovable, tangible or intangible objects for the purposes of proof, investigation, prosecution and justice." Confiscation is one of the forms of coercion that can be carried out to fulfill the mechanism of proving a criminal offense."

Goods or objects that can be subject to foreclosure are based on the provisions of Article 39 of the Criminal Procedure Code:

1. those that may be subject to foreclosure are
   a. Object or bills of a suspect or defendant which are wholly or partly suspected to have been obtained from criminal acts or as a result of criminal acts;
   b. Objects that have been used directly to commit a criminal offense or to prepare for it;
   c. Object used to obstruct the investigation of a criminal offense;
   d. Objects especially made or intended for the commission of a criminal offense;
   e. Other objects that have been a direct relations with the criminal offense commited.

From the definition and explanation of confiscation of as in the provisions of the Criminal Procedure Code, at least several things are known related to confiscation, namely [9]

1. Seizure is an investigator's action.
2. Confiscation is conducted by taking over and or keeping under its control moveable or immoveable, tangible or intangible objects;
3. Objects that can be seized are moveable or immoveable, tangible or intangible objects;
4. Confiscation is carried out for the purpose of evidence in the investigations, prosecution, and trial.

A restrictive understanding of the definition of confiscation as described above suggests that the official authorized to conduct confiscation, as seen from Article 1 point 16 of the Criminal Procedure Code on the definition of confiscation, appears that the investigator is the one authorized to conduct confiscation [10]. This interpretation, however, is not appropriate if it is associated with the system model adopted by the Indonesian criminal justice system, which divides the authority of the judicial sub-system based on the stages of the process, so that this model is far from the concept of Integrated criminal justice system (ICJS) which has been discussed by criminal law experts, and the expectations of the justice-seeking community [11].

Criminal justice practice shows that the division of authority model in the justice system is not always effective to operate. Essentially, the stages of the judicial process cannot be separated and are interrelated with each other. For this reason, there is an expectation that the realization of an integrated criminal justice system will only be realized through the pattern of election crime subscriptions [12], and the pattern of case subscriptions by the KPK, and the handling of corruption and laundering crimes by the prosecutor's office.

The phases of the process of solving criminal cases starting from investigations by investigators of the Indonesian National Police in general in order to find suspects and collect evidence to make light of a criminal offense. In the investigation process, there is the authority to carry out forced confiscation, then the evidence that has been collected, presented and submitted to the public prosecutor to be submitted to the court.

Prosecution is defined by the KUHAP as part of the prosecutor's authority to refer a case to a court with jurisdiction to hear it. Nevertheless, if prosecution is understood comprehensively or based on the system of the applicability of the dominus litis principle, and the flow of the criminal justice process, then prosecution is not only submitting cases to the court, but also includes all actions of the public prosecutor, which starts from the time the case is declared complete (P-21), with the investigator handing over the responsibility of the suspect and evidence to the prosecutor as the public prosecutor until the *incracht* of the case to carry out the decision.

The role of the prosecutor's office in the criminal justice system is central and as the holder of the dominus litis mandate, it is the prosecutor who has the right to determine whether a case can be submitted to the court. As in the case of receiving case files from investigators, it turns out that after a case is declared complete and the responsibility of the suspect and evidence is accepted, it turns out that at the prosecution stage there is still a lack of completeness of the case file to be completed. If not completed, it will have an impact on the process of proving the case in court. Additional examination powers are also granted by law to the prosecutor's office [13]. At the additional examination level, the prosecutor is technically authorized to confiscate new evidence. The technical provisions are as in the Regulation od the Attorney General of the Republic of Indonesia Number: PER 036/A/JA/09/2011 concerning Standard Operating Procedures (SOP) for the prosecution of general criminal cases, in Article 23 Paragraph (1) “In the event of additional examination at trial for the purpose of case settlement, the public prosecutor may conduct confiscation.” The confiscation is carried out both before the case is submitted to the court and after the case is submitted to the court.

The purpose of foreclosure is intended for evidentiary purpose as evidence before the court, as without this evidence the case cannot be submitted to the court [14]. The process of proving criminal acts court must be a genuine effort to find the meaning of the principle of truth for the sake of justice which requires professional and transparent law enforcement officials. One of the conditions that greatly supports the success of proof is the perfection of confiscation for the completeness of evidence [14].

Discussing the legal basis for the authority of confiscation at the prosecution stage, its existence cannot be ruled out. The confiscation is a must that be authorized by the Prosecutor’s Office in its capacity as a public prosecutor. Muhammad Fajar Ibnu Rahim argues “Although, the act of confiscation can only be carried by investigators at the level of investigation, it does not eliminated the legitimacy of the public prosecutor to request confiscation of evidence at the level of trial examination to the judge.” [15]

The coercive foreclosure effort is closely related to the prosecution process. The prosecution of cases is authorized by law to conduct prosecution as public prosecutors who act on behalf of the state in performing their duties and authorities [16]. The prosecution process is an effort to prove and the process to finding material truth, which with the fact of the truth of the material truth gives legitimacy to the prosecutor to prosecute, and the judge to give a decision.

According to R.M Surachman, who refers to the tradition and doctrine of prosecution, the principle of *dominus litis* or controller of the case process is known, in several countries such as Japan, Netherland, and France the prosecutorial is the monopoly of the prosecutor. Meaning that in the criminal process the prosecutor has the authority whether a case can be prosecuted in court or not [17] so that the authority to determine whether or not a person can be declared a defendant and submitted to the court based on evidence that is valid according to law, and as an executive *ambtenaar* executor and court decision in criminal cases is the prosecutor [18].

The prosecutor's role in the justice system starts from the beginning of the case investigation to the execution of the case, both the execution of the body and the execution of evidence that has been decided by the court. Considered at the practical level, the expansion of authority, apart from being able to be carried out by investigators, is through the recognition of execution seizures that can be carried out by prosecutors in order to carry out court decisions in handling corruption crimes. Based on Article 18 Paragraph (2) of Law number 31 of 1999 concerning Eradication of Corruption Crimes, "If the convicted person does not pay the restitution as referred to in paragraph (1) letter b within 1 (one) month after the court decision that has obtained permanent legal force, then his property can be confiscated by the prosecutor and auctioned off to cover the restitution". This provision is also a legal basis that confirms that confiscation is not only the authority of investigators in the criminal justice system.

The assertion of confiscation authority at the prosecution stage which can be carried out by the prosecutor as a public prosecutor based on the provisions of the Regulation of the Attorney General of the Republic of Indonesia Number 7 of 2020 concerning the Second Amendment to the Regulation of the Attorney General Number Per-027/A/JA/10/2014

concerning Guidelines for Asset Recovery letter F number 16 explained "Confiscation is a series of actions by investigators or public prosecutors or state lawyers to take over and / or store assets related to crimes/criminal acts or other assets under their control, both for the benefit of investigation, prosecution and justice as well as for the benefit of asset recovery, in accordance with statutory provisions". Asset recovery is one of the latest prosecutorial authorities through Law Number 11 of 2021 concerning amendments to Law Number 16 of 2004 concerning Prosecutors. Based on Article 30 A, it states "In asset recovery, the Public Prosecutor's Office is authorized to carry out tracking activities, seizure, and return of assets from the acquisition of criminal acts and other assets to the state, victims, or those entitled to them."

Asset retracement activities are ideally undertaken at the investigation stage and then followed up with confiscation, but it also does not rule out the possibility of these activities being carried out at the stage when the case has been declared complete (P-21) in order to recover state financial losses, especially for cases whose investigations are carried out by non-Prosecutor's Office investigators. The authority of the Prosecutor to search, seize and return assets resulting from criminal acts to the state, is also the legitimization of confiscation authority at the prosecution stage.

At the practical level at least there has been confiscation carried out at the prosecution stage including; in Case Number: 392/Pid.Sus/2017/PN Bks on behalf of Defendant Hendra Widjaja, S.E. and Case Number: 334/Pid. B/2019/PN. Ckr on behalf of Defendant I Fenny Lusianti Alias Fenny Binti Tintin Sumarni and Defendant II Fiorena Rosevelt Suryali Alias Fio Binti Rossy Erna Widiawati who were each charged with committing the crime of money laundering. The basis for the public prosecutor to conduct confiscation is Article 23 paragraph (1) and paragraph (2) letter b of the Regulation of the Attorney General of the Republic of Indonesia Number: PER036/A/JA/09/2011 concerning Standard Operating Procedures for Handling General Criminal Cases (hereinafter referred to as PERJA 36/2011), as well as the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Implementation of Book II of the Guidelines for the Implementation of Court Duties and Administration dated April 4, 2006 (hereinafter referred to as KMA 32/2006) [19].

In principle, it is implied that the authority for confiscation at the prosecution stage already exists in the Criminal Procedure Code, namely in Article 39 Paragraph (2) which states "Objects that are in confiscation because of civil cases or because of bankruptcy can also be confiscated for the benefit of investigation, prosecution and trial of criminal cases, as long as they comply with the provisions of paragraph (1)." The interest of prosecution shows the openness of the Criminal Procedure Code, to the possibility of goods or objects related to criminal acts, found after the case has been in the investigation stage has been completed.

In the context of performing its duties and authorities based on the provisions of Article 35 letters a and b of Law Number 11 of 2021 concerning amendments to Law Number 16 of 2004 concerning the Prosecutor's Office, namely; a. establishing and controlling policies for law enforcement and justice within the scope of the duties and authority of the Prosecutor's Office; b. The Attorney General of the Republic of Indonesia through Attorney General Instruction Number 1 of 2024 concerning the Implementation of the Results of the National Work Meeting of the Attorney General's Office of the Republic of Indonesia in 2024 instructs the field of special crimes to develop technical instructions for confiscation as a follow-up to Attorney General Instruction Number 8 of 2023 concerning optimizing the subscription of special criminal cases which states "carry out confiscation of execution in accordance with procedural law as regulated in laws and regulations and policy regulations, taking into account the interests of good faith third parties." With the existence of these technical guidelines, it can complement the needs of technical regulations related to confiscation that can be carried out by prosecutors as public prosecutors.

Conclusion

In a sense, the Criminal Procedure Code has implicitly laid the basis for the authority of confiscation to be carried out at the stage after the investigation of the case is completed, as a form of openness to the anticipation of finding goods related to criminal acts after the investigation is completed. Then the openness of the KUHAP has been elaborated in various forms of other technical regulations.

Due to the fact that the purpose of confiscation is for evidentiary purposes intended as evidence before the court, since without this evidence, the case cannot be submitted to the court. Confiscation is closely related to the prosecution process, especially in the context of recovering criminal assets. The Supreme Court through the Decree of the Chief Justice of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Implementation of Book II of the Guidelines for the Implementation of Court Administration and Duties dated April 4, 2006 has provided guidelines for confiscation at the trial stage. As well as the prosecutor's office as a form of fulfillment of law enforcement and justice has provided guidelines for confiscation at the prosecution stage through the Regulation of the Attorney General of the Republic of Indonesia Number : PER 036/A/JA/09/2011 concerning Standard Operating Procedures (SOP) for the Prosecution of General Criminal Cases, Regulation of the Attorney General Number Per-027/A/JA/10/2014 concerning Guidelines for Asset Recovery, and as a guideline for the implementation of execution confiscation mandated by Article 18 Paragraph (2) of Law Number 31 of 1999 concerning Eradication of Corruption Crimes has issued Attorney General Instruction Number 8 of 2023 concerning optimization of special criminal cases, and finally Attorney General Instruction Number 1 of 2024 concerning the Implementation of the Results of the National Work Meeting of the Attorney General's Office of the Republic of Indonesia in 2024 instructs the field of special crimes to develop technical guidelines for confiscation, with the hope that these technical guidelines can complement the needs of technical regulations related to confiscation that can be carried out by prosecutors as public prosecutors.

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