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Recovering state losses prior to criminal investigation in Indonesia: Between asset recovery and criminal accountability

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Abstract
The recovery of state losses prior to the criminal investigation stage in corruption cases raises legal questions concerning its effect on the continuation of criminal proceedings. Article 4 of the Indonesian Corruption Eradication Law stipulates that the recovery of state financial or economic losses does not extinguish the offender's criminal liability but may only be considered a mitigating factor. This provision must be examined alongside the Circular Letter of the Deputy Attorney General for Special Crimes Number B-765/F/Fd.1/04/2018, which allows the Prosecutor's Office, during the preliminary inquiry stage, to reconsider the continuation of legal proceedings where the state losses have been proactively and fully recovered. This study examines the legal nature of state loss recovery in corruption offences and its legal status prior to the commencement of a formal criminal investigation. It aims to formulate legal boundaries between asset recovery, the protection of the community's social rights, and criminal accountability. This study employs normative legal research using statutory, conceptual, and case approaches. Legal materials are analysed prescriptively by examining the Indonesian Corruption Eradication Law, state treasury legislation, and internal prosecutorial policies. The findings demonstrate that state loss recovery constitutes an integral part of corruption eradication, serving both to restore state assets and to safeguard the social rights of communities harmed by corrupt conduct. The novelty of this study lies in constructing a restorative justice-based model of prosecutorial discretion applicable prior to the criminal investigation stage. Full and voluntary recovery may be considered when determining whether proceedings should continue, provided that the amount of loss has been verified by a competent authority, the relevant parties have acted cooperatively, the public interest is adequately protected, and sufficient preliminary evidence of the elements of corruption has not been established. Once a formal investigation has commenced and the elements of the offence have been established, recovery may only serve as a mitigating factor and cannot extinguish criminal liability. This model harmonises Article 4 of the Indonesian Corruption Eradication Law with limited, proportional, and recovery-oriented prosecutorial discretion. It prevents state loss recovery from becoming a means of evading punishment while promoting the effective restoration of state finances for development and public welfare.

Keywords: State loss recovery, asset recovery, corruption offences, prosecutorial discretion

Introduction
The recovery of state losses by alleged offenders in corruption cases has become a significant issue in Indonesian legal discourse. This development has generated a public perception that the repayment of state losses may provide an opportunity for persons involved in corruption to avoid criminal liability for their conduct. Such a perception arises particularly when the repayment is made before the commencement of a formal criminal investigation and is followed by the discontinuation of the case. State loss recovery in corruption cases has, at the same time, not been implemented effectively, as substantial amounts of state funds unlawfully obtained through corrupt conduct remain unrecovered. The legal framework governing the recovery of state losses is principally contained in Article 4 of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, as amended by Law Number 20 of 2001, hereinafter referred to as the Indonesian Corruption Eradication Law. Article 4 stipulates that the recovery of state financial losses or losses to the national economy does not preclude the punishment of an offender who has committed a corruption offence under Articles 2 and 3. The elucidation of Article 4 further provides that such recovery constitutes only one of the factors that may mitigate the offender's sentence. Accordingly, the repayment of state losses does not, in itself, eliminate the unlawful nature of the conduct, the offender's culpability, or the criminal consequences arising from a completed corruption offence.

Article 4 does not expressly define the meaning of state financial loss. A definition of state or regional loss is provided in Article 1 point 22 of Law Number 1 of 2004 concerning the State Treasury. The provision defines state or regional loss as a shortage of money, securities, or goods that is actual and definite in amount and results from an unlawful act committed either intentionally or negligently. This definition contains three principal elements: a shortage of money, securities, or goods; an amount that is actual and definite; and a causal relationship between the loss and an unlawful act committed intentionally or negligently.

The Indonesian Supreme Audit Board applies broader criteria in identifying state financial losses. Such losses may arise from a reduction in state assets or an increase in state liabilities contrary to applicable laws and regulations; the failure to receive all or part of the revenue to which the State is legally entitled; unlawful expenditure that burdens state finances; or an increase in state liabilities resulting from commitments made in violation of the law. State financial loss must therefore be understood not merely as the physical disappearance of public money but also as an unlawful deterioration in the State's financial position, revenue, assets, or obligations.

Corruption commonly produces consequences extending beyond measurable financial losses. Systemic corruption reflects weaknesses in governmental and societal control mechanisms, undermines the efficiency of public administration, distorts public policy, and impedes economic development. Aidt's economic analysis of corruption demonstrates that corruption affects the allocation of resources and the functioning of public institutions, although its precise consequences depend on the institutional environment in which it occurs [1]. Olken and Pande similarly explain that corruption in developing countries imposes significant economic and institutional costs, including distorted public expenditure, inefficient service delivery, and weakened public accountability [2].

The economic theory of corruption provides a relevant analytical foundation for examining the legal consequences of state loss recovery. Corrupt conduct may be viewed as a calculated act in which a prospective offender weighs the expected benefits of the offence against the probability and severity of legal sanctions. Becker's economic theory of crime suggests that deterrence depends not only on the severity of punishment but also on the likelihood that unlawful conduct will be detected and sanctioned [3]. A legal policy allowing an offender to avoid criminal proceedings merely by returning the amount unlawfully obtained could reduce the expected cost of corruption. Such a policy may generate a perception that corruption constitutes a low-risk activity because an offender who is detected would only be required to return the proceeds already acquired.

The eradication of corruption must consequently pursue both punitive and restorative objectives. Criminal punishment remains necessary to express public condemnation, establish accountability, and deter future offences. Recovery measures are equally important because corruption eradication should not be limited to the imprisonment of offenders while allowing the proceeds of corruption to remain outside the State Treasury. Public funds recovered through legal proceedings can be restored to their original public function and used to finance development, public services, and the fulfilment of the social rights of the community.

The theory of asset recovery reinforces this dual orientation. Asset recovery is not merely an ancillary consequence of criminal punishment but an essential strategy for depriving offenders of the economic benefits derived from corruption. Trinchera argues that confiscation and asset recovery are central instruments in combating bribery and corruption because they remove the proceeds of unlawful conduct and reduce the economic incentives to commit such offences [4]. State loss recovery must therefore be interpreted as an integral component of corruption eradication and not as a substitute for criminal accountability. Its principal purpose is to restore state assets and prevent offenders from retaining the benefits of their unlawful conduct.

Recent practices demonstrate that persons involved in corruption cases may repay state losses before a final judicial decision has been rendered. In certain cases, repayment occurs even before the commencement of a formal criminal investigation or while a preliminary inquiry is still being conducted. One example concerns the discontinuation of a preliminary inquiry by the Lebak District Prosecutor's Office in a case involving an alleged overpayment of IDR 731,000,000 to PT Cipadang Jayabaya Utama as the provider of goods and services for the construction of the Gajrug Market. During the preliminary inquiry, the relevant party returned the overpayment. The case was not subsequently advanced because the available evidence was considered insufficient and the recovery of the loss was regarded as eliminating the element of state financial loss.

A different approach was adopted in the corruption case involving Fera Femike Mumek. The case concerned an allegedly fictitious activity relating to the withdrawal of an advance payment for a road improvement project in Ratahan District, Southeast Minahasa Regency, for the 2023 fiscal year. The alleged state financial loss amounted to IDR 1,345,130,834. The suspect returned IDR 1,345,130,900 through legal counsel on 19 June 2024, after detention had been imposed and while the South Minahasa District Prosecutor's Office was conducting a formal criminal investigation.

The repayment did not lead to the discontinuation of the proceedings. The Prosecutor's Office continued the case under Article 2 paragraph (1), Article 3 in conjunction with Article 18 of the Indonesian Corruption Eradication Law and Article 55 paragraph (1), subparagraph 1, of the Indonesian Criminal Code. The repayment did not automatically eliminate the alleged unlawful conduct, and the case proceeded to trial. This approach reflects Article 4 of the Indonesian Corruption Eradication Law, under which the recovery of state losses after the constituent elements of a corruption offence have been established may only be considered a mitigating factor and cannot extinguish criminal liability.

A different normative orientation is reflected in the Circular Letter of the Deputy Attorney General for Special Crimes Number B-765/F/Fd.1/04/2018 concerning Technical Guidelines for Handling Corruption Cases at the Preliminary Inquiry Stage. Point 4 of the Circular Letter contains an economic-policy consideration by providing that, where the parties concerned have acted proactively and fully restored the state financial losses, the continuation of legal proceedings may be reconsidered by taking into account the stability of local government administration and the continuity of national development. The Circular Letter indicates that a preliminary inquiry conducted by the Prosecutor's Office in a corruption case is not limited to determining whether an event may constitute a criminal offence or whether preliminary indications of unlawful conduct exist. The process may also be directed towards identifying and determining the amount of the state financial loss. The Prosecutor's Office may undertake this assessment independently or in cooperation with the Government Internal Supervisory Apparatus, the Supreme Audit Board, the Financial and Development Supervisory Agency, or a public accountant. Where the amount of the loss has been clearly established and the parties concerned demonstrate a cooperative attitude by fully restoring the loss, such conduct may be considered in deciding whether the case should proceed to the formal investigation stage.

The policy contained in the Circular Letter can be analysed through the theory of restorative justice. Restorative justice shifts attention from punishment alone towards the identification and repair of harm caused by an offence. Daly emphasises that restorative justice should not be simplistically regarded as the complete opposite of retributive justice or as an approach that necessarily replaces formal criminal accountability [5]. Restorative and retributive elements may coexist within a criminal justice framework, particularly where restoration is required without disregarding the seriousness of the offence and the need for accountability.

The application of restorative justice to corruption cases requires particular caution because the harm caused by corruption is collective and diffuse. The immediate victim is not limited to a specific individual. The community as a whole may suffer through reduced public services, delayed infrastructure, diminished development funds, and the erosion of trust in public institutions. State loss recovery may therefore possess a restorative function insofar as it returns public resources and supports the restoration of the community's social rights. Recovery cannot automatically be equated with the complete restoration of all harm because corruption may also generate institutional, social, and economic consequences that cannot be measured solely by the amount of money returned. A restorative approach to corruption should consequently be developed as a limited and conditional mechanism. Full and voluntary recovery at the preliminary inquiry stage may be treated as one relevant consideration in determining whether a case should proceed. Such consideration should apply only where the amount of the loss has been independently verified, the relevant parties have cooperated in disclosing the facts, the public interest has been adequately protected, and sufficient preliminary evidence establishing the constituent elements of a corruption offence has not yet been obtained. Recovery should not provide an automatic exemption from prosecution where unlawful conduct, culpability, and state financial loss have already been sufficiently established.

The authority to determine whether a case should proceed also concerns the theory of prosecutorial discretion. Prosecutorial discretion recognises that prosecutors must make decisions concerning evidentiary sufficiency, charging, prosecution priorities, and the public interest. Albonetti explains that prosecutorial decision-making frequently operates under conditions of evidentiary and factual uncertainty, requiring prosecutors to assess the likelihood that a case can be legally substantiated [6]. Jallow similarly observes that prosecutorial discretion constitutes an essential feature of criminal justice systems but must be exercised within a framework of legal standards, accountability, consistency, and public interest considerations [7].

These theoretical propositions indicate that discretion must not be understood as unrestricted institutional freedom. Prosecutorial discretion concerning the recovery of state losses must be based on objective and reviewable parameters. Evidentiary sufficiency, the nature and seriousness of the conduct, the offender's role, the amount and method of recovery, the extent of cooperation, the impact on the public interest, and the possibility of repeated offending should form part of the assessment. Transparency and institutional supervision are also required to prevent inconsistent treatment, selective enforcement, or the use of repayment as a transactional mechanism for avoiding criminal proceedings.

The application of Circular Letter Number B-765/F/Fd.1/04/2018 nevertheless creates a normative problem in relation to Article 4 of the Indonesian Corruption Eradication Law. Article 4 limits the legal effect of recovery by expressly providing that it does not extinguish the punishment of offenders under Articles 2 and 3. The Circular Letter, by contrast, permits the recovery of state losses to be considered in determining whether legal proceedings should continue at the preliminary inquiry stage. This apparent tension must be resolved by distinguishing between the legal characteristics of a preliminary inquiry and those of a formal criminal investigation.

A preliminary inquiry (penyelidikan) and a formal criminal investigation (penyidikan) form part of an integrated criminal procedure, but they possess different legal characteristics and consequences. A preliminary inquiry is conducted to determine whether an event may reasonably be classified as a criminal offence and whether the matter should advance to a formal investigation. At this stage, the proceedings have not fully acquired a pro justitia character and no definitive conclusion regarding criminal liability has been reached.

A formal criminal investigation constitutes a pro justitia process directed towards collecting evidence, identifying the suspect, and preparing the case for prosecution. This stage may involve coercive measures that restrict individual rights, including arrest, detention, search, and seizure. The commencement of a formal investigation therefore indicates that law enforcement authorities have identified sufficient preliminary grounds to pursue the alleged offence within the criminal justice process.

The distinction between these stages provides the basis for reconciling Article 4 of the Indonesian Corruption Eradication Law with the Circular Letter. Recovery undertaken during a preliminary inquiry may be considered as part of the assessment of whether sufficient legal and evidentiary grounds exist to commence a formal investigation. The discontinuation of a preliminary inquiry must nevertheless be based on the absence of sufficient evidence or the non-fulfilment of the constituent elements of a corruption offence, rather than solely on the fact that the state loss has been repaid.

Once a formal criminal investigation has commenced and the constituent elements of the offence have been sufficiently established, Article 4 must apply strictly. State loss recovery at this stage cannot extinguish criminal liability or constitute an independent ground for terminating the proceedings. It may only be considered in determining the appropriate sentence, evaluating the offender's cooperation, or reducing the remaining amount of state loss to be recovered. The central legal issue therefore concerns the formulation of clear boundaries between asset recovery, restorative justice, prosecutorial discretion, and criminal accountability. A legally coherent model must preserve the effectiveness of state financial recovery without creating impunity for corruption. Such a model must also ensure that discretion at the preliminary inquiry stage remains limited, proportional, transparent, and consistent with the hierarchy of laws and regulations. State loss recovery should ultimately be understood as an effort by the State to eradicate corruption, restore unlawfully depleted public assets, and protect the social rights of communities harmed by corrupt conduct. The recovery of public funds and the imposition of criminal liability are not mutually exclusive objectives. Both mechanisms should operate in a complementary manner: asset recovery restores the material resources belonging to the public, while criminal accountability affirms the unlawfulness of the conduct, deters future offences, and protects the integrity of public administration.

Research Method

A research method constitutes a systematic scientific framework employed to examine a particular subject or object and to produce findings whose validity can be academically justified. Research itself refers to an organised process of collecting, examining, and analysing relevant information to achieve predetermined objectives. Sugiyono defines research methodology as a scientific means of obtaining valid data through which particular knowledge may be discovered, developed, and verified, thereby enabling researchers to understand, resolve, and anticipate specific problems [8].

Legal research is essentially an exercise in legal know-how rather than merely acquiring know-about knowledge. Its principal function is to identify, analyse, and formulate legally defensible solutions to the legal issues under examination. Accordingly, this study employs a normative legal research method. Normative legal research examines law from an internal legal perspective, with legal norms serving as its principal object of analysis [9]. I Made Pasek Diantha explains that normative legal research is directed towards examining law within its own normative structure. This approach is consistent with Hans Kelsen's conception of a legal norm as an expression of an "ought," namely a binding command or prescription that encompasses the normative functions of law and distinguishes legal science as a sui generis normative discipline [10]. Within normative legal research, law is generally understood either as rules embodied in written legislation, commonly referred to as law in books, or as legal norms that prescribe standards of appropriate human conduct. The analysis therefore focuses on legislation, legal principles, doctrines, and other authoritative legal materials rather than on the empirical behaviour of legal institutions or members of society [11].

The normative legal method was selected because this study addresses an apparent conflict of norms concerning the recovery of state losses in corruption cases prior to the commencement of a formal criminal investigation. The normative inconsistency arises between Article 4 of the Indonesian Corruption Eradication Law and point 4 of the Circular Letter of the Deputy Attorney General for Special Crimes Number B-765/F/Fd.1/04/2018. The Circular Letter reflects an economic-policy orientation by permitting prosecutors, during the preliminary inquiry stage, to consider whether legal proceedings should continue where the parties concerned have proactively and fully restored the state financial losses. Article 4 of the Indonesian Corruption Eradication Law, however, limits the legal consequences of such recovery by providing that the repayment of state financial losses or losses to the national economy does not extinguish the criminal liability of offenders who have committed corruption offences under Articles 2 and 3. Recovery may only be taken into account as a mitigating factor.

This study consequently examines the normative relationship between the statutory prohibition against treating state loss recovery as a ground for extinguishing criminal liability and the prosecutorial discretion recognised under the Circular Letter. The analysis is directed towards determining whether the recovery of state losses before the formal investigation stage may lawfully influence the continuation of proceedings and identifying the legal limitations governing the exercise of prosecutorial discretion during the preliminary inquiry stage.

Results and Discussion

1. The Nature and Legal Function of State Loss Recovery in Corruption Cases

The term state loss recovery is not expressly defined in the Indonesian Corruption Eradication Law. Its legal meaning must consequently be constructed by examining the concepts of "recovery" and "state loss" separately before integrating them into a coherent legal formulation. In ordinary usage, recovery refers to the act of returning something to its original condition or restoring something that has been lost, removed, or unlawfully taken. The term corresponds to the English legal concept of recovery, which, according to Black's Law Dictionary, broadly encompasses the restoration of something lost or taken, the judicial recognition of a right to obtain property or compensation, and the amount awarded or collected pursuant to a judgment. Within the context of corruption, recovery should therefore be understood not merely as the physical return of money but as a legally structured process for restoring assets, rights, and public resources affected by unlawful conduct.

Indonesian legislation provides a more specific definition of the second component of the term. Article 1 point 22 of Law Number 1 of 2004 concerning the State Treasury defines a state or regional loss as an actual and definite shortage of money, securities, or goods resulting from an unlawful act committed either intentionally or negligently. The General Elucidation concerning the settlement of state losses further establishes that any state or regional loss caused by an unlawful act or negligence must be compensated by the responsible party so that the State's financial position can be restored. Law Number 1 of 2004 also places the management of state finances within a system that must be transparent, accountable, and directed towards the greatest possible prosperity of the people.

The integration of these concepts leads to the understanding that state loss recovery constitutes a legal act or series of legal measures aimed at restoring an actual and quantifiable shortage of state money, securities, or goods caused by intentional or negligent unlawful conduct. The concept includes more than the voluntary repayment of money by an alleged offender. It may encompass asset tracing, freezing, seizure, confiscation, the imposition and execution of replacement money, the return of property, and other mechanisms designed to restore the State's financial position. State loss recovery must also be distinguished from the wider concept of asset recovery. State loss recovery is primarily directed towards compensating a measurable loss suffered by the State. Asset recovery encompasses a broader process of identifying, tracing, freezing, seizing, confiscating, managing, and returning the proceeds or instrumentalities of crime. Tommaso Trinchera argues that confiscation and asset recovery are essential anti-corruption instruments because they deprive offenders of the economic benefits generated by bribery and corruption. Their function is not limited to punishment but extends to eliminating the financial incentives that make corruption economically attractive [12].

The philosophical foundation of state loss recovery arises from the nature of corruption itself. The Indonesian Corruption Eradication Law was enacted on the premise that corruption causes serious harm to state finances and the national economy, obstructs national development, and impedes the realisation of a just and prosperous society based on Pancasila and the 1945 Constitution. Law Number 31 of 1999 remains the principal statutory framework governing corruption eradication, although several of its substantive provisions have subsequently been affected by the enactment of the new Indonesian Criminal Code. The importance of recovering the proceeds of corruption is also recognised at the international level. Article 51 of the United Nations Convention against Corruption declares the return of assets to be a fundamental principle of the Convention and requires States Parties to provide the widest possible measure of cooperation and assistance in achieving that objective. Asset recovery is consequently not a secondary or incidental aspect of corruption eradication. It is one of the principal mechanisms through which the economic consequences of corruption may be reversed and stolen public resources returned to their legitimate public purpose.

The fundamental status of asset recovery under the Convention does not mean that corruption enforcement should be reduced solely to the repayment of financial losses. The recovery of state assets and the attribution of criminal responsibility serve distinct but complementary objectives. Recovery restores material resources and deprives offenders of unlawful benefits, while criminal liability affirms the unlawfulness of the conduct, condemns the abuse of public power, and deters similar conduct. Treating repayment as an automatic substitute for prosecution could transform corruption into a calculated economic risk under which an offender would merely be required to return the proceeds when detected. This proposition is supported by the economic theory of crime. An individual contemplating unlawful conduct may compare its expected benefits with the probability of detection and the severity of the anticipated sanction. A legal system that permits offenders to retain the benefits of corruption or to avoid criminal liability merely by repaying the amount discovered would reduce the expected cost of committing the offence. Asset recovery must therefore operate together with credible criminal sanctions to ensure that corruption does not remain economically profitable.

Paolo Mauro's analysis demonstrates that corruption reduces investment and consequently impedes economic growth. Corruption is not merely a transfer of resources from the State to an individual offender. It distorts the allocation of public resources, increases uncertainty, undermines institutional efficiency, and diminishes productive investment [13]. The economic consequences of corruption also include higher transaction costs, reduced competitiveness, distorted public procurement, diminished tax revenue, and the diversion of expenditure away from programmes that generate broad social benefits. State loss recovery therefore possesses a philosophical function associated with the protection of the social rights of the community. Public money is collected and managed not for the benefit of the government as an institution but for the financing of education, healthcare, infrastructure, social protection, environmental preservation, and other public services. The misappropriation of public resources prevents the State from fulfilling the constitutional objectives expressed in the fourth paragraph of the Preamble to the 1945 Constitution: protecting the Indonesian people, advancing public welfare, educating the nation, and realising social justice.

Corruption may accordingly be understood as an indirect form of deprivation imposed upon the community. This concern resonates with Sukarno's critique of l'exploitation de l'homme par l'homme, namely the exploitation of human beings by other human beings. Corruption does not ordinarily involve the direct physical coercion of its victims. Its exploitative character operates through the concealed diversion of public resources, unequal access to government services, and the concentration of development benefits in the hands of public officials, business actors, or affiliated groups. The community ultimately bears the cost through inadequate services, delayed infrastructure, increased prices, and diminished opportunities for social and economic development. Research concerning corruption and inequality supports this understanding. Gupta, Davoodi, and Alonso-Terme found that corruption may increase income inequality and poverty by reducing economic growth, weakening the progressivity of taxation, diminishing the quantity and effectiveness of social expenditure, restricting human-capital formation, and creating unequal access to education and public resources [14]. Corruption therefore injures the community not only through the nominal amount lost by the treasury but also through the social benefits that could have been generated had those resources been lawfully managed.

The political consequences of corruption are equally significant. Mark Warren conceptualises corruption in a democracy as a violation of the democratic norm of inclusion. Public authority is expected to be exercised for purposes that can be justified to all citizens. Corruption excludes members of the public from decisions, benefits, and opportunities that should be governed by public rules, while granting privileged access to actors capable of purchasing influence or exploiting public office [15]. Corruption also undermines public confidence in government and legal institutions. Anderson and Tverdova's comparative analysis of contemporary democracies demonstrates that citizens living in more corrupt political environments tend to express less favourable attitudes towards government institutions [16]. Hakhverdian and Mayne similarly explain that institutional trust is closely connected to citizens' assessments of institutional performance, including the perceived prevalence of corruption [17]. A government that fails to recover stolen public assets or appears to permit offenders to avoid responsibility through repayment risks reinforcing the perception that the legal system protects politically or economically powerful actors.

The social impact of corruption is reflected in the deterioration of ethical and professional standards. Widespread bribery and abuse of authority may normalise the belief that public services, permits, government contracts, or legal protection can be obtained through unofficial payments rather than through transparent procedures. This condition weakens respect for legality, honesty, professionalism, and public responsibility. The resulting harm extends beyond an individual transaction because it alters social expectations regarding the manner in which institutions operate. Environmental harm forms another dimension of corruption-related losses. Corruption in licensing, mining, forestry, spatial planning, waste management, and environmental supervision may facilitate the exploitation of natural resources and weaken the enforcement of environmental standards. Welsch's cross-country analysis found that corruption may increase pollution directly and may also affect environmental quality indirectly through its influence on income and economic performance. The relationship is particularly consequential in developing countries, where reducing corruption can improve both economic and environmental outcomes [18].

Environmental corruption demonstrates that the consequences of corruption cannot always be represented solely by an immediate shortage of state money. The approval of an unlawful mining licence, for example, may generate lost state revenue, ecological degradation, public-health costs, reduced agricultural productivity, and intergenerational harm. Asset and state loss recovery must therefore be situated within a wider understanding of public harm, even when the applicable statutory calculation requires the loss to be actual and definite. The practical urgency of this issue is demonstrated by the continuing disparity between state financial losses and the monetary sanctions imposed in corruption judgments. ICW's monitoring of corruption judgments during 2020–2024 indicates that the value of replacement money ordered by courts remained substantially lower than the amount of state financial loss identified in the relevant cases. ICW reported that state financial losses recorded in judgments for 2024 reached approximately IDR330.9 trillion, while monetary recovery through fines and replacement-money orders amounted to approximately IDR16 trillion, representing less than five per cent of the losses recorded. The exceptional increase in the 2024 figure was heavily influenced by the corruption case involving the tin-trading system.

The figures must be interpreted cautiously. Replacement money imposed by a judicial decision is not necessarily identical to the amount effectively executed and deposited into the State Treasury. Article 18 of the Corruption Eradication Law also limits replacement money to the maximum value of property acquired by the convicted person from the corruption offence. Total state loss may exceed the personal benefit obtained by one defendant, particularly in cases involving several perpetrators, corporations, environmental damage, or benefits transferred to third parties. The disparity nevertheless reveals that the economic dimension of corruption enforcement remains insufficiently developed. The practical experience of the Corruption Eradication Commission confirms that successful recovery requires an integrated process extending from asset tracing and seizure to valuation, management, auction, grants, transfer of use, and the execution of final judicial decisions. The KPK reported recovering approximately IDR2.54 trillion during the 2020–2024 period through various asset-recovery mechanisms, including auctions, replacement money, fines, grants, and transfers of confiscated assets.

State financial losses may arise at two principal points in the movement of public funds. The first occurs when funds should enter the State Treasury. Manipulated reports, tax evasion, unlawful reductions of penalties, collusion in the collection of public revenue, and the concealment of state receivables may prevent money legally owed to the State from being received. The second occurs when funds leave the State Treasury. Misappropriation, budgetary irregularities, fictitious projects, inflated prices, unlawful payments, and the diversion of expenditure may cause public money to leave the treasury without a lawful or equivalent public benefit. This classification demonstrates that a state loss is not limited to money that has physically disappeared after being deposited in a government account. A loss may also consist of revenue that the State was legally entitled to receive but failed to collect because of unlawful conduct. It may further arise from an unlawful increase in liabilities, the acquisition of goods at an inflated price, or expenditure that does not produce the contracted result.

The element of state financial loss has historically occupied a central position in Indonesian corruption proceedings. Its existence and amount may be examined from the preliminary inquiry and formal investigation stages through prosecution and judicial adjudication. Law-enforcement authorities commonly rely upon audits, expert assessments, documentary evidence, financial records, contractual documents, and the findings of competent supervisory or audit institutions to determine whether a loss exists and whether it is attributable to unlawful conduct.

The widespread occurrence of corruption across governmental sectors has consequently affected both the functioning of public administration and the State's economic capacity. Large-scale losses may undermine national economic stability and development priorities. Smaller-scale corruption may appear financially limited but can significantly damage public confidence, local services, and institutional integrity. No act of corruption is entirely without social consequences because every unlawful diversion of public resources reduces the capacity of the State to perform its public responsibilities. The legal nature of state loss recovery can ultimately be understood through three interconnected functions. The first is a restorative function, which seeks to return public assets and restore the State's capacity to fulfil the social rights of the community. The second is a preventive and deterrent function, which removes the economic benefits of corruption and communicates that unlawful conduct cannot generate lasting profit. The third is an accountability function, which complements rather than replaces the criminal responsibility of the offender.

State loss recovery should not be treated merely as an administrative transaction between the offender and the State. Its legal purpose is to reverse the economic consequences of corruption, protect the public interest, and restore resources to their constitutionally intended social function. Full recovery may be relevant to sentencing, cooperation, prosecutorial assessment, or the calculation of outstanding losses. It cannot automatically extinguish the unlawful character of a completed corruption offence. A coherent anti-corruption framework must consequently integrate asset recovery with criminal accountability. The success of corruption eradication should not be measured exclusively by the number of offenders imprisoned. It must also be evaluated by the State's ability to identify, secure, confiscate, and return the proceeds of corruption for the benefit of the community. Recovery and punishment are not competing objectives. They represent complementary legal responses to the material, institutional, social, political, and environmental harm caused by corruption.

2. The Legal Implications of State Financial Loss Recovery Prior to Criminal Investigation

The increasing practice of recovering state financial losses before the commencement of a formal criminal investigation raises fundamental questions concerning its legal effect on corruption proceedings. The principal issue concerns whether the full repayment of state losses may justify the discontinuation of a case at the preliminary inquiry stage or whether the proceedings must continue once indications of corruption have been identified. This question is particularly significant because state loss recovery serves an important restorative function, while corruption remains a public offence that harms state finances, public administration, institutional integrity, and the social rights of the community. Article 4 of the Indonesian Corruption Eradication Law establishes the principal substantive rule governing this issue. The provision stipulates that the recovery of state financial losses or losses to the national economy does not extinguish the criminal liability of an offender. Recovery may only constitute a mitigating consideration. The provision reflects the understanding that repayment does not retrospectively eliminate the unlawful act, the offender's culpability, or the state loss that had already occurred. The restoration of the amount unlawfully obtained may repair part of the material consequences of corruption, but it does not automatically erase the public wrong embodied in the offence.

The current legal analysis must also take account of the reform of Indonesian criminal law that entered into force on 2 January 2026. Articles 2 paragraph (1) and 3 of the Corruption Eradication Law were partially repealed and substantively replaced by Articles 603 and 604 of the National Criminal Code. Law Number 1 of 2026 concerning Criminal Adjustment further adjusted statutory references to the former corruption provisions. Article 4 of the Corruption Eradication Law must therefore be interpreted together with the replacement provisions governing unlawful enrichment and abuse of authority causing state financial or economic losses. A procedural distinction must be drawn between a preliminary inquiry (penyelidikan) and a criminal investigation (penyidikan). Law Number 20 of 2025 concerning the Criminal Procedure Code, which replaced Law Number 8 of 1981 on 2 January 2026, defines a preliminary inquiry as a series of measures undertaken to identify and examine an event suspected of constituting a criminal offence and to determine whether a criminal investigation may be conducted. A criminal investigation is directed towards collecting evidence, clarifying the offence, and identifying the suspect. The preliminary inquiry therefore functions as an initial legal and evidentiary screening mechanism, while the criminal investigation constitutes a formal pro justitia process that may involve coercive measures and restrictions on individual rights.

The Circular Letter of the Deputy Attorney General for Special Crimes Number B-765/F/Fd.1/04/2018 gives the preliminary inquiry in corruption cases an additional asset-recovery orientation. The preliminary inquiry is not limited to determining whether an allegedly criminal event has occurred. Prosecutors are also instructed to identify the amount of the state financial loss, independently or in cooperation with government internal supervisory institutions, audit bodies, or public accountants. Asset identification and the collection of information concerning property belonging to the parties involved are also intended to support the early recovery of state assets. The Circular Letter allows the proactive and full recovery of state financial losses to be considered when determining whether the case should proceed to the next procedural stage. Such consideration must take account of the stability of local government administration and the continuity of national development. This policy reflects an economic and utilitarian dimension of corruption enforcement. The effectiveness of law enforcement is measured not only by the number of cases brought to court, but also by the extent to which unlawfully depleted public resources are restored.

The first legal implication of this policy is that repayment may influence the assessment undertaken during the preliminary inquiry, but it cannot independently determine whether a criminal offence exists. A decision not to proceed must be based on a legal conclusion that the available facts and evidence do not sufficiently establish the constituent elements of corruption. The repayment of an overpayment may, for example, be relevant where the available facts indicate an administrative error, contractual miscalculation, civil default, or negligence that does not satisfy the required elements of criminal wrongdoing. The same repayment cannot justify the discontinuation of a case where evidence demonstrates intentional unlawful conduct, abuse of public authority, collusion, illicit enrichment, or the deliberate diversion of state resources.

The distinction is essential because the element of state financial loss concerns a historical legal fact. A loss that has actually occurred does not cease to have existed merely because it is subsequently repaid. Recovery changes the State's financial position after the offence, but it does not necessarily alter the legal character of the conduct that caused the loss. A contrary interpretation would allow an offender to neutralise criminal liability after detection by returning only the amount identified by investigators. Such an approach could reduce the expected legal cost of corruption and create a perception that the offence merely generates a repayable debt rather than criminal responsibility.

Asset recovery theory nevertheless demonstrates that early recovery should remain a central objective of corruption enforcement. Confiscation and recovery remove the economic benefits of unlawful conduct and restore the lawful financial position as far as possible. Hryniewicz-Lach characterises the confiscation of criminal proceeds as predominantly restorative because it seeks to deprive beneficiaries of unlawful gains and re-establish the status existing before the offence. The effectiveness of recovery depends on legal rules, inter-agency cooperation, and the practical capacity to identify, freeze, confiscate, and execute assets [19]. Trinchera similarly argues that confiscation and asset recovery are indispensable instruments in combating bribery and corruption because they demonstrate that crime does not pay. Recovery may be more significant to economically motivated offenders than imprisonment, particularly when the offender has attempted to conceal or transfer the proceeds of crime [20]. Early asset tracing during a preliminary inquiry may consequently prevent the dissipation of assets and increase the likelihood that the State will obtain actual recovery rather than merely a judicial order that cannot be executed.

The second legal implication concerns the position and limits of prosecutorial discretion. Prosecutors inevitably exercise discretion when determining evidentiary sufficiency, investigative priorities, the allocation of institutional resources, and the public interest in continuing a case. Albonetti's analysis of prosecutorial decision-making demonstrates that charging decisions are influenced by uncertainty concerning evidence and the anticipated possibility of obtaining a conviction [21]. More recent research also indicates that prosecutorial decisions are shaped by the interaction of legal considerations, organisational constraints, and institutional policy, which makes transparency and structured decision-making essential [22].

Prosecutorial discretion cannot be interpreted as an unrestricted power to set aside statutory criminal provisions. The Circular Letter constitutes an internal policy instrument and does not possess the same normative authority as an Act of Parliament. A circular letter may guide the internal exercise of prosecutorial authority, clarify technical procedures, and establish institutional priorities. It cannot create an independent ground for extinguishing criminal liability or derogate from a higher statutory rule.

Recent studies concerning the legal position of circular letters in Indonesia confirm that such instruments should operate as internal administrative guidance rather than as legislation capable of modifying statutory obligations. A circular letter that contradicts or effectively annuls a statutory provision may create legal uncertainty, unequal treatment, and institutional credibility problems [23]. The principle of lex superior derogat legi inferiori requires lower or internal policies to be interpreted consistently with higher legislation [24]. The phrase in Circular Letter Number B-765/F/Fd.1/04/2018 allowing prosecutors to "consider the continuation of legal proceedings" must therefore receive a restrictive interpretation. It authorises a structured assessment of whether sufficient legal and evidentiary grounds exist to commence a criminal investigation. It does not authorise prosecutors to declare that an established corruption offence has disappeared solely because the financial loss has been repaid.

The third implication concerns the relationship between state loss recovery and restorative justice. Restorative justice generally focuses on repairing harm, recognising the interests of victims, encouraging offender accountability, and restoring damaged social relationships. Tony F. Marshall's formulation emphasises a process in which parties affected by an offence collectively determine how to address its consequences and future implications. Restorative justice therefore differs from a model centred exclusively on punishment. The application of this concept to corruption presents particular difficulties. Corruption ordinarily has diffuse and collective victims. The injured parties include taxpayers, recipients of public services, communities affected by delayed development, and citizens whose trust in public institutions has been diminished. The State acts as the legal representative and manager of public resources, but the substantive harm extends beyond the State Treasury. A bilateral settlement between an alleged offender and a law-enforcement institution cannot fully represent the interests of all communities affected by the corrupt conduct.

Daly cautions against treating restorative and retributive justice as absolute opposites. Restoration may coexist with accountability and proportionate punishment because a criminal offence constitutes not only harm but also a public wrong [25]. Brooks similarly develops the concept of punitive restoration, under which restorative outcomes may be combined with proportionate penal consequences and stakeholder participation [26]. These perspectives support a model in which state loss recovery complements criminal accountability rather than replacing it.

Indonesian legal scholarship remains divided on the use of restorative justice in corruption cases. One position considers asset recovery a mechanism through which restorative values may be integrated into corruption enforcement, provided that selective criteria prevent abuse and preserve substantive justice [27]. Another position argues that using restorative justice to discontinue corruption cases contradicts Article 4 of the Corruption Eradication Law and weakens the State's anti-corruption obligations [28].

The enactment of Law Number 20 of 2025 has provided a decisive current-law clarification. The new Criminal Procedure Code formally regulates restorative justice at the preliminary inquiry, investigation, prosecution, and trial stages. Article 82 expressly excludes corruption offences from the formal restorative justice mechanism. A preliminary inquiry or criminal investigation concerning corruption cannot therefore be discontinued through the statutory restorative justice procedure regulated in Articles 79–88. This development materially changes the legal interpretation of the earlier prosecutorial circulars. The recovery-oriented policy contained in Circular Letter Number B-765/F/Fd.1/04/2018 can no longer be characterised as a formal restorative justice settlement for corruption cases. Its legitimate function is limited to asset recovery, evidentiary assessment, case prioritisation, and the determination of whether the facts disclose a criminal offence. Full repayment cannot produce a statutory restorative settlement or constitute an autonomous ground for discontinuing proceedings.

The exclusion does not render restoration irrelevant to corruption enforcement. Asset recovery remains restorative in function because it returns public resources and removes unlawful gains. The distinction lies between a restorative objective and a formal restorative justice procedure. Corruption proceedings may pursue restoration through repayment, confiscation, replacement money, compensation, and the social reuse of recovered assets, while the criminal case continues to establish responsibility and impose appropriate sanctions.

Fauzi, Anditya, and Fitriana's 2025 study supports the view that asset recovery may contribute to restorative justice by returning state resources and recognising the community's interest in the recovery of public funds [29]. Such recovery should nevertheless be positioned within the criminal process rather than as a means of granting impunity. The legal system must ensure that restoration is accompanied by disclosure of the offence, accountability for the responsible actors, and safeguards against repetition.

The fourth implication concerns efficiency and proportionality in law enforcement. The Circular Letter reflects the view that prosecuting a case involving a relatively small state loss may require expenditure exceeding the amount recoverable. Resources devoted to a minor case may also reduce the institutional capacity to investigate complex and continuing corruption involving high-ranking offenders or substantial public losses. The prioritisation of big fish cases can therefore be justified as a rational allocation of limited enforcement resources. Economic efficiency cannot serve as the sole basis for declining to proceed. The seriousness of corruption is not measured exclusively by the nominal amount of the loss. A relatively small financial loss may involve systematic bribery, repeated abuse of authority, manipulation of public procurement, obstruction of supervision, or conduct that seriously damages institutional trust. Enforcement research indicates that prosecutorial resources and enforcement intensity affect the number of public-corruption convictions, confirming that institutional prioritisation has consequences for deterrence and accountability [30].

A purely monetary threshold may also create unequal treatment. Officials or business actors with sufficient financial capacity would be able to repay losses and avoid investigation, while less affluent offenders would face the criminal process. Such an outcome would contradict equality before the law and could transform recovery into a transactional mechanism available primarily to economically powerful actors. The use of discretion must consequently be based on multiple legal and factual criteria rather than the amount of loss alone. Relevant considerations should include the nature of the unlawful conduct, the existence of corrupt intent, the offender's position and role, the duration and recurrence of the conduct, the use of collusion or concealment, the impact on public services, the amount of personal benefit, the involvement of third parties, the voluntariness and timing of repayment, and the extent of cooperation with law-enforcement authorities.

Full recovery should be independently verified by a competent audit or supervisory institution. The verification must ensure that the amount returned represents the entire state financial loss and not merely the sum initially identified by the alleged offender. Investigators must also determine whether additional assets, profits, interest, third-party benefits, or losses to the national economy remain outstanding. Repayment should not be regarded as complete where it excludes proceeds transferred to relatives, corporations, intermediaries, or affiliated parties. The timing of repayment is equally relevant. Voluntary disclosure and repayment before detection may indicate good faith, administrative correction, or the absence of corrupt intent, depending on the surrounding circumstances. Repayment made only after an audit, summons, search, seizure, or exposure of the offence has a different evidentiary significance. Late repayment may demonstrate cooperation and support mitigation, but it does not necessarily prove that the original conduct lacked criminal intent. The use of discretion also requires transparency and institutional accountability. A decision not to proceed should be documented in a reasoned legal assessment explaining the facts, the evidentiary position, the calculation and verification of the loss, the recovery mechanism, and the basis for concluding that the elements of corruption have not been sufficiently established. Internal supervision and the possibility of external legal review are necessary to prevent selective enforcement, conflicts of interest, and informal settlements.

A legally defensible model should distinguish three possible situations. The first arises where an administrative or contractual irregularity causes a financial discrepancy but the evidence does not establish criminal intent, unlawful enrichment, or abuse of authority. Full correction and recovery may support the conclusion that the matter should be resolved through administrative, civil, or treasury-loss mechanisms. The second situation arises where indications of corruption exist but the preliminary evidence remains insufficient to satisfy the legal threshold for a criminal investigation. Recovery may be considered together with all other circumstances, although the decision not to proceed must rest on evidentiary insufficiency rather than repayment itself.

The third situation arises where sufficient evidence establishes the constituent elements of corruption. Recovery in this category cannot prevent the commencement or continuation of a criminal investigation. It may be recognised as cooperation, reduce the remaining amount recoverable, support asset-management efficiency, and constitute a mitigating factor at sentencing. Criminal accountability must continue because the recovery of material losses does not fully repair the institutional and social harm caused by corruption. State financial loss recovery prior to criminal investigation therefore produces a limited procedural effect rather than an effect that extinguishes substantive criminal liability. Its legitimate role is to facilitate early asset preservation, assist evidentiary assessment, encourage cooperation, and support proportionate allocation of enforcement resources. Its legal role does not include erasing an offence whose elements have been established.

The appropriate construction is a dual-track model combining recovery-oriented enforcement with criminal accountability. The recovery track seeks the prompt identification, securing, and return of public assets. The accountability track determines whether the conduct constitutes corruption and, where supported by sufficient evidence, proceeds through investigation, prosecution, and adjudication. The two tracks may operate simultaneously and should not be treated as mutually exclusive. This formulation preserves the economic and restorative benefits intended by Circular Letter Number B-765/F/Fd.1/04/2018 while maintaining consistency with Article 4 of the Corruption Eradication Law, the National Criminal Code, and the express exclusion of corruption from the formal restorative justice mechanism under the 2025 Criminal Procedure Code. The resulting model prevents repayment from functioning as a means of purchasing immunity, while ensuring that anti-corruption enforcement remains capable of restoring state assets and protecting the social interests of the community.

Conclusion

State loss recovery in corruption cases must be understood as a mechanism rather than an administrative repayment to the State Treasury. Its scope includes identifying, tracing, freezing, seizing, confiscating, managing, and returning assets. Normatively, the concept is rooted in Article 1 point 22 of Law Number 1 of 2004 concerning the State Treasury, Article 18 of the Indonesian Corruption Eradication Law, and Article 51 of the United Nations Convention against Corruption, which recognises asset recovery as a fundamental principle of anti-corruption policy. The legal function of state loss recovery comprises three interconnected dimensions. First, it performs a restorative function by returning public assets and restoring the State's capacity to fulfil constitutional obligations relating to welfare, education, health, infrastructure, social protection, and environmental sustainability. Second, it serves a preventive and deterrent function by removing the economic benefits of corruption and ensuring that unlawful conduct does not remain profitable. Third, it performs an accountability function by complementing, rather than replacing, the criminal liability of offenders. Corruption produces consequences beyond quantifiable financial losses. It weakens institutional integrity, obstructs development, increases inequality, damages public trust, and may generate social and environmental harm. The effectiveness of corruption eradication must therefore be assessed not only through imprisonment rates but also through the State's ability to secure and return criminal proceeds for public benefit. State loss recovery and criminal punishment should operate as complementary legal instruments. Full repayment may support mitigation or demonstrate cooperation, but it cannot automatically extinguish the unlawful character of a completed corruption offence.

State loss recovery in corruption cases constitutes a comprehensive legal mechanism encompassing asset tracing, freezing, seizure, confiscation, management, and restitution. Its functions are restorative, preventive, deterrent, and accountable. Recovery restores public resources, protects social rights, and removes the economic benefits of corruption. It must operate alongside criminal liability because repayment does not eliminate the unlawful nature of a completed offence. Corruption causes financial, institutional, social, political, and environmental harm extending beyond measurable treasury losses. Therefore, the effectiveness of corruption eradication should be assessed through both punishment and the State's capacity to recover criminal proceeds for public welfare and development purposes.

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