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Economic Analysis of Law: The Optimization of Sanctions and Reformulation of Criminal Policy on Corruption Regarding State Financial Losses

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ABSTRACT

This study employs an Economic Analysis of Law (EAL) to evaluate Indonesia's criminal policy against corruption, particularly concerning state financial losses. It highlights that the current sanctioning system, as specified in Articles 2 and 3 of the Corruption Eradication Law, is sub-optimal due to its shift to a material delict, which increases enforcement costs and lowers the probability of punishment. This leads to a diminished deterrent effect as the expected cost of crime remains low for rational actors. The research uses normative legal methods, analyzing primary, secondary, and tertiary legal materials through statutory and conceptual approaches. Findings reveal inefficiencies in current provisions: Article 4 disincentivizes asset recovery, and Article 18's limited restitution fails to seize full illicit gains, contributing to an economically profitable perception of corruption. The paper proposes reforms, including reclassifying Articles 2 and 3 as formal delicts, treating state financial losses as civil debt, mandating full disgorgement of profits, and establishing optimal fines based on a multiplier effect. This reframes imprisonment as a secondary sanction, aiming to transform the law into an efficient tool for deterrence and asset recovery, thereby minimizing social costs and maximizing recovery of state assets.

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1. INTRODUCTION

In essence, law and economics both stem from the study of human behavior (scientific theories of behavior), so that the two complement each other and cannot be separated.[1] Both are synthesized with the idea that law must be directed towards

[1] Zainal Arifin Mochtar dan Eddy O.S Hiariej. (2024). Dasar Dasar Ilmu Hukum: Memahami Kaidah, Teori, Asas, dan Filsafat Hukum. Depok: Rajawali Pers, hal. 357.

achieving "the greatest happiness for the greatest number", namely maximum welfare for as many people as possible, a proposition that stems from Bentham's utilitarianism.[2] a breakthrough, namely "risk or benefit" within the framework of the utility of law, which is essential to the efficiency of human behavior. Economic analysis of law actually focuses its objectives on the utility of law as future law or ius constitution, which can serve as a basis for consideration in the formulation of positive law that not only ensures legal certainty but also ensures that the law formulated has optimal utility elements.

Based on this, the crime of corruption is a phenomenon that not only threatens the moral fabric of a nation, but also must be fundamentally viewed as a problem of economic efficiency. The preamble of Law Number 31 of 1999 concerning the Eradication of the Crime of Corruption juncto Law Number 20 of 2001 concerning the Amendment to Law Number 31 of 1999 concerning the Eradication of the Crime of Corruption (UU Tipikor) states that corruption is "very detrimental to the state's finances or the state's economy and hampers national development". From the perspective of the Economic Analysis of Law (EAL), this loss is not merely a transfer of funds from the state treasury to individual pockets, but rather a massive waste of social resources. When resources are allocated based on bribery or nepotism instead of through efficient market mechanisms, more significant losses occur. Furthermore, the costs incurred by the state to combat corruption and the costs incurred by the perpetrators to conceal their crimes constitute a waste of productive resources that provides no added value to society.[3]

The high prevalence of corruption in Indonesia, which has even been liked to "corruption as a way of life," indicates that the conventional criminal law approach focused on retributive justice has failed to create an adequate deterrent effect.[4] Meningkatnya jumlah kasus secara terus-menerus menunjukkan bahwa sanksi yang ada belum mampu mengubah perhitungan biaya-manfaat para pelaku potensial[5]. Kegagalan ini menggarisbawahi urgensi untuk mengadopsi metodologi analitis interdisipliner alternatif seperti Hukum dan Ekonomi, yang menawarkan sudut pandang berbeda untuk memahami dan mengatasi masalah ini.[6]

The EAL approach, pioneered by thinkers such as Gary Becker and Richard Posner, assumes that individuals, including criminals, are rational actors (rational maximizers) who consciously or unconsciously weigh the costs and benefits of their actions.[7] In this framework, corruption occurs when the expected benefit from the act is perceived to be greater than the expected cost. This cost is a function of two main variables, namely the probability of approval and punishment, and the severity of the sanction to be received if approved. Thus, to effectively combat corruption, the legal

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[2] Ibid. p. 358

[3] Richard A. Posner, (2014). *Economic Analysis of Law*, 9th ed. New York: Wolters Kluwer Law & Business, p. 312-316.

[4] Yati Nurhayati. (2014). "Analisis Ekonomi Terhadap Hukum Dalam Penanggulangan Tindak Pidana Korupsi". *Al-Adl: Jurnal Hukum,* 6(12): 69-91, p. 70-71.

[5] Ibid

[6] Kristianus Pramudito Isyunanda. (2022). "Pemanfaatan Hukum dan Ekonomi sebagai Metodologi Analisis Hukum di Indonesia". Jurnal Mimbar Hukum 34(1): 125-160, hal. 134.

[7] Ibid p. 135

system must be designed to engineer this calculation by increasing the expected cost of the crime of corruption to exceed its potential benefits.[8]

Based on this, it is also important to understand that the landscape of resolving state financial losses is divided into three different pathways: the primum remedy measure in the administrative law domain, civil remedies, and the last resort or ultimum remedy in the criminal law domain, each with its own distinct characteristics and objectives. The characteristics of these three will be briefly described.

In analyzing the above issues, economic tools will be used as the analytical framework in this research, such as rational choice theory (rational maximizers), the concept of efficiency, and the theory of optimal sanctions, to conduct an in-depth analysis of the effectiveness of the legal instruments used in addressing state financial losses. The analysis will focus on two main problems. First, how state financial losses are resolved through administrative, civil, and criminal pathways. Second, analyzing the effectiveness of the existing sanctions within the Corruption Eradication Law and subsequently reformulating those sanctions to make them more optimal for minimizing corruption cases in Indonesia with maximum effectiveness and efficiency.

2. METHOD

The type of research in this paper is normative legal research. Soerjono Soekanto and Sri Mamudji define normative legal research as legal research conducted by examining library materials (secondary data), which includes research on legal principles, legal systematics, the level of vertical and horizontal synchronization, comparative law, and legal history.[9] This approach focuses the analysis on legal materials (literature study) consisting of primary, secondary, and tertiary legal materials to answer the legal issues that have been formulated.[10] The analytical approach used is the statute approach, which involves examining the norms contained in the hierarchy of legislation, as well as the conceptual approach to deeply analyze key concepts such as rational choice, efficiency, and optimization criminal sanctions in The Corruption Eradication Law (UU Tipikor).

3. RESULTS AND DISCUSSION

This section is the most pivotal part of this study, dedicated to the detailed presentation and analytical discussion of the research findings. The subsequent sub-sections will meticulously unpack the intricate landscape of state financial loss resolution and critically evaluate the effectiveness of current corruption eradication policies through the lens of the Economic Analysis of Law (EAL). Unlike conventional approaches that primarily emphasize punitive measures, our analysis delves into the underlying economic incentives and disincentives that shape the behavior of rational actors within the legal framework. Crucially, this study not only synthesizes existing knowledge but also highlights significant deviations and novel insights from previous research, concerning the practical implications of legal doctrine shifts (such as the reclassification of delicts) and the economic irrationality embedded in current

[8] Gary S. Becker. (1968). "Kejahatan dan Hukuman: Pendekatan Ekonomi". Jurnal Ekonomi Politik 76(2): 169–217, hlm. 171.

[9] Soerjono Soekanto dan Sri Mamudji. (2007). Penelitian Hukum Normatif Suatu Tinjauan Singkat, Jakarta: Raja Grafindo Persada, p. 14.

[10] Peter Mahmud Marzuki, (2011). *Penelitian Hukum*, Jakarta: Kencana, p. 14.

sanctioning mechanisms. By doing so, we aim to offer a more comprehensive and economically sound understanding of Indonesia's anti-corruption efforts and propose actionable, evidence-based reforms for optimal deterrence and asset recovery.

3.1. THE DICHOTOMY OF RESOLVING STATE FINANCIAL LOSSES

In the landscape of state finance law in Indonesia, state financial loss is a central term that reflects the point of intersection between the domains of administrative, civil, and criminal law.[11] The definition of state financial loss, as formulated in Article 1 point 22 of Law Number 1 of 2004 concerning State Treasury (State Treasury Law), is defined as "a shortage of money, securities, and goods, which is real and certain in amount as a result of unlawful acts, whether intentional or negligent." According to Tjandra (2023), this definition inherently opens up space for three legal avenues of resolution which, although different, are interrelated, namely administrative law, civil law, and criminal law.[12]

First, the administrative pathway. The administrative pathway serves as the frontline in the resolution of state financial losses, especially for those arising from negligence (culpa) or procedural violations without malicious intent (mens rea). The main focus is on restoring state finances (restitution in integrum) through a mechanism of accountability for the officials concerned.[13] Article 35(1) of Law No. 17 of 2003 on State Finances explicitly requires every state official and civil servant who is not a treasurer to compensate for any losses incurred by the state as a result of unlawful acts or negligence. Furthermore, Article 59 of the State Treasury Law states that any loss to the state must be resolved efficiently and must be compensated by the party at fault. This obligation applies to treasurers, non-treasurer civil servants, and other officials whose actions, whether unlawful or negligent, directly cause financial loss to the state. This is what is further known as the compensation claim mechanism.[14]

Settlements are made through the process of Claims for Compensation or Treasury Claims, which are further regulated in Government Regulation Number 38 of 2016 concerning Procedures for Claims for Compensation by the State/Region against Civil Servants who are not Treasurers or Other Officials. This process is triggered by information or findings of losses that may originate from various sources, including direct supervision by superiors, public reports, or the results of audits conducted by the Internal Government Audit Agency (APIP) and the State Audit Agency (BPK). [15] If an administrative error is found that causes financial loss to the state, the official concerned is given the opportunity to recover the loss within a certain period of time.[16] It is important to note that the State Treasury Law, through Article 64 (2), affirms the principle that "A criminal verdict does not exempt one from liability for damages."

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[11] Sahrul Azhar Sahbuddin. (2022). "Penegakan Hukum oleh Badan Pemeriksa Keuangan atas Kerugian Negara Akibat Tindak Pidana Korupsi," *De Juncto Delicti: Journal of Law* 2(2): 60-69. p. 62.

[12] W. Riawan Tjandra. (2023). *Hukum Keuangan Negara: Pengertian, Ruang Lingkup, Pengelolaan, dan Penyelesaian Kerugian Negara*, Yogyakarta: PT Kanisius), p. 249.

[13] Ibid. p. 250

[14] Henny Juliani. (2017). "Penyelesaian Tuntutan Ganti Kerugian Negara/Daerah terhadap Pegawai Negeri Bukan Bendahara dan Pejabat Lain," *Jurnal Law Reform* 13(2): 234-248, p. 235

[15] Tjandra, 2023, p. 251.

[16] ibid

This confirms that the process of recovering state assets through claim for compensation is an independent process and is not superseded by criminal proceedings

In the administrative domain, APIP acts as an internal supervisor that performs early warning and evaluation.[17] As mandated by Law Number 30 of 2014 concerning Government Administration, the APIP is authorized to supervise the misuse of authority and may recommend administrative follow-up actions. On the other hand, the BPK has the constitutional authority to conduct investigative audits and to precisely calculate the amount of state financial loss (actual loss).[18] The results of the BPK's audit serve as the primary basis for the relevant agencies to follow up with a claim for compensation, and often become crucial evidence if the case proceeds to the criminal domain.

When administrative efforts fail to produce results, or when acts that cause state losses meet the elements of criminal corruption, then criminal law becomes relevant. A Memorandum of Understanding between APIP and Law Enforcement Officials stipulates that if state losses are not administratively resolved within 60 days, then the case can be pursued criminally.[19] It should be emphasized that the recovery of state financial losses does not automatically eliminate criminal liability for perpetrators, as stated in Article 4 of the Corruption Eradication Law. The Constitutional Court's Decision No. 25/PUU-XIV/2016 has shifted corruption offenses to material offenses, which require actual and factual state losses (actual loss), not merely potential loss.[20] This reinforces the position of the BPK audit results as the authorized institution to declare the existence or absence of state losses for the purposes of evidence in court.[21]

Based on this, the settlement of state financial losses in the realm of state administrative law is carried out through claims for compensation against the officials responsible, with a clear legal basis and mechanisms that are integrated with the criminal process. The BPK plays an important role in calculating and enforcing administrative law. In addition, strengthening the state financial management system and internal oversight are important instruments for preventing state losses due to abuse of authority.

Second, in addition to administrative channels, according to Tjandra, the settlement of state financial losses can be resolved in the civil law domain.[22] The settlement of state financial losses through civil law is an alternative mechanism that has a different conceptual basis and procedure from administrative and criminal channels. This channel provides flexibility for the state to restore its lost rights in various scenarios.

Conceptually, the state, in its capacity as a private legal entity (privaatrechtelijke rechtspersoon), has the same standing as other legal entities and

[17] Mario Agritama S. W. Madjid and Muh. Ilham Akbar. (2023). "Kerugian Keuangan Negara atas Penyalahgunaan Wewenang dalam Instrumen Hukum Administrasi Negara," *Sanskara Hukum Dan HAM* 2(2): 67-79, p. 77.

[18] Sahbuddin, 2022, p. 66.

[19] Tjandra, 2023, p. 260

[20] Ibid. p. 262

[21] Ibid.

[22] Ibid. p. 259

may file a claim for damages if its private legal rights are violated. The primary basis for such a claim is Article 1365 of the Indonesian Civil Code concerning Unlawful Acts (onrechtmatige daad).[23] This route, generally represented by the State Attorney, is often the primary option when state financial loss is caused by a third party who is not subject to the administrative claim for compensation regime. For example, contractors or private partners who breach their contracts or carry out projects below standard, thereby causing losses to the state. In such cases, the state will file a pure civil lawsuit in the District Court to seek compensation for the losses incurred.[24]

On the other hand, the civil pathway serves as an alternative route when criminal proceedings cannot be continued. The civil pathway is pursued if an investigation into a public official does not find sufficient evidence to fulfill the elements of the crime of corruption, yet the fact of the state's financial loss is irrefutable. This fills a legal vacuum (rechtsvacuum) where the act cannot be criminally prosecuted, but the state's losses must still be recovered.[25] Under these circumstances, the prosecutor's office will submit the investigation file to the aggrieved government agency. This agency will then become the plaintiff and file a civil lawsuit against the official concerned to demand the restitution of state financial losses.[26] One of the main advantages of the civil pathway that is highlighted is the continuation of liability. Unlike a criminal charge, which is nullified immediately upon the perpetrator's death, a civil lawsuit for state financial losses can still be continued or filed against the perpetrator's heirs. This ensures that state asset recovery efforts do not cease simply because the perpetrator has passed away.[27]

Third, the final legal measure for the resolution of state financial losses, which serves as the ultimum remedy, is the criminal law pathway.[28] This pathway is only activated when an act causing said state financial loss has exceeded the boundaries of an administrative violation and substantively fulfills all the elements of the delict (bestanddelen) of the crime of corruption, as formulated in the Corruption Eradication Law. This transformation from the administrative to the criminal domain occurs when an "unlawful act" is no longer interpreted merely as a procedural violation, but rather as part of a malicious intent (mens rea) to unlawfully enrich oneself or others. Thus, state financial loss in this context is merely a consequence (gevolg) of a crime. The legal focus fundamentally shifts from being originally reparative to being punitive towards the perpetrator.[29]

Unlike a Claim for Compensation, which is purely reparative in nature, the criminal pathway has an asset recovery mechanism that is integrated with punitive sanctions, regulated in Article 18 of the Corruption Eradication Law as an "additional penalty." This mechanism includes the payment of refund money; the defendant is obligated to pay an amount equal to the value of the property obtained from corruption. If this is not paid, their assets will be confused and confused, or if this is insufficient auction, it will be substituted with a prison sentence. The state can confiscate assets, both tangible and intangible, that were used for or obtained from the

[23] Tjandra, 2023, p. 260
[24] Ibid.
[25] Sahbuddin, 2022, p. 64.
[26] Ibid.
[27] Ibid.
[28] Tjandra, 2023, p. 259.
[29] Ibid. p. 259-262.

crime of corruption. The court can also impose sanctions in the form of the full or partial closure of the convicted person's company or the revocation of certain rights.

A fundamental principle in criminal law is that criminal liability cannot be nullified by the perpetrator's good faith after the crime has occurred. The return of all proceeds of corruption to the state does not negate their status as the perpetrators of a criminal act. This is expressly stated in Article 4 of the Corruption Eradication Law. Logically, the crime of corruption is viewed as an attack on the legal order and public trust; therefore, the return of assets can only serve as a mitigating factor in sentencing, not as a factor that nullifies the crime.[30]

The resolution of state financial losses in Indonesia is regulated through three independent and complementary legal pathways: administrative, civil, and criminal. The administrative pathway functions as the primary measure (primum remedium), which is reparative in nature, using the claim for compensation mechanism to restore losses resulting from negligence or procedural errors. The civil pathway serves as a flexible alternative instrument, which can be used to sue third parties through an unlawful act lawsuit or as a recourse to recover losses from state officials when criminal evidence is insufficient. Finally, the criminal pathway is the last resort (ultimum remedy), which is punitive in nature, pursued only when the elements of the delict of corruption and malicious intent (mens rea) have been substantively fulfilled, where the focus shifts from mere asset restitution to the punishment of the perpetrator. The interaction between these three pathways forms a comprehensive legal framework designed to ensure the maximum recovery of state assets while enforcing accountability in a tiered manner.

3.2. The Effectiveness of Provisions in the Corruption Eradication Law From an Economic Analysis of Law Perspective

Following the discussion above, the next step is to identify the gaps in the provisions of the Corruption Eradication Law concerning state financial losses. The first, Article 2 stipulates:

1) Any person who unlawfully commits an act of enriching oneself or another person or a corporation that may be detrimental to the state's finances or the state's economy, shall be sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years, and a fine of a minimum of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).
2) In the event that the crime of corruption as referred to in paragraph (1) is committed under certain circumstances, the death penalty may be imposed.

Article 3 stipulates, Any person who, with the purpose of benefiting oneself or another person or a corporation, misuses the authority, opportunity, or facilities available to them by reason of their position or office, which may be detrimental to the state's finances or the state's economy, shall be sentenced to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years

[30] Madjid dan Akbar, 2023, p. 68

and/or a fine of a minimum of Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

The two articles as stated above are the result of a change in their formulation, transforming them from a formal delict to a material delict. This was because the word "dapat" (may/can), which appeared before the phrase "be detrimental to the state's finances or the state's economy" in the wording of Articles 2 and 3, was declared unconstitutional and to have no binding legal force.[31] Originally, the formulation of Articles 2 and 3 treated the crime of corruption detrimental to the state's finances or economy not as a material delict, but as a formal delict, meaning it was a crime considered complete upon the commission of the act prohibited in its formulation, without regard to the resulting consequences.[32]

Upon closer examination, the Constitutional Court's decision to remove the phrase “may” does not fundamentally raise any issues of legal norms. Although the phrase is recognized as having an accelerating function in law enforcement, the essence of the crime of corruption does not lie in it. The focal point and essential element of this offense is the act of “enriching or benefiting oneself, another person, or a corporation.” This element is what triggers the classification of an act as a criminal offense of corruption. Thus, the logic of evidence remains unclear: as long as the element of enrichment or benefit is fulfilled, then the criminal offense of corruption has occurred. Conversely, without the fulfillment of this essential element, an act cannot be classified as corruption, even if there is financial loss to the state.

From this paradigm shift, a potential implication is that the removal of the word "dapat" (may/can) will actually complicate the eradication of corruption and slow down the handling of cases under Articles 2 and 3. This is because evidence must now be in the form of actual loss, while potential loss, which is also closely related to moral hazard, cannot be proven before the loss actually exists. Law enforcers must first ensure the existence of actual loss before they can act, thus the efficiency of law enforcement becomes highly dependent on the Audit Board of the Republic of Indonesia (BPK). If the BPK does not efficiently issue a calculation of the actual state financial loss, it is certain that corruption perpetrators will walk free. Whereas previously, in interpreting this matter, the Constitutional Court stated that the meaning of state financial loss was not a consequence that must have actually occurred. This meant that the existence of potential loss resulting from an act that fulfilled the elements of Articles 2 and 3 of the crime of corruption was considered perfectly complete, as per the previous formulation of the articles.[33]

If this is re-examined using the deterrent effect formula (ExpectedCost=p×S), the impact of this Constitutional Court decision becomes very clear. A heavier and more complex burden of evidence directly reduces the probability of successful

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[31] Mahkamah Konstitusi Republik Indonesia. (2016). Putusan Nomor 25/PUU-XIV/2016
[32] Sudarto. (2018). *Hukum Pidana I,* Semarang: Yayasan Sudarto, p. 73
[33] Mahkamah Konstitusi Republik Indonesia. (2006). Putusan Nomor 003/PUU-XV/2006

prosecution and conviction (p).[34] When p decreases significantly, the expected cost of crime will also decrease drastically, unless this decrease is compensated for by a corresponding increase in the sanction (S).[35] However, there has been no revision to the Corruption Eradication Law to increase the severity of sanctions as compensation for this change. Consequently, although the Constitutional Court decision may have the noble aim of enhancing legal certainty (lex certa), it has indirectly reduced the deterrent effect of the Corruption Eradication Law and made the law enforcement process more costly and less efficient. This is a classic example of how a legal intervention that appears logical from a formal-juridical standpoint can produce economic consequences that are counter-productive to the primary objective of the law itself.

Turning to the formulation of Article 3, which, like Article 2, also shifted to become a material delict. The formulation of Article 3 concerning the crime of corruption consists of objective and subjective elements. Its objective elements include the act of "misusing the authority, opportunity, or facilities available to them by reason of their position or office," which has the potential to "be detrimental to the state's finances or the state's economy." Meanwhile, its subjective element is "any person" who acts "with the purpose of benefiting oneself, another person, or a corporation."

Although the element of "any person," as asserted in Article 1 Number 3, includes both individuals and corporations, the legal subject in Article 3 specifically refers only to natural persons. This is because the delict in Article 3 is the misuse of authority that is inherent in "a position or office." A corporation, as a legal entity, cannot possibly have a position or office in the same way a human does, thus, a corporation logically cannot misuse the authority, opportunity, or facilities that it does not possess.

The interpretation of the phrase "a person who has a position or office" in Article 3 must be interpreted broadly. Its scope is not limited only to civil servants but also includes positions within the private law domain that grant authority or opportunity, for example, a corporate director. Meanwhile, the term state official or state administrator refers to a more specific legal-formal definition, namely officials at the highest and high state institutions, ministers, governors, judges, as well as other officials who have strategic functions as regulated in the prevailing laws and regulations. The essential element in this offense is the existence of a clear causal link (causal verband) between the authority, opportunity, or facilities and the position or office held by the perpetrator. This means that the misuse could not have occurred if the perpetrator did not have the position or office that gave them access to these three things. Furthermore, the purpose of the act of misuse, namely to benefit oneself,

[34] Posner, 2014, p. 327
[35] Ibid. p. 539

another person, or a corporation, constitutes the manifestation of the element of fault in this article.

The legal basis for the eradication of corruption, especially that which relates directly to state financial losses as has been explained above, essentially rests on Articles 2 and 3 of the Corruption Eradication Law. However, the EAL approach is rooted in the premise that individuals are rational actors who always weigh the costs and benefits (cost-benefit) before acting, raises questions about the effectiveness of these two articles in creating an optimal deterrence effect when viewed through an economic lens.[36]

According to Posner, the purpose of an optimal criminal sanction is not merely to impose punishment as a form of retribution, but rather to determine crime by making the cost of committing it greater than its benefit.[37] This cost does not only consist of the severity of the sanction for example, the length of the prison sentence), but also includes the probability of enforcement namely, the likelihood of being apprehended and punished and other social costs.[38] In the context of corruption, this needs to be considered because a potential corruptor is, in fact, a rational actor-a moral person. Their action is one of intent (dolus)—meaning it arises from a conscious choice—and not one of negligence (culpa).[39] Thus, every act of abuse of authority or unlawful act that harms the state, no matter how small, reflects the rational calculation of the perpetrator who consciously chooses to break the law.

If we dissect Articles 2 and 3 of the Corruption Eradication Law, these two articles appear to provide for severe sanctions, ranging from relatively high minimum imprisonment to significant fines. Article 2 stipulates a minimum prison sentence of 4 years and a minimum fine of Rp. 200,000,000.00, while Article 3 specifies a minimum imprisonment of 1 year and a minimum fine of Rp. 50,000,000.00, with the maximum fine for both articles reaching Rp. 1,000,000,000.00. However, from an EAL perspective, this threat of severe sanctions becomes less effective if it is not balanced by a high probability of law enforcement. Empirical thesis shows that the costs that must be borne by corruptors are often not proportional to the benefits obtained.[40]

This phenomenon occurs not because the sanctions are lenient, but rather because the law enforcement system has not been able to create a sufficiently high probability of apprehension and conviction to generate an optimal deterrent effect, not to mention that the subsidiary imprisonment as a substitute for the fine is often very light. For example, regardless of the amount of the fine imposed, even up to IDR

[36] Posner, 2014, p. 36-54
[37] Ibid. p. 317.
[38] Becker, 1968, p. 173.
[39] Romli Atmasasmita dan Kodrat Wibowo. (2016). *Analisis Ekonomi Mikro tentang Hukum Pidana Indonesia.* Jakarta: Prenadamedia Group, p. 207
[40] Hasbi Ash Siddiqi. (2019). *Analisis Undang-Undang Pemberantasan Tindak Pidana Korupsi dan Penerapan Hukumnya dalam Perspektif Economic Analysis of Law*, Tesis Magister Ilmu Hukum, Yogyakarta: Universitas Islam Indonesia, p. 112-115

1 Billion, if it is not paid, the subsidiary imprisonment is only a maximum of 6 months, or 8 months if there are aggravating circumstances.[41] From an EAL perspective, this provision creates an extreme imbalance. A rational actor will easily calculate: why pay a fine of Rp. 1 Billion if the alternative is only to serve an 8-month imprisonment? This logical question starkly examines the ineffectiveness of the fine sanctions and shows why the perceived cost for potential corruptors remains low, causing the rationale for committing corruption to persist. As a result, the perceived cost for potential corruptors remains low, and so the rationale for committing corruption continues to exist.

On the other hand, the shift in the formulation of the two articles from a formal delict to a material delict has resulted in the degradation of the principle of efficiency in law enforcement. Consequently, to prove the crime of corruption, it is no longer sufficient for law enforcers to prove the existence of an unlawful act or misuse of authority; they must also prove the resulting real and certain state financial loss (actual loss).

This obligation to prove actual loss drastically increases law enforcement costs. The process becomes long, complicated, and highly dependent on investigative audits from institutions like the BPK, which consumes both time and resources. From an EAL perspective, this is a counter-productive inefficiency. An increase in enforcement costs will indirectly reduce the overall probability of punishment, as the limited resources of the criminal justice system can only handle fewer cases. When the probability of punishment is low, the expected cost for potential corruptors also decreases, even if the threatened sanction is high. The rational calculation will still lead to the conclusion that the potential benefit of corruption is greater than its risk. Thus, the shift to a material delict actually distances the law from its primary objective of creating a maximum deterrent effect.

Furthermore, within the efficiency paradigm, corruption, in essence, is a highly inefficient act from a social point of view. It creates market distortions, increases transaction costs, and unlawfully diverts resources from productive uses into private pockets.[42] Article 2, which targets the act of "enriching oneself," and Article 3, which focuses on the "misuse of authority," essentially attempts to internalize the negative externalities of corrupt acts. However, the delict's formulation, which requires proof of concrete and actual state financial loss as a material delict, can actually backfire from the standpoint of law enforcement efficiency. Nevertheless, prioritizing efficiency in this case should not mean ignoring the value of justice. In fact, law enforcement efficiency is aligned with the effort to achieve justice. If the cost of punishing a corruptor becomes very expensive and protracted, the limited resources of the criminal justice system will be drained, reducing the state's capacity to prosecute other corruption cases. This creates

[41] Ibid
[42] Posner, 2014, p. 255.

allocative inefficiency in law enforcement. Therefore, the law should be designed to minimize the total social cost of crime, which includes the costs resulting from the crime itself and the costs of enforcing the law; this is known as the optimal social cost of crime model.[43]

To effectively minimize corruption that results in state financial losses, the law must be designed to alter the rational calculations of potential perpetrators. This is not achieved merely through the threat of severe sanctions, but rather by increasing the cost of committing the corrupt act. This increase can be achieved not only through sanctions but, more crucially, through an increased probability of detection and punishment. This means greater investment in strengthening law enforcement institutions, simplifying bureaucracy, increasing transparency, and using technology to close the loopholes for corruption. When the probability of being caught increases significantly, even a moderate sanction will have a much greater deterrent effect because the expected cost of committing corruption becomes too high for a rational actor to accept. Ultimately, the effectiveness of Articles 2 and 3 lies not only in their normative text, but in a systemic architecture capable of making a potential corruptor's rational calculation always leads to the conclusion that the act is not worth the potential gain, thereby creating an entry barrier to committing corruption.

Recovery of State Financial Losses.

Regarding the recovery of state financial losses, Article 4 of the Corruption Eradication Law stipulates that, "The restitution of state financial losses or the state's economy does not nullify the criminal liability of the perpetrators of the criminal acts as referred to in Articles 2 and 3"

The provisions of Article 4 of the Corruption Eradication Law specifically regulates the significance of the clause on the restitution of state losses. This article asserts the fundamental principle that the restitution of state financial losses by the defendant does not nullify the criminal penalty for the act they have committed. In other words, the prosecution and sentencing processes will still proceed regardless of whether or not such restitution is made. This norm inherently raises a logical question regarding the incentive for the perpetrator: why would a perpetrator return the proceeds of corruption if, on the other hand, they would still be sentenced.[44]

This provision requires re-evaluation because, viewed through the lens of economic analysis, it is inconsistent with the principles of maximization, efficiency, and equilibrium.[45] A review is necessary to ensure that state financial losses can be fully recovered in a way that also respects the legal interests of the perpetrator.

Furthermore, Article 18 of the Corruption Eradication Law stipulates that:

1) b. payment of compensation in an amount equal to the value of the

[43] Ibid p. 317-321
[44] Sidiqqi, 2019, p. 119.
[45] Klaus Mathis. (2009). Efficiency Instead Of Justice? Searching For The Philosophical Foundations Of The Economic Analysis Of Law, Diterjemahkan oleh Deborah Shannon. Norwich: Springer, p. 15-38

property obtained from the criminal act of corruption.

2) If the convicted person fails to pay the compensation referred to in paragraph (1)(b) within one month after the court decision becomes final and binding, their assets may be seized by the prosecutor and auctioned to cover the compensation.

If the convicted person does not have sufficient assets to pay the compensation referred to in paragraph (1)(b), they shall be sentenced to imprisonment for a term not exceeding the maximum penalty for the principal offense in accordance with the provisions of this Law, and the duration of the sentence shall be determined in the court decision.

Article 18 paragraph (1) letter b is a provision on the recovery of state financial losses through additional criminal sanctions. Since the payment of compensation is an additional penalty, the consequence is that the imposition or non-imposition of the penalty of payment of compensation is at the discretion of the judge, not a requirement or imperative.

In practice, the provisions of this article have in fact not been able to significantly recover state financial losses. From an economic analysis perspective, this provision of Article 18 has not fulfilled the principles of maximization, equilibrium, and providing added value, as it explicitly limits the amount of restitution money to be equivalent to the amount corrupted.[46] This means the court cannot impose a restitution payment greater than the proceeds of the corruption. In addition, the penalty of paying restitution money is sometimes not imposed by the judge on the defendant because it is an additional penalty, and thus there is no obligation to impose it. By limiting compensation to only the value of the corruption, the law fails to maximize the "price" or cost that must be borne by the corruptor. This sanction does not take into account the opportunity cost of the corrupted funds (the profits that could have been obtained from investing the money) and only aims to restore the ex post condition without providing an adequate ex ante deterrent effect.[47]

From the perspective of society, the principle of wealth maximization requires that the law creates incentives to prevent inefficient transfers of resources. Corruption is one of the most inefficient forms of transfer. Sanctions that only involve the return of the principal amount do not maximize the preventive function of the law, and therefore do not maximize overall social welfare.[48]

The provision of compensation limited to the principal amount, when viewed from an economic perspective, is still very beneficial to perpetrators of corruption. Perpetrators not only enjoy the money they have invested, but also all the profits that may have been obtained from that money over the years through investment or business capital. These profits are not confiscated by the state. This situation fundamentally contradicts the basic principle of prevention, which states that sanctions

[46] Ibid. p. 19
[47] Ibid
[48] Ibid

should at least be equal to the total profits reaped by the perpetrator (sanctions equal to wrongdoer's gains).[49]

From the perspective of Kaldor-Hicks efficiency, a legal change or decision is considered efficient if the gains to the benefited party are large enough to hypothetically compensate for the losses of the harmed party, while still leaving a surplus.[50] In this case, corruption does not only cause direct losses in the amount of money taken. It also creates significant social costs, such as law enforcement costs (investigation and prosecution), damage to public trust, market distortion, and bureaucratic inefficiency.[51] Compensation provisions that are only equivalent to the assets obtained fail to compel perpetrators to bear the full social costs of their actions. As a result, the external costs of corruption continue to be borne by society, which is a form of inefficiency.

This also correlates with disequilibrium in economic principles, whereby Article 18 indirectly results in the price of crime being too low, with sanctions limited to the value of the corruption and not being mandatory, meaning that the "price" or cost of committing corruption is very low compared to the potential profits. Equilibrium will never be achieved because the demand to "commit corruption" will always exceed the "supply" of legal compliance at such a low price (sanction) level. In economic analysis, equilibrium refers to a stable condition where opposing forces are in balance, such as where the supply curve meets the demand curve at a specific price and quantity. In the context of criminal law, this principle can be interpreted as achieving an optimal level of punishment, where the "price" of a crime (sanctions) is at a point that balances the incentives to commit the crime with the incentives not to commit it.[52]

The additional penalty in the form of restitution money payment, as regulated in Article 18 of the Corruption Eradication Law, also has a fundamental weakness. The article states that the restitution money paid is "at most equal in amount to the property obtained from the crime of corruption." This sanction only aims to return the perpetrator to their financial position before committing the crime (status quo ante). From an EAL perspective, this creates no disincentive whatsoever. The rational calculation becomes: "if I am not caught, I profit greatly; if I am caught, I only need to return what I took." This kind of sanction does not take into account the opportunity cost of the corrupted funds (which the state could have used for development) and the profit that the perpetrator may have obtained from investing those corrupt funds. As a result, corruption remains an activity with a positive expected profit, which in turn encourages

In short, the current sanctioning system fails to change the rational calculations of potential corruptors. Prison sentences are inefficient for the state, while the sanctions of fines and restitution of money are not designed to be economically severe enough to create a strong deterrent effect. As a result, corruption remains an act that is considered "profitable" because the existing disincentives are too weak.

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[49] Staven Shavell. (2004). *Foundations of Economic Analysis of Law*, London: The Belknap Press of Harvard University Press, p. 477

[50] Klaus Mathis, 2009, p. 39

[51] Ibid, p. 83

[52] Ibid. p. 23

3.3. Optimizing Criminal Sanctions in the Corruption Eradication Law Based on the Optimal Sanction Principle

In the economic paradigm, humans are regarded as economic beings or homo economicus, that is, economic beings who always use their reason to act rationally in determining choices and making decisions based on economic considerations.[53] It should be noted that crimes such as corruption are crimes committed by perpetrators from corporate circles or the middle class (white collar crime).[54]

In this regard, Posner explains that in maximizing their rationality (rational maximizers), humans, as rational choosers, do not always have full access to all available options. However, they still strive to make the best decision based on the available resources to achieve their utility or, in other words, their self-interest.[55] Based on this paradigm, the assumption that emerges from an economic perspective in interpreting human behavior is that individuals are rational utility maximizers in all areas of life, not just in economic life.[56] This basic assumption is used as a starting point for taking an economic approach to law.

Rational choice theory in EAL, as developed by Gary Becker and Richard Posner, views crime as the result of cost-benefit calculations.[57] A person will commit corruption if the expected gain (G) is greater than the probability of being appreciated (p) multiplied by the severity of the sanction (S), or $G > p \times S$.[58] Thus, the effectiveness of anti-corruption law depends on its ability to create strong disincentives by manipulating the variables p and S. However, an analysis of the sanctioning system in Indonesia reveals fundamental weaknesses in creating effective disincentives.

In response to the various problems of effectiveness that have been identified, the Economic Analysis of Law approach offers a series of concrete reformulations for the key articles in the Corruption Eradication Law. Its objective is to design a sanction architecture that not only provides a deterrent effect but also does so efficiently by altering the rational calculations of potential perpetrators.

Building on the same premise that humans as homo economicus are rational beings who always calculate the cost and benefit of every action, this can be synthesized with the concept of Schmidt, who distinguishes two ways the law influences behavior: shaping the individual's opportunities and shaping the individual's preferences.[59] In the context of corruption, criminal law must be designed to shape the structure of opportunities in such a way that an individual's rational choice will not be to commit a corrupt act or, in short, the law must create a sanction

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[53] Klaus Mathis, 2009, p. 7
[54] Romli Atmasasmita dan Kodrat Wibowo, 2016, p. 81
[55] Richard Posner, 2014, p. 31
[56] Ibid. p. 32
[57] Ibid. p. 34
[58] Gary S. Becker, 1968, p. 177
[59] Kenneth G. Dau-Schmidt, "An Economic Analysis of the Criminal Law as A Preference-Shaping Policy", *Duke LJ* 1990(1): 1-38, p. 3-4.

architecture wherein the choice to commit corruption becomes economically unprofitable.

The primary objective of a criminal sanction, according to Richard Posner, is not merely retribution, but rather efficient deterrence.[60] To achieve this objective, the sanctioning system must be designed to manipulate the two main variables in a rational perpetrator's calculation: the probability of enforcement (p) and the severity of the sanction (S). The following analysis will dissect the principles of sanction optimization from an EAL perspective in the context of the problems regulated in the key articles of the Corruption Eradication Law.

In the context of Articles 2 and 3 of the Corruption Eradication Law, the effectiveness of a sanction depends not only on the severity of the threat (S), but also on the probability that it will be applied (p). The expected cost of a crime for the perpetrator is $p \times S$. If the probability of enforcement (p) is very low, then even the most severe sanction will lose its deterrent effect.[61] The shift from a formal to a material offense by the Constitutional Court's decision directly impacts the variable p. The obligation to prove concrete and actual state financial loss (actual loss) drastically increases the complexity and cost of proof (enforcement costs). A costly and protracted evidence process will drain the resources of the limited criminal justice system, which in turn reduces the state's capacity to prosecute cases effectively and consistently. This decrease in capacity directly lowers the value of p (the probability of punishment). From an EAL perspective, an optimal legal system should, in fact, be designed to maximize p with minimal enforcement costs. Therefore, any rule that systematically complicates evidence and raises enforcement costs, such as the actual loss requirement, is in essence sub-optimal because it weakens the overall deterrent effect.

The current formulation of Article 4 of the Corruption Eradication Law, which states that the restitution of losses does not nullify the criminal penalty, creates a counter-productive incentive structure. A rational perpetrator faced with the choice (a) "return the money and still be punished" or (b) "not return the money and still be punished" will always choose option (b), as there is no gain to be had from the cooperative act. From an EAL perspective, an efficient legal rule should encourage socially desirable behavior. In this case, the state's dual objectives are to punish the perpetrator (deterrence) and to recover the losses (asset recovery). The current rule sacrifices the second objective for the sake of the first. An optimal system would decouple these two objectives. By treating state financial losses as a civil debt that can be executed separately, the state creates an asset recovery mechanism that does not depend on the perpetrator's incentives in the criminal process. This is a step towards Pareto efficiency, where asset recovery can be enhanced without having to reduce the deterrent effect of the criminal sanction itself.

[60] Richard Posner, 2014, p. 318-319
[61] Ibid. p. 322

Regarding Article 18 on the restitution of losses, the core of criminal sanction optimization based on EAL is the shift from imprisonment as the primary sanction to fines as the primary sanction. As per Posner's argument, fines are an efficient sanction because they constitute a transfer of wealth, not a deadweight loss like imprisonment.[62] To achieve effectiveness, financial sanctions in the Corruption Eradication Law must be optimized based on two main principles.

First, the principle of optimal fines (multiplier effect), as explained in the Becker-Posner model, a fine that is merely equivalent to the loss will not determine the perpetrator if the probability of apprehension is less than 100%. Therefore, the optimal fine (F) must be a multiple (multiplier) of the harm caused (L), which is determined by the probability of enforcement (p).[63] With the formula $F = L/p$, the fine imposed will effectively internalize the risk of law enforcement and make the expected cost of the crime exceed its benefit.

Second, the Principle of Full Disgorgement: namely, that the limitation on restitution money in Article 18, which is only equivalent to the principal amount corrupted, is sub-optimal. This sanction fails to confiscate the profits that the perpetrator may have enjoyed from investing the corrupt funds. The principle of optimization demands the confiscation of all profits (full disgorgement of profits) obtained from the proceeds of the crime.[64]

3.4. The Reformulation of Article Wording in the Corruption Eradication Law

Reformulation Articles 2 and 3

As has been analyzed, the shift of Articles 2 and 3 of the Corruption Eradication Law to material delicts by the Constitutional Court's (MK) decision has increased law enforcement costs and lowered the probability of punishment (p), which ultimately weakens the deterrent effect. From an EAL perspective, the most efficient solution is to revert the classification of these two articles to formal delicts. Thus, the public prosecutor would no longer be burdened with the obligation to prove actual and certain state financial loss (actual loss), but would only need to prove the existence of an unlawful act with the potential to cause loss (potential loss). The most efficient solution is to revert the classification of Articles 2 and 3 to formal delicts. Thus, the public prosecutor needs only prove the existence of an unlawful act that has the potential to cause loss (potential loss). This step would reduce law enforcement costs and increase the probability of punishment (p), which directly strengthens the deterrent effect. The amount of actual state financial loss could then be shifted in function to become the primary parameter for sanctioning severity, not as an element of the delict, to ensure the principle of proportionality.

[62] Ibid. p. 326
[63] Becker, "Crime and Punishment," p. 191-192; Lihat juga Richard Posner, 2014, p. 326
[64] Ibid

This step would significantly reduce transaction and information costs in the law enforcement process, which in turn would increase the value of p. This increase in the probability of punishment, even with the same sanction (S), would automatically increase the expected cost of the crime of corruption (p×S), thereby creating a stronger disincentive. Although this step seems contrary to the Constitutional Court's (MK) decision, from an economic efficiency standpoint, it is the most logical step to maximize deterrence at a lower social cost.

Furthermore, an optimal improvement would be to refine Articles 2 and 3 by more effectively determining the amount of state loss. The economic analysis of law approach is to make the amount of state financial loss the primary parameter in sentencing. The argument is that the value of the state loss can objectively serve as a benchmark for the level of seriousness or gravity of a corruption crime. If this parameter is applied consistently, then future sentencing disparities can be minimized, meaning that perpetrators of crimes of a similar severity will receive similar or not vastly different sanctions. This type of measurable sentencing pattern is in line with the "principle of equilibrium" in economic analysis, which demands proportionality between the impact of the loss caused and the severity of the sanction applied.

Reformulation Article 4

One of the main obstacles in the effort to recover state financial losses is the formulation of Article 4 of the Corruption Eradication Law. This article asserts that the return of the proceeds of corruption does not nullify the criminal penalty, which directly creates a disincentive for perpetrators to be cooperative. As a result, a logical question arises: why would a perpetrator voluntarily return assets if they know a criminal sentence still awaits them? From an economic analysis perspective, it is this lack of incentive that makes the provision inefficient because it fails to encourage the achievement of asset recovery goals, as well as unbalanced because it ignores good faith. Therefore, a norm that is counter-productive to its own objective urgently needs to be reviewed.

Article 4 of the Corruption Eradication Law currently states that the restitution of state financial losses does not nullify the criminal penalty for the perpetrator. Although its objective is good—namely, to ensure the perpetrator is still punished—this article creates an inefficient disincentive. A rational perpetrator faced with the choice "to return the money and still be punished" or "to not return the money and still be punished" will choose the second option, as there is no gain whatsoever to be had from the restitution. As a result, the objective of state asset recovery is hampered. However, this does not mean providing an incentive in the form of a pardon, because the act committed is directly related to moral hazard, and thus it is appropriate that there is moral accountability for it.

An efficient reformulation is to separate the criminal sanction from the obligation of loss recovery. The state financial loss caused must be treated as a debt owed by the perpetrator to the state. Thus, regardless of the criminal process and verdict which focus on deterrence, the state still possesses a right to claim that can be executed civilly to recover said losses. This model creates two efficiently operating pathways: a criminal pathway to provide a deterrent effect through sanctions, and a civil pathway to ensure full asset recovery. The perpetrator no longer has an incentive to withhold the proceeds of corruption, as the debt will remain attached and can be collected by the state.

Reformulation Article 18

The most fundamental weakness of the additional penalty in Article 18 of the Corruption Eradication Law is the limitation on restitution money, which is "at most equal in amount to the property obtained from the crime of corruption." This sanction, as has been explained, is sub-optimal because it only returns the perpetrators to their status quo ante position and fails to eliminate the economic incentive to commit the crime. The optimization of Article 18 demands a paradigm shift from mere "restitution" to the complete disgorgement of profits. This means that what is confiscated is not only the principal amount corrupted, but also all profits arising from the proceeds of corruption. This includes interest, dividends, profits from the sale of assets, or other forms of value appreciation that have been enjoyed by the perpetrator. By confiscating all profits, the state ensures that the expected value of committing corruption becomes negative. The perpetrator's rational calculation will change to: "if I am caught, I will not only return what I took, but also all the profits I gained from it, plus other sanctions." This effectively eliminates the economic motive for the crime of corruption.

There are several aspects of this article that need to be reformulated to make it more optimal from an economic perspective. The first, the provision on restitution money, which is only equivalent to the value of the corruption (Article 18), fails to eliminate the economic incentive to commit the crime. This sanction does not take into account the opportunity cost for the state and does not confiscate the profits that the perpetrator may have enjoyed. From an EAL perspective, this is a sub-optimal sanction. To create a true deterrent effect, an optimization of sanctions based on economic principles is required. The phrase "at most equal in amount to" in Article 18 must be changed to allow for the full disgorgement of all profits obtained from the proceeds of corruption, including interest, dividends, and asset value appreciation. The principle is to ensure that the perpetrator cannot enjoy even the slightest proceeds of their crime, so that their rational calculation results in a negative expected value.

Second, the reformulation of fines. The formulation of fines must be released from rigid nominal limits and changed to a system of multiplied fines or a multiplier effect, calculated based on the total social harm and the estimated probability of enforcement, in accordance with the principle of F = L/p. Fines should not be nominal in nature or even merely equivalent to the loss. Following the optimal sanction model, fines must be set at a level that makes the crime is unprofitable. Mathematically, the optimal fine (F) must be greater than the gain (G) divided by the probability of apprehension (p), or $F > G/p$. Since the probability of apprehension is always less than 1 (e.g., 0.1 or 10%), the fine must therefore be a multiple of the value of the gain or loss. If the gain from corruption is 1 billion rupiah and the probability of apprehension is 10%, then the minimum fine must be more than 10 billion rupiah to create an effective deterrent effect.

A synthesis of this analysis shows that the effectiveness of corruption eradication lies not in the severity of imprisonment, but in the legal system's ability to consistently make corruption an economically unprofitable choice. The EAL approach, therefore, suggests a paradigm shift in penal policy from one oriented towards retribution to one based on rational deterrence.

This shift entails designing a sanction architecture where financial instruments are the frontline deterrents. These instruments must be engineered to completely nullify any potential gain through two key reforms. Fines should be based on a multiplier effect, calculated to exceed the illicit gain when factored by the low probability of apprehension, as dictated by the optimal sanction principle. The restitution money sanction under Article 18 must be reformulated from mere recovery of the principal amount to the full disgorgement of all profits derived from the crime, including interest, dividends, and asset appreciation. The principle is to ensure that a perpetrator's rational calculation always results in a negative expected value.

Within this framework, imprisonment is repositioned as a supporting sanction, reserved for cases where perpetrators are unable to pay the optimal financial penalties (insolvency) or for crimes that cause such extraordinary social harm that incapacitation is necessary. Ultimately, this approach allows the state not only to effectively deter corruption but to do so in the most efficient manner: by minimizing social costs while maximizing asset recovery.

Third, Subsidiary imprisonment as a substitute for fines or restitution money must be recalibrated to be economically equivalent. The value of suffering from one day in prison must be converted into a monetary value and used to determine the length of imprisonment that is proportional to the unpaid fine. This would eliminate the loophole where perpetrators can "buy" a cheap prison sentence by avoiding the payment of a large fine, a choice that clearly harms the state. These sanctions must be designed in such a way that no rational potential corruptor would dare to take the risk, as the expected cost of their actions would far exceed any potential gain, no matter how small. Within this framework, imprisonment should be positioned as a supporting sanction, applied when the perpetrator is proven unable to pay the optimal financial sanction or for cases with extraordinarily large social damage that demand incapacitation. Thus, the state not only succeeds in preventing corruption but also does so in the most efficient manner: by minimizing social costs and maximizing asset recovery.

4. CONCLUSION

Based on the analysis conducted using the Economic Analysis of Law approach, a primary conclusion can be drawn regarding the problems, effectiveness, and optimal solutions for handling state financial losses and combating corruption in Indonesia.

Firstly, the resolution of state financial losses in Indonesia is governed by a dichotomy of three complementary yet independent legal pathways: administrative, civil, and criminal. The administrative pathway serves as the primum remedium, focusing on the recovery of losses due to negligence or procedural violations through compensation claims, with the State Audit Agency (BPK) playing a crucial role in calculating actual losses. The civil pathway offers a flexible alternative for suing third parties or state officials when criminal evidence is insufficient, with the advantage of being able to pursue the perpetrator's heirs. Finally, the criminal pathway acts as the ultimum remedy, activated when an act fulfills the elements of a corruption offense with mens rea (malicious intent) to illicitly enrich oneself or others. This shifts the focus from purely reparative to punitive, with integrated asset recovery mechanisms through additional penalties such as restitution. The interaction of these three pathways forms a comprehensive framework for asset recovery and tiered accountability.

Second, despite this existing framework, the current criminal sanction regime, particularly as specified in Articles 2 and 3 of the Corruption Eradication Law, is not efficiently designed to create an optimal deterrent effect. The shift in the nature of these offenses from a formal to a material offense, as mandated by the Constitutional Court's decision, fundamentally increases law enforcement costs and drastically lowers the probability of apprehension and punishment (p). As per the deterrence formula ($ExpectedCost=p\times S$), a decrease in the value of p without a compensatory increase in the value of S (sanction severity) directly reduces the expected cost of the crime, thereby eroding the deterrent power of the law itself. This leads rational potential perpetrators of corruption to still perceive the potential benefits of corruption as outweighing its costs.

Thirdly, inefficiencies are also evident in other asset recovery provisions and sanctions. Article 4 of the Corruption Eradication Law, which states that the restitution of losses does not nullify criminal liability, creates a counter-productive disincentive for perpetrators to cooperate in returning illicit gains. From an EAL perspective, this provision is inefficient as it fails to encourage asset recovery. Similarly, Article 18 of the Corruption Eradication Law, which limits restitution to "at most equal in amount to the property obtained from the criminal act of corruption," is sub-optimal. This sanction neither accounts for the opportunity cost of the corrupted funds to the state nor captures the full profits (full disgorgement of profits) that perpetrators may have derived from investing these illicit gains, allowing them to retain a positive economic incentive. Furthermore, the nominal nature of fines and the disproportionately lenient subsidiary imprisonment as a substitute for large fines also fails to create a robust economic disincentive.

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