

## Corruption Crime in Lending to the Government Banks: A Challenge in Criminal Law

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### Abstract

Banks provide a substantial proportion of external finance to corporations around the globe. Non-Performing Loans (NPL) occur if the bank's confidence through a credit breaker, which is institutional in nature, is not realized that (prospective) debtors are able to repay loans and interest, after the loan or when loan is given. Type of the research is a normative legal research (doctrinal research). The results of the research show that in terms of analyzing credit applications from prospective debtors, Bank Officials must always apply the Directors' Decree regarding the Credit Guidebook. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Hence, widespread expansion in credit, causing banks to provide convenience and caution in the process of granting credit to debtors, by not applying strictly the prudential banking principles when analyzing the credit requested. The effort that must be made by government banks in lending is by applying the prudent principle and the principles of good governance to avoid risks in returning credit from creditors. Immediately resolve and enforce statutory provisions concerning restrictions on currency transactions, to avoid misuse of the authority of bank officials in lending to debtors.

**Keywords:** Bank; Corruption Crime; Criminal Law; Credit

### 1. Introduction

Banks provide a substantial proportion of external finance to corporations around the globe.<sup>1</sup> Hence, efforts to prosecute and prevent corruption are very interesting issues in law enforcement, this proves the importance of every legal step taken to eradicate corruption. There is no exaggeration if corruption is considered as an extraordinary crime because it is carried out in a systematic and widespread manner, and the impact that is caused if it cannot be controlled will bring disaster to the life of the economy and national development, for the eradication of corruption requires extraordinary legal action also (extra ordinary measures).

Indonesia as a developing country is faced with a very serious problem of corruption. Clearly, this practice is very bad for the development. The problem of corruption in Indonesia is not a new problem. The corruption in Indonesia continues to increase from year to year even has reached unusual level and rooted. Like illness, corruption is a chronic disease, so it is very difficult to heal it.<sup>2</sup>

In terms of the quantity, the criminal act of corruption is more systematic and has been categorized as extraordinary crime and its scope has entered all aspects of community life, so that not only losses the States' finances but has violated the social and economic rights widely.<sup>3</sup> The description of corruption in Indonesia is reflected in the corruption perception index as released by an international survey institute, such as those released by *Transparency International*.<sup>4</sup> By 2015, locate Indonesia as a country with a high level of corruption, Indonesia ranked 117 out of 175 countries in the World with a score of 34 from 0 - 100 (level 0 is very corrupt and 100 is very clean) and in 2016, Indonesia ranked 90 out of 176 countries in the world with a score of 37 as shown in the table.

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<sup>1</sup> Beck, T., Demirgüç-Kunt, A., & Levine, R. (2006). Bank supervision and corruption in lending. *Journal of monetary Economics*, 53(8), 2131-2163.

<sup>2</sup> M.Akil Mochtar, *Memberantas Korupsi, Efektivitas Sistem Pembalikan Beban Pembuktian dalam Gratifikasi*, ( Jakarta:Q-Comunication, 2006), page. 103

<sup>3</sup> Isra, S., Ferdi, F., & Tegnan, H. (2017). Rule of Law and Human Rights Challenges in South East Asia: A Case Study of Legal Pluralism in Indonesia. *Hasanuddin Law Review*, 3(2), 117-140. doi:<http://dx.doi.org/10.20956/halrev.v3i2.1081>

<sup>4</sup> Transparency Internasional - Indonesia. Source: [https://www.transparency.org/cpi\\_2016](https://www.transparency.org/cpi_2016),

**Table 1**  
 Rating index of Indonesia corruption and some countries in the world

Rating	Countries	2013	2014	2015	2016
1	Denmark	91	92	91	90
8	Singapura	86	84	85	85
54	Malaysia	50	52	50	49
<b>90</b>	<b>Indonesia</b>	<b>32</b>	<b>34</b>	<b>36</b>	<b>37</b>
93	Thailand	35	38	38	35
95	Philippina	36	38	35	35
112	Vietnam	31	31	31	33
147	Myanmar	21	21	22	28

Source: Transparency International – Indonesia, 2017.

Law enforcement is an attempt to make the law as a code of conduct in every legal act, both by legal subjects concerned and by law enforcement officers who are officially given the duty and authority to ensure the proper functioning of legal norms prevailing in social life and state.<sup>1</sup> So that in the law enforcement of corruption, the “corruptor” must be punished to return all State’ financial losses that have been incurred, and not only the corruptor, but also who receive the transfer, receive the payment, the grant, deposit from the proceeds of corruption.

A way to optimize the return of State’ financial loss in corruption cases, in addition to demanding the return of corruption proceeds from corruptor as regulated in Act No. 20 of 2001 on Corruption Eradication, also demanding the return of beneficiaries of corruption as regulated in Act No. 8 of 2010 on Prevention and Eradication of Money Laundering, under the provisions of Article 75 of Act No. 8 of 2010 affirms that “in the case of investigators finding initial evidence of the Money Laundering crime and the original criminal offense, investigator combines the original criminal offense and the money laundering crime,” with this provision the law enforcement of corruption by combines case with the money laundering crime, then the criminal act of corruption is punished jointly with money laundering crime.

Recently, the practices of money laundering are very often committed against money earned from corruption. It may be just a way to disguise or conceal the proceeds of corruption crime. Hence, it is used as a shield for money from the corruption crime. Therefore, the provision of money laundering crime is expected to be of great benefit in the law enforcement of corruption in order to return the State financial loss optimally, because the more increasingly of corruption who committed by State officials and other corruptor which has a very significant impact on the rise of money laundering.

An effort of corruptor to avoid law or to avoid the payment of compensation by conceal or obscuring the proceeds of crime through money laundering. Officials and apparatuses and other actors involved in corruption have the potential to engage in money laundering, as in general the proceeds of corruption is enjoyed by the family. Wives and children of corrupt criminals tend to also engage in money laundering, as the proceeds of corruption is generally transferred or cash into his/her family accounts. The implementation of money laundering crime against perpetrators make the confiscation of the proceeds of corruption will be more optimal and at the same time can imprison those who enjoy the proceeds of corruption, and also more important is the return of corruption money to the country.

The importance of research is conducted to determines law enforcement of corruption crime in the return of State’ financial loss and the return of corruption asset through money laundering crime instrument, because in fact the law enforcement of corruption not yet effective in the effort of the return of State financial loss, and if such enforcement is allowed to continue can undermine the legal order and the purpose of law enforcement to create justice and benefit will not be achieved.

<sup>1</sup> Syukri Akub and Baharuddin Badaru, “*Wawasan Due Process of Law Dalam Sistem Peradilan Pidana*” Rangkang Education, 2012, page. 22

## 2. Method of the Research

Type of the research was a normative legal research.<sup>10</sup> Thus, this normative analysis primarily aimed at reviewing credit control at government banks to prevent criminal acts of banking sector corruption. Sampling is done by using purposive sampling technique, by taking subject is not based on strata, random or region but based on certain purpose.<sup>1</sup> In relation to this research, the consideration of sampling is the background of research, objectives and law enforcement that conducts investigation, prosecution and examination of corruption crime.

## 3. Implementing the Prudential Banking Principles in Lending to the Government Banks

Corruption in Indonesia beside harms the State finances is also harms the economic and social interests of the community and even entered the category of critical, because the corruption crime is not less but increasing, both its quantity and quality, it seems the corruption crime is no longer an act that must avoided and feared. One of the objectives of law enforcement of corruption is to return the State financial losses caused by the corruption crime, whether it is done by individuals or corporations.

In the effort to return the State financial losses through the substitute-refund, the investigation stage is very important because at this stage will be known the perpetrators of corruption or corruptor and the amount of State financial losses through an audit by the Supreme Audit Agency (BPK) or the Development Finance Supervisory Agency (BPKP) and to determine the use of the proceeds of corruption, and also to seek and find the defendants' asset.

At this stage, the investigator has forced effort, such as search and confiscation, as set forth in Article 28 of Act No. 20 of 2001 on the Corruption Eradication which reads; *“for the purpose of investigation, the suspect shall be required to provide information about all of his/her property and property of wife or husband, child and property of any person or corporation that is known and or suspected to have any connection with a criminal act of corruption committed by a suspect.”*

The existence of the suspects' obligation to report his/her property to the investigator greatly facilitates the investigator to know the property obtained by the suspect from the criminal act of corruption, and if the investigator has known any property from the reported property of the suspect, wife/husband and children, that obtained from a criminal act of corruption, then the investigator may confiscate property that is related to the criminal act of corruption. By the information of the suspect, wife/husband and children about the property, it is very easy in the effort to return the State losses due to corruption through the substitute-refund that will be passed by the court later in the decision, because from the beginning of the investigation has known all the property of the suspect, so that if it has been found guilty and the verdict has a permanent legal power, the convict can no longer evade to pay the substitute-refund, on the reasons of not having any property.

The examination stage in this trial is a very important stage, because in the trial the public prosecutor proves the whole indictment. Proof is the central point of examination in the court because in the stage of evidence to prove guilt of the accused, which is certainly proving to be in accordance with the provisions outlined in the law of criminal procedure, both judges, public prosecutors, defendants and lawyers, all bound by the provisions and ordinances as well as assessments of evidence provided by law.

Independence of the judiciary, especially in carrying out the process of proving in the court, to assess the evidence presented by the prosecution to prove the charges and on which the public prosecutor made letters claim by pleading that the defendant be punished according to his/her demands, and also to assess the evidence presented by the defendant or his/her legal counsel put forward to prove his/her innocence. Then, the judge will decide the case, to make decisions and agree with the prosecutor stating the defendant guilty of committing corruption offenses in accordance accused the prosecutor, or agree with the accused through his/her lawyer that states the accused not guilty as charged prosecutor or make their own conclusions and judgments.

Lastly, shift on the stage of execution of court decisions is a very important stage and the core of law enforcement, because at the stage of execution of court decisions it is determined on the rule of law, meaning

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<sup>1</sup> Suharsini Arikunto, *Prosedur Penelitian, Suatu Pendekatan Praktek*, Edisi Revisi V, Rineka Cipta, 2002, page 117

that the success of the judicial process of the investigation until the court decision, the court decision becomes meaningless if the decision the court was not enforced. Law enforcement requires a fee, hence the government prepares charges for law enforcement processes can be conducted by the law enforcers, both investigation and prosecution charges and other charges until the courts' decision has a permanent legal force (*in kracht van gewijsde*).

#### 4. Credit Quality at Government Banks and the implications of Corruption Crimes

Non-Performing Loans (NPL) occur if the bank's confidence through a credit breaker, which is institutional in nature, is not realized that (prospective) debtors are able to repay loans and interest, after the loan or when loan is given. NPL, based on Bank Indonesia Regulation No. 8/2/PBI/2006, is an assessment of bank asset quality, or referred to as collectivity classification, determined by banks, mainly based on the fact that the installments and interest payments are smooth.<sup>1</sup>

Factors that affect the effectiveness of the return of State financial loss in corruption, the researcher constructs from legal system theory proposed by Lawrence M. Friedman. Three components of the legal system include *substance*, *structure*, and *culture*. Friedman argues that the legal system should be examined as a unity that includes re-evaluation, repositioning and reforming the structure, legal substance and legal culture. The integration of the legal system should be done simultaneously, integral and parallel.

The legal structure here is related to the elements of the number and size of law enforcement agencies that play the role of enforcing the law, covering the types of cases and mechanisms of handling and how law enforcement officers commit the process of handling, whether to maximally implement cooperative relations or not. It also means how the structuring of each law enforcement agency and the relationships between law enforcement agencies, how many law enforcement agencies are ideal for handling a case, or how a case procedure involving state officials or public officials requires a cooperative relationship or not. Clearly the legal structure is a silent portrait in the legal system.

The legal substance is the rules, norms and patterns of real behavior of law enforcement tools within the legal system. For example, in the handling of a criminal case there is an obligation of the investigator to notify the prosecutor/ investigator of the time of investigation (SPDP), or the investigation of case shall be deemed complete if within 14 days the case file is not returned by the prosecutor. The fact of the legal substance as set forth in the Criminal Procedure Code does not work as it should. The legal substance lies in living law, not only on the rules of the law.

In the aspect of legal culture is related to human attitudes toward the law and legal system, beliefs, values, thoughts and expectations. This can be attributed to the attitude of law enforcers, including police, prosecutors and judges against the law. Law enforcement is a matter of law enforcement apparatus, so their values and attitudes shape much of the diversity of the legal system. The legal system put forward by Friedman is linked to the return of State financial loss in corruption is dependent on the factors that influence it.

In relation to the substitute-refund in the effort to return the State financial losses in corruption cases as stipulated in the provisions of Article 18 of Act No. 20 of 2001 as amended of Act No. 31 of 1999 concerning the Corruption Eradication, the return of State financial loss through the substitute-refund is placed as an additional punishment is facultative, which may be imposed on the defendant but may also not be imposed on the defendant, so that from the point of regulation in the legislation of State loss is not the main thing in the law enforcement of corruption, whereas when viewed from the background of the legal formation, a criminal act of corruption is intended to ensure that the assets of the proceeds of corruption can be returned. Subsequently, there is a dualism in criminal imposition, as the additional punishment is facultative with the consequence that the penalty may be imposed but not compulsory.

As the result of research, in determine the large of substitute-refund there is disparity that is not comparable with the physical criminal penalty and subsidiary, substitute penalty of substitute-refund. Similarly, on the subsidiary, no higher subsidiary to the defendant is punished by a substitute-refund rather than subsidized criminal sanction to the defendant who is sentenced to pay less substitute-refund. If the substitute-refund is sentenced large enough

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<sup>1</sup> Muhammad Djumhana, *Hukum Perbankan di Indonesia*, Citra Aditya Bakti, Bandung, 1996, p. 553.

but the substitute prison is not too large then there is a gap where the prison sentence is not commensurate with the value of the substitute-money, it would be more economical for the convicted person to undergo the imprisonment than to pay the substitute-money.

As result of research, in the settlement of criminal fines and substitute-money, the convicts prefer subsidiary penalties rather than paying fines and substitutes-money, because the subsidiary penalties are very low and not worth the amount of State losses enjoyed by convicts. The selection of subsidiary is used by convicts supported by the conditions and limitations of corruption cases to easily confess that they no longer have the wealth to pay the substitute-money and to choose a replacement prison sentence as more profitable for them, especially supported by the possibility of free prisoners more freely from the penitentiary due to remission at certain times. If a criminal penalty for a substitute-money is considered an option, then the effort to return the State finances as the purpose of enforcing corruption will not be achieved.

In addition to lower subsidiary penalties, convicts are reluctant to pay substitute-money, because if the convicted money is not enough to pay for all substitute-money that the court decided, a part payment of substitute-money is not accommodated in the legislation, so the part payment of substitute-money does not bring benefits the convict, because in the verdict of the court judgment there is no dispensation of subsidized crime, if the convicts pay partial substitute-money, or do not reduce the subsidiary punishment who will be served by the convicts.

The assets of corruption that have been confiscated at the investigation stage are very little compared to the amount of State financial losses corrupted by the suspects, whereas from the philosophical point of view, the target of law enforcement of corruption is the return of State financial losses, it should be since the investigation, investigator search the flow of corruption, therefore needs to be optimized task and function of intelligence of police and attorney. In addition to the search for the convicted asset obtained from corruption, it is no less important to search the asset of the suspect, wife/husband and children unrelated to the criminal act of corruption. By knowing the assets of the convicted person, his wife/husband and children during the process of investigation, prosecution and examination process in the court will facilitate the prosecutor as the executor to confiscate and auction the asset of defendant, wife/husband and children, to pay the substitute-money of the State, if the defendant is punished to pay the substitute-money and the decision has obtained a permanent legal force.

In the aspect of cultural, the changes of legal culture are parallel to the changing societies in which they grow. This postulate further confirms that it is difficult to recognize the legal culture comprehensively without studying the local cultural system, the legal culture being one of its parts. Finally, it cannot be denied to say that the study of legal culture concerns a very wide field.<sup>1</sup> If cultural understanding as proposed by Soejanto Poespowardojo studies corrupt behavior as a culture will not find a clear red thread. Corruption is a behavior that violates the existing value order in society such as the value of honesty, goodness, justice. The value of honesty that has developed in the Indonesian society will affect the law enforcement of corruption, especially in the effort to return the State financial losses, both the convicted person and the family voluntarily fulfill the courts' decision without waiting for the prosecutor as the executor to confiscate and commit the auction on the convicted assets.

It is a common practice for corruptor to conceal the proceeds of criminal acts of corruption in order to avoid himself from the law and also to take advantage of the proceeds of criminal acts of corruption, by hiding or obscuring the proceeds of crime through money laundering, on the other hand the State through law enforcement officers are authorized and tasked to seek and find the proceeds of crime.

Generally, it not directly spent or used by the perpetrators of crime because if directly used will be easily tracked by law enforcement on the source of the property, usually the perpetrators of crime in advance seek for the wealth obtained from the crime into the financial system especially into the banking system. In this way, the origin of the property is expected to be untraceable by law enforcement. Attempts to conceal or disguise the origins of assets acquired from a criminal offense referred to in this law are known as money laundering.<sup>2</sup>

A person or a crime organization performs money laundering as previously stated, the purpose being that the origin of the money cannot be known or cannot be traced to law enforcement. The perpetrators of criminal acts

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<sup>1</sup> TB. Ronny Rahman Nitibaskara, *Perangkap Penyimpangan dan Kejahatan, Teori Baru Dalam Kriminologi*,

<sup>2</sup> General Elucidation of Act No. 15 of 2002 (State Gazette of the Republic of Indonesia of 2002 No. 30) as Amended with Act No. 8 of 2010 on Money Laundering crime.

of corruption engage in practices or money laundering processes for the purpose of disguising or conceal the proceeds of criminal acts of corruption so as to make money or assets a legal matter. Various ways are done to convert the corrupt money into legitimate money before the money can be inventoried or spent. In order to achieve these purposes there are 4 (four) factors that must be considered by the launderer.<sup>1</sup>

*Firstly*, the legitimate ownership and the origin of the money laundered must be concealed. Do not do money laundering if everyone knows who owns the money if the money later arises at the end of the money laundering process. In this case, the corruptor in money laundering must conceal or disguise the origins of the money being laundered. *Secondly*, the form of money should be a fund derived from corruption is almost certainly in the form of cash. This cash should be able to be transformed into another means of payment, such as a check. For example, one who wants to launder large amounts of money or nominal amounts of cash, by converting cash means that it reduces the pile. *Thirdly*, traces left by money launderers must be obscured. The purpose of money laundering is when others can follow the process of money laundering from the beginning to the end of the process. *Fourthly*, continuous monitoring must be made of the money. In the end many people appear when the money is being washed knowing that the money is dirty money.

The philosophical foundation of money laundering law enforcement is money-oriented (*follow the money*). This means that money laundering crime is a criminal offense that can be investigated, prosecuted and brought to court without first proving the crime of origin. For example, a criminal act of money laundering whose original criminal offense is a criminal act of corruption, to be able to investigate and prosecute as well as examination of money laundering criminal cases in court, does not have to wait for the proven criminal act of origin is corruption because the intention of the money laundering law is to save the assets of the crime.

The philosophical basis of *the follow the money* approach does not stand alone because it must be followed by *a reverse burden of prove* approach. This means that the defendant is obliged to prove the assets or assets acquired legally, or the defendant must prove allegations that his/her property derives from criminal acts of corruption. In practice, the application of Article 69 of Act No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crime, there are 2 (two) possibilities, the first; in the case of money laundering being tried in a separate case without involving the crime of origin, no criminal origin should not be proven more but in the indictment the public prosecutor should describe and mention the crime of origin which is suspected or reasonably suspected to be the source of money laundering crime; *the second*, in the case of the handling of money laundering crime, there is also found the original crime, the offense and the offense money laundering crime is combined in a case file, then delegated in one indictment and two offenses proven in court.

The purpose of money laundering crime is to save assets, then in the money laundering law regulating the decision without the presence of the defendant, or an in-absence court can be imposed in the case that the defendant has been legally and properly called, but the defendant is not present at the court hearing without a valid reason. Or the absence of a suspect may be due to unknown presence or fugitive, or to be in another country that has no jurisdiction to present it.

Indonesia as a country based on law, the operation of the criminal justice system becomes a top priority in the field of law enforcement. Therefore, it is necessary to integrate the subsystems within the criminal justice system in the process of law enforcement of corruption and money laundering crimes in order to overcome the quality and quantity of criminal acts of corruption that occurred in the midst of society.

The law enforcement of corruption and money laundering can be optimal to return the State financial loss if law enforcement officers commits their duties and authorities in accordance with the laws and regulations as described above and have the same perception and orientation by prioritizing the search/tracking and finds the assets of the criminal acts of corruption from the suspect, family and others receiving the proceeds of crime to be confiscated to recover the States financial losses.

## 5. Conclusion

In terms of analyzing credit applications from prospective debtors, Bank Officials must always apply the Directors' Decree regarding the Credit Guidebook which regulates prudential banking principles consisting of

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<sup>1</sup> Jeffrey Robinson, *The Laundryman*, Simon & Schuster, 1994, page 11.

elements of Character, Capacity, Capital, Condition and Collateral. Besides that, the role of the Account Officer is also very important as the first door to assess the feasibility of business activities of prospective debtors to be financed with bank loans, while ensuring that prospective debtors are truly professionals in their fields. Hence, widespread expansion in credit, causing banks to provide convenience and caution in the process of granting credit to debtors, by not applying strictly the prudential banking principles when analyzing the credit requested.

The effort that must be made by government banks in lending is by applying the prudent principle and the principles of good governance to avoid risks in returning credit from creditors. Immediately resolve and enforce statutory provisions concerning restrictions on currency transactions, to avoid misuse of the authority of bank officials in lending to debtors.

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