



EFFECTIVENESS OF DECISIONS IN ABSENTIA IN RECOVERY OF ASSETS FROM CRIMINAL ACTS OF CORRUPTION: A LEGAL REVIEW OF ARTICLE 38 OF THE LAW ON ERADICATION OF CRIMINAL ACTS OF CORRUPTION

EFEKTIVITAS KEPUTUSAN SECARA IN ABSENSI DALAM PEMULIHAN ASET DARI TINDAKAN KORUPSI: TINJAUAN HUKUM TERHADAP PASAL 38 UNDANG-UNDANG TENTANG PEMBERANTASAN TINDAKAN KORUPSI

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Abstract

This study examines the effectiveness of *in absentia* judgments in the recovery of assets from corruption crimes based on Article 38 of the Law on the Eradication of Corruption Crimes. The background of this study is based on the phenomenon of many corruption defendants who are absent from trial, so that the judicial process continues through the *in absentia* mechanism. However, the effectiveness of such judgments in supporting the recovery of state financial losses remains a problem, especially in the aspects of execution and the return of assets resulting from corruption crimes. This study uses a normative legal method (normative juridical) with a statutory approach and a conceptual approach. The results of the study indicate that normatively, Article 38 of the Anti-Corruption Law provides a valid legal basis for courts to render judgments without the presence of the defendant. However, the effectiveness of such judgments in asset recovery is still not optimal because there are obstacles such as difficulties in tracing assets, transfer of asset ownership, limited coordination among law enforcement institutions, and weak asset tracing mechanisms. In addition, there are also juridical obstacles in the form of the lack of comprehensive technical regulations regarding the execution of assets in *in absentia* cases. Therefore, strengthening regulations and increasing synergy among law enforcement officers are required so that the objective of recovering state losses can be achieved effectively.

Keywords : In Absentia, Corruption Crime, Article 38, Asset Recovery, Legal Effectiveness.

Abstrak

Studi ini meneliti efektivitas putusan *in absentia* dalam pemulihan aset dari tindak pidana korupsi berdasarkan Pasal 38 Undang-Undang Pemberantasan Korupsi. Latar belakang studi ini didasarkan pada fenomena banyaknya terdakwa korupsi yang tidak hadir dalam persidangan, sehingga proses peradilan berlanjut melalui mekanisme *in absentia*. Namun, efektivitas putusan tersebut dalam mendukung pemulihan kerugian keuangan negara masih menjadi masalah, terutama dalam aspek



pelaksanaan dan pengembalian aset akibat tindak pidana korupsi. Studi ini menggunakan metode hukum normatif (juri normatif) dengan pendekatan hukum dan pendekatan konseptual. Hasil studi menunjukkan bahwa secara normatif, Pasal 38 Undang-Undang Pemberantasan Korupsi memberikan dasar hukum yang sah bagi pengadilan untuk mengeluarkan putusan tanpa kehadiran terdakwa. Namun, efektivitas putusan tersebut dalam pemulihan aset masih belum optimal karena terdapat kendala seperti kesulitan dalam melacak aset, pengalihan kepemilikan aset, koordinasi yang terbatas antar lembaga penegak hukum, dan mekanisme pelacakan aset yang lemah. Selain itu, terdapat pula kendala hukum berupa kurangnya regulasi teknis yang komprehensif terkait pelaksanaan penyitaan aset dalam kasus-kasus yang melibatkan pihak yang tidak hadir. Oleh karena itu, penguatan regulasi dan peningkatan sinergi antar aparat penegak hukum diperlukan agar tujuan pemulihan kerugian negara dapat tercapai secara efektif.

Kata Kunci : Dalam Ketidakhadiran, Kejahatan Korupsi, Pasal 38, Pemulihan Aset, Keefektifan Hukum.

1. INTRODUCTION

Corruption is one form of extraordinary crime that has broad impacts on national and state life. Corruption not only causes state financial losses, but also damages the governmental system, hinders development, and reduces public trust in law enforcement. Therefore, the handling of corruption crimes is not only focused on punishing the perpetrators, but also on efforts to recover state losses through the mechanism of returning assets resulting from criminal acts (*asset recovery*).

In practice, law enforcement against corruption crimes often faces serious obstacles, one of which is the absence of the defendant during the trial process. Many perpetrators of corruption crimes flee or avoid the legal process, both domestically and abroad, thereby obstructing the course of criminal justice. To overcome this problem, the Indonesian criminal law system recognizes the mechanism of *in absentia* judgments, namely court decisions rendered without the presence of the defendant at trial.

The legal basis for the application of *in absentia* judgments in corruption crime cases is found in Article 38 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes. This provision grants authority to the court to continue examining and deciding cases even though the defendant is absent, with the aim that the judicial process is not obstructed by attempts to evade legal responsibility.

One concrete example of the application of *in absentia* judgments in corruption crime cases can be seen in the Bank Century corruption case through the Central Jakarta District Court Decision Number 339/Pid.B/2010/PN.JKT.PST dated 16 December 2010. In that case, defendants Hesham Talaat Mohamed Besheer Alwarraq and Rafat Ali Rizvi were convicted *in absentia* because they were abroad and never attended the trial despite having been lawfully summoned. This case caused enormous state losses amounting to Rp3,115,890,000,000.00 (three trillion one hundred fifteen billion eight hundred ninety million rupiah). The panel of judges imposed a sentence of 15 years imprisonment, a fine of Rp15,000,000,000.00, and an obligation to pay substitute money amounting to Rp3,115,889,000,000.00. This judgment was later strengthened through a Supreme Court decision and followed by asset execution efforts through the Mutual Legal Assistance (MLA) mechanism in various jurisdictions, including Hong Kong. In addition, similar practices were also found in a number of Bank Indonesia Liquidity Assistance (BLBI) cases, involving defendants convicted *in absentia* after fleeing abroad. These facts show that the *in absentia* mechanism is not only used normatively, but has also been applied in major cases with significant state losses.

However, although *in absentia* judgments have been rendered and have permanent legal force (*inkracht*), in practice the execution of assets resulting from corruption crimes still faces various obstacles. Difficulties in tracing assets, the unknown whereabouts of convicts, and weak mechanisms for executing judgments are factors causing the recovery of state losses not to run optimally. This



condition shows a gap between the normative and implementative aspects of law enforcement against corruption crimes.

Based on these problems, this study formulates several issues as follows:

1. How is the regulation of *in absentia* judgments in Article 38 of the Anti-Corruption Law?
2. How effective are *in absentia* judgments in recovering assets resulting from corruption crimes?
3. What are the juridical obstacles in implementing *in absentia* judgments related to asset recovery?

This study aims to analyze the legal regulation of *in absentia* judgments in the Law on the Eradication of Corruption Crimes, assess their effectiveness in recovering state assets, and identify juridical obstacles that hinder the implementation of such judgments.

2. RESEARCH METHOD

This study is a normative legal research (normative juridical) that focuses on the examination of positive legal norms related to *in absentia* judgments in corruption crimes, particularly Article 38 of the Law on the Eradication of Corruption Crimes. The approaches used include the statutory approach and the conceptual approach. The legal materials consist of primary legal materials in the form of legislation and court decisions, as well as secondary legal materials in the form of relevant literature and scientific journals. The collection of legal materials was carried out through library research, while the analysis was conducted descriptively and qualitatively by interpreting existing legal norms and relating them to the issue of the effectiveness of *in absentia* judgments in recovering assets resulting from corruption crimes.

3. RESULT AND DISCUSSION

1. Regulation of *In Absentia* Judgments under Article 38 of the Anti-Corruption Law

The regulation of *in absentia* judgments in Indonesian criminal law, particularly in corruption crimes, has an important legal basis in ensuring that the law enforcement process is not obstructed by the absence of the defendant. Article 38 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes grants authority to the court to examine, adjudicate, and decide corruption crime cases even though the defendant is absent from trial. This provision constitutes an exception to the general principle of criminal procedural law which prioritizes the presence of the defendant in judicial proceedings, but it is specifically applied in corruption cases categorized as extraordinary crimes.

Normatively, the application of *in absentia* judgments under Article 38 of the Anti-Corruption Law cannot be separated from the main objectives of criminal law enforcement, namely to realize legal certainty, justice, and utility. This provision provides a legal basis for law enforcement officers to continue trial proceedings even when the defendant cannot be presented, whether because the defendant has fled, is in hiding, or is abroad. Thus, this mechanism functions as an instrument to prevent obstruction of the judicial process due to acts of obstruction by perpetrators of corruption crimes who seek to evade legal responsibility.

The formulation of Article 38 of the Anti-Corruption Law is fundamentally inseparable from the orientation of criminal law policy which emphasizes the recovery of state financial losses. In this context, legislators realized that corruption crimes often involve perpetrators who flee or hide outside the state's jurisdiction, thereby potentially obstructing judicial proceedings and the recovery of criminal assets. Therefore, the *in absentia* trial mechanism was formulated as a strategic legal instrument to ensure that judicial proceedings can continue while also providing a legal basis for the state to confiscate and recover assets, even without the presence of the defendant. Thus, this provision reflects a shift in orientation from merely punishing perpetrators toward optimizing the recovery of state losses as the main objective in eradicating corruption crimes.

When related to the Criminal Procedure Code (KUHP), the application of *in absentia* judgments is basically an exception to the principle of *audi et alteram partem*, which requires that the defendant be given an opportunity to be heard during trial. KUHP generally regulates that criminal



case examinations are conducted in the presence of the defendant, but in practice certain conditions allow proceedings to continue without the defendant's presence, especially in corruption cases with special characteristics. This shows a limited harmonization between KUHAP as the general procedural law and the Anti-Corruption Law as *lex specialis*.

From the perspective of the conditions for application, *in absentia* judgments in corruption cases may in principle only be rendered if the defendant has been lawfully and properly summoned but fails to appear without a valid reason. In addition, the examination process must still guarantee the formal fulfillment of the defendant's rights, including the right of defense, which is indirectly represented through the evidentiary process in court. Thus, although the defendant is absent, the panel of judges remains obliged to ensure that the judgment is based on lawful and convincing evidence in accordance with criminal procedural law.

Analytically, Article 38 of the Anti-Corruption Law may be understood as a legal instrument oriented toward the effectiveness of law enforcement in corruption cases, particularly to prevent impunity for perpetrators who flee. However, this regulation also leaves normative challenges, especially regarding the implementation of judgment execution after obtaining permanent legal force. Although procedurally judgments may be rendered without the defendant's presence, in practice the whereabouts of the defendant and the assets resulting from the crime remain crucial factors in determining the effectiveness of recovering state losses, thereby showing a gap between legal norms and the reality of law enforcement.

2. Effectiveness of *In Absentia* Judgments in Recovering Assets Resulting from Corruption

The effectiveness of *in absentia* judgments in the corruption criminal justice system is basically inseparable from the main objective of punishment, namely not only to impose sanctions on perpetrators, but also to restore state financial losses. In this context, *in absentia* judgments that have obtained permanent legal force (*inkracht van gewijsde*) should serve as a strong basis for law enforcement officers to carry out execution, including confiscation and recovery of assets resulting from corruption crimes. However, in practice, the effectiveness of this mechanism remains problematic because it is not always followed by success in tracing and executing assets.

In the practice of corruption criminal justice in Indonesia, *in absentia* judgments are generally rendered against defendants who have become fugitives or fled abroad. Although juridically such judgments have the same legal force as judgments rendered in the presence of the defendant, their implementation is often hindered by technical and factual factors. One of the main obstacles is the unclear whereabouts of the convict and the difficulty of identifying and tracing assets suspected to have originated from corruption crimes, so that judgments that have become final and binding cannot always be executed optimally.

This ineffectiveness can be clearly seen in several corruption cases decided *in absentia*, one of which is the Bank Century corruption case through Central Jakarta District Court Decision Number 339/Pid.B/2010/PN.JKT.PST. Although the judgment imposed imprisonment, fines, and substitute payment obligations with state losses exceeding Rp3 trillion, the implementation of asset recovery did not run optimally because the defendants were abroad and the assets were spread across various jurisdictions. This condition caused the execution process to require cross-border mechanisms such as Mutual Legal Assistance (MLA), which in practice takes a long time and faces various administrative and juridical obstacles. In addition, in a number of Bank Indonesia Liquidity Assistance (BLBI) cases, *in absentia* judgments against fugitive defendants also showed a similar pattern, where despite the judgments having permanent legal force, the recovery of state losses could not be carried out maximally. These facts indicate that the existence of *in absentia* judgments does not fully guarantee the effectiveness of asset recovery, especially when not supported by a strong asset tracing and execution system.

The relationship between judgments that have obtained permanent legal force and asset execution becomes very crucial in determining the effectiveness of the corruption punishment system. Normatively, after a judgment becomes final and binding, the prosecutor as executor has authority to



carry out seizure and confiscation of assets. However, in implementation, the execution process often does not run effectively because assets have been transferred, concealed, or placed under the names of third parties (*nominees*). This condition causes court judgments not to fully impact the recovery of state losses.

If analyzed using Soerjono Soekanto's theory of legal effectiveness, the effectiveness of *in absentia* judgments in asset recovery may be seen from several factors, namely legal substance, law enforcement officers, facilities and infrastructure, society, and legal culture. From the legal substance aspect, Article 38 of the Anti-Corruption Law has indeed provided a sufficiently strong legal basis. However, weaknesses arise in the technical aspect of implementation, particularly regarding asset tracing mechanisms and cross-border cooperation which are not yet fully optimal.

From the aspect of law enforcement officers and supporting facilities, the effectiveness of *in absentia* judgments still faces challenges. Limited asset tracing capabilities, minimal access to cross-jurisdictional financial data, and the slow process of mutual legal assistance are factors that hinder maximum asset recovery. In addition, coordination among law enforcement agencies such as the prosecution service, police, and financial institutions still needs to be improved so that judgment execution can run more effectively and in an integrated manner.

Thus, it may be concluded that normatively *in absentia* judgments in corruption cases have strong legal legitimacy and are designed to support the effectiveness of law enforcement. However, empirically, their effectiveness in asset recovery is still not optimal. This shows a gap between the normative objectives of law and the reality of implementation, so that strengthening the judgment execution system is required, particularly in the aspects of asset tracing and international cooperation, in order to increase the effectiveness of recovering state losses.

3. Juridical Obstacles in the Implementation of *In Absentia* Judgments Related to Asset Recovery

The implementation of *in absentia* judgments in corruption crime cases is inseparable from various juridical obstacles affecting the effectiveness of execution, particularly in the aspect of recovering assets resulting from crimes. Normatively, although judgments rendered have obtained permanent legal force (*inkracht*), their implementation often cannot run optimally because the legal system has not fully been able to guarantee successful tracing, seizure, and confiscation of assets that have been dispersed or transferred by perpetrators. This condition shows that the existence of court judgments is not always directly proportional to the success of recovering state losses.

One of the main obstacles is the existence of defendants or convicts who are fugitives, both domestically and abroad. In many cases, perpetrators of corruption crimes have fled before or during the trial process, thereby complicating the execution of judgments. The absence of the convict not only hinders the execution of imprisonment, but also directly impacts the difficulty of accessing information regarding the whereabouts of owned assets. As a result, law enforcement officers face limitations in effectively executing asset confiscation.

The next juridical obstacle lies in the aspect of proving assets resulting from corruption crimes. In practice, not all assets owned by convicts can easily be proven as proceeds of crime. Perpetrators often use asset concealment schemes through third parties, shell companies, or nominee arrangements, so that formally such assets cannot be directly linked to the committed crime. This creates difficulties in the evidentiary process at the execution stage, even though the court judgment has declared the existence of state losses.

In addition, the weakness of asset tracing mechanisms also constitutes a significant obstacle in implementing *in absentia* judgments. The asset tracing system in Indonesia still faces limitations both in terms of regulation and the technical capacity of law enforcement institutions. Limited access to financial data, lack of integration among institutions, and obstacles to international cooperation in tracing cross-border assets cause the process of identifying and seizing assets to become ineffective. This weakens the enforceability of court judgments that should serve as the basis for recovering state losses.



Besides that, there are also problems in the form of normative conflicts and weaknesses in regulations governing the implementation of *in absentia* judgments and asset recovery. Although Article 38 of the Anti-Corruption Law provides a legal basis for courts to render judgments without the presence of the defendant, technical provisions regarding asset execution have not yet been regulated comprehensively and integratively. This creates uncertainty in implementation, especially regarding the limits of the prosecutor's authority as executor, mechanisms for cross-jurisdictional asset seizure, and legal protection for third parties related to such assets.

Thus, it may be concluded that juridical obstacles in implementing *in absentia* judgments are not only technical, but also structural and normative. Regulatory limitations, weak asset tracing systems, evidentiary difficulties, and the unknown whereabouts of convicts are the main factors hindering the effectiveness of recovering assets resulting from corruption crimes. Therefore, strengthening more comprehensive regulations and increasing coordination among law enforcement institutions are required so that the objective of recovering state losses through the *in absentia* mechanism can be achieved optimally.

4. CONCLUSION

1. Based on the research findings, it can be concluded that the regulation of *in absentia* judgments in Article 38 of the Law on the Eradication of Corruption Crimes provides a valid legal basis for courts to continue examining and deciding cases even when the defendant is absent. This provision reflects the state's effort to maintain the effectiveness of judicial proceedings and prevent impunity for corrupt perpetrators who flee. However, empirically, the effectiveness of *in absentia* judgments in recovering assets derived from corruption crimes is still not optimal. This is caused by various obstacles, such as difficulties in asset tracing, transfer of ownership to third parties, limited coordination among law enforcement agencies, and weak judgment execution mechanisms, thereby indicating a gap between the normative and implementative aspects of corruption law enforcement.
2. This research has theoretical and practical implications. Theoretically, the findings reinforce the view that legal effectiveness is determined not only by the strength of legal norms, but also by implementation factors as stated in the theory of legal effectiveness. Practically, this study shows that the existence of *in absentia* judgments alone is not sufficient to guarantee the successful recovery of state losses without being supported by an effective and integrated execution system. Therefore, institutional strengthening, enhancement of law enforcement officers' capacity in asset tracing, and optimization of cross-jurisdictional cooperation are necessary so that court decisions truly have an impact on the return of state assets.
3. This research has limitations because it uses a normative juridical approach focusing on the analysis of legislation and legal literature, so it has not fully described empirical conditions in the field comprehensively. In addition, this study has not examined in depth quantitative data related to the success rate of asset recovery in *in absentia* cases, nor has it compared practices in other countries that may have more effective asset recovery mechanisms. These limitations open opportunities for further research combining empirical and comparative approaches.
4. Based on the research findings, it is recommended that the government and lawmakers strengthen regulations more comprehensively regarding the mechanism for executing *in absentia* judgments, particularly in the aspects of asset tracing, seizure, and confiscation. In addition, increased synergy among law enforcement agencies is required through concrete mechanisms, such as the establishment of cooperation agreements or joint decrees among institutions, both at the national and international levels. The optimization of the Mutual Legal Assistance (MLA) mechanism also needs to be strengthened, including by expanding cooperation with various strategic jurisdictions such as Hong Kong, in order to facilitate the tracing and confiscation of assets resulting from corruption crimes located abroad. Furthermore, strengthening information technology systems and integrating cross-agency financial data are important steps to support the effectiveness of state loss recovery.



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