

Disgorgement of Profits: An Alternative Solution to Stolen State Assets' Recovery from Corporate Financial Crimes

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Abstract: In recent years, the Indonesian government has suffered a huge loss of state assets due to the misbehavior of corporations in financial management because the Indonesian legal system does not have a specific regulation to address corporate financial crime. When a corporate financial crime case arises, Indonesian law enforcement approaches this crime using the Anti-Corruption Act. However, the aim to retrieve the stolen government assets purloined by a corporation using the Anti-Corruption Act is still insufficient, therefore, other related regulations such as the Money Laundering Act have to apply as an additional instrument to realize optimal recovery from the misbehaving corporation. Because the long process involved in criminal and civil courts it is sometimes a waste of the law enforcement effort and the funds expended to get paid back from offenders and/or corporations because the money received is much lower than the money lost or even zero. To bridge the gap between the money lost initially and the repayment money, because of the lack of special legal regulation concerning corporate financial crime, this research intends to study the possibility of using a "disgorgement of profits" approach as a faster way to get the maximum repayment of stolen money/assets from instances of corporate financial crime in out-of-court settlements.

Keywords: Corporate Crime; Criminology; Disgorgement of Profit; Corporate Crime

1. Introduction

The impact of corporate financial crimes in Indonesia implies great losses to the Indonesian national economy since the amount of state money lost due to this kind of crime is sizable. Unfortunately, the lack of special legal regulations concerning corporate financial crimes has been a stumbling block in the efforts to eliminate this kind of crime,¹ because Indonesia still does not have a special regulation around it. Until now, in private financial corporation misconduct, offenders faced indictment as a

¹ Tomasic, Roman. "The financial crisis and the haphazard pursuit of financial crime." *Journal of Financial Crime* 18, no. 1 (2011): 7-31.

general crime regulated by the Indonesian Criminal Procedures Law Number 8 of 1981 and for the most part face indictment under Chapter 378 on Fraud, Chapter 372 on Embezzlement, and Chapter 264 on Counterfeit. If financial mismanagement occurs in a state-owned corporation, this will usually be treated by application of the provisions in Anti Corruption Act Number 31 of 1999 and *juncto* Act Number 20 of 2001 Chapter 2 Paragraph 1 or Chapter 3, which allowed for a maximum of 20 years' punishment in jail and maximum fines of 1 (one) billion rupiahs, equivalent to USD 70,513.10².

Special circumstances means a factor in meting out more punishment because the illegal act was done when the country was facing a threat or in a dangerous situation as in a war, in time of national emergency such as having massive earthquake or flood, if the offender is a recidivist: a convict criminal who repeatedly doing criminal activities, or when the country was dealing with an economic crisis. From the punishment as set out in Chapter 2, even though the offender will be punished with a maximum lifetime jail sentence or capital punishment, the stolen state asset/money cannot be fully retrieved from the offender with a maximum fine limitation of one billion rupiahs, while the amount of stolen asset/money can be much more than the total amount of punishment.

To make for optimal repayment of the stolen state asset/money by a corporation, Indonesian legal enforcers often apply Act Number 8 of 2010 concerning the Eradication and Prevention of Money Laundering (Money Laundering Act) to add weight to the punishment of these crimes. This Act gives authority to the Indonesian legal enforcers to confiscate all the illegal assets and money of the offender with a non-conviction-based system as long as the court can prove that the initial crime actually occurred.

Unfortunately, the application of the Anti-Corruption Act with such limited sanctions, even though supported by the Money Laundering Act, is still insufficient for legal enforcers to access the stolen money from the criminal/corporation and put it back into state accounts. The main problem is that the end focus of Indonesian legal enforcers is how to send the offenders to jail and the repayment of the money will be treated as an additional task.³ Also, with incarceration in mind, legal enforcers ignored the corporation's existence and roles in corporate financial crimes, even though the Anti-Corruption Act Chapters 2 and 3 also discuss the corporation as an entity. However, its regulation did not specify any punishment for the corporation involved. The behavior of legal experts, legislators, and legal enforcers to ignore the corporation's existence when handling corruption cases or financial crimes is because they regard the corporation as a non-human entity, and corporations, *de jure*, cannot be punished as humans.

James Golbert in "The Evolving Test of Corporate Criminal Liability"⁴ assumes that there are people who think that criminal law exists because a criminal act/wrongful act/*actus*

² Indonesian Legislative, "Indonesian Criminal Procedures Law No. 8," Chapter 12.

³ Lukito, Anastasia Suhartati. "Financial intelligent investigations in combating money laundering crime: An Indonesian legal perspective." *Journal of Money Laundering Control* 19, no. 1 (2016): 92-102.

⁴ James Gobert, "The Evolving Legal Test of Corporate Criminal Liability," in *Corporate and White-Collar Crime*, ed. John Minkes and Leonard Minkes (London: Sage, 2008).

reus must be related to a wrongful state of mind/*mens rea*, that criminal law was designed purely for human application (who are flesh and blood), therefore, it is impossible to sue and punish a corporation that is inanimate and fictive. Golbert quotes Popper (1957), Hayek (1949), and Wolf (1985)⁵ holding that all social and economic actions are directed to humans, and Omi Hatashin⁶ added that a wrongful act contained a moral element or mentality (*mens rea*) such as evil minds and ignorance, and may be combined with a physical element to kill somebody.

Does a corporation have a mind/*mens* as individuals have minds and how does one derive moral elements from it? John Braithwaite⁷ describes the difficulties involved in proving a corporation is involved in a crime or a wrongful act, including the high cost involved in bringing a corporate crime to court and the political implications for the government, and more often the courts do not favor the government because of the legalities and corporation accountability complexities.

In contrast, Mannheim⁸ said that Sutherland⁹ deserved a Nobel prize for his book *white collar crime* as a pioneer of white collar crime and corporate crime discussions. Even though Sutherland¹⁰ refers white collar criminal as individual offender, he clearly believes that the real crook in white collar crime is corporate "...corporations have committed crimes....these crimes are not discrete and inadvertent violations of technical regulations. They are deliberate and have a consistent unity....the criminality of the corporations, like that of professional thieves, is persistent, a large proportion of the offenders are recidivist"¹¹ which Golbert and Punch defines as "*corporate crime*"¹² because the criminality element that consistently and persistently exists pertains to the corporation. In this paper, the corporation will be treated the same as a human with responsibility and accountability for their misconduct in financial management according to Sutherland's thinking and his followers such as Mannheim and Maurice Punch.

The main focus of this research is corporate financial crime in state-owned enterprises or any other related government institutions or any institution as long as state money is involved and/or government officials are somehow involved. Why? Because corruption in Indonesia limited to every act related to government officials' misbehavior and/or the

⁵ Gobert, "The Evolving Legal Test of Corporate Criminal Liability."

⁶ Omi Hatashin, "The Evolving Legal Test of Corporate Criminal Liability," in *Corporate and White-Collar Crime*, ed. John Minkes and Leonard Minkes (London: Sage, 2008).

⁷ John Braithwaite and Gilbert Geis, "On Theory and Action for Corporate Crime Control," *Crime & Delinquency* 28, no. 2 (2016), <https://doi.org/10.1177/001112878202800207>.

⁸ Mannheim, Hermann. *Comparative Criminology Pt2* IIs 200. The International Library of Sociology. 15 vols. Vol. 2: Routledge, 2013. doi:10.4324/9781315007809.

⁹ Mannheim, Hermann. "Sutherland, Edwin H. *White Collar Crime*. Pp. X, 272. New York: Dryden Press, 1949. \$3.00." *The ANNALS of the American Academy of Political and Social Science* 266, no. 1 (2016): 243-44. <https://doi.org/10.1177/000271624926600181>.

¹⁰ Sutherland, Edwin H. "White-Collar Criminality." *American Sociological Review* 5, no. 1 (1940). <https://doi.org/10.2307/2083937>.

¹¹ Gobert, James, and Maurice Punch. *Rethinking Corporate Crime*. Cambridge: Cambridge University Press, 2003. <http://www.cambridge.org/9780521606073>.

¹² Punch, "The Organization Did It: Individuals, Corporations and Crime."

mismanagement of state money. Until now, corporate financial crime in Indonesia, specifically dealing with the state's money, is still regarded as part of corruption crimes, therefore, the method, and legal system that are applied to this crime use corruption legal regulations. The Anti-Corruption Act in Indonesia has a unique requirement that differentiates the definition of corruption as found in other countries. An illegal/wrong act or behavior to gain profit can be categorized as corruption if that behavior involves state money or is carried out by government officials related to their position as government officials.¹³ If an individual (not a government officer) steals money from another individual or a private corporation and no state money is lost, this kind of act will be categorized as embezzlement, theft, or any other financial crime but corruption.

Although the Anti-Corruption Act notes corporate misbehavior, its provisions mostly administer punishment to the individual as an offender and there is no provision for the punishment of a corporation *per se* even if the corporation has acted illegally. Therefore, the corporation can go free without any consequences. Based on the legal reality and definition of corruption in Indonesia, the researcher limited the scope of this research by only analyzing the phenomenon of financial mismanagement or misconduct in or by a state-owned corporation and the best method to retrieve fully the state money lost. This research intends to analyze the use of the disgorgement of profits method as a solution to maximize the repayment of the state money lost through corporate financial crimes.

2. Method

This paper uses primary data in empirical research collected from interviews by using the Delphi Method besides using secondary data from documents about similar cases in other countries and other law references.

3. Corporate Financial Crime in Indonesian State-Owned Enterprises

Sally Simpson makes a limitation about corporate crime in saying that: "Corporate crime refers to illegal or unethical activities committed by corporations or individuals acting on behalf of corporations, typically for financial gain, or to maintain a competitive advantage. It encompasses a wide range of offenses such as fraud, environmental crimes, antitrust violations, bribery and corruption, intellectual property theft, occupational health and safety violations, and money laundering."¹⁴ Even though there is no exact definition of corporate crime, the definition offered by Simpson can, at least, give a better focus on this crime.

The term "corporate financial crime" typically refers to illegal or fraudulent activities committed by corporations or individuals acting on behalf of corporations that involve

¹³ Nelson, Febby Mutiara. "In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia." *Hasanuddin Law Review* 8, no. 2 (2022): 122-138.

¹⁴ Sally Simpson, University of Maryland, College Park, "Corporate Crime, Law, and Social Control", *Contemporary Sociology*, July, 2003, DOI: 10.2307/1556590. UK: Cambridge University Press.

financial transactions. It encompasses offenses such as accounting fraud, securities fraud, embezzlement, insider trading, and other types of financial misconduct.¹⁵ The impact of corporate financial crimes committed in state-owned corporations is massive and has impacted Indonesian economic growth, and until now the Indonesian government and, specifically, its legal enforcers have problems eliminating it. The main reason is that there is no special regulation to combat corporate financial crime, even though there are some stipulations regarding the crime or misconduct of corporations such as the regulations in the Anti-Corruption Act Chapters 2 and 3 and other supporting regulations such as the Money Laundering Act No. 8/2010; nevertheless, those regulations have weaknesses.

In the Anti-Corruption Act, there is a limitation to getting back the state money lost through corporate financial crime. Its regulation limits the amount of money that can be retrieved from the offenders and/or corporates at only 1 billion rupiahs ~ US\$ 66,465.94 as the maximum punishment; meanwhile, the amount of state money lost is oftentimes much higher than that limitation, so how can the victim, in this case, the Indonesian government, get its money back in full? In some cases, prosecutors use the Money Laundering Act as an additional layer to maximize the money losses that can be retrieved or confiscated. However, this approach still has some weaknesses: first, the application of the Money Laundering Act only can succeed if the original crimes are proven, which means the additional Act cannot be applied independently; second, if prosecutors gain favor from judges by giving maximum punishment for offenders/corporations as indicted in preliminary court (district court), the court process is still a long way from the case *inkracht* or the final court judgment, wherein the government can accept repayment of the stolen money. This case still has processes in the Court of Appeal, the Supreme Court, and via Judicial Review, and during the process, sometimes the amount of money to be repaid will be reduced significantly or even nullified. Given the situation discussed before, even though legal enforcers face uncertainty in their job in handling corruption and/or corporate financial crime, they still make their best efforts to retrieve as much of the stolen money as they can. A court order to give back in full the stolen money could be the best way to address corporate financial crime activities effectively, besides the jail punishment.

The Jiwasraya's case (an insurance state-owned company in Indonesia) proceedings can be selected as a good example. The Directors conspired with a private corporation embezzled the insurance money around 17 Trillion rupiahs ~ US\$ 1,129,920,963.00 by falsifying financial book report. The legal enforcers handling this case tried to get as much money repaid as they could (expected benefit). The six convicts have lifetime punishment and have to pay the money back in differing amounts according to how much money they took¹⁶. Benny Tjokrosaputro, President director of Trada Alam

¹⁵ Nicholas Lord, Karin Wingerde, and Liz Campbell. "Organising the Monies of Corporate Financial Crimes Via Organisational Structures: Ostensible Legitimacy, Effective Anonymity, and Third-Party Facilitation." *Administrative Sciences* 8, no. 2 (2018). <https://doi.org/10.3390/admsci8020017>.

¹⁶ Syahrizal Sidik, "Ketok Palu, Ini Vonis Lengkap 6 Terdakwa Kasus Jiwasraya," News article, *CNBC Indonesia* 2020, <https://www.cnbcindonesia.com/market/20201027095538-17-197347/ketok-palu-ini-vonis-lengkap-6-terdakwa-kasus-jiwasraya>.

Minera Tbk (Private Co.) had to pay 6.078 trillion rupiahs ~ US\$ 403,979,977.24; Heru Hidayat, commissioner of Trada Alam Minera Tbk 10.72 trillion rupiahs ~ US\$ 712,514,866.08; and fines for three Jiwayasa officials, Hendrismen Rahim (former president director), Hary Prasetyo (former finance director), and Syahmirwan (former head of the Finance and Investment Division), and another convict as director of Maxima Integra Joko Hartono Tirto. The sum of money repayable as punishment for Benny Tjokrosaputro and Heru Hidayat was the same amount as what they stole from Jiwayasa. The judgement gives more severe punishment than the Anti-Corruption Act¹⁷ because prosecutors used other regulation as a layer indictment. Provisions on Act of 8 about Money Laundering¹⁸ regulates about corporate crimes in :

Chapter 6

- (1) In the case of money laundering crimes, as stated in Chapters 3, 4, and 5 committed by a corporation, the **punishment is given to the corporation** or the people controlling the corporation (the directors).
- (2) The punishment will be given to the corporation **if** the money laundering crimes were:
 - a. committed by or on the orders of the directors.
 - b. committed to fulfill the corporation's needs and goals.
 - c. committed according to the role and duties of the actors/staff or the directors.
 - d. committed to benefiting the corporation.

Chapter 7:

- (1) The **corporation** will be punished with a fine of a maximum of a hundred billion rupiahs.
- (2) In addition to the punishment as stated in item (1), the **corporation** can be punished by:
 - a. announcing the judge's decision
 - b. freezing part or all of the corporation's activities
 - c. revoking the licenses
 - d. liquidating and/or restricting the corporation's activities
 - e. seizing the corporation's assets by the government
 - f. taking over the corporation by the government.

Chapter 9:

- (1) If the **corporation** is unable to pay the fine as stated in Chapter 7 paragraph (1), the fine can be replaced by the corporate or the directors' assets to the same amount as the fine.
- (2) If the sales of the seized **corporation** assets as mentioned in paragraph (1) are not sufficient, the asset's directors will be confiscated the same amount as the rest of payment.

Unfortunately, the Money Laundering Act has requirements meaning that this Act cannot be used as a separate and independent regulation, even though the said regulation holds that money laundering is an independent illegal activity. This Act could not be applied purely separately from other Acts. Legal enforcers have to prove the

¹⁷ Indonesian Legislative, "Act No. 8 About Money Laundering," Chapter 7.

¹⁸ Indonesian Legislative, "Act No. 8 About Money Laundering."

original crime first before applying the Money Laundering Act. If we suspect that someone obtains their assets from illegal activities such as corruption, smuggling, or drug trafficking, we have to prove in court that the assets in question are derived from corrupt acts, smuggling activities, or from activities in trafficking illegal drugs, before we add the indictment using provisions from the Money Laundering Act to get heavier sentences inflicted on the offenders. Conversely, if prosecutors fail to prove the indictment of the original crime, then the second indictment using the Money Laundering Act provisions will be ignored by the judges.

The difficulties in merely using provisions from the Money Laundering Act could be seen in the case of PT Putra Ramadhan, PT Tradha, and Kebumen Regent v the Government of Indonesia¹⁹. The offenders faced a lawsuit for money laundering activities on some projects funded by the government around 2016–2017 leading to a loss to the government of 51 billion rupiahs ~ US\$ 3,389,762.89. Confiscated assets only amounted to 70 million rupiah ~ US\$ 4,652.62 and the court still on going process. The case mentioned above used provisions to regulate the involvement of corporate illegal behaviors, and it seems difficult to decide on the offenders and their corporation's wrongdoings without the help of other criminal Acts. Indonesian legal enforcers are aware of the damage caused by corporate crimes, and they have tried to use existing legal regulations that have provisions to regulate the process of handling corporate crime, however, in this case, they failed, and even the judges still failed to make decisions.

The same situation where another case did not succeed in punishing a corporation which was involved in criminal behavior was in Lippo Group and Bekasi Regent Neneng Hasanah Yasin v the Government of Indonesia about the illegal permit to develop Meikarta Residences Project. The prosecutors succeeded in punishing the offenders by the court decision to give jail sentences and fines but failed to sanction the corporation²⁰. Only one case succeeded in sanctioning the related corporation involved as in PT Giri Jaladhi Wana v the Government of Indonesia in a corruption case in the development project of Antasari Central Market, Banjarmasin, South Celebes in 2010, with a state loss of 7.3 billion rupiahs ~ US\$ 485,201.35. The court decided to fine the offender 1.3 billion rupiahs ~ US\$ 86,405.72 and the corporation suspended its activities for six months²¹. Due to the lack of appropriate and special legal regulation concerning corporate financial crime, the legal processes relating to corporate financial misconduct as explained above.

¹⁹ Dylan Aprialdo Rachman, "Sistematisnya Kasus Dugaan Korupsi di Kabupaten Kebumen yang Menjerat Taufik Kurniawan," News article, *Kompas.com*, October 31 2018, <https://nasional.kompas.com/read/2018/10/31/10162311/sistematisnya-kasus-dugaan-korupsi-di-kabupaten-kebumen-yang-menjerat-taufik>.

²⁰ Merdeka.com, "5 Fakta di Balik Kasus Suap Mega Proyek Meikarta," News article, *Merdeka.com*, October 20 2018, <https://www.merdeka.com/uang/5-fakta-di-balik-kasus-suap-mega-proyek-meikarta.html>.

²¹ Decision on case number 812/Pid.Sus/2010/PN.Bjm, Direktori Putusan Mahkamah Agung Republik Indonesia, No. 04/PID.SUS/2011/PT.BJM (Indonesian Supreme Court 2010).

To bridge the gap of the lack of regulation concerning the problem of corporate financial crimes, the Indonesian Supreme Court published Internal Regulation for Judges Number 13 of 2016 concerning the Treatment Procedures of Corporate Crimes²². Chapter 4 Paragraph 2 of this provision allows judges to analyze corporate misconduct by criteria such as: (1) If the corporation benefits from the corporate crime activities or the misconduct was done for the benefit of the corporation; (2) The corporation permitted the crime to occur by doing nothing and letting it happen; or (3) The corporation did not take any precautions to prevent a crime from occurring, to prevent greater damage, and to make sure the people involved adhered to the existing legal regulations to prevent a crime.

Prosecutors use this regulation as a way to enhance the probability of suing corporations that are suspected of being involved in criminal activities or that criminal action occurs to benefit the corporation. Other than the Antasari Central Market case, this regulation supports the successful punishment of some corporations that caused damage in terms of environmental crimes to give the rehabilitation cost and other compensation for the citizen, and recently applied to the corruption case of the Jiwasraya case, while other cases did not succeed because the punishment was still far away from the end goals, because there was a huge gap between the state money loss and the money returned to the victim using the Anti-Corruption Act. This condition does not make Indonesian legal enforcers submissive and they still strive to gain the maximum results on every corruption or corporate financial crime case they were handling in courts.

The court's decision on the Jiwasraya case that awards the same amount as the stolen asset is something controversial and gives new hope in the legal sphere in Indonesia. The problem is that the court decision on the maximum amount of money to be repaid was decided in the district court, therefore, the Jiwasraya case journey still has a long way to go until it gets the final court decision. This case still has to be examined at other level courts as the High Court of Appeal and the Supreme Court of Cassation and Judicial Review. The result may be the same as the district court decision, or might not. Indonesian government hopes that the final court decision will punish the offenders by making them give back the same amount of money they stole as decided by the North Jakarta District Court, but in reality, often the result does not reflect that hopes. It is also possible that, after a long process, the final decision will absolve the offenders or corporations from any duty or punishment. The worst case, as explained before, will be unpleasant for the legal enforcers and will be grave for the Indonesian legal justice, but this situation is not uncommon in Indonesia.

Examining the problematics above, this research intends to study the possibility of implementing out-of-court settlements through the "disgorgement of profits" method as an alternative effective way to get back the maximum of the state's money stolen

²² Supreme Court, "Regulation No. 13 About Handling Procedures of Corporate Crimes," (2016). https://putusan3.mahkamahagung.go.id/peraturan/download_file/11ead556c6fec7d0b73b313335383437/pdf/11ead556c6fec1f08fe1313335383437.html.

through criminal behavior of corporations using less time, effort, and money than is needed in criminal or civil court procedures.

4. Why Disgorgement of Profits?

Disgorgement of profits is a legal remedy or sanction that requires individuals or entities to surrender or return ill-got gains or profits acquired through unlawful activities. It is a form of restitution intended to deprive wrongdoers of their illicit financial benefits and prevent them from profiting unjustly from their wrongdoing²³.

Disgorgement of profits has long been practiced in some countries²⁴ such as England, Australia, and Canada as a simpler and quicker alternative way of using litigation to solve breaches of law. These countries use the disgorgement of profits remedy as a punishment for people who breach copyright law in civil court or for fraud and counterfeit activities in criminal court. Katy Barnett, in her research on the application of disgorgement of profits in Australian civil law, states that disgorgement of profits only applies to the breach of copyright law, and the courts still have no plan to broaden the application of disgorgement of profits to other civil cases²⁵ as has happened in other common law countries such as England and Canada. A few years ago, the Indonesian Financial Services Authority (FSA) as the national financial control board applied disgorgement of profits in handling capital market crimes²⁶. In 2019, it published the Disgorgement and Disgorgement Fund for Capital Market regulation with the aim *“to prevent people from gaining benefits and enjoying the assets acquired illegally, to give compensation to the victims, and as a deterrent effect to the offenders.”*²⁷

In conjunction with those three aims of the Indonesian FSA's Disgorgement and Disgorgement Fund for Capital Market regulation, those aims can be applied to the disgorgement of profits resulting from corporate financial crime. The first aim of the Indonesian FSA regulation of disgorgement and disgorgement fund is to prevent people from benefiting from crime as in the saying *“crime does not pay.”* The phrase encapsulates the idea that the risks, potential legal consequences, and negative impacts on one's life outweigh any potential gains from criminal behavior. It suggests that even if individuals involved in criminal activities may experience temporary financial or material gains, they will eventually face negative consequences such as legal penalties,

²³ Zachary K. Goldman and Stefan Gottschalk, "Disgorgement: A Primer on the Extraordinary Remedy in SEC Enforcement Actions," 2013.

²⁴ Olivia N. Maryatmo and Ardhita P. Rusyadi, "The Legality of 'Disgorgement of Profits' in Case of A Breach Under CISG," *Juris Gentium Law Review*, (2016).

²⁵ Katy Barnett, "Disgorgement of Profits in Australian Private Law," in *Disgorgement of Profits, Ius Comparatum - Global Studies in Comparative Law* (2015).

²⁶ Indonesian Financial Services Authority, founded July 16, 2012 as a monitoring body to supervise the financial services industry, to protect the interests of consumers and the public, as a pillar of the global national economy, and to supervise activities in banking, capital markets, and non-bank financial industries sectors.

²⁷ Uni Tsulasi Putri, "Disgorgement as Remedial Action in Indonesian Capital Market Regime," *Jurnal Hukum Novelty* 11, no. 1 (2020), <https://doi.org/10.26555/novelty.v11i1.a15673>.

damage to their reputation, strained relationships, and limited opportunities going forward.

The second aim is to give compensation to the victim. The Indonesian legal system may have a similar system with disgorgement such as compensation, damages, or indemnity from the offenders to the victims in civil and criminal cases. A criminal case decision that punished the offender by making them give compensation to the victim was the case of Herry Wirawan²⁸, a teacher at an Indonesian Islamic boarding school (Pesantren) in Bandung, West Java, who raped 13 girl students there, 8 of whom got pregnant and gave birth. After he was convicted, the district court punished him with a life sentence along with an order to the Ministry of Women Empowerment and Child Protection to pay compensation to the victims. This was an odd punishment—why should a state institution pay compensation for a crime committed by someone who was not related to the institution? If the compensation punishment was given to the Pesantren, it would still be related to the responsibility of the employer. Some Indonesian legal experts state that the responsibility to give compensation to victims cannot be the burden of the state²⁹ because every person should be responsible of what their doing. Therefore, the High Court corrected the district court decision by condemning the offender to capital punishment and ordered him to pay restitution of around 300 million rupiahs.

Over the years, sometimes courts have decided to give restitution, compensation, or any other kind of payment to make up for the victims' losses or suffering. Unfortunately, this system is seldom executed in Indonesia. This is mostly because the offenders do not have enough money to pay for the compensation, damages, or indemnity, or perhaps the offenders prefer to spend time in jail rather than pay the victims, and the punishment will be toothless, as it cannot be enforced.

If a court decides to punish a state-owned corporation or a state organization to pay the victims, that corporation or organization *a quo* will give over the burden to the Ministry of Finance since there is no local and/or national regulation administering the fund for compensation payment in the state corporation/organization yearly budget, and to execute such a court decision that involves expenditure to pay the victims. Conversely, if a state corporation/organization becomes a victim of a corporate financial crime, legal enforcers are responsible for maximizing the efforts to gain maximum repayment from the corporation involved.

There are three options regarding the amount of money that the corporation should pay. First, the indictment will be based on the amount of lost money that can actually be traced and collected by prosecutors. This method is often used by prosecutors and even though they know that the lost money comes to much more than the indictment, they do not want to indict more than they are capable of because it will affect their

²⁸ Putusan PN Bandung 989 PID.SUS/2021/PN BDG Tanggal 15 Februari 2022, <https://putusan3.mahkamahagung.go.id>

²⁹ M. Iqbal A Machmudi, "Pakar Hukum Pidana: Negara Tidak Bisa Dibebani Restitusi Korban Herry Wirawan," *Media Indonesia*, February 17 2022, <https://mediaindonesia.com/humaniora/472225/pakar-hukum-pidana-negara-tidak-bisa-dibebani-restitusi-korban-herry-wirawan>.

reputation or the image of their institution. Usually, prosecutors give an indictment below the money losses because, during the investigation, the investigator and/or prosecutor found out that the corporation was bankrupt and/or the directors' assets have gone. If the judge gives a decision for a corporation to pay more than the corporation's capability, and if prosecutors could not get the exact amount of money the judge ordered, people will say that prosecutors received bribes or embezzles the money. Therefore, to avoid such prejudice, the prosecutor indictment will depend on how much money or asset they can confiscated.

Second, the indictment, and judge's decision is of the same amount as the money lost. In this option, prosecutors cannot give punishment more than the corporation stolen and usually prosecutors give such an indictment after making certain that the corporation can exercise court orders. It is the prosecutor's duty only to restore the damage caused by the wrongdoing of the corporation that extorted state money illegally as in the Jiwastara case. This treatment can only be applied if the corporation still has a healthy financial backup.

Third, the indictment and judgment award more than the amount of the stolen money, including all benefits that accrued from using the stolen money. For instance, if a corporation used stolen money to support its operation and success, legal enforcers would indict the corporation to return the stolen money fully plus any benefit they gained from using the money. In Indonesia, this method was applied to reboisasi's case that is a responsibility of a corporation to replant trees in a forest after they cut old trees to have its log. This case happened mostly in Indonesian cities around 2000. Corporation pay sum of money for this duty but the officials responsible to collect money did not transfer directly to the state's account and keep the money in a bank under their name and get daily interest for their own. Prosecutors confiscated all the money including all the interest. This method could be applied at that time since the money was still in the bank. However, after that case, criminals became smarter, and they divided money to keep in different bank, making it difficult for legal enforcers to trace it, so this last option has never been applied in Indonesia again.

The three options mentioned above mostly handle corruption/corporate financial crimes through court proceedings with minimum results, therefore, the purpose of this research is to discuss the situation where the state as the victim of corporate financial crimes can get the maximum money back from this crime by using the disgorgement of profits method as a way to solve the problem through out-of-court proceedings. The Indonesian Prosecution Office through its Intelligence Division has the authority to negotiate with the corporation involved in corporate financial crime. If the corporation has the will to give back the state's stolen money, the case will be closed and the process will not continue to the court as in the case of Adrian Waworuntu³⁰, where the negotiation reached an agreement and prosecutors were able to retrieve the stolen state money/assets successfully.

³⁰ Sabir Luluhu, "Dua Pensiunan Jenderal Polisi di Balik Kasus Maria Pauline-Adrian Waworuntu," News article, *Sindonews.com*, July 9 2020, <https://nasional.sindonews.com/newsread/95106/13/dua-pensiunan-jenderal-polisi-di-balik-kasus-maria-pauline-adrian-waworuntu-1594256862>.

Three government bodies which have the authority to combat this corruption are the Anti-Corruption Commission (ACC) (in Bahasa, the name is Komisi Pemberantasan Korupsi (KPK)), the Prosecution Office, and the Police Department. The first two bodies have been given authority to handle corruption throughout the process from getting reports, collecting data and evidence, investigating, interviewing, confiscating, submitting the case to court, proving evidence, and executing the judge's decisions. Police officers only have the authority to investigate the case and after they complete the investigation, they will submit the case to the prosecutors who then will submit it again to the court and debate it to prove the offender's guilt. Unfortunately, the ACC must finish all the legal proceedings on corruption when it handles a case from the beginning of the investigation until the execution of the court order. It cannot stop the process in the middle, no matter what. Therefore, only the Prosecution Office can implement fully the disgorgement of profits method for corruption or corporate financial crimes according to its duties and responsibilities.

5. Measurement of Disgorgement of Profits Using Unjust Enrichment and Restorative Justice

The measurement of disgorgement of profits using the concept of unjust enrichment typically involves calculating the amount of the ill-got gains or unjustly acquired profits that the wrongdoer has obtained through their unlawful actions. The aim is to return those profits to the affected parties or to the rightful owners who have been harmed by the wrongdoing. This involves the need to:

- a. Identify the Unjustly Acquired Profits: Determine the specific financial benefits or gains that the wrongdoer has obtained through their unlawful activities. This may involve analyzing financial records, transactions, or other evidence to establish the amount of profit gained as a result of the wrongdoing.
- b. Establish Unjust Enrichment: Demonstrate that the profits obtained by the wrongdoer are unjust or undeserved. This can be achieved by showing that the gains were acquired through illegal or wrongful means, such as fraud, breach of fiduciary duty, or some other misconduct.
- c. Calculate the Disgorgement Amount: Quantify the amount of profit that should be disgorged (or returned). This is typically done by determining the net gain or excess benefit deriving from the unlawful activity. It may involve subtracting legitimate costs or expenses from the total gains to arrive at the net unjust enrichment amount.
- d. Consider Mitigating Factors: Take into account any relevant factors that could affect the calculation of disgorgement, such as restitution to victims, the defendant's ability to pay, and the proportionality of the disgorgement figure to the harm caused.

Restorative justice approaches may focus on repairing the harm caused by the wrongdoing rather than solely punishing the offender. While the concept of disgorgement of profits is more commonly associated with compensatory or punitive

measures, the principles of restorative justice can be applied to guide the measurement of disgorgement in a somewhat more holistic and victim-centered manner. Here are some considerations to take into account when scoping the disgorgement of profits using restorative justice:

- a. **Identify Affected Parties:** Determine the individuals or entities who have suffered harm or loss as a result of the wrongdoing. This may include direct victims, indirect victims, or the community as a whole.
- b. **Assess the Nature of Harm:** Understand the extent and nature of the harm caused by the wrongdoing, including financial, emotional, or other types of harm experienced by the affected parties. This assessment may involve actually engaging with the victims and their perspectives to gain a comprehensive understanding of the impact.
- c. **Quantify the Financial Impact:** Determine the financial consequences of the wrongdoing, including any monetary losses, or other damage incurred by the affected parties. This can involve calculating the actual financial harm suffered by the victims or estimating the value of the benefits gained by the wrongdoer.
- d. **Consider Restorative Measures:** Explore restorative measures beyond financial restitution that can address the harm caused by the wrongdoing. This may involve actions such as apologies, community service, or engagement in activities that contribute positively to the affected individuals or community.
- e. **Engage in Dialog and Agreement:** Facilitate dialog between the wrongdoer, victims, and relevant stakeholders to reach agreement on the appropriate measures for disgorgement. This process encourages open communication, understanding, and a shared commitment to addressing the harm caused.

It is important to note that applying restorative justice principles to the measurement of the disgorgement of profits may necessarily involve collaborative and participatory processes that aim to address the needs and concerns of the affected parties. The specific approach and measurements may vary depending on the jurisdiction, legal context, and particular circumstances of the case.

6. The Collected Stolen Money From Disgorgement of Profits

The disgorgement of profits, when enforced, and used properly, can have several potential benefits for national development and welfare through criminology aspects. Some of these benefits include: First, deterrence. Disgorgement serves as a deterrent to potential wrongdoers by showing that illicit gains obtained through illegal activities will be confiscated and returned. This deterrent effect can help discourage individuals and corporations from engaging in unlawful behavior, thereby fostering a more compliant to corporations and ethical business environment; Second, Compensation for Victims. Disgorged profits can be used to compensate those victims who have suffered financial harm as a result of the wrongdoing. This compensation can help make good their financial losses and contribute to their recovery, promoting a sense of justice and fairness.

Third, Funding Public Initiatives. Disgorged funds can be directed toward public initiatives or government programs aimed at promoting national development. These initiatives could include infrastructure development, education, healthcare, environmental conservation, or other areas of public interest. The redirected funds can contribute to socioeconomic progress and address critical needs within the country. Last but not least, fostering the rule of law. Enforcing disgorgement of profits demonstrates the commitment of a country to uphold the rule of law and maintain a fair and transparent legal system. This contributes to an environment conducive to business, investment, and economic growth, attracting both domestic, and foreign stakeholders who look for stability and integrity in the market.

It is worth noting that the beneficial impact of the disgorgement of profits on national development is contingent upon effective enforcement, transparent mechanisms for funding allocations, and appropriate use of the disgorged funds. Additionally, the specific benefits may vary based on the unique circumstances and priorities of each state. Ultimately, the equitable redistribution of ill-got gains through disgorgement can contribute to a more just and prosperous society, reinforcing the rule of law and fostering sustainable national development.

7. Conclusion

The impact of corporate financial crime in Indonesia has resulted in significant losses to the national economy, with vast amounts of state money being lost. However, efforts to combat these crimes have faced obstacles due to the lack of specific legal regulations pertaining to corporate financial crimes. Currently, offenders involved in private financial corporation misconduct are indicted under general criminal laws, such as fraud, embezzlement, and counterfeiting, while financial mismanagement in state-owned corporations is treated under corruption laws. In the context of Indonesia, corporate financial crimes, particularly those involving state money, are regarded as a subset of corruption crimes. This research focuses on financial mismanagement or misconduct in state-owned corporations and aims to explore the disgorgement of profits as a potential solution to maximize the recovery of state money lost in corporate financial crimes.

The measurement of disgorgement of profits should involve identifying those unjustly acquired profits, establishing the extent of the unjust enrichment resulting from the wrongdoing, calculating the disgorgement amount, and considering mitigating factors. Additionally, adopting restorative justice principles in the measurement process can help ensure a victim-centered approach, focusing on repairing the harm caused and engaging in dialog and agreement between the wrongdoer, victims, and stakeholders. Overall, the implementation of disgorgement of profits in corporate financial crime cases in Indonesia has the potential to promote justice, deter wrongdoing, compensate victims, and contribute to the nation's development. It requires the concerted efforts of relevant government bodies, legal institutions, and stakeholders to ensure its effective implementation and achieve the intended objectives.

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Conflict of Interest Statement: The author(s) declares that the research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest.

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