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Non-conviction-based asset forfeiture As a legal formulation for asset recovery in corruption offences in Indonesia

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Abstract
Corruption remains one of the most serious crimes causing significant financial losses to the state and hindering national development, therefore asset recovery has become an essential objective in the enforcement of anti-corruption law in Indonesia. However, in practice, the recovery of assets derived from corruption often faces obstacles when the criminal conviction of the offender cannot be obtained, resulting in a gap between the objective of restoring state losses and the limitations of the conventional criminal justice system. Indonesian anti-corruption law has introduced additional penalties in the form of payment of replacement money, yet the regulation concerning asset confiscation without criminal conviction has not been comprehensively formulated in statutory law. This study aims to examine the juridical review of asset confiscation in corruption offences in Indonesia and to analyze the mechanism of non-conviction-based asset forfeiture as a legal formulation for asset recovery in corruption crimes. This research uses normative legal research with statutory, conceptual, comparative, and case approaches, focusing on the absence of clear legal norms regarding confiscation of assets obtained from corruption. The results show that asset confiscation related to corruption is regulated in Article 32, Article 33, Article 34, and Article 38C of Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, but Indonesia has not yet enacted a specific law that explicitly regulates non-conviction-based asset forfeiture, as such regulation remains in the form of a Draft Law on Asset Confiscation. The study concludes that the Non-Conviction-Based Asset Forfeiture model, which targets the asset rather than the offender, can serve as a legal formulation to optimize asset recovery in corruption cases in Indonesia.

Keywords: Non-conviction-based asset forfeiture, asset recovery, corruption crime

Introduction

The rule of law constitutes a fundamental principle in the administration of the state, in which law serves as the supreme authority to ensure justice, legal certainty, and public welfare for all citizens. Costa P. & Zolo, D. (Eds.). (2007) [9]. In Indonesia, the concept of the rule of law is based on the values of Pancasila as the philosophical foundation and the source of all sources of law, requiring that all legislation reflect the principles of justice, certainty, and expediency. Achmad Ali (2002) [1]. The Indonesian legal system consists of various forms of legislation, including statutes, presidential regulations, ministerial regulations, regional regulations, and other implementing rules which function as instruments for law enforcement. The existence of these legal instruments is intended to ensure that the enforcement of law can be carried out effectively in order to realize social justice for all Indonesian people. However, in practice, law enforcement still faces significant challenges caused by both individual and institutional factors within law enforcement agencies, resulting in the weakening of the effectiveness of law in achieving justice.

One of the most serious problems reflecting the weakness of law enforcement is corruption. Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, as amended by Law Number 20 of 2001, regulates various prohibited acts and provides criminal sanctions for individuals who commit corruption offences. In addition to principal penalties, the law also introduces additional punishment in the form of payment of compensation to recover state financial losses. The imposition of compensation as an additional penalty represents a development in the Indonesian criminal law system, indicating a shift in the orientation of punishment from merely imposing imprisonment toward restoring state losses. From a juridical perspective, corruption is categorized as an extraordinary crime due to its widespread impact on the state's economy and public welfare.

The development of economic-motivated crimes has become increasingly complex, organized, and often transnational in nature. Such crimes are frequently committed by well-educated offenders using sophisticated methods and facilities, with the primary objective of obtaining financial gain. Under these circumstances, the conventional criminal justice system, which focuses mainly on proving the guilt of the offender and imposing imprisonment, is often insufficient to achieve justice, particularly in recovering assets obtained from criminal activities. Modern criminal law development emphasizes not only the punishment of offenders but also the recovery of assets derived from criminal acts.

In the Indonesian legal system, the regulation of seizure and confiscation of proceeds of crime has not yet been comprehensively formulated. The criminal justice system still primarily depends on criminal conviction, which creates difficulties in asset recovery when the offender cannot be prosecuted, dies, escapes, or when the criminal elements cannot be proven before the court. Atmasasmita, Romli (2008) [2]. In international legal practice, the concept of Non-Conviction-Based Asset Forfeiture has been developed as a mechanism that allows confiscation of assets without prior criminal conviction, focusing on the unlawful origin of the asset rather than on the criminal liability of the offender. This concept has been widely recognized as an effective instrument in combating corruption and other economic crimes that are difficult to prove through conventional criminal procedures.

Previous studies have generally focused on criminal sanctions and the application of additional penalties in corruption cases, particularly the payment of compensation for state losses. However, studies concerning non-conviction-based asset forfeiture as a legal formulation for asset recovery remain limited, and Indonesian legislation has not yet provided explicit and comprehensive regulation on this mechanism. Existing provisions concerning asset confiscation are scattered in several articles, including Article 32, Article 33, Article 34, and Article 38C of Law Number 20 of 2001, while the regulation on asset forfeiture is still limited to the Draft Law on Asset Confiscation. This condition indicates the existence of a legal gap that may hinder the optimization of asset recovery in corruption cases.

Based on the above background, this research offers novelty by examining non-conviction-based asset forfeiture as a legal formulation for asset recovery in corruption offences through a juridical analysis of existing regulations in Indonesia and their relevance to contemporary developments in criminal law. Therefore, the objectives of this research are to analyze the juridical review of asset confiscation in corruption offences in Indonesia and to examine the mechanism of non-conviction-based asset forfeiture as a legal formulation for asset recovery in corruption crimes in Indonesia.

Method

This study employs a normative juridical research method by examining applicable laws and regulations, legal doctrines, and legal principles related to asset forfeiture in corruption offences. The normative approach is used to analyze law as a system of norms consisting of written rules, including statutes, implementing regulations, and court decisions. The analysis of legal materials in this study is conducted through the statute approach, which focuses on legislative provisions as the primary source of legal interpretation, particularly concerning the regulation of non-conviction-based asset forfeiture in corruption cases in Indonesia.

Result and Discussion

1. Juridical Review of Asset Forfeiture

In the Indonesian criminal law system, asset forfeiture with criminal prosecution is part of an additional penalty in the form of confiscation of certain goods resulting from criminal acts which can only be carried out by a court decision that has permanent legal force. Further provisions can be seen in Article 39 of the Criminal Procedure Code (KUHAP), which regulates the provisions regarding objects that may be subject to seizure. Objects that may be forfeited or seized are as follows:

a. Objects or claims belonging to the suspect or defendant which wholly or partly are suspected to have been obtained from a criminal act or partly the result of a criminal act;
b. Objects that have been directly used to commit a criminal act or to prepare it;
c. Objects used to obstruct the investigation of a criminal act;
d. Objects specifically made or intended to commit a criminal act;
e. Other objects that have a direct connection with the criminal act.

In addition to the provisions of Article 39 of the Criminal Procedure Code, Article 46 paragraph (2) of the Criminal Procedure Code also limits the objects that may be forfeited. If the case has been decided, the objects that are subject to seizure shall be returned to the person or to those mentioned in the decision, except if according to the judge's decision the object is forfeited to the State, to be destroyed or to be damaged so that it cannot be used anymore, or if the object is still needed as evidence in another case.

Thus only objects that have a direct connection with the criminal act may be forfeited based on a criminal decision. Objects that are not directly related to the occurrence of a criminal event cannot be seized by investigators. In the condition of being caught in the act, investigators may carry out seizure of objects and tools that are reasonably suspected to have been used to commit a criminal act as evidence.

In Corruption Crimes, the provisions regarding asset forfeiture resulting from corruption crimes with conviction are regulated in Law Number 20 of 2001 concerning the amendment to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. Law Number 20 of 2001 concerning the amendment to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes allows asset forfeiture against the proceeds of corruption or the means of corruption through criminal prosecution if the public prosecutor can prove the guilt of the defendant in committing the corruption crime and the assets that have been seized in the case concerned constitute the proceeds of the corruption crime.

In proving the guilt of the defendant in court, the public prosecutor often experiences difficulties because the modus of corruption crimes handled uses extraordinary methods and is added by the high standard of proof that must be fulfilled (beyond reasonable doubt). Such conditions can certainly cause difficulties for the public prosecutor to succeed in handling corruption crime cases. Therefore, efforts to forfeit assets resulting from corruption crimes through criminal prosecution must be carried out by public prosecutors who are intelligent, careful, and have sufficient knowledge in proving the guilt of the defendant who committed corruption crimes.

In accordance with its basic principle, forfeiture of assets resulting from corruption crimes with conviction is highly dependent on the ability of the public prosecutor to prove the guilt of the defendant in court as well as to prove that from the crime there are proceeds or assets from the criminal act charged by the public prosecutor. This provision is called forfeiture of assets based on the guilt of the defendant or conviction based asset forfeiture, meaning that forfeiture of assets resulting from corruption crimes is highly dependent on the success of the investigation and prosecution of the corruption crime case. Andi Hamzah (2017) [4]

The mechanism of conviction based asset forfeiture is in line with Article 39 and Article 46 paragraph (2) of the Criminal Procedure Code (KUHAP), which provide limitations regarding what objects may be seized. Furthermore, objects or assets that have been seized shall be forfeited to the State if they are proven to be the proceeds of corruption as referred to in Article 46 paragraph (2) of the

Criminal Procedure Code. The legal basis for the mechanism of forfeiture of assets resulting from corruption crimes through conviction is regulated in Article 38B paragraph (1) and paragraph (2) of Law Number 20 of 2001 concerning the amendment to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, the explanation of which is as follows:

1. Every person charged with committing one of the corruption offences as referred to in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15 and Article 16 of Law Number 20 of 2001 concerning the amendment to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes and Article 5 up to Article 12 of this Law, shall be obliged to prove otherwise against his/her property which has not yet been charged, but is also suspected to have originated from corruption.
2. In the event that the defendant cannot prove that the property as referred to in paragraph (1) was not obtained from corruption, such property shall be deemed to have been obtained from corruption and the judge has the authority to decide that all or part of the property be forfeited to the State. The source of law in the narrow sense is the origin from which the law is found. In a broad sense, the source of law is a means that may be used by the authority or competent party in determining the law that is appropriate to be applied. Esmi Warassih (2005).
3. In legal science, sources of law may be viewed from two aspects, namely formal sources of law and material sources of law. Material sources of law constitute the substance or material of formal sources of law and may be viewed from various aspects, such as economic, sociological, and historical aspects. Meanwhile, formal sources of law include: (1) Statutes, (2) Custom, (3) Jurisprudence, (4) Treaties or International Agreements, (5) Doctrine (opinions of legal scholars).

2. Model of Non-Conviction-Based Asset Forfeiture in Corruption Crimes

The forfeiture of assets resulting from crime actually originates from the principle that crime should not pay, or that a person must not gain benefit from illegal activities that he or she commits. Meanwhile, in practice, the asset forfeiture model currently applied in Indonesia tends to require a relatively long time for case disclosure. Asset forfeiture that takes a long time makes it easier for the perpetrator to prepare to conceal the assets obtained and even continue to gain benefits from the interest of those assets. In this context, the original purpose of asset forfeiture is so that the benefit expected by the perpetrator cannot be achieved. If this is not immediately responded to and handled quickly, it is feared that it will increasingly have a negative impact on the stability of a country's economy, both macro and micro.

Non-conviction-based asset forfeiture needs to be utilized optimally in order to accelerate the recovery of state asset losses more quickly and effectively in accordance with the principle of economic analysis of law. Therefore, perpetrators of crimes with economic motives are expected to consider the advantages and disadvantages obtained in deciding not to commit criminal acts. The easier it is for them to commit crimes (minimal cost but maximum profit), the more likely they are to commit crimes, and vice versa.

The initial concept of the emergence of the principle of economic analysis of law at least began from the writing of Cesare Beccaria entitled On Crimes and Punishments. According to him, the imposition of criminal sanctions should be designed to a certain level in order to eliminate the benefit obtained by the perpetrator.

The principle of economic analysis of law further developed after Garry Becker connected it to the problems of crime, racial discrimination, and others. The correlation or relationship of economic analysis of law (empirical economics) at least provides three important contributions. These contributions include:

1. economics provides a simple model of how individuals behave before the law, which more specifically analyzes how individuals respond to the presence of criminal sanctions. Most of us do the best with what we can do or maximize benefits in carrying out activities;
2. the main priority in economic (empirical) analysis is to distinguish between relationship and cause, because humans in behaving are rational with certain purposes; and
3. economics provides a clear metric in evaluating the success or failure of a criminal law policy.

In general, it can be said that the main principles used to understand economic analysis of criminal law are the principle of rationality and the principle of efficiency. The principle of rationality contains an understanding that humans, in carrying out certain activities, including committing crimes, think rationally with the main objective of maximizing the expected utility. Meanwhile, the principle of efficiency is related to saving, economizing, accuracy, or implementation in accordance with the objective. Efficiency is related to the objectives and the means used to achieve those objectives. If the means used require more cost than the objective to be achieved, then it is considered inefficient. In relation to this, non-conviction-based asset forfeiture in the perspective of economic analysis of law can be seen in two aspects. First, the perspective of rationality related to the perpetrator of crime. Russel B. Korobkin states four types of rationality that correlate with the occurrence of crime, namely:

1. humans are rational beings who will maximize the means to achieve their goals (a man is a rational maximizer of his ends);
2. rational in terms of the amount of benefit to be achieved (the expected utility);
3. rational in realizing benefits based on self-interest and the means used will be adjusted to the objectives of their respective interests (self interest); and
4. rational in maximizing wealth (the wealth maximization).

If the concept of rationality is associated with criminal law, then the assumption is that the perpetrator of crime is an economically rational being who will consider the costs that must be incurred in committing a crime with the benefits that will be obtained. When the benefit is greater than the cost incurred, then the perpetrator will commit the crime. Alwan Hadianto (2025) [7].

Conversely, if the benefit obtained is smaller than the cost that must be incurred, the perpetrator will likely cancel the intention to commit the crime. In other words, individuals behave rationally to maximize their utility. In the context of

NCB Asset Forfeiture, such asset forfeiture is important in reducing the desire of perpetrators to commit crimes (deterrence) because the benefit will become smaller. Perpetrators of crimes with economic motives (for example corruptors) are basically more afraid of becoming poor than of corporal punishment or even the death penalty. If property, wealth, profit, or anything related to assets resulting from criminal acts is taken away, then at that moment, rationally, their "life" is finished, because the assets of crime are the last chain in the crime. Even in relation to money laundering, this asset forfeiture is an important part in the effectiveness of the anti-money laundering regime. Thus, perpetrators are rationally expected to obtain a deterrent effect so as not to repeat it again.

Second, the perspective of efficiency in law enforcement policy. In the context of economic analysis of criminal law, efficiency is related to two things: (i) whether the acts to be prevented by criminal law do not require large costs, so that the benefit to be achieved is greater; (ii) whether the criminal sanctions imposed are greater and/or heavier than the benefits obtained by the perpetrator from committing the criminal act. If the criminal sanction is heavier than the cost that must be incurred by the perpetrator, it can be ascertained that the perpetrator will avoid committing the crime. In this context, cost and benefit analysis is very important in relation to efforts to prevent crime. The problem of crime prevention is closely related to the allocation of available budgets, how many resources must be allocated to overcome crime, and how much benefit is obtained or how much state loss can be recovered. Thus, the application of NCB asset forfeiture is expected to minimize the excessive use of law enforcement resources (high cost), because it does not prioritize a long judicial process, while the state losses that can be recovered are relatively large. This asset forfeiture is part of a form of monetary sanction.

Economic analysis of law in the application of the concept of non-conviction-based asset forfeiture should strongly reflect the principle of efficiency in law enforcement policy, because it is relatively simpler. However, in order to determine that the sanction is efficient and can prevent perpetrators from committing crimes again, it must first be ensured that the assets resulting from criminal acts can be properly traced, and that legal instruments are available to reach them, in this context the importance of the enactment of the Asset Forfeiture Bill which contains the concept of NCB asset forfeiture.

Non-Conviction-Based Asset Forfeiture (NCB Asset Forfeiture), which is also referred to as "Civil Forfeiture", forfeiture in rem, or object forfeiture in several jurisdictions, is an action against the asset itself and not against an individual. This is an action separate from any criminal proceeding and requires proof that the property is tainted. In general, unlawful acts must be applied based on the standard of proof of balance of probabilities. Because the action is not against an individual defendant, but against property, the owner of the property is a third party who has the right to defend the property.

Theodore S. Greenberg states that NCB asset forfeiture, also called civil forfeiture, in rem forfeiture, or object forfeiture, is an action against the asset itself and not against an individual person. According to him, the NCB asset forfeiture process is separate from the criminal justice process and requires a basis that the property is tainted, namely that the property constitutes proceeds or instruments of crime.

The definition according to Greenberg that the property to be forfeited must first be declared as tainted property is in line with the opinion of Mardjono Reksodiputro who states that, because there is an allegation that the property is related to a criminal act, the property must be considered as tainted or dirty property. Against such tainted property, the government through the prosecutor as the state attorney (hereinafter referred to as JPN) must file a civil lawsuit in rem so that it can be declared by the court as state assets. Huswandi (2017) [5]

According to Muhammad Yusuf, NCB asset forfeiture is one of the efforts that can be carried out to return assets to the state or to the party entitled to the ownership of assets that are unreasonable and suspected to originate from a crime, without having to be preceded by criminal prosecution. This means that asset forfeiture can be carried out without having to wait for a criminal judgment containing a declaration of guilt and the imposition of punishment on the perpetrator. NCB asset forfeiture is a method to confiscate assets resulting from crime. In the common law system, two types of asset forfeiture are known, namely:

a. Ordinary common law forfeiture or forfeiture based on a court decision. The act of forfeiture is viewed by the competent authority as a consequence of a criminal conviction. Ordinary common law forfeiture becomes forfeiture in personam, so that forfeiture may be carried out against all real and personal property owned by the convicted person after being decided by a court judgment.
b. Statutory forfeiture or forfeiture based on statute. Statutory forfeiture is forfeiture applied without requiring a court judgment. The concept is that the property is guilty, not the person.

According to Alldridge, the forfeiture of assets resulting from crime actually originates from a very fundamental principle of justice, namely that crime should not pay. This means that a person must not gain benefit from illegal activities that he commits. In Article 1 number 8 of the Draft Law on Asset Forfeiture (hereinafter referred to as the Asset Forfeiture Bill), forfeiture in rem is an action of the state taking over assets through a court decision in a civil case based on stronger evidence that the assets are suspected to originate from a criminal act or are used for a criminal act. Criminal assets that may be forfeited are assets obtained or suspected to originate from criminal acts, namely:

a. Assets obtained directly or indirectly from criminal acts, including those that have been granted or converted into personal property, property of another person, or a corporation, whether in the form of capital, income, or other economic benefits obtained from such property;
b. Assets strongly suspected to have been used or to be used to commit a criminal act; other lawful assets as substitutes for criminal assets; or
c. Assets that constitute found property suspected to originate from a criminal act.

The minimum value of assets that may be forfeited and its changes shall be regulated in statutory regulations. In addition to the categories of criminal asset forfeiture, assets owned by any person that are not proportional to his income or not proportional to the source of the increase in his wealth and cannot prove the lawful origin of the acquisition may also be forfeited.

Asset forfeiture under the provisions on criminal asset forfeiture may be carried out when:

a. The suspect or defendant dies, escapes, suffers permanent illness, or his whereabouts are unknown;
b. The defendant is acquitted of all charges;
c. The assets cannot be tried in a criminal proceeding; or
d. The assets have been related to a criminal case that has obtained a final and binding court decision, and later it is discovered that there are assets from the criminal act that have not yet been declared forfeited.

The authority to conduct tracing in the context of criminal asset forfeiture (in rem) is given to investigators or public prosecutors. In carrying out such tracing, investigators or public prosecutors are given the authority to request documents from any person, corporation, or government institution for the purpose of tracing assets.

The authority to block and seize assets is given to investigators or public prosecutors. Such authority is exercised in the following manner:

a. In the event that strong suspicion is obtained regarding the origin or existence of criminal assets based on the results of tracing, the investigator or public prosecutor may order the blocking to the competent authority.
b. The blocking may be followed by seizure. The competent authority shall carry out the blocking immediately after the blocking order is received.
c. The blocking shall be carried out in writing by clearly stating:

1. the name and position of the investigator or public prosecutor;
2. the form, type, or other description of the assets to be subject to blocking;
3. the reason for the blocking; and
4. the location of the assets.

a. The blocking shall be carried out within a maximum period of 30 (thirty) days from the receipt of the blocking order and may be extended for 30 (thirty) days.
b. A third party who controls the blocked assets may file an objection.
c. The investigator, the public prosecutor who orders the blocking, and the authority that carries out the blocking of assets in good faith cannot be prosecuted either criminally or civilly.
d. During the blocking period, the criminal assets may not be transferred to another party.
e. The seizure carried out by the investigator or public prosecutor shall be conducted in accordance with the provisions of the laws and regulations. Ni Wayan Sinaryati (2015) [8].

Conclusion

The juridical review of asset forfeiture in corruption offences in Indonesia shows that the regulation of asset recovery without conviction is currently provided in Articles 32, 33, 34, and 38C of Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 on the Eradication of Corruption Crimes. In practice, the recovery of state financial and economic losses still relies on the application of additional criminal penalties in the form of compensation payments as regulated in Article 18 of Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, so that asset recovery is highly dependent on criminal conviction through court decisions that have obtained permanent legal force.

The mechanism of non-conviction-based asset forfeiture as a formulation for future asset recovery should be developed by prioritizing the interests of the state and society as victims of corruption crimes. The future regulation is expected to adopt a concept similar to the Swiss model, in which asset confiscation can be carried out prior to criminal conviction, while third parties are given the opportunity to file objections through reverse burden of proof. This concept emphasizes confiscation of assets derived from criminal proceeds and allows civil-based asset forfeiture without prior criminal punishment, in order to optimize the recovery of state assets resulting from corruption offences.

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