

Legal Reconstruction of Non-Conviction-Based Asset Forfeiture for State Loss Recovery from Corruption Crimes

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ABSTRACT

The confiscation of assets without criminal prosecution has become a crucial mechanism in the fight against corruption in Indonesia, particularly in cases where prosecution is hindered by the death or absence of the perpetrators. Despite being permitted under Law Number 31 of 1999 in conjunction with Law Number 20 of 2001, its implementation faces significant challenges, primarily stemming from legal uncertainty and gaps in regulatory frameworks. This study aims to address these issues by examining the existing regulations, identifying deficiencies, and proposing legal reforms to enhance asset recovery mechanisms. Utilizing a normative method approach, this study analyzes national regulations and compares them with international practices, particularly those outlined in the United Nations Convention Against Corruption (UNCAC) 2003. The results highlight that the current laws lack clarity and comprehensiveness, leading to inconsistent application and difficulties in recovering state assets. The study recommends legal reconstruction, including amendments and additions to existing laws, to bridge these gaps. By adopting international best practices, Indonesia can improve its legal framework, ensuring more effective asset recovery and fostering greater public trust in the legal system. This study underscores the need for robust legal reform to strengthen the eradication of corruption and uphold justice.

Keywords : asset confiscation; corruption; legal uncertainty

INTRODUCTION

Corruption is an extraordinary crime that significantly impacts various aspects of life, particularly the economic and social stability of a country. In Indonesia, corruption has undermined the foundations of development and caused substantial state losses, necessitating serious and systematic efforts to address the issue. Despite various efforts, including severe criminal sanctions, the recovery of state losses often encounters obstacles, particularly in the seizure of assets derived from these crimes (Karim, 2022).

The Corruption Eradication Commission (KPK) reported that from 2004 to 2011, state losses due to corruption reached IDR 39.3 trillion. According to Indonesia Corruption Watch (ICW), state losses from corruption in 2010 amounted to IDR 2.1 trillion. In the first half of 2012, state losses reached IDR 1.22 trillion from 285 corruption cases involving 597 perpetrators. Additionally, the Anti-Corruption Study Center at Gadjah Mada University (PUKAT UGM) noted that state losses due to corruption between January and July 2013 had reached IDR 3.3 trillion. Despite these significant losses, efforts to recover state assets have been limited. In 2012, the Attorney General's Office managed to recover IDR 294.4 billion, while the National Police recovered IDR 260.9 billion in 2011 and IDR 258.08 billion in 2012. Meanwhile, the KPK recovered IDR 2.86 trillion from 2009 to 2011 (Ramdani, Putri, Affandi, Novitaningtyas, & Rohmat, 2023).

Article 51 of the 2003 United Nations Convention Against Corruption (UNCAC) reflects the international community's strong resolve to pursue state assets transferred illegally to corrupt individuals or other parties. This article emphasizes the importance of asset forfeiture without waiting for a criminal conviction, demonstrating a global commitment to combating corruption and recovering state losses (Vu Cao & Cao, 2024). This provision encourages participating countries to cooperate effectively in ensuring that unlawfully obtained assets through corruption are returned to their origin country without depending solely on conventional criminal processes, which are often time-consuming and fraught with challenges (Helfer, Rose, & Brewster, 2023).

Although non-conviction-based (NCB) asset forfeiture originated from the common law system, it can also be applied in countries with civil law systems (Suprayitno, Kurniawan, & Borsa, 2023). Article 54(1)(c) of the 2003 UNCAC urges all participating countries, whether common law or civil law, to consider applying asset forfeiture for corruption proceeds even without a prior criminal conviction. The provision stresses that countries must take necessary steps to enable asset forfeiture if criminal prosecution is not feasible (Kaligis, 2005). For example, in cases where perpetrators die, flee, or cannot be found, asset forfeiture can still be carried out. This is crucial because, in many cases, corrupt individuals employ various means to evade prosecution, such as fleeing to other countries or hiding their assets in foreign jurisdictions. The UNCAC encourages civil law countries to adjust their legal frameworks to adopt non-conviction-based asset forfeiture mechanisms.

Law No. 31 of 1999, as amended by Law No. 20 of 2001 on the Eradication of Corruption, specifically Articles 38(5), 38(6), and 38B(2), includes provisions for non-conviction-based asset forfeiture (Hufon & Fikri, 2024). However, these regulations still do not address specific issues, such as when the suspect cannot be found, flees, becomes mentally ill, or no heirs can be found for civil lawsuits despite proven state losses. Additionally, this law does not cover situations where the related assets are not in a criminal seizure status.

The lack of regulations governing specific scenarios, such as when suspects are missing, fleeing, or no heirs can be held liable, results in the low recovery of state funds compared to the losses incurred. This imbalance highlights weaknesses in the current legal mechanism, particularly regarding the recovery of assets from corruption. Therefore, it is important to examine the concept of non-conviction-based asset forfeiture within Indonesia's anti-corruption laws (Margaryan, 2019; Rukmono, Suwadi, & Islam, 2024).

This research must start by analyzing how the current anti-corruption laws implement non-conviction-based asset forfeiture, including assessing how existing legal provisions address asset recovery when criminal prosecution cannot proceed because suspects are missing or fleeing. Additionally, the study should evaluate whether the current legal gaps in non-conviction-based forfeiture could hinder efforts to recover state losses. It will propose solutions on how to ideally regulate non-conviction-based asset forfeiture in Indonesia as part of corruption eradication efforts. Implementing such a mechanism would allow the state to achieve justice through the lawful recovery of seized assets, even without a complete criminal process. Conversely, the mechanism must be designed fairly to ensure that perpetrators of corruption offenses receive balanced legal protection (Omondi, 2021; Saffa Abdulai, 2024).

A study by Margaryan (2019) explored the application of non-conviction-based (NCB) asset forfeiture in combating illicitly acquired wealth, focusing on its legal and

procedural challenges. While Margaryan highlighted the effectiveness of NCB asset forfeiture as a tool for recovering state assets, particularly in cases where criminal prosecution is infeasible, the study primarily centered on common law jurisdictions and lacked a detailed analysis of its application in civil law systems like Indonesia. This research builds on Margaryan's findings by addressing the specific gaps and limitations in Indonesia's legal framework, which is vital for ensuring effective asset recovery.

Corruption in Indonesia continues to cause significant financial losses to the state, yet the recovery of these assets remains suboptimal due to gaps and uncertainties in the legal framework. The lack of effective mechanisms for asset confiscation in cases where perpetrators are deceased, absconding, or mentally incapacitated highlights an urgent need for legal reform. Without addressing these issues, state asset recovery efforts will remain ineffective, hindering the broader fight against corruption and eroding public trust in the legal system.

Although existing regulations, such as Law No. 31 of 1999 and UNCAC 2003, provide a foundation for asset forfeiture, they fail to address critical scenarios, such as the absence of heirs, assets not in criminal seizure status, or cases where criminal prosecution is impossible. Furthermore, limited research has been conducted on the application of NCB asset forfeiture within Indonesia's civil law framework, particularly in adapting international best practices to local legal systems. This study fills this gap by proposing comprehensive legal reforms tailored to Indonesia's legal and socio-political context.

The novelty of this research lies in its integrative approach, combining an analysis of existing regulations with international practices such as those in the UNCAC 2003. It proposes legal reconstruction specifically designed to address Indonesia's unique challenges, including the inclusion of "ownerless assets" provisions and the application of "in rem" lawsuits. This study goes beyond theoretical recommendations by offering practical steps for integrating NCB asset forfeiture into Indonesia's legal system.

The primary objective of this research is to analyze the gaps and uncertainties in Indonesia's asset confiscation laws and propose a legal reconstruction that aligns with international standards while addressing local challenges. The study also aims to highlight the importance of NCB asset forfeiture as a critical tool for recovering state assets and ensuring justice in corruption cases.

This research benefits policymakers by providing actionable insights into reforming asset forfeiture laws, enabling more effective recovery of state losses due to corruption. It also offers guidance for legal practitioners on implementing NCB asset forfeiture mechanisms within Indonesia's civil law system, fostering more robust anti-corruption strategies.

The findings of this research have significant implications for Indonesia's legal and governance systems. By addressing legal gaps and uncertainties, the proposed reforms can enhance the effectiveness of state asset recovery mechanisms, ensuring that corruption-related assets are returned to the state even in challenging cases. Additionally, adopting international best practices will not only strengthen Indonesia's anti-corruption framework but also enhance its global reputation as a country committed to upholding transparency, accountability, and the rule of law. Ultimately, these reforms are expected to restore public confidence in the legal system and contribute to the broader fight against corruption.

RESEARCH METHOD

This research employs an empirical normative method with statutory and conceptual approaches. The statutory approach involves examining relevant regulations, such as Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on the Eradication of Corruption and the 2003 United Nations Convention Against Corruption (UNCAC), to understand the legal basis for non-conviction-based asset forfeiture. Meanwhile, the conceptual approach aims to analyze the legal concepts and theories underpinning asset forfeiture, both in the context of common law and civil law, as well as their relevance to the Indonesian legal system. In this study, secondary data obtained through a literature review will be supported by empirical data collected from legal practices and applications in Indonesia to provide an overview of the effectiveness of existing regulations and the legal gaps that require reconstruction.

RESULT AND DISCUSSION

Regulation of Asset Confiscation without Criminal Penalty in the Corruption Eradication Law in Indonesia

The confiscation of assets without criminal conviction has been regulated under Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption. In these rules, seizure of assets can occur without a criminal conviction if a civil lawsuit initiated by the State Attorney or the affected institution is initially authorized by the court (Yustika, Mas, & Zubaidah, 2021). This civil lawsuit is submitted under certain circumstances, such as insufficient evidence to continue criminal proceedings, but state financial losses have already been proven. Furthermore, if a suspect dies during the investigation and state losses have been proven, the assets related to the act of corruption may still be confiscated (Kurniawan, Soehartono, Setyawan, & Santos, 2024).

This regulation also covers provisions regarding suspects or defendants who die during court proceedings. In such cases, the State Attorney or the injured institution may file a civil lawsuit against the heirs of the suspect or defendant to recover state losses. This lawsuit is based on the fact that although the criminal proceedings cannot continue due to the perpetrator's death, state losses must still be recovered through civil mechanisms. Therefore, asset confiscation without criminal conviction can be carried out even if the perpetrator cannot be prosecuted in a criminal court (Setiawan, Fakhri, Fardiansyah, & Tisnanta, 2024).

Additionally, if after a court decision has become legally binding, it is discovered that there are still assets belonging to the convict suspected to have originated from acts of corruption but has not yet been confiscated for the state, the state retains the right to file a civil lawsuit. A legal action might be initiated against the offender or their descendants to guarantee that any assets connected to instances of corruption can be confiscated to compensate for the financial losses incurred by the state. This provision ensures that the asset confiscation process can continue even after criminal proceedings have concluded, as long as there is strong evidence that the assets originate from acts of corruption (Santosa, 2015).

In situations where the investigation of a corruption crime must be stopped, either due to insufficient evidence or because the suspect has died, the investigation file will be immediately submitted to the State Attorney. The prosecutor can then file a civil lawsuit to recover state losses. If this process occurs during the trial, the public prosecutor will submit the trial minutes to the State Attorney or the injured agency, to register a lawsuit

against the suspect's beneficiaries. It shows that the mechanism for confiscation of assets without criminal prosecution serves to ensure that state losses can be recovered even though the criminal process cannot be continued.

A lawsuit for confiscation of assets is filed when a court decision has obtained permanent legal force, and it is only discovered that other assets have not been confiscated, based on the provisions of Article 38B paragraph (2) of the Corruption Eradication Law, only applies to assets belonging to the convict that is revealed during the court examination. In this particular scenario, a civil lawsuit filed by the state can exclusively target assets that have not been previously encumbered, and the defendant is unable to demonstrate that the assets are unrelated to a corrupt activity. If the judge abstains from exercising their authority to expropriate the assets in favor of the state, the confiscation process will be restricted to assets brought to light solely during the trial proceedings.

In addition to the provisions in the Corruption Crime Law and Supreme Court Regulation Number 1 of 2013, the statute holds the handling of assets in the context of money laundering or other crimes. The regulation in Article 1 applies to requests for handling assets submitted by investigators in cases where the perpetrator of the crime cannot be found. In other words, this provision controls assets related to a crime if the perpetrator is absent or cannot be found by the provisions of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering.

Circular of the Supreme Court of the Republic of Indonesia Number 3 of 2013 concerning Guidelines for Handling Cases, as well as Regulation of the Attorney General Number: Per-027/A/JA/10/2014 regarding the Guidelines for Asset Recovery, were issued as a follow-up to Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2013. These two regulations regulate the handling of assets related to money laundering and other crimes, with a focus on situations where the perpetrators of the crime cannot be found or cannot be tried criminally.

Under these provisions, these regulations apply to several conditions. These include perpetrators of the crime who have fled, are permanently ill, whose whereabouts are unknown, have died, or cases where the defendant has been acquitted of all legal charges. Additionally, these regulations also apply to cases where assets related to the crime cannot be tried for various reasons. In such cases, if a court decision with permanent legal force finds that there are still assets that have not been confiscated, the state can sequester the assets through a civil process.

These regulations offer clear guidance on how to handle assets linked to money laundering and other crimes in cases where the perpetrators cannot be prosecuted through criminal proceedings. It allows for the recovery of assets even if the perpetrators cannot be located or sued criminally. Civil mechanisms are used to ensure that assets obtained from criminal activities can still be seized for the benefit of the state.

Legal Uncertainty in the Implementation of Asset Confiscation Without Criminal Charges Affects Efforts to Recover State Losses Due to Corruption

Until now, Indonesia has not had a specific law that comprehensively regulates asset forfeiture, and the relevant provisions only exist in Article 38 paragraph (5), Article 38 paragraph (6), and Article 38B paragraph (2) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. However, these regulations still do not address several important issues, such as handling cases where the suspect cannot be found, has fled, or suffers from mental illness, as well as situations where there are no heirs to be sued in a civil lawsuit, even though state losses are evident. These legal issues cannot be

resolved through criminal proceedings because criminal processes are in personam, which means attached to the perpetrator. The legal void needs to be addressed by adding regulations to the existing law, such as designating the assets of a deceased suspect or convict without heirs as "ownerless assets," which can then be petitioned to the court by the prosecutor or the injured institution to be designated as state assets.

Addressing legal issues related to civil asset forfeiture, such as when the suspect cannot be found, has fled, suffers from mental illness, or when there are no heirs to be sued despite clear state losses, and when the assets are not in the status of criminal seizure, does not contradict the spirit of the Corruption Eradication Law. This law is not only aimed at punishing the perpetrator but also at protecting state assets, which can be done through criminal, administrative, or civil processes. Based on the principle of Non-Conviction Based (NCB), an "in rem" lawsuit can be filed without waiting for the outcome of criminal proceedings, especially if suspicious or ownerless assets are found. The judge's decision in an "in rem" lawsuit focuses on whether or not the assets belong to someone, rather than the perpetrator's criminal guilt, thus allowing for more effective recovery of state assets.

In the current Indonesian legal system, asset forfeiture is part of an additional punishment regulated in Article 10 of the Criminal Code (KUHP), which includes the confiscation of goods obtained through criminal acts. This process applies to all criminal acts and aims to ensure that the convict cannot enjoy the proceeds of their crime. Asset forfeiture can only occur after the main case has been investigated and the defendant has been proven guilty. At that point, the proceeds of the crime can be confiscated and used for the benefit of the state through destruction, donation, or auction. Accommodating the legal gap in asset forfeiture for corruption offenses does not contradict Article 54 letter c of the UNCAC 2003, which allows for asset forfeiture without a criminal conviction in cases where the perpetrator cannot be sued if he is death, flight, or absence. Therefore, the addition of specific articles requiring civil lawsuits related to asset forfeiture to be conducted separately from criminal proceedings reflects the adoption of UNCAC values and ensures that civil lawsuits are not dependent on criminal judicial processes.

Non-Conviction Based (NCB) Forfeiture is often faced with challenges related to the presumption of innocence and the right to property, which is constitutionally protected. The presumption of innocence, as stipulated in Article 11 paragraph (1) of the Universal Declaration of Human Rights (UDHR) and the General Explanation of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), states that everyone is considered innocent until proven guilty in a court of law. However, in asset forfeiture without a criminal conviction, the focus is not on the perpetrator's guilt but on the legitimacy of asset ownership. This process is more similar to a civil case where assets suspected of being the proceeds of a criminal act are disputed due to suspected illegal or tainted ownership, and the asset owner is allowed to prove legitimate ownership. Therefore, asset forfeiture without a criminal conviction does not violate the presumption of innocence because it does not rely on the perpetrator's criminal guilt but on whether or not the assets are lawfully owned.

Asset forfeiture without a criminal conviction, in the context of property rights, does not violate citizens' constitutional rights when examined through the provisions of Article 29 Paragraph (2) of the Universal Declaration of Human Rights. The article expresses that the rights and freedoms of each person may be restricted by law to protect the rights and freedoms of others, as well as for the general interest of a democratic society. Since corruption involves the illegal appropriation of wealth that harms the state

and society, the forfeiture of assets obtained through corruption, essentially unlawfully acquired wealth, does not violate property rights. In this case, asset forfeiture aims to return illegally obtained investments to the state and society.

Article 28G paragraph (1) of the 1945 Constitution protects the right to property that is lawfully acquired according to the law and does not protect the unlawful possession of assets. Therefore, asset forfeiture without a criminal conviction, which aims to protect the right to lawfully acquired property, is not considered a violation of property rights. The European Commission on Human Rights stated in 1986, that non-conviction-based (NCB) asset forfeiture is consistent with human liberties, as long as the process is conducted through a fair and objective court. In other words, as long as asset forfeiture can be justified and tested in a fair court, it does not violate the constitutional right to property.

Legal Reconstruction Needed to Address Legal Voids and Uncertainties Related to Asset Confiscation Without Criminal Prosecution in Eradicating Corruption in Indonesia

Legal uncertainty in the context of asset confiscation without conviction in Indonesia arises from several gaps and ambiguities in existing regulations. Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 regulates corruption crimes and related asset confiscation but has not comprehensively addressed the various situations that may occur. In cases where a suspect or defendant cannot be found, has fled, or cannot appear in court due to reasons such as permanent illness or death, current regulations are not effective in managing the process of expropriating assets. It leads to uncertainty about how assets can be confiscated or returned to the state.

The legal uncertainty significantly impacts law enforcement and the recovery of state assets. The lack of clarity in procedures and provisions regarding asset confiscation without conviction makes it difficult for law enforcement officials to implement measures effectively. For example, in cases where the suspect has died and no heirs can be found, the courts are often confused about how to proceed with the process of confiscating the remaining assets. It can slow down the process of recovering state assets, reduce the effectiveness of anti-corruption efforts, and allow assets that should be returned to the state to be mismanaged.

Real-life examples that illustrate the legal uncertainty in the practice of asset confiscation can be found in various corruption cases in Indonesia. For example, in corruption cases involving high-ranking officials who die before the trial process is completed, assets suspected of being related to the crime often cannot be immediately confiscated or returned to the state due to the lack of regulations governing the process. These cases show how legal uncertainty can hinder the process of asset recovery, and reveal the urgent need to improve and clarify existing statutes to be more responsive to the various legal situations that may arise in the practice of asset confiscation.

In the legal system of asset confiscation without a criminal conviction in Indonesia, several aspects require changes or additions to regulations to address legal gaps and uncertainties. One of the main aspects that needs to be improved is the handling of cases where the suspect or defendant cannot be brought to court due to death, absconding, or other circumstances. Currently, existing regulations do not provide clear guidance on how the asset confiscation process should be carried out in these situations. In addition, there is a need to regulate the civil lawsuit procedure related to independent asset confiscation of the criminal process, so that the recovery of state assets can be carried out efficiently even though the criminal process cannot be continued.

Legal recommendations to address this gap and uncertainty include several important steps. First, there needs to be additional articles in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 that specifically regulate asset confiscation without criminal prosecution in cases where the perpetrator cannot be tried. In certain cases, there are provisions addressing the expropriation of "ownerless" assets through civil lawsuits managed by prosecutors or relevant agencies. Additionally, there are provisions that delineate the procedure for confiscating assets discovered subsequent to a court decision. Second, it is important to establish clear procedures regarding how assets that have not been identified at the time of the criminal process are carried out and should be handled and processed civilly.

In considering legal reconstruction, the adoption of international practices and global standards such as those set out in the UNCAC 2003 can provide useful guidance. Article 54 letter c of UNCAC 2003, which allows for the confiscation of assets without criminal prosecution in cases where the perpetrator cannot be prosecuted, could be the basis for formulating a policy that is more adaptive to the situation in Indonesia. Adopting these international principles could help ensure that the Indonesian legal system is not only effective in eradicating corruption but also by recognized global standards in eradicating criminal acts of corruption. Thus, a legal reconstruction that integrates international practices will strengthen the legal framework for asset confiscation and support state asset recovery efforts more effectively.

CONCLUSION

The issue of asset confiscation without criminal prosecution in Indonesia highlights significant challenges within the current legal system when addressing corruption. Legal uncertainties arise, particularly when perpetrators cannot be prosecuted due to reasons such as death, escape, or mental incapacity, impacting the effectiveness of state asset recovery. Insufficient regulations often hinder the asset confiscation process, leading to the state's inability to recover financial losses caused by corruption. Real-life cases demonstrate how this legal gap impedes asset recovery and diminishes public confidence in the law enforcement system.

To address this legal vacuum and uncertainty, a legal reconstruction is necessary, involving changes and additions to the regulations in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. It is crucial to incorporate specific provisions regarding asset confiscation in situations where the perpetrator cannot be prosecuted, as well as civil lawsuit procedures related to assets independent of criminal proceedings. Furthermore, aligning with international best practices, such as those outlined in the UNCAC 2003, will bolster the Indonesian legal system and ensure compliance with global standards. Through comprehensive legal reform, it is anticipated that the recovery of state assets can be conducted more effectively and fairly, ultimately fostering increased public trust in the legal system.

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