

The Possibility of Implementing In-Rem Asset Forfeiture as an Asset Recovery Effort in Indonesia

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Abstract

Improving the method of asset confiscation to recover state losses is an urgent issue that needs to be addressed. The current approach, which relies on in-person procedures, presents numerous ongoing obstacles. Therefore, a breakthrough in asset confiscation is required, namely implementing in rem asset forfeiture. This paper explores the feasibility of adopting in-rem asset forfeiture in Indonesia while addressing the associated challenges. It is both descriptive and prescriptive, providing an analysis of how to establish a comprehensive regulatory framework to optimize asset confiscation. The research employs a normative juridical research method, focusing on the concept and legal policies on asset confiscation. The findings suggest the need to revamp the legal system governing asset confiscation in Indonesia by officially incorporating in rem asset forfeitures into positive law and achieving vertical and horizontal legal harmonization.

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Introduction

The lifeblood of crime is an expression used to describe how assets derived from criminal activities function as sustenance, enabling criminal acts to persist and thrive, particularly in cases involving economic motives.¹ Confiscating ill-gotten wealth serves as an effective means to dismantle criminal operations and proactively address economic-motivated offenses.²

This study focuses on criminal acts driven by economic motives, which present complex challenges for law enforcement. The complexity arises due to the evolution of motives from traditional forms such as theft, fraud, and embezzlement to increasingly sophisticated methods. These crimes have resulted in significant financial losses for the state. Throughout 2022, there has been a noticeable surge in economic-motivated crimes. The graph below (Figure 1) provides

¹Khairul, Mahmul Siregar, dan Marlina, "Kewenangan PPATK Dalam Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang", *Mercatoria*, Vol. 4, No. 1 (2011), hlm. 34.

²Umumnya, tindak pidana ekonomi dapat dimaknai sebagai jenis delik dalam bidang ekonomi. Dimana delik ini dikerjakan melalui sekumpulan orang-orang yang memiliki kecerdikan dan kedudukan yang esensial di suatu masyarakat atau bahkan di pekerjaannya.

evidence of this trend, demonstrating a consistent increase in the flow of suspicious funds each year.

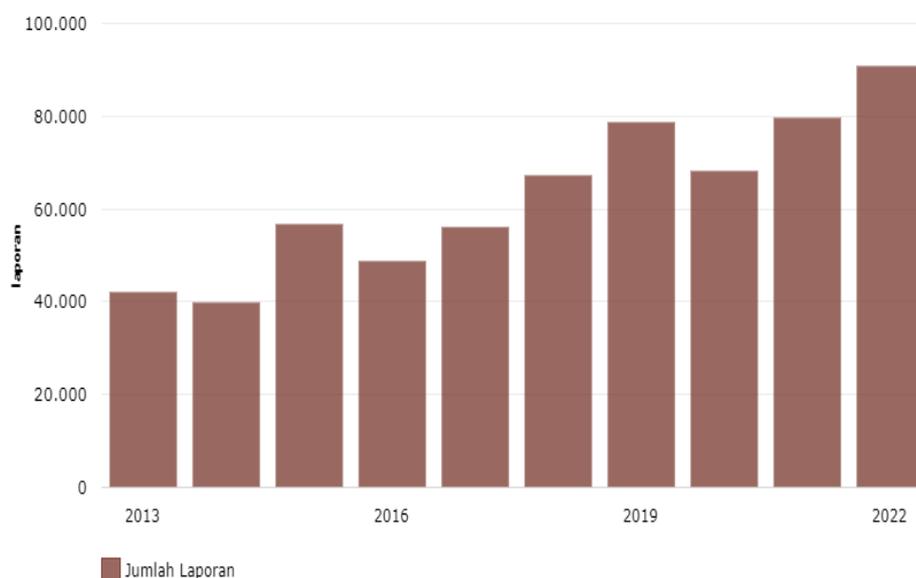


Figure 1. Development of Suspicious Transactions from 2013 to 2022

Source: Seconder Data, 2023³

To date, efforts to combat economic-motivated crimes have primarily relied on criminal forfeiture. However, this approach has proven ineffective in deterring perpetrators and suppressing such offenses. Asset confiscation can only occur when a court has rendered a definitive verdict (*inkracht van gewijsde*), confirming the commission of a crime.^{4,5}

The utilization of the criminal asset forfeiture model becomes challenging when the culprits behind the crime cannot be located, have deceased, or possess diplomatic immunity. Consequently, the recovery of state financial losses becomes protracted. To address this issue, a groundbreaking approach is required within law enforcement to enable asset confiscation even in cases where the perpetrator has passed away, absconded, or has similar circumstances. This innovative approach is called Non-Conviction Based (NCB) Forfeiture or in rem asset forfeiture, which allows for asset confiscation without a criminal conviction.

Until now, Indonesian legislation has not imposed strict provisions regarding in-rem asset confiscation.⁶ Asset confiscation is mandatory and follows the procedures outlined in civil and criminal justice systems. However, Article 10 of the Criminal Code designates asset confiscation as an additional penalty, meaning it can only be imposed when an introductory sentence is given. Consequently, asset confiscation remains an optional measure lacking binding authority. This has resulted in the inability to recover certain state assets. For instance,

³ Pusat Analisis Transaksi Keuangan RI, "Transaksi Mencurigakan Meningkat Pada Tahun 2022" diakses pada <https://www.ppatk.go.id/link/read/1249/buletin-statistik-apu-ppt.html>.

⁴ Direktorat Hukum, *Kajian Hukum Permasalahan Hukum Seputar Perampasan Aset dalam Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Upaya Pengoptimalisasiannya*, Jakarta: Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK), 2021, hlm.1.

⁵ *ibid.*

⁶ Irwan Hafid, "Perampasan Aset Tanpa Pemidanaan dalam Perspektif *Economic Analysis of Law*", *Lwx Renaissance*, No. 1, Vol. 6 (2021), hlm. 465.

the Indonesian Corruption Watch (ICW) reported that corruption has led to state financial losses of 62.7 trillion, with only 2% recoverable through the trial process.⁷

The Financial Transaction Reports and Analysis Center (FTRAC) plays a crucial role in enforcing asset confiscation, primarily due to its focus on combating money laundering.⁸ Money laundering involves concealing the proceeds from economic crimes (predicate crimes) to make them undetectable during investigations. It is imperative to address the issue of money laundering promptly to reduce crime rates and prevent illicit funds from being used to finance further criminal activities. By prioritizing prevention measures, we can ensure the stability of the national economy and enhance state security.⁹

Since 2006, the government has demonstrated its commitment to tackling this issue, as evidenced by the formulation of the Asset Confiscation Bill.¹⁰ After approximately 17 years, this bill is set to be revisited in 2023. Mahfud MD, the Minister for Coordinating Politics, Law, and Security, spearheaded the initiative to prioritize the Asset Confiscation Bill in the National Legislation Program. He requested that Commission III of the House of Representatives of the Republic of Indonesia prioritize it.¹¹

However, to date, the Asset Confiscation Bill has not been enacted. Considering the empirical evidence available, there is an urgent need to address the legal framework for asset confiscation to recover state financial losses. Existing research has primarily concentrated on identifying an ideal model of asset confiscation for criminal offenders to enhance the effectiveness of justice. In contrast, this study delves into more intricate matters by establishing connections to asset recovery endeavors. As such, the primary focus of this research is to explore novel legal remedies, mainly through an in-rem approach, aimed at safeguarding state assets.

Identification of problems

This paper addresses the asset confiscation strategy as a means of asset recovery and the challenges associated with its implementation in Indonesia. Furthermore, it aims to explore the significance of legal policy reformulation in Indonesia, with a specific focus on asset confiscation. The study also endeavors to investigate the development of comprehensive regulations that can ensure the effective execution of asset confiscation to recover state assets.

Methods

This research employed a normative juridical method, also known as dogmatic research, which involved studying relevant laws and literature concerning the politics of asset confiscation. Data sources for this study consisted of legal texts and scholarly works. The legal policy of asset confiscation was examined from a conceptual standpoint.¹²

⁷ Indonesian Corruption Watch, "Perbandingan Kerugian Keuangan Negara Hasil Korupsi dan Pidana Pengganti", Diakses pada <https://antikorupsi.org/id/article/tren-vonis-kasus-korupsi-2021>

⁸Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Konpress, 2006, hlm. 247

⁹*Ibid.*

¹⁰Aryo Mahendro, "Jalan Panjang RUU Perampasan Aset: Diteken Mahfud, Janji Dikebut DPR", selengkapnya <https://www.detik.com/bali/berita/d-6674503/jalan-panjang-ruu-perampasan-aset-diteken-mahfud-janji-dikebut-dpr>, 15 April 2023, diakses 19 April 2023.

¹¹ Nawir Arsyad Akbar, "Mahfud Minta Komisi III DPR Prioritaskan RUU Perampasan Aset", selengkapnya <https://news.republika.co.id/berita/rsa991330/mahfud-minta-komisi-iii-dpr-prioritaskan-ruu-perampasan-aset>, Rabu 29 Maret 2023, diakses 19 April 2023.

¹² P.M Marzuki, (2017), *Penelitian Hukum*, Kencana, Jakarta. hlm 47.

Results and Discussion

Strategy and Review of Criminal Law Policy: The Existence of Asset Confiscation as an Asset Recovery Effort

Review of the Asset Confiscation Policy

Asset confiscation in Indonesia is considered an additional penalty imposed for certain offenses. Crimes driven by economic motives, such as Corruption, Money Laundering, Embezzlement, and Smuggling, frequently entail additional sanctions in asset confiscation. A key strategy to combat these crimes is to dismantle illicit assets by tracing the money trail or identifying the assets involved.¹³ Since crimes with economic motives are already defined and regulated by the law, asset confiscation typically requires a legal verdict and underlying criminal sanctions to be imposed.

Within the realm of court rulings exist two categories of criminal sanctions: primary and supplementary. Supplementary punishments encompass the deprivation of specific rights, asset confiscation, and the public announcement of court decisions. Confiscation and subsequent auctioning of assets can be implemented to generate monetary compensation for the state. As an inherent outcome of confiscation being classified as a supplementary punishment, properties can be seized and treated as state assets based on a court decision.^{14,15,16}

Asset confiscation is initiated when the perpetrator is established as guilty beyond a reasonable doubt. This policy is called Conviction-Based Asset Forfeiture, which is commonly implemented in corruption and money laundering cases. Figure 2 illustrates the process and progression of in-personal asset confiscation.



Figure 2. The Flow of Asset Confiscation of a Criminal Act Through the Criminal Prosecution Channel

Source: Secondary Data, 2023 (processed)¹⁷

¹³ Kebijakan hukum pidana mengenal tiga pendekatan, yaitu *follow the suspect* yakni mencari pelaku kejahatan, *follow the asset* yakni mencari hasil kejahatan, dan *follow the suspect and asset* yakni gabungan dua pendekatan sebelumnya. Heri Joko Saputro, "Urgensi Pemulihan Kerugian Keuangan Negara Melalui Tindakan Pemblokiran Dan Perampasan Aset Sebagai Strategi Penegakan Hukum Korupsi", *Journal of Islamic Law*, Vol. 5, No. 2 (2021). hlm. 278.

¹⁴ Lihat Pasal 10 Undang-Undang Nomor 27 Tahun 1999 Tentang Perubahan Kedua Atas Kitab Undang-Undang Hukum Pidana. Secara *mutatis mutandis* ketentuan ini masih berlaku sebab KUHP baru masih memerlukan waktu 3 tahun kedepan untuk diberlakukan sebagai instrumen hukum pidana.

¹⁵ *Loc.Cit.*

¹⁶ Rosalinda Jati, "Penerapan Perampasan Aset Sebagai Pidana Tambahan Dalam Pemberantasan Tindak Pidana Korupsi Di Indonesia", *Humani (Hukum dan Masyarakat Madani)*, Vol. 11, No. 1.(2021). hlm. 138.

¹⁷ *Loc.Cit*

Confiscation of assets through criminal prosecution is subject to specific weaknesses, such as slow procedures and the voluntary nature of the sanctions, as acknowledged by Adami Chazawi. Despite the existing legal norms primarily regulating asset confiscation through criminal prosecution, in practice, asset confiscation can occur through alternative means. For instance, asset confiscation can also be pursued via civil proceedings in corruption cases. In this scenario, the prosecutor assumes the role of the State Attorney, initiating civil lawsuits against assets suspected of being derived from criminal activities. These lawsuits are directed toward the suspect, convict, and/or the heirs of the suspect/convict. To illustrate the process more comprehensively, the flow of asset confiscation in a civil lawsuit can be visualized as follows.



Figure 3. Civil Lawsuits Process for Confiscation of Assets Derived from Corruption

Source: Secondary Data, 2023 (processed)¹⁸

Although the civil model currently lacks a specific legal framework, law enforcement agencies express concerns regarding the limitations of confiscating criminal assets. To address this, the Supreme Court has issued Supreme Court Regulation No. 1 of 2013, which outlines the procedures for handling assets derived from criminal acts. The objective is to enable assets originating from non-corruption-related criminal activities to be subjected to civil lawsuits initiated by the State Attorney. Consequently, as mentioned earlier, the asset forfeiture process will apply to all asset confiscation procedures within civil proceedings.

Ironically, these legal approaches to asset confiscation rely on the same foundation, in-personam forfeiture. This concept restricts asset confiscation to cases where the identity of the perpetrators is established. However, in situations where the culprits remain unknown, civil lawsuits can be filed against the assets, potentially involving their heirs. Nevertheless, organized crimes present significant challenges regarding the burden of proof.¹⁹ The proceeds

¹⁸ *Loc. Cit.*

¹⁹ “Organized crime group shall mean a structured group of three or more existing for a period of time and acting in concert with the aim of committing one or more persons, in order to obtain, directly or indirectly, a financial or other material benefit. Lihat Konvensi Perserikatan Bangsa-Bangsa Melawan Kejahatan Lintas Negara Terorganisir. (2000), PBB, Bandung. hlm 1.

from such crimes are frequently transferred to foreign jurisdictions, making it difficult to trace the illicit assets back to their predicate crimes. Consequently, this complicates the task of apprehending the perpetrators involved.²⁰

Apart from challenges on the investigative front, the current criminal policy faces obstacles stemming from inter-country legal systems, inadequate infrastructure, divergent perspectives on criminality (dual criminality), and difficulties related to a lack of centralized authority, which impedes investigations.²¹ These problems become even more intricate in cases where the perpetrators are absent, mentally incapacitated, deceased, or have no heirs, resulting in assets that are deemed "no owner."²² In such scenarios, the existing asset confiscation policy no longer applies.

The implementation of asset confiscation serves not only as a means to punish wrongdoers but also as an endeavor to achieve communal justice. The state's primary objective is to uphold justice for all Indonesian citizens. Confiscated assets become valuable resources for the state, bolstering state finances by contributing to the national treasury. It is imperative to reform the criminal law policy surrounding asset confiscation to initiate a paradigm shift, enabling it to function optimally.

a. Asset Confiscation Strategy as an Asset Recovery Effort

The widely known phrase *Pecunia Non-Olet* (money doesn't have a smell)²³ reflects the legal impasse in Indonesia concerning the seizure of criminal proceeds. Consequently, the state's losses have a detrimental impact on the welfare of the people.²⁴ Asset recovery becomes imperative as a preventive measure to mitigate economic motive crimes. The existing legal remedies, particularly in-personam asset confiscation, exhibit weaknesses and require reformulation. Recognizing this, the international community is currently developing a system of confiscation that does not rely on identifying specific perpetrators, known as in-rem asset forfeiture.²⁵ The in-rem mechanism treats the physical property as the subject of the legal proceedings, detached from the criminal mechanism, known as Non-Conviction Based (NCB). The following table outlines the critical differences between in-personam and in-rem asset confiscation.

²⁰ Badan Pembinaan Hukum Nasional, "Laporan Hasil Penyelarasan Naskah Akademik RUU Perampasan Aset", Kemenkumham RI, (2017), Jakarta. hlm 9.

²¹ Mujahid A Latief, *Pengembalian Aset Korupsi via Instrumen Perdata*, diakses pada [Http://www.komisihukum.go.id](http://www.komisihukum.go.id).

²² Eva Achjani Zulfa, (2010), *Gugurnya Hak Menuntut*, Ghalia Indonesia, Bogor, hlm. 23.

²³ *Ibid.* hlm. 23.

²⁴ Lihat Pasal 33 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

²⁵ World Bank, *Non-Conviction Based Asset Forfeiture as a Tool for Asset Recovery*, di akses pada <http://www1.worldbank.org/finance/star> site

Table 1. In-Personam and In-Rem Mechanisms Differences in Asset Confiscation

| No. | Indicator | <i>In-Personam</i> (Conviction-Based Asset Forfeiture) | <i>In-Rem</i> (Non- Conviction Based Asset Forfeiture) |
|-----|-----------------|--|--|
| 1 | Defendant | The perpetrator of the crime must first be convicted of the crime | Assets originating from crime do not require a court decision against the crime that caused it. |
| 2 | proceedings | Can be done in criminal or civil trials. The civil lawsuit is granted to the suspect/defendant and the heirs of assets, while the criminal proceeding is a component of the additional punishment. | Using special civil procedural law by fulfilling lawsuits against assets that are proceeds of crime and/or detrimental to state finances. |
| 3 | Proof | The prosecutor and State Attorney are required to show that the actual assets belonging to the perpetrator are manifestations of criminal offenses during the trial process. | During their investigations, the Public Prosecutor and State Attorney found evidence of a suspicious flow of assets. Thus, they apply reverse proof (the assets' owner must prove that the assets are not the proceeds of a crime) at the trial. |
| 4 | Sanctions Focus | Aggravating sanctions in additional criminal and state financial returns | Focusing on recovering state financial losses |
| 5 | Asset terms | Not all assets can be confiscated, referring to the additional criminal provisions of the Criminal Code and related laws. | All assets can be confiscated as long as they are the result of a criminal act. |

Source: Secondary Data, 2023 (processed)²⁶

Table 1 highlights the advantages of utilizing the in-rem method for asset confiscation, particularly its expeditious procedure. In-rem proves to be an ideal approach for achieving Stolen Asset Recovery (StAR). Additionally, implementing the in-rem method is a preventive measure, ensuring that convicted individuals cannot reuse confiscated assets.²⁷ This method is particularly suitable for handling cases in which it is challenging to convict the perpetrator, such as when:²⁸

- 1) The perpetrator is a fugitive;
- 2) The perpetrator is deceased;
- 3) The perpetrator holds legal immunity;
- 4) The perpetrator has a position of power;
- 5) The perpetrator's identity is unknown, but the proceeds of the crime are identified;
- 6) Assets are controlled by innocent third parties;
- 7) Insufficient evidence is available to be presented in a criminal court.

²⁶ Badan Pembinaan Hukum Nasional, *Op.Cit.* hlm. 33-35.

²⁷ Theodore Greenberg, (2009), *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based*, UNDOC. Washington D.C. hlm 18.

²⁸ Wahyudi Hafiludin, "Implikasi Perampasan Aset Terhadap Pihak Ketiga Yang Terkait Dengan Tindak Pidana Korupsi, *Tesis*, Fakultas Hukum Universitas Indonesia (2010). hlm. 35.

Moreover, more complex scenarios may arise where it becomes impossible to prosecute or investigate the perpetrators of past and pardoned crimes, resulting in unaddressed dirty assets. One such example is a tax crime that permits administrative efforts to settle the tax debt and subsequently grants a pardon, effectively canceling the predicate crime. This raises the question of whether the money or assets derived from that tax crime can still be subject to confiscation.

The in-rem approach facilitates the confiscation of dirty assets by treating the assets themselves as the primary subject of the confiscation process. The burden of proof is reversed, allowing individuals who believe they are the rightful owners of the assets to demonstrate their innocence. This method serves as a means for the state to recover its financial losses while also accommodating potential claims of asset ownership.

In-Rem Asset Forfeiture: Answers to the Challenges of its Implementation in Indonesia

The United Nations Convention Against Corruption (UNCAC) is an anti-corruption treaty established by the United Nations (UN) in 2003. The implementation of the UNCAC is overseen by the Implementation Review Group, supported by the UN Office on Drugs and Crime (UNODC) Secretariat.²⁹ Indonesia has ratified this convention through Law Number 7 of 2006. The ratification of the UNCAC signifies the recognition of the legal necessity to address the escalating issue of corruption.³⁰ With the ratification, there is hope that Indonesia will utilize the in-rem method for asset deprivation of proceeds of crime to recover state losses effectively. To support this noble objective, the Asset Confiscation Bill has been introduced. However, the application of the in-rem method is not without challenges. Here are some potential challenges that may arise when utilizing the in-rem approach:

a. Assets: Legal Subjects in Court Proceedings

The fundamental distinction between the in-rem and in-personam methods lies in the subject of focus. The in-personam method centers around the individual being sued as the subject, whereas the in-rem method considers the assets themselves as the subject. According to the theory, legal subjects are limited to individuals and legal entities. Initially, legal entities were not acknowledged as legal subjects. However, the fiction theory has enabled the recognition of legal entities as legal subjects, conferring upon their rights and obligations.

The theory of fiction was introduced by Von Savigny, who posited that legal entities are conceptual rather than tangible entities, and the law assigns rights and obligations to them.³¹ Legal entities are represented by individuals in exercising these rights and obligations. Therefore, this theory of fiction can be applied to address inquiries concerning assets as legal subjects.

In the USA, the recognition of assets as legal subjects has been established. For example, in the process of confiscating assets using the name United States V. \$ 160,000 in U.S. Currency or United States V.³² Historically, the concept of in rem asset forfeiture originated in America, where the legal system faced challenges in adjudicating pirate ships or auxiliary vessels.³³ These ships were deemed "guilty" and subject to confiscation, thus becoming legal subjects in asset

²⁹ Marijana Trivunovic, *et.al*, "The role of civil society in the UNCAC review process Moving Beyond compliance?", *U4 Issue*, 2013.

³⁰ Eddy O.S Hiariej, "*United Nations Convention Against Corruption* dalam Sistem Hukum Indonesia", *mimbar hukum*, Vol. 31, No. 1, 2019, hlm. 123.

³¹ Muhammad RM Fayasy Failaq, "Transplantasi Teori Fiksi dan Konsesi Badan Hukum Terhadap Hewan dan Kecerdasan Buatan sebagai Subjek Hukum", *Jurnal Hukum dan HAM Wara Sains*, Vol. 1, No. 2 (2022), hlm. 119.

³² Refki Saputra, "Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (*Non-Conviction Based Asset Forfeiture*) dalam RUU Perampasan Aset di Indonesia", *Integritas*, Vol. 3, No. 1 (2017), hlm. 122.

³³ *ibid.*

forfeiture.³⁴ Over time, the in-rem approach has also been applied to assets that lack an owner or are not acknowledged by their owners, allowing for their confiscation through a judicial process by the state.

When considering the implications for state asset recovery, it becomes evident that this approach will positively impact efforts to regain state financial losses. The magnitude of state financial losses continues to escalate in tandem with societal modernization. To illustrate this, let us consider the real value of an asset embezzled or involved in money laundering in 2000, which would inevitably differ from its real value in 2023. For instance 2000, the average price per gram of gold stood at Rp. 55,000.00, while in 2023, it soared to Rp. 316,000.00 per gram. Various factors contribute to this disparity, including annual inflation.

The Institute for Development of Economics and Finance (INDEF) has forecasted that inflation in 2023 will reach 6-7%. Consequently, the actual value of the currency is expected to rise. This brings forth a fundamental question: How will the recovery of state finances be affected when the changing real value of the currency no longer allows for adequate accommodation? These circumstances hinder asset recovery endeavors due to prolonged procedures. This highlights the alignment between assets as legal subjects in court and the necessity for enforcing asset confiscation laws in Indonesia and numerous other countries.

b. Ne Bis In Idem

The case of Djoko S. Candra serves as a compelling example of the significance of implementing an in-rem asset confiscation mechanism. Despite Djoko S. Candra's disappearance, his assets remain in Indonesia and continue to generate profits. Unfortunately, these assets cannot be confiscated under the current confiscation system, which requires a court decision against the perpetrator (in-personam). Asset confiscation is only considered an additional punishment once the principal sentence has been imposed, and the principal punishment can only be imposed if there is an identified perpetrator. Opponents of utilizing the in-rem method argue that its implementation would violate the principle of *ne bis in idem* since the assets have already been subject to legal proceedings, and the perpetrators should also be subjected.

The *ne bis in idem* principle ensures that an individual is not prosecuted multiple times for the same act.³⁵ This principle is essential in providing legal certainty, which is also a constitutional right as stated in Article 28D, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which guarantees "the right to recognition, guarantees, protection, and legal certainty that is fair and equal before the law."³⁶ Various legal provisions, including Article 76, paragraph (1) of the Criminal Code, Article 1917 of the Civil Code, Constitutional Court Regulations, and other laws, establish rules prohibiting the prosecution of a person more than once when there has been a final and binding decision by a judge (*kracht van gewijsde*).

The in-rem method does not infringe upon the *ne bis in idem* principle since in-rem asset confiscation does not constitute a criminal conviction or trial. It does not serve as a substitute for in-personam proceedings. Criminals or corrupt individuals must still face criminal prosecution, as the objective of in-rem asset confiscation is to sever the connection between the assets and the crime and return the assets resulting from the criminal activity. Even in cases where criminal proceedings cannot be pursued due to the perpetrator's disappearance, death, or other factors, the confiscation of assets should still proceed.

³⁴ Direktorat Hukum Pusat Pelaporan dan Analisis Transaksi Keuangan 2021, *op.cit.*, hlm. 38.

³⁵ Maria Fletcher, "Some Developments to the *ne bis in idem* Principle in the European Union: Criminal Proceedings Against Huseyn Gozutok and Klaus Brugge", *Mod. L. Rev.* 66 (2003), hlm. 769.

³⁶ Lihat Pasal 24D ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

c. Presumption of Innocence

The presumption of innocence dictates that a person should be presumed innocent until proven guilty by a court decision.³⁷ This principle is fundamental to human rights and procedural justice in criminal law.³⁸ Some argue that applying in-rem asset confiscation may violate the presumption of innocence. However, this argument does not hold much weight because the subject in question is the asset itself, which is inherently connected to a crime. The asset may consist of proceeds obtained from a crime or serve as a tool used to commission a crime.

Harbert L. Packer highlights the distinction between the presumption of innocence and guilt. According to Packer, individuals suspected of guilt and possessing assets of questionable origin should be required to demonstrate the legitimate source of their wealth.³⁹ This creates a reverse burden of proof for asset owners who claim ownership over such assets. Sudarto and Hari Purwadi argue that in-rem confiscation does not contradict the presumption of innocence principle. They contend that the presumption of innocence specifically pertains to defendants during trial proceedings concerning the presentation of evidence, whereas in-rem focuses on assets as legal subjects.⁴⁰

d. Protection of Property Rights

Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia affirms individuals' right to protect themselves, their families, their honor, dignity, and property under their control.⁴¹ The constitution explicitly establishes the responsibility of the state to safeguard one's property. However, it is important to note that no provision in this article extends protection to unlawfully acquired assets. Therefore, the argument that in-rem asset confiscation would violate the constitution, specifically Article 28G paragraph (1), cannot be substantiated.

Based on the explanation above, implementing in-rem asset confiscation in Indonesia should be pursued, accompanied by necessary enhancements to relevant laws and regulations. The urgency of adopting the in-rem method lies in restoring losses caused by criminal activities while ensuring the protection of human rights and upholding existing legal principles.

Efforts to Reformulate the Direction of In-Rem Asset Forfeiture Arrangements in Indonesia

a. Reformulation from the Perspective of Norm Substance

Accommodating the in-rem method in Indonesia as a means of achieving asset recovery necessitates the reformulation of legal norms. It is widely recognized that the current asset confiscation process is conventional, highlighting the urgency of expediting the enactment of the Asset Confiscation Bill. However, the current draft of the Asset Confiscation Bill contains several aspects that need to be addressed, including:

1. The norms governing quasi-systems of criminal and civil justice are unclear. The procedural law applied in asset confiscation currently categorizes the in-rem method as civil. However, the Asset Confiscation Bill does not regulate this civil mechanism. Even

³⁷ James Bradley Thayer, "The Presumption of Innocence in Criminal Cases", *Yale Law Journal*, Vol. 6, No. 4 (1897), hlm. 190.

³⁸ Pamela R. Ferguson, "The Presumption of Innocence and Its Role in The Criminal Process", *Criminal Law Forum*, 27 (2016), hlm. 133.

³⁹ Yunus Husein, *Penjelasan Hukum tentang Perampasan Aset Tanpa Pidana Dalam Perkara Tindak Pidana Korupsi*, (Jakarta: Pusat Studi Hukum dan Kebijakan & Pusat Penelitian dan Pengembangan Hukum dan Peradilan Mahkamah Agung RI, 2019), hlm. 7.

⁴⁰ *ibid.*

⁴¹ Lihat Pasal 28G ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

the document's title still refers to the confiscation of criminal assets. Therefore, to ensure legal certainty in terms of substance, the criminal provisions in the Asset Confiscation Bill need to be abolished or, at the very least, be limited to being part of the grounds for asset confiscation. This is crucial to establish legal certainty that in-rem asset forfeiture adopts civil, rather than criminal, methods.

2. The Asset Confiscation Bill includes provisions regarding the confiscation of unexplained assets by the state. To ensure legal protection, confiscating these unexplained assets must first be validated by the Financial Transaction Reports and Analysis Center and the Corruption Eradication Commission, which are the institutions responsible for asset tracking. Investigators cannot initiate the process based solely on their findings. This coordination is crucial in verifying the existence of unexplained assets. It serves as a legal framework to prevent arbitrary actions by the state in seizing community assets and instead promotes the pursuit of communal justice.
3. The Asset Confiscation Bill stipulates a minimum threshold for the amount of assets that the state can confiscate. However, this approach is questionable, as it contradicts the purpose of the in-rem method of asset confiscation, which is to recover state finances. Setting minimum and maximum limits on the amount of assets that can be confiscated is unnecessary. It should be sufficient to prove that the assets are obtained illegally for the state to proceed with expropriation.

b. Reformulation from the Perspective of the Position of Norms

The ratification of the Asset Confiscation Bill will lead to laws' horizontal and vertical harmonization. Horizontally, it will involve repealing provisions related to confiscating civil assets in other laws, such as those concerning corruption, money laundering, and terrorism. Vertically, there will be amendments to Supreme Court Regulation No. 1 of 2013, which governs the procedure for seizing assets when the owner is unknown.

Furthermore, it is essential to establish a government regulation that addresses changes in asset values and facilitates collaboration between state institutions involved in coordinating asset confiscation for Stolen Asset Recovery purposes. When implementing this method, the in-rem system requires a specialized procedure outlined in a Supreme Court Regulation serving as a reference for State Attorneys and Judges. A Supreme Court Regulation should be enacted to consolidate state institutions' efforts in asset confiscation. By reformulating the regulatory framework, an ideal asset confiscation system can be established to facilitate the recovery of state finances in Indonesia.

Conclusion

The asset recovery efforts in Indonesia should address the transition from in-personam asset confiscation to an in-rem confiscation strategy. Asset confiscation is only considered an additional punishment that can be imposed after the principal sentence has been given. However, this approach proves ineffective when the subject or perpetrator dies, disappears, becomes mentally incapacitated, or has no heirs. Although civil asset confiscation is possible, law enforcement agencies face practical challenges in its implementation. The burden of proof required for in-personam asset confiscation is relatively longer than in-rem confiscation. Consequently, the proceeds of the crime are often lost as they are transferred to other countries to obscure the illicit nature of these assets. It creates difficulties in apprehending the perpetrators. To address these issues, adopting the in-rem asset confiscation method is necessary.

Several challenges are associated with implementing the in-rem asset confiscation method, as it may be perceived as conflicting with human rights and legal principles. The first challenge

pertains to treating assets as legal subjects. However, this can be addressed by employing the legal fiction theory, which allows assets to be categorized as legal subjects. The second challenge concerns that in-rem asset confiscation does not violate the principle of *ne bis in idem*. This is because confiscating in-rem assets does not constitute a criminal conviction or trial. The third challenge relates to the presumption of innocence, which is not violated by the in-rem method. The presumption of innocence applies to the accused in court, while in-rem targets assets as legal subjects rather than individuals. Lastly, the application of in-rem does not contradict the protection of property rights. Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia does safeguard personal property, but only in the case of legal assets, not illicit ones. Implementing the in-rem asset confiscation mechanism in Indonesia should be pursued to address these challenges. However, addressing the legal framework and reformulating regulations to support its practical implementation is crucial.

Thus, the authors suggest several things as follows:

- a. The acceleration of deliberations on the Asset Confiscation Bill should be prioritized by including it in the national legislation program.
- b. Comprehensive efforts should be disseminated about applying in-rem as a legal remedy to law enforcement agencies, prosecutors, and the general public. The in-rem confiscation system, which utilizes reverse evidence, is closely linked to public awareness. Therefore, educating the community about procedural guidelines is necessary before implementing this method to ensure legal protection.
- c. The Supreme Court plays a crucial role in regulating and supervising the guidelines for the in-rem method of asset confiscation. The Supreme Court should also establish a coordination system with institutions involved in asset confiscation, such as the Financial Transaction Reports and Analysis Center, Corruption Eradication Commission, and Civil Servant Investigators of relevant ministries.

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