

# Formulation of Asset Confiscation Without Criminal Decision (Non-Conviction Based) Based On The Principle of Due Process of Law

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## ABSTRACT

Asset forfeiture is a strategic legal instrument in the eradication of corruption, particularly for recovering state financial losses. However, asset forfeiture mechanisms that rely on criminal convictions often face various obstacles, such as the complexity of the evidentiary system, the lengthy judicial process, and the perpetrator's ability to conceal or divert assets derived from crime. Therefore, the concept of Non-Conviction Based Asset Forfeiture (NCB) has developed as an alternative legal policy that allows for asset forfeiture without having to wait for a final and binding criminal verdict. This study aims to analyze the NCB concept as a legal policy for asset forfeiture in corruption cases, while also examining the normative weaknesses in the Asset Forfeiture Bill, which currently does not optimally accommodate this principle. The study results indicate that the Asset Forfeiture Bill still has several fundamental weaknesses, including the lack of explicit regulation of the reverse burden of proof mechanism, provisions that open up the opportunity for changes to legal norms through government regulations, and the failure to prioritize asset forfeiture over criminal punishment. These conditions have the potential to reduce the effectiveness of recovering state losses and undermine the primary objective of asset forfeiture. Therefore, a reformulation of asset confiscation legal policy is needed by strengthening the reverse burden of proof, emphasizing compliance with the hierarchy of laws and regulations, and shifting the law enforcement paradigm to prioritize asset recovery. Therefore, the implementation of the NCB concept is expected to be an effective, fair, and progressive legal instrument in supporting the eradication of corruption in Indonesia.

**Keywords:** Formulation, Asset Confiscation, Non-Conviction Based Asset Forfeiture, Corruption Crimes, Legal Policy, Due Process of Law.

## 1. INTRODUCTION

Transnational, organized, and profit-driven crime is an increasingly complex modern criminal phenomenon. This type of crime is generally committed by individuals with high levels of education and intellectual capacity, who are able to exploit loopholes in the law, technology, and the global financial system to disguise their proceeds. This situation makes law enforcement, particularly in the area of asset recovery, a serious challenge for the state. Various crimes can be categorized as profit-driven crimes, including money laundering, narcotics, environmental crimes, investment fraud, and most importantly, corruption. Corruption not only results in state financial losses but also erodes public trust in state institutions and systematically impedes national development. (Young, 2009; Kennedy, 2006). (Chazawi, 2005; Hamzah, 2017).

In practice, corruption is often accompanied by sophisticated disguise and asset diversion strategies, such as the use of third-party accounts, shell companies, cross-border investments, and

the placement of assets in jurisdictions with strict financial secrecy regimes. As a result, law enforcement officials face difficulties in tracing and returning the proceeds of crime to the state treasury. Data released by Indonesia Corruption Watch shows that in 2023 there was a significant increase in corruption cases in Indonesia, with 791 cases and 1,695 suspects. This figure reflects that corruption remains a structural problem that has not been effectively addressed, particularly in terms of recovering state losses. This phenomenon demonstrates that transnational, organized, and profit-oriented crimes have a significant impact on the national economy. Therefore, the state requires legal instruments that are not only oriented towards punishing perpetrators but also capable of effectively cutting off the flow of economic profits from crimes through asset confiscation.

Asset forfeiture has a strategic objective: restoring the rights of victims—both the state and individuals—and preventing perpetrators from enjoying the proceeds of their crimes. If financial gain is the primary motivation for corruption, ensuring that such gain cannot be accessed or rationally enjoyed can reduce the incentive to commit similar crimes in the future. However, the current asset forfeiture mechanism in Indonesia still relies on a conventional approach that requires a prior conviction. This model is often ineffective, particularly when the perpetrator dies, flees, or is beyond the reach of the national criminal justice system. In such circumstances, the asset forfeiture process is hampered because assets suspected of being derived from corruption remain in the hands of family members, heirs, or third parties who cannot be held criminally accountable. As a result, the state loses the opportunity to optimally recover state financial losses. (Greenberg et al., 2009; Davis, 2016).

Normatively, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 has provided a mechanism for asset recovery through civil lawsuits by State Attorneys. However, this mechanism also faces serious obstacles, particularly in terms of asset tracing, especially if the assets have been transferred abroad. Furthermore, law enforcement practices in Indonesia still tend to be oriented towards material evidence to impose prison sentences, and have not made asset recovery a primary goal of corruption eradication. This approach creates an imbalance between the social and economic costs incurred by corruption and the recovery results obtained by the state.

In this context, the concept of Non-Conviction Based Asset Forfeiture (NCB) emerged, a mechanism for asset confiscation that does not require a criminal conviction. The primary focus of this mechanism is proving that an asset is the result or means of a crime, rather than proving individual guilt. The NCB concept gained international legitimacy through the 2003 United Nations Convention against Corruption (UNCAC), which encourages state parties to adopt effective legal instruments to trace, freeze, seize, and return assets obtained from crime, including

through mechanisms without criminal convictions under certain circumstances. (Priyatno, 2018; Hafid, 2021). (Garnasih, 2009; Davis, 2016).

Indonesia itself has ratified the UNCAC through Law Number 7 of 2006 and has been drafting the Academic Paper for the Draft Asset Forfeiture Law since 2008. However, to date, the NCB concept lacks a binding and comprehensive legal basis, and therefore cannot be effectively implemented by law enforcement officials. Furthermore, the implementation of NCB has also generated debate, particularly regarding potential violations of due process and human rights principles, such as the right to ownership and the presumption of innocence. Therefore, the formulation of NCB regulations must be able to balance the effectiveness of asset recovery with the protection of citizens' constitutional rights. (Garnasih, 2009; Davis, 2016).

Based on this description, it can be concluded that the main problem in the confiscation of assets resulting from corruption in Indonesia is the legal vacuum (*recht vacuum*) regarding the non-conviction-based asset forfeiture mechanism. This situation underscores the urgency of research to examine and formulate the NCB concept as an effective, fair legal policy that aligns with the principles of the rule of law and respects human rights.

## 2. RESEARCH METHODS

The research method used is juridical-normative legal research. The main focus is to examine the formulation of asset confiscation without criminal judgment (non-conviction based) based on the principle of due process of law. Juridical-normative research is a scientific procedure to find the truth based on scientific logic from a normative perspective, the object of which is the law itself. The approaches used in this research are the legislative approach, the conceptual approach, and the comparative approach. The types and sources of legal materials are primary legal materials and secondary legal materials. The legal material search technique in this research uses library research and internet research. After all legal materials are collected, they are then analyzed using systematic and grammatical interpretation methods. In contrast to grammatical interpretation, which seeks to determine the intent of statutory provisions, the interpretation of these provisions is carried out through linguistic explanations. The grammatical interpretation method or language-based interpretation is also called the objective method. In contrast, for systematic interpretation, regulations are interpreted in relation to other laws, legal regulations, or the entire legal system. The systematic interpretation approach views law as a unified system of regulations. (Hamzah, 2017).

### 3. RESULTS AND DISCUSSION

#### Comparison of Asset Implementation Mechanisms Without Criminalization

Non-conviction-based asset forfeiture (NCB) is a modern legal instrument that is rapidly developing in response to the limitations of conventional criminal justice mechanisms in recovering the proceeds of crime, particularly in corruption. In law enforcement practice, the conviction-based asset forfeiture approach is often ineffective when the perpetrator dies, flees, is outside the state's jurisdiction, suffers from permanent health problems, or when proving personal culpability cannot be optimally achieved. This situation creates a paradox in law enforcement: even though there are assets clearly suspected of originating from corruption, the state lacks a sufficient legal basis to confiscate and return these assets to the state or the community.

In response to this problem, many countries have developed asset forfeiture mechanisms that do not rely on criminal convictions. These mechanisms have gained international legitimacy through global legal instruments, particularly the United Nations Convention against Corruption, which places asset recovery as a fundamental principle in eradicating corruption. The UNCAC explicitly encourages state parties to adopt measures that enable the effective freezing, seizure, and confiscation of criminally obtained assets, including through non-conviction-based mechanisms, while still ensuring human rights protection and the principle of due process of law. However, the implementation of NCB forfeiture is not uniform. Differences in legal systems, judicial traditions, and criminal policy orientations in each country lead to significant variations in normative, procedural, and institutional design. Therefore, a comparison of NCB forfeiture implementation mechanisms in several countries is crucial for understanding the evolving models, their strengths and weaknesses, and their relevance as a reference in the development of national law. The following are the mechanisms for implementing asset forfeiture without criminal conviction in several countries: (Garnasih, 2009; Davis, 2016).

#### 1. United States of America

The United States is a pioneering country in implementing asset forfeiture without criminal prosecution through the civil asset forfeiture mechanism. In the American legal system, asset forfeiture without criminal prosecution is classified as a civil lawsuit *in rem*, that is, a lawsuit directed directly against the asset, not the individual owner. Thus, the focus of proof lies not on the perpetrator's personal culpability (*mens rea*), but rather on the asset's connection to a crime. (Cassella, 2015; Gray, 2012).

In the context of corruption, United States law enforcement officials can file civil lawsuits against assets suspected of being the proceeds or means of crime, including those related to bribery of foreign officials or transnational money laundering. The standard of proof used is



preponderance of the evidence, a lower level of certainty than the criminal standard of beyond reasonable doubt. Consequently, it is relatively easy for the state to prove the connection between assets and criminal acts.

While practically effective, this mechanism has drawn serious criticism from a due process of law perspective. The burden of proof often shifts to the asset owner to prove that their assets were acquired legally. Furthermore, the financial incentives for law enforcement officials, as part of the confiscation proceeds can be used to fund law enforcement institutions, are considered to have the potential to create a conflict of interest. Therefore, while the United States model is effective in recovering assets, it is often cited as an example of an NCB mechanism that needs to be strictly rectified to prevent it from compromising citizens' constitutional rights.

## **2. English**

In contrast to the United States' approach, the United Kingdom developed a more structured, procedurally safeguard-oriented asset forfeiture mechanism through the Proceeds of Crime Act 2002 (POCA 2002). This law provides a comprehensive legal framework for the forfeiture of assets resulting from crime, including corruption, through both criminal and civil channels. Under the UK's civil recovery mechanism, law enforcement authorities apply to a civil court to establish that an asset is the proceeds of crime. The standard of proof used is the balance of probabilities. (Kennedy, 2006; Young, 2009).

However, this process is carried out under strict court oversight, including granting asset owners the right to be heard, to file objections, and to pursue further legal action. In practice, the UK places the principle of due process at the heart of the process. Any freezing or seizure of assets must be authorized by the court, and there are protection mechanisms for good-faith third parties. This approach often leads the UK system to be viewed as a model of a relatively balanced balance between effective asset recovery and the protection of human rights, particularly the right to property.

## **3. Dutch**

As a country with a civil law tradition, the Netherlands was initially cautious in adopting a non-criminal asset forfeiture mechanism. However, the increasing complexity of economic crimes and corruption prompted the Netherlands to introduce a civil-based asset forfeiture mechanism as a complement to the criminal system. The Dutch approach emphasizes the role of civil courts in balancing state interests with the protection of individual rights. The state must prove that the assets sought for forfeiture have no legitimate origin or are strongly linked to the crime. The asset owner is given full rights to file a defense, including proving the legitimate origin of the

assets. This model reflects an effort to integrate the NCB forfeiture principle into a legal framework that upholds legal certainty and the protection of property rights. (Gray, 2012).

#### 4. Australia

Australia has also adopted a non-criminal asset forfeiture mechanism through the Proceeds of Crime Act 2002 (Australia). This law authorizes the state to seize assets derived from crime through civil proceedings, while maintaining the central role of the courts in the decision-making process. A hallmark of the Australian approach is the strong judicial safeguards. Every application for asset forfeiture must go through the judicial process, and the asset owner has the right to apply for an exclusion order if they can demonstrate that the assets were lawfully acquired or that forfeiture would cause a manifest injustice. In the context of corruption, this mechanism allows the state to act swiftly to prevent the forfeiture of assets, without completely overriding the procedural rights of the parties involved. (Kennedy, 2006; Young, 2009). (Clancy & Campbell, 2024).

A comparison of the implementation of NCB forfeiture in several countries reveals a broad spectrum of approaches. On the one hand, there is a highly pragmatic and effectiveness-oriented model (the United States), while on the other, there is a more normative and procedural model (the United Kingdom, the Netherlands, and Australia). This difference reflects a classic dilemma in modern criminal law: the balance between effective law enforcement and the protection of human rights. From a legal theory perspective, NCB forfeiture challenges the classical doctrine that confiscation of assets is a direct consequence of punishment. This mechanism shifts the focus from the perpetrator to the asset, raising fundamental questions about the limits of state intervention in property rights. Therefore, the successful implementation of NCB forfeiture depends heavily on a clear legal basis, a proportional standard of proof, and effective judicial oversight.

### **The Concept of Non-Conviction Based Asset Forfeiture as a Legal Policy in Confiscation of Assets from Corruption Crimes**

#### **1. Implementation of the Non-Conviction Based Asset Forfeiture Concept in the Corruption Eradication Law in Indonesia**

The 2003 United Nations Convention Against Corruption (UNCAC) is the first globally binding international legal instrument for combating corruption. This convention was born as a manifestation of the seriousness of the international community, particularly the United Nations, in responding to corruption as an extraordinary crime that threatens the economic, political, and social stability of countries worldwide. The UNCAC was drafted by upholding the principles of



equal sovereignty of states, equal rights, territorial integrity, and non-intervention. These principles emphasize that corruption eradication must be carried out through international cooperation that mutually respects the legal sovereignty of each country, without violating the basic principles of international law. (Garnasih, 2009; Davis, 2016). (Garnasih, 2009).

This convention was agreed upon at a Summit held in Merida, Mexico, in December 2003, and signed by all participating countries, including Indonesia. By signing it, Indonesia officially declared its commitment as a State Party legally bound by all provisions stipulated in the UNCAC. This commitment was then confirmed through the ratification of the UNCAC into national law with Law Number 7 of 2006. Through this ratification, Indonesia accepted eight chapters and seventy-one articles of the UNCAC, with the only reservation being Article 66 paragraph (2) which regulates the dispute resolution mechanism between countries. (Garnasih, 2009; Davis, 2016).

This ratification has legal consequences, requiring Indonesia to adjust its national legal system to align with the principles, objectives, and mechanisms stipulated in the UNCAC. Therefore, ratification is not merely a symbolic act, but rather requires concrete steps in the formation and adjustment of national regulations. Broadly speaking, the UNCAC contains five main pillars: corruption prevention, criminalization and law enforcement, international cooperation, technical assistance and information exchange, and asset recovery. Of these five pillars, asset recovery occupies a strategic position because it directly addresses the goals of substantive justice and restitution of state losses. (Garnasih, 2009; Davis, 2016).

In the Indonesian context, regulations regarding asset recovery are highly relevant, given that corruption has caused systemic losses to the country's finances and economy. These losses ultimately have a direct impact on the obstruction of the fulfillment of the community's social and economic rights. As a state based on the rule of law, as affirmed in Article 1 paragraph (3) of the 1945 Constitution, Indonesia has a constitutional obligation to uphold the law in order to achieve its national goals, namely advancing public welfare. The principle of the rule of law requires not only legal certainty but also justice and benefit.

Indonesia's concept of a legal state has also developed in line with the principles of a welfare state, which obligates the state to actively protect and fulfill the basic rights of its citizens. Within this framework, corruption eradication must not only focus on punishing perpetrators but also on recovering losses suffered by the state and society. Corruption is essentially an economically motivated crime, with the primary goal of unlawfully obtaining financial gain. Corruptors often exploit development projects, public funds, and state policies as a means to enrich

themselves, thereby denying the benefits of development that should be enjoyed by the wider community.

The systemic impact of corruption is explicitly recognized in the preamble to Law Number 20 of 2001, which states that corruption not only harms state finances but also violates the social and economic rights of the community. Therefore, corruption is classified as an extraordinary crime, the eradication of which must be carried out in an extraordinary manner. Based on this understanding, the state should not only focus on punishing perpetrators, but also on restoring the rights of the community that have been violated through corruption. A law enforcement orientation that solely emphasizes imprisonment without asset recovery has the potential to ignore the interests of victims in the broader sense, namely the state and society.

Corruption eradication that ends only with the criminalization of perpetrators, while the proceeds of crime remain in the hands of the perpetrators or related parties, has proven ineffective in providing a significant deterrent effect. This situation actually creates a paradox, where perpetrators continue to enjoy the proceeds of their crimes even after serving their sentences. Furthermore, from a national economic perspective, this approach creates a double burden. The state must bear the costs of law enforcement and corrections, while the financial losses caused by corruption cannot be fully recovered. (Hafid, 2021; Priyatno, 2018).

It is in this context that the concept of Non-Conviction-Based Asset Forfeiture (NCB) becomes relevant as a legal instrument for recovering assets derived from corruption. This concept allows the state to seize assets derived from criminal acts without having to wait for a criminal conviction. NCB is a mechanism recognized in the UNCAC and designed to overcome the limitations of the conventional criminal justice system, particularly when the perpetrator dies, flees, or is outside the jurisdiction of national law. (Garnasih, 2009; Davis, 2016).

However, to date, Indonesia has not comprehensively implemented the NCB concept in positive law. Asset confiscation is still dominated by the conviction-based asset forfeiture mechanism as stipulated in the Corruption Eradication Law, which requires a final and binding court decision. This requirement often poses a serious obstacle in practice, given that assets obtained from corruption are often hidden through cross-border money laundering schemes and complex ownership structures. As a result, even if the perpetrator is successfully apprehended or prosecuted, the assets targeted for confiscation are difficult for law enforcement to access.

Experience from major cases in Indonesia demonstrates that the limitations of legal instruments for asset confiscation have deprived the state of the opportunity to optimally recover state financial losses. In some cases, assets resulting from crimes continue to circulate within the national economic system. NCB offers a different approach, emphasizing the object of the asset (in



rem) rather than individual culpability (in personam). Thus, the focus of the evidence shifts to the relationship between the asset and the crime, rather than proving the perpetrator's criminal guilt.

However, the implementation of NCB has also raised serious debate regarding the protection of human rights, particularly the right to property and the principle of due process of law. These concerns must be addressed through the formulation of clear, transparent regulations that provide adequate procedural guarantees. The Indonesian Constitution itself recognizes that human rights are not absolute. Article 28J paragraph (2) of the 1945 Constitution emphasizes that the exercise of human rights may be limited by law for the sake of public interest, public order, and the protection of the rights of others.

Therefore, the regulation of NCBs in national law does not conflict with human rights principles as long as they are designed proportionally and guarantee an effective judicial oversight mechanism. In fact, such regulations can serve as a means to uphold substantive justice for victims of corruption. Experience in other countries shows that the success of NCB implementation depends heavily on the balance between effective asset recovery and the protection of citizens' constitutional rights. This principle should be the primary reference for Indonesia. Therefore, the need for NCB regulations in Indonesian positive law is an urgent legal necessity. These regulations are expected to close the legal gap in the confiscation of assets resulting from corruption while strengthening Indonesia's commitment to being a state based on the rule of law that upholds justice, benefit, and legal certainty.

## **2. Sociological and Legal Review of Non-Conviction Based Asset Forfeiture Not Yet Implemented in Indonesia**

The formation of legislation is essentially a systematic and hierarchical process. This process encompasses not only the technical activities of formulating norms but also political, social, and philosophical dimensions aimed at ensuring that the resulting regulations are able to meet the legal needs of society. Normatively, the stages of the formation of legislation in Indonesia include planning, drafting, discussion, ratification or stipulation, and promulgation. All of these stages are explicitly regulated in Law Number 12 of 2011, as amended by Law Number 15 of 2019 concerning the Formation of Legislation (P3 Law). (Najib, 2023).

However, not all types of legislation undergo identical processes at every stage. Each type of regulation has different characteristics, functions, and content, which influence the complexity and duration of its development. This distinction is particularly evident between laws, government regulations, and presidential regulations. The content of laws, for example, is substantially broader and more fundamental than that of subordinate regulations. Laws serve to comprehensively

regulate the public interest and serve as the basis for the development of implementing regulations. Therefore, the development process requires great care and a relatively long timeframe.

The length of the lawmaking process is also influenced by the requirement to develop an academic paper as the scientific and philosophical basis for the draft law. Academic papers must contain theoretical, legal, and empirical studies that can be scientifically justified, so their preparation often takes a considerable amount of time. After the planning and drafting stages, the draft law must undergo deliberation in the legislative body with the government. This stage is an arena for political compromise and normative debate, which often gives rise to conflicting interests, both between factions and between the legislature and the executive.

The length and complexity of these stages are primarily intended to ensure that the resulting laws are of good quality, aspirational, and do not conflict with the principles of good legislative regulation as mandated by the P3 Law. However, prior to the amendment to the P3 Law through Law No. 15 of 2019, there were serious problems in legislative practice. Draft laws that were not fully discussed within one term of the House of Representatives (DPR) had to be re-deliberated in the following term.

These provisions have caused many strategic bills to experience prolonged stagnation. One of the most obvious examples is the discussion of the Criminal Code (KUHP), which has been repeatedly debated for decades without ever being ratified. This situation creates inefficiencies in the legislative process and wastes state resources. Furthermore, repeated deliberations have the potential to obscure the substance of the initial agreement, as they must be re-adjusted to the new political configuration.

The amendments made through Law Number 15 of 2019 marked a turning point in the national legislative system. By eliminating the requirement to re-deliberate from the beginning in the next legislative period, the legislative process is expected to be more effective and sustainable. This change is a breath of fresh air for various previously delayed bills, including the Draft Law on Confiscation of Criminal Assets. Normatively, technical procedural obstacles have been minimized.

However, the lengthy process of drafting laws is not solely due to procedural issues. Another equally important factor is the low political will of lawmakers on certain issues. In the context of asset confiscation, this issue is often not considered a priority by legislators. This differs from draft laws directly related to legislative institutional interests, such as amendments to the Law on the People's Consultative Assembly (MPR), the House of Representatives (DPR), the Regional Representatives Council (DPD), and the Regional People's Representative Council (DPRD) (MD3 Law), which are passed relatively quickly.



This phenomenon demonstrates that the legislative process in Indonesia cannot be separated from political considerations. Draft laws whose substance does not address the immediate interests of legislators tend to be slow and protracted. Discussions on the Asset Confiscation Bill have been ongoing since 2008. This discourse intensified following the ratification of the 2003 UNCAC through Law No. 7 of 2006, which entailed the obligation to return assets obtained from criminal activity. (Garnasih, 2009; Davis, 2016).

As a follow-up, the National Legal Development Agency under the Ministry of Law and Human Rights has prepared an Academic Draft of the Asset Forfeiture Bill. This draft serves as the initial foundation for formulating the concept of asset forfeiture, including the non-conviction-based asset forfeiture mechanism. The academic draft was first drafted in 2008 and then revised in 2012 and updated again in 2015. This process demonstrates that academic study of asset forfeiture has been conducted seriously and continuously. However, the lengthy process of drafting and refining the academic draft also reflects internal challenges, including the limited number of experts with specialized competencies in asset recovery and economic criminal law. The Asset Forfeiture Bill was subsequently included in the National Legislation Program (Prolegnas) from 2015 to the present. However, its presence in the Prolegnas does not necessarily guarantee accelerated deliberation and ratification. (Anggraini et al., 2024; Najib, 2023).

From these conditions, it is clear that the main problems lie not only in the deliberation stage in legislative institutions, but also in the initial planning and assessment stages. The asset forfeiture legislative process faces a combination of structural and political obstacles. Lack of political will, limited expert resources, and the complexity of the legal substance of asset forfeiture are the main factors hampering the regulation of non-conviction-based asset forfeiture mechanisms in Indonesia. In fact, the need for effective legal instruments for asset forfeiture is increasingly pressing with the increasing complexity of transnational economic crimes and corruption. Therefore, the establishment of an Asset Forfeiture Law should no longer be viewed as a policy option, but rather as an urgent legal necessity to fill the legal vacuum in the national legal system. Without clear and comprehensive regulations, Indonesia will continue to experience difficulties in recovering assets obtained from criminal acts, despite its international commitments through the UNCAC. Therefore, accelerating the development of asset forfeiture regulations, particularly those that accommodate non-conviction-based asset forfeiture mechanisms, is a strategic step to strengthen the effectiveness of law enforcement and realize the goal of a just rule of law. (Garnasih, 2009; Davis, 2016).

**Formulation of Asset Confiscation Without Criminal Charge (NCB) in Accordance with the Principle of Due Process of Law****1. *Unexplained Wallin Australia***

Conceptually, in common law systems, the application of asset forfeiture—whether through court or out-of-court mechanisms—is rooted in a historical legal provision known as the deodand. In practice, a deodand refers to the seizure of an object deemed to have caused a person's death and then "offered to God." While its doctrinal origins are not fully understood, the deodand is believed to have emerged in the 11th century and remained in effect until it was formally abolished by the British Parliament in 1846. (Gray, 2012; Young, 2009).

The term deodand comes from the Latin phrase *deo dandum*, meaning "to be given to God." Under this doctrine, if an object is found by a jury to have caused a person's death, it can be confiscated by the Crown. This confiscation is then followed by the Crown's obligation to sell the object and use the proceeds for religious purposes as a form of honor to God. In practice, deodand can apply to various types of objects. For example, if a person dies after being struck by a horse, the horse can be confiscated. Similarly, if a person dies after being struck by a falling stone, the stone can also be subject to confiscation. Thus, the primary focus of deodand is not on human error, but on the object that actually caused the death.

Over time, deodand law developed a set of guiding principles for determining whether an object could be categorized as deodanded. The most fundamental principle was the *adage omnia quae movent ad mortem sunt deodanda*, which means "everything that moves toward death is deodanded." This principle asserted that any movable object that caused a person's death was subject to confiscation. In practice, objects seized under deodand were supposed to be donated to charities. However, in reality, the Crown often retained the objects or sold the right to collect the deodand to others. As a result, the deodand transformed into a kind of levy or tax on tragedy, providing the Crown with an opportunity to generate income from the event of death.

Confiscation based on deodand has historically been a means of legitimizing the Crown's economic gain through religious justification. In the medieval socio-cultural context, the Crown was often viewed as God's representative on earth or even the personification of divine power itself. This perception provided moral justification for confiscations carried out in God's name. However, as legal awareness grew, the practice of deodand began to draw criticism. Many jurists recognized that the practice was often irrational, as it placed the blame on inanimate objects without considering the context of substantive justice. As a result, the goals of justice were often not achieved, and the deodand appeared more as a fiscal instrument than a just legal mechanism.

Although ultimately abolished, deodand significantly influenced the development of modern law regarding asset seizure and forfeiture in common law countries. This doctrine served as the initial inspiration for mechanisms for asset confiscation without conviction, particularly in the context of crimes that are difficult to prove through conventional criminal mechanisms. This influence is clearly visible in the development of asset forfeiture law in Australia, particularly through the concept of unexplained wealth. This concept aims to deter organized crime by reducing or eliminating the profits derived from illegal activities. Ideologically, this mechanism reflects the spirit of deodand, namely separating wealth deemed illegitimate from its owner.

The primary legal basis for the implementation of unexplained wealth in Australia is the Proceeds of Crime Act 2002 (POCA 2002), which replaced the Proceeds of Crime Act 1987 (POCA 1987). While POCA 1987 only recognized a conventional confiscation mechanism dependent on a criminal conviction, POCA 2002 introduced a more progressive approach. Prior to POCA 2002, asset confiscation could only occur after a conviction. During criminal proceedings, assets could only be frozen to prevent their transfer or disappearance. Therefore, the recovery of state assets depended heavily on the success of criminal prosecutions. (Kennedy, 2006; Young, 2009). (Clancy & Campbell, 2024).

Significant changes occurred in 2010 through the amendments to the 2002 POCA Act, which explicitly established the unexplained wealth mechanism. This amendment was prompted by reports and investigations of serious crimes that demonstrated the ineffectiveness of conventional criminal mechanisms in recovering assets derived from crime. Through this mechanism, states such as New South Wales and Queensland adopted unexplained wealth arrangements. States were given broader powers to recover state losses, with the burden of proof shifted to the defendant. Thus, individuals with wealth disproportionate to their lawful income were required to prove the origin of that wealth.

An unexplained wealth order is issued when the court believes there is an imbalance between an individual's wealth and legitimate income. If the defendant fails to provide adequate explanation, the assets can be declared unexplained and subject to confiscation or payment to the state. This approach differs from the mechanism used in the UK. In the UK, unexplained wealth does not always result in asset confiscation, but rather in the obligation to pay a sum of money to the state representing the value of the illegal wealth. Thus, the assets can remain in the defendant's possession as long as the payment obligation is met.

This distinction highlights the philosophical differences between Australia and the UK. In Australia, unexplained assets are considered illegal assets whose ownership is void. In contrast, in the UK, the focus is on recovering economic value for the state without directly revoking



ownership rights. However, the primary goal of both systems remains the same: to recover state losses resulting from criminal activity. The only difference lies in how the state treats assets declared to be the proceeds of crime.

Under POCA 2002, unexplained wealth encompasses wealth derived from both domestic and foreign law violations. Therefore, a person who acquired wealth through a criminal offence abroad can still be subject to an unexplained wealth order in Australia. Another important characteristic of this system is the burden of proof placed on the defendant. The defendant must prove that their wealth did not originate from a criminal offence. This mechanism greatly facilitates the government's efforts to trace and recover assets obtained from crime. (Allen, 2021; Fajaryanto et al., 2025).

The concept of reversed burden of proof is rooted in common law and is used in contexts where the evidence is factually under the defendant's control. However, reversed burden of proof is not absolute, as the plaintiff still bears the initial burden of demonstrating a reasonable basis. Unexplained wealth proceedings are civil and use a balance of probabilities standard of proof, not a criminal standard of proof. The primary object of this process is the asset (in rem), not the individual's criminal liability (in personam).

The provisions of the POCA 2002 Act form the foundation for the implementation of unexplained wealth across Australia, although each state has its own specific implementation. This is evident in the differing approaches between Western Australia, the Northern Territory, and New South Wales. In Western Australia, the unexplained wealth mechanism results in the mandatory payment of a sum of money to the state. Meanwhile, in the Northern Territory, the payment is made through direct asset confiscation. These two models reflect a difference in approach, between pragmatic effectiveness and philosophical idealism.

In New South Wales, unexplained wealth is implemented as part of an asset recovery strategy through a financial investigation approach. This approach has proven effective, with a very high rate of negotiated settlements and significant asset recovery outcomes. Overall, the concept of Non-Conviction-Based Asset Forfeiture in the common law system, particularly through the unexplained wealth mechanism, represents a paradigm shift from an emphasis on individual punishment to restitution of state losses. This shift emphasizes that justice in corruption crimes is not solely measured by the punishment of the perpetrator, but also by the state's ability to recover assets seized for the public benefit.

## **2. Formulation of the Asset Confiscation Bill**

The Asset Confiscation Bill is a legal breakthrough aimed at addressing the limitations of the criminal justice system in recovering state losses resulting from corruption. Conventional

criminal justice mechanisms have proven ineffective in reaching all assets resulting from corruption, particularly those that have been disguised, diverted, or not directly linked to evidence of a crime. Therefore, this bill serves as an alternative instrument that emphasizes the recovery of state assets as a primary goal of law enforcement. (Anggraini et al., 2024).

The urgency of the Asset Forfeiture Bill is even more relevant given the empirical reality that demonstrates the disparity between the official income of state officials and their substantial asset holdings. This situation raises serious questions about the origins of this wealth, but to date, there has been no adequate legal mechanism to hold those responsible accountable for these illogical assets without first proving the underlying crime. The Asset Forfeiture Bill is designed to address this gap by providing a legal mechanism that allows for asset forfeiture without waiting for a criminal verdict. In this framework, asset forfeiture is not considered part of criminal punishment, but rather a stand-alone legal action, thus eliminating the need for prior proof of a crime. Thus, the primary focus is directed at state assets and losses, rather than solely on the perpetrator. However, the Asset Forfeiture Bill does not eliminate the authority to prosecute underlying crimes. This provision emphasizes that asset forfeiture and criminal prosecution are two paths that can coexist. This means that the state can still prosecute perpetrators for corruption while simultaneously pursuing efforts to recover state assets through the asset forfeiture mechanism. (Anggraini et al., 2024; Najib, 2023).

However, the regulation regarding the postponement of examination of an asset confiscation application if there is a criminal prosecution for the same assets actually raises conceptual problems. This provision implicitly re-links asset confiscation to proof of a crime, potentially negating the essence of asset confiscation without criminal prosecution. As a result, a mechanism that should be fast and efficient becomes hampered by a lengthy criminal process. This provision also opens up opportunities for abuse of authority by law enforcement officials. Public prosecutors may choose to prioritize primary criminal prosecutions to delay or even avoid the asset confiscation mechanism, potentially giving rise to transactional legal practices. Such procedural choices clearly contradict the primary objective of the Asset Forfeiture Bill, namely optimizing the recovery of state losses.

Normatively, the postponement provisions are inconsistent with the spirit of efficiency and public interest that underpin the Asset Forfeiture Bill. Public interest, in this context, must be understood as the broader interests of the nation and state, thus justifying the creation of new norms that deviate from conventional criminal mechanisms for the recovery of state assets. The Asset Forfeiture Bill also broadly defines the scope of assets subject to forfeiture, encompassing assets obtained directly or indirectly from criminal acts, assets transferred to other parties or



corporations, and replacement assets derived from the proceeds of crime. Furthermore, assets disproportionate to the owner's legitimate income are also included in the category of assets subject to forfeiture. (Anggraini et al., 2024; Najib, 2023).

However, the regulation regarding the minimum value of assets that can be confiscated and the government's authority to change this value through government regulations raises legal issues. Hierarchically, this regulation has the potential to conflict with the principles of establishing laws and regulations, as changes to the substance of laws should be made through legislation, not government regulations. The authority to change through government regulations also has the potential to be exploited for certain political interests. In certain situations, the minimum asset value can be changed quickly to avoid asset confiscation involving officials or political elites, thereby weakening the effectiveness of the law itself.

In terms of implementation, asset confiscation is carried out by investigators from various law enforcement agencies. This process begins with the temporary blocking and seizure of assets suspected of originating from criminal activity, under court supervision. This mechanism is intended to prevent the loss or diversion of assets during the legal process.

However, optimizing asset confiscation requires the involvement of institutions with specialized expertise in tracking financial transactions. Therefore, the role of financial analysis institutions is crucial in uncovering hidden assets that are difficult to trace through conventional investigative mechanisms. In the context of providing evidence, the Asset Forfeiture Bill still places the burden of proof predominantly on investigators and prosecutors, using conventional evidence. This model of proof has the potential to repeat the weaknesses encountered in eradicating corruption, particularly in proving the origin of assets.

In fact, the Indonesian legal system already recognizes the concept of reverse burden of proof in certain crimes, particularly money laundering. Reverse burden of proof emerged in response to the state's difficulty in proving the origin of assets that are actually in the perpetrator's possession. Although reverse burden of proof remains a theoretical debate due to its potential conflict with the presumption of innocence, its application can be justified in the context of public interest and extraordinary crimes. Corruption, as a systemic crime that harms the wider community, requires an extraordinary legal approach. Therefore, the Non-Conviction-Based Asset Forfeiture mechanism in the Asset Confiscation Bill should be consistently directed toward positioning asset confiscation as the primary instrument for recovering state losses. Focusing on assets as objects (*in rem*), rather than on criminalizing perpetrators, is a strategic step to address the increasingly sophisticated and cross-jurisdictional complexity of modern corruption crimes.

### **3. Revision of the Asset Confiscation Bill**

Given the numerous shortcomings of the Asset Forfeiture Bill, revisions are needed to ensure the regulation is able to address current legal challenges. These revisions are crucial to ensure the effectiveness of asset forfeiture as a tool for recovering state losses, particularly in complex and systemic corruption cases. The most fundamental revision is the addition of provisions regarding the reverse burden of proof, which has not been explicitly regulated in the Asset Forfeiture Bill. Ideally, the reverse burden of proof should be included in a dedicated chapter on evidence, thereby providing conceptual clarity and legal certainty in its implementation. (Allen, 2021; Fajaryanto et al., 2025). (Najib, 2023; Anggraini et al., 2024).

The application of the reverse burden of proof will provide a "spirit" to the enforcement of asset confiscation laws, considering that the objects examined fall within the realm of private property. This mechanism opens up a greater opportunity for successful asset confiscation, especially when the assets are difficult to trace through conventional evidentiary mechanisms. Rationally, there are two main reasons for the need for the reverse burden of proof: simplifying the evidentiary process and optimizing the recovery of state losses. This simplification of the evidentiary process is logical because the asset owner is, in fact, and legally, the party with the best knowledge of the origins of their wealth. (Allen, 2021; Fajaryanto et al., 2025).

The second reason relates to optimizing the recovery of state losses. If an asset owner cannot prove that their assets were legally acquired, then the assets are considered problematic and subject to seizure by the state. Conversely, if the asset owner can prove their legitimacy, there is no legal basis for seizure. The application of the reverse burden of proof cannot be considered an excessive burden on the alleged perpetrator. The burden of proof is actually proportional because the alleged perpetrator is in a position to best understand the origins of their assets, making this mechanism more effective in optimizing the recovery of state losses. (Allen, 2021; Fajaryanto et al., 2025).

In addition to the reverse burden of proof, the provisions of Article 6 paragraph (2) of the Asset Confiscation Bill, which authorizes changes to the minimum asset value through government regulations, also need to be revised. This provision contradicts the principle of the hierarchy of laws and regulations, because changes to the substance of laws should only be made by equivalent norms. Theoretically, changes to legal norms must follow the hierarchical principle, where lower regulations may not change or negate provisions stipulated in higher regulations. Therefore, changes to the threshold for asset confiscation through government regulations have the potential to create normative conflicts and legal uncertainty. (Allen, 2021; Fajaryanto et al., 2025).

The next revision concerns prioritizing asset confiscation when concurrent predicate criminal cases are pending. Prioritizing asset confiscation over criminal prosecution is a more rational approach to safeguarding state finances. By prioritizing the examination of asset confiscation applications, the focus of law enforcement shifts from solely criminal prosecution to optimizing the recovery of state losses. Therefore, the provision that postpones asset confiscation until a final and binding criminal verdict needs to be revised to ensure asset confiscation functions progressively and effectively in eradicating corruption.

#### 4. CONCLUSION

Based on the above description, it can be concluded that the Asset Confiscation Bill still requires substantial improvements to be able to function effectively as a legal instrument in recovering state losses due to corruption. The absence of regulations on the reverse burden of proof, the existence of provisions that open the opportunity for changes to legal norms through government regulations, and the fact that the asset confiscation process has not prioritized the criminalization of perpetrators, indicate that the normative framework of the Asset Confiscation Bill does not fully reflect a progressive and results-oriented legal approach (result-oriented justice). (Allen, 2021; Fajaryanto et al., 2025).

Therefore, the reformulation of the Asset Forfeiture Bill needs to be directed at strengthening the reverse burden of proof mechanism, affirming compliance with the hierarchy of laws and regulations, and prioritizing asset forfeiture in handling corruption cases. With these improvements, asset forfeiture will not only function as a complementary instrument to criminal penalties, but also become a strategic and effective legal policy in recovering state losses, while strengthening the state's commitment to eradicating corruption in a just and public-interest manner. (Allen, 2021; Fajaryanto et al., 2025).

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