Restoration Model For State Financial Losses Due To Corruption Crimes Through *Forfeiture Civil* Law

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ABSTRACT

Given the increasing quantity and quality of corruption cases in Indonesia, one way to combat corruption is to use civil forfeiture tools to facilitate the seizure and expropriation of the assets of corrupt criminals through private channels. So far, Indonesia has tended to prioritize criminal remedies, focusing more on punishing the perpetrators of corrupt acts than recovering the state's financial losses. In fact, the criminal path is not “powerful” enough to reduce or reduce the number/of cases of corruption.

Keywords: Legal transplant, Civil *Forfeiture*, Restoration, State financial loss

I. Introduction

Given the increasing number and quality of corruption cases in Indonesia, there is a need to combat corruption using a variety of effective arbitration tools. This is because criminal acts of corruption have caused economic losses to the state, which in practice is difficult for the state to enforce by law enforcement officers. Returning government finances due to corruption faces various obstacles. These obstacles are not only due to the fact that corruption has become an exceptional case with losses of power and national finances, but also because it is very difficult and complicated to prove corruption. Therefore, a crime prevention strategy is needed, including how to recover the financial losses of the state, through a holistic approach, both through the criminal approach and the non-criminal approach. crime, one of which is through a civilian instrumental approach, as well as a global approach (International Cooperation).

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The limitations of the judicial process, especially of civil law, are not considered effective enough to repair the financial losses of the state, as they face a variety of obstacles. The main reason is that, procedurally, reimbursement of the State's financial losses must be made through a civil action, incidentally, subject to the provisions of the Civil Procedure Code established by the Government which is Modified in *Herzien Inlandsch Reglement* (HIR) or updated of Indonesian regulations namely the procedural law in the trial of civil and criminal cases that apply on the islands of Java and Madura and *Rechtreglement Voor de Buitengewesten* (Rbg) or the procedural law applicable in the trial of civil and criminal cases in courts outside Java and Madura which are the successor product of the Dutch East Indies Government.

The Code of Civil Procedure no longer applies, of course, now that the law has developed rapidly, so it is no longer possible to use colonial-era products that are philosophically different from those of Indonesian citizens today. In relation to the system, electronic commerce, digital signatures, and proof that electronic record-keeping systems were all unregulated in the HIR and Rbg Evidence Systems. Corruption-free civil litigation cases also go hand in hand with the development of evidence systems that keep pace with the sophistication of the technology used by corrupt criminals. This is even more so when funds resulting from corruption are transferred to offshore accounts as part of a money laundering process that is not accessible through normal civil procedural processes.

Accordingly, in response to these obstacles, civil claims for reimbursement of state losses must have more specific rules embodied in law and regulations in effect. In relation to restructuring national finances, it is also important to prioritize more effective, quicker, cheaper, and simpler approaches to enable immediate recovery of national financial losses. One of the options available is a civil forfeiture tool that facilitates the civil seizure and expropriation of the bribe's assets. So far, Indonesia has prioritized criminal reconciliation focused on punishing perpetrators of criminal acts of corruption over redressing the state's financial losses. In fact, criminal roots are not "strong" enough to reduce or reduce the number/incidence of corruption.

Related to the research background above, problems can be formed, namely:

1. *Civil Forfeiture* arrangements in some countries.
2. Prospects for the implementation of *Civil Forfeiture* di Indonesia.

This research is a legal study with a conceptual approach. The legal sources used are analytically and descriptively analysed as secondary and tertiary legal sources.

II. Result And Discussion

A. *Civil Forfeiture* di Some Nations

Civil forfeiture or *civil recovery*, also known as *rem forfeiture* or *Non-Conviction Based Asset Forfeiture*, is used when criminal proceedings involving the subsequent seizure (*confiscation*) of property can be caused by five things, namely:[4]

1. The property owner has died;
2. End of criminal proceedings because the defendant is acquitted;
3. Criminal proceedings have taken place successfully but the property appropriation failed;
4. The defendant is out of the jurisdiction;
5. The name of the property owner is unknown, and there is not enough evidence to prosecute a criminal.

Civil forfeiture has become an important tool for uncovering improper assets in various countries, especially common law countries like the United States. The concept evolved in England from the Middle Ages when the kingdom confiscated items as the *instrument of death*.[5] In various rulings from the 1870s through the 1920s, the United States Supreme Court consistently ruled that criminal property can be confiscated regardless of the property owner's status in the crime committed. In the mid-20th century, the U.S. Congress passed laws authorizing the confiscation of assets for various crimes and crimes, including counterfeiting, gambling, smuggling, and drug trafficking. In the United States, the concept evolved from the 19th century to the 20th century, with an

[4] Anthony Kennedy (1), "*An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom*", 10(1) Journal of Money Laundering Control, 2007, p. 37.

[5] In Muhammad Yusuf, *Merampas Aset Koruptor (Seizing the assets of corruptors)*, (Jakarta: Kompas, 2007), p. 107.

emphasis on assets used in violation of liquor tax laws and regulations.[6] In various rulings from the 1870s through the 1920s, the United States Supreme Court consistently ruled that criminal property can be confiscated regardless of the property owner's status in the crime committed.[7] In the mid-20th century, the U.S. Congress passed laws authorizing the confiscation of assets for various crimes, including counterfeiting, gambling, smuggling, and drug trafficking.[8]

In general, the *civil forfeiture* system can be more effective than the criminal system in recovering assets stolen by corrupt people. Indeed, the institution of civil forfeiture has the advantage of facilitating the seizure of assets during the trial process. Indeed, civil forfeiture employs a civil law regime that uses a lower standard of proof than that used in criminal proceedings.[9] Furthermore, in its implementation, *civil forfeiture* uses a reverse proof system in which the government has sufficient initial evidence that the seized property is money obtained, related to, or used. for crimes.[10] For example, the government simply calculates the income the baker earns and compares it to the wealth he has. If the assets exceed the number of the company's earnings, it is the responsibility to demonstrate that the assets can be obtained through legitimate channels.[11]

Table 1

The Differences between *Criminal Forfeiture* dan *Civil Forfeiture*

Criminal Forfeiture	**Differentiator**	***Civil Forfeiture***
Addressed to individuals (in personam); are part of the criminal penalties imposed on people	Action	Addressed to things (*in rem*); Government legal action against objects
Being charged with a criminal offense in a criminal case	Can be confiscated	Submitted before, during, after criminal proceedings, or even if no criminal

[6] Stefan D. Cassella (1), *Asset Forfeiture Law in the United States*, (New York: Jurisnet, 2007), p. 31-32.

[7] *Ibid*.

[8] *Ibid*, p. 33.

[9] Anthony Kennedy (1), *Ibid*, p. 139.

[10] Anthony Kennedy (2), "*Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators*", 13 (2) Journal of Financial Crime, 2006, p. 140.

[11] Anthony Kennedy (1), *Op.Cit*., p. 38.

		proceedings are sent to the author
The need for faith-based criminal court decisions to establish beyond reasonable doubt that criminal proceedings are closed and provable	Evidence of misconduct	No criminal court decision is required, most cases are used on the basis of counter-evidence

For this reason, *civil forfeiture* is a great alternative when the criminal route doesn't work. Even in practice, the civil forfeiture procedure has proven to be more effective in recovering stolen property, although the procedure has not yet been freed from various weaknesses such as slowness and high cost.[12]

Civil forfeiture applications made in each country are different. Civil forfeiture was initially applied nationwide, that is, filing a civil action to confiscate or take over property resulting from a crime within the country. Some countries that apply domestic civil forfeiture apply them extraterritorially when the assets resulting from the crime are located abroad. For example, in the United Kingdom, in the *Proceeds of Crime Act* 2002, s 316(4), it was provided that the civil forfeiture model applied to the United Kingdom to all property or property wherever they are found.[13]

In the United States, 28 USC § 1355 (b) (2) If the object of confiscation or expropriation is outside the country, then a civil forfeiture may be filed in the District Court of Columbia. However, the application of extraterritorial civil forfeiture is not, in practice, free from various obstacles, especially in the absence of effective cooperation with other governments.[14] Therefore, mutual legal assistance is also an important factor. It is needed not only to help recover assets through criminal means (criminal law) but also through civil actions. Although there are obstacles, this is not an obstacle for developed countries to recover stolen assets.

For example, in the United States, a procedure that might be judged even more extreme. U.S. courts have the power to order confiscation of foreign assets,

[12] *Ibid*.
[13] Anthony Kennedy (2), *Op.Cit.*, p. 144.
[14] *Ibid*.

including freezing foreign bank accounts if the assets were obtained from crimes committed in the United States. In practice, however, this procedure encounters many obstacles. Especially in the absence of valid bilateral agreements, such as Mutual Legal Assistance Agreements with foreign countries on civil forfeiture. To overcome these obstacles, the United States enacted 18 USC 981(k). This was previously considered controversial but was deemed effective enough to recover assets resulting from crimes in the United States and abroad.[15]

18 USC 981(k) was enacted to overcome difficulties for U.S. courts in enforcing civil forfeiture orders abroad. The rationale behind the enactment of this regulation is that there are 2 (two) possible locations for proceeds of crime to be taken abroad and deposited in foreign banks in US dollars, namely foreign accounts at foreign banks in the form of debts owed by banks to the depositor (criminal)., or the funds themselves remain in the United States, specifically in dollar-denominated correspondent accounts held by most foreign banks to facilitate transactions for their clients. By having an agent account, if a criminal from the United States becomes a customer of a foreign bank in a foreign country and wants his money transferred to another location, at any time the foreign bank could also debit his agent's US account and transfer it. As such, practically no currency crosses national borders.

The U.S. government was initially unable to seize funds in correspondent accounts held by foreign banks because foreign banks were protected as "innocent owners" by U.S. foreclosure laws. Foreign banks can therefore avoid confiscation if they can show that there is no evidence that the deposited funds did not originate from a crime. As a result, telecommunications accounts in foreign banks in the United States are often misused by criminals to hold money from crimes.[16] However, this is no longer the case after 18 USC 981(k) entered into force.

[15] Stefan D. Cassella (2), "*Recovering the Proceeds of Crime from the Correspondent Account of a Foreign Bank*", 9(4) Journal of Money Laundering Control, 2006, p. 402.
[16] *Ibid*, p. 403.

After the enactment of this regulation, the U.S. government will be able to seize any required amount directly from the correspondent accounts of foreign banks if it provides accurate and compelling evidence. In addition, the foreign bank does not have the right or the ability to file a complaint only for the depositor who is also the perpetrator of the crime. Foreign banks, if correctly and convincingly proven in court, have the right to withdraw the same amount from the criminal depositor's account in exchange for funds seized by the U.S. government from the correspondent's account.[17]

The successful use of civil forfeiture measures in developed countries could be an impetus for Indonesia. Indonesia can apply this procedure because it will facilitate the trial and search for the assets of the corrupt. As seen so far, prosecutors often have difficulty proving corruption cases due to the high level of evidence used in criminal cases.

Moreover, in punishing corrupt people, they often fall ill, go missing, or die, which can hinder or slow down the judicial process. This can be minimized by *civil forfeiture*, as the subject of the seizure is the property, not the bribe. Therefore, as previously stated, Spoiler's illness, disappearance, or death is not a bar to legal proceedings. Moreover, given the globalization of crime, it would be beneficial to prosecute criminal proceeds, especially corruption proceeds, that are transferred abroad as part of asset *recovery.*

At least there are some downsides caused by corruption in multiple sectors. In politics, corruption undermines democracy and *good governance* by subverting formal processes. Corruption in general elections undermines the accountability and representativeness of policy-making. Corruption in the courts undermines legal certainty, and corruption in state administration leads to the emergence of different services, which tend to be unfair. Corruption generally undermines the capacity of government agencies. This is because procedures are ignored, existing resources are manipulated, and officials are not appointed or promoted on the basis of their merits. As such, corruption undermines the legitimacy of governments, hinders infrastructure

[17] *Ibid*, p. 404-405.

development, puts pressure on finances, and destroys democratic values such as trust and tolerance.[18]

Peter Eigen, President of Transparency International, once said:[19]

> Political corruption destroys hopes for prosperity and stability in developing countries and undermines the global economy. This political corruption sucks up the capital budget so it should be devoted to public service facilities that are very important to the people. The looting of public service facilities drives people to despair, leading to conflict and violence.

The United Nations Office on Drugs and Crime and the *World Bank* launched the *Stolen Asset Recovery Initiative* in 2007. Its main purpose is to provide *technical* dan *financial assistance* to strengthen the institutional capacity of national institutions in developing countries to recover stolen assets.[20]

More specifically, this initiative has five objectives, namely: [21]

1. First, support capacity building for responding to and requesting international *mutual legal assistance*.
2. Second, support the adoption and enforcement of forfeiture regulations, including impunity or innocence forfeiture laws.
3. Third, it contributes to increasing the transparency and accountability of public financial management systems.
4. Fourth, support the establishment and strengthening of national anti-corruption institutions.
5. Fifth: Assistance in the monitoring of returned funds (monitoring), if requested by the country concerned.

The initiative also provides guidelines against theft of public property, where at least three factors must be taken into account in response, namely: [22]

1. First, making sure there will be no place to store the proceeds of crime will be a very significant contributor, increasing the cost of high-level corruption.
2. Second, the fight against corruption in developing countries has the same responsibilities as in developed countries. One of the sources of corruption in developing countries is bribery, collusion, and other

[18] Phylis Dinino dan Sahr Jon Kpundeh, *A Handbook of Fighting Corruption*, *Center for Democracy and Governance*, (Washington D.C, 1999), p. 5.

[19] Tempo 12 December 2004, p. 68.

[20] Lihat United Nation, *Launch of Asset Recovery Initiative*, 17 September 2007 (http://go.worldbank.org/U2ZCWCDKR0) diakses tanggal 20 June 2022.

[21] *Ibid*.

[22] *Ibid*.

illegal income from offices or individuals in developed countries. Related funds are always attached to developed countries.

3. Third, stopping the flow of corrupt money from developing countries and recovering what has been stolen requires cooperation between countries.

Without support and cooperation between countries, the stolen money will continue to flow from poor countries and recovery can be difficult, time-consuming, and expensive.

B. Prospects for the enforcement of *Civil Forfeiture* judgments in Indonesia

From a civil law perspective, specifically the principles of the Civil Procedure Code considering the experience of different countries, for example in Ontario, with regard to civil lawsuits in civil cases, corruption cases are conceptualized as *Civil Forfeiture* that is specifically regulated, both outside of the business in general and criminal law specifically, as well as outside the law. Civil forfeiture as a special law of civil procedure, including the crime of corruption, is governed by the *Civil Remedies Act*. According to this experience, and to harmonize with UNCAC, it should be codified in a special law. Likewise, in the US, special provisions govern *Federal Forfeiture Law*, while in Australia/New Zealand it specifically covers the *Proceeds of Crime Act* 2002. In Ireland, it is specifically regulated in *the Proceeds of Crime Act* 1996, while in the UK it is governed by *The United Kingdom's Proceeds of Crime Act* 2002 and as amended by *The Serious Organized Crime and Police Act 2005*.[23]

This particular arrangement is important for three main reasons:

1. Harmonization of the PTPK Law and the Anti-Corruption Convention in relation to the ratification of the Anti-Corruption Convention.
2. The rules of the Code of Civil Law or known as BW (*Burgelijk Wetboek)* and HIR regarding liability and civil actions are not related to the use of corruption offenses.
3. The principle of criminal law is that a person not guilty or convicted shows no wrongdoing or guilt.

[23] Ministry of the Attorney General, *Civil Forfeiture in Ontario*, *An Update on the Civil Remedies Act*, 2001, Ministry of the Attorney General, 2007, Ontario. http://www.thenewspaper.com/rlc/docs/2007/ontarioag-size.pdf, accessed on 20 June 2022.

Harmonization of the Anti-Corruption Crimes Act with UNCAC has been sought in relation to civil proceedings, in particular, those that can be used as grounds provided for in Articles 32, 33, 34, and 38C of the Anti-Corruption Crimes Act is required. These rules do not involve the reversal of the burden of proof as is the case with civil forfeitures in other countries. This is particularly emphasized, but not limited to the case of illicit enrichment by civil officials/servants, in the sense that the plausible and unexplained wealth of civil servants increase significantly in relation to their statutory income.

BW actually makes it possible to articulate responsibilities in the form of "inverted burden of proof" and "risk liability". Those two things are:

1. The victim's position can be strengthened by maintaining the following preconditions: illegality and guilt, alteration of the usual allocation of the burden of proof (criminal liability with reversal of the burden of proof), and perpetuation. Advantageous relationship between victim and victim. interests of victims. Under normal circumstances, if the victim must prove that the perpetrator committed an illegal act, this is a violation of the law, and to show that the perpetrator did not violate the law, these assumptions and suspicions must be denied.[24]
2. Liability for damages may also be strengthened under the following conditions: Illegal and Error (Risk Liability). A distinction can be made between the pure exclusion of (narrowly) error on the one hand and the exclusion of illegality and error as a prerequisite for liability on the other. The first example is article 6.3.6 of the BW draft of the New Netherlands. Very young children and lunatics, while certainly innocent, can be held accountable for misconduct in certain circumstances. A second example is employer liability for misconduct by subordinates. (See Article 1367 Section 3 of BW).[25]

For civil proceedings for criminal acts of corruption, it is a matter of increasing the liability to be at fault by reversing the burden of proof as

[24] J.H. Nieuwenhuis, translate by Djasadin Saragih, *Pokok-pokok Hukum Perikatan (Principles of the Law of the Covenant)* (Surabaya: Without Publisher, 1985), p. 135.
[25] *Ibid*, p. 74.

provided for in Article 1367 paragraph (2) jo. Paragraph (5) BW. For example, in this case, grandchild A, three years old, broke a neighbours' window, B. A is only liable to compensate B for damage if A does not fulfill their "good parent" obligation and does not allow caused by children and not harm a third party (breaking the law) moreover, they can be reprimanded for failing their mission (error). The form of liability here is no different from the first example. However, B does not need to prove that A does not take adequate care of the child. On the other hand, in order to avoid responsibility, A must prove that they are good enough to take care of the child.[26]

If this provision is applied in corruption cases, only the conditions under which Articles 32, 33, and 34 of the Law on Elimination of Corruption Crimes can be applied. The argument can be made that under the conditions of entry into force of Articles 32, 33, and 34 of the Law on Elimination of Corruption, the prosecutor did not (Article 32) or not (Articles 33 and 34) succeed in proving the guilt and guilt of the accused. The problem becomes difficult, especially with regard to the provisions of Article 32 of the Law on Elimination of Corruption because of its illegal nature in the material sense which was declared by the Constitutional Court to be contrary to the 1945 Constitution.

On the other hand, formal illegality cannot be proven by the public prosecutor's office, leading to the release of the defendant. The requirements regulated by Articles 33 and 34 of the Anti-Corruption Act continue to be available for litigation with the cancellation of the burden of proof. The heirs of the deceased suspect or accused not only acted without breaking the law or committing any "mistakes", but also made every effort to avoid harming the state.

In any event, BW's rules regarding the possibility of overriding the burden of proof require an extension to apply in cases of state financial losses related to corruption offense cases. Absent special rules, reversal of the burden of proof precludes the possibility of successful civil litigation, especially regarding illicit/illegal enrichment. The only person who can prove the source of the

[26] *Ibid*, p. 136.

assets is inconsistent with his or her lawful income, namely the defendant himself, this is possible if the law provides for the reversal of the probate obligation.

At first glance, civil forfeiture tools are similar to civil actions under anti-corruption law, but there are differences between the two. Civil Efforts under the Anti-Corruption Act use ordinary civil rules where court proceedings are still governed by formal or ordinary civil rules. In the case of civil forfeiture, various civil law provisions apply. B. Reversal of Burden of Proof. Civil forfeiture has nothing to do with criminals, it treats assets as litigants. These differences produce different effects.

The civil lawsuits included in the Corruption Abolition Act placed the burden on prosecutors as public prosecutors to prove "pollution factors." Civil forfeiture, on the other hand, adopts the principle of shifting the burden of proof if the dissenting party provides evidence that the assets accused are free of corruption. Therefore, it is sufficient for the prosecutor to prove allegations that the accused property is related to a criminal act of corruption.[27]

Given the increasing quantity and quality of corruption cases in Indonesia, one way to combat corruption is to use civil forfeiture tools to facilitate the seizure and expropriation of the assets of corrupt criminals through private channels. So far, Indonesia has tended to prioritize resolving criminal assets, focusing more on punishing perpetrators of criminal acts of corruption than on redressing the government's financial losses. In fact, criminal roots are not "strong enough" to weaken or reduce the number or incidence of corruption. This is as Marwan Effendy stated: [28]

> Corruption seems to be inexhaustible in Indonesia, and in fact, its development continues to increase year by year, both in terms of the number of cases and the extent and quality of the damage caused to the state, as the fighting spreads. It seems more structured and systematized, and its reach permeates all areas of people's lives and transcends borders.

[27] Suhadibroto, *Instrumen Perdata untuk Mengembalikan Kerugian negara Dalam* korupsi (*Civil tool to recover State's losses due to corruption*), www.komisihukum.go id, in Detania, accessed on 20 June 2020, p. 34.

[28] Marwan Effendy, *Pengadilan Tindak Pidana Korupsi (Court of corruption)*, (Surabaya: Anti-corruption seminar for journalists, 2007), p. 1.

Corruption is nationally agreed not only as an "extraordinary crime" but also as a transnational crime.

To complete the understanding of civil forfeiture, there are generally some fundamental differences between civil forfeiture and criminal forfeiture, among others: [29]

1. *Civil forfeiture* has nothing to do with civil forfeiture. crime, so confiscation of property can be requested from the court more quickly. Forfeiture in criminal proceedings requires the presence of a suspect or a guilty plea. Civil forfeiture can be done as quickly as possible when there is a connection between the property and the offenses.
2. *Civil forfeiture* uses the standard of civil proof, but uses a reverse cause system, so it is easier to prove the case filed.
3. *Civil forfeiture* is a legal action against property (in rem) so that the perpetrator of the offense is no longer involved.
4. *Civil forfeiture* is useful in cases where criminal prosecution is impeded or impossible to pursue.

III. Conclusion And Recommendation

A. Conclusion

Based on the discussion, the author can conclude that a Civil forfeiture is an important tool for uncovering improper assets in various countries, especially common law countries like the United States. This concept has been developed in England since the Middle Ages. This concept is also used in Ontario, which is one of the second-largest provinces in Canada after Quebec. In Ontario, civil proceedings in corruption cases considered civil forfeiture are separately regulated outside both the General Penal Code and the Special Penal Code and Code of Civil Procedure. Civil forfeiture as a special law of civil procedure, including the crime of corruption, is governed by the Civil Procedure Act.

B. Recommendation

[29] Ario Wedatama dan Detania Sukarja, *Implementasi Instrumen Civil Forfeiture di Indonesia untuk mendukung Stolen Asset Recovery (StAR) Initiative (Deployment of civil forfeiture tools in Indonesia to support Stolen Asset Recovery (StAR) Initiative)*, (Jakarta: in the National Law Review Seminar, 2007), p. 22-23.

The successful use of civil forfeiture in developed countries can be seen as a story and applied in Indonesia as this procedure will benefit the adjudication process and allow for the seizure of assets. property of the corrupt. As seen so far, prosecutors often have difficulty proving corruption cases due to the high level of evidence used in criminal cases. Moreover, often during the punishment process, corrupt people get sick, go missing or die which can affect or delay the trial process. This can be mitigated by using civil forfeiture because the subject matter is property, not property, so the practitioner's illness, disappe e or death is not a for trial.

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