

Research Article

Formulation of Criminal Law System Policy in the Settlement of Compensation for Corruption Crimes

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Abstract: Corruption in Indonesia is not merely a moral transgression but an extraordinary economic crime that depletes national resources. The ultimate objective of corruption eradication, therefore, must be the restoration of state financial losses (*asset recovery*). However, the current formulation of the criminal law system specifically Article 18 of Law No. 31 of 1999 contains a critical policy flaw. The provision of "Subsidiary Imprisonment" (*Pidana Pengganti*) allows convicts to substitute their financial restitution obligations with a disproportionately short prison term. This mechanism inadvertently provides an economic incentive for corruptors to conceal assets and choose imprisonment, resulting in significant state revenue loss. This study aims to critique the current penal policy formulation and propose a comprehensive reformulation of the compensation system. The research employs a normative-judicial method with a statutory and conceptual approach, utilizing the "Economic Analysis of Law" theory to evaluate the efficiency of sanctions. The study argues that the penal policy must shift from a "person-based" approach (*in personam*) to an "asset-based" approach (*in rem*). It is imperative to abolish the subsidiary imprisonment option for high-value corruption and implement "Non-Conviction Based Forfeiture" to maximize the recovery of state losses. Furthermore, this policy shift requires law enforcers with high-level cognitive skills to trace complex financial trails.

Keywords: Asset Recovery; Criminal Law Policy; Non-Conviction Based Forfeiture; State Financial Loss; Subsidiary Imprisonment.

1. Introduction

Corruption in Indonesia is historically and juridically categorized as an "Extraordinary Crime." It is a systemic pathology that does not merely violate moral codes but systematically dismantles the economic foundations of the nation and violates the social and economic rights of the citizenry. Consequently, the paradigm of corruption eradication has undergone a fundamental evolution globally. The focus has shifted from the traditional "follow the suspect" approach which emphasizes physical incarceration (retributive justice) to the modern "follow the money" approach, which prioritizes Asset Recovery (restorative justice). This paradigm shift is enshrined in the United Nations Convention Against Corruption (UNCAC), which posits that the return of state assets is a fundamental principle of international law. Ideally, the primary objective of the criminal law system in corruption cases should be the complete restoration of state financial losses, placing the offender's physical punishment as a secondary objective.

A critical gap exists between this global normative ideal (*das sollen*) and the practical reality of Indonesia's penal policy (*das sein*). The current Criminal Law System Policy, embodied specifically in Article 18 of Law No. 31 of 1999 (as amended by Law No. 20 of 2001) concerning the Eradication of Corruption Crimes, contains a substantial policy flaw. While the law mandates the payment of "Replacement Money" (*Uang Pengganti*) equal to the

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amount corrupted, it simultaneously provides a legal loophole known as "Subsidiary Imprisonment" (*Pidana Pengganti*). This clause stipulates that if a convict's assets are insufficient to pay the replacement money, they shall serve an additional prison term. In judicial practice, this subsidiary imprisonment is often capped at a disproportionately low duration typically ranging from one to three years regardless of whether the stolen amount is one billion or one trillion Rupiah.

From the perspective of Economic Analysis of Law and Rational Choice Theory, this policy formulation is fundamentally defective and counter-productive. Rational Choice Theory suggests that an offender acts based on a calculation of "Cost vs. Benefit." Currently, the penal policy inadvertently lowers the "cost" of corruption. A rational corruptor will mathematically weigh the obligation to repay IDR 50 billion against the alternative of serving an extra two years in prison. Given that no legitimate profession offers an income of IDR 25 billion per year, the "rational" choice for the corruptor is to conceal their assets, plead poverty, and serve the subsidiary sentence. In this context, the subsidiary imprisonment clause functions not as a deterrent, but as a "state-sponsored discount" mechanism. It allows criminals to "buy" their stolen assets at a very cheap price paid in prison time.

This policy failure results in a phenomenon of "Double Loss" for the state. First, the state fails to recover the stolen financial assets, which are direly needed for national development and public welfare. Second, instead of receiving revenue, the state incurs additional expenditures to house, feed, and guard the convict during their extended imprisonment. Thus, the current formulation of the criminal law system is economically irrational. It transforms the victim (the state) into the financier of the perpetrator. This contradicts the very essence of justice and utility (*Zweckmassigkeit*), rendering the penal policy ineffective in dismantling the economic incentives of crime.

Urgency to reformulate this policy is driven by the sophisticated nature of modern corruption. Corruptors today utilize complex financial instruments from offshore trusts to cryptocurrencies to obscure the "beneficial ownership" of their assets. A penal policy that relies solely on traditional incarceration is obsolete against such methods. The legal system requires a radical reorientation towards "Non-Conviction Based Forfeiture" and strict civil liability, where the pursuit of assets continues beyond the prison walls.

Crucial to acknowledge that policy reformulation is only one side of the coin. The effectiveness of any criminal policy is ultimately determined by the quality of its human resources. Implementing a sophisticated asset recovery regime requires law enforcers (police, prosecutors, judges) who possess high-level cognitive capabilities. They must be able to perform "legal breakthroughs" and trace complex financial trails that are designed to deceive. This touches upon the critical need for Creative Thinking and problem-solving skills in law enforcement a competency gap that is often overlooked in legal studies but is essential for the execution of progressive legal policies.

This study aims to critically analyze the weaknesses in the formulation of the current compensation system for corruption crimes. It seeks to propose a comprehensive reformulation of the criminal law system policy, advocating for a shift from a "person-based" punitive model to an "asset-based" recovery model. By integrating legal dogmatics with economic analysis, this paper argues that the only way to effectively eradicate corruption is to impoverish the corruptor, ensuring that crime literally does not pay.

2. Preliminaries

This section constructs the theoretical architecture of the study, synthesizing the principles of criminal policy formulation, the economic rationality of crime, and the imperative of asset-based enforcement.

The Strategic Function of Criminal Law Policy (Penal Policy)

Criminal law policy is not merely the technical application of articles; it is a "rational effort" by society to control crime. Muladi and Arief (2023) define penal policy as a functionalization of criminal law to achieve the ultimate goal of social welfare (Social Defence). Within this framework, the "Formulation Stage" (legislative policy) is the most strategic phase. It is the blueprint of the entire justice system.

If the formulation contains a logical fallacy such as allowing a corruptor to substitute a billion-Rupiah debt with a short prison term the entire enforcement apparatus will fail. Hoefnagels (revisited by Sudarto, 2021) categorizes criminal policy into penal, non-penal, and mere influence. The current policy on corruption compensation suffers from a "functionality crisis" because the penal instrument (subsidiary imprisonment) fails to function as a coercive tool for restitution, turning instead into a passive "waiting room" for the offender.

The Economic Calculus of Corruption

Corruption is an economic crime par excellence. Therefore, it must be analyzed through the lens of Rational Choice Theory, pioneered by Gary Becker. This theory posits that a person commits an offense if the expected utility exceeds the utility of using their time and other resources for legal activities.

$$EU > C$$

(Expected Utility > Cost)

Wibowo (2025) applies this equation to the Indonesian context:

- a. Utility: The proceeds of corruption (e.g., IDR 100 Billion).
- b. Cost: The probability of getting caught \times (Prison Sentence + Asset Seizure).

Currently the "Asset Seizure" variable is weak due to the Subsidiary Imprisonment loophole. The law effectively places a "price cap" on the cost of corruption. Posner (2023 edition) argues in *Economic Analysis of Law* that efficient punishment for financial crimes should be a monetary fine that equals the social cost of the crime divided by the probability of detection. By allowing imprisonment to replace monetary fines at a low valuation, the current policy formulation sets the "price" of crime far below its social cost, thereby incentivizing the offense.

Shifting Paradigms

The traditional Indonesian penal code adheres to the *In Personam* principle, where asset forfeiture depends on the conviction of the person. This is increasingly obsolete. Graycar (2024) notes that global anti-corruption regimes are shifting towards Non-Conviction Based (NCB) Forfeiture, or action *In Rem* (against the thing).

The "guilt" lies with the asset, not necessarily the person. If an asset is derived from illicit enrichment, it must be forfeited regardless of whether the owner is convicted, dead, or fugitive. Prakoso (2024) emphasizes that adopting NCB Forfeiture is the only way to overcome the "Subsidiary Trap." If the state can seize assets *in rem*, the corruptor cannot choose to "pay with their body" because the assets are taken forcefully by civil law mechanisms, bypassing the criminal option of subsidiary imprisonment entirely.

The Human Dimension: Legal Culture and Professional Competence

Reforming the text of the law (*Legal Substance*) is insufficient if the apparatus executing it (*Legal Structure*) lacks the necessary mindset (*Legal Culture*). Utilizing Lawrence Friedman's Theory of Legal System, the effectiveness of the proposed "NCB Forfeiture" policy relies heavily on the Legal Culture of the enforcers specifically their professionalism and cognitive competence.

The legal culture in Indonesia is dominated by "Legal Positivism," where judges and prosecutors prioritize procedural compliance over substantive justice. To execute a complex asset recovery regime, law enforcers must shift towards "Progressive Law" (*Hukum Progresif*), acting not just as "mouthpieces of the statute" but as intelligent problem-solvers who can trace concealed assets through sophisticated financial layers.

This requirement for high-level analytical skill highlights the urgent need for educational reform within the judiciary. As evidenced in broader cognitive research by Rizaldi et al. (2025), the capacity to handle "ill-structured problems" such as unraveling complex money laundering schemes is heavily dependent on the quality of training models used. Their study indicates that specific instructional approaches (like Problem-Based Learning) are required to build the cognitive agility needed for complex tasks. In the context of penal policy, this implies that without a fundamental upgrade in the competency training of prosecutors and investigators to enhance their analytical faculties, the reformulation of the law will remain a "paper tiger" technically sound but operationally ineffective.

3. Proposed Method

Research Design: Legal Policy Evaluation

This study adopts a Juridical-Normative research design with a specific orientation towards Legal Policy Evaluation (*Evaluasi Kebijakan Hukum*). Unlike traditional dogmatic research that focuses on the coherence of norms (*law in books*), this study evaluates the "rationality" and "efficiency" of the penal policy formulation. According to Barda Nawawi Arief (2022), research on criminal law policy must extend beyond the *juridical-dogmatic* stage to the *juridical-political* stage. It aims to critique the current formulation (*ius constitutum*) and propose a reformulation (*ius constituendum*) that better achieves the goal of asset recovery.

Methodological Approaches

To dissect the inefficiencies of the current system, this study employs three specific approaches:

- a. Statute Approach (*Pendekatan Perundang-undangan*): Analyzing Article 18 of Law No. 31 of 1999 concerning Corruption Eradication. The analysis focuses on the "Substitute Clause" (*Subsider*) to identify the normative loophole that permits the evasion of restitution.
- b. Conceptual Approach (*Pendekatan Konseptual*): Examining the doctrines of Strict Liability and Non-Conviction Based (NCB) Forfeiture. This approach is used to construct a theoretical basis for separating civil liability from criminal culpability in corruption cases.
- c. Economic Analysis of Law Approach: Utilizing the framework of Richard Posner, this approach treats legal sanctions as "prices." The study analyzes whether the "price" of subsidiary imprisonment is set too low relative to the "social cost" of the corruption, thereby testing the economic rationality of the current policy (Santoso, 2024).

Sources of Legal Materials

The study relies on secondary data, categorized into:

- a. Primary Legal Materials: The 1945 Constitution, the Corruption Law (UU Tipikor), the Money Laundering Law (UU TPPU), and the Criminal Code (KUHP).
- b. Secondary Legal Materials: Recent literature (2023–2025) on asset recovery, penal reform, and economic analysis of crime. Disemadi (2022) emphasizes that secondary materials are crucial in policy research to provide comparative perspectives and theoretical validation.
- c. Tertiary Legal Materials: Legal dictionaries and encyclopedias to clarify terms such as *In Rem* and *In Personam*.

Technique of Analysis

The collected data is analyzed qualitatively using a Teleological and Functional interpretation method.

- a. Teleological Analysis: Interpreting the law based on its ultimate purpose (asset recovery). If a rule (subsidiary imprisonment) hinders this purpose, it is deemed defective.
- b. Means-Ends Analysis: Evaluating whether the "means" (imprisonment) effectively achieve the "ends" (returning state losses). The conclusion is drawn deductively, moving from the general principles of *Restorative Justice* to the specific recommendation of abolishing subsidiary imprisonment.

4. Results and Discussion

This section critically evaluates the structural failure of the current penal policy and proposes a paradigm shift towards an asset-focused recovery system, underpinned by strengthened human resource competency.

A Criminogenic Policy Formulation

The fundamental flaw in the formulation of Indonesia's corruption eradication policy lies in Article 18 of Law No. 31 of 1999. By allowing "Subsidiary Imprisonment" (*Pidana Pengganti*) as an alternative to paying "Replacement Money" (*Uang Pengganti*), the state effectively introduces a "price ceiling" on the cost of corruption. This formulation is economically irrational and counter-productive. From the perspective of Rational Choice Theory, a potential offender calculates the net benefit of a crime by subtracting the expected cost ($NB = \text{Benefit} - \text{Cost}$).

Wibowo (2025) reveals a startling anomaly in current judicial practice: corruptors who embezzle hundreds of billions of Rupiah are frequently sentenced to subsidiary imprisonment ranging only from 1 to 3 years.

Mathematically consider a corruptor who steals IDR 50 billion. If they choose to serve a 2-year subsidiary sentence instead of repaying the money, the state implicitly values their time at IDR 25 billion per year. This valuation is absurdly high far exceeding the legitimate earning potential of any CEO or high-ranking official.

Atmasmita (2024) argues that this policy formulation transforms the penal system into a "transactional" mechanism. It effectively grants the criminal a "state-sponsored discount," allowing them to "launder" their stolen assets by serving a relatively short prison term. Consequently, this policy is criminogenic it creates an incentive structure that encourages the concealment of assets rather than their return. The corruptor calculates that "hiding the money and serving time" is the economically superior strategy. Thus, the policy fails to achieve General Deterrence because it does not result in the impoverishment of the offender, leading to a "Double Loss" for the state: the permanent loss of the stolen assets and the fiscal burden of financing the convict's incarceration.

The Imperative of Non-Conviction Based (NCB) Forfeiture

To dismantle these economic incentives, the penal policy must undergo a radical shift from a "person-based" approach (In Personam) to an "asset-based" approach (In Rem). This necessitates the integration of the Non-Conviction Based (NCB) Forfeiture regime into the national legal system.

Currently, asset confiscation relies on a criminal conviction. If the suspect dies, flees, or is acquitted on technical grounds, the assets often cannot be touched. Prakoso and Widyopramono (2024) argue that NCB Forfeiture solves this by allowing the state to sue the asset itself. The legal logic is that the asset is "tainted" by illegality. This mechanism offers three critical advantages for legal certainty and state revenue:

- a. **Overcoming the Standard of Proof:** While criminal conviction requires proof "beyond a reasonable doubt," NCB forfeiture typically operates on the civil standard of "balance of probabilities" (*preponderance of evidence*).
- b. **Reversal of Burden of Proof:** In NCB proceedings, once the prosecutor demonstrates a reasonable suspicion that the assets are disproportionate to the owner's known income (Illicit Enrichment), the burden shifts to the asset owner to prove the legitimate origin of the wealth.
- c. **Strict Liability:** It treats the recovery of state losses as a civil debt that is absolute and inheritable.

By implementing NCB Forfeiture, the "loophole" of subsidiary imprisonment is strictly closed. The state forcibly seizes the assets through civil procedures, leaving no option for the corruptor to "pay with their body."

Cognitive Gap in Asset Tracing

Formulating a progressive policy is the first step; executing it requires a different caliber of human resources. Modern corruption involves sophisticated concealment methods—such as layering through shell companies, offshore trusts, and crypto-assets. Tracing these assets is an "ill-structured problem" a complex scenario with ambiguous data and no linear solution path.

This highlights a critical "Competency Gap" in law enforcement. Currently, legal education and training for prosecutors and investigators heavily emphasize "dogmatic knowledge" (memorizing statutes and procedures). However, executing an NCB Forfeiture regime requires high-level Analytical and Creative Thinking skills to connect disparate financial data points and construct a flow-of-funds analysis.

Empirical findings from cognitive science provide a crucial roadmap for legal training reform. Rizaldi et al. (2025), in their research on instructional models, demonstrated that the ability to solve complex, ill-structured problems is not an innate talent but a skill developed through rigorous Problem-Based Learning. Their study indicates that individuals trained to actively deconstruct problems and synthesize information exhibit significantly higher cognitive flexibility and creative thinking compared to those trained with traditional "Direct Instruction" methods.

Applying this scientific insight to the legal sector: The Attorney General's Office and the Judiciary must overhaul their training curriculum. The "Direct Instruction" method lecturing on articles of the law is insufficient for the complex task of asset recovery. Training must shift to Problem-Based Learning, using real-world financial simulations to cultivate the

"financial intelligence" and "creative problem-solving" capabilities of enforcers. Only by equipping law enforcers with the mental agility to outsmart the sophisticated financial schemes of modern corruptors can the new penal policy be effectively implemented. Without this cognitive upgrade, the sophisticated legal instrument of NCB Forfeiture will remain a blunt tool in the hands of unskilled executors.

5. Conclusions

The study concludes that the current penal policy is economically irrational, as the subsidiary imprisonment clause creates a perverse incentive for asset concealment. To maximize the recovery of state losses, the legal system must be reformulated to abolish this loophole and fully implement Non-Conviction Based (NCB) Forfeiture. Crucially, the execution of this asset-based regime requires a paradigm shift in law enforcement competency. Institutional training must move beyond dogmatic instruction to cultivate creative thinking and analytical problem-solving skills, ensuring that enforcers possess the cognitive agility required to dismantle sophisticated financial schemes and trace hidden assets effectively.

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