

Non Conviction Base (NCB) Asset Forfeiture Regarding the Recovery of Assets from the Proceeds of Corruption Crimes

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ABSTRACT

Non-Conviction Based Asset Forfeiture as a new formulation in efforts to return assets resulting from corruption crimes can be adopted into the Indonesian national legal system as an effort to restore state losses to the maximum. The state losses that have been returned are still not comparable to the state losses that actually exist due to corruption. The research method used is normative juridical law or library legal research (search library), by analyzing literature or secondary data relevant to the topic. This research is descriptive analytical, the data obtained and processed and analyzed to provide a comprehensive picture of the legal regulations on Non Conviction Base (NCB) Asset Forfeiture against the Asset Confiscation Bill with data collection methods through document studies. The results of the study show that asset confiscation without criminalization or Non-Conviction Based Asset Forfeiture is a major breakthrough regarding the return of state wealth (asset recovery) issued by UNCAC in 2003. The concept NCB Asset Forfeiture in essence is the seizure of assets from the perpetrator of a crime without any prior legal process. So in this case, the seizure is carried out in a civil manner (in brake) and is aimed at the perpetrator's assets without going through a criminal process.

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1. INTRODUCTION

As a country based on law (rechtstaat) (Lubis, Lubis, and Zulyadi 2024) and not based on mere power (machtsstaat) then law enforcement efforts adhere to the principles of the rule of law, namely: the supremacy of law, the principle of equality before the law and the guarantee of human rights by law and court decisions. In the context of the teachings of the welfare state, the government is obliged to synergize law enforcement efforts based on the values of justice with efforts to achieve national goals to realize general welfare for the community. (Ananda Kurniawan 2019)

Looking at the reality of what has been caused by criminal acts of corruption, such as the APBD

corruption case involving Hendy Boedoro, the former regent of Kendal who was sentenced to prison by the Corruption Court at the Supreme Court cassation level for seven years along with a fine and compensation of 13.121 billion. The Supreme Court cassation decision was made in June 2008, but until 2010, Hendy Boedoro had not paid the compensation as stated in the Supreme Court cassation decision. Ironically, in May 2010 Hendy Boedoro's wife, Widya Kandi Susanti officially participated in the Kendal regional election and won. In fact, to become a regent candidate, a lot of money is needed. As stated by the former Semarang mayoral candidate, Mahfud Ali, he had spent at least around Rp. 5 billion to participate in the regional election contest. ("APBD Corruption; Kendal Regent on Trial, Allegedly Received Rp 24.3 Billion" 2007)

In addition, ICW recorded 579 corruption cases in Indonesia throughout 2022. This figure increased by 8.63% from the previous year which recorded 533 cases. Of these cases, 1,396 people have been named as corruption suspects domestically. This number also increased by 19.01% compared to 2021, with 1,173 suspects. In detail, the Attorney General's Office (Kejagung) has handled 405 corruption cases in 2022. The Attorney General's Office has also named 909 individuals as corruption suspects in 2021. The National Police handled 138 corruption cases involving 307 suspects. Meanwhile, the KPK handled 36 cases involving 150 suspects. (Maharani et al. 2025)

Meanwhile, the village sector was the location of the highest corruption in 2022, with a total of 155 cases. This figure represents 26.77% of all corruption cases followed up by law enforcement in 2022. Corruption was also rampant in the utilities sector in 2022, with 88 cases outside the village. After that, the government sector has recorded 54 corruption cases throughout 2021. There were 40 incidents of corruption in the education sector in 2022. Furthermore, there were 35 cases of corruption in the natural resources and banking sectors. If examined further, data from Transparency International (TI) shows that Indonesia's Corruption Perception Index (CPI) reached a score of 34 points from a range of 0-100 points in 2023. Where there was no increase in the score in 2023 compared to the previous year. Indonesia scored 34 and its position dropped from 110th to 115th. (Lisa Ira, Yeni Lisa Sitorus, Lidya Erdawati, Veronika Laurensia Yolanda Br Nababan 2024)

Based on the above, extraordinary efforts are needed in terms of handling and eradicating it. (Harahap et al. 2023) One of the efforts that can prevent Indonesia from going downhill due to corrupt practices is by making efforts to return assets resulting from corruption. For this reason, the Indonesian government has made several efforts to carry out recovery in order to be free from the downturn that occurs as a result of corrupt practices. Several efforts by the Indonesian government have been to ratify the UNCAC in Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption on April 18, 2006, and to create a Law on Mutual Legal Assistance in the Criminal Field (MLA Law), where one of the basic principles is the principle of reciprocity. (Webb 2010)

In UNCAC 2003, the confiscation of assets of perpetrators of corruption crimes can be carried out through criminal and civil channels. The process of confiscating the perpetrator's assets through criminal channels through 4 (four) stages, namely: first, asset tracking with the aim of identifying, proof of ownership, storage location of assets related to the crime committed. Second, freezing or confiscation of assets according to Chapter I Article 2 letter (f) UNCAC 2003 where it is temporarily prohibited to transfer, convert, dispose or move assets or temporarily bear the burden and responsibility to manage and maintain and supervise assets based on a court order or a decision from another competent authority.

Third, Asset confiscation according to Chapter I Article 2 letter (g) UNCAC 2003 is interpreted as the permanent revocation of assets based on a court decision or other competent authority. Fourth, the return and submission of assets to the victim country. Furthermore, UNCAC 2003 also regulates that the confiscation of assets of perpetrators of corruption crimes can be through direct return through a court process based on the "negotiation plea" or "plea bargaining system", and through indirect return, namely through a confiscation process based on a court decision (Articles 53 to 57 UNCAC). (Syarafi, nd)

Of course, the existence of this international instrument is very important, as evidence of

international cooperation in crime prevention and criminal justice. Ratification of the international instrument is very important considering the increasing concern in Indonesia and in countries around the world regarding the increasing and growing crime both in quantity and quality.(Mhd Ansor Lubis 2024)The development of crime today has even become transnational, crossing national borders and showing the existence of criminal cooperation that is both regional and international. This seems to be a by-product of the development of modern information and communication technology facilities.(Hamdi 2018)

Based on the starting point of UNCAC as an international instrument in the effort to eradicate corruption which is increasingly multidimensional and complex. At the starting point, UNCAC provides a reference basis in Article 54(1) UNCAC, which requires all State Parties to consider confiscation of the proceeds of crime without going through criminal penalties. In this case, UNCAC does not focus on one legal tradition that has been in effect or suggest that fundamental differences can hinder its implementation. With this, UNCAC proposes confiscation of non-criminal assets as a tool for all jurisdictions to consider in eradicating corruption, as a tool that transcends differences between systems. Of course, based on its validity in the ratification carried out by countries that participate in the UNCAC convention, the UN as the organizer hereby continues the disposition in the form of making guidelines, standards and model treaties, which include more specific substances in efforts to eradicate corruption and efforts to restore the impacts caused by corruption.(Rustamaji, Santoso, and Kurniawan 2024)

One of the breakthroughs that emerged was the concept of Non Conviction Based (NCB) or what is known as the concept of asset confiscation. In Indonesia, the regulation regarding asset confiscation has been regulated in Article 10 of the Criminal Code, Article 3 and Article 18 of Law Number 31 of 1999 in conjunction with Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption (UU TIPIKOR).(Hafid 2021)There is a fundamental difference that must be understood between the concept of Non-Conviction Based (NCB) and the current asset confiscation, namely that asset confiscation as regulated in the Criminal Code (KUHP) and the Corruption Act (TIPIKOR) is an additional punishment imposed through a judge's decision after the trial process (court process).

Assets seized by criminals can be returned by the Non-Conviction Based (NCB) legal mechanism as an effort to restore state losses from criminal cases or accelerate the trial process through reverse evidence against assets. The result is a decision to implement the confiscation of the assets.(, Purwadi, and , 2018)The biggest possibility to reduce corruption in Indonesia is to make corruptors poor. When interacting with other people, no one wants to live in poverty. Certainly, people who are corrupt and used to enjoying life will be afraid of living in poverty.

2. METHODS

Legal research is conducted to find solutions to legal issues arising from the topics discussed in this paper. The research method used is normative juridical. Normative juridical legal research, or library legal research, is conducted by analyzing literature or secondary data relevant to the research topic. (Mahmud, 2005). According to Soerjono Soekanto, normative legal research consists of: legal principles; legal systematics; research on the level of legal synchronization; on legal history; comparative law.

Of the five types of normative legal research that will be used in this study are research on legal principles and comparative legal research. (Sukanto, 1990). This type of research examines legal norms and principles on asset confiscation through the Non-Conviction Based (NCB) mechanism as an effort to return state losses from corruption cases by referring to Law Number 21 of 2001 concerning Amendments to Law Number 30 of 1999 concerning the Eradication of Corruption.

3. RESULTS AND DISCUSSION

A. *Non-Conviction Based (NCB)*

Non-Conviction Based (NCB) Asset Forfeiture is an important tool in asset recovery. In some jurisdictions, Non-Conviction Based Asset Forfeiture is also referred to as “civil forfeiture”, “in rem forfeiture”, or “objective forfeiture”, is an action against the asset itself. (Saputra 2017) NCB Asset Forfeiture is a separate action from any criminal proceeding, and requires proof that a property is “tainted” (tainted) by a crime. As is well known, in general, a crime must be established on the balance of probabilities standard of proof. This eases the burden on the government (authority) to act and means that it is possible to obtain a fine if there is sufficient evidence to support a criminal conviction. Because the action is not against the individual defendant, but against the property, the property owner is the third party who has the right to retain the property that is being forfeited. (Dhiavella and Naibaho 2024)

NCB Asset forfeiture (NCB) is the seizure and takeover of an asset through an in rem lawsuit or lawsuit against the asset. The concept of civil forfeiture is based on the 'taint doctrine' where a crime is considered to "taint" an asset that is used or is the result of the crime. Although it has the same purpose, namely to seize and take over assets resulting from crime, NCB is different from Criminal Forfeiture which uses an in personam lawsuit (lawsuit against a person) to seize and take over an asset.

In countries that adopt the common law system, NCB as an instrument to seize and take assets originating from, related to or resulting from crimes is commonly practiced. The roots of the NCB principle were first found in the Middle Ages in England when the British monarchy confiscated goods considered to be instruments of death or often referred to as Deodand. (Rozah and Nashriana 2023) The advent of industrialization in England then forced parliament to abolish deodand after increasing accidents that resulted in many assets being seized. Although in practice NCB is often considered oppressive and unfair, the first Congress of the United States maintained its use in shipping law by passing regulations that authorized the federal government to seize ships. The Supreme Court later also supported the use of NCB in America in the *Palmyra* case which occurred in 1827 where the court rejected the argument of the shipowner's lawyer who said that the seizure and takeover of his ship was illegal because there was no verdict stating that the owner was guilty. (Muntahar, Ablisar, and Bariah 2021)

As is known, NCB is a lawsuit against assets (in rem), while Criminal Forfeiture is a lawsuit against people (in personam). This certainly creates differences in evidence in court. In criminal forfeiture, the public prosecutor must prove that the elements of a crime such as personal culpability and mens rea of a defendant have been fulfilled before being able to seize assets from the defendant. Because it is criminal in nature, Criminal Forfeiture also requires the prosecutor to prove this with a standard beyond reasonable doubt. On the other hand, because of its civil nature, NCB does not require the prosecutor to prove the elements and fault of the person who committed the crime (personal culpability). (Rachmarani, Afriana, and Mantili 2024) The prosecutor only needs to prove that there is probable cause or suspicion that the assets being sued are related to a crime. Here the prosecutor only needs to prove by the preponderance of evidence standard that a crime has occurred and an asset has been produced, used or involved in the crime. The owner of the asset must then prove by the same standard that the assets being sued are not the result of, used or related to the crime being sued. (Sukarno, 2018)

However, it should be underlined that the proof of the asset owner in NCB is only related to the relationship between a crime and the assets being prosecuted or in other words the owner only needs to prove that "the asset is innocent". If the owner cannot prove that "the asset is innocent" then the asset is confiscated for the state. So in NCB the asset owner does not have to prove that he is innocent or not involved in a crime. The relationship between the alleged crime and the owner's involvement in the crime is not relevant in the trial and only the relationship between the owner and the assets being prosecuted is the focus of the trial. To make it easier to understand how NCB works, it can be

seen from the following case illustration:

"For example, a criminal rents a car from a car rental company and commits a robbery at a bank. The government then carries out an NCB on the car to be confiscated and taken over by the state. In court, the government only needs to prove that there is an alleged connection between the robbery and the car in accordance with civil evidence standards." (Nasutyo 2009)

Based on the explanation above, it can be seen that NCB can be a very useful tool to seize and take over assets from corruptors in Indonesia. At least there are several uses of NCB to assist law enforcement in the process of returning corruptors' assets.

- a. *First*, NCB is not related to a crime so that confiscation can be requested more quickly from the court than Criminal Forfeiture. Unlike confiscation in criminal proceedings which require a suspect or a guilty verdict, NCB confiscation can be carried out as quickly as possible once the government suspects a connection between an asset and a crime. In the Indonesian context, the speed of confiscation is essential in the stolen asset recovery process. As previously stated, corruptors often move their assets abroad to make it difficult for Indonesian law enforcement to confiscate and take them once there is an indication that they will be investigated for involvement in a crime.
- b. *Second*, NCB uses civil evidentiary standards. This can facilitate stolen asset recovery efforts in Indonesia because civil evidentiary standards are relatively lighter to meet than criminal evidentiary standards. In addition, NCB also adopts a reverse evidentiary system, thus lightening the burden on the government to provide evidence for the lawsuits filed.
- c. *Third*, NCB is a lawsuit process against assets (in rem). This means that NCB only deals with assets that are suspected of originating, being used or having a relationship with a crime. The perpetrator of the crime itself is not relevant here so that the escape, disappearance, death of a corruptor or even the existence of an acquittal for the corruptor is not a problem in NCB. The trial can continue and is not disturbed by the condition or status of the corruptor. Seeing how often corruptors escape or become ill during the corruption trial process in Indonesia, NCB is a very profitable alternative for the process of returning corruptors' assets.
- d. *Fourth*, NCB is very useful for cases where criminal prosecution is hampered or impossible to carry out. In efforts to eradicate corruption, the government often faces corruptors who are politically well-connected so that law enforcement officers face difficulties in prosecuting them. Here NCB is very useful because law enforcement officers are facing assets from the corruptor so that the political and social costs of a criminal charge can be minimized. In addition, there are times when an asset related to a crime is unknown to its owner or perpetrator. NCB is very useful in this condition, because what is being sued is the asset, not its owner. If using the criminal regime, the unowned asset will be difficult to take, because in general, confiscation in criminal law is related to the perpetrator of the crime. So if within a certain period of time after the confiscation is carried out no other party objects, the state can immediately seize the unowned asset.

Furthermore, it is important to realize that the application of NCB in the confiscation of assets resulting from criminal acts is a way out to overcome the stagnation of confiscation of assets resulting from criminal acts considering the provisions in the Criminal Procedure Code that an asset can only be confiscated if the public prosecutor can prove the defendant's guilt and the asset in question is the result or means of a crime (confiscation is very dependent on whether or not a defendant is proven guilty). Confiscation of assets resulting from criminal acts based on the Criminal Procedure Code system cannot be carried out if the defendant cannot be present at the trial, either because he died, ran away, his whereabouts are unknown or is permanently ill. Thus, legal prosecution of these assets cannot be carried out, except by using the NCB instrument or provisions.

2. Implementation of the Concept Non-Conviction Based Asset Forfeiture in efforts to return assets resulting from criminal acts of corruption in Indonesia.

The concept of Non-Conviction Based Asset Forfeiture is a legal breakthrough pioneered by Chapter V of the UNCAC. Countries that ratify the UNCAC are required to make efforts to enable the

return of assets resulting from the crime by seeking national laws to order competent law enforcers to return assets based on national laws in accordance with Article 53 in conjunction with Article 54 of the UNCAC. Non-Conviction Based Asset Forfeiture is guided by Stolen Asset Recovery initiated by the United Nations. The World Bank in 2007 launched a program called the Stolen Assets Recovery (StaR) Initiative. The World Bank has initiated this program to facilitate the technical realm which also produces several guidelines that are also outlined in A Good Practices Guide for Non-Conviction Based Asset Forfeiture.

The concept of Non-Conviction Based Asset Forfeiture is different from the In Personam asset seizure currently known in criminal procedure law. Based on article 10 letter b of the Criminal Code, additional penalties are:

- a. Revocation of certain rights;
- b. confiscation of certain goods;
- c. announcement of the judge's decision.

Non-Conviction Based Asset Forfeiture is a legal mechanism that allows state assets that have been taken by criminals to be re-confiscated. This concept is part of the United Nations Convention Against Corruption, 2003. Non-Conviction Based Asset Forfeiture is a way to confiscate assets resulting from crime. In the common law system, there are two types of asset confiscation that are developing, namely: (Sudarto, 2017).

1. Forfeiture that applies based on a court decision (Ordinary common law forfeiture), and;
2. Forfeiture that applies based on the law (Statutory forfeiture).

Ordinary common law forfeiture occurs after a court decision on a serious crime. The act of confiscation is viewed by the competent authorities as a consequence of the crime. Ordinary common law forfeiture becomes confiscation in persona, so that confiscation can be carried out on all real and personal property owned by the convict after being decided by a court decision. While statutory forfeiture is the opposite confiscation, namely it is enforced without the need for a court decision, but is only limited to property used in committing a crime. Statutory forfeiture is called civil confiscation in rem. The concept is that the guilty party is the property, not the person.

According to Fletcher N. Baldwin, Jr., the civil forfeiture model is significant for the return of corruption proceeds in Indonesia because civil forfeiture uses a reversal of the burden of proof and can confiscate more quickly after an alleged relationship between assets and criminal acts. In addition, civil forfeiture is a lawsuit against assets, not against the defendant or suspect, so that state assets can be saved even though the perpetrator has died or passed away. Asset confiscation without criminal punishment is a comprehensive confiscation mechanism, because it starts from tracing, blocking, and confiscation, as well as the trial process in court. This commitment must also be present from the court, in this case the judge, in examining and adjudicating the Non-Conviction Based Asset Forfeiture application without being influenced by the opinion that the Non-Conviction Based Asset Forfeiture process violates Human Rights.

Social justice theory has also provided a moral basis for the justification of asset restitution by the state, as Michael Levi has argued:

1. Reasons for prevention (*prophylactic*), namely to prevent perpetrators of criminal acts from having control over illegally obtained assets to commit other crimes in the future;
2. Reasons of appropriateness (*property*) namely because the perpetrator of the crime does not have proper rights to the assets obtained illegally;
3. The reason for priority/precedence is because criminal acts give the state priority to claim assets obtained illegally rather than the rights owned by the perpetrator of the crime;
4. Reason for ownership (*proprietary*) namely because the assets were obtained illegally, the state has an interest as the owner of the assets.

UNCAC also regulates Non-Conviction Based Asset Forfeiture or in rem asset confiscation or confiscation without punishment. NCBAF is very important for asset recovery when the perpetrator of the crime dies, has left the jurisdiction, is immune from investigation or prosecution, or is basically too strong to be prosecuted. NCBAF is a legal mechanism that allows state assets that have been taken

by the perpetrator of the crime to be confiscated again. Thus, the Non-Conviction Based Asset Forfeiture mechanism is an effective way to make the crime unprofitable because the perpetrator will think again about the consequences that will arise later.

The most appropriate and simple way to implement the Non-Conviction Based Asset Forfeiture mechanism is to initially block the assets suspected of being the proceeds of crime and withdraw them from economic traffic, namely through confiscation requested by the court. Furthermore, the assets are declared as tainted assets, and the court then makes an announcement through media that can be accessed and known by the public for approximately 30 days. This period of time is considered sufficient for third parties to be able to know that the assets will be confiscated by the court. The concept of Non-Conviction Based Asset Forfeiture has become a legal requirement in Indonesia because the Non-Conviction Based Asset Forfeiture mechanism is an alternative to recover state assets lost due to criminal acts related to the country's economy. In the criminalization scheme (Non-Conviction Based Asset Forfeiture), namely criminalization that is punitive in nature is set aside because the goal is to change the paradigm of "follow the suspect" to "follow the asset". There are two options in the formulation that should be included in the provisions of the Law, namely whether criminal prosecution and NCB Asset Forfeiture are carried out at the same time or whether the implementation of NCB Asset Forfeiture will be permitted if criminal prosecution is not possible.

In situations where criminal forfeiture is not possible, forfeiture of assets without conviction serves a number of legal purposes. When a suspect escapes and is never found, for example, these assets or property can also be seized from a deceased suspect. A suspect with this much power makes it impossible to conduct an investigation or bring a criminal case. Even if there are third parties who are not charged with a crime but are aware that the property is the proceeds of a crime, it is possible that the property is held by them. Although forfeiture of the proceeds of a crime is not comparable to or even greater than the property held by a third party, forfeiture of assets without conviction can be a solution to seizing property held by a third party.

There are two types of confiscation applied, namely Criminal Confiscation (Perampasan Pidana) and Confiscation of assets or assets without punishment. The basic idea behind confiscation of assets without punishment is that it should be possible to track and seize the property of people suspected of committing corruption crimes, even if the criminal is acquitted by a court decision because his actions are not proven, died before the verdict has permanent legal force, or escaped before the trial is over. Because the process of securing assets takes a long time if waiting for an *inkracht* verdict, there is no need to wait for the TPA to be proven to carry out asset confiscation. This does not mean that the process of confiscation of assets without punishment is prioritized over the judicial process; for example, before carrying out coercive efforts, summons, or searches, sufficient initial evidence must be available. He assessed that PPATK has a significant impact on asset searches, especially for layering money assets in banking.

4. CONCLUSION

Efforts to return assets have become a fundamental problem in eradicating corruption, considering that the essence of eradicating corruption is not only focused on efforts to pursue and arrest perpetrators of criminal acts, but also efforts to confiscate and seize instruments and proceeds of criminal acts based on national criminal and civil law. Confiscation of assets without criminal punishment or *Non-Conviction Based Asset Forfeiture* is a major breakthrough regarding the return of state wealth (*asset recovery*) issued by UNCAC in 2003. The concept *NCB Asset Forfeiture* in essence is the seizure of assets from the perpetrator of a crime without any prior legal process. So in this case, the seizure is carried out in a civil manner (*in brake*) and is aimed at the perpetrator's assets without going through a criminal process.

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