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## The Importance of Adopting and Adapting Non-Conviction Based Asset Forfeiture Norms in Eradicating Corruption

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### Abstract

Overcoming corruption in Indonesia, which is always growing very massively and has become entrenched, certainly requires an effective strategy. Pursuing corruptors and criminalizing them is not a good idea to eradicate corruption. Considering the trend of low sentences for corruptors in Indonesia, this does not have a deterrent effect at all. Non-Conviction Based Asset Forfeiture could be the answer to the difficulty of eradicating corruption due to the fact that it is not easy to prove corrupt actions. Focusing on assets is more important than criminalizing perpetrators. This article will discuss the urgency of adopting and adapting Non-Conviction Based Asset Forfeiture norms in eradicating corruption. This research uses normative legal research methods with a conceptual approach. The result of this research is that the implementation of the Non-Conviction Asset Forfeiture in Indonesia, apart from being implemented based on the Corruption Eradication Law, the State Attorney must be able to prove that there has been real state financial loss, the state financial loss was caused by criminal acts of corruption and there is a guarantee from the corruptor. to facilitate the implementation of confiscation of assets resulting from corruption without punishment.

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### Keywords

corruption; confiscation of assets; without sentencing

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## 1. INTRODUCTION

Corruption can occur anywhere, not only in government bureaucracy or in the judiciary but can also occur in companies, foundations, political parties, hospitals and even religious institutions. The roots of corruption are greed, opportunity, need, and disclosure (Sinaga & Gulo, 2023). This also includes Indonesia, which is a developing country. Rampant corruption in all sectors causes development to be hampered.

Corruption in Indonesia is currently becoming increasingly systematic and organized because it involves legal officials (V. patria Setyawan, 2019). The rise in news about buying and selling cases, the legal mafia, the judicial mafia, the tax mafia and case brokers, indicates that corruption has infected the law itself (Vincentius Patria Setyawan & Gregorius Widiartana, 2020). In various parts of the world,



corruption always receives more attention than other criminal acts because its impact touches various areas of life.

Placing perpetrators of criminal acts of corruption in prison (follow the suspect) turns out to be ineffective in reducing the level of corruption crimes if it is not accompanied by efforts to confiscate the proceeds of the criminal act of corruption. By allowing the perpetrator of a criminal act of corruption to continue to control the proceeds of the criminal act, it provides an opportunity for the perpetrator of the criminal act or other person who is related to the perpetrator of the criminal act to enjoy the proceeds of the criminal act and re-use the proceeds of the criminal act, or even develop the criminal act that has been committed (V. P. Setyawan & Kurniawan, 2022). In addition, confiscation of assets that applies in Indonesia so far can only be carried out if the perpetrator of the crime has been declared legally and convincingly guilty of committing a criminal act based on a court decision that has permanent legal force (inkracht) or in other words, confiscation of assets is carried out by means of a criminal decision. However, confiscation by criminal decision has experienced difficulties in its realization.

Non-Conviction Based asset forfeiture or confiscation of assets resulting from criminal acts using a mechanism without punishment. This mechanism allows confiscation of assets resulting from criminal acts in rem (to assets) and not to perpetrators of corruption (Patria Setyawan & Dwi Kurniawan, 2022). Forfeiture of Assets Without Punishment (NCB Asset Forfeiture), which is also referred to as "Civil Forfeiture", Forfeiture In Rem, or Forfeiture of Objects in some jurisdictions is an action against the assets themselves and not against an individual. This is a separate action from any criminal justice process and requires proof that the property is contaminated. In general, unlawful acts must be implemented based on the standard of evidence on a balance of probabilities. Because the action is not against an individual defendant, but rather against property, the owner of the property is a third party who has the right to defend the property.

The emergence of the NCB asset forfeiture concept was also motivated by a shift in the law enforcement paradigm from initially being oriented or prioritizing the perpetrator (follow the suspect) to being oriented towards money or losses (follow the money). This is important because criminal acts such as corruption or money laundering cause financial losses to the state and therefore the money from these criminal acts must be immediately returned to the state, and on the other hand, there are often conditions where the perpetrator cannot be tried first.

In accordance with the existence of the NCB asset forfeiture which does not depend on the criminal justice process, filing a lawsuit in rem can be done without waiting for the criminal process, but the state can immediately file a lawsuit in rem if a person's financial condition or assets are found to be suspicious or the assets are unclaimed. The judge's decision on the in rem lawsuit does not depend on the criminal decision, because once again what needs to be ascertained in the in rem lawsuit is whether or not the

existence of assets in a person is legal and not whether a person is guilty or not of committing a criminal act of corruption.

NCB asset forfeiture (seizure of assets without punishment) opens up a wide opportunity to confiscate all assets which are suspected to be the proceeds of crimes (proceeds of crimes) and other assets which are reasonably suspected to be used or have been used as instruments (instrumentalities) to commit criminal acts. This mechanism can also be used as an alternative to obtain compensation or replacement money for state losses. Therefore, even if assets are only discovered at a later date and are not included in the list of assets that can be confiscated or confiscated based on a criminal decision that includes a criminal asset confiscation mechanism, they can still be confiscated and confiscated through the NCB Asset Forfeiture mechanism. Indonesia as a state party to UNCAC is obliged to implement 36 key guidelines (stolen asset recovery guidelines/StAR) UNCAC 2003. From of the 36 key guidelines, 24 of them relate to statutory regulations (Fauzia & Hamdani, 2022).

Confiscation of assets without punishment is a legal mechanism that allows state-owned assets that have been taken by criminals to be confiscated again. NCB Asset Forfeiture is regulated in the 2003 United Nations Against Corruption (UNCAC) convention which has also been ratified by Law Number 7 of 2006 concerning Ratification of the United Nations Anti-Corruption Convention. The explanation of NCB Asset Forfeiture in UNCAC is explained in Article 54 paragraph (1) letter c UNCAC 2003.

Based on this article, UNCAC 2003 regulates the obligations of participating countries in accordance with their respective national laws, to take action to allow the confiscation of property obtained through or involved in the commission of a crime without a criminal conviction in cases where the perpetrator cannot be criminally prosecuted for reasons death, flight, illness, or absence. For the record, even though the confiscation of assets resulting from criminal acts of corruption has been carried out, this does not necessarily erase the criminal act (Tantimin, 2023).

The dissatisfaction of the international community, including Indonesia, with the rescue of state finances which is disproportionate to state financial losses and operational costs incurred in saving state finances has led to the birth of UNCAC 2003. Article 51 of UNCAC 2003 shows the spirit of the international community to pursue the assets of state parties which are in hands of corruptors or other parties illegally using confiscation of assets without punishment (NCB asset forfeiture). Therefore, it would be interesting to write a study on the adoption and adaptation of NCB asset forfeiture in eradicating corruption.

## **2. METHODS**

This research uses normative legal research methods, the approach used in this research is a conceptual approach. The legal materials used in this research are primary legal materials and

secondary legal materials. The legal material collection technique used in this research is literature study. The analysis technique used is deductive analysis.

### 3. FINDINGS AND DISCUSSION

Confiscation of assets resulting from criminal acts of corruption without punishment in Indonesia is regulated in Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption Crimes.

First, in Article 32 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, confiscation of assets resulting from criminal acts of corruption through civil lawsuits gives authority to investigators with the following conditions:

- 1) In the event that the investigator finds and is of the opinion that there is insufficient evidence for one or more elements of a criminal act of corruption, even though there has actually been a loss to the state's finances, the investigator immediately submits the case files resulting from the investigation to the State Attorney for a civil lawsuit or handed over to the injured agency to file a lawsuit.
- 2) An acquittal in a corruption case does not eliminate the right to sue for losses to state finances.

This article gives authority to investigators if they find and are of the opinion that there is insufficient evidence for one or more elements of a criminal act of corruption, even though there has actually been a financial loss to the state, then the investigator will immediately hand over the case files resulting from the investigation to the State Attorney for civil action or handed over to the injured agency to file a civil lawsuit. Even the defendant's acquittal does not eliminate the state's right to demand assets resulting from corruption which are strongly suspected to have harmed the state's finances.

Second, Article 33 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes. Investigators can also submit case files resulting from investigations to the State Attorney or hand them over to the aggrieved agency for a civil lawsuit against his heirs if the suspect dies during the investigation while there has been actual financial loss to the state.

Third, based on Article 34 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, if the defendant dies during an examination at a court hearing, while there has been real financial loss to the state, then the public prosecutor is given the authority to immediately submit a copy of the trial minutes file to the state attorney general or hand it over to the agency that suffered the loss to carry out a civil lawsuit against his heirs.

In connection with the calculation and determination of the value of state financial losses in the

Corruption Crime process, the basic framework for thinking can be seen from three approaches. First, the calculation of state financial losses in Corruption Crimes by the authorized agency using an investigative examination approach. As explained in Article 32 of Law Number 31 of 1999, what is meant by actual state financial losses is losses whose amount can be calculated based on the findings of the authorized institution or appointed accountant.

Meanwhile, based on the decision of the Constitutional Court Number: 003/PUU-IV/2006 dated July 24 2006 in the weighing dictum states that whether or not state financial losses occur must be carried out by experts in state finances, the state economy as well as experts in analyzing the relationship between a person's actions and losses. Second, determining the value of state financial losses in the investigative examination process at the authorized agency in accordance with the formal authority provided by statutory regulations, independent, objective and professional calculation procedures, appropriate presentation of the substance of the problem. Third, determining state financial losses in the Corruption Crime trial process by the trial judge.

The legal basis for implementing the mechanism for confiscating assets resulting from corruption using a non-conviction based asset forfeiture approach is regulated in Article 54 paragraph (1) letter c UNCAC which requires all States Parties to consider taking actions deemed necessary so that confiscation of assets resulting from corruption is possible. without criminal proceedings in cases where the offender cannot be prosecuted by reason of death, escape or not being found the whereabouts of the perpetrator of the crime. This approach can be applied in countries with common law or civil law legal systems.

Article 54 paragraph (1) letter (c) of UNCAC requires all Contracting States to consider confiscating assets resulting from criminal acts without resorting to punishment. In this case, UNCAC does not focus on one legal tradition that has been in force or suggests that fundamental differences could hinder its implementation. UNCAC hereby proposes non-criminal asset confiscation as a tool for all State Party jurisdictions to consider in eradicating criminal acts of corruption, as a tool that transcends differences between legal systems.

#### **4. CONCLUSION**

Non-Conviction Based Asset Forfeiture is an alternative to make the eradication of corruption more effective. Chasing the perpetrator or following the suspect is no longer relevant in the agenda for eradicating corruption. So prioritizing asset recovery is best. NCB Asset Forfeiture also prevents the loss of illegal assets resulting from corruption because they are taken away by corruptors,

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