

The Urgency of Implementing Non-Conviction Based Asset Forfeiture in Recovery of State Losses Due to Corruption

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Abstract

Following the asset is the right approach to use in eradicating corruption in this era. The trend of low verdicts for corruptors and the suboptimal recovery of assets resulting from corruption are reasons to prioritize confiscation of assets rather than criminalizing corruptors. The aim of this research is to analyze the importance of implementing Non-Conviction Based Asset Forfeiture in corruption regulations in Indonesia. The method used in writing this article is a normative legal research method with a conceptual approach. The results of this research are that the use of NCB can optimize the recovery of assets resulting from corruption because it does not depend on a complicated criminal case examination process. The defendant's fault is not a criterion for confiscating assets, but proving that the assets are illegal is the basis for confiscating assets.

Keywords: NCB, asset, corruption

Introduction

Corruption is not something new in the history of human civilization. This phenomenon has been known and been the subject of discussion even since 2000 years ago when a Prime Minister of the Indian Empire named Kautilya wrote a book entitled Arthashastra. Likewise, Dante, who seven centuries ago also wrote about corruption (bribery) as a crime. Even Shakespeare mentioned corruption as a form of crime. A famous expression in 1887 regarding corruption from the British historian, Lord Acton, namely "power tends to corrupt, absolute power corrupts absolutely", this emphasizes that corruption has the potential to appear anywhere regardless of race, geography or economic capacity (Badjuri, 2011).

Likewise in Indonesia, corruption is also not something strange in the history of the Indonesian state. History proves that the movement to eradicate corruption in Indonesia has been carried out by the rulers for a long time, namely since the Old Order government. Various efforts and strategies have been made to eradicate corruption, including the enactment of laws and regulations regarding the eradication of corruption, the emergence of countless anti-corruption institutions, both those established by the Government, Higher Education Study Institutions, Non-Government Organizations (NGOs), as well as the goodwill of academics and community groups observing corruption (Suraji, 2018). However, all these efforts do not guarantee that this country is free from corruption, or at least reduce the amount of corruption that occurs in this



country. Public confidence in the government's seriousness in eradicating corruption is decreasing day by day.

According to data released by Indonesia Corruption Watch (ICW) based on the results of work from Transparency International Indonesia (TII), it shows that Corruption in 2023 will experience stagnation compared to the previous year. Indonesia received a score of 34 and its ranking dropped from 110 to 115. (Indonesia Corruption Watch, 2024). This data certainly does not show good progress in eradicating corruption in Indonesia compared to the performance of the last 1 (one) decade. The imposition of sanctions against corruptors in Indonesia also shows an ironic trend. Based on data from Indonesia Corruption Watch, the average length of prison sentences handed down to corruptors in Indonesia is very low, namely 3 (three) years and 4 (four) months (Indonesia Corruption Watch, 2023).

Such a low verdict for corruptors is certainly not commensurate with the losses incurred due to corruption. Apart from damaging the foundations of the country's economy, corrupt behavior also hampers development and the realization of prosperity for the Indonesian people. State money that should be used for education, health, public facilities and public facilities for welfare has actually turned into the hands of irresponsible parties. Apart from that, this trend of low decisions certainly does not have a deterrent effect for corruptors, and a preventive effect for parties who intend to commit corruption.

On the other side, if it is related to the economic aspect, eradicating corruption in Indonesia is also not optimal in terms of recovering state losses due to corruption. According to data from Indonesia Corruption Watch (ICW), only 2.2% of state losses due to corruption can be recovered. (Kompas, 22 C.E.) Looking at this data and connecting it with the low number of criminal convictions further reinforces the statement that eradicating corruption in Indonesia is not optimal both in terms of enforcing criminal law and returning assets resulting from corruption.

Based on facts that are both ironic in terms of both punishment and asset confiscation, a choice should be made between the two. Priority in eradicating corruption should be directed at recovering state losses due to corruption. This approach to eradicating corruption is often known as follow the money or follow the assets (Ginting, 2021). This is due to the difficulty of proving material acts of corruption carried out in a systematic and structured manner.

Efforts to optimize effectiveness in eradicating corruption can be done by confiscating assets that are the result of corruption. Confiscation of assets resulting from corruption is included in additional criminal sanctions in eradicating criminal acts of corruption (Prasetyo, 2016). These sanctions are special sanctions that are not found in all laws, but only in certain laws. Apart from that, additional criminal sanctions in the form of confiscation of assets are also different from additional criminal sanctions in general which cannot be imposed without the main punishment. Additional criminal sanctions in the form of confiscation of assets can still be imposed even though there is no main crime, for example imprisonment.

Despite the urgent need to eradicate corruption, regulations regarding confiscation of assets resulting from corruption are not yet comprehensive. Law Number 31 of 1999 concerning the Eradication of Corruption Crimes in conjunction with Law Number 20 of 2001 concerning



Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (Anti-Corruption Law) has not provided regulations that guarantee success and optimization in asset confiscation. Based on this, there is a solution to optimize the confiscation of assets resulting from corruption by implementing Non-Conviction Based Asset Forfeiture.

Non-Conviction Based Asset Forfeiture can be implicitly found in the United Nations Convention Against Corruption (UNCAC). UNCAC has regulated the NCB in terms of the pursuit of illegal profits (Saputra, 2017). Indonesia, as a UNCAC ratification country, should consider adopting norms regarding the pursuit of illegal profits. Apart from that, Indonesia has also embedded the ratification in Law Number 7 of 2006.

This article will discuss the importance of implementing Non-Conviction Based Asset Forfeiture in national laws and regulations in optimizing the recovery of state losses due to corruption.

The Urgency of Implementing Non-Conviction Based Asset Forfeiture in Recovery of State Losses Due to Corruption

Confiscating assets resulting from corruption is a step that is very difficult to take because the regulations regarding the eradication of corruption in Indonesia that have been in force so far are not very supportive. Confiscation of assets that can only be carried out after a court decision is the main obstacle in confiscation (Halif, 2010). Criminal law policy in asset confiscation so far still refers to prioritizing proving the defendant's guilt, where this still uses an outdated approach, namely follow the suspect. Proving material acts committed by corruptors in front of a court is not easy, considering that corruption is usually carried out with a modus operandi that is so complicated and neatly structured that it is not easy to uncover.

Apart from that, difficulties in providing evidence are also caused by the death of the corruptor, the corruptor's escape, and other circumstances that make it difficult to confront the accused in court. However, the Anti-Corruption Law regulates the confiscation of assets without criminal sanctions. In this regulation, it is stipulated that confiscation of assets without punishment can be carried out if the judge has first granted a civil lawsuit from the State Attorney or agency that has suffered losses, namely in the event that there is not enough evidence to continue the criminal process while there has been actual financial loss to the state, in the case of the suspect. dies at the time of the investigation while there has actually been a financial loss to the state, in the event that the defendant dies during an examination in court while there has actually been a financial loss to the state, and in the event that after the court decision has obtained legal force it is still known that there are still assets objects belonging to the convict which are suspected or reasonably suspected to have resulted from criminal acts of corruption which have not been subject to confiscation to the state.

Likewise, in the case of a criminal act of corruption the investigation must be stopped, or in the event that the suspect dies during the investigation, the investigator immediately submits the case files resulting from the investigation to the State Attorney for a civil lawsuit or handed over to the agency that suffered the loss to file a lawsuit. Also, in the event that the defendant



dies during an examination in court, the public prosecutor immediately submits a copy of the trial minutes to the State Attorney or agency that suffered the loss to carry out a civil lawsuit against his heirs. Meanwhile, if the court decision has permanent legal force and it is discovered that there are still assets of the convict that have not been subject to confiscation for the state, the state can file a civil lawsuit against the convict and/or his heirs (Bureni, 2016).

Specifically for claims for confiscation of assets that are filed in cases where the court decision has permanent legal force, it will only be discovered that there are other assets that have not been confiscated. By linking the provisions of Article 38 B paragraph (2), the civil lawsuit by the state is only limited to the property belonging to the convict which was only discovered at the time a court examination is taking place, the property belonging to the convict in question has not been charged, the convict cannot prove that his property does not originate from a criminal act of corruption and in the event that the judge does not use his authority to confiscate the property belonging to the convict to the state.

Until now, Indonesia has not has a special law on asset confiscation and asset confiscation is only regulated in Article 38 paragraph (5), Article 38 paragraph (6) and Article 38 B paragraph (2) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 However, it turns out that there are still problems that have not been touched upon by this regulation, namely in the case of the suspect not being found, the suspect running away, the suspect or defendant going crazy, there being no heirs or the heirs not being found to carry out a civil lawsuit even though there has been real financial loss. state, and in the event that the assets are not subject to criminal confiscation. The legal issues that are still untouched above cannot be resolved through the criminal process because the criminal process is an in personam process that is attached to the perpetrator (Ismail et al., 2021).

Non-Conviction Based Asset Forfeiture is the right solution because it does not depend on the criminal justice process, so that 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 someone's financial condition or assets are found to be suspicious or the assets are not master. The judge's decision on the inrem lawsuit does not depend on the criminal decision because once again what needs to be ascertained in the inrem 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.

In the current legal system in Indonesia, confiscation of assets is part of an additional crime in the form of confiscation of certain items resulting from criminal acts, as stated in Article 10 of the Criminal Code. This generally applies to every criminal act that occurs in the realm of criminal law in Indonesia with the aim of harming the convict who is proven through a binding court decision to have committed a criminal act so that he cannot enjoy the proceeds of the criminal act. Confiscation of assets resulting from crime can only be carried out if the main case is examined and the defendant is proven guilty, then the goods obtained from the proceeds of crime can be determined by the court to be confiscated by the state for destruction. Other measures are taken so that the goods or assets can be used for the benefit of the state by donating them or conducting auctions for assets resulting from criminal acts (Latifah, 2016).



Accommodating the legal vacuum of confiscating assets for criminal acts of corruption does not also conflict with Article 54 letter c UNCAC 2003 which regulates: consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. The circumstances of the legal vacuum can be translated from other appropriate case terms as intended by Article 54 letter c UNCAC 2003, so as to accommodate the legal vacuum in Law Number 31 of 1999 jo. Law Number 20 of 2001 is an adoption of the values contained in Article 54 letter c UNCAC 2003. Likewise, it would be necessary to add as a stand-alone article that civil lawsuits regarding confiscation of assets must be filed separately without relying on the criminal justice process. The use of the word mandatory means that the civil justice process is separate from the criminal justice process and the civil justice process for inrem lawsuits does not depend on the criminal justice process.

Conclusion

Confiscation of assets without punishment (non-conviction based), especially the provisions of Article 54 letter c UNCAC 2003 regarding situations where the suspect is not found, the suspect has run away, the suspect or defendant has become crazy, there are no heirs or the heirs have not been found to carry out a civil lawsuit even though there is real financial loss to the state, and in the event that these assets are not placed in criminal confiscation as a translation of the terms in other appropriate cases, it can be adopted in the Corruption Crime Law because it does not conflict with the spirit of Law Number 31 of 1999 jo, Law Number 20 of 1999 2001 and the spirit of eradicating criminal acts of corruption in Indonesia.

Adopting the concept of confiscation of assets without punishment (non-conviction based) in the Corruption Crime Law is a solution for legal protection and providing justice for the state to recover assets that it should have and for perpetrators of criminal acts of corruption to have legal assets.

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