Berajah Journal
Jurnal Pembelajaran dan Pengembangan Diri
ISSN (p): **2797-1805** | ISSN (e): **2797-1082**

THE IMPORTANCE OF IMPLEMENTING NON-CONVICTION BASED ASSET FORFEITURE IN THE RECOVERY OF CORRUPTION PROCEEDS ASSETS

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ABSTRACT

The Anti-Corruption Convention has mandated participating countries to confiscate assets resulting from corruption without punishment. This aims to further optimize recovery of state losses due to corruption. Difficulties that may be encountered when confiscation of assets is carried out after the verdict is that the confiscation of assets fails to be carried out because the judge's decision states that the defendant is not guilty or the assets resulting from corruption have been confiscated by the defendant. This article will discuss the importance of implementing asset confiscation without punishment (or also called Non-Conviction Based Asset Forfeiture) as an effort to optimize recovery of state losses. The research method used in this writing is the normative legal research method. The approach used is a conceptual approach. The results of this research are that the Non-Conviction Based Asset Forfeiture mechanism is a form of shift from material truth regarding corrupt behavior carried out by the defendant to formal truth regarding the legality of assets controlled by the corruptor. The focus of this mechanism is not on the fault of the defendant who has committed corruption, but on the illegal assets under his control.

Keywords: *NCB, without punishment, corruption*

INTRODUCTION

Crime continues to develop following the development of human civilization. Previously crimes were only conventional crimes, whereas now crimes are unconventional (Takanjanji, 2021). The development of these crimes requires that handling efforts must also develop. When crimes still take the form of conventional crimes, finding, arresting and punishing the perpetrators is an effective way to overcome these crimes.

In its development, handling crime by searching for, pursuing and punishing perpetrators is no longer effective. So the focus of handling crime ultimately shifts towards confiscation of illegal financial profits. This effort is considered more appropriate than just focusing on punishing the perpetrator.

One of the confiscations of assets resulting from crime applies to criminal acts of corruption. A basic idea of asset forfeiture is that any illegal profits (obtained from crime) must be returned to their owners. The relevance to criminal acts of corruption is that state losses due to corruption must be returned to the state.

The model of pursuing illegal profits was then formalized in the provisions of the United Nations Covenant Against Corruption (UNCAC) in 2003. Apart from setting out several provisions regarding cooperation in dealing with criminal acts of corruption in the world, UNCAC also mandates member countries to make efforts to confiscate assets resulting from crime. Article 54 paragraph (1) letter c UNCAC requires all Contracting States to consider taking measures 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 or in other

cases. In this case (Prasetyo, 2016). UNCAC's focus is not just on one legal tradition, because the fundamental differences that exist in each legal tradition will hinder the implementation of the convention. It is therefore proposed that each State Party use non-conviction based (NCB) confiscation as a tool or means – capable of transcending differences in legal systems – to confiscate assets resulting from corruption in all jurisdictions.

Indonesia as a state party to UNCAC as formalized in Law no. 7 of 2006, while still considering national sovereignty, it is mandatory to take steps to implement the provisions of the convention. Regarding confiscation of assets without criminal charges, Indonesia has made it a proposed legal product (RUU) to the DPR since 2012 through the creation of an Academic Paper. If seen in general, the content of the Asset Confiscation Bill is considered very revolutionary in the process of law enforcement regarding the acquisition of proceeds of crime. This can be seen from at least 3 (three) paradigm changes in criminal law enforcement.(Saputra, 2017). Namely first, the party accused of a crime is not only the legal subject as the perpetrator of the crime, but also the assets obtained from the crime. Second, the justice mechanism used for criminal acts is the civil justice mechanism. Third, court decisions are not subject to criminal sanctions as are imposed on perpetrators of other crimes.

This article will discuss the importance of implementing Non-Conviction Based Asset Forfeiture to optimize recovery of state losses. Where the implementation of NCB is a shift from the follow the suspect approach to follow the asset.

METHOD

This article was written using normative legal research methods with a conceptual approach. The technique for collecting legal materials uses literature study, the analysis technique for legal materials uses deductive analysis techniques.

RESULT AND DISCUSSION

The NCB Asset Forfeiture mechanism or confiscation in rem in fighting financial crime is no longer negotiable. This is very reasonable considering the main principle of criminal confiscation which must first require proof of the perpetrator's guilt in order to confiscate his assets. Meanwhile, there are many conditions that make it impossible to bring the perpetrator to criminal prosecution. For example, the perpetrator is at large, the perpetrator has died, the perpetrator has immunity, and the whereabouts of the perpetrator are unknown.(Patria Setyawan, 2024).

Basically, forfeiture in rem has the same objective as criminal forfeiture, namely to take the proceeds of crime, but with a different process. This mechanism places the state as the plaintiff and the assets as the defendant, while the parties involved in the confiscation process are the intervention parties (claimants). In rem forfeiture mechanisms in the USA use unusual names such as United States V. $160,000 in U.S. Currency or United States V. Contents of Account Number 12345 at XYZ Bank Held in the Name of Jones. Here, legal fiction theory applies to assets which are usually objects, but in this mechanism are positioned as subjects. Assets are considered capable of carrying out an action that must be accounted for. The concept of confiscation in rem originates from the history of law in America in the eighteenth century, which gave the name to smuggled

assets such as pirate ships or slave smuggling ships when their owners were outside America and could not be prosecuted under American law (Pranoto et al., 2018).

At first glance, forfeiture in rem is similar to a civil lawsuit in a criminal case which is already known in Law no. 16 of 2004 concerning the Prosecutor's Office. Where, it regulates the role of the Prosecutor who can act both inside and outside the court for and on behalf of the state in civil and State Administrative cases (Article 30 paragraph 2) as a State Attorney (JPN). However, JPN's role in this criminal case still uses pure civil procedural law. Where, assets are still treated as objects of dispute and lawsuits are addressed to the party who controls the assets.

The confiscation in rem model in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 concerning the Eradication of Corruption Crimes (UU Tipikor) requires the public prosecutor to prove the existence of state losses (vide Articles 32, 33, 34 and Article 38 of the Law on Corruption). Meanwhile, the anti-money laundering approach through the follow the money strategy, which is considered more advanced than the conventional criminal approach, is still unsatisfactory because basically it is still carried out after a court decision is handed down (post-conviction forfeiture). Even though you don't have to prove a predicate crime, in the trial of a money laundering crime (TPPU) you must determine the type of predicate crime to be formulated in the public prosecutor's indictment later. Reverse evidence in TPPU cases is a complement to proving a person's guilt in order to be convicted of committing the crime of money laundering. Only in the case of the defendant's death is remand confiscation truly applied in a TPPU case, that is, without proving guilt, a request is sufficient to confiscate the defendant's assets which are suspected to be the proceeds of a criminal act (Article 69 of Law No. 8 of 2010). For this reason, Gallant and King (2013) call confiscation in rem a quite radical change from conventional criminal investigation, prosecution and punishment approaches (Patria Setyawan & Dwi Kurniawan, 2022)

The emphasis of confiscation in rem is to reveal the relationship between assets and the criminal act, not the relationship between the assets and the perpetrator. Mistakes are not part of the evidence in confiscation in rem, but rather formal evidence regarding the origin of the assets. As long as no party proves otherwise, the court can decide that the assets are 'tainted' and can be confiscated by the state or returned to the rightful person.

However, it is important to remember that seizing the brakes is not intended to replace the criminal justice process against criminals. Although confiscation in rem is considered more effective, it is not recommended if law enforcement is capable of prosecuting the perpetrator criminally. Bearing in mind, to tackle crime, we still have to use criminal law sanctions and also confiscate assets resulting from crime (Greenberg, 2009). This means that this model of confiscation in rem cannot bypass all criminal legal processes that should be imposed on a criminal. Unless circumstances make it impossible to use the criminal route, then confiscation in rem can be used. It would also be better if the criminal confiscation and in rem confiscation approaches were used simultaneously.

Like the concept of confiscation in rem which is a criminal law enforcement process but adopts the civil justice process by prioritizing formal truth, not material truth. In

this Academic Draft of the Asset Confiscation Bill, the handling of the process is the authority of the General Court. The general court in question is the first level court in each city/district which contains judges who decide criminal and civil cases on a daily basis.

This formulation does not specify the criteria for a judge who can decide on an application for confiscation of assets later. Considering the context of confiscation of assets in rem which uses a civil justice mechanism, where the decision issued is in the form of a determination, the criteria for judges referred to in this case are more towards judges who usually examine civil cases. However, the actual proof mechanism regarding the origin of assets is a reverse proof mechanism which is not usually carried out in civil cases in general. Therefore, to ensure the effectiveness of the in rem asset confiscation process, it can be done by mixing and matching criminal and civil judges or judges who are given special training on the in rem asset confiscation mechanism.

Then, related to the authority of the special court for criminal acts of corruption (tipikor court) which is not referred to in the academic text of the Asset Confiscation Bill. This is actually ahistorical in the spirit of establishing a Corruption Court. At that time there was an idea that the handling of corruption cases could be more effective by a special court for corruption crimes because it was equipped with judges who had specific expertise in handling corruption crimes, both judges in general courts and ad hoc judges. The concept of confiscation in rem was formalized in the anti-corruption convention (UNCAC), because of the widespread concealment of criminal proceeds from this criminal act. So it is appropriate that cases of confiscation of assets in rem can also be carried out in the Corruption Court if the contaminated assets are suspected to have originated from criminal acts of corruption.

CONCLUSION

The development of technology which means that economic transactions currently do not recognize national borders (borderless), where the perpetrators of crimes are separated from those who enjoy the proceeds of crime means that conventional criminal law mechanisms are deemed insufficient to recover the losses resulting from the crime in question. This method of seizing assets in rem through NCB Asset Forfeiture is a revolutionary concept in confiscating the proceeds of crime. The process is more effective because it bypasses several legal principles and also by lowering the standard of proof in criminal cases, which is considered to have the potential to run afoul of the principles of fair trial (due process of law) and also the right to ownership of one's assets (property rights). For example, this reflects the experience of material review lawsuits regarding several articles in the TPPU Law, such as the issue of reverse evidence and proof of predicate criminal acts. Even though the Constitutional Court's decision has confirmed the constitutionality of the articles being reviewed, the decision does not provide a strong theoretical foundation regarding the concept of proceeds of crime and developments in contemporary financial crimes.

The biggest challenge in introducing the law of asset confiscation in rem in the Asset Confiscation Bill is how to explain this approach which separates the relationship between assets resulting from crime and the perpetrators of the crime. Even though it is not at all aimed at eliminating the criminal legal process, there are times when confiscation in rem is really just about pursuing assets

resulting from crime without caring about who the perpetrator is. On the one hand, this is solely aimed at returning losses resulting from crimes committed and minimizing violations of human rights.

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