

Asset Forfeiture Bill as a Challenge to Non-Conviction Based Asset Forfeiture

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Abstract

Asset confiscation without criminal punishment in civil forfeiture recognizes the principle of Non Conviction Based Asset Forfeiture (NCBAF) which is a civil law instrument to confiscate assets/proceeds without going through criminal prosecution. The purpose of this writing is to design the mechanism and challenges of implementing NCBAF in the Asset Confiscation Bill. The research method used is normative juridical which emphasizes document studies or library research. The design of the PAS Bill mechanism in highlighting the traces of suspected assets is divided into several stages of practice that have been included in its content, namely starting from the tracing stage, blocking and confiscation, filing and submitting an application for asset confiscation, summons, examination in court, and asset management. The challenges of implementing NCBAF in the PAS Bill are the long process, the type which is an additional optional criminal offense, and the existence of a paradigm that pits NCBAF against the principle of the presumption of innocence so that they argue that NCBAF is contrary to Human Rights.

I. Introduction

Indonesia is a country based on law as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). The idea of a country based on law was built by developing the legal apparatus itself as a functional and just system, developed by organizing the superstructure and infrastructure of political, economic and social institutions in an orderly and regular manner, and fostered by building a rational and impersonal legal culture and awareness in the life of society, nation and state.

Legal norms are the main symbol in community life because they are a summary of norms and rules that have been agreed upon by society, the formation of which is represented by the people's representatives who sit in legislative

institutions.¹ Efforts to eradicate corruption have long been carried out, including through legal policies contained in Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended several times, most recently by Law Number 30 of 2002 concerning the Corruption Eradication Commission (hereinafter referred to as the Corruption Law). In addition, the legal policy for eradicating corruption is also reflected in the ratification of the United Nations Convention Against Corruption (UNCAC) through Law Number 7 of 2006 concerning the Ratification of the UN Convention Against Corruption. As a member country that has ratified the UNCAC, it is only right that the Corruption Law be adjusted in terms of content and substance to the provisions of the UNCAC. Because the Corruption Law was formed long before the ratification of the UNCAC. Because in reality the corruption index in Indonesia has difficulty decreasing significantly. Sanctions in laws related to criminal acts of corruption have not been able to reduce cases of corruption itself. Therefore, new breakthroughs and concrete actions are needed to overcome criminal acts of corruption which are included in the category of extraordinary crimes.²

In recent years, Indonesia's corruption index as the cleanest country has decreased drastically. Recorded as the cleanest country from corruption, Indonesia is ranked 110th, previously ranked 96th. This can be an indication that the corruption rate in Indonesia is still very high. The high number is more or less influenced by its regulation which has begun to be irrelevant because it is still focused on physical retaliation.³

Article 54 paragraph (1) letter c UNCAC requires all States Parties to consider taking measures deemed necessary so that the confiscation of assets resulting from corruption is possible without criminal proceedings in cases where the perpetrator cannot be prosecuted due to death, escape or not being found or in other cases. In this case, the focus of UNCAC is not only on one legal tradition, because the fundamental differences that exist in each legal tradition will hinder the implementation of the convention. Therefore, it is proposed that each State Party

¹Heri Joko Saputro, 2021, "The Urgency of Recovering State Financial Losses Through Blocking and Confiscation of Assets as a Strategy for Enforcing Corruption Law", MIZAN: Journal of Islamic Law, Vol. 5 No. 2, p. 274

²Lisa Ira, 2024, "Analysis of Legal Political Policy in Enforcing Corruption Crimes Through the Ratification of the Asset Confiscation Bill", Jurnal Res Justitia: Jurnal Ilmu Hukum, Vol. 4 No. 2, p. 260

³M. Ainun Najib, 2023, "Polemic of Ratification of Draft Law on Asset Confiscation in Indonesia", Sosio Yustisia: Journal of Law and Social Change, Vol. 3 No. 2, p. 160

use confiscation without criminal charges (Non Conviction Based- NCB) as a tool or means that is able to transcend differences in legal systems to confiscate assets resulting from corruption in all jurisdictions.⁴

In this regard, the Government of the Republic of Indonesia through the Ministry of Law and Human Rights of the Republic of Indonesia has initiated law enforcement reform by proposing a draft law on asset confiscation to the Indonesian House of Representatives. If observed closely, both in the academic text and the published draft law, the substance of the Draft Law on Asset Confiscation (hereinafter referred to as the PAS Bill) contains a political will of the government to reconstruct the law enforcement system in order to return state financial losses more optimally through an in rem or non-conviction based asset confiscation mechanism.⁵

Asset confiscation without criminal prosecution in civil forfeiture recognizes the principle of Non Conviction Based Asset Forfeiture (NCBAF), which is a civil law instrument for confiscating assets/proceeds without going through criminal prosecution.⁶ The idea of asset seizure without criminal punishment has long been planned but has not yet been enacted. Political issues and human rights debates have become pros and cons and are mutually exclusive.

Based on the description above, the author is interested in studying further the design of the Non-Conviction Based Asset Forfeiture mechanism in the Draft Asset Confiscation Law and the challenges of implementing Non-Conviction Based Asset Forfeiture in the Draft Asset Confiscation Law.

2. Research Method

This Research using normative legal research methods which emphasize document studies or library research.⁷ The normative legal approach is carried out by reviewing and studying library materials in the form of laws and regulations relating to the problem being researched.⁸ Therefore, this study

⁴ Refki Saputra, 2017, "Challenges in the Implementation of Non-Conviction Based Asset Forfeiture in the Asset Confiscation Bill in Indonesia", Jurnal Integritas, Vol. 3 No. 1, p. 118

⁵ La Ode Yustamin and Risma Yulestari, 2024, "Optimizing Human Rights Protection in the Draft Law on Asset Confiscation in Handling Economic Crimes", Judicatum: Jurnal Dimensi Catra Hukum, Vol. 2 No. 1, p.3

⁶ Teuku Isra Muntahar, et al., 2021, "Confiscation of Corrupt Assets Without Criminalization in a Human Rights Perspective", Iuris Studia: Journal of Legal Studies, Vol. 2 No. 1, p. 50

⁷ Peter Mahmud Marzuki, 2016, Legal Research, Revised Edition, 12th Printing, Prenadamedia Group, Jakarta, p. 55.

⁸ Amiruddin and Zainal Asikin, 2010, Introduction to Legal Research Methods, Rajawali Pers, Jakarta, p. 118.

focuses more on the use of secondary data. The secondary data referred to is a source of research data obtained indirectly through a literature study. The data comes from research results in the form of journal articles, books, or archives that are not published or that have been generally published.⁹

3. Results and Discussion

Mechanism Design*Non-Conviction Based Asset Forfeiture*in the Draft Asset Confiscation Law

Regime *Non-Conviction Based*(NCB) can generally be more effective in retrieving assets stolen by corruptors than through the criminal regime. This is because the NCB regime has advantages that make it easier to retrieve assets in the process of proof in court. NCB uses a civil law regime that uses a lower standard of proof than the standard used by the criminal law process. In addition, in its implementation, NCB uses a reverse burden of proof system where the government only needs to have initial evidence that the assets to be taken are the result of, related to or used for crime. For example, the government only needs to calculate how much the corruptor's income is and compare it with the assets he owns. If the assets exceed the amount of the corruptor's income, then it is the corruptor's job to prove that he obtained the assets through legal channels.¹⁰

NCB Asset Confiscation, as conceptualized in the Draft Law on Criminal Asset Confiscation (RUU PAS), is a legal action carried out by a state entity to confiscate criminal assets in accordance with a court decision that has obtained permanent legal force, without requiring a basis for punishment against the individual concerned. Thus, the implementation of this confiscation is separate from the actions taken by the perpetrator or the owner.

NCBAF is a way to carry out the seizure of assets resulting from crime. In the common law system, there are two types of asset seizures that are developing, namely:

- a. *Ordinary common law forfeiture*(confiscation that applies based on a court decision); and
- b. *Statutory forfeiture*(deprivation that applies based on law).

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

⁹ Bahder Johan Nasution, 2008, Legal Science Research Methods, Mandar Maju, Bandung, p. 87

¹⁰ National Legal Development Agency, 2022, Academic Manuscript of Draft Law on Confiscation of Criminal Assets, Jakarta, p. 148

lawsuit against assets, not against the defendant or the suspect, so that state assets can be saved even though the perpetrator has died or passed away.¹¹

The content of the Asset Confiscation Bill is considered very revolutionary in the process of law enforcement against the acquisition of proceeds of crime. This can at least be seen from 3 (three) paradigm changes in criminal law enforcement. First, the party charged in a crime is not only the legal subject as the perpetrator of the crime, but also the assets obtained from the crime. Second, the judicial mechanism for criminal acts used is the civil judicial mechanism. Third, the court decision is not subject to criminal sanctions as imposed on other perpetrators of crimes.¹²

In order to facilitate tracing of assets deemed to be the result of criminal acts, the RUU PAS has previously classified the types of assets that can be the object of tracing and confiscation. This aims to facilitate investigators in carrying out tracing tasks to find assets originating from criminal acts, in addition to making it easier for investigators to monitor and identify parties who have the potential to commit crimes motivated by economic motives. Furthermore, the classification that serves as a guideline for law enforcement officers in tracing the types of assets is regulated in Article 6 of the RUU PAS which states that: Paragraph (1) "Criminal Assets that can be confiscated as referred to in Article 5 paragraph (1) consist of: a) Assets worth at least IDR 100,000,000.00 (one hundred million rupiah); and b) Assets related to criminal acts that are subject to imprisonment of 4 (four) years or more." Paragraph (2) "Changes to the minimum value of Assets as referred to in paragraph (1) letter a are regulated by Government Regulation."

In this regard, the design of the PAS Bill mechanism in highlighting the traces of assets that are suspected to be divided into several stages of practice that have been included in its content, namely starting from the tracing stage, blocking/temporary suspension, to confiscation. By using the concept of civil channels, the content of the PAS Bill makes assets that are considered to originate from criminal acts the main instrument that needs to be highlighted, in other words, unlike the asset confiscation mechanism that has been implemented, the priority in this draft is not the party that controls the assets but the assets themselves.

Viewed from the structural aspect/component (legal structure), the asset confiscation mechanism in stages is the same as the general judicial procedure. However, in the legal substance aspect/component and the legal culture aspect/component which is based on the manifestation of the "legal culture

¹¹ Nurdiana Yuniar Kusumawardhani, et al., 2024, "Asset Confiscation Without Criminal Prosecution in Corruption Crimes", *Unes Law Review*, Vol. 6 No. 4, p.12394

¹² Refki Saputra, *Op.Cit.*, p.118

values" system, the content of the PAS Bill has slight changes and shifts compared to conventional mechanisms, because it adopts legal cultures from other countries (Anglo Saxon, such as the United States) which use the NCBAF approach which is considered more effective in pursuing and breaking the chain of economic crimes that are currently growing in Indonesia.

Based on the author's analysis of the PAS Bill, there are at least 6 (six) stages that are the procedural content of the asset confiscation mechanism in Indonesia according to the design contained in the Asset Confiscation Bill (PAS Bill) from the beginning, namely the tracing stage to the final stage, namely regarding the management of assets resulting from criminal acts, including the following:

Table 1. Stages of Asset Confiscation in the PAS Bill

No.	Types of Stages	Chapter
1.	Search Stage	Articles 8-11
2.	Blocking and Confiscation Stage	Articles 12-20
3.	Filing and Submission Stages of Asset Confiscation Applications	Articles 21-32
4.	Calling Stage	Article 33
5.	Examination Stage in Court Hearing	Articles 34-49
6.	Asset Management Stages	Articles 50-62

Table 1 is a general description of the structural procedures of the asset confiscation mechanism from the tracing stage to the asset management stage. In general, the design has been well constructed, but there are several elements that need to be re-evaluated in order to achieve a new procedural formulation in the proceedings that prioritizes the fulfillment and protection of Human Rights (HAM). Asset confiscation without criminalization is a comprehensive confiscation mechanism, because it starts from tracing, blocking, and confiscation, as well as the trial process in court.¹³

¹³Sudarto, et al., 2017, "Asset Confiscation Mechanism Using Non-Conviction Based Asset Forfeiture as an Effort to Recover State Losses Due to Corruption", UNS Postgraduate Law Journal, Vol. V No. 1, p. 111

The application of the reversal of the burden of proof in the NCBFA mechanism is not something that should be questioned. With the inability of the perpetrator to prove that he has legally owned the assets, there is a strong suspicion that the assets are the result of a crime. The assets that cannot be proven are then what must be declared as "legally tainted property" by the court (Judge). Because it has been declared as tainted property by the Court, the State Attorney then filed a request for the tainted assets to be declared as state property.

Challenges of Implementing Non-Conviction Based Asset Forfeiture in the Draft Asset Confiscation Law

PAS Bill has the breakthrough needed by law enforcers to strengthen the legal system that carries out the confiscation of criminal assets without a court decision in criminal cases. The NCBFA system has a wide opportunity to confiscate all assets suspected of being the proceeds of crime and other assets that are suspected of being means (instrumentalities) to commit crimes, especially those included in the category of serious crimes or transnational organized crime. The existence of this system may be effective because confiscation through criminal prosecution is considered to take a very long process.¹⁴

The issue of asset seizure has been rolling since 2008, proposed by PPATK (Financial Transaction Reports Center). Even before that, Indonesia had ratified an international agreement. *United Nations Convention Against Corruption* 2003 (UNCAC) became Law Number 7 of 2006. The issue of asset confiscation then re-emerged after the recent exposure of the large-scale corruption case carried out by Mahfud MD.¹⁵

Formally, the PAS Bill has basically been included in the last two Prolegnas periods, namely the 2015-2019 period with 189 other bills, and the 2020-2024 period with 284 other bills. However, until now there have been no signs that the bill will be passed into law soon. This is because the DPR has never made the PAS Bill a priority and there are still pros and cons to the ratification of the PAS Bill. The asset confiscation mechanism referred to in the RUU PAS still has many loopholes in it that can allow convicts to escape this type of confiscation. The loophole in question is the long process, where in order to carry out asset confiscation, one must wait for a final and binding decision (*inkracht*) that the defendant is guilty. The impact of the length of this process is the high possibility

¹⁴ Oly Viana Agustine, 2019, "The Asset Confiscation Bill as an Opportunity and Challenge in Eradicating Corruption in Indonesia", *Journal of Criminal Law and Legal Development*, Vol. 1 No. 2, p. 6

¹⁵ Syahril Syakur, 2022, "Legal Protection for Victims of Fintech Robot Trading Through Confiscation of the Perpetrators' Assets," *Manional Law Magazine* 52, No. 2, p. 230

that the defendant will be able to hide or launder assets obtained from the proceeds of crime. Another loophole is the type which is an additional penalty that is optional. Adami Chazawi as quoted by Tommy and Sularto stated that additional penalties are not mandatory, the decision of which is fully submitted to the Judge.¹⁶ This can provide a loophole for the defendant to escape the criminal penalty of asset confiscation.

Another challenge in implementing the NCBAF mechanism is the existence of a mutually exclusive debate on Human Rights (HAM). The arguments used Those who are against it are opposing the NCBAF to the principle of presumption of innocence so that they argue that the NCBAF is contrary to human rights. The group that opposes NCBAF as being contrary to human rights is based on the principle *no bis in idem*, property/asset ownership rights, the principle of presumption of innocence (*presumption of innocence*) or principle *non-self-discrimination*. Those who reject this argue that in addition to the right to life and liberty, the right to property is a fundamental right that must be protected and respected from a human rights perspective. If violated, then a human rights violation has occurred. The state must protect property ownership which is a person's basic right. Based on the principle of the presumption of innocence. A person cannot be convicted simply because of suspicion of owning property and asking him to explain in court that the property was obtained in a legitimate manner.¹⁷

Generally these advocates oppose the use of NCBAF in connection with confiscation to impoverish the perpetrator and his family. Confiscation of assets without criminal punishment is very crucial with the guarantee of protection of property rights in Article 28H Paragraph (4) of the 1945 Constitution of the Republic of Indonesia which cannot be taken arbitrarily by anyone. Protection of a person's assets in the constitution is indeed very protected from arbitrariness and is also a characteristic of a state of law (rule of law). However, what is important to note is how the confiscation of assets without criminal punishment is carried out without violating the constitutional rights of each person.

A number of countries have signed the UNCAC 2003, such as the Philippines, Switzerland, and Colombia, have used the NCBAF concept in their regulations to implement the confiscation of assets resulting from criminal acts. This mechanism has proven effective in recovering state financial losses. NCBAF

¹⁶ Deypend Tommy Sibuca, et al., 2016, "Criminal Law Policy in Confiscation of Assets Proceedings of Corruption in Indonesia", *Diponegoro Law Review*, Vol. 5 No. 2, p. 4

¹⁷ Alvon Kurnia Palma, 2014, *Implementation and Regulation of Illicit Enrichment in Indonesia*, Indonesia Corruption Watch, Jakarta, p.31

can be successful if the attorney general's office has a strong determination and is willing to file an application to the court regarding the confiscation of assets. The court must also be committed, especially the judges, in examining and deciding on NCBAF applications without being influenced by opinions that oppose the process on the basis of violating human rights.

Switzerland using the NCBAF mechanism is regulated in Articles 69 to 73 of the Criminal Code of Switzerland in 2019. Article 70 paragraph (1) of the Criminal Code of Switzerland stipulates that the judge will order the confiscation of assets that are the result of a crime or that are intended to invite or give gifts to the perpetrator of the crime with the provision that the confiscated assets do not have to be returned to the injured party in order to restore their rights. Switzerland applies the criminal standard of proof to all cases of asset confiscation. This is different from the application of proof in common law countries which use a more limited civil balance of probabilities or reverse proof mechanism.¹⁸

In Philippines application of NCBAF to assets resulting from corruption in general courts in the Philippines can be requested through civil procedures in rem to determine the origin of a property or asset. If based on civil law it is determined that the asset was obtained from the proceeds of crime, then the court can issue an order for the seizure of the asset. The Philippines also has laws for the defense of third parties who have rights or interests in the asset.¹⁹

4. Conclusion

The design of the PAS Bill mechanism in highlighting the traces of assets that are suspected to be divided into several stages of practice that have been included in its content, namely starting from the tracing stage, blocking and confiscation, filing and submitting an application for asset confiscation, summons, examination in court, and asset management. By using the concept of civil channels, the content of the PAS Bill makes assets that are considered to originate from criminal acts the main instrument that needs to be highlighted, in other words, unlike the asset confiscation mechanism that has been implemented, the priority in this draft is not the party that controls the assets but the assets themselves.

The challenge of implementing NCBAF in the RUU PAS is the long process, where in order to carry out asset confiscation, one must wait for a final and binding decision (*inkracht*) that the defendant is guilty, the type of which

¹⁸ Fathin Abdullah, 2021, "Confiscation of Assets Proceedings of Corruption Without Criminalization (Non-Conviction Based Asset Forfeiture) Based on Indonesian Law and the United Nations Convention Against Corruption (UNCAC) 2003", *Jurnal Ilmiah Advocacy*, Vol. 9 No. 1, p. 28

¹⁹ *Ibid.*

is an additional optional punishment. In addition, there is a mutually attractive debate on Human Rights (HAM). The argument used by those against it is to pit NCBAF against the principle of the presumption of innocence, so they argue that NCBAF is contrary to human rights.

References

Journal

- Alvon Kurnia Palma, 2014, Implementation and Regulation of Illicit Enrichment in Indonesia, Indonesia Corruption Watch, Jakarta.
- Deypend Tommy Sibuca, et al., 2016, "Criminal Law Policy in Confiscation of Assets Proceedings of Corruption in Indonesia", Diponegoro Law Review, Vol. 5 No. 2.
- Fathin Abdullah, 2021, "Confiscation of Assets Proceedings of Corruption Without Criminalization (Non-Conviction Based Asset Forfeiture) Based on Indonesian Law and the United Nations Convention Against Corruption (UNCAC) 2003", Jurnal Ilmiah Advocacy, Vol. 9 No. 1.
- Heri Joko Saputro, 2021, "The Urgency of Recovering State Financial Losses Through Asset Blocking and Confiscation as a Strategy for Enforcing Corruption Law", MIZAN: Journal of Islamic Law, Vol. 5 No. 2.
- La Ode Yustamin and Risma Yulestari, 2024, "Optimizing Human Rights Protection in the Draft Law on Asset Confiscation in Handling Economic Crimes", Judicatum: Jurnal Dimensi Catra Hukum, Vol. 2 No. 1.
- Lisa Ira, 2024, "Analysis of Legal Political Policy in Enforcing Corruption Crimes Through the Ratification of the Asset Confiscation Bill", Jurnal Res Justitia: Jurnal Ilmu Hukum, Vol. 4 No. 2.
- M. Ainun Najib, 2023, "Polemic of Ratification of Asset Confiscation Bill in Indonesia", Sosio Yustisia: Journal of Law and Social Change, Vol. 3 No. 2.
- Nurdiana Yuniar Kusumawardhani, et al., 2024, "Asset Confiscation Without Criminal Prosecution in Corruption Crimes", Unes Law Review, Vol. 6 No. 4.
- Oly Viana Agustine, 2019, "The Asset Confiscation Bill as an Opportunity and Challenge in Eradicating Corruption in Indonesia", Journal of Criminal Law and Legal Development, Vol. 1 No. 2.
- Refki Saputra, 2017, "Challenges in the Implementation of Non-Conviction Based Asset Forfeiture in the Asset Confiscation Bill in Indonesia", Jurnal Integritas, Vol. 3 No. 1.
- Sudarto, et al., 2017, "Asset Confiscation Mechanism Using Non-Conviction Based Asset Forfeiture as an Effort to Recover State Losses Due to Corruption", UNS Postgraduate Law Journal, Vol. V No. 1.
- Syahrijal Syakur, 2022, "Legal Protection for Victims of Fintech Robot Trading Through Confiscation of the Perpetrators' Assets," Manional Law Magazine 52, No. 2, p. 230
- Teuku Isra Muntahar, et al., 2021, "Confiscation of Corrupt Assets Without Criminalization in a Human Rights Perspective", Iuris Studia: Journal of Legal Studies, Vol. 2 No. 1.

Book

- Amiruddin and Zainal Asikin, 2010, Introduction to Legal Research Methods, Rajawali Pers, Jakarta.
- National Legal Development Agency, 2022, Academic Manuscript of the Draft Law on Confiscation of Criminal Assets, Jakarta.
- Bahder Johan Nasution, 2008, Legal Science Research Methods, Mandar Maju, Bandung.
- Peter Mahmud Marzuki, 2016, Legal Research, Revised Edition, 12th Printing, Prenadamedia Group, Jakarta.