

Legal Development Through the Implementation of Non-Conviction Based Concepts in Money Laundering Asset Recovery Practices in Indonesia

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ABSTRACT

The high number of cases of money laundering crime appear an idea to implement a new legal concept, namely the confiscation of assets without punishment (Non-conviction based asset forfeiture), which is called NCB with the aim of recovering state losses (Asset Recovery) from money laundering crime. However, in Indonesia itself, the laws and regulations governing money laundering crime still haven't provided a solid legal basis for foreclosure and confiscation of assets proceeds of crime. So that, for the implementation of the NCB concept, it is feared that it will cause confusion in law enforcement regarding the violation of the rights of suspects and other aspects of the criminal procedure law in effect in Indonesia. Therefore, the main objective of this study focuses on the analysis related to the urgency of implementing the NCB concept in the practice of asset recovery for money laundering crime in Indonesia and how the essence of protection of the rights of suspects in the context of development and legal reform in Indonesia. In this research, the method used is normative juridical using statutory, conceptual, and historical approaches. The results of the research present an idea in efforts to develop and reform the law in Indonesia, namely in the field of money laundering crime. It is because the rapid development of information technology makes it easier for perpetrators to hide money or assets from their crimes or criminal acts. In relation to the protection of the suspect's rights, the NCB concept actually doesn't violate the principle of presumption of innocence because it uses a civil process, which is focused on how to determine whether or not ownership of an asset is legal and explain how the perpetrators of the crime obtain ownership of it. The defendant, as the owner of the asset, is given the opportunity to prove the ownership of the asset.

Keywords: *Non-Conviction Based Concept, Asset Recovery, Legal Reform in the Money Laundering Crime Sector.*

1. INTRODUCTION

The development of science, technology, and information, aside from having a positive impact, on the one hand, these developments also has a negative impact; for example, the development of criminal acts from conventional ones to organized and transnational crimes [1]. Even the development of criminal acts in the modern era leads to economic gain or better known as crimes with economic motives, such as corruption, money laundering, and narcotics trafficking [2]. According to Romli Atmasasmita, the development of criminal acts with economic motives that were originally conventional in nature, such as money laundering, fraud, and embezzlement, has become

increasingly complex because it involves white-collar crime and is often transnational or cross-country in nature [3].

Although technological progress certainly has a significant impact on the development of human life in all fields, including the economy. For example, the integration of the financial system into the banking system offering the concept of easy and short distribution of funds. In the end, we can channel funds through internet banking and electronic fund transfers which make it easier for banking customers to transfer their funds from accounts at one bank to another around the world. However, as mentioned above, the negative impacts still cannot be avoided [4]. Because through this

financial system, the criminal actors will try hard so the money obtained from a crime can be injected back into the financial system or the banking system easily. Of course, this is intended to make money/property obtained from the proceeds of the crime is untraceable by law enforcers [5].

So concerning the description above, one of the crimes in the financial system that still become the problem in Indonesia and continues to develop is Money Laundering (TPPU). Money laundering occurs in almost every country in the world. In money laundering, on the one hand, we are faced with crimes resulting from money laundering, and on the other hand, we are faced with possible crimes that may occur after the money has been laundered. Therefore, preventive action in the crime of money laundering can also prevent predicate offenses and posteriori offenses. Private banks, lending and credit institutions, stockbrokers and dealers, insurance companies, foreign exchange dealers, gold and silver dealers are some of the institutions that are vulnerable to money laundering. Money laundering is the process by which the proceeds of crime are converted into money or other assets that appear legitimate [6]. Money laundering is the process by which the proceeds of crime are converted into money or other assets that appear legitimate. Money Laundering in the world of international crime has been known for a very long time, to be precise, since 1930 in the United States. Meanwhile, in Indonesia, the regulation regarding TPPU is still new [7]. The regulation regarding TPPU has undergone several revisions, and the last is Law No. 8 of 2010 concerning the Crime of Money Laundering (TPPU Law). Continuous revisions do not necessarily make TPPU cases recede; even in 2020, it reaches 9 trillion [8].

Based on the high number of money laundering cases, many parties finally come to the idea to apply a new legal concept that has been echoed by the United Nations Convention Against Corruption or the UN Convention since 2003, namely regarding the confiscation of assets without punishment (Non-conviction based asset forfeiture) which hereinafter referred to as NCB which is a legal mechanism whereby the state-owned assets that the perpetrator of the crime has taken can be seized back, in this case, one of the objectives of the concept is to recover state losses (Asset Recovery), one of which is from the Money Laundering Crime Case [9].

In Indonesia, several criminal provisions have regulated the possibility of confiscating and seizing the proceeds of a criminal act [10]. However, based on these provisions, confiscation can only be carried out after the perpetrator of the criminal act has been legally and convincingly proven to have committed the crime [11]. This is clearly part of the application of the principle of reverse proof, which if the NCB will

continue to be carried out based on the provisions in the TPPU Law, it is feared that confusion will occur regarding the problem of proving predicate crimes in relation to the crime of money laundering. Apart from that, the concern that there will be confusion in law enforcement related to the rights of suspects and other aspects of the criminal procedural law is also a problem that could arise later. So that in an effort to apply the NCB concept in the practice of TPPU asset recovery in Indonesia, a legal instrument or reform in the TPPU Law is needed that can guarantee the protection of the human rights of suspects and the application does not violate the presumption of innocence, this is due to the fact that this principle is one of the most important principles in criminal procedural law in Indonesia.

In his book titled "The Legal System: A Social Science Perspective," Lawrence Friedman says that the building of a legal system must be based on three main elements. The three main elements are legal substance, legal structure (procurement organization and its enforcement), and legal culture, which is also a significant determinant of whether the law is meaningful in national life all the time [12]. In terms of the legal structure, law enforcement officials have tried so hard to eradicate money laundering offenses. Then in terms of legal culture, by looking at how money laundering becomes increasingly developed, of course, there are shortcomings of these three elements, namely in terms of legal substance. Therefore, it is very important to reform in terms of legal substance, namely the existing regulations, because the instruments for implementing the NCB concept as described previously are still inadequate.

As previous studies such as those conducted by Xavier Nugraha et al., entitled "Non-Conviction Based Asset Forfeiture as a New Formulation of Stolen Asset Recovery Efforts for Indonesian Corruption Crimes" in 2019 only explained how the formulation and implementation model of Non-Conviction Based Asset Forfeiture in corruption, this study only focuses on money laundering and examining the relationship between NCB and the principle of presumption of innocence. In addition, another previous study is conducted by Imelda F.K. Bureni, titled "Legal Vacuum of Asset Confiscation Without Criminalization in the Corruption Crime Act," in 2016, also examined how the legal vacuum or the absence of regulations governing the seizure of assets without punishment in criminal acts of corruption. However, compared to all of the previous studies mentioned before, the difference from this study is that the author will explain money laundering more specifically and describes its relationship to the principle of the presumption of innocence comprehensively so that there will be no hesitation regarding the application of this concept later.

2. RESEARCH METHOD

In this study, the method used is normative juridical using statutory, conceptual, and historical approaches. The statutory regulatory approach referred to is all forms of legislation relating to the settlement of cases of money laundering, as well as criminal procedural law in Indonesia. Then in a conceptual framework, the author examines the concepts and principles in criminal procedural law in Indonesia and the settlement of cases of money laundering crime. Meanwhile, in the historical approach, the author provides the review and analysis by examining the development of the presumption of innocence, one of the principles prioritizing the protection of the human rights of suspects. By using this research method, it is hoped that it will be able to dissect and show how legal instruments in the enforcement of money laundering offenses must be reformed. So that later this research is expected to be a reference both academically and practically in terms of legal reform in the field of money laundering offenses, namely by applying the concept of Non-Conviction Based in the practice of ML Asset Recovery in Indonesia.

3. FINDINGS AND DISCUSSION

1.1. The Urgency of Implementing the Non-Conviction Based Concept in Money Laundering Asset Recovery Practices in Indonesia

Asset deprivation is a fundamental concept to eradicate criminal acts that cause financial harm to the country's economy by reducing the property of the perpetrators allegedly obtained from such crimes [13], one of which is Money Laundering. The application of the NCB concept in the practice of Asset Recovery of Money Laundering in Indonesia is a necessity in the context of legal reform in Indonesia.

According to the Legal theory as a change or a tool of social engineering, which is stated by Roscoe Pound, the law is actually not only used as a means to regulate order but the law can also be used as a means to reach the ideal order of life [14]. It means that through the application of the NCB concept in the practice of Asset Recovery, it is expected that the enforcement of Money Laundering Crimes is increasingly optimal and realizes the ideals of the Indonesian state that the people can prosper.

The emergence of the NCB asset forfeiture concept was motivated by a shift in the paradigm of law enforcement, which initially oriented or prioritized the perpetrator (follow the suspect) to be oriented towards money or loss (follow the money) [15]. It is important because criminal acts such as money laundering can cause losses of the state finances, so the money proceeds from these crimes must be returned to the state

immediately. But, on the other hand, in the process of enforcing cases of money laundering, it is often found that the perpetrators cannot be tried first.

The urgency of the NCB asset forfeiture concept [16] is due to the emergence of problems in the return of state assets (asset recovery), regarding the difficulty for the state to recover state losses in cases where the suspect fled or the owner does not exist. As for more broadly, Theodore S. Greenberg explains the following [17]:

- a. The perpetrator of the crime has died (death will automatically end the criminal justice process).
- b. The perpetrator of the crime has fled abroad (criminal proceedings hang).
- c. The perpetrator is still a fugitive; although the perpetrator can be tried in absentia, the verdict cannot be executed.
- d. Criminals are difficult to touch because they have very strong immunity (for example, the Century Bank case and the Hambalang case that have not touched people suspected of being involved in them but are hindered by political power or very strong legal immunity).
- e. The offender is not known, but their assets are found.
- f. The related assets are held by third parties who are not charged with criminal charges, but there is a fact that the assets are contaminated.
- g. The criminal prosecution cannot proceed because there is insufficient evidence.

In the conditions mentioned above, of course, it will hamper law enforcement; instead of the state being able to recover its financial losses, the perpetrators will find it increasingly difficult to feel the deterrent effect, and the crime of money laundering will increase. But, in addition, the implementation of the NCB asset forfeiture can at least prevent potential perpetrators of money laundering from escaping or fleeing abroad.

In addition, Indonesia has also regulated mutual legal assistance (MLA) in Law no. 1 of 2006; the principle of this MLA is the principle of reciprocity, namely that each country provides cooperation assistance in handing over the perpetrator in the criminal act of corruption and collecting assets resulting from corruption [18]. As a criminal offense that is also closely related to Money Laundering and often becomes the main criminal act of Money Laundering cases, so that if Indonesia wants its assets that have been stolen and taken abroad to be returned, then Indonesia must also have clear arrangements regarding the return of assets that also guarantee a return of assets from other countries held in Indonesia.

1.2. Review of the Presumption of Innocence in the Application of the Non-Conviction Based Concept in ML Asset Recovery Practices in Indonesia

In the criminal law system adopted by Indonesia today, before carrying out investigations, prosecutions, and court examinations on the crime of money laundering, it must first be proven the original crime [19]. As with regard to confiscation of assets, in the legal system in Indonesia, this is part of an additional crime in the form of confiscation of goods used for a criminal act or objects resulting from a criminal act. The aim is to provide a sense of deterrence to the perpetrators of criminal acts. Then before the object is confiscated, it must first be ascertained that it is the result of a criminal act which is proven by a binding court decision.

However, additional punishment cannot stand alone and will always follow the main case, which means that additional punishment can only be imposed simultaneously with the main sentence. Confiscation of assets proceeds of crime can only be carried out if the main case is examined and the defendant is proven guilty so that the goods obtained from the proceeds of crimes by the court can be determined as confiscated by the state to be destroyed. Another action is taken so that the goods or assets can be used to benefit the state by donating them or carrying out auctions of assets resulting from criminal acts.

Meanwhile, it is different from the concept proposed in the Asset Confiscation Bill; in the NCB concept, confiscated assets are "presumably" proceeds or objects used in a criminal act. When carrying out a confiscation, it is preceded by an investigation order for the confiscation of assets; this aims to ensure that the criminals will not use the results of their crime. Confiscation orders are intended as a deterrent against crime and to seize profits from illegally acquired assets. Then this is also to prevent the occurrence of further crimes that may follow money laundering.

In addition, confiscation of assets without punishment is always linked to the presumption of innocence and human rights. The principle of presumption of innocence or presumption of innocence principles is contained in [20]:

- a. Article 11, paragraph (1) of the Universal Declaration of Human Rights (UDHR / DUHAM) states: " Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his
- b. defence."
- c. Point 3c General Elucidation of Law Number 8 of 1981 concerning KUHAP states: "Everyone who is

suspected, arrested, detained, prosecuted and or brought before a court hearing, must be presumed innocent until a court decision declares his guilt and obtains permanent legal force."

From the definition above, when examined further, the confiscation of assets without punishment actually does not depend on the presence or absence of a fault with the defendant. It is the same as in civil cases in general, where assets are being sued because they are argued to be in unclear ownership or illegally. Meanwhile, owners of fixed assets are given the opportunity to prove their rebuttal that the assets under their control are legitimate and not contaminated. So the confiscation of assets without conviction is not related to whether someone has committed a criminal offense but is related to the legality of the assets under the control of a suspect or defendant. Thus, it can be concluded that confiscation of assets without punishment does not violate the presumption of innocence principles for the suspect or defendant.

In addition, the provisions of Article 29, paragraph (2) of the Universal Declaration of Human Rights stipulate that: " In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare

in a democratic society." One form of respect for the human rights of others is not taking something that is not a personal right; the crime of laundering money that is obtained from the results of a criminal act of corruption, for example, is also a violation committed by the perpetrator of the human rights of citizens, namely illegally obtaining wealth or assets.

Furthermore, quoting Artidjo Alkostar, that a right to a normal trial and its full rights as a citizen can be obtained when people are cooperative or when they don't break the law; but when people misuse their rights, then the law has the right to intervene to settle the case, as fairly as possible [21] so that the rights that the perpetrator originally obtained before committing a crime can be defended. However, when the perpetrator has abused his rights, the state has the right to take that right back. Moreover, these actors cause state losses.

In addition, as stated by H. L. Packer, applying the presumption of innocence as a practical matter only serves to remind law enforcement officials to challenge and help to alert investigators to the dangers inherent in the assumption of guilt. The inherent dangers are divided into two, namely: First, assuming innocence makes the police focus on finding evidence that is likely to acquit the suspect instead of focusing on incriminating evidence. Second, treating a suspect as

'possibly guilty' makes it easier for the police to 'justify' threatening or even physically harassing a suspect, increasing the danger of a false confession. Of course, both of these dangers will give the possibility to increase the wrong conclusion [22]. Therefore, in applying the presumption of innocence, it must be understood as a whole and contextually to find legal truth instead of being a legal justification.

When examined further, in this case, the state is in a disadvantaged position compared to that of the perpetrator; the state becomes a "victim" of what the perpetrator does so that the country is entitled to a civil lawsuit. Prior to the NCB concept, the values contained in the NCB had actually been enforced in Indonesia, namely, the Corruption Law, which has an equivalent in Article 32, paragraph (1), which reads, "In the event that the investigator finds and is of the opinion that one or more elements of a criminal act of corruption do not have sufficient evidence, while in fact there has been a state financial loss, the investigator shall immediately submit the case file resulting from the investigation to the State Attorney for a civil suit or submitted to the aggrieved agency to file a lawsuit."

Then in paragraph (2), "An acquittal in a corruption case does not abolish the right to claim losses on state finances." With this right, it is actually agreed that NCB can be enforced in Indonesia with strict conditions that have been mandated in the Asset Confiscation Bill. A well-filtered mechanism will provide the right law according to the level of error and legal circumstances. NCB, in its concept, explains that a period that can reasonably be suspected of originating from a crime or being used or the result of a criminal act can be confiscated. However, this concept intersects with Article 28G of the 1945 Constitution of the Republic of Indonesia, which states that everyone has security for assets under their control. However, it is not known that rights that do not need to be a basis will not become uncontrollable, so it is also said that the same spirit exists in the regulation of human rights in the 1945 Constitution of the Republic of Indonesia, namely that related human rights are guaranteed by law. This spirit gave birth to Article 28J of the 1945 Constitution of the Republic of Indonesia. The restrictions that govern Article 28J include Article 28A to Article 28I of the 1945 Constitution. that nothing is absolute.

Then it is emphasized in Article 28I, paragraph (1) of the 1945 Constitution that there are a number of non-derogable rights, which cannot be reduced under any circumstances, including the right to life and the right not to be prosecuted based on retroactive law. In this context, the court interprets that Article 28I, paragraph (1) must be read together with Article 28J, paragraph (2) so that the right not to be prosecuted based on retroactive law is not absolute. Moreover, since the rights stipulated in Article 28I paragraph (1) of the 1945

Constitution, which are included in the formulation of rights which cannot be reduced under any circumstances, can be limited, various human rights provisions outside of the Article, for example, religious freedom (Article 28E), the right to communicate (Article 28F), and also the right to property (Article 28G) can, of course, be limited, provided that this is following the restrictions stipulated by law.

The restrictions have been stated in Article 73 of Law Number 39 of 1999 concerning Human Rights, that the rights and freedoms regulated in this law can only be limited by and based on law, solely to guarantee recognition and respect for human rights and other people's fundamental freedoms, morality, public order and the interests of the nation. Then, related to the concept of NCB regarding the confiscation of asset recovery and the state becomes a victim of a crime, the element of the interests of the nation can become a limitation on the right to property in article 28G of the 1945 Constitution of the Republic of Indonesia.

1.3. Design for Reforming the Regulation on Money Laundering in Indonesia

It should be noted, in a lawsuit based on the TPPU Law, the process of proceeding is still using formal and conventional procedural law, which of course puts forward the principle of "who argues about a right then he who proves the truth of his argument" [23] and will use formal evidence in the form of the use of tools, valid evidence [24]. However, there are concerns that the use of formal civil procedural law will result in difficulties for the district court prosecutor to prove it. This is because the district court prosecutor has to prove the argument that the defendant's assets as the object of the lawsuit to be seized are assets that are related to state losses in a criminal decision that has permanent legal force. Therefore, the state is in a difficult position, for it is not easy to prove such a case.

In contrast to confiscation of assets with the concept of NCB asset forfeiture, proof can be done by reversing the burden of proof (reversed proof). The district court prosecutors argued sufficiently that the assets of the object of the lawsuit have something to do with the crime of money laundering. Then the defendant, as the owner of the assets, who objects to the act of confiscation, will prove to the court that the assets of the object of the lawsuit have absolutely nothing to do with the criminal act committed or do not originate from the criminal act as intended.

In Indonesia, the Asset Confiscation Bill to carry out the NCB asset forfeiture has not yet been formulated. However, the Supreme Court has formulated Supreme Court Regulation Number 1 of 2013 concerning Procedures for Settlement of Requests for Handling Assets in Money Laundering or other Criminal Acts. The term used in this Supreme Court Regulation is not

confiscation of assets but rather the handling of assets, but it can be seen in the formulation of the Supreme Court Regulation that handling of assets is similar to the concept of the NCB asset forfeiture [25]. For example, the provision in Article 1 of Supreme Court Regulation states that an investigator files an application for the handling of assets in the event that the alleged perpetrator of a criminal act is not found as referred to in the Law on Prevention and Eradication of Money Laundering. In addition, Article 3 of the Supreme Court Regulation also describes the requirements that must be met in submitting an application for handling assets, one of which is an official report on the search for a suspect. So that through this regulation, NCB asset forfeiture can actually be implemented. In addition, based on the Supreme Court Regulation No.1 of 2013, the procedural law for NCB asset forfeiture can also refer to the Supreme Court Circular Number 3 of 2013 concerning Case Handling Guidelines: Procedures for Settling Requests for Assets in TPPU and Other Criminal Actions before the formulation of new regulations regarding the application of the NCB asset forfeiture concept in the TPPU Act.

As for the design of reforming the regulation of money laundering in Indonesia, applying the NCB asset forfeiture concept can actually be included in the civil domain. It is because, in a civil process, the focus is on how to show legitimate ownership of an asset or property and explain how the perpetrator of the crime got their ownership. So that in this case, there is no violation of the presumption of innocence because when the defendant, as the owner of the asset, tries to prove their ownership of the asset, they have been given the opportunity to recover the disputed asset. In addition, in NCB, when the defendant loses, they are also given the opportunity for appeal and cassation so that there will be no rights degraded in this process. In fact, there are very many benefits that will be obtained if the NCB is implemented.

In addition, in the process, an NCB asset forfeiture can be filed simultaneously with the main criminal act; it can also be filed without waiting for the main criminal act; it can even be filed after there is a legally binding decision regarding the guilt of a criminal. Prior to confiscation of assets, the court must first declare the assets tainted and blocked or withdrawn from economic traffic and include them in the list of blocked assets. Then, to prove whether the property is contaminated or not, the defendant must be able to prove that the property was obtained by lawful means and did not violate the law. If they cannot explain the source of the assets, the judge will declare that the assets are contaminated. After the judge's statement comes out, then the process of confiscating assets can be carried out without punishment or NCB asset forfeiture. The court will announce in the media about the assets to be confiscated with a notification at a certain time, and if a

third party feels that they own the property, they can put up a fight [26].

4. CONCLUSION

By applying the concept of NCB, Asset Forfeiture will be expected to resolve several problems such as a. The perpetrator has died (death by itself will end the criminal justice process); b. The perpetrator has fled abroad (criminal process hanging); c. The perpetrator is still a fugitive; although it can be tried in absentia, the verdict cannot be executed; d. The perpetrators are difficult to touch because they have a very strong immunity (for example, the Century Bank case and the Hambalang case that has not touched people suspected of being involved in it, blocked by very strong political or legal power); e. Unknown violators, but their assets are found; f. Related assets are held by third parties who are not prosecuted under criminal charges, but there is the fact that the assets are tainted; and g. Criminal prosecution cannot be continued because there is not enough evidence.

In its application, the concept of NCB asset forfeiture does not contradict the presumption of innocence, as is the reversal of the burden of proof, because in a civil process, what is focused is how to show legal ownership of an asset or property and explain how the perpetrator gets their ownership. Meanwhile, as the owner of the assets, the defendant will be given the opportunity to prove his ownership of the asset. In addition, there is no linkage between the status of a suspect in criminal proceedings and status in civil proceedings because they are not interrelated, and there is no suspect status in civil proceedings; these are different things. The limitation of the right to property has been stated in Article 73 of Law Number 39 of 1999 concerning Human Rights, namely that the rights and freedoms regulated in this law can only be limited by and based on law, solely to guarantee recognition and respect for human rights and the basic freedoms of others, morality, public order and the interests of the nation. Then, if it is related to the concept of NCB, which confiscation is for asset recovery and the state becomes a victim, the element of the interests of the nation can become a limitation on the right to property in article 28G of the 1945 Constitution of the Republic of Indonesia.

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