



Comparison of Asset Confiscation Arrangements for Corruption Crimes Between Indonesia and the United States Which Have Implemented *Non-Conviction Based Asset Forfeiture*

Muhammad Daud Tarigan ¹, Ismaidar ².

Panca Budi Development University

Email: ¹ daudtarigan2024@gmail.com ² Ismaidarisma@gmail.com

Abstract

This research compares the regulation of asset confiscation for criminal acts of corruption between Indonesia and the United States, with a focus on the implementation of the *Non-Conviction Based Asset Forfeiture* (NCB *Asset Forfeiture*). The research method used is normative law with a comparative approach. Using primary and secondary legal materials, this research analyzes the legal framework for asset confiscation in both countries to evaluate its effectiveness. It was found that although Indonesia has statutory regulations regarding asset confiscation, its implementation is still less effective and there are deficiencies in the authority to manage and confiscate assets resulting from corruption. Meanwhile, the United States has implemented the *NCB Asset Forfeiture*, which allows for the confiscation of assets without criminal penalties, as part of efforts to recover assets lost due to corruption. The research results show significant differences between the two countries in their approach to confiscating assets for criminal acts of corruption. Indonesia needs to strengthen regulations and increase international cooperation for the effectiveness of asset confiscation. Meanwhile, the United States has taken a step forward by implementing the *NCB Asset Forfeiture*, which provides flexibility in handling assets resulting from corruption. This research highlights the need for improvements in the regulation of asset confiscation for criminal acts of corruption in Indonesia and appreciates the United States' steps in implementing the *NCB Asset Forfeiture*.

Keywords: *Asset Confiscation, Corruption, Non-Conviction Based Asset Forfeiture, Indonesia, United States*.

INTRODUCTION

Law is a system of regulations created and enforced by government institutions in a society, which functions to regulate people's behavior so that it can run according to the desired order (Robertson, 2006:90). The presence of law is important in maintaining the stability of a society as a social organization, by providing guidelines on acceptable and unacceptable behavior, so that every member of society understands their role and responsibilities in the community. Therefore, the study of law is essential in providing a strong foundation for the stability of a society.

One form of law violation that damages social order is the criminal act of corruption. Corruption, as a criminal act involving dishonest behavior or crimes committed by individuals or organizations to enrich themselves or that entity, has become a serious problem in many countries (Merle, 2013: 812). Categorized as an extraordinary crime, corruption can cause huge losses to the country and its society. Therefore, some countries have specifically regulated corruption in their legislation.

Corruption, as a global problem, has caused significant financial and economic losses for countries around the world. *The United Nations Convention Against Corruption* (UNCAC) has recommended that countries adopt *Non-Conviction Based Asset Forfeiture arrangements* as an effort to recover assets that have been misused. However, the return on assets that has been made is still not commensurate with the actual losses (Nugraha, 2019:29). One country that has adopted regulations regarding *Non-Conviction Based Asset Forfeiture* is Indonesia.

The philosophical basis of *the Non Conviction Based Asset Forfeiture* is in line with one of the goals of the Republic of Indonesia, namely "promoting general welfare", as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia. Regulation of *Non Conviction Based Asset Forfeiture* in the law on eradicating

criminal acts Corruption is very important considering that current regulations are still limited in scope and less effective in practice (Helmi, 2018: 5).

The importance of establishing legal instruments regarding *Non-Conviction Based Asset Forfeiture* encourages comparisons between existing regulations in Indonesia and other countries that have implemented them, such as the United States. In the United States, the *Non Conviction Based Asset Forfeiture regulation* has been implemented as a legal step aimed at perpetrators of corruption (offenders). Therefore, the comparison between Indonesia and the United States in terms of confiscation of assets for criminal acts of corruption is the focus of this research.

In this context, this research aims to explain the comparison of arrangements for asset confiscation for criminal acts of corruption between Indonesia and the United States which have implemented *Non-Conviction Based Asset Forfeiture*. It is hoped that this research will provide a new perspective on the implementation of *Non-Conviction Based Asset Forfeiture* in Indonesia, as well as a positive contribution to efforts to eradicate corruption.

METHOD

The research method used in this research is normative legal research or *doctrinal research* with a comparative approach and a statutory approach. This research is prescriptive in nature, aims to provide an overview or formulate the problem according to existing facts. The data sources used are primary and secondary sources, including statutory regulations, official records, minutes, books, journals and related research. Data collection techniques are carried out through literature study, while analysis of legal materials uses interpretive methods with a focus on grammatical, systematic, comparative and teleological interpretation.

RESULTS AND DISCUSSION

Comparison of Asset Confiscation Arrangements for Corruption Crimes Between Indonesia and the United States Which Have Implemented *Non-Conviction Based Asset Forfeiture*

The criminal justice system in Indonesia is based on statutory regulations that regulate confiscation in criminal law. Forfeiture in criminal law in Indonesia is regulated in the Criminal Code (KUHP). Forfeiture is used as an additional crime in a person's criminal decision (Criminal Code, 2021).

In criminal acts of corruption, the asset confiscation mechanism is based on Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes and Law Number 46 of 2009 concerning Corruption Crime Courts. The mechanism for confiscation of assets is regulated in Article 18 letter a of the Corruption Crime Law, which explains that confiscation can be carried out on movable or immovable goods used for or obtained from criminal acts of corruption, including companies owned by the convict and the price of goods that replace the goods. .

Confiscation of assets as a sanction against perpetrators of criminal acts of corruption aims to return the proceeds of the criminal act. The Corruption Crime Law also regulates that asset confiscation can be carried out if the defendant dies before a court decision is made, if there is strong evidence that the defendant committed a criminal act of corruption.

Apart from that, the Corruption Crime Law also regulates provisions through civil law. Article 32 paragraph (1) explains that if an investigator finds elements of a criminal act of corruption without sufficient evidence but there is a loss to the state's finances, then the investigator can submit the case file to the State Attorney for a civil lawsuit or hand it over to the injured agency to file a lawsuit. An acquittal in a corruption case does not eliminate the right to claim losses to state finances in accordance with Article 32 paragraph (2).

If the suspect dies during an investigation and there is a loss to the state's finances, the investigator can hand over the case files to the State Attorney or hand it over to the agency that suffered the loss to carry out a civil lawsuit against his heirs in accordance with Article 33 of the Corruption Crime Law.

The source of law in the narrow sense is where the law is discovered. In a broad sense, legal sources are tools used by authorities or authorized parties to determine appropriate laws to use (Theresia Ngutra, 2016). Legal sources can be classified into formal legal sources and material legal sources. Formal sources of law

include laws, customs, jurisprudence, international treaties or agreements, and doctrine. Material legal sources are the substance or material of formal legal sources and can be viewed from various aspects such as economics, sociology and history (Kansil, 2002).

International agreements, regulated in the 1969 Vienna Convention, are agreements entered into by relevant countries which are regulated by international law. Article 2 paragraph (1) of the 1969 Vienna Convention explains that international agreements are signed in written form and are subject to international law.

Corruption is not only a country's problem, but also a global problem. The United Nations (UN) held the UN Convention Against Corruption (UNCAC) which was ratified at the Summit in Mexico in 2003. UNCAC is recognized by 183 countries as a source of international law in efforts to eradicate criminal acts of corruption (UNCAC, 2023).

The United Nations Convention against Corruption (UNCAC) consists of 8 chapters covering prevention measures, criminalization, law enforcement, international cooperation, technical assistance, exchange of information, and asset recovery. This convention has a *Conference of State Parties* (CoSP) which is held every 2 years to discuss UNCAC and its implementation in each member country.

CoSP has the aim of increasing the capacity of countries in implementing UNCAC, increasing cooperation between countries, and promoting and reviewing the implementation of this convention. CoSP is supported by supporting bodies which are divided into several groups, such as *the Working Group on Prevention, Working Group on Asset Recovery, Implementation Review Group and Technical Assistance, and Expert Meeting on International Cooperation*. One of the important chapters in UNCAC is Chapter V which discusses Asset Recovery. This chapter introduces the concept of *Non Conviction Based (NCB) Asset Forfeiture* which allows confiscation of assets without first punishing the perpetrator. NCB Asset Forfeiture aims to take assets related to criminal acts of corruption, not to punish the perpetrators.

In UNCAC, forfeiture and confiscation are not distinguished, so the terms "forfeiture" and "confiscation" have the same meaning. However, it is important to use the correct terminology in international cooperation to avoid misunderstandings.

NCB Asset Forfeiture can be carried out in two contexts, namely confiscation of assets in a criminal context without a final decision, and confiscation through separate legislation. Not all countries have jurisdictions that implement *the NCB Asset Forfeiture*.

Some countries use *the NCB Asset Forfeiture* after the investigation process is complete, while other countries use it after the criminal process fails.

Several countries that implement *the NCB Asset Forfeiture* in eradicating corruption include Australia, Canada, Colombia, Costa Rica, New Zealand, the Philippines, South Africa, Switzerland, Thailand, England, the United States and Zambia.

NCB Asset Forfeiture is useful in situations where confiscation of assets using punishment is not possible or not available, such as when the perpetrator of a crime dies, has fled abroad, has legal immunity, or the assets are in the hands of a third party who is not involved in the crime.

The implementation of *the NCB Asset Forfeiture* can be carried out based on an assessment based on property or value. Property-based asset confiscation aims to take assets related to the instrumentality of the crime, while value-based asset confiscation focuses on profits obtained from the crime.

In *NCB Asset Forfeiture*, third parties who have interests related to the assets have the right to be involved in the forfeiture process. The third party must prove that his involvement was limited to ownership of the assets without knowledge that the assets were related to a criminal act.

Implementation of *Non Conviction Based (NCB) Asset Forfeiture*

It is very common for investigations into criminal acts of corruption and money laundering to go abroad, so it requires cooperation with other countries that have different jurisdictions. MLA is mutual legal assistance, namely a request for legal assistance by a country concerned to another country that has a different jurisdiction to share information, surveillance and evidence for investigations.

StAR is a collaborative organization between *the World Bank* and *the United Nations Office on Drugs and Crime (UNODC)*. (*Signature and Ratification Status*, 2023) StAR provides facilities for parties with different jurisdictions in confiscating assets. (*Signature and Ratification Status*, 2023) *The NCB Asset Forfeiture*

concept contained in UNCAC has actually been around for a long time and has been applied in *common law countries*. An example is the United States which has had laws that regulate in detail regarding Asset Forfeiture since 1776. Apart from being a facilitator in the systematic recovery of assets contaminated by criminal acts of corruption, StAR also works with developing countries and financial centers to prevent money laundering from criminal acts of corruption. (*United Nations Convention Against Corruption* , 2005) StAR collaborates with several international organizations, namely *the Conference of States Parties* (CoSP) UNCAC, G8, G20, and *the Financial Action Task Force* (FATF). In particular, StAR acts as a technical advisor to key policymakers in the areas of asset recovery, transparency and beneficial ownership, and corruption risk mapping.

Star SAR then works with international organizations such as FATF to promote and develop policies to combat corruption and money laundering. In this case, StAR simply offers the opportunity to consult and propose solutions for countries with different jurisdictions. This agreement binds Indonesia to UNCAC (UU No. 7 of 2006 concerning the Declaration of the United Nations Convention Against Corruption (UNCAC), 2006). If a State declares that it is bound by a treaty through ratification, acceptance or approval, then the treaty becomes binding on the State concerned only if that State expresses its agreement to be bound. If not, that means (In Wayan Patriana, 2002) the article above explains that if a dispute occurs between the parties and a solution cannot be found through negotiations, then one of the parties can request that the dispute be resolved through arbitration. If, after six months, the parties do not agree on the composition and administrative structure of the arbitration, either party may refer the matter to the International Court of Justice (ICJ).

In accordance with the attachment to Law Number 7 of 2006 concerning the United Nations Convention against Corruption (UNCAC), Indonesia is not bound by the provisions of this article. Apart from the reasons above, the author believes that if a dispute occurs with another UNCAC participating country, Indonesia will prefer to resolve the dispute through mediation, for example negotiations. The meaning of this article is that a reservation or reservation means a unilateral statement, in whatever form and name, made by a country, when signing, ratifying, accepting, approving or acceding to an international agreement, which is intended to exclude or change the legal consequences of certain provisions of the treaty in their application to the country concerned.

In Indonesia, in general the confiscation of assets resulting from criminal acts is regulated in the Criminal Code (KUHP), specifically Article 10 letter b. The contents of this article are: (Law Number 20 of 2001 concerning the Eradication of Corruption Crimes., 2001a) From this article, it can be said that the act of confiscation of assets has been regulated and used as a sanction against perpetrators of criminal acts of corruption, in an effort to return the proceeds of the act. the crime. Furthermore, the Corruption Crime Law not only places confiscation of assets as a criminal sanction, but confiscation of assets is carried out if the defendant dies before a court decision is made (carried out when there is strong evidence that the party concerned has indeed committed a criminal act of corruption), then the judge can determine the action of confiscating assets that have been previously confiscated.

The regulations regarding previously confiscated assets are regulated in Article 38 point 5 of the Corruption Crime Law. "If the examiner finds that there is not enough evidence to prove one or several criminal acts of corruption, even if public property has been lost, then the examiner will immediately open a case. This investigation file will be submitted to the Public Prosecutor for Criminal Affairs. The case or injured party will be sent to file a lawsuit. Article 32 paragraph (1) explains that if there is not enough evidence to fulfill the requirements for a criminal act of fraud, then investigators can open a case to the Government to the Public Prosecutor (JPN), Organization. Those who lose can sue the government. Paragraph (2) of the article explains that stopping a corruption case is not a basis for eliminating the right to sue for loss of public funds. "If the suspect dies during the investigation, the investigator must immediately hand over his findings to the prosecutor or hand over the deceased to his successor, regardless of the loss of public funds." If community funds are lost and it becomes clear at trial that there is sufficient evidence, then the heirs can be sued by agreement. Added in line 38(6) that confiscation cannot be appealed.

This also happens when the perpetrator dies after being sentenced, Article 38 C of the Criminal Code regulates: (Law on the Elimination of Criminal Acts No. 20 of 2001, 2001b) "If the court decision has final force, then it can be understood that the property of a prisoner who is suspected or suspected of committing

corruption have not been confiscated by the Government. For the purposes of section 38B(2), the Government may subject its Successor to a lawsuit. Efforts to recover state losses resulting from criminal acts of corruption are optimal, because both the provisions of the Criminal Code and the Anti-Corruption Law require court decisions that have binding legal force and require lengthy evidence, right? Sudarto also assessed that the civil asset confiscation mechanism contained in the Corruption Law is not yet optimal. Civil litigation adheres to a formal evidentiary system, meaning that judges are reluctant because they only need to prove the plaintiff's claims. Therefore, confiscation of assets according to positive law in Indonesia has not been optimal.

In Indonesia itself, the confiscation of NCB assets has not been used to commit criminal acts of corruption. The Batam District Court finally granted the East Java BNN's request and allowed the execution of the perpetrator's assets related to drug crimes. Procedure

“NCB asset confiscation” is also used and approved by a panel of judges to allow a perpetrator's assets to be confiscated without trial. A major corruption case in Indonesia in 2016, the Century Bank case, which cost the state approximately \$7.4 trillion, resulted in confiscation based on a court decision. After the verdict, Hartawan's assets were confiscated by the state to compensate his clients and the state for losses, but this confiscation only occurred after the verdict.

The Indonesian reservation has no impact on *the NCB Asset Forfeiture* because the focus is not on asset forfeiture. There is a significant difference between *NCB Asset Forfeiture* and asset confiscation in Indonesian positive law. Here are the differences:

No	Indicator	According to <i>NCB Asset Forfeiture</i>	According to the Criminal Code	According to the Corruption Law
1	Understanding	Confiscation of assets without first punishing the perpetrator. It can also be called confiscation of objects, it can be done before, during and after a court decision.	Confiscation of assets carried out after a court decision, which is an additional crime	It is a sanction against the perpetrator of a criminal act of corruption in an effort to return the proceeds of the criminal act of corruption or tainted wealth, possibly because the perpetrator died
2	Base Law	Article 54 paragraph (1) letter c <i>United Nations Convention Against Corruption</i> (UNCAC)	Article 10 letter b Criminal Code	Article 18 letter a, chapter 32 verses (1) and (2), chapter 33, chapter 38 verses (5) and (6), article 38C Act Corruption
3	Cave	Seize the resulting assets criminal offense if plunder punishment is impossible done.	As a criminal addition to roar perpetrator	As a sanction towards the perpetrator criminal act internal corruption effort return of results criminal act corruption.
4	Object	Assets (possessions that contaminated and acquired from criminal acts corruption) and also that used as an instrument to take action criminal corruption.	Perpetrator (deprivation referred to in This Criminal Code is used to punish perpetrator).	Perpetrator (deprivation What is meant is on Act This TIPIKOR is used for punish perpetrator).

5	Room Scope	Covers foreclosure and plunder (in the sense of confiscation and plunder does not differentiated in UNCAC)	Covers only just plunder (in Indonesia plunder and foreclosure distinguished)	Covers only just plunder (in Indonesia, plunder and foreclosure differentiated).
6	Process	Can be done before, medium, and after process punishment.	Done after there is a decision criminal	Done after there is a decision criminal
7	Mix Hand Party Third	Third parties can participate mix as long as you have it legal interests on case the.	No allowed human intervention third.	No allowed human intervention third

The difference between *NCB Asset Forfeiture* and Indonesian positive law is clearly visible from different legal perspectives. *NCB Asset Forfeiture* focuses on assets or property that are suspected of being tainted due to criminal acts of corruption, while Indonesian positive law regulates asset forfeiture as an additional criminal action that is only carried out after a court decision. This reflects the differences in terms, processes and application of the concept of asset forfeiture between the two legal systems.

In the United States, the corruption asset confiscation system is supported by the *Civil Asset Forfeiture Reform Act* and involves several components, such as *the Asset Forfeiture Management Staff (AFMS)*, *the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)*, and *the Organized Crime Drug Enforcement Task Forces (OCDETF)*. The process of confiscating corruption assets can be carried out in three forms: *Criminal forfeiture*, *Civil judicial forfeiture*, and *Administrative forfeiture*, with the aim of eliminating profits from crime, disrupting criminal organizations, and dismantling criminal activities.

At the global level, corruption is considered a threat to economic growth, democratic governance, and national security. Therefore, the Biden-Harris administration has designated anti-corruption as a core national security interest. However, there has been criticism of the practice of asset forfeiture, which can be abused and harm individuals' civil rights. Corruption asset confiscation is also a hot topic in Indonesia. The Corruption Eradication Commission (KPK) is the institution responsible for the process of confiscating corrupt assets in this country, which must first go through a court process. The proceeds from the confiscation of corruption assets are used to finance corruption eradication programs and pay compensation to the state. Even though there are differences in the process, use of confiscation proceeds, and the amount of assets confiscated between Indonesia and the United States, both have the same goal, namely to eradicate criminal acts of corruption and recover state losses.

In the context of international law, *NCB Asset Forfeiture* is a product regulated by the 2003 *United Nations Covenant Against Corruption (UNCAC)*, which mandates member countries to seek the confiscation of assets resulting from crime. Article 54 paragraph (1) of UNCAC emphasizes that all party states must consider taking actions deemed necessary so that confiscation of assets resulting from corruption is possible without criminal proceedings in certain cases.

Despite this, the confiscation of corrupt assets remains a controversial topic in both countries, with differences in the process, objectives and use of confiscation proceeds. The application of the NCB concept of asset confiscation in Indonesia is also still an interesting topic of discussion, especially in the context of the growth of transnational crime and threats to world peace and order. In this case, it is important for both countries to continue to improve and review the process of confiscating corrupt assets in order to increase justice, transparency and effectiveness in eradicating criminal acts of corruption.

Corruption Eradication Commission (KPK) data shows assets amounting to IDR 2.5 trillion have been confiscated since 2004. The United States confiscated assets worth \$36.5 billion from 1989 to 2019. In Indonesia, the assets confiscated included cash, vehicles, property and other assets suspected to have come from corruption. In the United States, seized assets include cash, vehicles, property, electronic equipment, and other assets suspected of originating from corruption. The KPK is responsible for seizing assets in Indonesia, while law enforcement agents in the United States do so. The asset confiscation process must pay attention to

human rights and not harm innocent parties in both countries. Their goal is to eradicate corruption and recover state losses.

CONCLUSION

This research highlights the important role of the United Nations Convention on Corruption (UNCAC) in increasing state capacity in the prevention and recovery of corrupt assets. Chapter V of UNCAC, which discusses "Asset Recovery", introduces the concept of *Non Conviction Based (NCB) Asset Forfeiture* which has significant implications in dealing with corruption.

The difference between *NCB Asset Forfeiture* and positive law in Indonesia can be seen from a different legal perspective. *NCB Asset Forfeiture* focuses on assets or property that are suspected of being contaminated due to criminal acts of corruption, while Indonesian positive law regulates asset confiscation as an additional crime that is only carried out after a court decision. Confiscation of assets in *the NCB Asset Forfeiture* can be carried out before, during and after the criminal process, while in Indonesian positive law asset confiscation can only be carried out after a criminal decision has been made. This reflects the differences in terms, processes and application of the concept of asset forfeiture between the two legal systems.

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