

Analysis Of The Implementation Of The Non-Conviction-Based Concept In The Practice Of Asset Recovery Of Money Laundering Criminal Act In Indonesia From The Perspective Of Presumption Of Innocence

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ABSTRACT

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Purpose: *This research aims to analyze the discourse on applying the non-conviction-based concept in the practice of restoring money laundering assets in Indonesia from the perspective of the presumption of innocence.*

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Methodology: *In this research, the method used was normative juridical using statutory, conceptual, and historical approaches.*

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Results: *The research results present a concept of the importance of the presumption of innocence and protection of the suspect's property before they are stated or convicted in court. Given the non-conviction-based concept in the assets recovery practice of money laundering crime, it is a mechanism for seizing state assets that criminals have taken, and it is possible to confiscate them again, even though the initial criminal act is not yet known for certain guilt so that it has the potential to castrate the suspect's human rights.*

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Applications of this study: *This article explains the importance of safeguarding the presumption of innocence and protecting the property rights of suspects. It is crucial to be used as a reference considering that the criminal procedural law system in effect in Indonesia is also inadequate to apply this concept. Thus, if this concept will be applied in the future, this study can be a reference in terms of drafting related regulations to safeguard against the presumption of innocence and the rights of suspects.*

Novelty/Originality of this study: *The non-conviction-based concept in the asset recovery practice of money laundering crime is new. Therefore, the research presents to analyze whether the concept is under the existing legal system in Indonesia.*

Keywords: Non-conviction-based concept, asset recovery of money laundering crime in Indonesia, the presumption of innocence

INTRODUCTION

The development of science, technology, and information does not always positively impact. These developments also have a negative impact, such as the development of criminal acts from conventional to organized and transnational crimes. In fact, the development of criminal acts in this modern era has led to economic gain, better known as crimes with economic motives, such as corruption, money laundering, and narcotics trafficking. According to Romli Atmasasmita, crimes with economic motives, which were originally conventional in nature, such as laundering, fraud, and embezzlement, have become increasingly complex since they involve well-educated perpetrators (white-collar crime) and are often transnational (Romli Atmasasmita, 2016).

On the one hand, 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 offers the concept of easy and short distribution of funds. Now, people can channel funds through internet banking and electronic fund transfers, which have helped make it easier for banking customers to transfer their funds from one bank to another worldwide. However, as mentioned above, negative impacts, on the other hand, cannot be avoided. Through this financial system, the perpetrators of the crime will seek action so that the money obtained from the crime can easily enter into the financial or banking system. It, of course, aims to ensure that the money (property) obtained from the proceeds of the crime is untraceable by law enforcers.

In connection with the description above, one of the crimes in the financial system that is still a problem in Indonesia and continues to develop is money laundering (TPPU). 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 money laundering is still new (Hibnu Nugroho, Budiyanto, and Pranoto, 2016: 1). Besides, the regulation regarding money laundering has been amended several times, and the last one is

Law No. 8 of 2010 concerning the Money Laundering Crime. Changes that continue to occur do not necessarily make the Criminal Case of Money Laundering recede; in fact, in 2018, it reached 7.96 trillion, and in 2020, it reached 9 trillion rupiahs (Taufik Fajar, 2019). The increase of the money laundering cases causes the idea of many parties to apply a new legal concept that has been echoed by the United Nations Convention Against Corruption or the UN Convention since 2003 regarding the confiscation of assets without punishment (non-conviction-based asset forfeiture). It is hereinafter referred to as NCB, which is a legal mechanism whereby state-owned assets that criminals have taken are allowed to be confiscated, 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 (July Wiarti, 2017).

In Indonesia, several criminal provisions have regulated the possibility of appropriation and foreclosure of the proceeds of crime (Raida L. Tobing, 2009). However, based on this provision, confiscation can only be carried out after the perpetrator of the criminal act is legally and convincingly proven to have committed the crime. It is clearly part of applying the reverse proof principle. If the NCB continues to be implemented based on the provisions in Law No. 8/2010, confusion will arise in the problem of proving predicate crimes related to the money laundering crime. In addition, regarding readiness, Indonesia itself, in carrying out NCB in the practice of returning assets at money laundering crime, is still not qualified. There are concerns about confusion in law enforcement regarding the rights of suspects and other aspects of criminal procedural law, in which problems may arise later. Thus, through this research, we try to provide an analysis related to the application of the non-conviction-based concept on the practice of asset recovery in Indonesian money laundering cases from the perspective of the presumption of innocence, given that this principle is one of the most important principles in criminal procedural law in Indonesia.

RESEARCH METHODS

In this research, the method used was normative juridical using statutory, conceptual, and historical approaches. The statutory regulatory approach refers to all forms of legislation relating to the settlement of money laundering cases and criminal procedural law in Indonesia. Then, in a conceptual framework, we examine the concepts and principles in criminal procedural law in Indonesia and the settlement of money laundering cases. Meanwhile, in the

historical approach, we provide analysis by examining the development of the presumption of innocence as one of the principles prioritizing the protection of the suspects' human rights.

DISCUSSION

Criminal Law System in Indonesia

In the criminal law system adopted by Indonesia today, before carrying out investigations, prosecutions, and court examinations on the money laundering crime, firstly, it must be proven the original crime. Article 78 paragraph (2) of Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering states that for examination at trial, the defendant is obliged to prove that their assets are not the result of a criminal act. It is one of the specificities of the crime of money laundering compared to the provisions in the Criminal Procedure Code (KUHAP), where the defendant is not burdened with the obligation of proof (Article 66 of the Criminal Procedure Code), but reverse proof for the crime of money laundering can only be carried out by the defendant in court level and not at the investigation or prosecution level (Raida L. Tobing, 2009).

Therefore, if we examine the confiscation of assets resulting from crimes committed without imposing penalties on the perpetrators, it will have implications for the concentration of law enforcers who are more inclined only to their assets, not the perpetrators. In fact, if we examine further in the criminal procedural law system, the confiscation of existing crimes must be linked to the defendant's guilt. It means that there must be proof of wrongdoing first. Then, the state can confiscate assets resulting from a criminal act.

In addition, in the provisions of positive law in Indonesia, confiscation of assets proceeds of crime is included in additional penalties and based on the provisions, additional punishment cannot stand alone and will always follow the principal criminal. It means that additional punishment can only be imposed simultaneously with the principal criminal. Confiscation of assets proceeds of crime can only be carried out if the principal criminal is examined and the defendant is proven guilty. Thus, the goods obtained from the proceeds of crime by the court can be determined to be confiscated by the state, to be destroyed, and other measures taken so that the goods or assets can be used for the benefit of the state by donating them or conducting an auction of assets resulting from criminal acts.

In general, it is often said that the function of a criminal procedure law is to limit the power of the state itself to the people involved in the criminal justice system. Provisions in the

Criminal Procedure Code are intended to protect suspects and defendants against actions by legal and court officials who deviate from these provisions. Then, what needs to be understood is that the law, through the legal apparatus, often carries out actions that injure the rights of suspects and defendants. In other words, the criminal procedural law is also a source of authority for those involved in this process (police, prosecutors, judges, and legal advisors).

Friedmen interprets the Criminal Procedure Code as the fairest because it has been regulated by *lex scripta*. However, we need to realize that a fair legal process does not only apply to the laws and regulations but also to our attitude in respecting the rights of every individual (including suspects and defendants) as contained in the 1945 Constitution, which states that "independence is the right of all nations" (Anggi Nursatangi, 2020). Therefore, the application of the non-conviction-based concept on the practice of money laundering asset recovery is not in accordance with the spirit of the constitution. It means that every person the court has not convicted is considered the same before the law and has the right to personal protection and personal property rights.

In fact, in the judicial review of several articles in the regulations of money laundering crimes, such as the matter of proof of reverse and proof of predicate crimes which later granted the petitioner's claim that it was constitutional, the Constitutional Court as the examining institution in its decision did not provide a solid theoretical basis regarding the concept of proceeds of crime and contemporary financial crime developments (Refki Saputra, 2017).

Then, if the confiscation of an asset that is reasonably suspected to be directly related to a criminal case can then be controlled by the whole state for the sake of asset recovery, then how can the measure of justice be preserved. It is due to the fact that there has not been a verdict in a criminal case that constitutes the main act or action that caused a loss to the state, so it is not certain whether the suspect has indeed committed a criminal act or not. It is certainly not in accordance with the criminal principle of presumption of innocence and will impact the loss of legal certainty and justice for the suspect.

However, several issues always raised in applying the NCB concept relate to the possibility of a suspect or defendant dying. Based on Article 79 paragraph (4) of the Money Laundering Crime's Law, "in the event that a defendant dies before the verdict is passed and there is sufficiently strong evidence that the person concerned has committed the crime of

money laundering, the judge on the demands of the public prosecutor decides the confiscation of assets that have been confiscated." Furthermore, based on the Article 79 paragraph (5) of the Money Laundering Crime's Law, "the determination of confiscation cannot be filed for legal remedies." Concerning the protection of third parties with good intentions, based on the Article 79 paragraph (6) of the Money Laundering Crime's Law, "any person with interest can propose an objection to the court which has passed the decision as referred to in paragraph (5) within 30 (thirty) days from the date of the announcement as referred to in paragraph (3)."

By looking at the provisions mentioned above, the provisions and mechanisms for confiscation of assets have been regulated if a suspect or defendant dies. Likewise, in the case of a third party with interest, they can propose an objection to the court so that the homework for law enforcers at this time is how to improve the existing performance and professionalism. After all, there are many improvements in terms of legal instruments (legal substance) without being matched by improvements in terms of legal structures (law enforcement officials). Thus, it is hoped that law enforcement of the money laundering crime will not find a smooth path.

Furthermore, when looking at the provisions in Article 67 of Law No. 8/2010 concerning the Prevention and Eradication of the Crime of Money Laundering, that investigators are given the authority to submit a request to a district court so that the court decides assets that are known or reasonably suspected to be the proceeds of crime become state assets or returned to those who have the right. In addition, based on Article 2 of the Money Laundering Crime's Law, corruption is included in the category of predicate offenses, where the proceeds of the crime of corruption can be confiscated using Article 67 of the Money Laundering Crime's Law.

Nevertheless, once again, the efforts to adopt a mechanism for expropriation of assets without criminalization have their own obstacles for Indonesia. Indonesian criminal law adheres to the retributive principle, where the priority is to criminalize the person, not return the assets. In addition, up to now, Indonesia does not yet have a comprehensive domestic mechanism and regulations related to efforts to confiscate assets without punishment, so it is feared that the mindset of law enforcers has not been accustomed to implementing this mechanism until now. Therefore, Article 67 of the Money Laundering Crime's Law cannot be implemented due to the absence of punishment procedural law for law enforcers to seize assets resulting from criminal acts of corruption. Thus, to apply the NCB asset forfeiture

concept, it must be examined comprehensively beforehand so that its application does not violate the suspect's presumption of innocence and human rights.

Review of the Presumption of Innocence and Protection of Property Rights of Suspects

The presumption of innocence is regulated in the Criminal Procedure Code and Law No. 48 of 2009 concerning Judicial Power. In the Criminal Procedure Code, it is regulated in point 3 letter c that "every person, who is suspected, arrested, flanked, prosecuted, and/or brought before a court session, is obliged not to declare the procedure until there is a court decision stating his guilt and obtaining permanent legal force." The principle of presumption of innocence is also implicit in the provisions of Magna Carta 1215, which are the embryo of the birth of human rights in the international sphere. According to Living Stone Hall, Article 39 of the Magna Carta provides that "no one may be confined, confiscated, considered, excommunicated, or taken his life, except through lawful means by the laws of his country."

The description above shows that even in the norms of international law, the protection of the suspect's human rights is clearly regulated, and no one may be deprived demonstrated through lawful means by the law of his country. It means there must be evidence beforehand whether they have actually committed a criminal act. Then, looking at the phrase "doing what is lawful by the law of the country," this phrase shows the legality principle that the state must not arbitrarily seize assets that are suspected of being the result of a criminal act of corruption before a person is convicted. With the guarantee of legal certainty and justice that the law can obtain, the status of the state actually acts not only to take advantage of every criminal case.

In addition, in Article 11 paragraph (1) Universal Declaration of Human Rights and Article 14 paragraph (2), ICCPR states, "Everyone charged with a penalty offense has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense." Then, in the provisions of Article 14 paragraph (2) of the ICCPR, it is stated that "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law." It means that a person has the right to be treated innocently before the prosecutor can convince the judge, accompanied by sufficient evidence, that the defendant is guilty. Judges from the start may not have the presumption of guilt, and the obligation of proof is in the prosecutor's

hands, and if there is any doubt, a decision is made in favor of the defendant (Alvon Kurnia Palma et al., 2014: 50).

To prove whether the suspect is guilty so that a legal sentence can be given, in settlement of a criminal act, the material truth must be sought. Therefore, even if a person is suspected of committing a criminal act with preliminary evidence, their human rights must be respected at the investigation and court level. In tracing the material truth, a principle applies that the entire process leading to the judge's decision must be directly confronted by the judge, and the whole process should be followed by the accused and endeavored with perfect evidence. Quoting the statement of John Rawls (John Rawls, 2003: 52):

“Thus, it is maintained that where we find formal justice, the rule of law and the honoring of legitimate expectations, we are likely to find substantive justice as well.”

It means that there must be an emphasis on justice in the criminal justice system, which provides the opportunity for the defendant to present and evaluate evidence and logical arguments. Therefore, when a defendant is still undergoing a criminal trial, applying the non-conviction-based concept in the practice of money laundering asset recovery before a suspect is found guilty has actually injured the value of justice and protection of the suspect's human rights.

It is in line with a principle that reads *"Geen straf zonder Schuld,"* which means that there is no crime without guilt, so that to impose a sentence on someone, the judge must have confidence that the defendant has been proven to have made a mistake. Mardjono Reksodiputro argued that although a citizen (Indonesian citizen or foreign citizen) has committed a disgraceful act (in this case, a criminal act), his rights should not be abolished or lost, especially when we remember that it was only a "suspect" who was faced (Mardjono Reksodiputro, 2018). We also have to remember that we can discipline ourselves not to violate the law, but are we not free from the risk of becoming a "suspect" or then a "defendant"? Herein lies the importance of fighting for the rights of the suspect or defendant.

In addition, Yahya Harahap stated that by including the presumption of innocence in the explanation of the Criminal Code, it could be concluded that legislators have established it as a legal principle underlying the Criminal Code and law enforcement (M. Yahya Harahap, 2004: 40). As a consequence of adhering to the principle of the presumption of innocence, a suspect or defendant who is accused of committing a crime still cannot be treated as a guilty person even though he or she may be subject to arrest/detention according to the applicable

law. Thus, all parties, including law enforcers, must uphold the human rights of the suspect/defendant (Heri Tahir, 2010: 87).

Applying the non-conviction-based concept in the context of money laundering asset recovery from a human rights perspective does not indicate the protection of private property rights. As known, in terms of human rights, apart from the right to life and freedom, property rights are fundamental rights that must be protected and respected. If this is violated, then there has been a human rights violation. Property is also a person's basic right, which the state must protect. In this principle, it is also emphasized that a person cannot be convicted only for suspicion of owning property and asks him to explain before the court that the property was obtained by lawful means (Alvon Kurnia Palma et al., 2014: 31).

Furthermore, private property right is one of the rights guaranteed by the constitution. The formulation of the protection of private property rights is explicitly stated in the constitution, namely in Article 28 G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that everyone has the right to protection of personal, family, honor and dignity, and property under his control. Also, in Article 28 H paragraph (4), everyone has the right to have private property rights, and these rights cannot be taken over arbitrarily by anyone. Further, Article 29 paragraph (1) Law No. 39 of 1999 on Human Rights emphasizes that everyone has the right to protect personal, family, honor, dignity, and property. Protection of human rights, namely the suspect's private property rights, is a logical consequence of the rule of law adopted by Indonesia, as stated in the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia that the Indonesian state is a law state.

In addition, Russell Brown defines private rights as rights born as a result of private property rights over certain resources (Russel Brown, 2006:589). Then, according to the views of John Locke and Jan Jaques Rousseau quoted by Max Boli Sabon in his book with the title of *Human Rights*, humans since in their natural life (naturalist status) have had human rights, including rights that are privately owned. Human rights include the right to life, freedom and independence, and property rights (the right to own something). The aspect of freedom for each individual has rested on the value of morality and puts forward the principle of equality of values that no one is stated to be guilty of and can be taken forcibly before the person is found guilty by the judge. Therefore, the right to protection of property under its control refers to property rights that cannot be taken over by anyone arbitrarily, either by the

state, even before the person is proven in court and the judge decides that the property in possession is obtained from the proceeds of a criminal act.

It signifies that there must be an emphasis on justice in the criminal justice system, which allows the defendant to present and evaluate evidence and logical arguments. Therefore, when a defendant is still undergoing a criminal trial, applying the non-conviction-based concept in the practice of money laundering asset recovery before a suspect is found guilty has injured the value of justice and protection of the suspect's human rights.

CONCLUSION

Technological developments cause economic transactions currently borderless, thus requiring a revolutionary new concept in the law enforcement system dealing with contemporary financial crimes. The presence of the non-conviction-based concept in the practice of money laundering asset recovery may be a breath of fresh air for some parties. However, if we re-examine this concept, there are still many things that are not per the concept of criminal law in Indonesia, starting from contradicting this concept with the presumption of innocence, reversing evidence in court that has the potential to violate the due process of law to injure the principle of the right to property rights.

Therefore, the suggestion from the author is that the government should further study the concept of the presence of non-conviction-based asset forfeiture in the practice of money laundering asset recovery. Thus, in the end, the goal of this concept is only to pursue its assets without paying attention to the perpetrator, which will then lead to violations of human rights. The second, in terms of preventing money laundering offenses, institutional strengthening of the Financial Transaction Reports and Analysis Center (PPATK) can then carry out investigations into any financial information transactions indicated to be money laundering crimes.

REFERENCES

- Atmasasmita, Romli. (2016). Globalisasi & Kejahatan Bisnis dalam Halif, “Model Perampasan Aset terhadap Harta Kekayaan Hasil Tindak Pidana Pencucian Uang”. *Jurnal Rechtsens*, Vol. 5 (2).
- Brown Russel. (2006). Rethinking Privacy. Dalam *Alberta Law Review*, Vol. 43 (589).
- Harahap, M. Yahya. (2004). *Pembahasan Permasalahan dan Penerapan KUHP: Penyidikan dan Penuntutan*. Jakarta: Sinar Grafika.
- Hibnu Nugroho, Budiyanto, dan Pranoto. (2016). Penyidikan Tindak Pidana Pencucian Uang dalam Upaya Penarikan Aset. *Jurnal Penelitian Hukum DE JURE*, Vol. 16 (1).
- Nursatanggi, Anggi. (2020). Perlindungan Hak-Hak Tersangka dan Terdakwa Melalui Asas Praduga Tidak Bersalah (*Presumption Of Innocent*) dan Asas Kesamaan Kedudukan Dihadapan Hukum (*Equality Before the Law*) dalam Sistem Peradilan Pidana Indonesia. Retrieved from https://www.academia.edu/31091182/Perlindungan_HakHak_Tersangka_dan_Terdakwa_Melalui_Asas_Praduga_Tidak_Bersalah_Presumption_Of_Innocent_dan_Asas_Kesamaan_Kedudukan_Dihadapan_Hukum_Equality_Before_the_Law_dalam_Sistem_Peradilan_Pidana_Indonesia.
- Palma, Alvon Kurnia, et.al. (2014). *Implementasi Dan Pengaturan Illicit Enrichment (Peningkatan Kekayaan Secara Tidak Sah) di Indonesia*. Jakarta: Indonesia Corruption Watch.
- Rawls, John. (2003). *Justice as Fairness; A Restatement*. Massachusetts: The Belknap Press of Harvard University Press Cambridge.
- Reksodiputro, Mardjono. (2018). Mardjono Reksodiputro: Jaminan Hukum untuk Tersangka. Retrieved from <http://jentera.ac.id/mardjono-reksodiputro-jaminan-hukum-untuk-tersangka/>.
- Saputra, Refki. (2017). Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (*Non-Conviction Based Asset Forfeiture*) dalam RUU Perampasan Aset di Indonesia. Retrieved from <https://acch.kpk.go.id/id/artikel/riset-publik/tantangan-penerapan-perampasan-aset-tanpa-tuntutan-pidana-non-conviction-based-asset-forfeiture-dalam-ruu-perampasan-aset-di-indonesia>.
- Tahir, Heri. (2010). *Proses Hukum yang Adil dalam Sistem Peradilan Pidana Indonesia*. Yogyakarta: Laksbang Pressindo.
- Taufik, Fajar. (2019). PPAATK Berberkan Tindak Pidana Pencucian Uang Sepanjang Tahun 2018. Retrieved from <https://economy.okezone.com/read/2019/02/26/20/2022893/ppatk-beberkan-tindak-pidana-pencucian-uang-sepanjang-2018>.
- Tobing, Raida L. (2009). Efektivitas Undang-Undang Money Laundering. *Jurnal Penelitian Hukum*.
- Wiarti, July. (2017). *Non-conviction Based Asset Forfeiture* Sebagai Langkah Untuk Mengembalikan Kerugian Negara. *Jurnal UIR Law Review*, Vol. 1 (1).