

# The Concept of Non-Conviction Based Asset Forfeiture As a Legal Policy in Assets Criminal Action of Corruption

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## ABSTRACT

This research intends to examine both the notion of non-conviction based asset forfeiture as a legal policy in assets criminal action of corruption and the legal regulations against mechanism of asset confiscation that are present in Indonesian positive law. Research of the normative (legal) or doctrinal variety was used. The findings of this study demonstrate that asset confiscation regulations in Indonesia's current positive law handle both criminal forfeiture and civil forfeiture, but the regulations continue to be founded on criminal evidence first (follow the suspect), and criminal law still regards the seizure of assets as a separate crime. The United Nations Convention Against Corruption (UNCAC 2003) has been ratified by Indonesia through Law No. 7 of 2006, which then, as a follow-up to the government's renewal step, publishes the draft law on the confiscation of assets for criminal actions. This is anticipated to be the beginning of the asset seizure regime by focusing on efforts to return the assets (follow the money), where UNCAC as an international instrument proposes ratifying countries to apply the concept of non-conviction based asset forfeiture as an effort to eradicate criminal action of corruption. The NCB concept is a practical way to optimize the return on state losses resulting from asset seizures, foreclosures, and other forms of criminal law policy.

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## ABSTRAK

Penelitian ini bertujuan untuk menganalisis peraturan hukum terhadap mekanisme perampasan aset yang ada pada hukum positif Indonesia dan menganalisis konsep non-conviction based asset forfeiture sebagai kebijakan hukum dalam perampasan aset tindak pidana korupsi. Tipe penelitian yang digunakan adalah normatif (legal research) atau doktrinal. Hasil penelitian menunjukkan bahwa peraturan perampasan aset dalam hukum positif Indonesia yang ada saat ini dilakukan dengan penanganan pidana dan perdata namun tetap didasari pada pembuktian pidana terlebih dahulu (follow the suspect) serta hukum pidana juga masih menempatkan perampasan aset sebagai pidana tambahan. Indonesia telah meratifikasi United Nations Convention Against Corruption (UNCAC 2003) melalui Undang-Undang No. 7 Tahun 2006 yang kemudian sebagai tindak lanjut pemerintah pada langkah pembaharuan tersebut menerbitkan Rancangan Undang-Undang tentang Perampasan Aset Tindak Pidana yang diharapkan menjadi awal mula rezim perampasan aset dengan berfokus pada upaya pengembalian aset (follow the money) di mana UNCAC sebagai sebuah instrumen internasional mengusulkan negara-negara peratifikasi untuk menerapkan konsep perampasan aset tanpa bergantung pada putusan pidana terhadap pelakunya (non-conviction based asset forfeiture) dalam upaya pemberantasan tindak pidana korupsi. Konsep NCB merupakan solusi yang efektif dalam memaksimalkan pengembalian kerugian negara melalui penyitaan dan mengambil alih suatu aset secara in rem atau gugatan terhadap aset sebagai bentuk kebijakan hukum pidana.

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## I. INTRODUCTION

In order to profit oneself or others by exploiting positions of trust in the state, corruption is a type of criminal crime that is frequently tied to issues with the state, state officials, or persons who hold positions of power in society. Because it is practiced consistently, undermining the structure of power and destruction in this nation, the issue of criminal acts of corruption has moved beyond the realm of the ordinary and has instead become endemic. In other terms, it can be said that a corrupt act is a crime that is carefully thought out, neatly executed, and frequently done so for the benefit of particular people or groups.

In 2020–2021, the value of governmental financial losses as a result of corruption climbed four times, according to Indonesia Corruption Watch (ICW). This demonstrates that state losses as a result of corruption reached Rp. 56.7 trillion, a 4-fold rise from Rp. 12 trillion in 2019 (Watch, 2022). Based on the aforementioned facts, it can be deduced that asset seizure is crucial to maximizing the recovery of state losses that have not been recovered, in addition to criminalizing corrupt individuals.

When it comes to the use of asset confiscation, there have been many instances of corruption, but the quantity of assets seized frequently does not correspond to or even come close to making up for the corrupted state losses. In Indonesian positive law, the method for asset confiscation now focuses more on revealing illegal conduct when there is a component to catch the offender and send him to prison by just designating wealth confiscation as an additional crime. The criminal mechanisms used to seize assets under the Corruption Law, the Criminal Code, and the Criminal Procedure Code are essentially identical because both are awaiting a court decision with legal force that will determine their status, such as whether they should be confiscated for the state or returned to the rightful owner. In an effort to recoup the losses of the corrupted condition, this takes a long time and is not ideal.

However, the Corruption Law also enables the recovery of corrupted assets by submitting a claim for compensation via a civil court system based on Articles 32, 33, and 34. This clause, however, can only be used if a corruption case results in acquittal. The state attorney general may bring a lawsuit in accordance with these provisions if there is insufficient evidence for one or more elements of the criminal act, if the suspect passes away during an investigation, examination, or decision-making process, while there has been a genuine loss of state funds.

Given the aforementioned circumstances, the Corruption Law, which governs the seizure of assets through the civil justice system, is still very narrow in scope, making it seem like there is a real need for a policy that permits the confiscation and confiscation of proceeds and instruments of criminal acts effectively and efficiently taking into account the efforts confiscation of wealth proceeds from crime is one of the main concerns in tackling financial crime in recent time. Of course, by respecting individual rights, this is done in a way that upholds the principles of justice. As a result, an alternative legal strategy is required to gradually restore state finances, such as by harmonizing the mechanism for confiscating criminal assets as one of the standards in the United Nations Convention Against Corruption (UNCAC) or the United Nations Convention Against Corruption (UNCAC). As a result of the adoption of this norm, States Parties are required to use all reasonable means to seize property obtained via illicit activity without first pursuing criminal charges (Saputra, 2017).

Through Law No. 7 of 2006, Indonesia, a State Party to the UNCAC, ratified this treaty. Then, in 2008, the government started to produce the Draft Law on Asset Confiscation as a concrete attempt in the renewal phase. Based on the aforementioned, the best way to recover assets lost as a result of corruption is to adopt the concept of non-conviction based asset forfeiture as a method of UNCAC implementation. This method is based on the simple premise that if something violates the law, it can be tried and confiscated for the state without first putting the person on trial through a civil lawsuit, and is also known as *in rem* or civil asset forfeiture.

Contrary to present law, the Asset Confiscation Bill introduced the idea of non-conviction based asset forfeiture. Confiscated assets are those that are "suspected" to be the proceeds of or the tools of a criminal act. When it is used, an inquiry order for asset confiscation comes before the seizure itself in order to prevent the criminals who committed the crime from profiting from their actions. Seizure orders are designed to prevent crime and deprive those who have been found guilty of it of profits that were obtained illegally. Additionally, this is being done to stop the commission of new crimes; for example, if there has been a corrupt act, the assets are being seized to stop new crimes like money laundering (Wiarti, 2017).

Assets can be seized while people are still suspects in the non-conviction based asset forfeiture concept under the guise of asset recovery for the State. According to global developments, the regulation was created as a legal framework for asset forfeiture and confiscation resulting from criminal acts. Asset forfeiture in the context of returning the proceeds of criminal acts can be carried out directly on property or objects (*in rem*), other than individuals (*in personam*). Because the NBC Asset Forfeiture actually focuses on recovering assets, not people, and does not eliminate the authority to prosecute criminals, it is imperative that this bill be passed in order to fill the legal void left by the Corruption Crime Act in regards to seizing assets resulting from corruption crimes. Although NCB Asset Forfeiture is the topic of the case and not another punishment, it is permanent rather than temporary.

According to the description given above, it should be required to reform Indonesia's criminal justice system by enacting legislation controlling asset forfeiture and the confiscation of proceeds from illegal activity. In addition to being comprehensive, these agreements must also be integrated with other agreements through the harmonization of already-existing laws and regulations in order for the laws to be drafted to be effectively implemented, able to offer legal certainty to the public, and able to guarantee legal protection.

Asset Recovery Theory and Legal Policy Theory make up the theoretical framework. The author conducts research on various papers related to this issue, including Zebua Rahmeni, whose thesis is titled "non-conviction based asset forfeiture attempts on corporate shares as contaminated assets" and was published by the Faculty of Law, University of Indonesia. The research's goal is to propose a law that is more comprehensive than the existing system. One of the challenges of identifying shares as contaminated assets is share ownership and control by a third party, which is the focus of this research. This research differs from the author's thesis work, which had a narrower focus because it discusses the application of the idea of non-conviction based asset forfeiture as a legal policy in the seizure of assets for criminal acts of corruption as well as the implications of the draft law on asset forfeiture as a practical effort to get around currently in force but deemed ineffective regulations.

## II. RESEARCH METHODS

This research employs a normative or doctrinal research methodology. Research that examines an existing norm or requirement is referred to as normative research. Because this study is conducted by looking at secondary materials from libraries or other repositories, it is sometimes known as doctrinal research or library research (Irwansyah & Yunus, 2015). and after that, it will be examined in light of the laws and rules that apply in Indonesia (positive law) as well as current theories. By using qualitative analysis, which goes beyond just the stage of data collection and preparation and also includes analysis and interpretation of the data itself, problems are solved and the descriptive

approach is put into practice. Qualitative analysis procedures, which are carried out by interpreting, describing, characterizing, and compiling a logical systematic that is tailored to the research objectives, are employed in drawing conclusions from the data and facts acquired in the research done.

### III. DISCUSSION RESULTS

#### The Concept of Non-Conviction Based Asset Forfeiture As a Legal Policy in the Confiscation of Assets for Corruption Crime

The regulation of asset confiscation employed internationally in an effort to process assets and return illegal instruments employing two ways, namely civil forfeiture and criminal forfeiture (also known as asset seizure in personam and inbrakes, respectively). Asset forfeiture of this kind has two related goals. First of all, it is against the law for anybody to make money from breaking the law; instead, the victim must receive restitution from the proceeds and tools of the crime (state or individual). The second is the suppression of monetary gains from crime and the avoidance of additional criminal activity.

The following table compares the differences between in person forfeiture of assets and in rem (Ramelan, 2015):

**Tabel 1** Differences Between In Person and In Rem Asset Forfeiture

Acts	Confiscation of Assets In Personam (Criminal)	Confiscation of Assets In Rem (Civil)
The object of confiscation	is part of the criminal penalty imposed on the defendant and is addressed to the person (in person).	Lawsuits brought by the government that are targeted at objects are actions addressed to the object (in rem)..
Confiscation	is a component of the criminal penalties imposed by the judge's ruling on the defendant's errors. It occurs concurrently with the Public Prosecutor's submission of the indictment.	It may be submitted prior to, during, or after the criminal justice process, or it may even be filed if the criminal court is unable to hear the matter.
Proof	establishing the defendant's guilt for the alleged crime is the basis for asset forfeiture. The defendant must have been cleared of all charges by clear and convincing evidence, in the judge's opinion.	The judge's decision regarding the lawsuit for asset seizure does not take the evidence of the defendant's guilt in a criminal case into account. It is possible for the confiscation in this lawsuit to invert the burden of proof.

#### Study of Non-Conviction Based Asset Forfeiture Basics/Principles

The principle is a crucial component in the creation of legislation since it directs the development of positive law. Legal principles are the cornerstone of legal science, according to Satjipto Rahardjo, because they provide the broadest foundation for the creation of a legal regulation. This is supported by Bellefroid's assertion that legal principles are fundamental standards that are translated from positive law and upon which science is based. More generic norms are not given the status of law. The ancestor of a society's positive law is this legal idea (Ishaq, 2007).

From this understanding, it is very important to determine the principles or principles that are relevant and become the direction of legal politics towards the NCB *Asset Forfeiture* which will be initiated in the Asset Confiscation Bill. As the way the NCB *Asset Forfeiture works* is to confiscate and take over an asset through an *in rem* lawsuit or a lawsuit against assets. This concept is based on the "*taint doctrine*" where a criminal act is considered "*taint*" (desecrates) an asset that is used or

is the result of the crime, so that under such conditions, the formulation of the Act on Asset Confiscation uses the Non-Conviction Based Asset Forfeiture mechanism. be the most appropriate solution.

Here are some general principles used in NCB in rem asset forfeiture: First, the company that owns the aset that was seized is not a legitimate business; rather, it is acting just as the fourth party in the persidangan process. In addition, the focus is on the interaction between the owner and the aset that is being used, rather than the relationship between the owner of the aset and the activity being carried out. The third is that the aset's perampasan does not involve a person who is piling on the guilt and instead refers to the aset as a perky organization. As a result, throughout the peradilan process, the nation in question will have a strong stance against aset dipengadilan and will insist that the benda in question is an aset tercemar, which will make conducting aset perampasan dangerous. Then, if there is a relevant organization that has a disagreement with the gugatan in question, it will be designated as the third relevant organization in the case at hand. The following are some guidelines or rules that apply to the forfeiture of NBC assets:

a. Principles/Bassics of Asset Forfeiture

This idea stresses using the assets themselves as the target of a judicial action to carry out the seizure of assets rather than going after specific people (in person). While it is immaterial to the criminal conduct's perpetrator, this confiscation is concentrated on assets that are thought to have originated from, were utilized in, or were connected to a criminal act. Since the intent is only for asset recovery and not to punish the person in charge of the asset, if the criminal is confronted and flees, dies, or is found not guilty, it will not impede the process of asset confiscation.

Because the state through its apparatus is the first party in asset-focused confiscation, and the asset is the second, the absence of a criminal subject permits the position of the parties connected to the asset to be positioned as a third party. The process for asset confiscation against items that are connected to or utilized as instruments or even media in committing crimes will be governed by the principle of in rem confiscation of assets.

b. Principles/Basics of Reversal Proof

While NCB Asset Forfeiture is civil in nature, if a criminal law procedure, also known as "criminal forfeiture," is used and is more focused on persons (in personam), the Public Prosecutor must be able to show the fulfillment of the components of the criminal act before the assets are taken. In general, it suffices to show that the asset being sued has a connection to a criminal conduct without having to establish the element of guilt of the act's perpetrator (formal evidence) so that the asset's owner is likewise have to meet the same burden of proof that the object of the lawsuit is not the proceeds of a crime. pertaining to a crime Due to this, one of the procedural rules used in the regulation of asset confiscation is the reverse burden of evidence principle.

c. Basics of Property Rights

In accordance with the law, there are two types of rights: individual rights (jus in personam) and material rights (jus in rem). rights are those that belong to an individual. Due to their relative nature, these rights can only be asserted against specific individuals if the law functions as intended. Despite the fact that material rights can be applied to all persons generally and that those who were born first have a higher status and are connected to a particular object, these rights can be used to bring charges against anyone connected to things that are subject to judgment. In essence, this principle recognizes each person's right to safeguard the property that is under his or her control until a decision has been made regarding the asset.

d. General Principles of Civil Procedure Law

In the event of a right claim, civil procedural law is a set of formal legal rules employed to uphold the consistency of substantive civil law. A few significant civil procedural law principles, according to Sudikno Mertokusumo, are that judges must wait, that judges must be passive, that trials

must be open to both parties, that both parties must be heard, that decisions must be supported by reasons, that proceedings must be paid for, and that no party must be represented (Mertokusumo, 2018). The HIR procedural legislation then has an oral event, direct event, no need for expert help, active judge, duty to educate both parties, active process leader, judicial independence, open trial, closed discussion, and open pronouncement characteristics, according to Supomo (Supomo, 2005).

This procedural principle is used in asset confiscation courts that employ a civil court mechanism, but it has a particularity, namely having a different grace period from civil procedural law and the status of the parties involved in this case is the state against the asset and not the state against the asset owner. If the party involved is interested in objecting assets to such action, they can then file themselves in court as a third party objecting, at which point the objecting third party must comply with all applicable procedural requirements. It can also be prioritized so that the state, which is represented by the State Attorney, proves it first.

e. The Principle of Legality.

There is no confiscation of assets without statutory rules that regulate in advance, all state actions must be based on laws that have been made democratically before that the laws made have supremacy or are above all and everyone is equal before the law (M.D, 1998). According to Eddy OS Hiarij, the notion of legality is a concept with two purposes. First, protecting is more of a material role of the criminal law, which is interpreted to defend the populace against arbitrary state power. Second, the instrumentation serves as a formal criminal law within the parameters set down by law, and the state is specifically permitted to exert its authority. Therefore, formal law governs how material law is implemented whereas material law contains material punishment (Sofyan, 2020). The legislation governing the seizure of assets is also relevant to this issue as it relates to current criminal law.

There are three key issues with criminal law that are discussed in the Academic Paper of the Criminal Code Bill. These issues are criminal acts (*strafbaarfeit*), mistakes (*mens rea*), and crimes (*straf*), which are actually just parts of the larger criminal justice system that exists in Indonesia. Actually, it is also a criminal justice system. This principle demonstrates that the criminal law politics that underlie the preparation of criminal law reform are criminal law politics in the sense that the policy is to choose, criminalize, or decriminalize an act that, absent the seizure of assets, does not result in the criminalization process being initiated against that person.

### **The Urgency to Regulate Non-Conviction Based Asset Forfeiture As a New System in the Law's Contents**

Non-conviction based (NCB) asset forfeiture has long been formulated in the United Nations Convention Against Corruption 2003 (UNCAC), which is the first international agreement. The UNCAC is universally established with the aim of combating corruption crimes and expressly states that the return of assets resulting from corruption crimes is to be treated as a new form of legal instrument. As a first step in reforming criminal law, Indonesia should move quickly to harmonize legal instruments that are highly helpful in attempting to recover assets obtained via corruption after ratifying UNCAC by Law No. 7 of 2006. Each country is required to examine asset confiscation without first obtaining a sentence decision under their respective national laws, as stated in Article 54, paragraph 1, letter c of the UNCAC.

As one of the UNCAC ratifying nations, Indonesia incorporated the NCB concept into the Draft Law on Asset Confiscation because NCB is thought to be more efficient at recovering state financial losses than asset confiscation through the procedure governed by criminal law. The NCB has the advantage of retrieving state assets through the court's evidentiary procedure, employing the lesser standard of proof—balance of probability—under civil law jurisdictions as opposed to the higher level—beyond a reasonable doubt—under criminal law. It is necessary to demonstrate that there is a connection between the assets that will be seized and a criminal act because this NCB is an *in rem*, which means that the state does not need to establish the defendant's guilt. Additionally, it might be

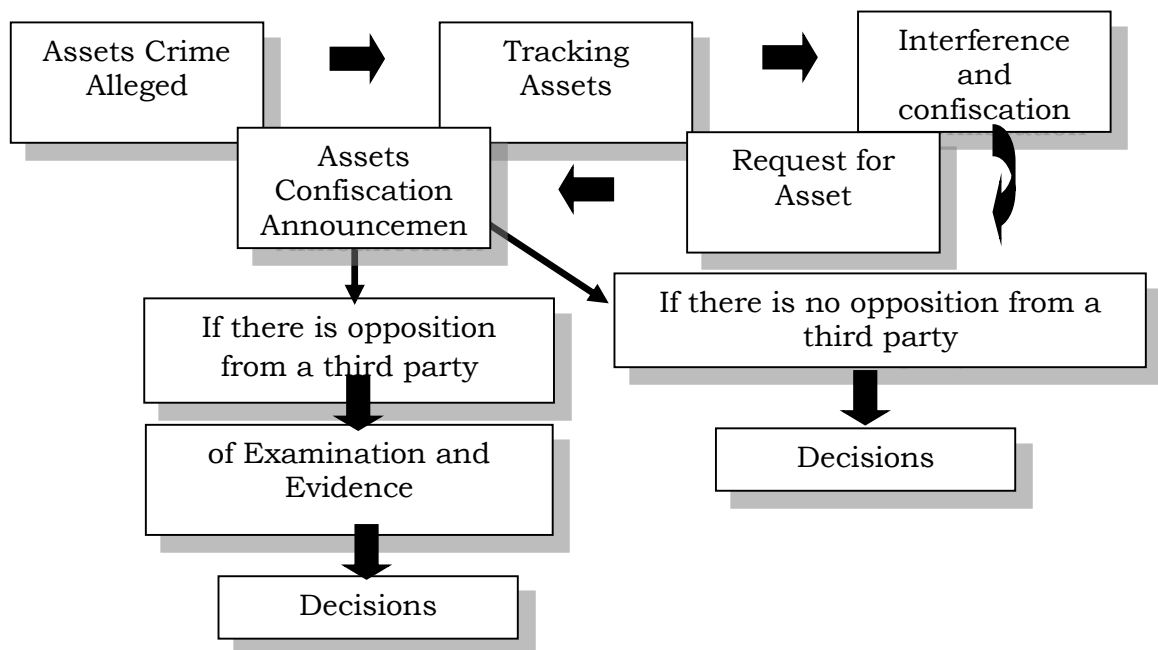
claimed that the state has a strong enough initial suspicion that the assets under seizure are connected to criminal activity. The onus of proof is now on the asset's owner to demonstrate that the asset is not connected to a criminal act once probable cause has been established. This is the reverse proving that is the distinguishing feature of NCB forfeiture.

One of the National Legislation Programs for the 2020–2024 Bill is the Draft Law on the Confiscation of Criminal Assets, which has been under development since 2012. It is expected to strengthen the system of asset forfeiture for criminal acts, particularly in eradicating corruption, as well as to slow the rate of crime growth and satisfy community needs. This is due to the fact that laws governing the confiscation of property obtained through illegal activity are still viewed as being less thorough and in-depth. By implementing legal tools in asset confiscation like the NCB Asset Forfeiture, the draft of the Asset Confiscation Law required by UNCAC is expected to address the current issues with asset confiscation through criminal proceedings. It should be underlined, nonetheless, that the seizure of NCB is not meant to be a replacement for criminal legislation. When criminal law is unable to seize tainted assets for confiscation, forfeiture of NCB assets is a practical option. According to Theodore S. Greenberg, who made this claim in his book, the NCB's assets are genuinely seized when:

- a. The offender is eluding capture. A legal proceeding in Indonesia can be conducted in absentia, although it still cannot be done well;
- b. Before the verdict against him was rendered, the crime's perpetrator passed away. The criminal judicial system is terminated by death;
- c. A person with legal immunity is the one who commits a crime;
- d. A criminal act's perpetrator has the authority to prevent an inquiry and prosecution from being made against him;
- e. Although assets were discovered, the criminals are still at large. This becomes a problem when the asset was obtained by criminal activity since the owner of the asset will naturally be reluctant to appear in court to assert his rights due to the uncertainty that the legal process will result in a criminal investigation against him;
- f. It was discovered that further contaminated assets were held by third parties, but through asset seizure, criminals were prevented from accessing these assets because doing so would violate third parties' rights. In order to do so without breaching the rights of third parties, NCB is here to seize the tainted assets; and
- g. There is not enough evidence to carry out criminal prosecutions.

According to the Asset Confiscation Bill, taking property is illegal for two main reasons. First, the Republic of Indonesia's 1945 Constitution's mandated reasonable and community-benefitting law enforcement operations have not been able to receive the fullest possible support from the mechanism and system of asset confiscation that is currently in place. In order to achieve transparent, professional, and accountable law enforcement, there is a need for clear agreements in the management of confiscated assets. Additionally, it has been specifically regulated beginning with the suspected assets obtained or generated from a criminal conduct through the time of managing the assets through the Asset Confiscation Bill. The Asset Confiscation Bill also governs international collaboration, which is crucial to the existing regime of asset forfeiture, particularly in order to maximize the confiscation of assets resulting from transnational corruption crimes. As a result, the legislative framework that supports it is necessary, as well as international cooperation.

The process for confiscating assets for criminal acts has been systematically explained in the Asset Confiscation Bill, from the initial stages of suspected tainted assets to the final process following a trial where the judge decides whether to confiscate the assets for the state or return them to those who are entitled. The mechanism chart outlined in the Criminal Acts of Asset Confiscation Bill is described as follows:



**Table 2.** Machanism of Non-Conviction Based Asset Forfeiture in the Draft Criminal Act of Asset Confiscation

As previously stated, the NCB Asset Forfeiture program administers asset seizure by bringing a lawsuit against the asset in question rather than the person in charge of or the owner of the proceeds of the crime. NCB has nothing to do with the sentences imposed by judges. There are generally two ways to use NCB Asset Forfeiture. First, confiscation is done within the framework of a criminal procedural law process, but without the need for a sentencing determination. The NCB mechanism's provisions are incorporated into the law (material criminal law), and they can also be viewed as criminal proceedings for the purposes of applying criminal procedural law (formal criminal law). Second, different laws and regulations govern the technique of seizure (separate from other material criminal law rules). This approach introduces the application of NCB, which is often governed by the norms of civil procedural law and is either independent from or related in parallel with the criminal procedure law process (Brun, 2011).

The use of the NCB mechanism is thought to have an impact that goes beyond simply collecting illegal assets and instead serves as a means of crime prevention. NCB focuses on putting an economically driven crime to rest and is prohibited from making money from the crime's proceeds being utilized or being used to commit the same crime again. It is important to reiterate that the NCB concept introduced in the Bill does not eliminate the authority to prosecute criminals. Similar to the Criminal Act Confiscation of Assets Bill, it also states that the goal of the establishment of this Criminal Acts of Asset Confiscation Bill is to suppress the rate of crime growth, which is one part of efforts to prevent crime itself. The NCB mechanism will later be implemented in Indonesia on the basis of this bill, which serves as a *lex specialis* that seeks to fill the existing legal framework around asset seizure.

## CONCLUSION

The confiscation of assets has been regulated by Indonesian laws and regulations up to this point by handling criminal and civil matters, but always based on the criminal evidence first (in person). This has been done by classifying the confiscation of assets as an additional crime, with

additional regulations regarding the items that can be seized. formal criminal law in the Criminal Procedure Code.

By adopting the idea of non-conviction based asset forfeiture (NCB), the Draft Law on the Confiscation of Criminal Assets provides an efficient means of maximizing the return of state losses in cases of criminal acts of corruption through confiscation and taking possession of an asset in rem or a lawsuit against an asset as a defendant. The structure of criminal law policy is in line with what the United Nations Convention Against Corruption (UNCAC 2003) requires, however despite all of its benefits, the NCB concept still faces a number of challenges that prevent its adoption in Indonesia.

The Government of Indonesia should swiftly ratify the Draft Law on the Confiscation of Assets for Crime as a follow-up to the ratification of UNCAC in order to take decisive action to maximize the recovery of public financial losses due to corruption. It is envisaged that by passing the bill adopting the idea of non-conviction based asset forfeiture (NCB), it will be possible to address the flaws in the current system for seizing assets in connection with corrupt crimes. As a follow-up to ratifying UNCAC, the Government of Indonesia should act rapidly to ratify the Draft Law on the Confiscation of Assets for Crime in order to take decisive action to maximize the recovery of public financial damages brought on by corruption. The current system for seizing assets in connection with corrupt offenses is expected to be improved by passing the bill adopting the concept of non-conviction based asset forfeiture (NCB).

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