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# IMPLEMENTATION OF NON CONVICTION BASED ASSETS AGAINST MONEY LAUNDERING AND MONEY CHANGING CRIMES IN INDONESIA

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**Abstract**
Money Laundry is an extraordinary crime with the act of hiding or disguising the money or assets obtained from the proceeds of a crime. Money Laundry is closely related to other criminals, including corruption as a predicate crime. Due to the development of criminal acts, a new breakthrough emerge which was echoed in The United Nations Convention Against Corruption in 2003 named Non-Conviction Based Asset Forfeiture, which is a legal mechanism that allows the owned assets that have been taken by criminals and is possible to be confiscated again.

**Keywords**: non-conviction-based assets, extraordinary crime, money laundry, predicate crime

**Abstrak**
Pencucian uang merupakan suatu tindak pidana luar biasa dengan perbuatan menyembunyikan atau menyamarkan darimana asal usul uang maupun sebuah harta kekayaan yang didapat dari hasil tindak pidana. tindak pidana pencucian uang memiliki kaitan yang erat dengan

tindak pidana lainnya termasuk di dalamnya korupsi sebagai tindak pidana asal (*predicate crime*). Atas berkembangnya tindak pidana, maka muncul terobosan baru yang digaungkan dalam United Nations Convention Against Corruption atau Konvensi PBB Menentang Korupsi pada tahun 2003 yakni Perampasan aset tanpa pemidanaan (*Non-conviction based asset forfeiture*) yang merupakan mekanisme hukum yang memungkinkan aset milik negara yang telah diambil oleh pelaku kejahatan dimungkinkan untuk dirampas kembali. Perampasan aset tanpa pemidanaan ini dapat diterapkan sebagai solusi hukuman pemidanaan di Indonesia.

**Kata Kunci**: *Non-convictionn based assets*, tindak pidana luar biasa, Pencucian Uang, Tindak Pidana Asal.

## INTRODUCTION

Money laundering is an attempt to hide or disguise money or assets from criminal acts through various kinds of financial transactions so that the assets appear to come from legitimate or legal activities. Criminals generally try to hide or disguise the assets that they got criminal acts in various ways so that the it will be difficult to trace by law enforcement officers, then they can freely use these assets for legal or illegal activities.

Money laundering is the result of a criminal act in the form of assets obtained from criminal acts of corruption or several other criminal acts. This indicates that money laundering is related with other criminal acts, including corruption as a predicate crime.

The negative impacts arising from money laundering not only threaten the stability and integrity of the economic and financial system, but can also endanger the community, nation and state. Therefore, this requires a more serious act in to prevent this crime. The perpetrators commit money laundering in various ways. For instance is by setting up a business using the money of the crime. Besides, they can also use the money to invest in foreign companies, or store it abroad. And even the most likely thing is to use the money for scholarships. The most dangerous money laundering activity is the funds or money for weapons financing activities for radicalism groups or narcotics activities.

This money laundering has threatened the country's economy, this is like an example of a case that just happened when the Indonesia's Corruption Eradication Commission (KPK) arrested a Substitute Registrar of the North Jakarta District Court, Rohadi. The KPK suspects that the money they get from gratification have been converted into a number of assets and goods. Rohadi is suspected of transferring, diverting, spending, granting, entrusting, changing the form of assets that are known or reasonably suspected to be the result of a criminal act of corruption to disguise the source of the money for the transfer of rights or ownership. The KPK has determined Rohadi as a suspect in money laundering because investigators have found two sufficient preliminary evidences.

Another example of a case that is detrimental to the country's economy is the case of Governor Nur Alam who is suspected of abusing his authority in issuing a Decision Letter (SK) for Mining Area Reserves, Approval of Exploration Mining Business Permits (IUP), and Approval for Upgrading Exploration Mining Business Permits into Business Permits Mining Production Operations to PT. Anugrah Harima Barakah (AHB). A company that mines nickel in Buton and Bombana Regencies in Southeast Sulawesi.

From the two cases above, it is illustrated that money laundering is the estuary of predicate crimes with various activities to trick law enforcement against money laundering crimes that threatened the economy of the state and society. Therefore, this study has aimed at investigating whether or not the law enforcement against money laundering that harms the country's economy can be carried out by means of non-conviction based assets. Besides, this study is also carried out to investigate whether or not the substitute money punishment comparable in legal certainty.

The purpose of this study is to find out about law enforcement against money laundering which is detrimental to the country's economy, which can be done by implementing Non-Conviction Based Assets and compensation for money that is comparable in legal certainty.

## METHOD

The method used in this paper is a normative juridical approach or literature and document studies aimed at legislation or other legal materials related to law enforcement against money laundering. In normative juridical research, it is used to obtain secondary data, namely through a literature study by reviewing all written information about law enforcement against money laundering which threatened the country's economy, which can be done by means of non-conviction based assets. The source of this research is by using laws and regulations, literature related to legal theory, journals, and literacy through digital media.

In the use of legal materials there are 2 (two) parts, namely primary legal materials and secondary legal materials. The technique of analysing legal materials in this journal is normative juridical using primary and secondary legal materials. Based on the data obtained from the results of the search for documents and cases, then identified by means of systematic preparation to facilitate the process of analysing every problem found.

## DISCUSSION

### Non Conviction Based Asset

There is no comprehensive definition of money laundering. Each country has a definition of money laundering in accordance with the terminology of crime according to the laws of the respective country. There are several definitions of money laundering. In general, the meaning or definition is not much different from each other. Black's Law Dictionary provides the definition of money laundering as a term used to describe investment or other transfers of money flowing from racketeering, drug transactions and other illegal sources into legitimate channels so that original source cannot be traced.

Money Laundering is literally mean money laundering, money panning or also known as money laundering from the proceeds of illicit transactions (legitimizing illegitimate income). The word money in terms of money laundering has various connotations, some call it dirty money, hot money, illegal money, or illicit money. In Indonesian terms, it is also called variously, in the form of dirty money, illicit money, hot money, or black money.

Basically what is known in the criminal law system in Indonesia, among others, in the Anti-Corruption Law is the seizure of tangible or intangible movable goods or immovable goods (confiscation of assets) which is an additional punishment from the main criminal in the form of imprisonment or property. Therefore, the nature of this asset confiscation is an additional punishment accompanied by other criminal sanctions, not the confiscation of assets without a crime. However, in Supreme Court Regulation 1/2013 concerning about Procedures for Settlement of Applications for Handling Assets in Money Laundering or Other Crimes, it is possible to confiscate assets whose owners are not known and are suspected of money laundering.

The seizure of assets without punishment has been applied in several countries. In the article The Need for Illicit Enrichment Rules to Prevent Corruption, Deputy for Legal Affairs of the Presidential Work Unit for Development Control Oversight (UKP4), Yunus Husein said that in the implementation of illicit enrichment (IE) in Australia and several other countries, asset confiscation is carried out without punishment. The confiscation is imposed on a set that cannot be proven by the perpetrator by proving the burden of reverse, without being sentenced.

The regulation of money laundering in Law number 15 in 2002 concerning the Crime of Money Laundering as amended by Law number 25 in 2003 concerning Amendments to Law number 15 of 2002 concerning the Crime of Money Laundering. In the amendment to the Law, where the crime of corruption has been formulated as one of the "predicate crimes" of the Crime of Money Laundering. According to Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, what is meant by Money Laundering is any act that fulfils the elements of a criminal act in accordance with the provisions of this Law, especially those concerning Suspicious Financial Transactions. According to Article 5 of Law no. 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, what is meant by suspicious transactions are:

1. Financial Transactions that deviate from the profile, characteristics, or habits of the Transaction pattern of the relevant Service User.
2. Financial Transactions by Service Users which are reasonably suspected to have been carried out with the aim of avoiding reporting

of the relevant Transactions that must be carried out by the Reporting Party in accordance with the provisions of the Act.

3. Financial Transactions carried out or cancelled using Assets suspected of originating from the criminal acts.
4. Financial Transactions requested by PPATK to be reported by the Reporting Party because it involves assets from criminal acts.

As stated by Harmadi, Law Number 15 of 2002 needs to be adjusted to the development of the criminal law of money laundering and international standards so that efforts to prevent and eradicate money laundering can be performed effectively.

So that the Law on Money Laundering is refined again with the issuance of Law Number 8 of 2010 about the Prevention and Eradication of the Crime of Money Laundering, namely:

1. Criminalization of money laundering.
2. Obligations for service users, Supervisory and Regulatory Agencies, and Reporting Parties.
3. Arrangements for the establishment of a Financial Transaction Reports and Analysis Centre.
4. Aspects of law enforcement.
5. Cooperation.

So that the existing instruments of the Money Laundering Law are expected to be adequate, but considering the fact that money laundering offenses continue to develop and become more sophisticated, the legislation must be dynamic in order to be able to handle it. According to Prof. Barda Nawawi Arief that, "predicate offenses" are offenses that become the source of illicit money (dirty money) or the criminal proceed which are then laundered.

In general, there are at least 3 reasons why money laundering should be criminalized. First, money laundering is a serious problem for the international community, so it must be criminalized. Second, anti-money laundering regulations are seen as the most effective way to find leaders of organized criminal enterprises. Third, that the criminals of money laundering are easier to catch than the predicate offence.

According to Dr. Yunus Husein, reviewed the justification for criminalizing money laundering as a crime from an economic point of view which he distinguished in the context of macroeconomics and

microeconomics. In the macroeconomic context, money laundering is criminalized as a criminal act because money laundering is detrimental to state finances due to money laundering criminals evading taxes. In addition, in the macroeconomic context, money laundering is an act that is not only detrimental to the community, but also harms the state because it can affect or damage the stability of the national economy or state finances and encourage the increase in various crimes. Thus, the act of money laundering allows drug dealers, smugglers, and other criminals to expand their operations freely.

In the context of micro-economy, money laundering is criminalized as a crime because the impact of money laundering practices is detrimental to customers, harms both consumers and society. The losses created by the practice of money laundering are not direct losses, but the breakdown of the market system. The practice of money laundering can lead to a high cost economy and a business climate that is not conducive to doing business because of the institutionalization of corruption, collusion and nepotism in the government bureaucracy.

However, on a macro level, either directly or indirectly, money laundering can disrupt various economic and political systems of a country. There are quite a number of negative implications caused by money laundering activities, for example by tax evasion which reduces the portion of state revenue, the morale of officials becomes uncontrollable, because they are increasingly tempted to commit corruption and other abuses of office. Money laundering can also affect the economic and political system of a country so that it becomes unstable. Mexico in 1994 and Thailand in 1997, for example, had been shaken because the problems of the national economy were so great with the exchange of rate crisis that mixed with the money laundering in the two countries. One of the important factors to eradicate money laundering is the need for a special agency to deal with illegal efforts in the practice of money laundering. This agency is important, because the problems of money laundering crimes are quite severe, complex and trans-institutional in scale, which crosses the boundaries of agencies or institutions, organizations, crosses state jurisdictional boundaries or is transnational and international.

The duties and functions of the PPATK are financial intelligence and in dealing with anti-money laundering in several countries it is called the Financial Intelligence Unit (FIU). PPATK has an independent institution, which is free from interference of a politics such as State Institutions, State Organizers and other parties and in carrying out its duties is obliged to refuse interference from any party. This principle can be interpreted from the provisions of Article 18 paragraph (2) and reaffirmed in Article 25 paragraph (1) which states that Article 18 paragraph (2): PPATK is an independent institution in carrying out its duties and authorities. Article 25 paragraph (1): each party may not intervene in any form of interference in the implementation of the duties and authorities of the PPATK.

Regarding Non Conviction Based Assets, namely the confiscation of assets without any punishment, this is applied in several countries. The Deputy for Legal Affairs of the Presidential Work Unit for Development Controlling Oversight (UKP4), Yunus Husein said that in the implementation of Illicit Environment (IE) in Australia and several other countries, asset confiscation is carried out without punishment. The confiscation is imposed on assets that cannot be proven by the perpetrator by proving the burden of reverse, without punishment. In Article 54 point 1 letter (c) UNCAC 2003 expressly asks states: “consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be perpetrated by reason of death , flight, or absence or in other appropriate cases”. To fill the legal vacuum regarding asset confiscation, but in the context of the investigator's application because the alleged perpetrator of a criminal act was not found, the Supreme Court has issued Supreme Court Regulation Number 1 of 2013 concerning Procedures for Settlement of Applications for Handling Assets in Money Laundering or Other Crimes. (Supreme Court Regulation 1/2013). Indeed, there is no term for confiscation to be found in this regulation. The Supreme Court Regulation refines it with the phrase handling of wealth. Article 67 of Law Number 8 of 2010 concerning ML which regulates the procedural law for the handling of assets, this regulaiton consists of three important parts, they are the scope, the application for the handling of assets, and the procedural law for the confiscation of

assets. This regulation applies to applications for handling assets submitted by investigators in the event that the alleged perpetrator of a criminal act is not found as referred to in the Money Laundering Law.

Returning assets resulting from corruption is a very important thing to do in an effort to handle corruption cases. So far, there are only two known ways to return assets, namely criminally and civilly. However, often the return of assets in criminal and civil cases does not meet results, especially when the assets have been laundered or transferred. The mechanism for taking assets with criminal sanctions also often encounters obstacles when the corruptor dies, is permanently ill, is out of jurisdiction, and has immunity. To be able to overcome the problems as mentioned above, UNODC in collaboration with The World Bank formed a program, namely StAR (Stolen Asset Recovery). In some countries such as Peru and the Philippines agreed to cooperate in the return of assets. Non conviction Based Asset Forfeiture is an agreed tool for the return of assets from other jurisdictions or countries. The mechanism for returning assets is also contained in international arrangements, for example in the United Nations Convention Against Transnational Organized Crime (UNTOC) and the United Nations.

**Criminal Penalty Payment**

Paying criminal penalty or fine is an additional punishment as stated in the Corruption Act in Indonesia. In a sentencing, additional punishment can be given separately but given together with the main punishment. The fine is an effort to restore a state's financial condition to its original state for losses to the state or the state economy created by corruption. In Article 18 paragraph (1) letter b along with the imposition of the main criminal offense in Article 2 and Article 3 of the Anti-Corruption Law. Violations of the law against Article 2 and Article 3 of the Law on the Eradication of Criminal Acts of Corruption are dominated by cases of procurement of goods and services aimed at directly or indirectly building an economy.

In the theory of retaliation, it is often characterized as an accountability justification of punishment that looks at past conditions which is contrary to prevention theory, and also reform theory, which really looks to the future. Prevention can also be done indirectly by providing deterrence, in which an effect can be more effective against

parties who have the potential or have the intention to commit a criminal act. That punishment is the intentional giving of suffering imposed by a law enforcement official. The punishment is something that is considered by the perpetrator to be a burden, Barton and Dignan adopt a very broad idea that a punishment is any action imposed on the perpetrator.

Punishment is defined as having implications as suffering from harsh treatment by state authorities to someone for their fault in respecting the law. The state money losses must be calculated in detail by taking into account the time span until the state money can be returned by the corruption convict. The concept of Restorative Justice in Black's Law Dictionary is that Restorative Justice is an alternative sanction for crime that focuses on repairing the harm that has been done, meeting the needs of the victim, and holding the perpetrator accountable for his actions.

Restorative Justice is a process by which parties who have an interest in a specific and collective violation to address and how to deal with the violation and its implications for the future. Returning state funds by calculating the time value of money means returning all-state losses in their entirety to their initial conditions along with the economic loss of time for national development. By paying attention to and adding the interest element according to the time of value money approach, the weaknesses and obstacles to the application of Restorative Justice include, among others, that rich people can pay compensation while poor people cannot.

Restorative sanctions that are imposed must be expressly enforced in order to provide a space of mutual respect between the parties, where the difference is very small between restorative and punishment so that the terminology used is restorative sanctions rather than using punishment terminology. Some countries make efforts to minimize differences between court decisions by making a guideline that can be used as a reference for judges in terms of imposing criminal sanctions in which the idea of proportional punishment has become a developing idea which has become an idea to create a sentencing guide that is able to reduce subjectivity. judges in deciding cases, so that empirically the results of the centralization of the bureaucracy and professionalism in

the modern criminal system have been able to overcome and are quite effective against most lawbreakers.

The obstacle faced in imposing fine in order to settle state finances was once conveyed by Ramelan, namely that corruption cases can be disclosed after a long period of time making it difficult to trace the money or wealth obtained from corruption. The criminals of corruption spent money they get from the crimes they commit in in various ways and use them in other forms, like registering their wealth using the name of other people who are difficult to reach by law, third parties suing the government for evidence in order to fulfil the payment of fine.

Prof. Barda said that the criminal policy strategy must pay attention to the nature of the problem. If the problem is closer to economy and trade, the use of fines or the like is preferred. There are two impositions of compensation payments in corruption cases, namely: the participation model by charging losses with joint and multiple responsibilities if one party compensates for state losses, the other party loses its obligations, the proportional model by calculating the responsibility of each defendant based on the defendant's contribution to the crime. corruption crime.

Determination of the factors against the imposition of a criminal offense including paying fine or penalty that can be divided by the classification of the perpetrator himself, for example based on the following: the position or social position of the offender which is often referred to as a high profile offender, and other classifications of medium and low profile offenders, the form of the crime is included in a certain offense, for example, corruption of funds is distinguished from gratification.

The concept of fine in proportion to the substitute for corruption defendants in the Penal Policy in public policy basically it must be a rational policy in which one measure of the rationality of criminal policy, among others, can be related to the problem of effectiveness, so that the measure of rationality is placed on the issue of the criminal's success or effectiveness in achieving its goals. So with this, it is hoped that in the future whatever the resulting effect can regulate lawbreakers, and it can also provide views to other people about the imposition of the sentence. The most expected effect is prevention and education.

Completion of the replacement of criminal compensation in the form of additional imprisonment, in practice the convict prefers to carry out additional imprisonment which is considered more profitable than paying replacement money. The impact of the disparity in sentencing will threaten law enforcement efforts itself, in a sociological view this problem is understood as a phenomenon of legal injustice that will disrupt the sense of community justice (social justice), due to a negative impression and a declining level of public trust in law enforcement institutions that causes social control in society to be weak, which in the end will appear injustice (fairness), impartiality (impartiality), and freedom (independence) from the judiciary.

According to Black's Law Dictionary, disparity is a marked difference in quantity or quality between two things or between many things. In the criminal justice system, with a proportional approach to the imposition of criminal sanctions or punishments, it is a form that has been formulated into a new form.

The proportionality approach can be applied in two ways, in most jurisdictions the principle of proportionality is used to determine the upper limit on the level of a sentence, so that its application can be limited. This gives room for freedom in the application of the law that has been determined, but in its operation with relevant factors such as rehabilitation and personal circumstances of an offender, punishment can be reduced.

The principle of proportionality stipulates that the suffering of a sanction must be equal to the violation committed. This concept has proven difficult to implement. There are two main reasons for this, firstly there is no real appreciation of what factors are relevant to the violation. That this is only measured by referring to the level of distress caused by a violation. Second, there is no method of ascertaining the severity of the punishment.

Discretionary power or freedom possessed by judges is considered to be so great that what happens is abuse of power which leads to arbitrarily imposing sentences, in which sentencing guidelines are considered the best way to limit judges' freedom so that objectivity and consistency in deciding cases will be maintained. Discretion is the

authority given to a person with the authority to choose between two or more alternatives, each of which has legal force.

Judges can exercise their discretionary rights in the form of implementing breakthroughs in economic justice considerations for the state by using a Jurimetrics approach with proportionality calculations, with the hope that the additional punishment imposed on the defendant in the form of repayment of state money can be maximally accepted by the state because the justice of the convict by returning state losses is partly calculated. proportionality is not an act of abuse of power because basically the judge can choose or determine the appropriate punishment for the defendant in a corruption case which is an extraordinary crime so that it must be handled with extraordinary ideas as well.

In the West Java High Court Decision Number: 26/TIPIKOR/2013/PT.BDG dated July 22, 2013, which in the decision stated that:

- Sentencing the defendant Mr. X (name withheld) to pay a fine of Rp. (disguised);
- With the stipulation that if the convict within 1 (one) month after the Court's decision has decided (permanent legal force), but does not pay the replacement money, then his property can be confiscated by the Public Prosecutor and auctioned off to cover the fine;
- In the event that the convict does not have sufficient assets to pay the fine to the state, he shall be sentenced to imprisonment for (disguised) years;
- In the event that a convict who is proven to have jointly committed a Corruption Crime has paid the fine either from the defendant's assets or direct payments, then the total amount of money that has been paid will be calculated proportionally as a reduction in the length of imprisonment that has been imposed.

The considerations in this decision are stated that with considerations from the aspect of justice, and other considerations to encourage the payment of replacement money with the intention of restoring state finances, with the addition of this sentence, it creates legal certainty that the Defendant will receive a proportional reduction in imprisonment for the payments that have been made. carried out, so that it is able to encourage the Defendant to pay the maximum compensation.

## CONCLUSION

The fine or penalty, in law enforcement practice, does not protect the economic interests of people who are confiscated over time until there is a decision that has permanent legal force. It is only based on the amount obtained by the defendant as a result of a criminal act of corruption. The amount of fine can be applied using Jurimetrics approach.

The procedure of paying fine to the state should be based on several aspects, namely the element of bank interest rates, so that law enforcement officers can use the Jurimetrics concept in the form of instructions for reimbursement in accordance with the portion of the return of state losses to avoid wide disparities or imbalances in determining the amount of fine.

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