The Urgency of Implementing Non-Conviction-Based Asset Forfeiture in Combating Green Financial Crimes in Indonesia

Rahmi Dwi Sutanti[1], Pujiyono[2], Nur Rochaeti[3]
{rahmidwisutanti@live.undip.ac.id[1]}

Universitas Diponegoro, Indonesia[1, 2, 3]

Abstract. The Republic of Indonesia's environmental wealth has been given legal protection under the Constitution to ensure its population can live prosperous lives. In order to maintain biological sustainability from challenges posed by internal and external natural forces, the environment must be constitutionally protected. The emergence of environmental crimes, particularly green financial crimes, is one of these threats. This essay examines prospects for using non-conviction-based asset forfeiture in addressing green financial crimes in Indonesia and analyzes criminal law policies. It does so using a normative juridical writing method. The discussion's findings indicate that Law Number 8 of 2010, concerning the prevention and eradication of the crime of money laundering, is a tool for combating green financial crimes in Indonesia. However, there are still challenges that prevent the maximum amount of action from being taken, primarily concerning the seizure of the offender's assets. Indonesia has a significant chance to regulate non-conviction-based asset forfeiture in more detail and with greater clarity to combat green financial crimes. Since the rule is now only limited if the defendant passes away before being found guilty and there is adequate evidence to convict him or her. This mechanism will help prevent green financial crimes as much as possible.

Keywords: Green Financial Crime, Money Laundering, Environment

1 Introduction

The Republic of Indonesia, with its tropical climate, weather, seasons, and crossroads between two continents and two oceans, generates special natural conditions. Natural resources are in plentiful supply, and Indonesia has a rich biodiversity. However, Indonesia is also highly susceptible to the effects of climate change. Among these effects is a decline in food production, a disruption in water supply, the spread of pests and plant and human illnesses, rising sea levels, sinking tiny islands, and losing biodiversity. At least 68.82 million hectares of production forest, 27.43 million hectares of conservation areas, 2.5 million hectares of coral reefs, 47,910 species of flora and fauna, 8,500 species of fish, 555 species of seaweed, and 950 types of coral reef exist in Indonesia [1]. Based on the knowledge of the archipelago, this natural treasure must be conserved and maintained in an integrated system of environmental protection and management between the sea, land, and air ecosystems.

Everyone has the right to live in bodily and spiritual prosperity, a place to dwell, and a healthy environment, according to Article 28 H of the 1945 Constitution of the Republic of Indonesia. This article serves as a general framework for environmental preservation on

IWLEG 2022, July 27, Semarang, Indonesia

DOI 10.4108/eai.27-7-2022.2326300

Indonesian soil. Since threats to the environment emerge from sources more than only the conditions of the natural world, protecting the environment must be pursued without question. According to facts on environmental and forestry law enforcement issued by the Ministry of Environment and Forestry of the Republic of Indonesia, there were 1,210 environmental criminal cases between 2015 and 2022. Forty-six cases, including 26 cases of illegal logging, 10 cases of illegally distributing wild plants, 8 cases of encroachment, and 2 cases of environmental degradation, have been reported throughout 2022 (up through July [2].

Environmental and forestry crimes are illegal acts that harm the environment and predicate crimes with a high potential for creating money laundering. According to the Centre for Financial Transaction Reports and Analysis (PPATK - Financial Intelligence Unit), at least 360 reported questionable financial transactions totalling IDR 2.4 trillion regarding forestry and environmental offenses between 2016 and 2020. PPATK has also handled the analysis and examination outcomes of 81 reports, totalling IDR 44 trillion in nominal value [3]. This situation undoubtedly highlights the significance of stepping up measures to combat money laundering, which stems from illegal activity in the forestry and environmental sectors.

The idea of confiscating assets for criminal acts without punishment, also known as non-conviction-based asset forfeiture (NCB), has emerged as a means of combating money laundering on a global scale. Asset recovery itself consists of several stages for assets that may be connected to criminality. Asset recovery involves several steps, from asset tracing, freezing, confiscation, forfeiture, utilization, and asset maintenance [4].

The asset return policy serves as a preventative measure and an eradication campaign:

1. Criminals control assets, which prevents them from having the means to commit additional crimes.
2. By directly confronting the corruptors' illicit motivations, there is no longer any potential for them to profit from their actions; instead, it will be eradicated or, at the very least, reduced.
3. The return of assets sends a clear message to the public that it is nowhere safe for criminals to hide the proceeds of their crimes [5]

It also sends the message that no one can benefit from the assets due to their actions, which will deter people from committing crimes, especially potential offenders. The seizure of assets is regulated by several Indonesian laws, including the money laundering statute. However, enforcement needs to be improved. Since money laundering offenses sometimes stem from green financial crimes, this study aims to introduce the idea of non-conviction-based asset forfeiture (NCB).

Based on the background that has been described, the formulation of the problem in this paper is:

1. How does the Indonesian Criminal Law approach dealing with green financial crimes?
2. How could non-conviction-based asset forfeiture be used in Indonesia to combat financial crimes against the environment?

2 Method

This paper applies a normative or doctrinal juridical approach. When it comes to equality legislation in the same field, the normative juridical method seeks to uncover the truth and the degree to which specific laws and regulations can be aligned either vertically or horizontally. The statute in question, in this instance, relates to the outlawry of the crime of money laundering.

The secondary data was taken from the primary legal documentation, notably Law Number 8 of 2010, about the Prevention and Eradication of the Crime of Money Laundering.

3 Finding and Discussion

3.1 Criminal Law Policy in Combating Green Financial Crimes in Indonesian

Indonesian law Number 8 of 2010 concerning the Prevention and Overcoming of Money Laundering serves as the foundation for treating Green Financial or money laundering crimes resulting from illegal environmental activities. Since the implementation of Law Number 15 of 2002 concerning the Crime of Money Laundering as amended by Law Number 25 of 2003 concerning Amendments to Law Number 15 of 2002 concerning the Crime of Money Laundering, the treatment of money laundering crimes has begun in Indonesia. However, it is believed that several barriers have emerged during its development, including the emergence of various interpretations of criminal acts, the existence of legal loopholes, the lack of clear sanctions, the failure to utilize the shift in the burden of proof, the restricted access to information, the limited scope of the reporter and the type of report, and the unclear nature of duties. And the power of the Act's implementers. Consequently, the two previous laws have not been legally implemented since 2010 in favor of the new law.

In Black's Law Dictionary, *money laundering* is defined as "The act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"[6]. According to Sarah N. Welling, "money loundering is the process by which one conceals the existence, illegal source, illegal application of income, and then disguises that income to make it appear legitimate." At the same time, Pamela H. Bucy defines the term as the "concealment of the existence, nature, or illegal source of illicit funds in such a manner that the funds will appear legitimate if the funds are discovered" [7]. According to these definitions, a feature of money laundering as a subsequent crime is that it always starts with a predicate crime. Despite continuing the predicate crime, it is not a continuing act (delictum contiuatum) but rather a concurrent act (*concursus realis*) under criminal law.

In Law No. 8 of 2010, the definition of the crime of money laundering is carried out in three articles, namely Articles 3, 4, and 5. The Act of "placing, transferring, spending, paying, granting, entrusting, bringing to abroad, changing the form, exchanging it with currency or securities or other actions on Assets which are known or reasonably suspected to be the proceeds of criminal acts" is defined in Article 3 of the Convention. Article 4's definition of the conduct, which includes "hiding or obscuring the origin, source, location, designation, transfer of rights, or true ownership of Assets which are known or reasonably believed to be the proceeds of illegal actions," is more expansive than Article 3's. As compared to Article 5, which defines the conduct as "receiving or controlling the placement, transfer, payment, grant, donation, safeguarding, exchange, or use of Assets which are known or reasonably believed to be the proceeds of a criminal act," this article does not mention these terms. The acts classified as money laundering crimes are supplemented by these three formulations of money laundering acts. Money laundering involves passive acts like receiving assets and active acts like intentionally concealing the source of assets obtained through illicit activity.

There are various provisions that apply, especially in the procedural rules for handling the crime of money laundering, including those governed by Articles 69 and 77–78. According to Article 69 of this Law, the predicate crime need not have been established to conduct an inquiry, bring charges, or conduct an examination in court regarding the crime of money laundering.

This clause frequently leads to disputes because a predicate crime must exist before money laundering can begin. Hence the predicate crime should be established first. Even though the Constitutional Court of the Republic of Indonesia dismissed the claimant's case in decision number 77/PUU-XII/2014, which addressed contradictions connected to this article, Article 69 is still in force. The fact that this clause exists promotes the idea that money laundering is a separate crime that the law can deal with in a way that upholds the rule of law and justice.

The law's articles 77 and 78 govern how the burden of proof is shifted. The defendant must demonstrate that his assets are not the consequence of illegal activity to be examined in court. In order to fulfill this duty, the court orders the defendant to provide adequate evidence to establish that the assets at issue in the money laundering case are not connected to or originated from a crime (the core crime). It does not imply that the defendant will be exonerated of all accusations after successfully demonstrating that their assets are unrelated to the core crime. The public prosecutor must still demonstrate what was alleged as procedural proof under Indonesian criminal law.

Investigations into money laundering crimes against underlying crimes must be conducted. The assets resulting from the crime that the perpetrator owns may be seized or confiscated through the investigation of the criminal conduct of money laundering. It is anticipated that TPPU investigations will improve the deterrent effect on criminals and asset recovery due to criminal activity [8]. However, there are still many difficulties for law enforcement to overcome when trying to stop money laundering from environmental and forestry crimes, such as:

1. The enormous number of criminal parties engaged and their solid political connections.
2. The 90-day time limit for investigators to complete and submit case files
3. The criminals are making a significant effort to prosecute themselves.
4. Assets such as accounts identified as a depository for the proceeds of illegal activity in the forestry sector continue to be challenging to freeze.
5. The outcomes of case judgments in the forestry industry have a tendency or phenomenon that imposes high fines, yet the ancillary alternatives are somewhat limited.

These difficulties pertain to the imposition of punishment and efforts to maximize the recovery of state losses and environmental damage [8]. Therefore, it is crucial to demand the return of or the confiscation of property obtained by criminal activity, either through penalty or not.

3.2 Possibilities for Non-Conviction-Based Asset Forfeiture in Indonesian Green Financial Crime Prevention

The significance of the time of asset confiscation without punishment has been explained by international standards in preventing and eradicating money laundering crimes or the Financial Action Task Force (FATF) Revised 40+9 Recommendations. "Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law," states recommendation No. 3.

Asset forfeiture refers to the government's taking of assets or property that it believes a direct connection to a criminal act. In common law countries, particularly the United States, there are three ways to forfeit assets: criminal forfeiture, administrative forfeiture, and civil forfeiture. Assets are seized through the criminal court system in a process known as criminal forfeiture, which establishes if the defendant committed a crime [9]. At the same time, administrative forfeiture is a method of asset confiscation that enables the state to seize property without involving legal authorities. When assets are confiscated by civil forfeiture, a lawsuit is brought

against the assets rather than the offenders; this enables asset confiscation even while the criminal justice process against the criminals is not yet complete. When opposed to criminal forfeiture, civil forfeiture has fewer restrictions, making it easier to implement and more advantageous for the state [10].

The civil forfeiture model is essential to apply in Indonesia, according to Fletcher N. Baldwin, Jr., quoted in the Journals of Sudarto and Hari Purwadi. Civil forfeiture uses a reversal of the burden of proof. It can confiscate more quickly after it is suspected that there is a connection between assets and criminal acts. Additionally, actions involving civil forfeiture are directed at property rather than suspects or defendants, allowing the state to seize assets even if the offender dies or is otherwise unable to be brought to justice. This approach appeared to have been used subsequently and was referred to as Non-Conviction-Based Asset Forfeiture (NCB asset forfeiture) or "asset confiscation without punishment" in Indonesia [11].

Non-Conviction-Based Asset Forfeiture is a crucial instrument for recovering assets. Non-Conviction-Based Asset Forfeiture is also known as "civil forfeiture," "in rem forfeiture," or "objective forfeiture" in various countries. Assets confiscated via a "in rem" (in rem forfeiture) procedure have been taken without a court's approval.

The confiscation of the property of the criminal suspected of having acquired it through a crime damaging to the state's finances or economy is a crucial idea in efforts to eradicate criminal acts that are destructive to the state's finances or economy. These crimes may have their origins in corruption, illegal logging, drug trafficking, customs and excise violations, or money laundering. NCB Asset Forfeiture is an action against the asset rather than the owner. It is necessary to provide proof that the property was tainted for this action, which is distinct from any criminal judicial procedure. Generally, the standard of proof for criminal activities must be a balance of probabilities. The property owner is a third party with the right to defend the property because the action was not brought against an individual defendant but rather against the property.

According to Theodore S. Greenberg, NCB asset forfeiture is a legal action taken against the asset itself rather than a person. He asserts that the process of NCB asset forfeiture is distinct from the criminal justice system and requires proof that the property is tainted, i.e., that it was used in or as a result of a crime. Greenberg's definition that the property to be confiscated must first be declared tainted property is consistent with the claims of Mardjono Reksodiputro, which holds that because there is a claim that the assets are linked to a crime, the assets must be classified as tainted or dirty asset [12]. The focus of in-rem confiscation is to show the connection between assets and criminal activity, not the connection between assets and criminals. In rem confiscation, mistakes are not considered evidence; instead, they serve as legal proof of where assets or property originated. The court may determine that an asset is contaminated and can either be returned to the legal owner or confiscated by the state if it is believed to have come through criminal conduct, provided that no party can present evidence to the contrary [13].

Asset confiscation or criminal forfeiture based on an in-person judgment against the defendant means that the confiscation is connected to the defendant's conviction. Asset confiscation in person is an action taken against a person directly or individually. Hence it is necessary to establish the defendant's guilt before taking any of their property. The public prosecutor must first demonstrate what the criminal did with the assets or tools obtained via illegal activity under his or her control. If it is established, the court's judgment, which is final and binding, will serve as the legal basis for taking the defendant's property [13].

The idea of in rem transformed the criminal's perspective from following the suspect to following the money and learning the history of the assets acquired due to the core crime. The

process then moves on to confiscating assets, which is taken in the belief that those responsible for the crime would not be able to profit from their actions. Because it begins with tracing, blocking, and confiscation, as well as the civil court trial process, asset confiscation without punishment is a specific confiscation mechanism. The following scenarios are examples of when NCB can address the concern of criminal proceedings that cannot perform asset recovery: The violator is a fugitive, the violator has died before receiving punishment, the violator is so powerful that criminal investigation or prosecution is unrealistic or impossible, the violator is unknown, and the assets are found, the related property is held by a third party who is not prosecuted, and there is insufficient evidence to proceed [12].

Compared to the Non-Conviction-Based Asset Forfeiture (NCB) recommended by the United Nations and other international institutions, the current legislation is considered not to have comprehensively and in detail regulated the seizure of assets related to criminal acts and still has many loopholes. NCB is employed if a criminal proceeding followed by the confiscation of assets cannot be carried out. It can happen for several reasons, including

1. the asset owner has passed away,
2. the criminal process is concluded because the defendant is found not guilty
3. a criminal prosecution took place and was successful, but the expropriation of assets was unsuccessful
4. the defendant is outside the jurisdiction; the identity of the asset owner is unclear
5. there is no jurisdiction [14]

However, the NCB procedure must still be based on a belief about the source of the acquisition of wealth that is beyond reasonable through the principle of reversing the burden of proof in order to ensure that the confiscation of assets is carried out correctly and does not harm property that is the criminal's and his family's legal ownership.

As stated in Article 79 Paragraph 4 of the Money Laundering Law, "In the event that the defendant dies before the verdict is handed down and there is strong enough proof that the person concerned has committed the crime of Money Laundering, the court on the prosecution's demands general decision on the seizure of the confiscated Assets," the confiscation of assets without penalty is indeed suggested by this clause. Because only if the defendant passes away in this situation is there still little scope for asset seizure without repercussion. Additional causes may make it possible for NCB to be executed. Therefore, it is crucial that the NCB be developed in greater depth and used to prevent money laundering from financial crimes involving the environment.

4 Conclusion

1. Based on the provisions of Law No. 8 of 2010 Concerning the Prevention and Eradication of the Crime of Money Laundering, criminal law policies in Indonesia aimed at combating green financial crimes are formulated. *Money laundering* is a crime that is defined in three articles and is divided into active and passive laundering. The money laundering statute permits disclosure of money laundering even though the predicate offense has not been demonstrated from a procedural standpoint. The money laundering law also allows for an inversion of the burden of proof. The prevention of money laundering crimes from illegal activity in the forestry and environment sectors is still not ideal because there are still barriers to implementation.

2. As opposed to the current regulation, which is only limited if the defendant dies before being convicted and there is strong evidence that the defendant is guilty, non-conviction-based asset forfeiture will likely be applied in detail and with greater clarity in Indonesia to combat green financial crimes. The NCB mechanism will contribute to preventing money laundering crimes that have their roots in environmental and forestry infractions by giving the option of asset confiscation without punishment. NCB will aid initiatives to end and prevent money laundering crimes that are difficult to identify the offenders or determine the maximum sentence that may be given.

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