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## **Policy Formulation of State Lawyer's Regulations in Seizing Assets Proceeding from Money Laundering Crimes Original from Corruption Crimes**

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### **Abstract**

Efforts to overcome criminal acts of corruption in Indonesia are currently based on the provisions of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption Crimes. The follow the money approach aims to prioritize tracing assets originating from criminal acts, which is then developed to look for perpetrators and criminal acts committed. The prosecutor's authority to confiscate assets from money laundering crimes is limited. This condition is a legal vacuum or can be interpreted as the absence of laws and regulations that regulate the dynamics of problems that occur in society. The mechanism for civil confiscation of assets resulting from crime is a fundamental concept of justice, where the perpetrator of the crime must not obtain any benefit or benefit from a crime he has committed (crime should not pay). The concept of justice means that a person who commits a crime is not allowed to obtain the slightest profit from the evil act that he has proven to have committed. The Indonesian government needs to formulate legislation whose content is aspirational and responsive to social needs or social influences in society. So it is hoped that realizing the

asset confiscation law can effectively restore state losses resulting from criminal acts of money laundering originating from corruption. The paradigm shift from follow the suspect to follow the money as a solution to asset confiscation ultimately resulted in a change in the emphasis of punishment from initially seeking to reveal the relationship between assets and the perpetrator to a link between assets and the criminal act. The function of confiscation of assets by state prosecutors is very necessary considering that the construction of criminal law built in Indonesia tends to prioritize efforts to punish criminals. Legal reform regarding the confiscation of assets resulting from money laundering crimes originating from corruption crimes is implemented through, through the reconstruction of the new Asset Confiscation Law, it is necessary to focus on tracing assets obtained improperly that are suspected of being assets originating from crime. This is important to pay attention to because the country has experienced so many losses due to the failure of the asset confiscation mechanism to its full potential.

**Keywords:** Policy Formulation, State Attorney, Corruption Crime

### **Introduction**

Efforts to overcome criminal acts of corruption in Indonesia are currently based on the provisions of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption Crimes. One of the goals of eradicating criminal acts of corruption in Indonesia is to maximize the return of state financial losses committed by perpetrators of corruption. So that efforts to eradicate corruption do not only lie in preventing and punishing perpetrators of corruption crimes. Other efforts are needed so that the recovery of state financial losses can be carried out effectively through various means, such as confiscation and confiscation of assets that are suspected to be the result of corruption crimes both nationally and internationally.<sup>1</sup>

So, the strategy that can be implemented to realize asset confiscation is carried out through a tracing mechanism for the origin of the assets from the crime (follow the money). Law enforcement of criminal acts of corruption is closely related to the crime

<sup>1</sup> Indriyanto Seno Adji, *Korupsi dan Penegakan Hukum*, (Jakarta: Diadit Media, 2009), h. 149.

of money laundering, so the conventional approach of tracing the perpetrator (follow the suspect) is no longer relevant. The more effectively law enforcement is implemented, the greater the value of the law's benefits to society.<sup>2</sup>

The follow the money approach aims to prioritize tracing assets originating from criminal acts, which is then developed to look for perpetrators and criminal acts committed. The application of the follow the money concept aims to carry out asset recovery by breaking the ties between perpetrators of money laundering crimes and the assets they own. The existence of asset recovery must be integrated with the legal system, so that it can place the position of the prosecutor's office as an institution that handles asset confiscation issues.<sup>3</sup>

The main obstacle for prosecutors in carrying out asset confiscation of wealth obtained from money laundering is that there are no regulations that specifically regulate asset confiscation. The prosecutor's authority to confiscate assets from money laundering crimes is limited. First, Article 79 paragraph (4) of Law Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering (hereinafter referred to as the TPPU Law), only regulates the confiscation of assets of defendants who have died before the verdict is passed. Second, Article 33 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (hereinafter referred to as the PTPK Law) only regulates the authority of state prosecutors to file lawsuits against the heirs of suspects who have died.

This condition is a legal vacuum or can be interpreted as the absence of statutory regulations that regulate the dynamics of problems that occur in society.<sup>4</sup> Bearing in mind that the crime of money laundering or known as money laundering is a crime which is not simply categorized as a form of criminalization, but rather as a dual crime. This is because the criminal act of money laundering has a distinctive characteristic, namely that it is a continuation crime resulting from the original crime which aims to produce property or money and is called a predicate crime or unlawful activity.<sup>5</sup>

As the crime of money laundering develops, it has the characteristics of a form of crime that attempts to remove the background of the money or proceeds of crime using certain methods such as forming a business, transferring it and converting it into foreign currency. The follow the money mechanism is one of the requirements for building an anti-money laundering system. By tracing the flow of money resulting from crime, it makes it easier for law

enforcement officials to uncover criminals and confiscate the assets resulting from crime.<sup>6</sup>

In fact, criminal acts of corruption have very detrimental consequences for the state and society. Corruption can systematically harm the country's finances and economy which has the impact of hampering national development. Corruption is a real illustration of a government that is dirty and full of hypocrisy. State losses resulting from criminal acts of corruption are included in the category of endangering the integrity and resilience of the nation. Considering its enormous impact, criminal acts of corruption have been classified as extraordinary crimes.<sup>7</sup>

Corruption is a form of public crime that can spread and affect various parties, especially those in government power. This is because criminal acts of corruption have the potential to trigger other crimes such as money laundering, bribery and other economic crimes. Therefore, criminal acts of corruption are a common enemy that must be dealt with immediately. Returning state financial losses is a legal step aimed at saving state assets and wealth taken by perpetrators of corruption crimes. Rescuing state assets that have been corrupted is not an easy matter, this is because the crime of corruption is a crime that is committed in a structured and systematic manner.

So, in carrying out their crimes, corruption perpetrators often rely on their ingenuity and ability to move, divert and hide wealth resulting from corruption by utilizing various parties in their network. This then becomes an obstacle for law enforcement officials in disclosing and tracing corrupted state assets. If corrupted state assets have been moved and hidden abroad, it will make it even more difficult for law enforcement officials to confiscate them.

So international cooperation is needed to restore the country's corrupted wealth<sup>8</sup>. The patterns and modes of corruption crimes continue to undergo transformation, which often makes it difficult for law enforcement officials to make disclosures. Corruption perpetrators also make various efforts to avoid being punished, including by eliminating the origin of the assets resulting from their crime.

Based on ICW data which maps the performance of the three main agencies authorized to recover state financial losses. The performance of law enforcement in eradicating corruption in semester 1 of 2022 is as follows:

**Table 1.1:** Regarding the Performance of Law Enforcement in Eradicating Corruption

S. No	Institution	Amount Case	Amount Suspect	Value of State Losses
1.	Attorney	183	413	30,791 Triliun
2.	POLRI	54	141	853 Milyar
3.	KPK	15	58	2,021 Triliun

**Source:** Data from Indonesia Corruption Watch (ICW) in 2022

<sup>2</sup> Orin Gusta Andini dan Nilasari, "Menakar Relevansi Pedoman Pemidanaan Koruptor dengan Upaya Pemberantasan Korupsi" Tanjungpura Law Journal. Vol. 5 No. 2, 2021, h. 2

<sup>3</sup> Maggie Regina Ambar, *Peran Jaksa Terhadap Asset Recovery Dalam Tindak Pidana Pencucian Uang*, Jurnal Lex Crimen, Vol. IV, No. 1, 2015, h. 88

<sup>4</sup> Gamal Abdul Nasir, *Kekosongan Hukum dan Percepatan Perkembangan Masyarakat*, Jurnal Hukum Replik, Vol. 5, No. 2, 2017, h. 2.

<sup>5</sup> Josua Nainggolan, Atma Suganda, Agung Makbul, *Upaya Penegakan Hukum Terhadap Terpidana Tindak Pidana Korupsi Sebagai Upaya Pengembalian Kerugian Negara*, Jurnal Penelitian Hukum Legalitas, Vol. 15, No. 1, 2021, h. 22.

<sup>6</sup> Yunus Husein, *Negeri Sang Pencuci Uang*, (Jakarta: Pustaka Juanda Tiga Lima, 2008), h. 62.

<sup>7</sup> Chatrana Darul Rosikah dan Dessy Marlioni Listianigsih, *Pendidikan Antikorupsi Kajian Antikorupsi Teori dan Praktik*, (Jakarta: Sinar Grafika, 2016), h. 5.

<sup>8</sup> Lutfiatul Hasanah, *Upaya Pengembalian Aset Negara: Wujud Pemberantasan Tindak Pidana Korupsi*, Jurnal Anti Korupsi, Vol. 3, No. 2, 2021, h. 45.

The Prosecutor's Office is the institution that has succeeded in prosecuting the highest number of corruption cases, namely 183 cases with a state loss value of 30.791 trillion. Then the POLRI agency took action against 54 corruption cases with state losses amounting to IDR 853 billion, and the Corruption Eradication Commission (KPK) took action against corruption in 15 cases with state losses amounting to IDR 2.021 trillion. The results of ICW monitoring in 2021 show that corruption cases that occur in Indonesia are often related to state financial losses resulting from the implementation of articles 2 and 3 of the PTPK Law.

Meanwhile, in cases of money laundering, law enforcement officials only used money laundering instruments in two cases.<sup>9</sup> In fact, criminal acts of corruption have great potential to give rise to other types of criminal acts in the economic sector, such as misappropriation of funds, money laundering, and bribery of law enforcement officials tasked with eradicating criminal acts of corruption. So far the return of assets from corruption crimes has not been significant, so it requires maximum effort in confiscating assets.<sup>10</sup>

Efforts to maximize the return of state financial losses resulting from money laundering crimes originating from corruption crimes are through civil law mechanisms. The use of civil mechanisms in confiscating assets resulting from criminal acts is carried out purely in the form of taking over assets suspected to be the proceeds of criminal acts without being accompanied by criminal sanctions against the perpetrators of the crime. This is a logical consequence of this mechanism because what is brought before the court by the public prosecutor is the asset itself, not the perpetrator. So this concept requires that asset confiscation be carried out without criminal prosecution (*Non Conviction Based Forfeiture*).<sup>11</sup>

The mechanism for civil confiscation of assets resulting from crime is a fundamental concept of justice, where the perpetrator of the crime must not obtain any benefit or benefit from a crime he has committed (crime should not pay).<sup>12</sup> The concept of justice means that a person who commits a crime is not allowed to obtain the slightest profit from the evil act that he has proven to have committed.<sup>13</sup> The existence of the concept of confiscation through civil action is caused by the ineffectiveness of confiscating assets

through criminal means, which so far requires efforts to prove guilt first before the assets resulting from criminal acts can be confiscated by the state. Confiscation of assets through civil action is considered an appropriate breakthrough to find assets resulting from crime rather than focusing on finding the perpetrators.

The paradigm shift from follow the suspect to follow the money as a solution to asset confiscation ultimately resulted in a change in the emphasis of punishment from initially seeking to reveal the relationship between assets and the perpetrator to a link between assets and the criminal act. Crime is not positioned as a basis for proof in this concept, but rather as initial evidence for tracing the origin of assets that are suspected to be the result of a criminal act.<sup>14</sup> The main point in the follow the money concept is tracing the flow of funds that are closely related to crimes or criminal acts. This understanding views assets or property as *life blood of the crime*.<sup>15</sup>

That to tackle the crime of money laundering, in addition to confiscation efforts, it must also provide a deterrent impact for criminals through criminal measures.<sup>16</sup> Based on the provisions of Article 3 point 2 of Law Number 16 of 2004 concerning the Prosecutor's Office (hereinafter referred to as the Prosecutor's Law) states that in carrying out its duties and authority in the civil and state administration fields, the prosecutor with special powers can act both inside and outside the court to act to and on behalf of the government. Prosecutors whose job is to represent the state or government are called state attorneys.

Through the concept of confiscation without prosecution or non-conviction based asset forfeiture by state prosecutors, the main emphasis is on returning state losses without first punishing the perpetrators of the crime. So the main goal is to optimize the recovery of state financial losses.<sup>17</sup> Confiscation of assets through civil law has so far been applied to first, cases where there is not enough evidence but there has been real loss to the state, second, during the investigation process the suspect dies, third, during the examination in court the defendant dies.

These weaknesses indicate that changes are needed in efforts to implement confiscation of assets resulting from crime through the follow the money mechanism. One of them is by implementing reforms to the laws and regulations as well as an in-depth study of the asset confiscation mechanism for state attorneys. Based on this understanding, it is appropriate that the authority of state attorneys general be strengthened and reaffirmed to optimize the recovery of state financial losses in all jurisdictions.<sup>18</sup>

<sup>9</sup> *Ibid*, h. 14.

<sup>10</sup> Ridwan Arifin, *Upaya Pengembalian Aset Korupsi Yang Berada Di Luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi Di Indonesia*, Jurnal IJCLS (Indonesian Journal of Criminal Law Studies), Vol. 1, No.1, 2016, h. 26.

<sup>11</sup> Refki Saputra, *Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia*, Jurnal Integritas Volume 3, Nomor 1, Maret 2017, h. 120.

<sup>12</sup> Fona Aprilia Dwi Ningtyas & Bayu Indra Permana, *Perlindungan Hukum Nasabah Bank Terhadap Kekeliruan Transfer Dana Akibat Kelalaian Bank*, Journal of Economic and Business Law Review, Volume 3, Nomor 1, Mei 2023, h. 14.

<sup>13</sup> Peter Alldrige, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Civil Recovery, Criminal Laundering and Taxation of Proceeds of Crime*, (Hart Publishing, Oregon, 2003), h. 123.

<sup>14</sup> Stefan D. Cassela, *Asset Forfeiture Law in the United States, Chapters 1 and 2*, (Juris Publishing, New York, NY, 2007), h. 72

<sup>15</sup> Yunus Husein, *Bunga Rampai Anti Pencucian Uang*, (Bandung: Books Terrace and Library, 2007), hl 289.

<sup>16</sup> Theodore S. Greenberg, *et al. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, The World Bank, Washington DC, 2009.

<sup>17</sup> Mohammad Rafi Al Farizy, Dodik Prihatin AN, Fiska Maulidian Nugroho, Bhim Prakoso, *LPI Dalam Lingkaran Pertanggungjawaban Kerugian Negara*, (Yogyakarta: Bintang Pustaka Madani, 2023), p. 30.

<sup>18</sup> Ramelan, *et. al.* 2008, *Panduan untuk Jaksa Penuntut Umum Indonesia dalam Penanganan Harta Hasil*

Based on the background of the problem described above, the problem can be formulated as follows: 1). Is the authority of the state attorney general to confiscate assets resulting from money laundering crimes originating from corruption crimes in accordance with Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes?; 2). What is the position of the state attorney general in confiscating assets resulting from money laundering crimes originating from corruption crimes based on the provisions of Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes?; 3). What is the criminal law reformulation policy regarding the regulation of confiscation of assets resulting from money laundering crimes originating from corruption crimes by state attorneys general in the future?

### Research Methods

The methods used in legal research are oriented towards explaining the procedures for carrying out legal scientific work. Legal research aims to answer legal issues or problems and to develop legal science. Research methods are an important factor that must be present in every legal scientific work. Legal research is carried out to produce an identification of legal sources that can be implemented to provide a solution to a legal problem that is being identified as being faced.<sup>19</sup> The type of research used is normative juridical. Meanwhile, the problem approaches used are the Legislative Approach, Conceptual Approach and Comparative Approach.<sup>20</sup>

### Discussion

#### 1. Authority of State Attorneys to Seize Assets Proceeding from Money Laundering Crimes Derived from Corruption Crimes

State Attorneys have the authority to act on behalf of the state in restoring corrupted state property rights. State property rights, which include movable and immovable objects that can be valued in money, are the scope of state assets that can be recovered by state attorneys. The crime of money laundering is a crime that is included in economic crime or financial crime (crimes against finance) through the motive of seeking as much money as possible. So efforts to overcome this must be implemented using a follow the money mechanism. The prosecutor's authority to confiscate state assets can operate without immediately eradicating the criminal acts of criminals.<sup>21</sup> The authority to confiscate assets by state prosecutors is urgently needed, this is because efforts to return corrupted state assets in Indonesia have not been running optimally.

It is important to maximize the function of asset confiscation by the state attorney general because recovering corrupt

state assets is the most important part of overcoming the crime of money laundering. The mechanism for punishing perpetrators of corruption crimes does not have a significant impact on recovering state assets. The ineffectiveness of dealing with the crime of money laundering in Indonesia is due to the absence of statutory regulations that clearly regulate the system for recovering financial losses. These weaknesses result in perpetrators of corruption crimes being able to utilize corrupted state assets for their personal and group interests. Joint use of corrupted state assets is often used as initial capital to commit money laundering crimes.<sup>22</sup> Efforts to realize the function of asset confiscation by state attorneys general require support in the form of concrete policies and mechanisms. Knowing that confiscation of assets is closely related to procedural principles of asset recovery, various efforts to overcome the crime of money laundering must be specifically regulated from the stages of tracing, freezing, confiscation and confiscation, maintenance to the stage of returning corrupted state assets<sup>23</sup>. The existence of state attorneys general has a central role in enforcing the law on returning state financial losses.<sup>24</sup>

The function of confiscation of assets by state prosecutors is very necessary considering that the construction of criminal law built in Indonesia tends to prioritize efforts to punish criminals. This kind of legal construction is still limited to criminal punishment against the body, such as prison, while efforts to confiscate and return assets tend to be excluded. This indicates that the legal system in Indonesia currently does not support the realization of a mechanism for recovering state losses. The modus operandi in hiding corrupt state assets is increasingly developing and varying, even taking advantage of international jurisdictions and networks.

Conceptually, there are two types of asset confiscation methods, namely the *in personam* asset confiscation method and the *in rem* asset confiscation method *in rem*<sup>25</sup>. Confiscation of assets *in personam* aimed at mistakes committed by someone through criminal law mechanisms. This proves that the confiscation of assets is *in personam* must be carried out based on a court decision and the prosecutor must be able to prove that the assets to be confiscated are the proceeds of a crime committed by the perpetrator.

Meanwhile in confiscation *in rem*, *civil forfeiture* or in Indonesia it is better known as the NCB concept *asset forfeiture* is an asset confiscation that is separate from the criminal justice administration mechanism. This means that the confiscation is directly aimed at the state assets that were corrupted, not at the perpetrators of the crime. The principle of confiscation of assets *in rem* essentially aims to discover

*Perolehan Kejahatan*. (Jakarta: Indonesia – Australia Legal Development facility, 2008), h. 125.

<sup>19</sup> Dyah Ochtorina Susanti dan Aan Effendi, *Penelitian Hukum (Legal Research)*, (Jakarta: Sinar Grafika, 2013), h. 31.

<sup>20</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, (Jakarta: Prenada Media Group, 2017), h. 47.

<sup>21</sup> Yunus Husein, *Penjelasan Hukum Tentang Perampasan Aset Tanpa Pidana Dalam Perkara Tindak Pidana Korupsi*, Pusat Studi Hukum dan Kebijakan Indonesia (PSHK) (Jakarta: Mahkamah Agung Republik Indonesia, 2019), h. 6

<sup>22</sup> Purwaning. M. Yanuar, *Pengembalian Aset Hasil Korupsi*, (Bandung: PT. Alumnus, 2007), h. 51.

<sup>23</sup> *Ibid*, h. 155.

<sup>24</sup> Fatin Hamamah dan Heru Hari Bahtiar, *Model Pengembalian Aset (Asset Recovery) Sebagai Alternatif Memulihkan Kerugian Negara Dalam Perkara Tindak Pidana Korupsi: Jurnal Kajian Hukum Islam*, Vol. 4, No. 2, 2019, h. 5.

<sup>25</sup> Barbara Vettori, *Tough on Criminal Weakth Exploring the Practice of Proceeds from Crime Confiscation in the EU*, (Berlin: Springer, 2006), h. 8.



the fact that there are assets that have been contaminated by crime, and then confiscate them<sup>26</sup>.

The concept of confiscation without punishment or NCB is a legal construction of returning state assets which aims to recover state losses without first providing sanctions against the perpetrators of the crime. This concept was first applied to countries that adhere to a common law system, such as the United States<sup>27</sup>. NCB asset forfeiture requires that there are various types of assets that can be confiscated, such as assets obtained directly or indirectly, assets that have been added to the perpetrator's assets, both personal and corporate.

So this concept really seeks to maximize the return of corrupted state assets. This model of confiscation also supports that criminals do not benefit from the criminal acts they commit. This idea also aims to ensure that the assets obtained from the crime are not used as capital to commit further crimes<sup>28</sup>. The existing legislation is deemed unable to provide comprehensive support to state attorneys general to maximize their asset confiscation function.

Confiscation of assets without punishment is not fully regulated by legal regulations in Indonesia. Article 32 of the PTPK Law only regulates state losses, but if there is not enough evidence, the investigator immediately submits the investigation results files to the public prosecutor or agency that suffered the loss to file a lawsuit<sup>29</sup>. This provision only provides authority in the form of a lawsuit by the state attorney general if there is a state loss for which there is insufficient evidence.

## 2. The Position of State Attorneys in Confiscating Assets Proceeding from Crimes, Money Laundering Derived from Corruption Crimes

The position of the state attorney general in seeking confiscation of assets through the concept of confiscation without prosecution or non-conviction-based asset forfeiture by the state attorney general, the main point of emphasis is to return state losses without first punishing the perpetrator of the crime<sup>30</sup>. So the main goal is to optimize the recovery of state financial losses. Based on Articles 32-34 of the Corruption Eradication Law, confiscation of assets through civil means has so far been applied to first, cases where there is not enough evidence but there has been real loss to the state, second, during the investigation process the suspect dies, third, during the examination in court the defendant died.

The process of recovering injured state finances often experiences obstacles due to the lack of effective asset confiscation mechanisms in Indonesia. There are at least two

main factors that cause the implementation of confiscation of assets resulting from crime to not be effective in Indonesia, namely, first, there is no support in the form of a set of laws and regulations that specifically regulate asset confiscation, especially those relating to the role and position of prosecutors and attorneys. the state in confiscating criminal assets belonging to money laundering crimes belonging to defendants who are still alive, secondly, there is no clear mechanism regarding the return of assets resulting from money laundering crimes originating from corruption crimes.

Confiscation of assets using the NCB mechanism is carried out without first imposing criminal sanctions on the perpetrators of the crime. This indicates that the main goal of law enforcement officials is to seek the return of their assets, not to punish criminals. The existence of this concept is caused by the ineffectiveness of confiscating assets through criminal channels which so far must prioritize efforts to prove the perpetrator's guilt first<sup>31</sup>.

The asset confiscation mechanism using the NCB asset forfeiture concept is an appropriate legal construction in correcting the weaknesses of the current asset confiscation system in Indonesia. According to Fletcher N. Baldwin, Jr. The civil forfeiture model is significant for returning the proceeds of corruption in Indonesia because civil forfeiture uses a reversal of the burden of proof and can carry out confiscation more quickly after it is suspected that an asset is connected to a criminal act.<sup>32</sup> *Civil forfeiture is a lawsuit against assets, not against the defendant or suspect, so that state assets can be saved even if the perpetrator has died or passed away*<sup>33</sup>.

Confiscation of assets without punishment is a comprehensive confiscation mechanism, because it starts from tracing, blocking and confiscating, as well as a trial process in court. NCB asset forfeiture can operate effectively if there is a strong will from the Attorney General's Office to submit a request for asset forfeiture to court. This commitment must also come from the court, in this case the judge, in examining and adjudicating the NCB asset forfeiture application.<sup>34</sup> The act of implementing the NCB asset forfeiture mechanism has nothing to do with the principle of whoever accuses him who must prove his accusation and is not related to the principle of presumption of innocence<sup>35</sup>.

The reason is that these two principles relate to proving a defendant's guilt at trial, while reversing the burden of proof is a form or method of showing whether or not ownership of an asset/property is valid and explaining how the perpetrator of the crime obtained ownership. With the perpetrator's

<sup>26</sup> Marfuatul Latifah, *Op. Cit.*, h. 17.

<sup>27</sup> Yunus Husein, *Penjelasan Hukum Tentang Perampasan Aset Tanpa Pidana Dalam Perkara Tindak Pidana Korupsi*, Jurnal Pusat Studi Hukum dan Kebijakan Indonesia (PSHK), h. 6.

<sup>28</sup> Fery Aries Suranta, *Peranan PPATK Dalam Mencegah Terjadinya Praktek Money Laundering*, (Depok: Granata Publishing, 2010), h. 52.

<sup>29</sup> Penjelasan Pasal 32 Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi

<sup>30</sup> Noverdi Puja Saputra, *Politik Hukum Dan Muatan Pengaturan Dalam Pembentukan Undang-Undang Perampasan Aset*, Pusat Analisis Keparlemenan Badan keahlian DPR RI, 2023, h. 4.

<sup>31</sup> David Scott Romantz, *Civil Forfeiture and The Constitution: A Legislative Abrogation of right and The Judicial Response: The Guilt of the Res*, (Suffolk University Law Review, 1994), h. 390

<sup>32</sup> Muhammad Yusuf, *Merampas Aset Koruptor Solusi Pemberantasan Korupsi di Indonesia*, (Jakarta: Kompas, 2013), h. 10.

<sup>33</sup> *Ibid*, h. 11.

<sup>34</sup> Sudarto, *et. al*, *Mekanisme Perampasan Aset dengan Menggunakan Non-Conviction Based Asset Forfeiture Sebagai Upaya Pengembalian Kerugian Negara Akibat Tindak Pidana Korupsi*, Jurnal Pasca Sarjana Hukum UNS Vol IV No. 1, 2017, h. 111.

<sup>35</sup> *Ibid*, h. 112.

inability to prove that he legally owns the assets according to the law, there is a strong suspicion that the assets are the proceeds of crime.

Assets that cannot be proven must then be declared as legally tainted property by the court (judge)<sup>36</sup>. Because it had been declared as tainted property by the Court, the State Attorney then submitted a request for the tainted property to be declared as state property. The most appropriate and simple step in carrying out the NCB asset forfeiture mechanism is that initially the assets suspected to be the proceeds of crime are blocked and withdrawn from economic traffic, namely through confiscation requested by the Court.

The assets are then declared as tainted assets by court order. After being declared as contaminated property, the court then makes an announcement through media that can be accessed and known by many people for a sufficient period of time, namely approximately 30 (thirty) days. This time period is considered sufficient for third parties to know that the court will confiscate assets. If within this time period there is a third party who objects to the confiscation action, then the third party can submit an objection to court and prove with valid evidence that he is the owner of the property by explaining how the property was obtained<sup>37</sup>.

The legal construction implemented in Indonesia places the mechanism for confiscation of assets as part of an additional crime in the form of confiscation of certain items resulting from criminal acts. This generally applies to every criminal act that occurs within the realm of criminal law in Indonesia with the aim of harming the convict who is proven through a binding court decision to have committed a criminal act so that he cannot enjoy the proceeds of the criminal act. The consequence of additional punishment is that additional punishment cannot stand alone and always follows the main case, meaning that additional punishment can only be imposed at the same time as the main punishment<sup>38</sup>.

Confiscation of assets resulting from crime can only be carried out if the main case is examined and the defendant is proven guilty, then the goods obtained from the proceeds of crime can be determined by the court to be confiscated by the state for destruction. Other measures are taken so that the goods or assets can be used for the benefit of the state by donating them or conduct an auction for the proceeds from the confiscation of these assets. Indonesian criminal law provisions still require that the confiscation of certain goods can only be carried out with a court decision that has binding legal force. Thus, during the law enforcement process for a criminal act, other actions can be taken, namely confiscation<sup>39</sup>. Confiscation in the criminal law system in Indonesia is a forced effort carried out by investigators to take over and keep objects (assets) for

evidentiary purposes in the law enforcement process at the stages of investigation, prosecution and trial.

This is temporary and can only be done with permission from the chairman of the local district court, however, in urgent situations, confiscation can be carried out first and then the confiscation that has occurred is reported to the chairman of the local district court to obtain approval. The status of the confiscated goods can change if the case in question has been decided by a judge, then the goods subject to confiscation are returned to the person or party mentioned in the decision. Using the asset confiscation mechanism using conventional steps, the confiscation of assets resulting from criminal acts is not optimal because the objects that can be confiscated and confiscated are only objects that are directly related to a criminal act.

This becomes an obstacle for law enforcement officers who carry out confiscation or confiscation because sorting out which items are directly related or which items do not have a direct connection to a criminal act takes time, whereas the nature of confiscation and confiscation of assets requires speed so that existing assets do not change hands. Weaknesses that will be seen when using the mechanisms in the Criminal Procedure Code are that the practice of confiscating assets resulting from criminal acts takes a very long time, because the time it takes for a case to obtain a binding court decision can take months or even years.

The mechanism for confiscation of assets as stated in the Criminal Procedure Code as explained above, focuses on disclosing criminal acts, which includes the element of finding the perpetrator and placing the perpetrator in prison and only placing confiscation of assets as an additional punishment is apparently not effective enough to reduce the crime rate. By not making confiscation of assets the focus of law enforcement for criminal acts that have an economic element, perpetrators of criminal acts are allowed to control and enjoy the proceeds of criminal acts and even repeat criminal acts they have committed even with more sophisticated *modus operandi*<sup>40</sup>.

The existence of a subsidiary mechanism for the obligation to pay assets resulting from criminal acts also causes efforts to confiscate assets resulting from criminal acts to be less effective. Because most convicts will prefer to declare their inability to return the assets resulting from the crime they have committed so that their inability will be punished with corporal confinement as a substitute. The existence of a subsidiary mechanism whose duration does not exceed the threat of a basic criminal sentence in exchange for the amount of assets that must be paid to the state is certainly a very promising alternative for convicts, compared to having to return the assets they generated from criminal acts.

The criminal mechanism is regulated in Article 18 paragraph (1) letter (a) of the Corruption Eradication Law, in this provision confiscation of assets in Corruption cases is regulated in the same way as the generally applicable provisions for confiscation of assets, namely the same as the provisions in the Criminal Procedure Code. Apart from criminal mechanisms, the TIPIKOR Law also regulates civil asset confiscation mechanisms in Article 32 paragraph (1). In this provision, when an investigator finds and is of the opinion that there is not sufficient evidence for a criminal act of corruption, but real losses to the state are found, the investigator can submit the case files resulting from the

<sup>36</sup> Yunus Husein, *Perampasan Aset Hasil Tindak Pidana di Indonesia Yang Mengacu Pada Pasal 10 KUHP Huruf b Tentang Pidana Tambahan*, Jurnal Legislasi Indonesia, Vol.7 No.4, 2010, h. 14.

<sup>37</sup> Yenti Garnasih, 2010, "Asset Recovery Act sebagai strategi dalam pengembalian aset hasil korupsi, dalam Perampasan Aset Hasil Tindak Pidana," Jurnal Legislasi Indonesia, Vol.7 No.4, 2010, h. 610.

<sup>38</sup> Jamin Ginting, *Perjanjian Internasional Dalam Pengembalian Aset Hasil korupsi di Indonesia*, Jurnal Dinamika Hukum, Vol. 11, No. 3, 2011, h. 453.

<sup>39</sup> *Ibid*, h. 455.

<sup>40</sup> *Ibid*, h. 92.

investigation to the State Attorney (JPN) or the agency that suffered the loss to file a civil lawsuit.<sup>d</sup>

### 3. Criminal Law Reformulation Policy Concerning Arrangements for Confiscation of Assets Proceeding from Money Laundering Crimes Derived from Corruption Crimes by State Attorneys in the Future

The criminal law reformulation policy regarding the regulation of confiscation of assets resulting from criminal acts of corruption is focused on clear concepts and mechanisms regarding confiscation of assets. The state attorney general has the authority to sue assets resulting from corruption in a civil manner, but its function is not yet optimal. This means that the prosecutor's authority to confiscate assets from money laundering crimes is limited. This reformulation was carried out to overcome the problem of asset confiscation which experienced a paradigm shift from follow the suspect to follow the money.

The NCB asset forfeiture mechanism became a solution to asset confiscation, ultimately resulting in a change in the emphasis of punishment from initially seeking to reveal the relationship between assets and the perpetrator to a link between assets and the criminal act. Crime is not positioned as a basis for proof in this concept, but rather as initial evidence to carry out an investigation into the origin of assets which are suspected to be the result of money laundering crimes originating from corruption crimes.

Efforts to break ownership of dirty assets can be done through a follow the money or follow the asset mechanism<sup>41</sup>. The crime of money laundering is a crime that has been planned in advance, so efforts to confiscate assets should be carried out without waiting for a decision or principal criminal sanction first. So this mechanism aims to prevent the disappearance or transfer of assets resulting from corruption crimes during the criminal justice process. Bearing in mind that resolving criminal cases through conventional justice often takes a relatively longer time.

The logical consequence of placing asset confiscation as part of an additional crime is that property or criminal assets can only be confiscated if the court decision confirms this. Asset confiscation should be placed as an important role in providing a deterrent effect as well as restoring injured state finances<sup>42</sup>. There are unresolved problems in criminal law regulations, namely regarding aspects of the person who committed the crime who were not found, who went crazy, died and who have no heirs who can file a civil lawsuit, even though there has actually been a loss to the state. These legal problems cannot be resolved using conventional criminal law regulations.

This is because the criminalization stage is a process that applies in person or is attached to the perpetrator of the crime<sup>43</sup>. Confiscation of assets using both criminal and civil mechanisms, both of these aspects really require the role and function of prosecutors in recovering state losses caused by money laundering crimes. The legal vacuum regarding optimizing the authority of state prosecutors in carrying out

asset confiscation must be immediately complemented by adequate legal regulations. Through the new asset confiscation mechanism, state attorney generals have an important role in every stage of asset confiscation until the assets can be determined as state-owned assets<sup>44</sup>.

The formation of the Asset Confiscation Bill was based on the awareness that the mechanism for confiscating assets for money laundering crimes originating from corruption crimes had not been able to support law enforcement on the return of state assets. The Asset Confiscation Bill requires that property or wealth originating from crime be confiscated without waiting for a court decision<sup>45</sup>. This then became a much needed breakthrough for law enforcement officials, especially state attorneys general. Through the new asset confiscation mechanism, it focuses on confiscation using the NCB asset forfeiture method which has advantages over the criminal forfeiture method, in terms of:

1. NCB focuses on assets that are suspected or reasonably suspected to be the proceeds of crime, not focusing on aspects of the crime that have been committed by the perpetrator;
2. Confiscation of assets can be carried out at an early stage without waiting for a court decision stating so;
3. NCB can maximize asset confiscation without considering the disappearance, insanity, or even death of the perpetrator of the crime. Even if the perpetrator of the crime is released, it cannot stop the process of confiscation of assets through the NCB mechanism.
4. NCB is a solution for cases that cannot be resolved through criminal mechanisms<sup>46</sup>.

The existence of the NCB asset forfeiture mechanism in the asset confiscation system in Indonesia is a useful breakthrough for confiscating assets or assets that are suspected to be the proceeds of crime. The proof process in the NCB mechanism uses a reverse burden of proof system (onkering van weijlast) by the defendant. Therefore, the state attorney general has a role in determining asset tracking, asset freezing and asset confiscation<sup>47</sup>.

The reason for using reversal of the burden of proof in money laundering criminal cases is because the crime is carried out in a complicated manner and involves various organized crime networks. So these conditions often cause prosecutors to experience difficulties in providing evidence during the trial process. The burden of proof placed on the public prosecutor is ultimately deemed to be less effective in dealing with the eradication of money laundering crimes. The concept of the reverse burden of proof in money laundering cases requires that criminals prove that the property and wealth obtained did not come from the

<sup>44</sup> Imelda F.K. Bureni, *Op.Cit.*, h. 8

<sup>45</sup> Rosalinda Jati, Beni Harmoniharefa, *Penerapan Perampasan Aset Sebagai Pidana Tambahan Dalam Pemberantasan Tindak Pidana Korupsi Di Indonesia*, Jurnal Hukum dan Masyarakat Madani, Vol. 11, No. 1, 2021, h. 145.

<sup>46</sup> Stefan D. Cassela, *Op.Cit.*, h. 25.

<sup>47</sup> Andi Saputra, *Pengembalian Aset Negara Terhadap Tindak Pidana Korupsi Melalui Kerjasama Internasional Berdasarkan Undang-Undang Nomor 7 Tahun 2006 Tentang Pengesahan United Nations Convention Against Corruption (UNCAC)*, JOM Fakultas Hukum, Volume V, 2, 2018, h. 10,

<sup>41</sup> Heri Joko Saputro, *Urgensi Pemulihan Kerugian Keuangan Negara Melalui Tindakan Pemblokiran Dan Perampasan Aset Sebagai Strategi Penegakan Hukum Korupsi*, Journal of Islamic Law, Vol. 5, No. 2 2021, h. 278.

<sup>42</sup> Aziz Syamsudin, *Tindak Pidana Khusus*, (Jakarta: Sinar Grafika, 2011), h. 155.

<sup>43</sup> Eva Achjani Zulfa, *Op.Cit.*, h. 23.

proceeds of crime<sup>48</sup>. The formulation of the regulation of the State Attorney's authority in confiscating assets must contain three main aspects, namely:

1. Search stages;
2. Stages of blocking or confiscation;
3. Stages of court assessment<sup>49</sup>.

The asset tracing stage by the state attorney general aims to identify evidence of ownership of the state assets taken as well as find out where the assets are stored. The investigation was carried out by investigators along with the public prosecutor and state attorney general. The search began when investigators found two strong pieces of evidence regarding assets suspected of originating from the proceeds of crime. The involvement of state attorneys from the start of the investigation process aims to speed up the asset confiscation mechanism. This is because it is the state attorney general who will play an important role in prosecuting assets suspected of being the proceeds of crime. State attorney who will represent the state to recover state losses caused by criminal acts of money laundering originating from corruption crimes. In an effort to facilitate coordination and synergy between investigators and public prosecutors, the role of state attorneys and attorneys needs to be involved from the start of the investigation process. So, if sufficient strong evidence is found regarding the alleged taking of assets by a criminal, the state attorney general can immediately file an asset confiscation process. The formulation of the new mechanism requires that the asset confiscation process occur quickly to avoid concealment or disappearance of evidence of assets by criminals<sup>50</sup>.

The blocking or confiscation stage is part of the state attorney general's authority to anticipate the transfer or disposition of assets suspected to originate from the proceeds of crime. The state attorney general can submit a blocking and confiscation process to an institution related to criminal assets based on a written recommendation from the investigator or public prosecutor. The confiscation and blocking by the state attorney is submitted to the local district court where the assets suspected to be the proceeds of the crime are located.

The court assessment stage is the authority of civil justice which uses a fast procedural examination process. Files for filing a lawsuit filed by a state attorney are addressed to the district court which has the authority to examine, try and decide cases whose jurisdiction includes the location where the assets are located. If the claim for asset confiscation by the state attorney is accepted, the chairman of the court is obliged to:

1. Order the clerk to announce the request for confiscation of assets on the notice board and inform the relevant agencies, such as to the BPN if the assets are in the

form of land, or to the banking sector if the assets requested are in the form of wealth in an account.

2. Immediately appoint a panel of judges to hear the case<sup>51</sup>.

The trial regarding these assets is carried out by a state attorney who submits a lawsuit against the assets along with the arguments used as reasons for asset confiscation to be carried out. The state attorney must also convey the origin of the assets obtained in connection with the proceeds of crime. The judge will consider all forms of arguments and evidence that support the reasons for confiscating assets. In the event that the panel of judges accepts a lawsuit for confiscation of assets by the state attorney, the judge will issue a decision stating that the assets will be returned to the state.

The NCB asset forfeiture mechanism is a necessary asset confiscation mechanism in the criminal law system in Indonesia. The inability of the criminal to prove ownership of the assets is a strong suspicion that the assets are the proceeds of crime. These assets must be declared by the court to be legally tainted assets and can be confiscated by the state<sup>52</sup>. Bearing in mind that there are two fundamental aspects in optimizing asset recovery, namely:

1. Prove the basis for confiscation of assets which are considered to be closely related to the proceeds of a crime;
2. Determine what assets or assets must be held accountable for confiscation.<sup>53</sup>

The application of the NCB is often used as an instrument for confiscation of assets for goods deemed to be related to crime by countries that adhere to the common law system. The application of NCB in America is used to file lawsuits against assets (in rem) and the NCB mechanism does not require the prosecutor to prove the elements and faults of the person who committed the crime (personal culpability)<sup>54</sup>. The prosecution only needs to prove that there is probable cause or an allegation that the assets being sued are related to a criminal act.

Here the prosecution simply needs to prove with preponderance standards of evidence (formal proof) that a criminal act has occurred and an asset has been produced, used or involved with the criminal act<sup>55</sup>. The owner of the asset must then prove to the same standard that the asset in question is not the proceeds of, used or related to the criminal offense charged. Even though the process used is civil, the NCB uses a slightly different mechanism where the owner of the assets being sued is not a party to the lawsuit and is only a third party to the trial process.

Based on the description of the implementation of asset confiscation without punishment in other countries mentioned above, it can be seen that the provisions of laws

<sup>48</sup> Sahuri Lasmadi, Elly Sudarti, *Pembuktian Terbalik Pada Tindak Pidana Pencucian Uang*, Jurnal Refleksi Hukum, Vol. 05, No. 02, h. 10.

<sup>49</sup> Badan Pembinaan Hukum Nasional (BPHN) Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, *Hasil Penyelarasan Naskah Akademik Rancangan Undang-Undangn Tentang Perampasan Aset Terkait Dengan Tindak Pidana*, 2022, h. 131.

<sup>50</sup> *Ibid*, h. 129.

<sup>51</sup> *Ibid*, h. 136.

<sup>52</sup> Sudarto, Hari Purwadi, Hartiwiningsih, *Mekanisme Perampasan Aset Dengan Menggunakan Non Conviction Based Asset Forfeiture Sebagai Upaya Pengembalian Kerugian Negara Akibat Tindak Pidana Korupsi*, Jurnal Pasca Sarjana Hukum UNS Vol V No. 1, 2017, h. 112.

<sup>53</sup> *Ibid*, h. 390.

<sup>54</sup> Stefan D. Cassella, *Provision of the USA Patriot Act relating to Asset Forfeiture in Transnasional Cases*, Vol. 10, No.4, Journal of Financial Crime, 2003, h. 303.

<sup>55</sup> *Ibid*, h. 305.



and regulations related to asset confiscation continue to develop following developments in the social needs of society. The change in the concept of asset forfeiture in Australia has brought positive changes to asset recovery in that country. Changes to laws and regulations to meet community needs are also being implemented in Australia, so that these regulations can confiscate assets resulting from criminal acts without being preceded by a criminal process. Regulations on confiscation of assets without punishment have advantages, among others:

1. Confiscation of assets without punishment can be carried out immediately when the government suspects there is a connection between an asset and a criminal act;
2. Use of civil evidentiary standards which are relatively lighter to fulfill than criminal evidentiary standards. Apart from that, confiscation of assets without punishment also adopts a reverse burden reversal system, thereby easing the burden on the government to prove the lawsuit filed;
3. A lawsuit is filed against assets, so that the escape, disappearance, death of a corrupt person or even an acquittal for a corrupt person is not a problem;
4. Confiscation of assets without punishment is useful when criminal prosecution is obstructed or impossible to carry out<sup>56</sup>.

Referring to the benefits of the mechanism for confiscating assets without punishment as mentioned above and looking at the factual situation in Indonesia where confiscation of assets with punishment or criminal forfeiture cannot restore state financial losses, it is time for Indonesia to use a mechanism for confiscation of assets without punishment to recover state financial losses due to criminal acts. laundering money originating from corruption crimes.

The Indonesian government needs to formulate legislation whose content is aspirational and responsive to social needs or social influences in society. So it is hoped that realizing the asset confiscation law can effectively restore state losses resulting from the crime of money laundering originating from corruption.

### Conclusion

The paradigm shift from follows the suspect to follow the money as a solution to asset confiscation ultimately resulted in a change in the emphasis of punishment from initially seeking to reveal the relationship between assets and the perpetrator to a link between assets and the criminal act. Crime is not positioned as a basis for proof in this concept, but rather as initial evidence for tracing the origin of assets that are suspected to be the result of a criminal act. The main point in the follow the money concept is tracing the flow of funds that are closely related to crimes or criminal acts. This understanding views assets or property as the life blood of the crime (the blood that feeds the crime).

The function of confiscation of assets by state prosecutors is very necessary considering that the construction of criminal law built in Indonesia tends to prioritize efforts to punish criminals. This kind of legal construction is still limited to criminal punishment against the body, such as prison, while

efforts to confiscate and return assets tend to be excluded. This indicates that the legal system in Indonesia currently does not support the realization of a mechanism for recovering state losses.

Legal reform related to the confiscation of assets resulting from money laundering crimes originating from corruption crimes is implemented through, through the reconstruction of the new Asset Confiscation Law, it is necessary to focus on tracing assets obtained improperly that are suspected of being assets originating from crime. This is important to pay attention to because the country has experienced so many losses due to the failure of the asset confiscation mechanism to its full potential.

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<sup>56</sup> Muhammad Yusuf, *Merampas Aset Koruptor, Solusi Pemberantasan Korupsi Di Indonesia*, (Jakarta: Kompas Media Nusantara, 2013), h. 158.

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