

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

## **Confiscation of Assets Without Criminal Imposition from a Non-Conviction-Based Forfeiture Perspective**

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**Abstract.** *The purpose of this article is to describe criminal policies regarding the implementation of Non Conviction Based Forfeiture of Stolen Assets Recovery (NCB), which is a mechanism for confiscating the proceeds of criminal acts of corruption from corruptors without a criminal justice process. By using a normative study with a statutory approach and a case approach, namely the Asset Confiscation Draft Law (RUU), Law Number 20 of 2001 concerning Amendments to the Corruption Eradication Law, Law Number 7 of 2006 concerning Ratification of United Nations Convention Against Corruption and Law Number 11 of 2008 concerning ITE. This article is based on research with the first results, this concept aims to restore State losses incurred as a result of crime without first imposing a crime on the perpetrator. There are 2 types of confiscation in question, namely in personam (criminal forfeiture) and in rem confiscation, namely civil forfeiture, civil forfeiture and Non Conviction Based (NCB) asset forfeiture with a lawsuit against assets not against people. This requires proof that a property has been contaminated by criminal activity. However, in practice, this criminal policy does not work optimally with civil justice but is created separately.*

**Keywords:** *Corruption, Civil Forfeiture and Non Conviction Based (NCB), Criminal Policy.*

### **1. Introduction**

In simple terms, the draft asset confiscation law aims to provide a way to recover State losses so that the losses suffered by the State are not significant. In the future, this bill will be useful for confiscating assets of State officials whose acquisition cannot be proven legally. any people consider the Draft Law (RUU) on Asset Confiscation to be in conflict with the principle of presumption of innocence, where a person is considered innocent until a judge's decision has permanent legal force (inkracht van gewijsde).

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The concern is that there will be irregularities committed by law enforcement officers in carrying out their duties. Law enforcement officers are parties who are vulnerable to being caught in corruption cases using bribery. Then if we look at the perspective of criminal procedural law which requires a proof process first to be able to impose a sentence. So the process has changed slightly in the concept of asset confiscation in the Asset Confiscation Draft Law (RUU). There is a need for harmonization between the law on eradicating criminal acts of corruption and NCB regulations. NCB as an idea for reforming criminal law in handling corruption crimes.

Prevention of criminal acts of corruption, by confiscating the proceeds of criminal acts of corruption without being linked to the conviction of the perpetrator can prevent people who have the potential to commit criminal acts of corruption from having to think again about committing criminal acts of corruption, the perpetrator is convicted but still has a lot of wealth and can be enjoyed by his family. Where the NCB mechanism outside of justice focuses on determining whether asset ownership is legal and the perpetrator as the owner of the asset is given the opportunity to prove that the asset is his. The mechanism for confiscating assets stolen by corruptors through the NCB is not based on punishing the perpetrators.

Corruption related to State finances, namely: Article 2 of Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, namely every person who unlawfully commits an act of enriching himself or another person or a corporation which can harm State finances or the State's economy and if carried out in In certain circumstances the death penalty can be imposed.

Then, Article 3 of the Law also regulates that every person with the aim of benefiting himself or another person or a corporation abuses the authority, opportunity or means available to him because of his position or position which can harm the State's finances or the State's economy. This means that the activity of showing off assets or flexing is the entry of funds into an account according to the amount of value in providing luxury goods such as cars, houses, land, jewelry, the origin of which is unclear and not in accordance with the basic salary or honorarium, and lending bank books. personal property to be used as collateral for bank credit.

One of the ideas of Stolen Asset Recovery Non Conviction Based Asset Forfeiture in the 2003 United Nations Conventions against Corruption is defined as the recovery of assets that have been stolen through confiscation of assets without punishment. This idea is considered important because it restores the results and stops the criminal justice process, even though it can be tried in absentia, it can be executed or the perpetrator of the crime is difficult to

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apprehend because many have very strong immunity. This NCB is aimed at the perpetrator's property or property whose ownership is unclear which is suspected to be the proceeds of crime and not to the person because the person is only in the interest of the court to try.

The United States was the first to develop the NCB concept with the aim of returning the State's losses incurred as a result of crimes before imposing a criminal penalty on the perpetrator.

NCB is a means of confiscating the proceeds and tools used in criminal acts of corruption, with legal mechanisms provided to detain, confiscate and confiscate stolen State assets without punishing the perpetrator, in the event that the perpetrator dies, the perpetrator flees outside the jurisdiction, the perpetrator is immune law of investigation or prosecution, or a very strong position for prosecution, UNCAC urges member states to apply the NCB when the perpetrator cannot be prosecuted. UNCAC gives member countries the freedom to implement the NCB whether it is formulated in the Criminal Code or included in the Money Laundering Law.

Proceeds of criminal acts are assets that are directly or indirectly obtained from a criminal act. For example, assets taken out of the country, as was done by Gayus Tambunan, cost the State finances IDR 106,700,000 and only IDR 2,081,000,000 was deposited into the State treasury and the rest has not been returned because it is suspected that it is still stored outside the State. So this NCB legal instrument without punishment is very necessary to overcome the emergence of various modus operandi in criminal acts.

The criminal justice system in arresting perpetrators of criminal acts of corruption has been changed to a follow the money method which follows the track record of assets resulting from predicate crimes. By following where the assets are located, it will be quicker to confiscate assets resulting from criminal acts.

## **2. Research Methods**

The research method used in this research is normative legal research or doctrinal legal research. In this research, law is conceptualized as what is written in statutory regulations and draft legislation (law in book).

The problem with this article is how to recover state assets in criminal acts of corruption and what is the role of institutions and law enforcement in efforts to seize state assets that have been corrupted.

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### **3. Results and Discussion**

Confiscation and confiscation are two different things. The difference is that confiscation is temporary, where a person's belongings are released from him for evidentiary purposes (both evidence at the investigation, prosecution and court levels).

If it is proven that the goods confiscated are the proceeds of a criminal act, then the next action regarding the goods is to confiscate them for the state through a court decision first. If this is not proven, the item is returned to the owner. Meanwhile, confiscation can only be carried out based on a court decision with permanent legal force stating that the goods have been confiscated by the state. Confiscation of assets may only be carried out with prior confiscation.

In Indonesia, the regulations regarding asset confiscation are still in the form of a draft law. In the bill, confiscation is defined as an attempt to forcefully take over rights to property or profits that have been obtained, or may have been obtained by a person from a criminal act committed either in Indonesia or in a foreign country.

Article 194 paragraph (1) of the Criminal Procedure Code is as follows:

In the event of a conviction or acquittal or acquittal from all legal charges, the court shall determine that the confiscated evidence be handed over to the party most entitled to receive it back whose name is stated in the decision unless according to the provisions of the law the evidence must be confiscated in the interests of the state or destroyed or damaged so that it can no longer be used."

Article 67 of Law Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering gives investigators the authority to submit a request to the District Court for the court to decide that assets (assets) which are known or reasonably suspected to be the proceeds of a crime become state assets or are returned to entitled.

Can confiscation of assets be carried out without prior confiscation? This is explained in the Final Report of the National Legal Development Agency on Institutions for the Confiscation and Management of Proceeds of Crime prepared by the Legal Review Team of the National Legal Development Agency of the Ministry of Law and Human Rights that:

Of course, to be able to bring a corruptor's property or assets to court, it must be preceded by confiscation by investigators during the investigation stage. The corrupt assets confiscated by investigators by the public prosecutor will be presented as evidence before a judge at the prosecution stage

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Based on a juridical perspective, the asset confiscation mechanism in the Indonesian legal system consists of three mechanisms, namely

1. First, criminally by law enforcement officials (APH) through a legal process and obtaining a final court decision with the Prosecutor acting as the executor of the execution by confiscating related evidence or assets.
2. Second, in a civil case, if there is not sufficient evidence in the case and the suspect dies but there is actual loss to the state then the State Attorney can file a civil lawsuit.
3. Third, administratively through excise, taxes or customs.

Indonesia, as one of the countries that has ratified UNCAC 2003, has adopted provisions regarding the return of assets resulting from corruption, especially the legal standing that states that file lawsuits and demand compensation, place confiscations in state courts in order to return assets resulting from corruption in that country. In this case, as in civil law, it is regulated in Article 1365 of the Civil Code, namely acts against the law.

It's just that a civil lawsuit to recover state financial losses resulting from criminal acts of corruption is a special civil lawsuit regulated in the criminal law on corruption and is not a lawsuit against the law. The basic concept of confiscating assets of criminals without criminal law procedures is that confiscating the assets of corruptors even though they are declared free by the court because they have not been proven or have died while the trial has not been completed before the court decision has permanent force and Articles 39-42 of the Criminal Code and Article 194 of the Criminal Procedure Code where the defendant is not can be made a party in the criminal case, then their alternative assets are the target of confiscation and must be submitted to court. The concept used is a lawsuit against objects as opposed to a lawsuit against humans.

The Non Conviction Based (NCB) concept is a legal mechanism that allows state assets taken by criminals to be confiscated again, in this case one of the aims of this concept is to return state losses (asset recovery) from criminal cases or a form of accelerating the trial process with an agenda. only reverse proof of the assets and the output is in the form of a decision to carry out the confiscation of the assets or not.

So confiscation of these assets is the only principal crime that will be imposed. In this case, the legal principle of *lex specialist deroget lex generalis* will apply, where more specific rules override general rules, because the Draft Law (RUU) on Asset Confiscation regulates its own procedural law.

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The validity of human rights (HAM) itself is not absolutely absolute, there are several restrictions that can be made, especially for human rights (HAM), which are classified as derogable rights, which are defined as rights that can still be suspended or limited (reduced) in their fulfillment by country under certain conditions.

Draft Law (RUU) on Asset Confiscation in Article 14 Paragraph (1) which reads:

Asset confiscation is carried out in the event of:

- a) The suspect or defendant is dead, has run away, is permanently ill, or his whereabouts are unknown; or
- b) The defendant was acquitted of all legal charges

One example of an NCB case is the KTP Project involving Setya Novanto, who was sentenced to 15 years in prison with a fine of IDR 500,000,000, - revoked for 5 years of political rights and compensation amounting to IDR 101,000,000,000, even though the total loss in corruption was IDR 2,300,000,000.

Indonesia includes the NCB in a special law which is in the process of drafting the Law on Confiscation of Assets Related to Criminal Acts, where in:

Article 1 states that:

"Confiscation of criminal assets or confiscation of assets is a coercive effort carried out by the state to take over control and/or ownership of criminal assets based on a court decision that has obtained permanent legal force without being based on the punishment of the perpetrator.

Article 2 emphasizes that:

"Confiscation of assets under this law is not based on the conviction of criminals."

Without being based on the punishment of the perpetrator, here confiscation of assets is not a crime. Having a court decision with permanent force as a basis for confiscating assets is counter-productive because it will actually become an obstacle to the work of law enforcement officials to confiscate assets when there is no court decision.

Confiscation of assets based on the NCB mechanism is not part of the punishment of the perpetrator and is not a criminal sanction, NCB is not a substitute for criminal prosecution, so

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it is very possible because the confiscation is only of property or assets, not of people so that punishment of the perpetrator is not required.

The philosophical perspective of punishment revolves around the justification for the imposition of a sentence, how the sentence is imposed, why the sentence must be imposed and what is the purpose of the sentence imposed.

It must be involve an evil, an unpleasantness to the victim (criminal must involve a crime and discomfort for the victim).

It must be for an offense, actual or supposed (Criminal action must be aimed at criminal acts, whether committed or suspected).

he pain or unpleasantness should be an essential part of what is intended and not merely a coincidental or accidental outcome.

#### **4. Conclusion**

The concept of confiscating the assets of criminals does not conflict with human rights (HAM) and the Principles of Criminal Law if it is carried out and implemented well by law enforcement officials (APH) in law enforcement and theoretically, but there are still gaps that exist. allows violations related to human rights (HAM) and criminal law principles because they are misused by unscrupulous law enforcement officers (APH). So that in the future it is necessary to improve not only the existing rules but also be implemented by law enforcement officers (APH) who are professional, accountable, with integrity (professional, accountable, integrity) so that these rules can run well.

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