



Confiscation of Assets Resulted from Money Laundering to Return State's Loss

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Abstract

One of the forms of money laundering is when a government official gets money or asset illegally then reinvest them to make them considered-legitimate money or asset. Money laundering crimes in Indonesia are increasingly diverse. The Indonesian government's efforts to confiscate assets resulted from criminal acts are often considered ineffective. Therefore, it is important to examine the effectiveness of the Indonesian Law on Money Laundering in the implementation of Asset Confiscation. This study used normative juridical legal research method. It was carried out through the examination on library materials or secondary materials. The study also used legal and conceptual approaches. The results of the study indicate the importance of a law that covers confiscation of assets to run the confiscation of assets run effectively.

Keywords: *Asset Confiscation; Crime; Money Laundering Law Hadiths*

A. Introduction

The banking sector and the capital market are two rapidly growing sectors. With the current development of technology and globalization, trade of various sectors is also developing. Unfortunately, crime is also developing. The fast-paced economic sector has developed new types of white-collar crimes. In addition to means of financial transactions, capital markets and banks are also centers of economic and financial regulation. Therefore, these two sectors are also commonly used for money laundering activities.¹

Money laundering is an activity that must be avoided because it can harm state and society. This crime can be subject to severe sanctions in accordance with the impacts. Money Laundering covers any act that fulfills the elements of a criminal act, according to the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering. According to Robinson, the "money laundering" is used because the process covers the change of illegal money related to crime or illegal activity into money that looks legal or clean.²

¹ Hibnu Nugroho, Budhiyono, Pranoto, "Investigation of the Crime Of Money Laundering In Assets Withdrawal", *DE JURE*, Vol. 16 No. 1, 2016, p. 1.

² Jeffresy Robinson, The Laundryman quoted in Sutan Remy Sjahdeini, *Seluk Beluk Tindak Pidana Pencucian Uang Dan Pembiayaan Terorisme*, Jakarta: Pustaka Utama Grafiti, 2004, p. 6.

There are two types of money laundering in Articles 3 and 4 of the Law Number 8. The first is an act that change the form or transfer of assets originated from criminal acts with the aim of hiding or disguising the origin of assets that are known or suspected to have originated from criminal acts.³ The second is an act of concealing or disguising the origin, source, location, designation, transfer of rights or actual ownership of assets known or reasonably suspected to be the result of a criminal act.⁴

Money laundering is indeed a form of corruption. There are, of course, state officials with authority who are happy and have opportunities to take state money but are aware of the risks of corrupt allegation. They may look for other ideas, the money laundering, as an alternative to circulating money to cover the corruption.

Confiscation of asset is a necessary step that must be taken following crime of money laundering. Asset recovery is carried out to restore the economy. This study focuses on asset recovery as an effort to return assets obtained from freezing and confiscation of assets obtained from criminal acts.⁵ There is an urgency to confiscate assets resulted from criminal acts since the process of proving in court is intended to recover state losses due to money laundering and corruption. Therefore, confiscation of assets is necessary to stabilize the economy and prosper economic development of community.⁶

The lack of maximum efforts to eradicate corruption and money laundering has so far been the main cause of the lack of support and firmness of the state apparatus and law enforcement officials, as well as the active role of the community in conducting supervision. Various improvements and innovations to the eradication of corruption in Indonesia have become a necessity. Asset recovery is a part of the efforts. Anyone who intends to commit corruption should feel anxious since it also has a deterrent effect. Article 3 regulates that prohibited acts (*actus reus*) are *to change the shape* or *to transfer*. In addition, Article 4 states that the prohibition (*actus reus*) covers *to hide* and *to disguise* wealth originating from a crime.

There are four types of perpetrators of money laundering as follows.

1. According to the guidelines for the preparation of the Money Laundering Law issued by UN ODC (United Nations Office on Drugs and Crime), perpetrator of money laundering is *any person*. It could be anyone, both the main actor who commits the predicate crime and other actors who do not commit the predicate crime.
2. If the perpetrator of the predicate crime commits money laundering, the activity is called *self-laundering*. In this case, one perpetrator commits two crimes. There are two different violation on different laws with different *locus* and *tempus delicti*. This is called *concursum realis*, a combination of criminal acts.
3. If the constitution or the *fundamental legal principles* prohibit self-laundering, as in Sweden, this is recognized in the UNTOC (United Nations Convention on Transnational Organized Crime).
4. There can be a case when the predicate offense is committed by a person and the money laundering is committed by another person. This is called *standalone money laundering*.

³ Article 3, Law Number 8 of 2010 on The Prevention and Eradication of the Crime of Money Laundering.

⁴ Article 4, Law Number 8 of 2010 on The Prevention and Eradication of the Crime of Money Laundering.

⁵ Ridwan Arifin, Indah Sry Utari, Herry Subondo, "Upaya Pengembalian Aset Korupsi yang Berada di Luar Negeri (Asset Recovery) dalam Penegakan Hukum Pemberantas Korupsi di Indonesia", *Indonesia Journal of Criminal Law Studies*, Vol. 1, No. 1, 2016, p. 135.

⁶ Krisdianto, "Implikasi Hukum Aset Hasil Tindak Pidana Korupsi yang Hak Kepemilikannya Telah Dialihkan pada Pihak Ketiga", *e-Jurnal Katalogis*, Vol. 3, No. 12, December 2015, p. 188.

Indonesia has ratified the UNCAC (United Nations Convention against Corruptor) convention 15 years ago, on September 19, 2006. There have been three periods of government. There is an indication that Indonesia still has not shown significant progress. Indonesia should have produced an action plan, for example a revised law that needs to be implemented and produce a new breakthrough law.

In the last two years, Indonesia has experienced a setback to strengthen the eradication of corruption and money laundering. The contributor to the eradication of corruption and money laundering is obstacles stemming from practices that originated with countries and governments that made corruption crimes irrelevant. For example, the state has shown no commitment to protect and to strengthen anti-corruption institution. Indonesia has revised the Law on Corruption Eradication Commission in 2019. Based on international point of view, it is a setback since the anti-corruption institution made it is most important but impeded efforts. Indonesia is also diligent in ratifying but reluctant to implement the UNCAC. In 2006, the Indonesian Corruption Eradication Commission (KPK –*Komisi Pemberantasan Korupsi*) compiled a GAP Analysis between UNCAC and the national legal framework.⁷ Indonesia's prevention and eradication of corruption has been based on specific legislation that has been in force since 1957 and has changed 5 times, but it is deemed inadequate because it has not specifically discussed international cooperation in the return of assets. Also, UNCAC could not easily overcome the corruption problem which underlies Indonesia. That will require considerable effort and earnestness not only from law enforcement institutions but also from all societies, for the implementation of the UNCAC will not only require the active role of the private sector and the civil society.⁸

UNCAC uses the term asset recovery, not asset confiscation, because asset seizure is a process to recover or return corrupted assets. Article 51 of the UNCAC⁹ regulates asset recovery to the state of origin as a basic principle of the convention. The Asset Recovery arrangement is important because it aims to take preventive measures. Therefore, the assets can be detected from the start of the crime and are not taken out of the state. In this case, assets that have been transferred abroad can encourage the important role of the Center for Financial Transaction Reports and Analysis (PPATK –*Pusat Pelaporan dan Analisis Transaksi Keuangan*) as the central institution to eradicate Money Laundering in Indonesia.

Previously, Harjanto has explained that the recovery process of assets resulted from corruption can be carried out through criminal, civil, administrative, or political channels. The mechanism for the process of asset recovery can be through confiscation of asset without punishment and seizure of assets legally and voluntarily. To return assets through criminal channels, the prosecutor's office as a state attorney may apply civil, administrative, and political diplomacy mechanisms. In addition, the assets can be confiscated for the benefit of the state.⁷ Since Indonesia legal regulations, corruption and money laundering are criminal acts, the perpetrators of these actions must be criminally resolved, asset return is an obligation in this case.

Prasetyo also explained that according to current laws and regulations, it is not enough to return the country's financial losses through confiscation and confiscation of assets. The implementation is still very simple, encountering various obstacles and problems, so it is not optimal. The current laws and regulations do not regulate the central authorities' international cooperation in the confiscation and return of corrupt or money laundered assets. There is no authorized party to manage the forfeiture of assets.⁸

⁷ Prof. Edward Omar Sharif Hiarie in Webinar titled "Diskusi Online Temporer Membedah Krusialnya Pengesahan RUU Perampasan Aset Tindak Pidana" on April 7, 2021, <https://www.youtube.com/watch?v=EmKMbbpMsE0>, accessed on August 2021

⁸ ACCH, "GAP Analysis Indonesia Terhadap UNCAC", <https://acch.kpk.go.id/id/berkas/litbang/251-gap-analysis-indonesia-terhadap-uncac>, accessed on November 2021

⁹ Article 51 of the UNCAC.

⁷ Tri Raharjanto, "Perampasan Harta Terpidana Korupsi dalam Prespektif Peradilan Tindak Pidana Korupsi di Indonesia", *Jurnal Politikologi*, Vol 3, No. 1, 2015, p. 106.

⁸ Dessy Rochman Prasetyo, "Penyitaan dan Perampasan Aset Hasil Korupsi sebagai Upaya Pemiskinan Koruptor", *DiH Jurnal Ilmu Hukum*, Vol 12, No. 24, 2016, p. 159.

This means that in this case there is still a legal vacuum in Indonesia regarding asset recovery, this is one of the urgencies that must be discussed and designed so that the recovered assets are no longer misused.

In carrying out the prevention and eradication of money laundering, the PPATK receive several reports from the reporting party, according to Article 23 to Article 27 of Law Number 8 of 2010, that covers.

1. Suspicious Financial Transactions;
2. Cash Financial Transactions;
3. International fund transfers from Financial Service Providers;
4. Transactions worth Rp500 million or more from goods and or service providers

Objects of the Crime of Money Laundering are people and assets. The term *follow the money* is used as an effort to eradicate money laundering globally. It is a part of the anti-money laundering approach. It looks for money or assets resulted from criminal acts. Asset tracking and recovery are activities to seek and trace the origin of assets owned by suspects, defendants, convicts, or other related parties suspected of being the result of criminal acts of corruption and/or money laundering. The purpose of tracking and recovering assets is to support the evidentiary process in the investigation/prosecution stage of corruption cases and the state's assets recovery.

The law enforcement must be discussed and exercised simultaneously. Money laundering has the potential to uncover corruption. It is detrimental to the state, not only from an economic point of view, based on many aspects. A state may be considered not good if there are still many white-collar crimes. Therefore, the study covers the legal handling of the crime.

The study complements previous studies on money laundering. It aims to show the methods of asset confiscation. The main problem of this study discusses the process of confiscation or seizure of assets that will become state financial recovery based on the Law Number 8 of 2010 on Money Laundering. The objective of this study is to stress the importance of updating or revising the Law on Money Laundering so that the implementation can achieve legal certainty and the ratification of laws and regulations on asset confiscation. From the background, the study can formulate the problems into two questions: (1) how is the confiscation of assets resulted from the crime of money laundering; and what are the inhibiting factors in the implementation of asset confiscation?

B. Research Methods

This research was conducted using a normative juridical method, the type of normative juridical research using library sources as the basic material or secondary data was carried out through a literature search to examine the problems raised in this study. Soerjono Soekanto provides a view on the definition of a normative juridical approach, namely as a legal research that relies on library materials or secondary data as the basic material by conducting searches both on regulations and related literature to examine the research.¹⁰

The approach used in this study is a normative juridical approach, namely the statute approach which is carried out by reviewing all regulations or laws and regulations relating to the legal issues to be studied, and the conceptual approach is a conceptual approach. which provides an analytical point of view of problem solving in legal research seen from the aspect of legal concepts. Research conducted in a normative juridical manner where the law is conceptualized as what is written in legislation (law in

¹⁰Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum*, (Jakarta: Rajawali Pers, 2001), page. 13-14

books) or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.

In this research, which uses normative juridical, in order to support the acquisition of legal materials, of course, through the search for legal materials or literature studies on primary, secondary, and tertiary legal materials.

- a. Premier legal materials consist of judges' decisions, official records, and laws or official minutes in the making of legislation. In this study using premier legal materials, namely:¹¹
 - 1) Law No. 8 of 2010 Amendments to Law No. 15 of 2002 concerning the Prevention and Eradication of the Crime of Money Laundering
 - 2) Law No. 31 of 1999 concerning the Eradication of Corruption Crimes
 - 3) Criminal Code
 - 4) Criminal Procedure Code
- b. Secondary legal materials consist of a collection of various reference books, foreign journals, and scholarly opinions related to the legal issues being researched, as well as legal cases and symposiums conducted by experts related to the legal issues under study, namely the confiscation of criminal assets. money laundering in Indonesia.¹²
- c. Tertiary legal materials are legal materials that discuss in sufficient detail the primary and secondary legal materials consisting of legal dictionaries or internet searches, collections of laws, and expert opinions.¹³

C. The Implementation of Confiscation of Assets Resulted from Money Laundering

Within the last five years, many money laundering perpetrators have used increasingly sophisticated, very complex, and international-scale methods to execute their crimes. Predicate crimes that have the potential to become Money Laundering Crimes includes narcotics, corruption, taxation fraud, banking fraud, forestry, and capital markets. The Indonesian government's efforts to eradicate money laundering have been started since the establishment of the Law Number 15 of 2002 on the Prevention and Eradication of the Crime of Money Laundering. It has been updated with the Law Number 8 of 2010 on Money Laundering, which covers all anti-money laundering efforts. The Law has regulated money laundering and criminal prosecution of money laundering actors.

The Crime of Money Laundering has real and potential impacts as follows.¹⁴

1. Real Impact:

- a. Average Value of Suspicious Financial Transactions.
- b. Average Value indicated by money laundering in the PPATK Analysis Result Report.
- c. Average Value indicated by money laundering in the PPATK Inspection Result Report.
- d. Average Value indicated by money laundering in the money laundering Investigation File.
- e. Average Value indicated by money laundering in the money laundering Prosecution File.
- f. Average Values decided on money laundering offenses in the Court Decision Files for money laundering offenses.

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta, PRENADAMEDIA GROUP), 2016), page. 181

¹² Ibrahim, Johnny. *Teori & Metodologi Penelitian Hukum Normatif* (Malang, Bayumedia Publishing, 2012), page. 392

¹³ Peter Mahmud Marzuki, op. cit. page. 181

¹⁴ Indonesian NRA Update Team, "Pengkianan Penilaian Resiko Indonesia Terhadap Tindak Pidana Pencucian Uang Tahun 2015" Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK), p. 26.

2. Potential Impact: law enforcement perceptions regarding the average value of money laundering offences according to predicate crime.

As an effort to improve prevention and eradication of money laundering and/or other criminal acts related to money laundering and to increase state revenues from the taxation sector, there is the Presidential Instruction Number 2 of 2017 on Optimizing the Utilization of Analysis Results Reports and Results Reports on March 10, 2017 (INPRES-02/2017). The INPRES-02/2017 essentially contains instructions to the Minister of Finance, the Attorney General, the Chief of Police, and the Head of the National Narcotics Agency as the leaders of investigator bodies who are authorized to investigate money laundering and predicate crime based on their respective tasks and authority to optimally use the analysis report and the examination report delivered by the PPATK.¹⁵

Indonesia is experiencing a situation that is not good. In 2020, the Transparency International Indonesia (TII) released the Indonesian Corruption Perception Index (CPI) that shows Indonesian CPI decreased significantly.¹⁶ Indonesia's 2020 index was dropped to 37 from 40 in 2019. Indonesia's rank has also dropped from 85 to 102 out of 180 countries. The decline of the Indonesian CPI must be taken seriously. Indonesia must correct the policies to eradicate corruption.¹⁷

Figure 1. Indonesian CPI 1995-2020.



The data above indicates that the current regulations in overcoming the crime of money laundering and corruption have not been maximized. The data above explains that Indonesia is not in a good condition. During 2019-2020, there is a decrease in efforts to eradicate corruption. In this condition, it is necessary to reform the existing regulations. Among others, the Law on Money Laundering and the ratification of the latest regulations, the Asset Confiscation Bill to maximize efforts to eradicate corruption and money laundering.

So the author concludes that in this case it can be seen that corruption may result severe social impacts like (1) negative impact on economic growth, (2) lowering the level of investment, (3) increasing the burden of economic transactions, (4) low quality of public facilities and infrastructure; (5) income inequality; and (6) increase of poverty. The practice of corruption creates a high cost economy that imposes an economic burden. These high cost economic conditions affect the price of public services and services. This is because established prices should cover the damage caused by large amounts of capital caused by lapses in corruption.

¹⁵ *Ibid*, p. 29.

¹⁶ M. Rosseno Aji, "Indonesia's Corruption Perceptions Index Drops in 2020: TII", <https://en.tempo.co/read/1427429/indonesias-corruption-perceptions-index-drops-in-2020-tii>, accessed on November 2021.

¹⁷ *Ibid*.

The five impacts of corruption, in short, may make the rich richer and the poor poorer. The economic inequality may be widened; and the poverty may increase. It is a challenge for all Indonesian people and government to be serious with the strategy of maximizing asset recovery. In fact, it is not enough just to maximize asset recovery but Indonesia can also recover the victims or parties who are socially affected by corruption. The recovery is certainly sourced from corruption perpetrators. The significant challenge is the procedure for asset recovery to be easier.

There are problems in dealing with corruption nowadays. In addition to dealing with the corruption itself, pursuing perpetrators is another problem to be solved. Based on the cases resolved by the KPK, the Prosecutor's Office, and the Police, the law enforcement officials have begun to discuss the issue of balanced state financial losses significantly. There have been efforts to implement the Money Laundering Law and the use of corporate crime criminal provisions. There is still a small part of the handling of corruption cases that chase perpetrators. Based on data from Indonesia Corruption Watch (ICW), in 2020, Indonesia had successfully recovered losses to Rp56.7 trillion; and the replacement money reached Rp8.9 trillion. This means that there is around Rp.47 trillion that still has not returned and difficult to achieve. This is because, what is experienced by the PPATK, the time wasted to confiscate an asset will complicate the process of returning assets.¹⁸

The next problem in dealing with corruption is the low optimization of the efforts to pursue the profits of crimes that are transferred abroad. There are still problems in regulation and law enforcement. Article 9 of the Law Number 1 of 2006 on Mutual Assistance in Criminal Matters grants the central authority to submit requests for assistance among states to the Minister of Law and Human Rights. The flow of requesting assistance is based on the submission process carried out by law enforcements, the Attorney General's Office or the National Police Chief. Therefore, this submission flow is considered to be ineffective because it affects the speed of the investigation process. In addition, the Minister of Law and Human Rights is the only authority who can submit requests for assistance to foreign states. The Minister of Law and Human Rights should only regulate the administration of legislation, not to handle cases of transnational crimes which should be carried out by law enforcers. In this case, the problem is whether there are technical problems due to the difficulty of recovering the assets located abroad. It takes time and other situations may occur, for instance: deviations of law enforcement or the professionalism problem of the law enforcers. This matter certainly needs to be identified in detail.

The third problem is that law enforcement and policies have not prioritized the perspective of defending and recovering victims of corruption. Indonesia is busy questioning good rules, good policies, etc. In the end, the rules are not necessarily beneficial and felt by the people. There are rights of victims of criminal acts as follows.¹⁹

Figure 2. Rights of Crime Victims



¹⁸ Muhammad Fatahillah Akbar, S.H., LL.M., in Webinar titled "Diskusi Online Temporer Membedah Krusialnya Pengesahan RUU Perampasan Aset Tindak Pidana" on April 7, 2021, <https://www.youtube.com/watch?v=EmKMbbpMsEQ>, accessed on August 2021.

¹⁹ Fiithriadi Muslim, in Webinar titled "Diskusi Online Temporer Membedah Krusialnya Pengesahan RUU Perampasan Aset Tindak Pidana" on April 7, 2021, <https://www.youtube.com/watch?v=EmKMbbpMsEQ>, accessed on August 2021.

Based on the chart, from the bottom of the chart is assistance. One form of assistance in the losses is compensation. The victims who suffered losses and were compensated, hoping for changes and for fair treatment.

The rights of victims of criminal acts necessary to identify who victims of corruption are. The government needs to be more systematic in carrying out every right of victims of criminal acts. Therefore, people do not think state is the only party harmed by corruption. It is in line with Article 2 and 3 of the Anti-Corruption Law.

Aside from the rights of victims of corruption, it is equally important to launder money. There are several disadvantages in the implementation of the Anti-Money Laundering Law. Firstly, the implementation of Articles 77 and 78 has not considered an objective balance between the interests of the suspect and the people. These articles are contrary to legal certainty and protection contained in Article 28 D paragraph (1) of the 1945 Constitution and contrary to the principle of non-retroactive law as reflected in Article 1 paragraph (1) of the Criminal Code. Secondly, there are still problems in the formulation of criminal acts and procedures as formulated in Articles 2, 3, 4, and 5 of the Money Laundering Law. The law explains the predicate crime in the Crime of Money Laundering but there are contradictory to the Article 69 where the provisions for conducting investigations, prosecutions, and examinations in court proceedings against the crime of money laundering do not have to be proven in advance of the predicate crime. In this case, Article 69 does not give rise to legal certainty but Articles 2, 3, 4, and 5 clearly stipulates predicate offenses that must be proven first.²⁰ Thirdly, the Law Number 19 of 2019 on the KPK and the Law Number 8 of 2010 on the Crime of Money Laundering are two regulations that do not discuss the provisions of the KPK's authority to prosecute perpetrators of the money laundering. However, Article 74 and 75 of the Law Number 8 of 2010 essentially states that money laundering offenses investigations are carried out by investigators of predicate crimes; and if investigators find sufficient preliminary evidence of the occurrence of money laundering and predicate crime, the investigators combine the investigations into the predicate crime and notify the PPATK. This means that the investigation of predicate crimes and money laundering can be carried out by the KPK simultaneously but the KPK does not have the authority to prosecute the crime of money laundering. The KPK needs to submit to the Public Prosecutor of the Attorney General's Office to follow up the money laundering. Fourthly, the Anti-Money Laundering Law does not have regulations that govern *illicit enrichment* and *unexplained wealth*. On the other hand, UNCAC contain the provisions. *Illicit enrichment* and *unexplained wealth* are two points that actually need to be added in the money laundering law. This increase in wealth that is not proportional to the legal income is often found and becomes a question in the public. For example, a public official, a law enforcement officer, or a state administrator may earn the maximum salary up to Rp50 million. However, the individual has wealth that is exhibited to the public which is incomparable to the legal income. The law must be able to regulate such case and arrange proper illicit enrichment to be recovered. Articles 77 and 78 of the Law Number 8 of 2010 on Money Laundering do not regulate the consequences. If *illicit enrichment* and *unexplained wealth* are regulated and linked in the articles, a defendant can prove that the assets are not the result of a criminal act. The absence of the

²⁰ Law Number 8 of 2010 on Prevention and Eradication of the Crime of Money Laundering.

Makes the laws concerning money laundering stricter. Increases penalties for violators of crimes. Also expands the grounds under which money can be seized. This law expands the list of agencies permitted to conduct money laundering investigations; increases the ability of the independent Financial Intelligence Unit (PPATK) to examine suspicious financial transactions; expands institutions authorized to obtain results of PPATK analysis or examination of transactions; creates a streamlined mechanism to seize and freeze criminal assets; expands the entities which must file reports with PPATK and increases some criminal penalties for money laundering offenses. The law designates non-financial businesses, in addition to Indonesian banks and providers of financial services, which are required to report suspicious transactions to PPATK. Money gained from criminal acts falling within the scope of this law include crimes related to: corruption; bribery; narcotics; psychotropic substances; labour trafficking; smuggling of migrants; banking; capital market; insurance; customs; clearance; trafficking in persons; illicit arms trafficking; terrorism; kidnapping; theft; embezzlement; fraud; counterfeiting; gambling; prostitution; taxation; forestry sector; environmental field; maritime affairs and fisheries, or other offenses punishable by criminal sanction of more than four years jail.

two provisions in the Money Laundering Law is very unfortunate. The *illicit enrichment* and the *unexplained wealth* are expected to minimize white-collar crimes and to trace money resulted from the crimes to be returned to the state.

The last one is procedural principles and mechanisms in the Money Laundering Law. The procedural principles are still reflected in the *in persona* mechanism or the punishment of perpetrators only to create a deterrent effect. It is expected that asset confiscation mechanism uses an *in rem* mechanism where it is no longer the state against the perpetrators, but the state against the assets. The *in rem* mechanism has been formulated in the asset confiscation bill. There is an *in rem* mechanism in the asset confiscation process where the procedure used for confiscation is based on civil proceedings. The outcome of corruption is certainly related to assets or property acquired in an unauthorized and dirty manner. The prosecution of the perpetrators of corruption is not only related to the problem of his actions but also the repression of the result of his act of seizure of assets or assets of the perpetrator. Presidential Instruction Number 5 of 2004 on the Acceleration of Corruption Eradication issued by the President on December 9, 2004 to prove the seriousness of the government in criminalizing the money laundering of corruption results as well as a legal instrument that ordered law enforcement officers to immediately restore the state loss (asset recovery). The state can prove that the object was obtained from a crime; and, therefore, law enforcement authorities can confiscate the assets.

The latent danger of corruption has touched almost all levels of society, not only in relation to state organizers, power and policy, but also to the presence of private parties. Various methods have been taken to eradicate it, both preventively and repressively as well as by making changes to the method of eradication. One of the objectives of repressive action is to restore the State's losses. Corruption has resulted in heavy losses to the state's finances and undermines the stability of the national economy. The state losses in the form of assets resulting from corruption in returning it are not easy, the complexity of the settlement of criminal cases is one of the most dominant causes, not to mention the settlement of cases of corruption, especially those that have obtained permanent legal force, in relation to the spoils and payments replacement money, suspects, defendants, or convicted persons who disappeared at the time the proceedings were underway.²¹

There are several regulatory weaknesses due to the absence of an asset confiscation regulation in the Money Laundering Law. Therefore, the establishment has become an urgency that should be followed up. One of the weaknesses is the Anti-Corruption Law. For example, Article 18 of the Anti-Corruption Law regulates the mechanism for the confiscation of assets resulted from corruption. The mechanism uses the corruption law.²² The article only covers the amount of money taken by the perpetrators of corruption. However, it does not cover the situation when the loss is greater. For instance, there is a corruption case causing a loss of more than Rp1 Trillion but the replacement money that can be used is only the maximum amount of bribe or fee received by public officials. It ultimately makes the Rp1 trillion loss a very crucial loss. The replacement money will become crucial, whether only imposed on officials or would also ensnare the other party. The law enforcement is not optimal and has not put a strategy to ensnare, for example, corporations as the main strategies in handling corruption cases.

The other weakness of the current regulation is about coverage. The regulation should also cover confiscation on targeted assets controlled by corporations, not to seize just corrupted assets. It is also possible to develop a broader concept of loss. For instance, the civil law contains the term loss, compensation for interest paid, or profits that are not obtained. The extent can be broadened to which it can be developed in such a way and includes social costs that must be paid by the perpetrators of

²¹ Abvianto Syaifulloh, in discussion with the author, August, 26, 2021, Deputy Attorney General for Special Crimes of the Republic of Indonesia.

²²Article 18, Law Number 31 of 1999 on the Eradication of the Crime of Corruption.

corruption. If this is formulated into the Money Laundering Law, the asset purchase strategy and the impoverishment of the perpetrators of corruption can be discussed more seriously.

Based on the fact, the return of corrupted assets is effective because on the one hand the government is aggressively performs efforts but, on the other hand, the process of asset recovery does not run smoothly. In addition, improper return and management of recovered assets will not have the expected return to be used for nation and state development. Therefore, the state must be responsible to protect the public from criminal acts of corruption since the biggest loss is borne by the community.²³ Corruption causes delays of development and the achievement of people's welfare that are the objective of the state. This protection does not only cover the prevention and eradication of corruption. Generally, confiscation will also be associated with confiscation whether it is related to the evidence of the case and must be ordered to confiscate the confiscated property to be handed over to the rightful person (returned to the person or those named in the decision, unless according to the judge's decision the object is confiscated for state, to be destroyed or to be destroyed until it can no longer be used or if the object is still needed as evidence for another case, or confiscation which is associated with additional penalties, namely as stipulated in Article 39 of the Criminal Code, which The items that can be confiscated are:

- a. Goods belonging to the convict obtained due to a crime;
- b. Goods belonging to the convict which have been intentionally used to commit a crime.²⁴

The third weakness of the current regulation is related to criminal decisions where the current mechanism only relies on sentencing decisions. In the case of Bank Indonesia Liquidity Assistance (BLBI –*Bantuan Likuiditas Bank Indonesia*), the corruption included the misappropriation of the Certificate of Clearance for Liquidity Assistance of Bank Indonesia. The court's decision did not fully describe the loss originating from the predicate crime. It made the execution difficult. The total loss is Rp284 trillion. However, until 2009, the state only received a refund of Rp546 billion. The law enforcement is more focused on imposing crimes against the perpetrators without focus on pursuing their assets. In addition, the mechanism of compensation claims is still very weak. The prosecutor as the state attorney targeted the assets. However, in the civil process, the investigators cannot go deep into the accounts involved in money laundering because the existing regulations still depend on formal evidence. Then, one can only witness the names involved. From a criminal perspective, asset confiscation can be seen in the material context, which is where the money flows and, from *in rem* forfeiture, cannot be done.

Lastly, the implementation of confiscation of assets should not only aim to confiscate assets but also needs to regulate the use for victims of criminal acts of corruption with a simpler but still accurate mechanism. The status of recovered state assets is uncertain. In particular, the procedure or the mechanism of asset recovery does not state the party that is authorized to take over the state assets in the trial process, types of assets to be confiscated to compensate the state losses, and institutions that are authorized to execute the confiscation, to receive, to store, and to manage the assets. Article 46 of the Criminal Code regulates the return of the rest of the confiscated goods to the owner. In essence, it is stated that the return of confiscated goods/objects must be carried out as soon as possible to those most entitled to the provision, if it turns out the investigation does not require it anymore, and the case is no longer prosecuted because there is not enough evidence or it turns out that it is not a crime. Therefore, the proceeds of asset confiscation are not corrupted by irresponsible persons.

²³ Abvianto Syaifulloh, in discussion with the author, August, 26, 2021, Deputy Attorney General for Special Crimes of the Republic of Indonesia.

²⁴ Yenti Ganarsih. 2016. *Penegakan Hukum Anti Pencucian Uang dan Permasalahannya di Indonesia*. Ctk. Kedua. Jakarta: PT. Raja Grafindo Persada.

D. Inhibiting Factors in the Implementation of Asset Confiscation

According to Abvianto, an investigator from the office of Deputy Attorney General for Special Crimes, the obstacle in tracking assets for asset confiscation, is that suspect or defendant often hides assets by obscuring and bringing assets abroad. Another obstacle is the investigator is often sued by the defendant's family. Thus, there is a lawsuit from a third party who claims to have rights and there has been a transfer of assets owned by the perpetrator confiscated by investigators.²⁵ For example, in case of Ahmad Fathanah (the meat import bribery), the defendant has transferred money that is suspected to be generated from corruption with a total of Rp34,729 billion. The KPK confiscated a number of assets that have been spent by Fatahanah and they said there were 45 women receiving Fathanah's funds. However, there was a third party who wanted to having their assets back. In fact, the asset had been confiscated by the state in Fathanah's case.²⁶

Therefore, the implementation of Asset Confiscation so far has focused on criminalizing the perpetrators. The law has not been effective. Only a few assets that have been recovered. In addition, the concept of *in rem* forfeiture is still weak in its implementation because it depends on formal evidence from the civil concept of forfeiture. Therefore, the current mechanism, whereby requests for criminal justice processes from investigators and submitted to public prosecutors to court, are expected to be more effective with the concept of non-conviction based. Focusing on assets to increase the potential for greater returns must be an ultimate objective to reduce the high rate of money laundering crimes. Therefore, when we look at economic crime, the concept of non-conviction based in adjudicating economic crimes, the flow of money will be visible. Likewise, cases of large economic crimes with billions and even trillions in losses can be revealed. The flow of the loss and the perpetrators of the economic crime can also be traced.

The expected concepts in the Law on the Crime of Money Laundering for Asset Confiscation are as follows.

1. Non-Conviction Based (Asset confiscation without criminal prosecution). This is in line with what was discussed in UNCAC, where asset recovery is one of the goals outlined in the purpose of UNCAC's establishment.
 - a. It should be no longer dependent on punishment.
 - b. It is carried out if the suspect or the defendant dies or runs away or is in a release decision.
 - c. It continues to go through the criminal justice process but still focus on assets.

As the term of an application, that has discussed before this is very interesting if we compare the US Financial Intelligence Unit and the Indonesian PPATK. The PPATK should act as an investigator because if the PPATK only provides recommendations, their role will be weak. The American Financial Intelligence Unit is equipped with the expertise to trace assets, if the Financial Intelligence Unit is only limited to providing recommendations and the decision is in the hands of investigators, it will weaken the process as well. Thus, if the INTRAC who has expertise in tracing assets is given investigative authority, it will optimize the process. This is because the current judicial mechanism regulates the investigator to transfer to the public prosecutor and the public prosecutor submits an application to the local district court.²⁷

²⁵Abvianto Syaifulloh, in discussion with the author, August, 26, 2021, Deputy Attorney General for Special Crimes of the Republic of Indonesia.

²⁶ Detik News, "Total Duit Korupsi yang Dicuci Fathanah Rp 34,7 M dan US\$ 89 Ribu", <https://news.detik.com/berita/d-2282650/total-duit-korupsi-yang-dicuci-fathanah-rp-347-m-dan-us-89-ribu>, accessed on August, 2021.

²⁷ Mardjono Reksodiputro. 1993. Sistem Peradilan Pidana Indonesia (Melihat Kepada Kejahatan Dan Penegakan Hukum Dalam Batas Batas Toleransi). Jakarta: Fakultas Hukum Universitas Indonesia.

The PPATK's concept of tracing and investigators' recommendation will reduce effectiveness. It is much more effective if the PPATK has the authority to investigate and to determine whether or not to continue the search.

2. International asset recovery

- a. Assets in Indonesia can replace foreign assets that are rejected.

The Asset Confiscation Law Draft has a very interesting mechanism because there are provisions for money laundering cases that rush assets abroad. For instance an asset is transferred to Hong Kong but Hong Kong refused the asset can be exchanged for the same amount of funds in Indonesia.

Returning asset of corruption in Indonesia Can be done in two ways:²⁸

- 1) through the means of civil law or civil based forfeiture (CB) or non-conviction based forfeiture (NCB);
- 2) through the means of criminal law or criminal based forfeiture (CB)
 - a) The return of criminal assets through civil law has long been applied in America and the UK.
 - b) In Indonesia, the return of criminal assets is only through the means of criminal law. This means that the return of new criminal assets can be carried out based on a court decision that has permanent legal force so that it takes a relatively long time.
 - c) The existing arrangements are limited to the seizure of assets from criminal acts with two models: (1) seizure in the sense of confiscation of assets used to commit criminal acts (*instrumentum sceleris*); and seizure in the sense of confiscation of objects related to criminal acts (*objectum sceleris*).
 - d) Confiscation of the proceeds of a criminal act (*fructum sceleris*) has not been regulated in detail and adequately, including the reverse verification process in the confiscation of criminal assets.
 - e) The *Instrumentum sceleris*, *objectum sceleris*, and *fructum sceleris* in Indonesia, United States, and United Kingdom are only intended for the interests of the state and have not been intended for the interests of victims of criminal acts as regulated in the Criminal Law in Belgium and the Netherlands. The confiscation and seizure of the *fructum sceleris* in Belgium and the Netherlands is intended to compensate victims of criminal acts.

The PPATK was established as an institution that is responsible for preventing and eradicating money laundering crimes in Indonesia. It is regulated in Articles 37 to 46 of the Money Laundering Law. According to Muslim, the Legal Director of the PPATK, Indonesia has regulations regarding asset confiscation in Article 67 of Law Number 8 of 2010, which states the following.²⁹

1. If no person and/or third party submits an objection within 20 (twenty) days from the date of the temporary suspension of the Transaction, the PPATK submits the handling of the assets, which are known or reasonably suspected to be the proceeds of the crime, to the investigator for investigation.
2. If the alleged perpetrator of a criminal act is not found within 30 (thirty) days, the investigator may submit an application to the district court to decide on the assets as state assets or be returned to those entitled.
3. The court as referred to in paragraph (2) must decide within a maximum of 7 (seven) days.

The implementation of Article 67 of the Law Number 8 of 2010 has succeeded in resolving, among others, cases of online gambling, export and import of goods, and pandemic assistance corruption, etc. The money transactions were successfully postponed by the Financial Service Authority (OJK –

²⁸Hikmahanto Hikmahanto, "The 2nd Proceeding Indonesia Clean of Corruption in 2020", 2017

²⁹ *Ibid*

Otoritas Jasa Keuangan). The OJK has the authority to delay the transaction for five days before it is reported to the PPATK. The PPATK continues to recommend to investigators and is processed with the Regulation of the Supreme Court Number 1 of 2013 on Procedures for Settlement of Applications for Handling Assets in the Crime of Money Laundering. This means that Indonesia already has an experience in recovering assets resulted from the crime of money laundering without criminalizing the perpetrators effectively. Currently, Indonesia will better regulate more comprehensive arrangements, including the management of its assets in the newly Asset Confiscation Law Draft, as well as in the procedural law arrangements.

The Academic Manuscript of the Asset Confiscation Law Draft has been drafted since 2012, during the administration of Susilo Bambang Yudhoyono. Four years later, the draft was introduced. This Bill on Asset Confiscation applies to all types of criminal acts but does not specifically regulate assets from corruption. For this reason, it is necessary to consider the characteristics of the assets generated from corruption and their distribution at the national and international levels.³⁰

The Asset Confiscation Law Draft will contribute the mechanism. It provides an authority to the government to confiscate assets hidden abroad if the assets are located abroad. The draft has the potential to overcome obstacles in international cooperation such as double criminality, differences in trial system, and cost and time of trial. Article 24 of the draft states that if the assets of the criminal offense requested for confiscation are abroad and have met the requirements as objects of asset confiscation, the Central Jakarta High Court has the right to examine the assets.³¹

This bill still uses the term *asset confiscation*. However, the 2020-2024 National Mid-Term Development Plan (RPJMN –*Rencana Pembangunan Jangka Menengah Nasional*), the Regulation of the Supreme Court, and the Regulations of the Attorney General have used the term *asset recovery*. The equation of both used terms needs to be corrected before it is passed into law because this definition has different implications for more detailed arrangements.

There are six priority issues for the UNCAC review that have been presented by the KPK:³²

1. Revision of the Corruption Law
2. Increasing Public Sector Transparency-and-Integrity and Bureaucratic Reform
3. Private Sector
4. Revision of Money Laundering Law
5. Strengthening the Independence and Institutionalization of Anti-Corruption Institutions
6. Asset Confiscation Law Draft

Unfortunately, Indonesia still faces problems. One of them is the Asset Confiscation Law Draft, which seems unwanted by a number of parties because it can disturb the comfort of some public officials, who have wealth that is not balanced with legal income. Before the introduction of the Assets Confiscation Law Draft, one of the recommendations from the UNCAC review carried out by the KPK is Strengthening Independence and Anti-Corruption institutions. On the contrary, Indonesia revised the KPK Law in 2019 that may weaken the KPK.

In addition, the PPATK has issued a statement on the importance of the draft for the 2021 or 2022 priority agenda. The current regulation has limitations to recover asset generated from criminal acts. If

³¹*Ibid*

³² Komisi Pemberantasan Korupsi (KPK) and Kementerian Luar Negeri, *Komitmen Indonesia pada United Nations Convention Against Corruption (UNCAC) dan G20 Anti-Corruption Working Group (ACWG) Tahun 2012-2018*, Jakarta: KPK dan Kementerian Luar Negeri, 2019.

Indonesia is able to produce and to draft progressive laws, Indonesia may get benefit from the recovered assets. The benefit can be maximize for Indonesia's development.

Conclusion

Assets recovery has become a priority. The Indonesian government continues to recognize the importance of asset recovery, so the focus on eliminating corruption continues to be resolved to separate corruption from corruption. Asset return must be carried out in the beginning of the process for final handling. Law enforcement should cooperate with various state institutions in which there should be facilitated by monetary intelligence assistance.

Based on the foregoing, it can be concluded that the restoration process must be done in an efficient and effective way until the asset is successfully recovered as much as possible from the total cost to the country caused by corruption and money laundering, according to existing regulations of the law.

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