MECHANISMS FOR ASSET FORFEITURE IN THE MONEY LAUNDERING CRIMINAL LAW AND ASSET FORFEITURE DRAFT LAW (LAW COMPARISON WITH THE UNITED STATES)

a Ahmad Sofian, b Bambang Pratama, c Hanifah Azizah

ABSTRACT

Objective: This paper attempts to compare the law between Indonesia and The United States of America regarding the mechanism of asset forfeiture in the context of criminal law. In Indonesia, several criminal law provisions already regulate the possibility of confiscating and forfeiting the proceeds of criminal acts. However, under these provisions, asset forfeiture can only be carried out after the perpetrator of the criminal act is legally and convincingly proven to have committed a criminal act. The Asset Forfeiture Draft Law the text of which is just about to be submitted to parliament can bridge the norm of illicit enrichment or improperly obtained wealth, which is actually set out in the UN Convention Against Corruption, but not yet in Indonesian law.

Theoretical framework: To present Indonesian and U.S. experience in regulating the possibility of confiscating and forfeiting the proceeds and instruments of criminal acts. It takes a complete and comprehensive normative juridical approach to asset forfeiture law, presents theoretical elaboration from international scientific publications, reports, and empirical studies. This paper presents a comparison between Indonesian and United States law regarding the forfeiture of assets resulting from money laundering. The United States has been the initiator of the Non-Conviction Based Asset Forfeiture mechanism. As a result of applying the concept of Non-Conviction Based Asset Forfeiture, the United States has benefited by being able to recover state losses suffered due to corruption without having to go through criminal proceedings. Thus, it has been able to minimize state losses occurring due to corruption.

Methodology: There have been many studies examining asset forfeiture in various countries, but no study has been found thus far which adequately describes the norms and implementation of laws Indonesian and United States laws, respectively. It is important for Indonesia to understand the United States’ experience, both normatively as well as empirically. Therefore, the normative juridical approach with comparative study approach serves as a tool to investigate various legal aspects of the two countries. Articles with relevant themes that occur in various countries, including Indonesia and the United States, are included in this study.

Results and conclusion: An asset forfeiture mechanism is required in national law which adopts the model of forfeiture of assets resulting from criminal acts through civil law. The implementation of the model of criminal asset forfeiture by the means of civil law is needed for the prompt recovery of state losses without first having to prove the criminal act committed by the perpetrator.
**Originality/value:** This paper is a comparative study of Indonesian and U.S. law respectively which highlights money laundering and asset forfeiture. This study also demonstrates that the asset forfeiture mechanism applied in the United States of America using Non-Conviction Based Asset Forfeiture is a revolutionary concept in forfeiting the proceeds of crime.

**Keywords:** asset forfeiture, asset confiscation, money laundering crime, business law, Indonesian and U.S. law comparison.

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**PROJETO DE LEI RELATIVA AOS MECANISMOS DE CONFISCO DE BENS NO DIREITO PENAL EM MATÉRIA DE BRANQUEAMENTO DE CAPITAIS E DE CONFISCO DE BENS (COMPARAÇÃO DE LEIS COM OS ESTADOS UNIDOS)**

**RESUMO**

**Objetivo:** Este artigo tenta comparar a lei entre a Indonésia e os Estados Unidos da América no que diz respeito ao mecanismo de confisco de ativos no contexto do direito penal. Na Indonésia, várias disposições de direito penal já regulam a possibilidade de confiscar e confiscar o produto de atos criminosos. No entanto, nos termos destas disposições, a perda de bens só pode ser efetuada depois de o autor do ato criminoso ter provado, de forma legal e convincente, ter cometido um ato criminoso. O Projeto de Lei de Perda de Bens, cujo texto está prestes a ser submetido ao parlamento, pode transpor a norma do enriquecimento ilícito ou da riqueza obtida indevidamente, que é efetivamente estabelecida na Convenção das Nações Unidas contra a Corrupção, mas ainda não na legislação indonésia.

**Estrutura teórica:** Apresentar a experiência indonésia e dos EUA na regulamentação da possibilidade de confiscar e confiscar os produtos e instrumentos de atos criminosos. Tem uma abordagem jurídica normativa completa e abrangente para a lei de confisco de ativos, apresenta elaboração teórica de publicações científicas internacionais, relatórios e estudos empíricos. Este documento apresenta uma comparação entre a legislação indonésia e os Estados Unidos em relação à confisco de ativos resultantes de lavagem de dinheiro. Os Estados Unidos têm sido os iniciadores do mecanismo de não-condenação baseado no confisco de ativos. Como resultado da aplicação do conceito de Perda de Ativos Baseada em Não-Condenação, os Estados Unidos têm beneficiado com a capacidade de recuperar as perdas do Estado sofridas devido à corrupção sem ter que passar por processos criminais. Assim, ele tem sido capaz de minimizar as perdas de estado que ocorrem devido à corrupção.

**Metodologia:** Há muitos estudos que examinam o confisco de ativos em vários países, mas nenhum estudo foi encontrado até agora que descreva adequadamente as normas e a implementação das leis indonésias e americanas, respectivamente. É importante para a Indonésia entender a experiência dos Estados Unidos, tanto normativa quanto empiricamente. Portanto, a abordagem jurídica normativa com abordagem de estudo comparativo serve como uma ferramenta para investigar vários aspectos legais dos dois países. Artigos com temas relevantes que ocorrem em vários países, incluindo a Indonésia e os Estados Unidos, estão incluídos neste estudo.

**Resultados e conclusão:** O direito nacional exige um mecanismo de confisco de ativos que adote o modelo de confisco de ativos resultantes de atos criminosos através do direito civil. A aplicação do modelo de perda de bens de origem criminosas através do direito civil é necessária para a rápida recuperação dos prejuízos do Estado, sem ter de provar previamente o ato criminoso cometido pelo autor do crime.
1 INTRODUCTION

In the midst of the revelation of the incredible assets of government employees, the urgency of passing the Asset Forfeiture Draft Law in Indonesia is echoed again. In academic and legal practices in several countries, asset forfeiture has developed, hence to date three types of asset forfeiture models have become known. First, criminal forfeiture of assets (in personam forfeiture); Third, administrative asset forfeiture is forfeiture by federal property agencies, namely an attempt to seize property without court intervention. (Main, 2013:60). The Asset Forfeiture Draft Law, which has been discussed since 2006, is believed to enable to forfeit "assets that are not balanced with income or sources of increased assets which cannot be proven". (National, 2012:4). Forms of crime have evolved with organized crime, and it is paramount for them to be disabled. Endeavors for disabling such forms of crime will only be effective if the perpetrators are found and convicted and the proceeds and instruments of the crime are confiscated and forfeited by the state. (National, 2012:5).

In Indonesia, there are already several criminal provisions under the law which regulate the possibility of confiscating and forfeiting the proceeds and instruments of criminal acts. However, asset forfeiture can only be carried out after the perpetrator of the crime is legally and convincingly proven in court to have committed a criminal act. At the same time, there are various factors which can potentially hinder the implementation of the law enforcement mechanism. (National, edited by Ramelan 2012:5). The Ministry of Law and Human Rights has drafted the Asset Forfeiture Draft Law. The provisions on asset forfeiture related to criminal acts in this Draft Law aim to provide special regulations on tracing, blocking, seizing, and forfeiting assets related to criminal acts in the context of law enforcement in our country. The Asset Forfeiture Draft Law has been included in Prolegnas (National Legislation Program) 2023 as part of the government's proposal. Therefore, the government needs to submit the Asset Forfeiture Draft Law to the House of Representatives as a form of completing its task in completing the draft. However, up
to the present time, the draft of the Asset Forfeiture Draft Law is yet to be submitted by the government to the House of Representatives of the Republic of Indonesia. It was reported earlier that the text of the Asset Forfeiture Draft Law was going to be sent to the House of Representatives immediately as all of its substantive materials had been agreed upon by ministers and heads of institutions and it had been initialed. (Republika, May 3, 2023).

The mechanism of asset forfeiture was invented in medieval England when the British empire confiscated items that were considered *instruments of a death* or often referred to as *Deodand*. Deodar's concept was eventually adopted by the United States, thus developing the concept of *Non-Conviction Based Asset Forfeiture*. (National, edited by Ramelan 2012: 39). The United States became the initiator of the mechanism of *NonConviction Based Asset Forfeiture*. Initially, the concept of *Non-Conviction Based Asset Forfeiture* was used in shipping law. In the course of its development, the concept of *NonConviction Based Asset Forfeiture* was used to handle narcotics trafficking between countries whereby law enforcement found it difficult to eradicate such practices, and over time this concept has been eventually used to deal with the problem of criminal acts of corruption. (National, edited by Ramelan 2012: 39).

There has been some research on subnational efforts to forfeit assets as a policy instrument against criminal elements in developing countries. (Estrada, et.al., 2021: 387). The study of Estrada, et.al., 2021 focuses on alternative crime eradication strategies in Mexico: tackling crime in the economic sphere through asset forfeiture policies at the local government level. (Estrada, et.al., 2021: 388). The study focuses on the institutional capacities of Mexican state governments in view of criminal assets. The main policy instruments for states in strategies against criminal assets is to identify and sanction Transactions with Illegally Obtained Resources (ORPI), primarily through domain extinction which can be considered as asset forfeiture mechanism. These instruments, according to the relevant legislation, focus on four high-impact crimes in Mexico: Human trafficking, kidnapping, car theft, and drug trafficking. (Estrada, et.al., 2021: 392). One of the most common instruments applied against crime and money laundering assets is asset forfeiture. (Estrada, et.al., 2021: 397). The study concludes that countries like Mexico face the most concerning challenges to security due to organized crime. (Estrada, et.al., 2021: 401).
Asset forfeiture is a policy instrument that can enhance strategies against crime and violence, but its enforcement also requires collaboration across different agencies and developing specialized units to continue investigations to build cases and bring them to justice. (Estrada, et.al., 2021:403). It is necessary for the countries of the studied region to set as priorities in their governments' plans the fight against money laundering, the implementation of strategies aimed at controlling this issue and the effective use of asset forfeiture figures. (Estrada, et.al., 2021:403).

Another social science research on other forfeiture activities is Holcomb, et.al., (2018). He states that study on the topic of asset forfeiture is very much limited. There appear to be two main strains of empirical research on asset forfeiture. He cites previous empirical studies, namely Benson et al., (1995) and Mast et al., (2000) with themes aimed at examining the relationship between the proceeds from forfeiture and police budgets. Kelly and Kole, (2016), Miller and Selva (1994) Vecchi and Sigler (2001) relate this theme to police behavior. Holcomb, et.al., 2018 cites Baumer's (2008) note that there is a need for more sophisticated empirical studies of forfeiture activities. (Holcomb, et.al., 2018). The study also examines the relationship between the cost and benefit of state forfeiture laws and the dependent variables of fair distribution to institutions in various countries. Worrall and Kovandzic (2008) have also conducted studies using a single measure of state forfeiture law or examining the independent and combined effects of different features of law in various countries. Holcomb et al. (2011) plausibly state that state laws make it difficult for agencies to exploit asset forfeitures create incentives for agencies to engage in equitable sharing with the federal government. (Holcomb, et.al., 2018:8). There is a chance for the agency to use other opportunities to pursue asset forfeiture, such as fair share. (Holcomb, et.al., 2018:10).

Theoretically, most of these studies are interested in the coefficients associated with the index of the asset forfeiture law. Model 1 uses an index whose values come from the same weighting scheme as the Institute for Justice. In particular, the index places more emphasis on the financial incentives of institutions to pursue asset forfeiture rather than the legal barriers institutions face in doing so. Model 2 uses an index whose value puts equal weight for the institution's legal barriers and financial incentives in asset forfeiture. Finally, Model 3 uses an index whose value represents an additive index. (Holcomb, et.al., 2018:12). An important finding of Holcomb's study, et.al., (2018) is the high value
representing federal state institutions where the financial rewards of asset forfeiture are low and legal barriers are high under state law that encourage institutions to use fair share. (Holcomb, et.al., 2018:14).

Another literature review that specifically examines the civil forfeiture of assets in the United States is Kantor, et.al (2021: 239-240). The study shows that there are potentially substantial externality costs associated with the implementation of civil asset forfeiture previously not documented in the literature. While the civil forfeiture of assets could help achieve some of the policy goals put forward by its proponents, it also raises new concerns about the unintended negative consequences of the law, in addition to civil liberties concerns emphasized by opponents. (Kantor, et.al., 2021:239-240).

Jorgensen, C. (2018: 14) in his study included asset forfeiture in his research instrument. In the questionnaire disseminated, this study asked respondents whether they strongly agreed (SA), agreed (A), disagreed (D), or strongly disagreed (DA) with the following statements about asset forfeiture. Q84. Asset forfeiture is a good way to increase the police department's budget. Q85. Asset forfeiture can lead to unethical decisions by police administrators. Q86. The community in (city name) supports the practice of asset forfeiture. Q87. Asset forfeiture laws encourage the police to obtain benefits.

What distinguishes the above stated research from this study is the methodological aspect, whereby this study departs from the normative approach study and literature study by comparing Indonesian law and U.S. law related to money laundering and asset forfeiture issues.

2 THEORETICAL FRAMEWORK

In a total of twenty-eight selected articles, there have been numerous findings in previous studies on the asset forfeiture mechanism from various countries, and specifically in the United States of America. However, data sources on this topic are still minimal to describe the issues occurring in Indonesia.
2.1 THE CRIMINAL ACT OF MONEY LAUNDERING AND ASSET FORFEITURE

The recommended long-term action is the utilization of existing domestic laws to prevent illegal financing of piracy acts, laundering of proceeds and application of asset forfeiture laws to extract received benefits (FATF, 2011; Geoplicity, 2011; United Nations, 2015). Asset forfeiture mechanisms can be used to facilitate the forfeiture of piracy proceeds. Asset forfeiture is a crime control strategy developed to deal with the proceeds of crime, primarily by attempting to deprive criminals of illegal profits that includes the utilization of two main mechanisms, criminal and civil forfeiture (Gallant, 2005). The concept of asset forfeiture has been evolving and it currently applies to an ever-growing list of crimes (FATF, 2012). The reasons that prompted the international community to enact asset forfeiture laws were twofold. First, perpetrators of serious crime are happy to serve their prison sentences knowing that upon release the proceeds of their crimes will be waiting for them. (National Director of Public Prosecutions v Meir Elran [2013] (1) SACR 429 [CC]; Kennedy, 2004; Hendry and King, 2015). Secondly, the use of the internet, electronic means of communication and a sophisticated international banking system allows criminals to distance themselves from the face of crime. (National Director of Public Prosecutions v Meir Elran [2013]; Hendry and King, 2015). Thus, the purpose of asset forfeiture is to take criminal advantage and consequently serve as a deterrent for offenders (Keesoony, 2016) and help reduce the profits available to fund further criminal activities (McCaw, 2011). The rationale for enacting asset forfeiture laws is also a useful method to be used in dealing with Somali PFRs who take advantage of piracy attempts and enjoy their illegal profits undisturbed (Scott, 2014). Shane et al., 2015 and Rengelink, 2012 use asset forfeiture laws in line with the situational crime prevention theory (Gikonyo, 2018: 535).

Levi, M. (2008:392) There has been a growth in the 'civil recovery' regime, implementing financial investigations and asset forfeiture (apart from criminal penalties) to complement post-penalty forfeiture solutions that have replaced Criminal Insolvency Orders. (Levi, , 2008:412).

In simple terms, asset forfeiture is the forfeiture of property by the government due to the property's association with criminal activity. According to the United States Department of Justice, asset forfeiture relates to the taking of property "stemming from a crime, engaging in a crime, or that makes a crime easier to commit or detect without compensating the owner (Joseph, 2003)." Criminal and civil procedures can result in the
forfeiture of assets and they can be used independently or in conjunction with each other. (Bechara & Manzano, 2020:5-6). Worrall & Kovandzic, 2008 mention, the possibility of police supporting tough law enforcement against drug offenses based on hidden motives such as profit motives through asset forfeiture or boosting the number of arrests to get promotions (Jorgensen, 2018: 2).

In fact, asset forfeiture does not guarantee the return of confiscated property to the rightful owner, so the government can actually keep cash and confiscated property (regardless of whether the asset is personal or tangible), sell the property or use it to fund a number of activities. Asset forfeiture consists of three basic steps, namely: identification, forfeiture, and custody. The first step in asset forfeiture is to identify the res. (United States Attorneys, 2019:10). Following forfeiture, it is the responsibility of the government to keep the property safe and to carry out individual actions related to the forfeiture. (Bechara &; Manzano, 2020:6-7).

From the perspective of the law on the forfeiture of proceeds of crime (including currency), criminals are unable to benefit from their crime (Hamin et al., 2015). Forfeiture of proceeds is referred to as the application of procedures prohibiting the transfer, conversion, disposition, or movement of criminally acquired property or assets, allowing competent authorities or courts to control them (‘Basic Manual on Detection and Investigation of Laundering of Proceeds of Crime Using Virtual Currency’, 2014). In the policy manual published by the U.S. Department of Justice (DoJ), the forfeiture of proceeds of crime is intended to punish and deter criminal activities, as well as compensate victims (Asset Forfeiture Policy Manual, 2021). This method is effective for crime prevention, prosecution, and administration of justice (‘Basic Manual on Detection and Investigation of Laundering Proceeds of Crime Using Virtual Currency’, 2014). (Taylor, et.al., 2022:6).

Zollner et al. (2019) combine live forensics and postmortem to analyze Bitcoin artifacts on Windows 7 and 10. Their goal is to find and extract important Bitcoin artifacts, such as Bitcoin keys and addresses. They then identified that this information could be used for asset forfeiture in proceeds of criminal legislation (Holmes & Buchanan, 2023:6, Subagyno, et.al., 2023:4). The unintended negative effects of the forfeiture of operational assets are mitigated when local institutions can supplement the forfeiture measures with initiatives intended to reduce uncertainty and fill the void left by criminal organizations. (Operti, 2018: 332). Critics question the appropriateness, scope
and use of such powers and the effectiveness of the law. Naylor (2001: 148) notes that after fifteen years of using the forfeiture approach in the United States there is no strong evidence of its effectiveness. Woodiwiss (2003: 24) argues that various crime control measures including asset forfeiture "have made the U.S. organized crime problem more complex but they are not yet close to solving it' (Chistyakova, et.al., (2021: 496).

2.2 ASSET FORFEITURE MECHANISMS IN VARIOUS COUNTRIES

Drezner, (2015) reveals the most frequently discussed issue in the realm of foreign policy; the logic of economic sanctions between countries is slightly different from domestic tools traditionally used to address certain criminal activities, such as civil asset forfeiture and anti-money laundering regimes and proceeds of crime laws. Saunders (2023:2) states that Canadian sanctions under SEMA may be comprehensive or limited to a list of individuals or entities designated in a particular country. This asset forfeiture also applies to perpetrators who pass away before having the opportunity to pay restitution to the victim, according to the latest court decision. (Ali, M., et.al., 2022a:9).

The laws of some countries (for example Peru and Colombia) permit the forfeiture – through the process of asset forfeiture – of land used for the cultivation of illegal crops (Mason & Campany, 1995, pp. 143, 145; Peña et al, 2019). Some observers argue that the threat of forfeiture deters the (re)cultivation of illegal crops, particularly if the farmer has been granted a formal title, as this means he/she has more to lose (Garzón &; Riveros, 2018, p. 13; Muñoz-Mora et al., 2018; Samper-Strouss 2019, cited in Peña et al, 2019, 98). The basic idea is that certification serves drug control because it makes the threat of forfeiture stronger. No text whatsoever has been found that evaluates the effectiveness of such a forfeiture policy, or any text that directly and openly defends it (see Muñoz-Mora et al., 2018), possibly due to social regressive implications (Thomson, et.al., 2022:2).

In Africa, with regard to acts of asset forfeiture, courts have rejected requests by prosecutors to impose such sentences as unjustified or unwarranted. (Birkett, 2019: 158). Although reparations awards can be made directly against people convicted of international crimes, such measures do not fulfill the corrective function caused by the forfeiture of assets as punishment in the constituent instruments of ICT. (Birkett, 2019: 160). In the case against Hissene Habré, although there was no order for asset forfeiture as an additional punishment for imprisonment, the EAC provided significant reparations
to its victims. (Birkett, 2019: 161). In Africa too, the Environmental Court was established in 2003 as an initiative jointly funded by (then) including the Department of Justice's Asset Forfeiture Unit and the Special Operations Directorate (Scorpions) to gather intelligence on abalone hunting. (See footnote, Isaacs & Witbooi, 2019:158).

Kennedy (2006) states that the application of asset forfeiture laws is bound to facilitate the withdrawal of proceeds from targeted piracy. Clarke (1983) is of the view that forfeiting the benefits obtained by past offenders can serve as a disincentive for current and prospective offenders. Given the nature of both methods of asset forfeiture, it is evident that for criminal forfeiture proceedings, piracy trials should have been conducted. For civil forfeiture, a piracy trial does not need to be conducted and concluded.

The process can be instituted to target any property associated with the proceeds of piracy. (Gikonyo, 536).

In Somalia, asset forfeiture mechanisms can be used to facilitate the forfeiture of piracy proceeds. (Gikonyo, 2018: 534). Gikonyo's (2018: 541) study recommends the need for the establishment of other long-term and sustainable measures to address Somalia's PFR. The use of asset forfeiture mechanisms is bound to be fraught with challenges and compromises need to be made in order for them to work. Unlike criminal forfeiture which only targets the property of the defendant, civil forfeiture can target property held by a third party. (Gikonyo, 2018: 537). Despite the implementation of criminal and civil forfeiture mechanisms, both are fraught with challenges. This would interfere with its use to target piracy proceeds as discussed next. The civil forfeiture process allows individuals with an interest in targeted property the opportunity to reject state claims (Kruger, 2013, Gikonyo, 2018: 538).

The application of asset forfeiture laws is expected to facilitate the withdrawal of targeted piracy benefits. (Kennedy, 2006). Given the nature of both methods of asset forfeiture, it is clear that for criminal forfeiture proceedings, a piracy trial should be conducted. If the guilt of the accused is established, it may trigger the initiation of further criminal forfeiture proceedings. The benefits obtained are calculated; benefits are in the form of the ransom received. For civil forfeiture, a piracy trial need not be conducted and concluded. (Gikonyo, 2018: 537). Further consideration of both methods of asset forfeiture suggests that civil forfeiture is becoming the preferred method of depriving Somali piracy proceeds, as evidenced below. Unlike criminal forfeiture which only targets the property of the defendant, civil forfeiture can target property held by a third
party. (Gikonyo, 2018: 537). Kruger (2013) distinguishes the application of criminal and civil forfeiture mechanisms, although both are fraught with challenges. Civil forfeiture proceedings allow individuals with an interest in targeted property the opportunity to deny state claims. (Gikonyo, 2018: 538).

Moreover, if countries use the serious crime list approach, in identifying offences that apply asset forfeiture, they may not list piracy as one of the offences. Any of these possibilities would prevent the exercise of asset forfeiture in dealing with the proceeds of piracy, since the essential requirement of double criminality is not met. (Gikonyo, 2018: 539). Asset forfeiture provisions are generally technical in nature. The people and agencies involved must all possess the relevant skills and resources, failing which it is bound to lead to investigative, prosecution, and law enforcement challenges (U.S. Department of State, 2016). With respect to Somalia and the process of forfeiture of PFR, this is a definite issue. Most importantly, Somalia has no laws or institutions dealing with asset forfeiture. In addition, neighboring countries in the East African region lack expertise and experience in handling asset forfeiture cases (U.S. Department of State, 2016; Scott, 2014). Therefore, in order for the forfeiture of assets to be effective, it is necessary to enact relevant laws, develop institutions and ensure capacity building. (McLauglin and Paige, 2016). Ultimately, the study concludes that there needs to be an international and integrated approach if the use of asset forfeiture laws is to bear results. Doing so may incentivize the federal government to commit and assist in the asset forfeiture process, and in the implementation of other long-term measures to deal with piracy. (Levi and Osofsky, 1995). If the forfeiture of assets is to be successfully applied, it requires the joint efforts of various actors. This includes federal governments, local governments, local communities, and states working together (Scott, 2014; Gottlieb, 2013). Together, all need to play a role in facilitating the forfeiture of piracy proceeds. However, there may be difficulties in intervention. (Gikonyo, 2018: 540). Corruption can be a major obstacle in the entire process and hinder the effective implementation of asset forfeiture (Williams and Pressly, 2013). This ultimately points to the need to develop consensus among various actors, on the need and benefits of asset forfeiture, in addressing PFR. Nonetheless, despite these potential challenges, and in compliance with the call to follow the money trail, it is wise to try asset forfeiture as a crime control strategy and see what happens. In such condition, asset forfeiture laws would apply. It also points to the fact that the use of asset forfeiture mechanisms will be fraught with challenges and that
compromises will have to be made for it to work and without a doubt this calls for another long-term approach to dealing with PFR. (Gikonyo, 2018: 541).

In Mexico, the legal concept developed is the concept of "domain extinction," which is rather similar to "property extinction" as developed in countries such as Spain, and "civil asset forfeiture," as developed in countries such as Ireland, South Africa, and the United States of America. (Estrada, et.al., 2021: 397). The only references related to the implementation of domain extinction are found in Chihuahua's annual report, where the governor announced the first two successful procedures by the government, and Sonora in 2018, where the governor noted the establishment of a special unit to implement asset forfeiture and, again in 2019, revealed that this unit prosecuted 78 different cases, mainly targeting drug trafficking, and has won one case. (Estrada, et.al., 2021: 394).

Federal and subnational experience in Mexico underscores the importance of developing specialized units within dependencies responsible for enforcing asset forfeiture. Asset forfeiture requires collaboration between various financial, civil and criminal departments, for which sharing databases is essential. (Estrada, et.al., 2021: 399). As the Tamaulipas state prosecutor noted in an interview, previous laws focused on the creation of special units, staff training, and collaboration among various government agencies, but lacked clear procedures for asset forfeiture. Legislation and reforms after 2013 can be seen as the basis for federal reforms and the 2019 Constitution, which ultimately considers domain extinction as a tool for asset forfeiture. (Estrada, et.al., 2021:389).

Another study of asset forfeiture in Mexico is the study of Simonato, M. (2017) which analyzes the endeavors of Mexico’s states on the northern border and against criminal assets, especially through asset forfeiture. The policy measures implemented by Mexico's northern border states against criminal assets are compared to similar initiatives taken in other countries, especially in view of the forfeiture of civil and criminal assets. The complexity of developing and implementing asset forfeiture in contexts where different actors participate in different jurisdictions requires the enforcement of multilevel governance as a policy instrument against criminal assets. Compared to the traditional concept of forfeiture, where the forfeiture of property (instruments and proceeds of crime) follows the conviction for a particular crime, the new forms of forfeiture provide a loose relationship between the offense and confiscated assets. Assets can be confiscated even if they are not the proceeds of a crime for which the offender has been convicted (extended forfeiture),2 if it belongs to someone other than the offender (third-party forfeiture), or if
it is the proceeds of a crime that has not been proven at trial (forfeiture based on nonconviction); in some cases, even if criminal proceedings against the suspect have not begun at all (civil forfeiture of assets). Assets not being a determining factor for implementing an act of forfeiture raises some questions regarding the general purpose of the criminal justice system and balance between effectiveness and human rights. (Simonato, 2017:365-379). In Butler, a case was brought against the U.K. regarding the regime of civil forfeiture of assets related to drug trafficking. The main reason is that such forfeiture order does not involve the determination of any criminal charges, more or less like references to other criminal conduct in the extended forfeiture assessed at Phillips. This makes it incomparable to criminal sanctions, as the civil asset forfeiture regime applied in cases under surveillance is 'designed to extract from circulation money deemed tied to the international trade in illegal drugs'. (Simonato, 2017:372)

In Ireland, Hamilton, C. (2022:1606) reviewing the history of the summer of 1996 can be considered a turning point in Irish criminal justice policy. Among these changes is the establishment of a Bureau of Criminal Assets that uses a 'no doubt draconian' nonconviction-based asset forfeiture model (King, 2017: 16) that is extensively used as an example of best practice in other jurisdictions. (O'Donnell and O'Sullivan, 2003: 48). International treaties and guidelines, as well as U.S., E.U. and Australian regulations, related to trade in coral reef wildlife. (Thorson and Will, 2010, Dee, et.al, 2014:228).

In other jurisdictions, different terms are often used, including 'civil forfeiture,' 'non-conviction-based asset forfeiture,' and 'non-conviction-based forfeiture' to give a few examples. Section 5 of the POCA also contains provisions for cash forfeiture under s. 298. While our discussion here deals with macro issues regarding civil recovery (and procedural hybrids, more generally), the same concerns may also be expressed in relation to cash forfeiture without criminal penalties. (See footnote, Hendry & King, 2017:745).

2.3 ASSET FORFEITURE MECHANISM IN THE UNITED STATES OF AMERICA

The main lesson of the civil forfeiture of assets in the U.S. experience. As mentioned earlier, asset forfeiture laws are a powerful tool to assist law enforcement in fighting corruption and organized crime by seizing illegally acquired assets. (Davis, 2016: 347). In the 1970s, the enactment of the Comprehensive Drug Abuse Prevention and

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While the 1980s and 1990s ushered in a wave of policy reform, we limit our attention in this paper to the impact of the CCCA. More specifically, we focus on one important aspect of the CCCA—federal civil asset forfeiture (hereinafter, briefly referred to as "forfeiture") that extends government power to seize assets from people suspected of engaging in unlawful acts. Stefan Cassella, former Assistant Chief of the Justice Department's Asset Forfeiture and Money Laundering Section noted that asset forfeiture has become one of the most powerful and important tools federal law enforcement can use against all manner of criminals and criminal organizations — from drug dealers to terrorists to white-collar predators who prey on the vulnerable for financial gain. (United States Congress 1999; Kantor, et.al., 2021:218).

In the early 1980s, cases of civil forfeiture increased significantly due to the start of the war on drugs. Subsequent sections of the Comprehensive Crime Control Act of 1984 further expanded the scope of forfeiture, allowing local and federal law enforcement agencies to share seized assets and cash. In the period between 1985 and 1993, supported by the Reagan administration as a means of fighting crime, authorities seized more than $3 billion in cash and property through asset forfeiture. However, as the number of forfeitures increased, asset forfeitures began to face significant constitutional challenges in the U.S. (Bechara &; Manzano, 2020:6). Baicker and Jacobson 2007; Benson, Rasmussen, and Sollars 1995; Boudreaux and Pritchard 1996; Holcomb, Kovandzic, and Williams 2011; Kelly and Kole 2016; Makowsky, Stratmann, and Tabarrok 2017; Mast, Benson, and Rasmussen 2000; Worrall 2001; Worrall and Kovandzic 2008 became part of the literature which has studied the impact of the civil forfeiture of assets both on police budgets as well as police incentives. Had the CCCA not enacted forfeiture, crime would have been about 17% higher in states that implicitly restrict the application of civil asset forfeiture. (Kantor, et.al., 2021:220).

Schwarz and Rothman (1993) mention that civil forfeiture of assets in the United States stems from British maritime law under the Navigation Act. After the Revolutionary War, forfeiture continued in the United States, where property smuggled to avoid customs was subject to forfeiture to compensate for lost customs revenue. Confiscation remains
part of federal statutes, although it is rarely used aside from episodes during the American Civil War and Prohibition. (Kantor, et.al., 2021:220). Kantor, et.al., uses subcounty-level data to examine arrest behavior so that we can include data related to drug arrests. With a population of 50,000, out of 217 agencies 187 appeared in 38 states that had detailed civil asset forfeiture laws, resulting in 2,431 agency annual observations. Variations in state-level forfeiture laws prior to the CCCA set the stage for local law enforcement agencies in certain states to benefit more from changes in federal law than in other locations. Local law enforcement agencies in states like Florida, Georgia, and Texas are unlikely to benefit from the new federal law because their respective states have allowed them to keep every dollar generated from the civil forfeiture of assets. (Kantor, et.al., 2021:224).

The empirical design implicitly assumes that locations with less generous state forfeiture laws are more strongly affected by the introduction of CCCA than places with generous state laws that have allowed police to keep most, if not all, forfeitures. Unfortunately, detailed forfeiture data at the state level did not exist for most of the sample period, as the DOJ's Consolidated Asset Tracking System (CATS) was not created until 1990, limiting the review to directly testing the underlying assumptions. Florida was a relatively early and generous adopter of civil asset forfeitures, leading local agencies to aggressively seize assets. Meanwhile, in Arizona, where forfeiture laws are significantly stricter, the city of Phoenix seized 15 vehicles with a combined value of about $33,000 during the same time span (Stellwagen and Wylie 1985). Thus, anecdotally it seems as though states like Arizona have more reasons to atone in terms of forfeiture activity. (Kantor, et.al., 2021:225).

Ideally, we should be able to directly measure the relationship between crime and forfeiture activity at the local level. However, local forfeiture data is not available. Therefore, it is important to understand that the enactment of the CCCA actually triggered a major shift in police activity. Two pieces of evidence suggest that forfeiture is widely used and has been popular among law enforcement agencies, among other things based on the fact that DOJ forfeiture revenues skyrocketed. After the entry into force of the CCCA, the DOJ established the Asset Forfeiture Fund in 1985 to manage newly acquired assets. Between 1985 and 1989, new deposits into this account grew from a meager $15 million to over $580 million per year. To put this last figure into perspective, the DOJ's entire budget in 1989 was $6.7 billion, so the forfeiture revenue represents about 8% of
the DOJ's annual budget value. In addition to the rapid increase in deposits into the federal Asset Forfeiture Fund, states that initially lacked generous forfeiture laws quickly changed their laws. In 1984, the DOJ developed a model Draft Law for states to expand their own powers for the civil forfeiture of assets. In 1984, the model Draft Law was circulated to more than 7,000 state legislators (DOJ 1984). Between 1984 and 1986, ten states changed their state codes to allow local law enforcement to retain forfeited assets. In most cases, every dollar seized under state law is returned to the forfeiture agency. This development of the law is important because amendments to state laws increase the set of crimes that qualify for forfeiture. (Kantor, et.al., 2021:225). Starting in the 1990 version of the survey, the agency began inquiring about the task force and the forfeiture of such assets. (Kantor, et.al., 2021:231). The civil forfeiture of assets can be an effective tool against certain types of crime, but it can also incentivize the police department to reallocate efforts toward revenue-generating activities that can lead to its own unintended consequences. (Kantor, et.al., 2021:233). Keeps, 1984 measures the maximum percentage resulting from the civil forfeiture of assets that a local law enforcement agency can sustain under its state law in 1984, prior to the CCCA. Xi, 1970 is a county-level control vector that considers differences in population, measured in 1970, that can affect outcomes of interest. (Kantor, et.al., 2021:225).

The U.S. Attorney General's Office has a series of laws that can be used to prosecute criminals, including the False Claims Act (fines of up to $10,000, triple damages, and up to 5 years in prison), Anti-Kickback provisions of the Social Security Act (fines of up to $25,000 and up to 5 years in prison), civil monetary penalties (fines of up to $50,000 and triple damages), the Influenced and Corrupt Organizations Act of Extortion (RICO, offers prison sentences of up to 20 years and civil liability with asset forfeiture), the Health Insurance Portability and Accountability Act (up to 10 years in prison, or up to 20 years if serious bodily injury occurs, or up to life in prison if death occurs), and, if prosecutors still feel inadequately equipped, (Jones, et.al., 2005:1241).

Carpenter et al., (2015) states that asset forfeiture, especially civil forfeiture, results in large sums of money being returned to law enforcement each year. Although data on state forfeiture activities are much more limited, only 14 states raised more than $250 million in 2013 under state forfeiture law procedures. Moreover, the use of asset forfeitures appears to have increased dramatically since the turn of the century. For the same sample of 14 states, Carpenter et al. (2015) also report that forfeiture assets
increased by 135%. Payments to state and local law enforcement through fair share increased by 300%, and balances in the Justice Department's Asset Forfeiture Fund increased by 450% during this same time period. The federal government's equitable sharing policies, and some state laws, limit how proceeds from forfeiture can be spent (see Carpenter et al., 2015; Edgeworth, 2008; US DOJ, 2008, 2009). (Holcomb, et al., 2018:5). Carpenter et al. (2015), Chi, (2002), Drug Policy Alliance (2015), Dunn, n.d., Government Accountability Office [GAO] (2012), Sallah, (2015) and Stuteville, 2014 note, laws in many states place few restrictions on the use of confiscation proceeds and exceptions to many of these restrictions exist. While there is ample evidence that these rules are broken, the lack of accountability prevents meaningful judgments about how the results of forfeiture are even spent. (Holcomb, et al., 2018:5).

Since 2014, 33 states and Washington, D.C. have enacted reforms to raise the evidentiary standards required for civil forfeiture. The argument that asset forfeiture violates the excessive fine clause of the Eighth Amendment has recently been successful with the courts. (Bechara &; Manzano, 2020: 7).

The U.S. willingness to pursue unilaterally the proceeds of major corruption (i.e., other than at the request of the Affected Country) is increasingly evident. In 2014 for example, it famously pursued a civil asset forfeiture case against U.S.-based assets that led to a settlement agreement in which Obiang among other things agreed to forfeit $30 million worth of his assets to U.S. authorities (the "Obiang Settlement"). There is rich scope for analysis of how this aspect of America's federal criminal justice system impacts approaches to negotiating the outcome of corruption. (Clancy, 2022:160).

In 2017, total net deposits of $2.15 billion were paid into the asset forfeiture fund of the U.S. Treasury and Justice Department (Department of Justice 2017; U.S. Department of the Treasury, 2017). If U.S. asset forfeiture (sometimes referred to as forfeiture) represent 80 percent of the total, this represents a global forfeiture of $2.7 billion in 2017. At first glance, this appears lower than the U.N.’s estimate of $3.1 billion for 2009. However, the 2017 figure represents the amount seized, while the 2009 U.N. figure represents the amount seized, so a comparable 2009 estimate of global forfeiture is $1.55 billion, using Europol's empirical findings of a 50 percent discrepancy between the amount seized initially and seized finally (Europol 2016, 4, 11). Therefore, the estimate of $2.7 billion indicates a 74 percent increase in criminal asset forfeitures between 2009 and 2017 (Pol, 2020:84). These figures are far from definitive. In fact, in
some cases with available data, criminal asset forfeitures often use the net amount paid to relevant government funds, excluding allocations for administrative expenses. Forfeitures from institutions that are not recorded in a centralized database may be lost. Authorities in many countries also often claim increased forfeitures, but such claims are extremely specific to date ranges. For example, Canadian forfeiture increased in each of the four years since 2009, then fell in the subsequent two years. The total amount seized in 2014/2015 (C$77 million) was almost C$18 million during 2009/2010 (FATF & APG 2016, 56). (Pol, 2020:85). According to the latest available asset forfeiture data mentioned above, the estimated annual cost of anti-money laundering compliance in four EU1 countries is $81.4 billion (LexisNexis 2017; Pol, 2020:85-86).

Pol (2020: 302) states that the trivial forfeiture of 0.1 percent of criminal funds has the potential to overestimate the impact of money laundering control policies. That is because the forfeiture of criminal assets often occurs independently of anti-money laundering obligations. For example, forfeitures often result from traditional policing methods such as drug trafficking investigations that uncover assets purchased with criminal funds. Empirical research in New Zealand found that conventional methods trigger 80 percent of forfeitures involving lawyers, accountants and real estate agents facilitating illegal real estate transactions. Only 20 percent start with key anti-money laundering mechanisms, legitimate businesses report suspicious transactions (Pol, 2020:88).

Asset forfeiture would deny parties of their Fifth and Fourteenth Amendment right to legal proceedings. In addition, as the amount of seized cash and cash equivalents has been increasing every year over the past two decades, critics regard the upward trend as an abuse of police power, arguing that asset forfeitures encourage "policing to profit" because law enforcement typically retains a portion of the seized proceeds. According to a 2016 poll, 84% of Americans oppose the civil forfeiture of assets, and, currently, the institution faces extinction in the US. (Bechara &; Manzano, 2020: 7).

Libertarians and conservatives alike take a dim view of the state having the power to seize assets from citizens for no apparent reason. (ACLU, n.d.: para. 1). There is an almost universal condemnation of "policing for profit" when assets can be seized without evidence that a crime has been committed. (Rasmussen, 2018:97).

In recent investigations into the civil forfeiture of assets, similar problems have been identified across the United States (Holcomb, et.al., 2018:17-18 citing Burnett,
2009a, 2009b, 2009c, 2009d; Drug Policy Alliance, 2015; Dunn, n.d.; Lawsuit, 2009; Thompson, 2012). As a result, financial incentives for police are an especially important factor in forfeiture decision-making across jurisdictions. Even with higher standards of proof, law enforcement will likely continue to engage aggressively in asset forfeitures (Holcomb, et.al., 2018 citing Baicker and Jacobson, 2007; Chi, 2002; Drug Policy Alliance, 2015; Miller and Selva, 1994; Stillman, 2013:19-20).

Jefferson Holcomb, Marian Williams, William Hicks, Tomislav Kovandzic, and Michele Bisaccia Meitl (2018) and Pimentel (2018) point out that it is policing for profit that generates most of the scientific, legal, and media criticism of the civil forfeiture of assets. (Rasmussen, 2018:97-98). Three fundamental issues arise in the civil forfeiture of assets. First, the fundamental issue of justice that cannot be avoided when the police are able to seize assets when no crime has been committed. Second, the economic principle that people and institutions, such as police bureaucracies, respond to incentives. Both Holcomb et al. (2018) and Pimentel (2018) emphasize that asset forfeiture gives police an incentive to change their behavior when they seek to increase income-generating activities. The third issue is whether asset-forfeiture activities actually impose costs on a sufficient number of criminals so that crime rates go down as financial returns to criminals diminish. (Rasmussen, 2018:98). Therefore, evaluating the desire of police agencies to increase revenues through the civil forfeiture of assets rests on two pillars, one of which, the population, must be assured that they will not be deceived by the police who seize financial and real assets when no crime has been committed. (Rasmussen, 2018:99). The question of whether asset forfeiture can reduce crime is not easily resolved. The FBI calls it a powerful tool against criminal organizations, and Cassella (1997: para. 1) states that "Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can use against all manner of criminals and criminal organizations." He further claims that most forfeiture cases are federal in nature. (Rasmussen, 2018:98). There is little evidence that asset forfeiture is an effective tool for reducing crime. Worrall (2008) published a report on targeted asset forfeitures for law enforcement officials in which he discusses the need for forfeitures. In a subsequent section on Crime Reduction, Worrall (p. 5) notes that "not a single published study links forfeiture activities to the prevalence of criminal activity." If it turns out that the civil forfeiture of assets can deter certain types of crime, these benefits should be counterbalanced with the cost of decreasing police services in other areas. Reducing crime does not always provide free
passage for the civil forfeiture of assets. Even if asset forfeiture deters crime to some extent, widespread criticism of using this tool against people who have not been convicted of a crime is justified. (Holcomb et al. 2018, Rasmussen, 2018:99).

In February 2019, the U.S. Supreme Court unanimously declared in Timbs v. Indiana that the Eight Amendment prohibition on excessive fines is an integrated protection that applies to states under the Fourteenth Amendment, thereby limiting the application of asset forfeiture by state and local governments. Indeed, the prospect of the civil forfeiture of assets in the U.S. looks bleak. (Bechara &; Manzano, 2020: 7)

Assets can be "confiscated", as in the case of asset forfeiture laws, as well as "destroyed", as in the case of contraband and illegal drugs (Cassella, 2018; Mughan et al., 2020; Neu, 2022:4).

2.4 ASSET FORFEITURE MECHANISM IN INDONESIA

In the midst of scarce literature related to the law on the asset forfeiture mechanism in Indonesia, there is one study that mentions the keyword asset forfeiture, namely the study of Astuti, et.al. (2022). She states that by granting amnesty, the Omnibus Law risks undermining the achievement of social and environmental goals, including efforts to restore and protect important carbon stocks and mitigate climate change. Environmental and agrarian NGOs state that illegal oil palm farmers, especially those without permits, are bound to abuse the fine-based system to expand deeper into forest areas, compared to harsher penalties such as imprisonment or asset forfeiture (Astuti, et.al., 2022:7, Redi, 2023:4, Agustinus, et.al, 2023: 5).

Another literature that mentions asset forfeiture is the research of Ali et.al., (2020 &2022). Asset forfeiture or payment of fines in installments is recommended to replace fines that are yet to be paid by companies and individual actors. Imprisonment for natural persons is placed as a last resort only if the convicted person has no property at all. (Ali, M., et.al., 2022b:1) Alternative sanctions for unpaid fines need to be directed at reducing the offender's profits from committing a crime (Mungan, 2012; Raskolnikov, 2020) such as the forfeiture of assets or the payment of fines in installments. (Ali, M., et.al., 2022b: 7). One notable example is the network around Chi Yupeng, which was approved by the U.S. Treasury Department in 2017 and was subject to the civil forfeiture of $4 million worth assets. The network used North Korean coal exports sold in China to buy a variety of commodities—including mobile phones, luxury goods, sugar, rubber, petroleum
products, and undisclosed "dual-use technology"—for re-export to North Korea. The network was allegedly responsible for 10 percent of trade from North Korea to China in 2016. Using a double-ledger system it was able to ensure that all aspects of finance were based outside of North Korea. (Salisbury, 2021).

3 METHODOLOGY

This normative juridical research report has been written by comparing scientific databases to articles explaining the legal mechanisms in Indonesia and the United States that regulate money laundering and asset forfeiture. To make this study complete and comprehensive, a literature review was conducted on 28 selected studies relevant to this research topic. The type of data collected in this study is in the form of secondary data. Research methods are a systemic way to structure science. (Suryana, 2010:16). Normative research methods are used to answer the problem formulated. Normative research is a method that examines written law from various aspects. This type of study is also known as doctrinal research or library research. The data are secondary and references in this study include primary, secondary, and tertiary legal materials, including qualitative documents. The documents used by the author are documents in the form of books, theses, journals, articles, and news that discuss the mechanism of asset forfeiture under the TPPU (Anti-Money Laundering) Law and the Asset Forfeiture Draft Law which are studied through aspects of theory, history, comparison, and material, consistency, general explanation, and article by article. Secondary data include the following:

<table>
<thead>
<tr>
<th>Problem Statement</th>
<th>Type of Data</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the asset forfeiture mechanism implemented in the United States using</td>
<td>Secondary</td>
<td><strong>Criminal Proceeds and Instruments Bill</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Civil Asset Forfeiture Reform Act (CAFRA)</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>USA Patriot Act</strong></td>
</tr>
</tbody>
</table>
NonConviction Based Asset Forfeiture?

Admiralty Law

There are legal materials to supplement this normative approach. Such legal materials consist of three types, namely: Primary, Secondary, and Tertiary legal materials. Conceptual approach, statute approach, and comparative approach (Soekanto & Mamuji, 2001: 14) are used in analyzing this topic. A comparative study was conducted to determine the comparison of asset forfeiture mechanisms under the TPPU Law (AntiMoney Laundering Law) and the Asset Forfeiture Draft Law with asset forfeiture mechanisms applied in the United States of America using Non-Conviction Based Asset Forfeiture. Technical descriptive analysis, systematic analysis, and legal interpretation analysis were applied in analyzing the data and materials used in this study. Descriptive analysis serves to provide an overview in the form of elaboration on the asset forfeiture mechanism under the TPPU Law (Anti-Money Laundering Law) and the Asset Forfeiture Draft Law.

4 RESULTS AND DISCUSSION

Every society must have what is called a law, as Cicero stated, *ubi societas ibi ius* (where there is a society there is law). Van Apeldoorn has stated that law exists all over the world because there is human society. (Mustofa, 2003:12). Sudikno Mertokusumo have stated that the *raison d'être* of law is the conflict of human interest. (Mertokusumo, 2005:31) The objective of the law is to resolve conflicts of human interest. Indonesia has promulgated the TPPU Law (Anti-Money Laundering Law) as an instrument to prevent and eradicate money laundering and regulate the forfeiture of assets resulting from original and money laundering crime.

Article 67 of the Anti-Money Laundering Law (TPPU Law) is indicative of the asset forfeiture model adopted by the TPPU Law. The said article furnishes investigators with the authority to file a request with the District Court to decide that assets that are known or reasonably suspected of being the proceeds of a crime to become state assets or be returned to their rightful owner. Based on Article 2 of the TPPU Law, corruption is included in the category of predicate crime the proceeds of which can be forfeited based on Article 67 of the TPPU Law. This provision is one of the measures to forfeit assets without conviction or *non-conviction based* (NCB) asset forfeiture. In addition to Article
67 of the TPPU Law, there are other articles that regulate the mechanism for civil asset forfeiture, namely Article 79 paragraph (4) of the TPPU Law which provide for money laundering defendants who pass away and decisions to forfeit assets that have been confiscated. Furthermore, Article 79 paragraph (5) of the TPPU Law regulates the determination of forfeiture. Regarding the protection of third parties acting in good faith, Article 79 paragraph (6) of the TPPU Law provides for the filing of objections. The U.N. Convention Against Corruption determines two stages in carrying out the forfeiture of criminal assets, especially assets of criminal acts, namely the preparatory procedures stage (Article 31, paragraphs 1 and 2), the implementation of asset return stage (Article 52), direct action for the return of criminal asset (Article 53) and criminal asset return mechanism through international cooperation in forfeiture (Article 54).

Article 1 sub-article 16 of the Indonesian Code of Criminal Procedure defines "forfeiture is a series of actions by an investigator to take possession and or keep under his/her control movable or immovable objects, tangible or intangible for evidentiary purposes in investigation, prosecution and trial." The definition of confiscation can be found in article 2 sub-article g of UNCAC, namely: "confiscation" which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority". Article 2 sub-article g is translated by UNODC as follows: "Forfeiture" which includes the imposition of fines where applicable, means the perpetual forfeiture of property by order of a court or other competent body. (UNODC, 2021).

The elucidation on the TPPU Law states that in the concept of anti-money laundering, the perpetrators and proceeds of criminal acts can be identified by tracing for the proceeds of the crime to be seized for the state or returned to the rightful person. The TPPU Law adheres to the procedure of confiscation and forfeiture based on the criminal law (criminal forfeiture) and is followed by a reversal of the burden of evidence as stated in Article 77 of the TPPU Law. The implementation of reversed burden of evidence as provided for in Article 77 and Article 78 of the TPPU Law is not far different from the practice of reversed burden of evidence implemented in the U.S. In the case United States vs. Baja, the study asserts that the prosecution must prove the existence of probable cause which is strong evidence that the assets obtained are the proceeds of crime; if the process of proving is successfully carried out, in turn, the owner of the property allegedly derived from the crime must prove otherwise. (Mertokusumo, 2005:12).
The concept of the TPPU Law currently in force related to asset forfeiture, namely there are several articles that regulate the forfeiture of assets resulting from the predicate crime and money laundering crimes. Article 67 of the TPPU Law furnishes investigators with the authority to file a request with the District Court to decide that assets known or reasonably suspected to be the proceeds of crime become state assets or be returned to the rightful person. Article 79 paragraph (4) of the TPPU Law also provides for a defendant who passes away. Furthermore, Article 79 paragraph (5) of the TPPU Law sets forth that there are no legal remedies in view of the determination of forfeiture, Article 79 paragraph (6) of the TPPU Law sets forth provisions concerning the filing of objection to the court. The TPPU Law also adopts the procedure of confiscation and forfeiture based on the criminal law (criminal forfeiture) and is followed by a reversal of the burden of evidence as set forth in Articles 77 and 78 of the TPPU Law.

It is often difficult to implement the asset forfeiture mechanism due to various obstacles that result in criminal perpetrators not being able to undergo court hearings, or it can be potentially non-implementable due to the lack of adequate evidence for filing charges at court. Criminal assets are often easily diverted or even brought out of the country. The recovery of assets through the instrument of pure civil litigation contains weaknesses in the evidentiary system that is bound by formal evidence and requires a relatively longer period of time, and relatively higher costs. At the same time, asset recovery through the criminal justice process alone also has its weaknesses, namely in such process the public prosecutor is not dealing with the accused; rather than that, he/she is facing the assets obtained from the proceeds of crime. (National, 2022:238).

The Criminal Asset Forfeiture Draft Law has been formulated based on several considerations. First, that the existing systems and mechanisms regarding the forfeiture of assets resulting from criminal acts and the instruments used to commit criminal acts, are currently unable to support efforts to enforce just laws and improve people's welfare as mandated by the 1945 Constitution of the Republic of Indonesia. Second, clear and comprehensive provisions regarding the management of forfeited assets is expected to promote the realization of professional, transparent, and accountable law enforcement. Third, that based on the first and second considerations, there is a legal need for setting forth provisions regarding the forfeiture of assets in the form of a law; bearing in mind Article 5 paragraph (1) and Article 20 of the 1945 Constitution of the Republic of Indonesia.
The Criminal Assets Forfeiture Draft Law will be a major step in building a national legal system capable of reaching aspects of national regulation and international cooperation. Asset forfeiture provisions apply a system of legal action against the assets themselves, rather than individuals (in personam), hence the judicial mechanism used is a special civil system. The application of such mechanism does not eliminate the criminal liability aspect of an individual or corporation. The asset forfeiture mechanism is preceded by tracing, blocking and forfeiture, by opening up space for complaint by objecting parties, then regulating the authority of the court, announcement of assets to be forfeited, involvement of third parties who object, examination and proving mechanisms carried out in front of a judge. (National, 2022: 242-243). The Criminal Asset Forfeiture Draft Law has been initiated by PPATK [Financial Transaction Reports and Analysis Centre] since 2003 by adopting provisions in The United Nations Conventions Against Corruption which has been ratified through Law Number 7 of 2006; in 2012 the Ministry of Law and Human Rights completed the Academic Paper of the Criminal Asset Forfeiture Draft Law. The Criminal Asset Forfeiture Draft Law has been included (three) times in the National Legislation Program (PROLEGNAS), specifically in Prolegnas 2010-2014, Prolegnas 2015-2019, and Prolegnas 2020-2024. Up the present time, the draft law is still under discussion. According to Franz Von List, the problem of criminal nature is "Rechtsguterschutz durch Rechts guterverletzung" which means protecting interests but by attacking interests. Hence Hugo De Groot stated that "Malum Passionis (gouding ligiteer) propter malum actionis" which means suffering caused by evil deeds. (Abdulgani, 2023:75). Barda Nawawi Arief has stated that predicate crime or predicate offence is an offense that results in criminal proceeds or laundered proceeds of crime. (Abdulgani, 2023:76)

The application of Non-Conviction Based / NCB in the forfeiture of assets resulting from criminal acts is a solution to overcome the stagnation of forfeiture of assets resulting from criminal acts. Based on the Indonesian Criminal Procedure Code, in the absence of the accused in the trial process, whether due to the defendant’s demise, escape, or unknown whereabouts, no forfeiture can be carried out. With the Non-Conviction Based / NCB mechanism, this becomes a solution.

Indonesia as one of the countries that has ratified the 2003 United Nations Convention Against Corruption based on Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption. As a consequence,
Indonesia has had to make adjustments in its legal provisions, particularly with regard to the forfeiture of criminal assets. The Criminal Asset Forfeiture Law can help law enforcement officials to identify passive perpetrators and active trafficking actors, so that not all parties who receive money or objects from criminal actors can be made passive perpetrators and criminalized. Non-Conviction Based (NCB) Asset Forfeiture is an important tool in asset recovery. In some jurisdictions, Non-Conviction Based Asset Forfeiture is also referred to as civil forfeiture, —in rem forfeiture, or —objective forfeiture, which is action taken against the asset itself (e.g., State vs. $100,000) and not against individuals (in personam). This NCB Asset Forfeiture is an act separate from any criminal proceeding and requires proof that the property is —tainted or —tarnished by a criminal offence. (Abdulgani, 2023:47).

NCB Asset forfeiture is the forfeiture and expropriation of an asset through an in rem prosecution or prosecution against the asset. The concept of civil forfeiture is based on the —taint doctrine whereby a criminal act is considered to "taint" (tarnish) an asset used or is the proceeds of such crime. Although it has the same objective, which is to seize and expropriate assets resulting from crime, NCB is different from Criminal Forfeiture which uses in personam prosecution (lawsuits against persons) to seize and expropriate assets. The U.S. Supreme Court subsequently upheld the use of NCB in the Palmyra case of 1827. It was this case that became the basis for the use of NCBs in the United States. (Abdulgani, 2023:49). The law enforcement paradigm implemented at that time was no longer limited to the pursuit of perpetrators, but also through the pursuit of illegal 'profits'. Fancoist Noel Babeuf (1760-1797) has stated that, from the vantage of ethics, whatever is stolen from the people should be taken back wherever possible. (Saputra, 2017: 118).

The mechanism for the pursuit of illegal profits was then formalized in the provisions of the United Nations Convenant Against Corruption (UNCAC) in 2003. In addition to setting out several provisions on cooperation in handling corruption globally, UNCAC also mandates member states to seek the forfeiture of assets resulting from crime. Article 54, paragraph (1) (c) of UNCAC, which requires all States parties to consider taking such measures as they deem necessary so that the forfeiture of corrupt assets is possible without criminal proceedings in cases where the offender cannot be prosecuted by reason of death, escape or being undiscovered or in any other cases.
The mechanism of NCB Asset Forfeiture or forfeiture *in rem* has the same purpose as criminal forfeiture, which is to take the proceeds of crime, but through a different process. This mechanism positions the state as the plaintiff and the assets as the defendant, while the parties related to the forfeiture process are the intervention parties (claimants). At first glance, *in rem* forfeiture is indeed similar to a civil lawsuit in a criminal case that is already known in Law No. 16 of 2004 concerning the Prosecutor's Office (Article 30 paragraph 2). The emphasis of *in rem* forfeiture is to uncover the relationship between assets and the criminal act, rather than the relationship between assets and the perpetrator. Assets suspected of originating from criminal acts, as long as no party proves otherwise. However, this *in rem* forfeiture is not intended to replace the criminal justice process against the perpetrators of crime. This model cannot bypass all criminal proceedings except in circumstances that make it impossible to use the criminal prosecution route.

The following is a comparison table between the Indonesian TPPU Law, the Asset Forfeiture Draft Law and the NCB in the United States related to the asset forfeiture mechanism.

<table>
<thead>
<tr>
<th>TPPU Law</th>
<th>Asset Forfeiture Draft Law</th>
<th>NCB in the United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>The TPPU Law adheres to the procedure of confiscation and forfeiture based on the criminal law (<em>criminal forfeiture</em>) and is followed by a reversal of the burden of evidence.</td>
<td>Decision on the forfeiture of assets is not made based on a criminal justice verdict (<em>in personam</em>).</td>
<td>Forfeiture and expropriation of an asset through an <em>in rem</em> lawsuit or a lawsuit against the asset</td>
</tr>
<tr>
<td>The investigator applies to the District Court to have the court decide that assets known or reasonably suspected to be the proceeds of crime become state assets or be returned to the rightful person.</td>
<td>The application for asset forfeiture is filed by the state attorney to the local Chief Justice</td>
<td>An application for asset forfeiture is filed by the state</td>
</tr>
<tr>
<td></td>
<td></td>
<td>of the District Court in writing in the form of an application letter accompanied by a case file.</td>
</tr>
</tbody>
</table>

### Table 2. Comparison Between TPPU Law, Asset Forfeiture Draft Law and NCB in the United States.

5 CONCLUSION

The asset forfeiture mechanism under the TPPU Law is provided for in Article 7 paragraph (2) sub-paragraph e, Article 9 paragraph (1), and Article 79 paragraph (4). The TPPU Law adopts the model of criminal acts asset forfeiture by civil means. The implementation of the criminal asset forfeiture model by civil means adopted by the
TPPU Law is supported by a reversal of the burden of evidence. In the academic paper it is explained that the current regulation regarding asset forfeiture in Indonesia can only be implemented if the perpetrator of the crime has been declared by the court to be legally and conclusively guilty of committing a criminal act. It is often difficult to implement this mechanism due to various obstacles, as a result of which perpetrators of crime are unable to undergo court hearings; in fact, it may even not be applicable due to lack of adequate evidence to file charges in court. Criminal assets are often easily diverted or even brought out of the country. The asset forfeiture mechanism in the Criminal Asset Forfeiture Draft Law adopts the concept of asset forfeiture with the in rem method by asserting that a legal action is taken against the asset rather than the individual (in rem personam) by focusing on assets that allegedly originate or are used in criminal acts.

Legal sources of asset forfeiture in the United States include the Criminal Proceeds and Instruments Bill, the Civil Asset Forfeiture Reform Act (CAFRA), USA Patriot Act, and the Admiralty Law. The asset forfeiture mechanism implemented in the United States using Non-Conviction Based Asset Forfeiture is a revolutionary concept in forfeiting the proceeds of crime. The process is more effective because it cuts through several legal principles and it also lowers the benchmark of evidence in criminal cases, it may potentially have to face the principle of fair trial (due process of law) and also the right to ownership of one's property (property rights).

There is an urgent need for the Criminal Asset Forfeiture Draft Law to be tabled and ratified into law. Adequate legal instruments are required as a manifestation of strengthening asset forfeiture provisions of the TPPU Law. It is necessary to insert an article clause regarding giving priority to returning assets to victims, not just confiscating them for the state. It is recommended that legislative drafters adopt provisions implemented in the United States as they deem fit for application with regard to the forfeiture of assets.
REFERENCES


Indonesia, Republic of (2010). Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering


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