

The Design of Assets Appropriation Law based on Human Rights and Pancasila Study in Indonesia

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Abstract. Efforts to recover assets resulting from crimes (delicts) is one of discussion in anti-corruption society recently. Draft Law on Asset Forfeiture aims at bringing easiness in asset recovery from criminal acts. Draft Law on Asset Forfeiture contains very good regulation and has clear goals for now and in the future, but of course it must look at various aspects so that it can be implemented properly in the future, such as aspects of human rights and based on Pancasila. This research used a library approach. The nature of the research is descriptive and prescriptive and analyzed by means of content analysis. The results of this study indicate that the aspect of Human Rights is very important to note and all the rules contained in the Draft Law on the Asset Forfeitures must be based on Pancasila as a source of law in Indonesia.

Keywords: Asset Forfeitures, HAM, Pancasila

1 Introduction

Indonesia has always talked about development since the New Order. There must be a paradigm whose echoes are getting more intense in this day and age. Moreover, ongoing effects are related to the legal basis of Pancasila democracy. Legal development in Indonesia must be based on Pancasila. Pancasila is crystallization of values that has existed and developed even before Indonesia (NKRI) is shaped and is being one of the most crucial democratic achievement [1].

The results of the founding fathers' thoughts can be a benchmark so that sustainable development does not create gaps. Examples of Pancasila as a domestic legal development paradigm include the teachings of Divinity, justice and humanity, Indonesian unity, citizenship according to virtue of for deliberation and representation, and social justice for all Indonesian people. This includes preventing and tackling all types of criminal acts in Indonesia [2].

Efforts to crime recovery assets are main concerns of the global community in tackling financial crime today. The return of state financial losses from the proceeds of money laundering (TPPU) is low. One example is based on data reported by *Indonesian Corruption Watch (ICW)* that state losses in corruption cases in 2020 amounted to 18.6 trillion Rupiah, and less than half of those who returned to the country produced [3].

Efforts to confiscate assets in a country certainly require an unyielding will from state politics from the parliament, government, and judicial institutions. However, it is undeniable

that the implementation of asset confiscation cannot be carried out quickly, precisely, and ideally, including in the state of Indonesia. For this reason, facilities and infrastructure are needed both through the legal *structure and legal substance* [4]. Until now, Indonesian regulations are still limited and not optimal in saving assets, especially in corruption, drugs, and other embezzlement of money. This can be done by accelerating the discussion of the Asset Confiscation Bill by the House of Representatives (DPR) and the President. It takes strong legal and political power so that the Draft Law on Asset Confiscation can become a legal umbrella for asset confiscation by law enforcers who also see aspects of Human Rights (HAM) and Pancasila as one of the sources of all legal sources in Indonesia (*ground norm*) [5].

2 Method

This is *normative legal research* which conceptualize the law as legislation (*law in a book*) by using the *statute, conceptual, analytical, and historical approaches*. [6] The method used in this study is a library approach. [7] The nature of the research is descriptive and prescriptive and is analyzed using content analysis. [8]

3 Discussion

3.1 Draft Law on Asset Confiscation in the Study of Human Rights (HAM)

The contents of the Draft Law on Confiscation of Assets are considered revolutionary in the law enforcement process regarding criminal proceeds. This can be seen in three paradigm shifts in criminal law enforcement. First, people who commit crimes are not only legal objects as perpetrators of crimes but also property obtained from the offense. Second, the justice system used for criminal acts is the civil justice system. Third, like other criminals, court decisions cannot be held criminally responsible. The issue of human rights (HAM) in Indonesia has become the central theme in the state and community life discussion. Human rights (HAM) statements in Pancasila means God Almighty created humans with two aspects, namely:

- a. Individuality (personal) aspects;
- b. Aspects of Sociality (society).

However, each person's freedom is under limitation of others' human rights so that everyone must show respect and recognition of others right. This is also mandatory to every organization in any order, especially the state and government in Indonesia [9].

According to Law Number 39 of 1999 concerning Human Rights:

"Human rights are fundamental rights naturally inherent in humans, are universal and enduring; therefore, they must be protected, respected, maintained, and should not be ignored, reduced, or confiscated by anyone.

Regulations on human rights must made, interpreted and implemented according to Pancasila as the basic guideline for the Indonesian state, even though it is implied. Both concern the relationship between humans and God Almighty and human relations one another as precepts in Pancasila. One of the related rule is Article 28 H Paragraph (4) of Indonesia Constitution, which regulates that:

"Everyone has the right to have private property rights, and such rights may not be taken over arbitrarily by anyone."

Followed by Article 29 Paragraph (1) of Law Number 39 of 1999 concerning Human Rights, which reads:

"Everyone has the right to protection of his personal, family, honor, dignity, and property rights."

Both of these rules provide guarantees against private property rights. However, when talking about Human Rights (HAM), of course, we must also understand that the applicability of Human Rights (HAM) itself is not wholly absolute; several restrictions can be made, especially for Human Rights (HAM), which are classified as *derogable rights* which interpreted as rights that can still be suspended or restricted (reduced) by the state under certain conditions.

Indonesian constitution has determined that Indonesia is the rule of law [10]. This implies that *in law must* be implemented well to maintain its functions namely control, supervise and limit power. Law must not be subjugated by politic (*rule by law*). [11]. The obligation to respect, protect and fulfill each contains a responsibility *to conduct*. Namely, the state must take specific steps to complete a right and a commitment *to result*, which requires the state to achieve particular goals and meet measurable substantive standards [12].

Referring to the above, of course, these restrictions should not be arbitrary, one of the conditions is that the restrictions on Human Rights must be regulated in under Act. Not all assets can be confiscated. Article 2 of the Asset Confiscation Bill stipulates that assets that can be confiscated under this Law, namely:

- a. All or part of assets suspected of being obtained from a criminal act, including assets which are then converted, changed, or combined with the assets produced or obtained from the criminal act. , including income, capital, or other economic benefits derived from such assets;
- b. Assets that are strongly suspected to have been used or have been used to commit a criminal act;
- c. Other assets that are legal as a substitute for Crime Assets; or
- d. Assets which are found items suspected of originating from a criminal act. (Asset Confiscation Bill) [13]

Then there is the question of what if the asset is purchased or owned with mixed funds with parties who are not involved in corruption (TIPIKOR), in this case even though it is a criminal matter, because the legal construction of the Asset Confiscation Bill focuses on civil law, so that all parties who feel aggrieved can file a lawsuit. in a civil manner and will be able to do reverse proof of this.

Meanwhile, the provisions on assets that can be confiscated consist of assets with a value of at least Rp. 100,000,000.00 (one hundred million rupiah); or assets originating from criminal acts which are punishable by imprisonment of 4 (four) years or more. However, in the event of a change in the minimum value of the Assets, the adjustment of the minimum value shall be regulated by a Government Regulation (PP) [13].

Then, if we observe more closely, the confiscation of assets referred to in the Draft Law (RUU) has clearly provided limitations related to asset confiscation. Limitations in the Draft Law (RUU) in Article 14 Paragraph (1) that regulate:

"Asset confiscation is carried out in the event that: the

- a. *suspect or defendant dies, runs away, is permanently ill, or his whereabouts are unknown;*
or
- b. *the defendant is acquitted of all lawsuits".*

Seeing the sound above is limited to the Suspect or Defendant who died, fled, was permanently ill, or whose whereabouts were unknown. If we examine one by one that the suspect or defendant has died, then there are no longer human rights attached to him, someone who dies can no longer be a legal subject in criminal procedural law, [14] means that provisions of article 28 H Paragraph 4 Indonesia Constitution cannot be used as an excuse to protect the assets of the suspect and the defendant which will be confiscated by the state [15].

Then the Suspect or Defendant who runs away, someone who runs away must have firmly rejected the validity of the existing law. Thus, he does not have the right to ask for protection by adhering to the provisions of Article 28 H Paragraph 4 of Indonesia Constitution. Where we know that the law with one another is a system and also hierarchically, the lower law always comes from the law above it. Thus, a suspect or defendant who has run away and whose whereabouts are not known should be subject to the provisions for confiscation of assets.

This is based on the opinion of M. Yahya Harahap which basically states that a guarantor of the Defendant or Suspect who is involved in legal problems because his guarantee runs away or runs away then his property can be confiscated, [16] , this is also in line with Attachment to the Decree of the Minister of Justice No. M.14-PW.07.03/1983 number 8 letter j stipulates that the guarantor of the person will have their property confiscated as payment for the money that must be borne by the guarantor through a court order [17].

Regarding the point of the Defendant who is permanently ill, it is necessary to obtain a more in-depth study, because the limits of permanent illness as intended are not clearly specified in the Draft Law on Asset Confiscation. This can later become a gap for violations of Human Rights (HAM), so that this permanent illness clause must be further specified, lest it will become a loophole for investigators to violate the law. Article 29 of this Criminal Procedure Code provides an additional detention time, which is currently being misused by the Suspects/Defendants to slow down the legal process [15].

This Asset Confiscation Bill also takes into account the interests of third parties where in Article 17 which reads:

Article 17 paragraph (1)

“Before there is a decision on Asset Confiscation that has obtained permanent legal force, the Minister may grant a temporary permit to a third party. who have used or made use of the Assets with the following requirements:

- a. Not changing the physical form of the Assets;*
- b. Not transferred to the use or utilization;*
- c. Performed maintenance and care; and*
- d. Not used to commit acts against the law”.*

Article 17 paragraph (2)

"All maintenance costs, taxes, billing accounts, and other expenses required during the use or utilization of the Assets as referred to in paragraph (1) shall be borne by third parties who use or utilize the said Assets".

Article 17 paragraph (3)

"Further provisions regarding the terms and procedures for granting permits to third parties as referred to in paragraph (1) shall be regulated by a Ministerial Regulation".

The Draft Law on Asset Confiscation has regulated the mechanism for objecting to the decision on asset confiscation, and there are also provisions governing the use of assets for third parties as long as there is no Court decision related to the confiscation of assets.

Indonesia is a rule of law to bring out legal certainty and protection of human rights [18]. State must in force necessary action to guarantee equality of every individual in pursuing human right and freedom. This is a *condition sine qua non*, rule of law arise as a result of individual struggles to free themselves from arbitrary actions done by authorities. On this basis, the ruler must not act arbitrarily against individuals and his power must be limited [19]. Human rights (HAM) require a sense and rule of law and impose obligations on people or legal subjects to respect the human rights of others. They should not be taken except as a result of legal proceedings under certain circumstances; for example, human rights may include freedom from unlawful imprisonment, torture, and execution [15].

The main challenge in introducing the Asset Forfeiture Bill is to explain the approach to separating the relationship between criminal and criminal assets. Although it is not intended to eliminate criminal proceedings, confiscation can only trace property that actually resulted from a criminal act, regardless of who the perpetrator was. The aim is solely to compensate for the losses caused by the crimes committed and to minimize human rights violations.

3.2 The Draft Law on the Confiscation of Assets Based on Pancasila

Making laws that rely solely on ideas embedded in the human mind will produce abstract and speculative rules. The thoughts that will be poured out as the formulation of the Act are only based on the possibilities that will occur, not focusing on the interests and real problems the community faces. Such a formulation of the Act will be empty and cannot be applied to the reality of practice. If this happens, the constitution no longer has the power to be respected and obeyed.

In many developed countries, the legal system is the benchmark and the foundation for establishing a country. Law serves to regulate the order of social and state life. When a country does not run according to the rules made, there will be a lot of chaos (*chaos*) in the government system of a country. There is no doubt about the legal system in developed countries [20].

The Draft Law (RUU) on Asset Confiscation, under government initiation and became President Joko Widodo's Nawacita, is expected to be an effort to recover assets resulting from crime can be repaired and made effective. Some of the challenges the government must face are related to the issue of property rights and a fair judicial process.

The Asset Confiscation Bill aims to pursue criminal assets, not against criminals. Thus, this Asset Confiscation Bill has changed the paradigm of criminal law, starting from the most traditional, namely to create a deterrent effect with retribution (*retributionist*), even the most recent one, namely rehabilitation (*rehabilitationist*). Then, with the work of the Asset Confiscation Bill, will it shift or even eliminate the conventional law enforcement process in pursuing criminals or collaborate between the two approaches [21]. Because Indonesia uses the Continental European tradition (*civil law*), the existing regulations, including the Draft Law on Asset Confiscation, must be bound by the highest legal source, Pancasila. Article 1, paragraph (3) of the 1945 Constitution states that Indonesia is a state of law. It was different when the 1945 Constitution had not been amended, which stated that Indonesia was based on the law (*rechstaat*), not based on sheer power (*machtstaat*) [22].

Talking about Pancasila is also inseparable that the ideology of this nation implies that the people or society must be spared and free from all types of violations and crimes that exist, which can threaten the survival of the people or society. Crime grows and develops along with the development of society. The more advanced and developing human civilization, the more

colors and forms of crime will appear, but in its development, new types of complex crimes appear along with the development of the community, for example [2].

The background of the birth of the Draft Law on Asset Confiscation is for the welfare of the people because the existing system and mechanism for confiscation of criminal assets are mandated by fair law enforcement and the 1945 Constitution of the Republic of Indonesia. In addition, a clear and comprehensive agreement on the management of confiscated assets facilitates the establishment of professional, transparent, and responsible law enforcement. The draft Asset Confiscation Law aims to pursue assets from criminals, not perpetrators. Thus, the law on asset confiscation changes the paradigm of criminal law from the most traditional one and prioritizes rehabilitation.

The draft of the Asset Confiscation Law must be under and must not conflict with the basis of the Indonesian state, namely Pancasila or Soekarno, called *the philosophy of the gronslag* or the way of life of the Indonesian nation. Because Pancasila has two interests, namely:

- a. Pancasila as guidelines and instructions in daily life of Indonesian people both in family life and in society because of the position of Pancasila as *grundnorm* or *staatsfundamentalnorm*;
- b. Pancasila is ideology which is mandatory to all state arrangements include law, politics, economics, or social society. When observed, the reality of Indonesian people and nation that has long been a god, civilized, family, deliberation for consensus and justice. For this reason, it is impossible for legal regulations that were born to be contrary to Pancasila, such as the Draft Law on the Confiscation of Assets, which must include and practice the values of Pancasila because it is the identity of the nation [23].

Lawrence M. Friedman argues that there are three essential pillars in the development of law: content, structure, and culture. Ideally, the three pillars of domestic law development must run in harmony, harmony, and balance. Because all three are closely related. Gustav Radbruch also said that from the point of view of the purpose of the law, the purpose of the law is justice, certainty, and benefit. Justice must stand on legal certainty and interests above all else. Historically, according to Gustav Radbruch, the goal of legal certainty is the highest among other destinations. However, he saw that in Nazi Germany, with the help of this theory, a Law was passed that legalized the inhumane methods and atrocities of the then-military during World War II. Gustav Radbruch finally modified his approach by placing the goal of justice above other legal purposes. In practice, there are often conflicts between legal certainty and interests, fairness and legal certainty, and justice and interests [24].

The following is an elaboration of the values contained in Pancasila related to the Draft Law on Asset Confiscation in Indonesia:

3.2.1 Divine Values

As the Indonesian nation, we must recognize that the Indonesia has the principle of regulating its people through rules and that individuals must act following norms that apply in society, starting from each individual. The value of divinity implies that all human activities and regulation must be according to norms. Faith and trust in God are followed by piety to Him. The Asset Confiscation Bill is a draft regulation that does not conflict with the Divine Values contained in Pancasila and can benefit the community, nation, and state in law enforcement against crimes, especially corruption in Indonesia.

3.2.2 Human Values Human

Values such as respect for dignity and human rights (HAM) must be internalized in eradicating the Bill on Asset Confiscation. Every rule that applies in society must not explicitly

conflict with humanitarian issues. This has been described in the previous elaboration that the Asset Confiscation Bill does not violate respect for human rights (HAM), so it is considered appropriate and does not conflict with Pancasila as a *grund norm* and a *staatsfundamental norm*.

3.2.3 Social Justice as Value

Social justice is the foundation and goal for bringing out a just and prosperous Indonesian society physically and mentally. According to Pancasila, achieving social justice requires realizing religious and humanitarian values. In this case, the state protects people or the community in any way possible from violations and crimes of any kind; this Asset Confiscation Bill clearly covers the entire Indonesian nation in tackling crimes that are increasingly developing in the era of the industrial revolution 4.0. and society 5.0.

Thus, the existence of an Asset Confiscation Bill with Pancasila values does not contradict one another at all. The Asset Confiscation Bill to enforce certainty, benefit, and justice, prevent and eradicate existing violations and crimes such as corruption (TIPKOR).

According to M. Mahfud MD, the legal product, in this case, the Draft Law on Asset Confiscation, is continuously changing according to the context. Thus it can also be said that the law as a service to the needs of the community must be updated so that it is actually with the needs of the people being served. In carrying out legal development, a guideline is needed to attain state goals. The reform of the National Legal System is the embodiment of National Law System with Pancasila [25]. Pancasila as a national legal philosophy be the basis and direction and function as national legal philosophy. As the nation's view of life, Pancasila contains noble values that direct legal system. As a way of life, it regulates personal life and interactions between humans. By developing national laws such as the Asset Confiscation Bill, we have to go through several steps, such as looking at the political, religious, and values approach. The approach is value-oriented legal reconstruction. Indonesian criminal law must be based on core ideas and Pancasila as the core values of Indonesian national life.

4 Conclusion

1. The issue of human rights (HAM) in Indonesia has become the main theme in the state and community life discussion. The statement of human rights (HAM) in Pancasila contains the thought that God Almighty created humans by bearing two aspects, namely Aspects of Individuality (personal) and Aspects of Sociality (society). However, each person's freedom is limited by others' human rights. This means that everyone must recognize and respect the human rights of others. Article 28 H Paragraph (4) of the 1945 Constitution of the Republic of Indonesia and Article 29 Paragraph (1) of Law Number 39 of 1999 concerning Human Rights. Both of these rules provide guarantees against private property rights. However, when talking about Human Rights (HAM), of course, we must also understand that the applicability of Human Rights (HAM) itself is not completely absolute; several restrictions can be made, especially for Human Rights (HAM), which are classified as *derogable rights* which interpreted as rights that can still be suspended or restricted (reduced) by the state under certain conditions. Looking at Article 2, Article 14 Paragraph (1), Article 17 Paragraph (1), (2), and (3) the Draft Law (RUU) on Asset Confiscation, this rule, in principle, does not conflict with human rights (HAM). ;

2. The work of this Asset Confiscation Bill will shift or even eliminate the conventional law enforcement process in pursuing criminals or then collaborate between the two approaches, the Asset Confiscation Bill must be tied to the highest legal source, namely Pancasila as *filosofishe gronslag, grundnorm dan staatsfundamentalnorm*.

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