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Asset Forfeiture for the Offense of Illicit Enrichment: Between Eradication and Deterrence

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The Indonesian government has ratified the United Nations Convention Against Corruption (UNCAC) or the UN Anti-Corruption Convention with law number 7 of 2006. One of the important issues is the return of criminal assets through asset confiscation and criminalizing illicit enrichment. However, to date the Asset Forfeiture Bill has not been passed. This research aims to examine the practice of asset confiscation in Indonesia, the obstacles that arise as a result of the incomplete discussion of the Draft Law on Asset Forfeiture, giving the impression that there is an attempt to obstruct it, and the urgency of reforming the law for handling criminal acts of corruption by criminalizing asset confiscation for illicit enrichment offenses. This research uses a normative method with a statutory, conceptual and country comparison approach. From the results of this research, recommendations were obtained to strengthen and encourage efforts to ratify the Draft Law on Asset Forfeiture in Indonesia.

Keywords: Asset Forfeiture, Illicit Enrichment, Corruption

INTRODUCTION

Since the reform era, the issue of eradicating corruption has become a central theme in law enforcement in Indonesia. Corruption is an extraordinary crime as well as difficult to find the perpetrators (Crime Without Offends). This is because corruption is said to be an Invisible Crime that is difficult to prove procedurally, where the modus operandi is a systematic and joint activity.[1]

[1] Novalinda Nadya Putri & Herman Katimin, 'Urgensi Pengaturan Illicit Enrichment dalam Upaya Pemberantasan Tindak Pidana Korupsi dan Tindak Pidana Pencucian Uang di Indonesia' (2021) 9:1 J Ilm Galuh Justisi 38–61.

Corruption crimes are usually committed with a difficult modus operandi that is not easy to prove.[2] The consequences of corruption crimes that have occurred so far are not only detrimental to state finances or the state economy, but also hamper the growth and continuity of national development which demands high efficiency.[3] The rise of corruption cases, starting from the BLBI case reaching Rp. 114.Trillion, the e-ktp case reaching 2.3 Trillion, even the latest in 2023 the corruption case of BTS Bakti Ministry of Communication and Information reached Rp. 17 Trillion, to the findings of alleged corruption in the Ministry of Agriculture that dragged the name Syahrul Limpo with an estimated Rp. 30 Billion.[4] This phenomenon shows that corruption in this country is very sad and needs serious attention.

Normatively, the spirit of eradicating corruption is accommodated in Law Number 31 of 1999 concerning Eradication of Corruption as amended by Law Number 20 of 2001 (TIPIKOR Law), which has formulated 30 types of corruption crimes which are then classified into 7 groups, including harm to state finances, bribery, embezzlement in office, fraudulent acts, extortion, conflict of interest in procurement, and gratuities. In order to strengthen the legal instruments to eradicate corruption in Indonesia, in addition to the establishment of the Corruption Eradication Commission (KPK) with Law Number 30 of 2002, the Government of Indonesia has also ratified the United Nations Convention Against Corruption (UNCAC) with Law Number 7 of 2006. UNCAC itself contains 8 chapters and 71 articles that regulate the standards of an effective legal framework and guidelines related to handling corruption. UNCAC describes the problem of corruption as a serious threat to the stability, security of national and international communities, democratic values and justice, weakening institutional values so as to jeopardize sustainable development and law enforcement.[5] This convention was ratified by the majority of UN member states, both developed and developing countries. This indicates the understanding of countries in the world about the adverse effects of corruption on society not only nationally but also internationally, thus the need for cooperation between countries in preventing and eradicating corruption.[6]

The question then becomes whether the ratified UNCAC is merely an instrument to eradicate corruption in Indonesia or the main spirit as a breakthrough to combat corruption crimes in Indonesia. This is because, to date, of the 32 recommendations from the first round of UNCAC review in 2010-2015, Indonesia has only completed around 8 recommendations. Meanwhile, of the 21 recommendations from the second round of review in 2016-2017, Indonesia has only completed around 13 recommendations.[7] KPK stated that there are at least 6 priority issues that need to be resolved from the recommendations of Indonesia's first and second round of UNCAC review, among others: Completion of the Revised Law on Corruption; Improvement of Transparency and Integrity in the Public Sector and Strengthening the Implementation of Bureaucratic Reform; Improvement of Transparency and Integrity in the Private Sector; Completion of the Revised Law on Mutual Legal Assistance in Criminal Matters (MLA);

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2 Saldi Isra & Eddy OS Hiariej, *Korupsi Mengorupsi Indonesia: Sebab, Akibat dan Prospek Pemberantasan* (Jakarta: Gramedia Pustaka Umum, 2009).

3 See the preamble letter b of Law Number 31 Year 1999 on the Eradication of Corruption.

4 Adhl Wicaksono, 'KPK: Total Uang yang Dibawa dari Rumah Dinas Mentan Rp30 Miliar', (2023), online: *CNN Indones* <https://www.cnnindonesia.com/nasional/20230930040843-12-1005439/kpk-total-uang-yang-dibawa-dari-rumah-dinas-mentan-rp30-miliar>.

5 Lilik Mulyadi, 'Asas Pembalikan Beban Pembuktian terhadap Tindak Pidana Korupsi dalam Sistem Hukum Pidana Indonesia Dihubungkan dengan Konvensi Perserikatan Bangsa-Bangsa Anti Korupsi 2003' (2015) 4:1 J Huk dan Peradil 101–132.

6 Jan Wouters, Cedric Ryngaert & Sofie Cloots, 'The International Legal Framework Against Corruption: Achievements and Challenges' (2013) 14:1 Melb J Int Law 205–280.

7 Indonesia Corruption Watch, 'Evaluasi Satu Tahun Komisi Pemberantasan Kosupsi', (2021), online: <https://antikorupsi.org/id/evaluasi-satu-tahun-komisi-pemberantasan-korupsi-2020>.

Strengthening the Independence and Institutionalization of Anti-Corruption Institutions; and Completion of the Asset Forfeiture Bill.[8] Despite being a priority issue, the Asset Forfeiture Bill has never been completed.

This lack of seriousness can also be seen from the results of the Transparency International (TI) survey on the Corruption Perception index (CPI) in early 2023 Indonesia plunged from a score of 38 to a score of 34 or ranked 110 out of 180 countries. According to TI Indonesia's records, Indonesia is now ranked in the 1/3rd most corrupt country in the world and far below the average CPI score in Asia-Pacific countries, which is 45. The largest country in Southeast Asia shares a position with Bosnia and Herzegovina, Nepal, Malawi, Gambia, and Sierra Leone with a score of 34. Meanwhile, Indonesia's position in the Southeast Asia Region is ranked 7th out of 11 countries, far below a number of neighboring countries such as Malaysia, Vietnam, Singapore, Timor Leste, and Thailand.[9]

This lack of seriousness then raises public attention, for example on legal reform through the Draft Law on Corruption (RUU TIPIKOR) and the Asset Forfeiture Bill. This condition is due to the very long completion of legal reform efforts, especially regarding the internalization of asset forfeiture for illicit enrichment offenses so that it seems that there are efforts to obstruct, especially when the chairman of Commission I DPR RI said "Maybe the Asset Forfeiture Bill can be (passed), but you have to talk to the party leaders first...". As a result, this statement invited controversy among both academics and the public. One of them, Constitutional Law expert Denny Indrayana, argues that the Asset Forfeiture Bill, which seems to be running in place and has not yet been passed, has no maximum restrictions in the constitution.[10]

Asset forfeiture is a forced effort by the state to take over the control and/or ownership of Criminal Assets based on a court decision that has obtained permanent legal force without being based on the punishment of the perpetrator.[11] Article 2 Use of terms (g) of UNCAC defines asset forfeiture as *"Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority"*. That is, "forfeiture" which includes the payment of fines is the permanent deprivation of wealth based on a court order or other authorized official. Meanwhile, the term "asset recovery", Matthew H. Flening firmly states that in the international world there is no agreed definition of asset recovery. Therefore, in the context of corruption crimes, asset recovery is the process of revocation, deprivation, and removal of rights to the proceeds or profits from criminal acts so that the perpetrators of criminal acts cannot use these proceeds or profits as a tool or means of committing other criminal acts.[12] Meanwhile, in international legal instruments, the offense of illicit enrichment itself is regulated in Article 20 of the UNCAC. The offense of illicit enrichment is an act of unlawful self-enrichment in the form of an increase in assets or wealth in a large enough amount of a public official where the increase in wealth cannot be explained if it is obtained from lawful sources of income.[13]

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[8] *Konitmen Indonesia Pada United Nations Convention Against Corruption (UNCAC) dan G20 Anti-Corruption Working Group (ACWG) Tahun 2012-2018*, by Komisi Pemberantasan Korupsi (Jakarta, 2019).

[9] Transparency International Indonesia, 'Indeks Persepsi Korupsi Indonesia 2022', (2023), online: <https://ti.or.id/indeks-persepsi-korupsi-indonesia-2022-mengalami-penurunan-terburuk-sepanjang-sejarah-reformasi/>.

[10] Adi Mirsan, 'RUU Perampasan Aset Jalan di Tempat, Denny Indrayana Tuding Jokowi dan Koalisinya Sangat Koruptif', (2023), online: <https://fajar.co.id/2023/07/12/ruu-perampasan-aset-jalan-di-tempat-denny-indrayana-tuding-jokowi-dan-koalisinya-sangat-koruptif/>.

[11] Fathul Hamdani, 'Urgensi Penerapan Konsep Non-Conviction Bassed dalam Praktik Asset Recovery TPPU di Indonesia' in Idul Rishan, Aroma Elmina Martha & Dodik Setiawan, eds, *Huk Sebagai Penggerak Pembang Berkelanjutan di Indones* (Yogyakarta: FH UII Press, 2021).

[12] Matthew H Fleming, *Asset Recovery and Its Impact on Criminal Behavior, An Economic Taxonomy: Draft for Comments* (London: University College, 2005).

[13] Garnasih Yenti, *Illicit Enrichment* (Bandung: Citra Aditya Bakti, 2012).

Therefore, from the description above, it is necessary to review several things: first, the practice of implementing asset forfeiture in Indonesia. Second, the obstacles to criminalizing asset forfeiture against illicit enrichment. Third, the urgency of legal reform in handling corruption crimes through criminalizing asset forfeiture against illicit enrichment offenses.

RESEARCH METHODS

In conducting this research, the type of research used is normative-juridical legal research because of the emptiness of the norms of the offense of illicit enrichment and asset forfeiture. The analytical knife used with several approaches, namely the statute approach, conceptual approach and comparative approach.

ANALYSIS AND DISCUSSION

Asset Forfeiture Implementation Practices in Indonesia

Efforts to combat corruption crimes are not only through punishing the perpetrators, but also through efforts to return the assets of corruption crimes. In general, the return of criminal assets can be pursued in two ways: First, through the means of civil law or civil based forfeiture or non-conviction based forfeiture (NCB) or in rem forfeiture which is defined as a punishment for asset forfeiture without criminalization. This means that the State Attorney files a lawsuit in rem against assets or property suspected of being the proceeds of crime or property suspected of being obtained or used to commit a crime. This model can be carried out without having to wait for the criminal case to be decided by a panel of judges. This is because in rem forfeiture is an action against the asset itself and not against the individual.

In rem asset forfeiture recognizes a legal fiction that makes it appear as if the asset was "guilty" at the time of its use or unlawful acquisition. Thus, in rem asset forfeiture is a separate action from criminal proceedings and requires proof that the property or asset was tainted by the criminal act. In in rem asset forfeiture the court will focus on the use of the property and not on the good faith of the owner of the property.

Second, through the means of criminal law or so-called criminal based forfeiture (CB) or asset forfeiture in personam is a judgment in personam against the defendant, which means that the forfeiture carried out is closely related to the conviction of a convicted person.[14] Since in personam forfeiture relates to the conviction of a person, the Public Prosecutor must first prove the criminal offense committed by the defendant as well as the relationship between the criminal offense committed by the defendant and the assets that are the proceeds or instruments of the criminal offense controlled by the defendant. Moreover, in the common law system, criminal asset forfeiture requires a standard of proof beyond a reasonable doubt or intimate conviction, which means that there must be no doubt as to the guilt of the defendant and the status of the assets that are the proceeds or instruments of the criminal offense committed by the defendant.[15] This in personam forfeiture model is currently adopted in Indonesia. Thus, the return of criminal assets can only be implemented based on a court decision that has permanent legal force, which requires a relatively long time.

Likewise, the asset forfeiture model adopted is only limited to the forfeiture of criminal assets through two models. First, seizure in the sense of confiscation of property used to commit a criminal offense *(instrumentum sceleris)*. Second, confiscation in the sense of confiscation of objects related to criminal acts *(objectum sceleris)*. Meanwhile, the confiscation of criminal

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[14] *Kajian Hukum: Permasalahan Hukum Seputar Perampasan Aset Dalam Undang-Undang Nomor 8 Tahun 2010 Tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang Dan Upaya Pengoptimalisasiannya*, by Direktorat Hukum (Jakarta, 2021).

[15] Hamdan Rampadio, Ana Fauzia & Fathul Hamdani, 'The urgency of arrangement regarding illicit enrichment in indonesia in order to eradication of corruption crimes by corporations' (2022) 9:2 J Pembaharuan Huk 225–241.

proceeds *(fructum sceleris)* has not been regulated in detail, clearly and adequately, including the process of reversing the burden of proof in the confiscation of criminal assets.[16]

Currently, the TIPIKOR Law has provided a limited process for the return of corrupt assets on a national scale through civil lawsuits. This provision is regulated in Article 32, Article 33, Article 34, and Article 38 of Law Number 20 Year 2001, or through criminal law as regulated in Article 18 of Law Number 31 Year 1999. This criminal prosecution is essentially a limited solution in an effort to recover corrupt assets by confiscating the assets of the perpetrators who are unwilling to pay restitution. This is because there are often difficulties in law enforcement in Indonesia regarding the problem of returning corrupt assets that have been integrated outside the competence of Indonesian law enforcement. The return of assets within the national jurisdiction of the perpetrator often experiences obstacles in the national legal system, especially the return of assets from corruption that is transnational or cross-border. These obstacles are a logical consequence of the legal vacuum in regulating asset forfeiture and illicit enrichment offenses.

Barriers to Criminalizing Asset Forfeiture for Illicit Enrichment

A decade has passed since the government formulated the Bill on Criminal Asset Forfeiture. In 2012, through the National Law Development Agency (BPHN), the government first prepared an Academic Paper as the basis for the formation of the Asset Forfeiture Bill. However, the completion of the Criminal Asset Forfeiture Bill has not been completed to date. From the political side, this then proves the results of a study conducted by the Center for Anti-Corruption Studies at the Faculty of Law, Gadjah Mada University, which conducted a study on the Return of Criminal Assets involving several experts such as Denny Indrayana, Zainal Arifin Mochtar and Edward O.S Hiariej, stating that asset forfeiture is often associated with a corrupt regime, so that to return assets resulting from crime, political will is needed from the state, both from the government, parliament and the judiciary. The political factor is the most important thing for the birth of the Asset Forfeiture Bill. From a political science point of view, however, political will in the political system is not simple. The existing political will may not necessarily be implemented if the political system does not support it.[17] The lack of completion of the Asset Forfeiture Bill makes it seem as if there is an attempt to block the Asset Forfeiture Bill. Member of Commission III DPR RI Didik Mukrianto stated that the Asset Forfeiture Bill is seen as making a group of people uncomfortable. This is because this regulation, if passed, can be used to seize assets obtained from the proceeds of crime. This is what then causes the opportunity for the Asset Forfeiture Bill to fail again like its fate years ago. Then this opinion is reinforced by the statement of the former head of the Financial Transaction Reports and Analysis Center (PPATK) Yunus Husein, who stated that the lack of completion of the discussion of the Criminal Asset Forfeiture Bill is most likely due to political obstacles.[18] Therefore, political support for corruption eradication efforts is a necessity. Denny Indrayana stated that no matter how strong the anti-corruption commission is, in terms of regulation, authority and so on, all of that becomes meaningless if in reality the country's leaders do not support the work of eradicating corruption. The alleged obstruction is because the Asset Forfeiture Bill is a harsher criminal offense than the Anti-Corruption Law, where the logical consequence is that corruptors can be impoverished.

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[16] Edward OS Hiariej, *Pembuktian Terbalik dalam Pengembalian Aset Kejahatan Korupsi* (Yogyakarta: Fakultas Hukum Universitas Gajah Mada, 2012).

[17] Rizki Febrari, *Politik Pemberantasan Korupsi: Strategi ICAC Hong Kong dan KPK Indonesia* (Jakarta: Yayasan Pustaka Obor Indonesia, 2015).

[18] Yakub Pryatama Wijayaatmaja, 'Hambatan RUU Perampasan Aset bukan di Pemerintah tapi di Parlemen', (2023), online: *Media Indones* <https://mediaindonesia.com/politik-dan-hukum/573897/hambatan-ruu-perampasan-aset-bukan-di-pemerintah-tapi-di-parlemen>.

Looking further, the majority of developed countries such as the United States, the United Kingdom, and Australia tend to refuse to criminalize illicit enrichment. In general, the basic consideration for the refusal to criminalize illicit enrichment is the view that the enforcement of this crime has the potential to violate human rights, especially in relation to the principle of presumption of innocence. This means that a person is considered innocent before there is a court decision that declares him guilty and has the force of law. This principle occupies an important position in the due process model.[19] This human rights violation occurs because the illicit enrichment law enforcement process uses a reversal of the burden of proof or reverse burden of proof/reverse onus of proof or omkering van bewijslast. In this context, the suspect or defendant is burdened with the burden of proof so that he must explain the origin of the increase in his wealth that occurred outside the limits of reasonableness, compared to the income he received as a public official or other legal income. The consequence of the defendant's failure to prove the origin of the wealth he or she has acquired will prove that the defendant is guilty of illicit enrichment.[20] The subject of the offense of illicit enrichment is all public officials, including and especially officials or state administrators or former state administrators, while the object is a significant increase in the assets of public officials or state administrators or former public or state administrators. The reason for the confiscation or criminalization of the offense of illicit enrichment is because the public official concerned cannot reasonably explain the cause of the increase in his assets compared to his official income. The illicit enrichment provision is only based on the belief of suspicion of a public official's assets that have increased unreasonably and cannot be explained. In the process, when law enforcers do not find a match between the wealth of a public official and his or her legal income as a public official, the assets should be suspected of being the proceeds of crime and made the object of forfeiture through legal proceedings.

In Indonesia, the debate about the possibility of violating the principle of presumption of innocence in terms of reversing the burden of proof in corruption cases has emerged since the enactment of Law No. 31/1999 on the Eradication of Corruption. The provisions of Article 66 of Law No. 8 of 1981 concerning Criminal Procedure Law (KUHAP) state that the suspect or defendant is not burdened with the burden of proof. Actori incumbit onus probandi. That is, whoever charges is the one who is obliged to prove. Actore non probante, which means that if you cannot prove, then reus absolvitur, namely the defendant must be released.[21] Likewise, when using the NCB mechanism, in the context of civil procedure, the burden of proof is regulated in Article 163 *Het Herziene Inlandsch Reglement* (HIR), Article 283 *Recht Reglement voor de Buitengewesten* (Rbg), Article 1865 *Burgerlijk Wetboek* (BW), which reads "Anyone who claims to have a right or who is based on an event to strengthen that right or to deny the rights of others, must prove the existence of the right of that event". This provision is based on the principle of actori incumbit probatio, meaning that whoever sues, he is the one who is obliged to prove. Another related principle is ei incumbit probatio qui dicit, non qui negat, meaning that the burden of proof is on the person who sues, not the defendant.[22] Then the emergence of deviations from general principles with the existence of Article 37 number 3 of Law No. 31 of 1999 stating that the defendant is obliged to provide information about all the assets of his wife or husband, children, and every person or corporation suspected of having a relationship with the corruption case concerned. The Asset Forfeiture Bill itself in Article 38 paragraph (2) states "The party who submits objections and / or resistance as referred to in paragraph (1) must prove that the assets

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[19] Eddy OS Hiariej, *Teori dan Hukum Pembuktian* (Jakarta: Erlangga, 2021).

[20] Rasamala Aritonang et al, *Menggagas Perubahan UU Tipikor: Kajian Akademik dan Draft Usulan Perubahan* (Jakarta: Biro Hukum Komisi Pemberantasan Korupsi, 2019).

[21] Zainal Arifin Mochtar & Eddy OS Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori, Asas, dan Filsafat Hukum* (Depok: Rajawali Press, 2023).

[22] *Ibid.*

blocked and / or confiscated are legally owned or the assets requested to be confiscated are not Criminal Assets".

Thus, the UNCAC has regulated provisions regarding the reversal of the burden of proof system in Article 31 paragraph (8) which states that participating states may consider requiring the transfer of the burden of proof to the perpetrator to show that the alleged proceeds of crime were actually obtained from legitimate sources. The application of the reversal of the burden of proof in each participating country must be adjusted to the basic principles of their law.

Urgency of Legal Reform of Corruption Crime Handling through Criminalizing Asset Forfeiture Against Illicit Enrichment Delicts

Starting from the philosophical reason that asset recovery correlates with the principle of nature aequum est, neminem cum alterius detrimento et injuria, fieri locupletiorem. That is, no one can enrich themselves at the expense of the loss and suffering of others. This principle is in line with the doctrine of crime does not pay or shall not pay as an expression of resistance to the perpetrators of criminal acts so that they cannot enjoy the results of criminal acts or the results of the crimes they commit.[23] Edgargo Buscaglia and Maria Dakolias in An Analysis of the Causes of Corruption in the Judiciary said that the fight against corruption is the main task that must be completed during the reform period. It is impossible to reform a country if corruption is still rampant.[24] Fighting corruption is a war against the corrupt mafia that is very solid on all fronts. Corruption is the source of disaster and evil, the roots of all evils. Corruptors are relatively more dangerous than terrorists. The trillions of rupiah looted by corruptors are the life-and-death costs of tens of millions of poor Indonesians.

From a juridical perspective, in order to return the proceeds of corruption to the state, it seems that the provisions contained in Law No. 31 of 1999 jo. Law No. 20 of 2001 are not sufficiently accommodating, in this case relating to the application of restitution sanctions or fines. These provisions are not easy to be applied by judges and are often not implemented because sometimes the perpetrators prefer punishment or even substitute confinement due to the insufficient property of the convict. Asset forfeiture can currently be carried out if the perpetrator of a criminal offense is proven in court legally and convincingly to have committed a criminal offense. The mechanism through this settlement is very likely to cause various possibilities that cause obstruction in the process of efforts to recover crime money. For example, the death of the perpetrator or other obstacles that prevent the perpetrator from undergoing examination in court or not finding sufficient evidence to file charges in court and other reasons. Thus, comprehensive, transparent and accountable asset forfeiture is required.

The World Bank identifies at least 3 (three) objectives that states put forward when establishing threats or criminal sanctions for asset forfeiture for illicit enrichment offenses. Sanctions against illicit enrichment should serve to: first, recover state losses due to corruption; second, punish state officials who commit illicit enrichment; third, prevent them from obtaining unauthorized gains.[25]

In the preambule, the fourth paragraph of UNCAC says "Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential", meaning that it believes that corruption is no longer a local problem, but an international phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential. Chapter 3 of

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[23] Lilik Mulyadi, *Kembang Setaman Tindak Pidana Korupsi Indonesia dalam Teori, Norma dan Praktik* (Jakarta: Kencana Prenada Media Group, 2021).

[24] Denny Indrayana, *Negeri Para Mafioso, Hukum di Sarang Koruptor* (Jakarta: PT Kompas Media Nusantara, 2008).

[25] Aritonang et al, *supra* note 20.

UNCAC contains 11 acts that can be criminalized. Specifically, 5 acts are mandatory offences and 6 acts are non-mandatory offences. This means that when they are mandatory offences, all participants in the convention agree to regulate them in national law, thus creating an obligation on the state party. Conversely, if it is non-mandatory offences, there is no agreement of the convention participants to declare the act to be criminalized. The regulation of illicit enrichment itself is included in non-mandatory offences. Of the 193 countries in the world, at least 44 have criminalized illicit enrichment. A total of 39 out of 44 countries use imprisonment sanctions, for example, India, China, Malaysia, Macau, Brunei, Egypt and Bangladesh. With an average minimum sanction setting of 2-5 years. In addition, there are 26 out of 39 countries that apply fines, ranging from 50-100% or twice the value of illicit enrichment. On the other hand, there are 9 countries that impose administrative sanctions, such as the Philippines, Argentina, Chile, Colombia, El Salvador, and Uganda.[26]

Asset forfeiture through the NCB Asset Forfeiture mechanism or in rem forfeiture is one of the breakthrough efforts to fight corruption crimes. Basically, in rem forfeiture basically has the same purpose as criminal forfeiture, namely to retrieve the proceeds of crime, but with a different process. The NCB mechanism places the state as the plaintiff and the assets as the defendant, while the parties related to the forfeiture process are interveners.

The NCB mechanism has been implemented in several countries such as the United States, the United Kingdom and several other European countries. The mechanism of returning assets of corruption crimes through NCB by reversing the burden of proof basically does not violate human rights. This is based on the balanced probability principle theory. This theory separates between criminal assets and their owners. This theory, then, guarantees the protection of the suspect's human rights to be presumed innocent, on the contrary, it does not guarantee the protection of the defendant's ownership rights over assets suspected of originating from criminal acts, unless the person concerned can prove otherwise.[27]

Reverse evidence in the context of asset recovery of corruption crimes through both criminal and civil legal means can be done considering the consequences, nature and character of corruption crimes as considering the consequences, nature and character of corruption crimes as extraordinary crimes that require extraordinary methods. extraordinary crime so that extraordinary ways are needed to overcome it. also requires extraordinary ways to deal with it. However, reverse evidence in the context of However, reverse evidence in the context of asset recovery for corruption crimes is only specific to acts that are qualified as illicit qualified as illicit enrichment or self-enrichment. acts of unlawful self-enrichment. In the explanation of Law No. 31/1999 explicitly explains that the evidence adopted by Indonesia is reversed evidence. Indonesia adopts reversed evidence which is limited or balanced, i.e. the defendant has the right to that is, the defendant has the right to prove that he did not commit the crime of corruption and is obliged to provide testimony. the crime of corruption and is obliged to provide information about all of his property and the property of his wife or his property and the property of his wife or husband, children, and the property of any person or corporation suspected of having a relationship with him. or corporation suspected of having a relationship with the case in question, and the public prosecutor remains obliged to and the public prosecutor is still obliged to prove his charges.

The presumption of innocence is not an absolute principle. Restrictions on this principle are not absolutely prohibited as long as they meet the principles of rationality and proportionality. The European Court of Human Rights stated that the presumption of innocence is not an absolute rule

[26] Ana Fauzia & Fathul Hamdani, 'Pembaharuan Hukum Penanganan Tindak Pidana Korupsi oleh Korporasi Melalui Pengaturan Illicit Enrichment dalam Sistem Hukum Nasional' (2022) 3:7 Rewang Rencang J Huk Lex Gen 497–519.

[27] Hiariej, *supra* note 16.

and therefore this principle can be deviated from as long as it meets several requirements, namely whether the reversal of the burden of proof applied is used to achieve a legitimate goal and whether the reversal of the burden of proof is proportional to the goal to be achieved. Therefore, reverse proof does not necessarily contradict the presumption of innocence. As far as illicit enrichment is concerned, the public prosecutor is still obliged to prove that the increase or addition to the assets of a public official occurred outside reasonable limits. Instead, it is the suspect or defendant who must then prove the origin of his or her wealth in a reasonable and credible manner (rebuttable presumption).

At first glance, the civil lawsuit in the TIPIKOR Law is almost similar to the NCB, but there are actually differences in the civil mechanisms regulated by the TIPIKOR Law and the NCB. The civil remedy in the TIPIKOR Law still uses a civil regime where the proceedings are subject to formal or material civil law, so that the civil suit in the TIPIKOR Law requires the public prosecutor to prove the existence of "state losses". In addition, the provisions of Article 38 of Law No. 20/2001 also only regulate civil suits after a court decision with permanent force.[28] This is certainly different from NCB which uses a different civil regime such as reverse proof. In addition, NCB is also not related to the perpetrator of the crime and enforces an asset as a litigant. The civil lawsuit in the Anti-Corruption Law places the burden of proving the existence of an "element of state loss" on the State Prosecutor (JPN). This provision is not easy to carry out. In fact, the burden of proof that must be carried out by the JPN in a civil lawsuit is as heavy as criminal proof. In contrast, the NCB adopts the principle of reverse proof where it is the objecting parties who prove that the assets being sued have no connection to corruption. It is sufficient for the JPN to prove that there is an allegation that the assets being sued have a connection to a corruption crime. The most important thing is that NCB is an in rem lawsuit that has no connection to the criminal act. Therefore, the JPN does not need to prove the element of "state loss" which is an element that is quite difficult to prove in court.[29]

There are at least several uses of NCB to assist law enforcement in the process of recovering corrupt assets. First, NCB is not related to criminal offenses so that confiscation can be requested to the court more quickly than Criminal Forfeiture. This is in contrast to confiscation through the criminal process which requires a suspect or guilty person. Second, NCB uses civil standard of proof. By using the civil standard of proof, it will facilitate stolen asset recovery efforts in Indonesia. This is because the civil standard of proof is relatively lighter to meet than the criminal standard of proof. In addition, NCB adopts a burden of proof reversal system so as to ease the burden on the government to prove the lawsuit filed. Third, NCB is an asset claim process which means that NCB only deals with assets that are suspected of originating, being used or having a relationship with a criminal offense. The existence of concerns such as the escape, disappearance or death of the perpetrator of corruption is not a problem in NCB. The trial can continue and not be interrupted by the condition or status of the corrupt person. Fourth, efforts through the NCB are very useful for cases where criminal prosecution is hindered or not possible. Efforts to eradicate corruption often face politically well-connected corruptors that law enforcement officers face difficulties in prosecuting. However, this problem will not be an obstacle in asset recovery efforts through NCB. In addition, there are times when an asset related to a criminal offense is not known to its owner or perpetrator. NCB is very useful in these circumstances, as it is the asset that is being sued, not the owner. If the criminal regime is used, the assets will be difficult to retrieve, because confiscation in criminal law is generally related to the perpetrator of the crime. Fifth, the application of NCB in the confiscation of assets resulting from criminal acts is a way out to overcome the stagnation of confiscation of assets resulting from criminal acts considering that the applicable provisions in the

[28] Bismar Nasution, *Anti Pencucian Uang: Teori dan Praktek* (Bandung: Books Terrace & Libary, 2009).
[29] *Ibid.*

Criminal Procedure Code one asset can only be confiscated if the public prosecutor can prove the guilt of the defendant and the asset is the proceeds or means of crime.[30]

The implementation of the return of criminal assets of perpetrators of corruption through the Forfeiture Bill does not necessarily bring obstacles to the return of assets of perpetrators of corruption. First, there are constraints on the difference in legal systems between the requesting country as a victim country or the country of origin of corruption crime assets and the requested country or the place where the assets of the perpetrators of corruption crimes are stored. In the civil law system, the emphasis is on administrative measures, civil litigation and criminal prosecution. Countries that adhere to the common law system do not separate the approach of criminal law and civil law in the context of returning assets resulting from criminal acts (fructum sceleris), making it possible to confiscate or seize assets resulting from criminal acts without a court decision. Second, there are norm constraints regarding the criminalization of substitute payments as regulated in the provisions of Article 18 paragraph (1) of Law Number 31 Year 1999 jo. Law Number 20 Year 2001, but it turns out that this provision does not necessarily return the money from corruption crimes because of the norm provisions of Article 18 paragraph (2) and (3). This provision results in the potential for non-return of the replacement money itself. Restitution in corruption crimes still has many problems in the implementation process, where there are incomplete regulations governing in the event of the death of the defendant, whether the corruption act can be borne by the heirs.

To prevent the occurrence of the things described above, criminalization of asset forfeiture through the NCB mechanism for illicit enrichment offenses, the assets of public officials, even if they are not proven to have committed corruption crimes, can still be confiscated if it is later proven that they are not in accordance with their legitimate income and their acquisition cannot be explained reasonably. In this case, the illicit enrichment provision can be a backdoor for asset recovery efforts. However, in an effort to seize assets against illicit enrichment offenses, it is not enough only through the Asset Forfeiture Bill but also the integrity of law enforcement is a non-negotiable price. Law enforcement with integrity is law enforcement that is based on the system, not because there is a viral case first and then there is law enforcement. As long as the practice of legal mafia is still rampant, effective law enforcement will never be present, and justice will always be a trading ground. Justice, which should be present for the right, becomes expensive and transactional, depending on who is strong enough to pay.[31] In addition, it is also important to harmonize legislation in its enforcement efforts. This harmonization is intended to avoid overlaps between various laws. This is because law enforcement against corruption is not only the authority of the KPK but also the authority of the police and prosecutors. The process of asset recovery needs to be organized in an efficient, effective and coordinative manner among law enforcement institutions that have the authority to do so with a proportional and professional division of tasks. This is in line with the adage Interpretare et concordate leges legibus est optimus interpretandi modus. This means that to achieve the best legal construction, harmonizing interpretations are required.

CONCLUSION

The application of asset recovery efforts through the seizure of criminal assets with the NCB mechanism is a breakthrough in efforts to eradicate corruption. Reverse evidence in the context of returning assets of corruption crimes through the means of civil law or NCB can be applied considering the nature and character of corruption crimes as extraordinary crimes so that

[30] *Hasil Penyelarasan Naskah Akademik Rancangan Undang-Undang Tentang Perampasan Aset Tindak Pidana*, by Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia (Jakarta, 2015).

[31] Denny Indrayana, *Indonesia Optimis* (Jakarta: PT Bhuana Ilmu Populer, 2011).

extraordinary ways are needed in handling them. However, reverse proof in an effort to recover assets of corruption crimes through asset forfeiture is only specific to acts that qualify as illicit enrichment. Political will and the existence of great support from the public determine the efforts to eradicate corruption. Thus, the assumption that there is an attempt to block the Asset Forfeiture Bill from being passed is automatically refuted. This willingness is needed to ultimately achieve the widest possible welfare for the community.

Speaking of Ius Constituendum, from the discussion above, there are several things that need to be recommended, namely: First, internalize the offense of illicit enrichment in the TIPIKOR Law. Thus, encouraging the Draft Law on Corruption to be included in the 2025 national legislation program. Second, passing the Asset Forfeiture Bill through the NCB mechanism both for instrumentum sceleris, objectum sceleris, and fructum sceleris. Third, harmonize related laws. Interpretare et concordate leges legibus est optimus interpretandi modus. This means that to achieve the best legal construction, a harmonizing interpretation is required. Both between the Asset Forfeiture Bill and the TIPIKOR Bill.

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