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The Indonesian Arrangement of Asset Forfeiture Draft as Reform Efforts in Recovering State Losses due to Corruption: A Comparative Study of United States Code

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ABSTRACT

Corruption remains a pervasive challenge in Indonesia, undermining governance, economic development, and social justice. The Draft Law on Asset Forfeiture in Indonesia is an effort in reform to restore state losses caused by the crime of corruption. This is a comparative legal research which aims to compare the Draft Asset Forfeiture Law with the United States Code as a reference to assess compatibility with human rights. The findings of this research indicate that despite the fact that there have been numerous previous efforts and procedures from law enforcement to return assets under the criminal procedure law and other regulations, the judicial system is still insufficient to effectively address potential state financial losses due to the rampant corruption crimes in Indonesia. The Asset Forfeiture system, which shares similarities with the Asset Forfeiture principle in the U.S.C., has the potential to be abused and violates human rights and the basic Criminal Law principle of presumption of innocence, both in Indonesia and the United States. Therefore, it is necessary to improve the Draft Law on Asset Forfeiture with due regard to Human Rights, by placing the perpetrators of corruption on the Principle of the Highest Balanced Probability, and still adhering to the principles of the criminal process in accordance with basic criminal law.

Keywords: Corruption, Draft Law, State Financial Losses, United States Code

INTRODUCTION

Crime is behavior that is against the law. It involves deviant behavior which is legally defined as crimes by the authorities. While there are many types of deviant behavior that are not considered crimes, corruption is considered a serious manifestation of crime. Corruption harms both the affected parties and the state in a financially detrimental manner. In order to solve crimes, including corruption, intensive efforts are necessary. One of the steps involved is to enact criminal law regulations that encourage law enforcement in general, thereby increasing the effectiveness in addressing such crimes.

In Indonesia, corruption exists throughout several institutions, including the judicial system as well as the legislative and executive departments.¹ The misuse of authority by individuals in positions of power within state institutions is closely related to corruption. This leads to cases that are challenging to reach effectively and require considerable time to prove criminal acts in accordance with applicable law. In Indonesia, corruption is categorized as an extraordinary crime due to its widespread impact and the difficulties in eradicating it. Therefore, the prosecution of corruption requires extraordinary efforts as well. Corruption is currently a significant public concern because it has a distinctive *modus operandi* and perpetrators. Corruption is becoming a widespread global problem, such as an epidemic that infects almost every developing country, and is almost considered an absolute necessity to eradicate.²

The global response to the eradication of corruption is reflected in the establishment of the 2003 United Nations Convention against Corruption, which has generated important advances in asset recovery efforts. The recovery process can be conducted through both criminal and civil legal proceedings. Indonesia, in the name of the 2003 Anti-Corruption Convention, has formally adopted this convention, which requires the revision of Indonesian legislation to be aligned with the principles contained in the 2003 Anti-Corruption Convention. As a result of these adjustments, Law No. 20/2001 on the Amendment of Law No. 31/1999 on the Eradication of Corruption was enacted.

Submitting evidence against an individual suspected of committing a corruption can often raise the question of whether the principle of reverse proof is applicable. The principle of reverse proof is a system that differs from the general norm in criminal law, in both continental and Anglo-Saxon systems, where it is customarily the public prosecutor who is responsible for proving the guilt of the accused. Under this principle, if there is sufficient evidence of any suspicious

¹ Diky Anandya and Lalola Ester, *Laporan Hasil Pemantauan Tren Penindakan Kasus Korupsi Tahun 2022* (Indonesia Corruption Watch, 2023), <https://antikorupsi.org/sites/default/files/dokumen/Narasi%20Laporan%20Tren%20Penindakan%20Korupsi%20Tahun%202022.pdf>.

² Wicpto Setiadi, "Korupsi Di Indonesia Penyebab, Hambatan, Solusi Dan Regulasi," *Jurnal Legislasi Indonesia* 15, no. 3 (2018).

activity, the defendant is required to prove that they were not involved in the criminal offense. Thus, the reverse proof principle shifts the burden of proof to the defendant, which is a distinct approach from the principle that in court, the public prosecutor is obligated in proving the defendant's guilt.³

Legal regulations relating to the eradication of corruption in Indonesia, the principle of reverse proof is regulated in Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of Corruption. The application of the reverse proof principle in the Indonesian legal system is not perceived as an act of legal intervention into the fundamental rights of individuals or a direct violation of the International Covenant on Civil and Political Rights. Nevertheless, this principle should be adjusted to the principles of justice, including the presumption of innocence which places the burden of proof on the public prosecutor.⁴ Its implementation must be careful and consider the principles of justice as well as individual human rights guaranteed by law.

The approval of asset forfeiture has also received support from the international community through Part V of the United Nations Convention against Corruption (UNCAC). As a state party to UNCAC, Indonesia, based on Law No. 7/2006 on the Ratification of the UN Convention against Corruption, has an obligation to implement regulations relating to the expropriation of assets obtained from criminal activities in its legal system.

Basically, the legal foundation of reverse proof in Indonesian regulations is provided in Article 37 of Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of Corruption. Article 37 specifies that:

1. The defendant is entitled to prove that they did not commit the crime of corruption;
2. In case the defendant is able to prove that they did not commit the crime of corruption, the court will use this proof as a basis to declare that the charges are not proven.⁵

The principle in Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of Corruption, the defendant is entitled to prove the non-involvement in the corruption act. They must also disclose all of their assets and the assets of other parties involved in the case. Nonetheless, the public prosecutor is still responsible for proving their charges related to corruption acts. It is the point of the balanced burden of proof reversal system described in Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of

³ Hari Soeskandi and Setia Sekarwati, "Pembuktian Terbalik Dalam Tindak Pidana Korupsi," *Jurnal Indonesia Sosial Teknologi* 2, no. 11 (2021): 1942–1950.

⁴ Aristo Pangaribuan, "Innocent Until Presented," *Jurnal Hukum & Pembangunan* 50, no. 2 (September 28, 2020): 344.

⁵ Pemerintah Pusat Indonesia, *Pasal 37 Undang-Undang Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi* (Jakarta, 2001), 37, <https://peraturan.bpk.go.id/Details/44900/uu-no-20-tahun-2001>.

Corruption.⁶ This is regulated in Article 37A of Law No. 20/2001 concerning Amendments to Law No. 31/1999 concerning the Eradication of the Corruption.

The elements of the corruption crime itself emphasize state financial losses in Law No. 20/2001 concerning Amendments to Law No. 31/1999 concerning Eradication of Corruption Act. In Indonesian regulations, it is stipulated that state financial losses must be restored or replaced by the perpetrators of corruption crimes. This is referred to later as Asset Recovery. However, the implementation of law enforcement in Indonesia has not been in accordance with the foundation of the law on the eradication of corruption, because in fact the judicial practice of corruption cases is still unable to effectively return state finances in the absence of confiscation or seizure of criminal proceeds.

However, these measures are considered contrary to the principle of presumption of innocence because there is no court decision that legally and convincingly states that a person has committed a corruption crime. Some are concerned that the application of the reverse proof principle could create a loophole for human rights violations. For instance, an official who owns luxurious property from legitimate income can easily be accused of obtaining it through corruption. This can put great pressure on officials and seems incompatible with the principle of presumption of innocence.⁷

This then becomes a legal paradigm of law enforcers in the Indonesian criminal justice system due to the incompatibility of legislation with its implementation. The current Draft Law on Criminal Assets Forfeiture has generated a lot of controversy with Article 5, which classifies the assets of the criminal defendant:

1. Assets obtained from criminal offenses, including those that have been transferred to personal property, other people, or corporations, whether in the form of capital, income, or other economic benefits;
2. Assets suspected of being used in a criminal act;
3. Other assets owned by the perpetrator of a criminal act as a substitute for assets confiscated by the state;
4. Assets that are found items suspected of originating from criminal acts.⁸

In addition, Article 5 Paragraph 2 provides that in addition to the assets as referred to in Paragraph 1, assets that may be forfeited under this law include:

1. Assets that are not equivalent to income or sources of additional wealth that cannot be proven legally the origin of its acquisition, suspected of

⁶ Pemerintah Pusat Indonesia, *Pasal 37A Undang-Undang Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi* (Jakarta, 2001), <https://peraturan.bpk.go.id/Details/44900/uu-no-20-tahun-2001>.

⁷ Rahman Gazali and La Jamaa, "Asas Pembuktian Terbalik Dalam Tindak Pidana Korupsi (Perspektif Hukum Pidana Indonesia Dan Hukum Pidana Islam)," *TAHKIM: Jurnal Hukum dan Syariah* 15, no. 2 (2022): 235–254.

⁸ Pemerintah Pusat Indonesia, *Pasal 5 Ayat (1) Rancangan Undang-Undang Perampasan Aset Tindak Pidana*, 2017, 5.

being related to criminal assets obtained since the enactment of this law; and

2. Assets that are confiscated objects obtained from the proceeds of a criminal offense or used to commit a criminal offense.⁹

Article 7 states that asset forfeiture, as described in Article 5, is carried out under the following conditions:

1. The suspect or defendant has either deceased, absconded, is permanently ill, or their whereabouts are unknown; or
2. The defendant has been acquitted of all charges.

Asset forfeiture can also be carried out against assets that:

1. The case cannot be tried; or
2. The defendant has been found guilty by a court that has obtained permanent legal force, and then it is found that there are criminal assets that have not been confiscated.

The provisions drafted in the Draft Law on Asset Forfeiture are then considered to be contrary to the presumption of innocence. On the other hand, the prosecutor's office, which is authorized under Law No. 16/2004 on the Prosecutor's Office of Indonesia, contains the functions and duties of the prosecutor's office. This regulation serves as the legal foundation for the prosecutor's office in carrying out its duties and authority as an investigator and public prosecutor.

Therefore, whether law enforcement in their efforts to conduct Asset Recovery from corruption crimes is a significant challenge, so there should be a law specifically drafted for asset forfeiture. Furthermore, whether the draft law on asset forfeiture is in accordance with the principles and objectives to support Asset Recovery of state financial losses when adjusted to the principles and legal norms in Indonesia.

In the legal regulations applicable in the United States, the concept of asset forfeiture is also recognized in the United States Code (U.S.C.). Asset forfeiture is a significant legal instrument with several key objectives in law enforcement. The primary goals of asset forfeiture are to harness the proceeds of crime from criminals, disrupt the financial flow of organized criminal syndicates and drug cartels, and return property that can be used to compensate victims and deter crime. Under United States federal law, there are three types of asset forfeiture: criminal, civil judicial, and administrative.

The U.S.C operates in a different manner to the system adopted by the Draft Asset Forfeiture Law. This is generally apparent from the types of settlements and

⁹ Pemerintah Pusat Indonesia, *Pasal 5 Ayat (2) Rancangan Undang-Undang Perampasan Aset Tindak Pidana*, 2017.

the respective objectives of asset forfeiture carried out by United States law enforcement officials. Therefore, this research aims to examine the Draft Asset Forfeiture Law using the United States Code as a comparison to determine whether the Draft Asset Forfeiture Law contradicts individual human rights even in a public law environment.

RESEARCH METHODOLOGY

Comparative legal studies involve analyzing laws from different jurisdictions to identify similarities and differences.¹⁰ These methods help in understanding how legal systems address practical problems, differences in legal standards, distinctive features, commonalities, and historical development of legal regulations.¹¹ The data collected is obtained from laws and regulations, court decisions and online digital survey data. The data is then analyzed and examined to determine the answers to the questions above regarding the suitability of the Draft Law on Asset Forfeiture in relation to criminal offenses and the practice of law enforcement in recovering state financial losses. Legislation that contains regulations regarding the criminal law of Indonesia is a variety of variables that then need to be examined with other regulations or principles of criminal law and statutory principles to be able to provide answers to this research question. The authors collected basic legislation on Indonesian criminal law, Indonesian criminal procedure law, corruption eradication law, United States Code, national and international literature on asset forfeiture and other legal literature. The decisions collected by the authors become secondary data that become materials for analyzing the real execution of the laws and regulations regarding Indonesian criminal law specifically in corruption cases. The digital survey data obtained will serve as evidence for the authors' opinion based on the results of the analysis of the other two data.

RESULT AND DISCUSSION

State Financial Losses

According to Indonesian criminal law, as stipulated in Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of Corruption, Article 2 / Article 3 discusses the elements of the corruption which emphasizes state financial losses. Therefore, calculations and investigations related to state financial losses are important aspects in law enforcement to deal with corruption cases.

¹⁰ Fajar Rachmad Dwi Miarsa et al., "Comparative Study of the Good Faith Concept between Indonesia and the Netherlands in Civil Law," *YURIS: Journal of Court & Justice* 3, no. 1 (2024).

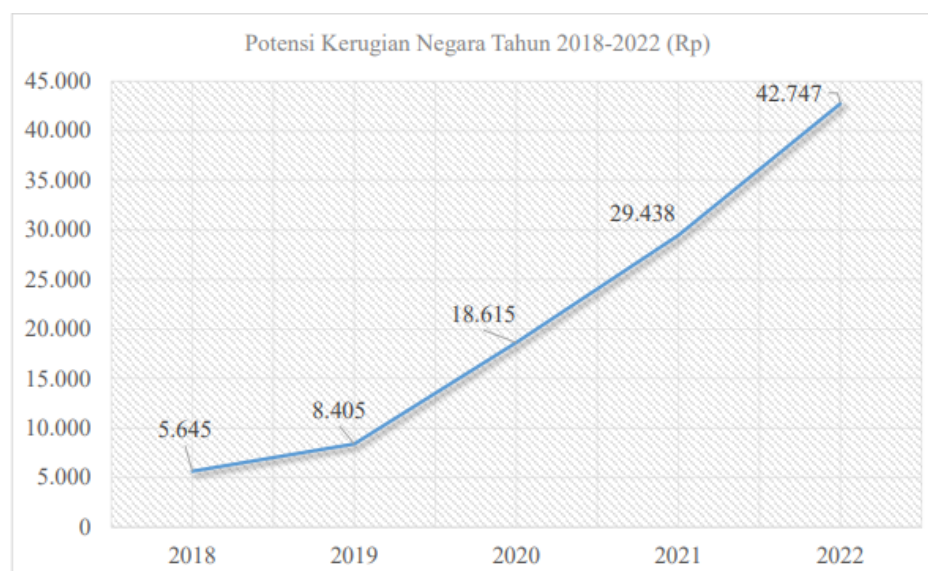
¹¹ Manuchehr Kudratov and Denis Pechegin, "Towards the German Doctrine Interpretation and Criticism of the Construct of Comparative Criminal Law Studies," *Russian Journal of Legal Studies (Moscow)* 8, no. 4 (2021): 55–62.

Table 1. Data on Corruption by Type in 2022

No	Type	Total
1	State Financial Losses	510
2	Bribery	37
3	Extortion	22
4	Embezzlement in Office	4
5	Obstructing Investigation	2
6	Conflict of Interest in Procurement	2
7	Gratuities	2

Source: Report on the Results of Monitoring Corruption Enforcement Trends in 2022.¹²

The data presented above reveal cases with an excessive amount of state financial losses. This indicates the low commitment of law enforcement officials in efforts to return assets from the proceeds of corruption cases.

**Figure 1.** Potential State Financial Losses in 2018-2022

Source: Report on the Results of Monitoring Corruption Enforcement Trends in 2022.¹³

From the lack of law enforcement officials' performance in efforts to recover state finances, the potential value of state financial losses continues to increase consistently. This is caused by the increasingly poor management of the state budget in terms of supervision at every level of government. The presence of Constitutional Court (MK) Decision No. 25/PUUXIV/2016 is expected to resolve the problems that arise regarding the application of Article 2 Paragraph 1 and Article 3 of Law No. 31/1999. This decision changes the characteristics of the

¹² Divisi Hukum dan Monitoring Peradilan ICW, *Laporan Hasil Pemantauan Tren Penindakan Korupsi Tahun 2022*, 2023, <https://antikorupsi.org/id/tren-penindakan-kasus-korupsi-tahun-2022>.

¹³ Ibid.

offense in the Article into a material offense, thus state losses, in accordance with Article 2 Paragraph 1 of Law No. 31/1999 and Article 1 Paragraph 22 of Law No. 1/2004, are defined as a tangible state loss that can be quantified. As a result of this change, investigations of state losses are first conducted by the Supreme Audit Agency (BPK), in accordance with the provisions of the BPK Law and Presidential Decree No. 103/2001 on the Position, Duties, Functions, Authorities, Organizational Structure, and Work Procedures of Non-Departmental Government Institutions. BPK and BPKP have the authority to evaluate and determine the existence of state financial losses.

General Guidance in the Return of State Assets Proceeds from Corruption

Fundamentally, in Indonesia's formal criminal law system, the responsibility to prove whether a crime has been committed lies with the Public Prosecutor. This is outlined in Article 66 of the Criminal Procedure Code (KUHP), where the defendant or the accused is not required to prove their innocence. The elucidation of Article 66 of the Criminal Procedure Code states that this principle is a manifestation of the presumption of innocence.

In several corruption cases investigated and tried in 2023, there were several decisions that punished convicts with restitution. For instance, in Decision No. 1/Pid.Sus-TPK/2023/PN Pdg, the defendant was found guilty of Article 3 of Law No. 31 of 1999 on the Eradication of Corruption as amended and supplemented by Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of Corruption Jo Article 55 Paragraph 1 to 1 of the Criminal Code. The Panel of Judges ordered the defendant to pay restitution in the amount of IDR 3,607,000,000 (three billion six hundred seven million rupiahs). If the defendant fails to pay the restitution within 1 (one) month after the court decision is legally binding, their property can be confiscated by the prosecutor and auctioned off to cover the restitution amount. If the defendant does not have sufficient assets to pay the restitution, it will be replaced with a subsidiary punishment of 6 months imprisonment.¹⁴

In Decision No. 67/Pid.Sus-TPK/2023/PN Jkt.Pst, the amount of restitution was Rp3,469,500 (three billion four hundred sixty nine million five hundred thousand rupiah). However, because the witness Oey Sutomo has returned the land he purchased as stated in the Certificate of Ownership No.4507/Kamal, No.4508/Kamal, No.4509/Kamal, No.4510/Kamal, and No.4511/Kamal to the West Jakarta National Land Agency (BPN), the amount of state losses to be paid by the defendant is nil.¹⁵

¹⁴ *Putusan Pengadilan Tindak Pidana Korupsi Pada Pengadilan Negeri Padang Kelas 1A Nomor 1/Pid.Sus-TPK/2023/PN Pdg*, 2023.

¹⁵ *Putusan Pengadilan Tindak Pidana Korupsi Pada Pengadilan Negeri Jakarta Pusat Nomor 67/Pid.Sus-TPK/2023/PNJkt.Pst*, 2023.

In its pleadings, the Public Prosecutor is required to include an additional sanction in the form of restitution if it is convinced that the defendant has used the proceeds of corruption have resulted in a loss to the state, as examined by the Supreme Audit Agency. Once the defendant receives the judge's final verdict, implementation takes place, particularly if restitution is to be paid, within a month of the verdict being read publicly. Confiscation of the proceeds of crime may be carried out in advance to prevent transfer. If the property is insufficient, the convicted person or their heirs are responsible to pay. If still insufficient, other assets may be auctioned. Problems arise when assets cannot be traced, for instance they have been mortgaged or pledged to a bank, causing delays in execution due to civil issues.¹⁶

The trial of corruption offenses in court is similar to general criminal offenses, except that there are differences in terms of proof. Law No. 20/2001 applies limited reverse proof: the defendant must prove that they are not involved in corruption and disclose their assets, while the public prosecutor remains responsible for proving the charges. This is regulated in Article 37 of Law No. 20/2001 on the Amendment to Law of Indonesia No. 31/1999 on the Eradication of Corruption, which reads:

1. The defendant is entitled to prove that they did not commit the crime of corruption.
2. In the event that the defendant is able to prove that they did not commit the crime of corruption, the proof shall be used by the court as a basis to declare that the charges are not proven.¹⁷

This provision is an exception to the rule in the Criminal Procedure Code where the burden of proof should be on the Public Prosecutor as the party who is obliged to prove the charges during the trial. However, the prosecutor is still required to prove the charges. This causes difficulties for the Public Prosecutor if the defendant can prove that their wealth did not originate from corruption. Although there is a regulation in the Regulation of the Prosecutor's Office of the Republic of Indonesia No. 19/2020 concerning the Settlement of Money in Lieu of Court Decided Based on Law No. 3/1971 concerning the Eradication of Corruption Crimes which gives additional authority to prosecutors in the execution of restitution to carry out Asset Recovery against state losses, execution can only be carried out following a verdict from the Panel of Judges.

Presence of Draft Law on Asset Forfeiture Related to Crimes

¹⁶ Diandra Ayasha Soesman and Rizanizarli Rizanizarli, "Penolakan Tuntutan Pidana Pembayaran Uang Pengganti Oleh Hakim Terhadap Tindak Pidana Korupsi," *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana* 2, no. 2 (2018): 430–440.

¹⁷ Indonesia, *Pasal 37 Undang-Undang Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi*.

In the Draft Law on Asset Forfeiture Related to Crimes, the regulated efforts aim to strengthen the legal system for the forfeiture of assets related to criminal acts without requiring a court decision in a criminal case (non-conviction based forfeiture). This mechanism, known as In Rem Forfeiture, is considered a necessity in the endeavor to eradicate financial crimes. In rem forfeiture has an objective in line with criminal forfeiture to retrieve the proceeds of crime, except with a different process. The in rem forfeiture model stipulated in Law No. 20/2001 on the Amendment to Law of the Republic of Indonesia No. 31/1999 on the Eradication of Corruption, with reverse proof, requires the prosecutor to prove the existence of state losses without the obligation to prove the defendant's guilt, only with a request to seize assets suspected of being the proceeds of a criminal act.

Although in rem forfeiture is considered more effective, it is important to remember that it should not replace the criminal justice process against the offender. Although more efficient, it is advisable not to use in rem forfeiture if law enforcement is capable of criminally prosecuting the perpetrator. Criminal law sanctions and asset forfeiture should still be utilized to deal with crime. In rem forfeiture should not replace the entire criminal law process, unless the criminal justice system is not viable. It is preferable that criminal forfeiture and in rem forfeiture approaches are utilized together to address crime more effectively.

Although the purpose of the Draft Law on Asset Forfeiture Related to Crimes is to improve difficulties in recovering state financial losses, the proposed regulation is causing problems due to the underdeveloped draft of the regulation. According to Article 7 of the Asset Forfeiture Draft Law, asset forfeiture may be used in cases when the defendant or suspect has been found not guilty of all charges, has passed away, absconded, is terminally ill, or is unknown.¹⁸ When a defendant is found guilty by a court with permanent legal force, asset forfeiture can also be used against assets that are unable to be utilized in a criminal trial. However, it is sometimes discovered that there remains criminal assets which have not been recovered.¹⁹

According to the provisions of Law No. 20/2001 concerning Amendments to Law No. 31/1999 concerning Eradication of Corruption, there may have been a breach of the principle of justice if the defendant is capable of proving otherwise in a restricted and impartial reverse proof.

The United States System for Asset Forfeiture of Criminal Acts

Under most circumstances involving financial crimes or income from criminal activity, the property and proceeds of those crimes can be legally seized by the United States government. Title 18 U.S.C. 981 and 982 are federal

¹⁸ Pemerintah Pusat Indonesia, *Pasal 7 Rancangan Undang-Undang Perampasan Aset Tindak Pidana*, 2017, 7.

¹⁹ Ibid.

regulations that govern the conditions under which property may be seized and taken by the US government through asset forfeiture procedures. Asset forfeiture is a highly effective means of seizing the ill-gotten gains of criminals, disrupting networks of structured criminal organizations, and preventing ongoing criminal activity. Funds obtained from asset forfeiture can also be used to compensate victims of crime for their losses. However, if a person is unfairly charged or the government mistakenly suspects that an asset is linked to criminal activity, then it is likely that the asset will be seized for no apparent reason.

Under the U.S.C., there are two legal ways to forfeit assets: criminal forfeiture and civil forfeiture. The goal of both procedures is to seize assets that are related to illegal conduct. The primary distinction between the two is that, in contrast to civil forfeiture, criminal forfeiture does not require a prosecutor to secure a criminal conviction. In Section 18 U.S.C. 981 on Civil Forfeiture, it is explained that: “a) (1) The following property is subject to forfeiture to the United States: (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.”²⁰

Meanwhile, Article 18 U.S.C. 982 on Criminal Forfeiture states that: “(a) (1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeits to the United States any property, real or personal, involved in such offense, or any property traceable to such property.”²¹

Expropriation and forfeiture are frequently associated with criminal inquiries into organized crime, including cases involving the Racketeer Influenced and Corrupt Organizations Act (RICO), drug trafficking, and money laundering. Any other criminal laws also include provisions that allow for forfeiture of proceeds from criminal offenses, such as fraud, theft, forgery, mail fraud, telephone fraud, drug smuggling, identity theft, computer crimes, and other fraudulent crimes.

As provided in § 981 and § 982 U.S.C, there exist two types of forfeiture, Criminal Forfeiture and Civil Judicial Forfeiture. Criminal Forfeiture is an in personam (against the individual) action against the defendant that involves notice of intent to seize property as mentioned in the criminal conviction. A criminal conviction is required, and forfeiture becomes part of the defendant’s sentence. Criminal forfeiture is limited to the defendant’s property interest, including proceeds obtained from the defendant’s illegal activity. In general, criminal forfeiture occurs on property involved in the specific articles for which the

²⁰ United States Government, *Title 18 United States Code Part I Chapter 46 § 981*, 1988, <https://uscode.house.gov/view.xhtml?path=/prelim@title18/part1/chapter46&edition=prelim#:~:text=%C2%A7981.,property%20traceable%20to%20such%20property.>

²¹ United States Government, *Title 18 United States Code Part I Chapter 46 § 982*, 1988, <https://uscode.house.gov/view.xhtml?path=/prelim@title18/part1/chapter46&edition=prelim#:~:text=%C2%A7981.,property%20traceable%20to%20such%20property.>

defendant is found guilty. As part of the sentence, the court may order forfeiture of the property listed in the indictment, a sum of money as restitution, or other property in lieu. The government must prove with a certain amount of evidence the necessary connection between the crime of which it is convicted and the assets to be seized. After an initial forfeiture order is issued, additional proceedings are initiated to determine whether there is a third-party ownership interest in the property that the government wishes to seize. Then, the court will issue a final seizure order.

Meanwhile, Civil Judicial Forfeiture is an *in rem* (against property) proceeding brought against property derived from or used to commit an offense, rather than against the person who committed the offense. In contrast to criminal forfeiture, no criminal conviction is required, although the government must still prove in court by a preponderance of the evidence that the property is related to criminal activity. This process allows the court to gather all parties with interests in the property in one case and resolve all issues related to the property simultaneously. In a civil forfeiture case, the government is the plaintiff, the property is considered the defendant, and anyone who claims an interest in the property is referred to as the claimant. Civil forfeiture allows the government to file cases against property that would not be reachable through criminal forfeiture, such as the property of runaways, terrorists, and other criminals located outside the United States. Civil forfeiture also allows for the recovery of assets from defendants who have deceased or where the perpetrator of the crime cannot be identified.²²

The desired effort of the Draft Law on Asset Forfeiture Related to Criminal Acts, when considered from the conditions and situations where corruption crimes in Indonesia are increasingly potential, and so is the potential for state financial losses because the *modus operandi* of the perpetrators of criminal acts is to use the state budget or with other plans that impact on state financial losses. Therefore, it is obvious that the drafters of the law considered that *in rem* forfeiture is an appropriate new method to support law enforcers in their duties and functions to return assets resulting from criminal offenses that cause damages to state finances.

However, the mechanism without criminal charges, which is considered a new breakthrough, as stipulated in Article 7, conflicts with the human rights mandated in the Indonesian constitution, which is the 1945 Constitution Article 28H Paragraph 4. Although in Indonesian criminal procedure law, confiscation of the proceeds of crime is carried out in accordance with Article 39 Paragraph 1 letter a of Law No. 8/1981 concerning Criminal Procedure Law (KUHP), which authorizes the confiscation of objects or bills allegedly obtained from criminal acts by suspects or defendants. For example, in the case of theft, stolen goods can be confiscated during an arrest or search, while in the case of corruption, proceeds

²² United States Department of Justice, "Types of Federal Forfeiture," last modified 2023, <https://www.justice.gov/afp/types-federal-forfeiture>.

of crime such as bribes to public officials can also be confiscated as state losses. However, it is crucial to note that the seized assets must first be proven to be part of the criminal proceedings and whether the proceeds relate to evidence of the perpetrator's guilt.

In the technical context governed by the U.S.C, as previously explained in § 981 and § 982 U.S.C, since the alleged assets are included in the indictment in criminal forfeiture cases, the federal defense attorney's primary objective is to either establish that the stated assets are not the outcomes of criminal behavior or obtain the charges dropped or acquitted. In civil forfeiture proceedings, there are multiple avenues for obtaining the government to relinquish unlawfully confiscated assets. One is to become a petitioner in the forfeiture proceedings. A person may file a petition in a civil forfeiture action if they are entitled to a legitimate legal claim to the property. The person has the responsibility of proving that the property was not conceived from illegal conduct or that they are entitled to it in another way, such as as a result of being an innocent bystander of crime.

In the Draft Law on Asset Forfeiture, asset forfeiture referred to in Article 2 is a type of civil asset forfeiture that is *in rem*. In *rem* asset forfeiture is a legal action aimed directly at the asset itself, rather than at an individual (*in personam*) as in criminal cases. In this regard, asset forfeiture provided for in the Draft Law shares similarities with the system provided for in the U.S.C. In *rem* confiscation through a reverse evidentiary hearing process requires a balance of probabilities. This principle of balanced probability of proof separates asset ownership from the criminal offense, and aims to provide protection for the rights of the defendant to be presumed innocent, in line with the principle of non-self incrimination.²³

Oliver Stolpe emphasizes the importance of proportionality between the protection of individual rights and asset forfeiture measures allegedly derived from corruption.²⁴ Stolpe argues that perpetrators of corruption crimes should be faced with charges that correspond to the crime they committed, as charged by the public prosecutor. In addition, Stolpe opposes the use of reversal of the burden of proof and prefers to rely on negative proof based on the law of the land.

The idea of "very high balanced probability theory," which nevertheless requires negative proof in compliance with the law, elevates the human rights of those implicated in corrupt conduct to a high level. Reversing the burden of proof can be used to determine the provenance of assets accused of coming from corruption, as there are situations when the law requires no negative proof. The aim is to uncover state assets that have been corrupted by the perpetrators of

²³ Refki Saputra, "Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) Dalam RUU Perampasan Aset Di Indonesia," *Integritas: Jurnal Antikorupsi* 3, no. 1 (2017): 115–130.

²⁴ Lilik Mulyadi, "Asas Pembalikan Beban Pembuktian Terhadap Tindak Pidana Korupsi Dalam Sistem Hukum Pidana Indonesia Pasca Konvensi Perserikatan Bangsa-Bangsa Anti Korupsi 2003," *Jurnal Hukum dan Peradilan* 4, no. 1 (March 31, 2015): 101.

corruption.²⁵ It is necessary to emphasize the proportionality between protecting individual freedom and deprivation of individual rights regarding the ownership of assets suspected of originating from corruption.

In the context of human rights, the accused of corruption should be placed in the most honorable position. Therefore, the use of reversal of the burden of proof should not be applied, and the principle of beyond reasonable doubt should remain. However, the reversal of the burden of proof can be selectively applied only to the assets owned by the perpetrators of corruption using balanced and limited probabilities. Implementing the theory developed by Oliver Stolpe can help overcome problems in the enactment of asset forfeiture laws that may conflict with human rights.

However, in the Draft Law on Asset Forfeiture related to Criminal Offenses, there is no sign of any application or exception to human rights or the principle of proof of guilt (*schuld*) over the *mens rea* and *actus reus* of the perpetrator, especially in consideration of Article 7 which states that asset forfeiture can be carried out with or without charge. This principle of *in rem* forfeiture raises issues similar to those in the United States, where civil forfeiture allows law enforcement to seize and then keep or auction/sell any property/assets that they claim are involved in a crime. This is comparable to the system where evidence can be forfeited to the state in a criminal offense. However, in *in rem* forfeiture in the United States, the owner does not have to have been arrested or convicted of a crime for their cash, car, or even real estate to be permanently taken by the government.²⁶

English law perpetuated the practice of civil forfeiture within the United States. During the Prohibition era, the government constantly confiscated bootleggers' property in an effort to prohibit the illegal production and distribution of alcohol. Civil forfeiture remained an option even after Prohibition came to an end, although it was less frequently employed until the 1980s, when the Drug War began. Congress enacted the Unified Crime Control Act of 1984 in response to mounting worries over a thriving drug trade and various other criminal activity. The Racketeer Influenced and Corrupt Organizations laws (RICO) was revised in Part III of the statute with the aim of making it clearer which property is forfeitable and to provide a rebuttable forfeitability presumption. Put differently, the government possesses the right to forfeit beforehand and then oppose the forfeiture in court. The Justice Sharing Program, which enables the government to distribute confiscated assets and keep the earnings, was also established by the law in question.

The Civil Asset Forfeiture Reform Act (CAFRA), enacted by Congress in 2000, established a more equitable and standardized system to handle federal civil

²⁵ Ibid.

²⁶ American Civil Liberties Union, "Asset Forfeiture Abuse," <https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse>.

forfeiture. Better safeguards for those facing civil forfeiture were added by CAFRA, which also altered a number of federal statutes pertaining to civil forfeiture. These consist of the following: a requirement that the government reimburse reasonable legal costs incurred by claimants who “substantially prevail,” a “innocent owner” defense, procedures for civil forfeiture of real property, and an encouragement to make use of criminal forfeiture rather than civil forfeiture.

Many states have passed legislation restricting the use of civil forfeiture in recent years; some have even outright prohibited it unless the owner has been found guilty of the offense that warrants the forfeiture. State and local law enforcement agencies can now divide the liquidation proceeds from civil forfeiture proceedings they turn over to federal law enforcement through a gap created by the Justice Sharing Program. In the US, there is plenty of discussion concerning the controversy related to this, which is thought to violate the Bill of Rights guaranteed by the US Constitution. In response to this loophole, in 2015, Attorney General Holder unilaterally prohibited federal law enforcement from collaborating with local and state police departments to take forfeiture cases where local and state law prohibits without a search warrant or criminal charges. Attorney General Holder also limited federal forfeiture of bank accounts to only those cases where illegal transactions occurred.²⁷ Thus, an Asset Forfeiture System similar to the Asset Forfeiture principle in the U.S.C. allows for misuse/abuse of the legislation and is potentially contrary to human rights and the basic principle of criminal law “presumption of innocence”, both in Indonesia and the United States.

CONCLUSION

The establishment of the Draft Law on Asset Forfeiture Related to Crimes, which aims to improve the system of returning state financial losses by perpetrators of corruption crimes in Indonesia, has generated considerable controversy as it contradicts human rights guaranteed by the Constitution. Although there have been numerous previous efforts and procedures from law enforcement to return assets under the criminal procedure law and other regulations, the judicial system is still insufficient to effectively address potential state financial losses due to the rampant corruption crimes in Indonesia.

The Asset Forfeiture system, which shares similarities with the Asset Forfeiture principle in the U.S.C., has the potential to be abused and violates human rights and the basic Criminal Law principle of “presumption of innocence,” both in Indonesia and the United States. Therefore, it is necessary to improve the Draft Law on Asset Forfeiture with due regard to Human Rights, by

²⁷ Legal Information Institute, “Civil Forfeiture,” *Cornell Law School*, https://www.law.cornell.edu/wex/civil_forfeiture.

placing the perpetrators of corruption on the Principle of the Highest Balanced Probability, and still adhering to the principles of the criminal process in accordance with basic criminal law. This emphasizes that a person should only be punished proportionally and based on a judge's decision as an instrument that confirms that a person has legally and convincingly committed a criminal act.

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