The Urgency Of Criminalizing Illicit Enrichment And The Prospect Of Its Law Enforcement In Indonesia

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Abstract
The UNCAC has regulated illicit enrichment in Article 20 as the acquisition of improper assets by public officials whose legitimate origin cannot be proven. Indonesia has ratified the convention, which imposes a mandatory obligation to regulate illicit enrichment as a criminal offense. However, until now, Indonesia has not yet criminalized illicit enrichment. This study aims to determine the urgency of criminalizing illicit enrichment and the prospects for its law enforcement in Indonesia. This research is normative legal research with descriptive qualitative data analysis. The results of this study show that the criminalization of illicit enrichment is important to do because of international obligations as a logical consequence of the ratification of UNCAC. Furthermore, the criminalization of illicit enrichment is an effort to reform the law, especially anti-corruption law enforcement in Indonesia, including the optimization of asset recovery mechanisms. The prospect of law enforcement that can be projected for the criminalization of illicit enrichment can be studied through the perspective of material criminal law which requires delict and sanction arrangements, as well as in the perspective of formal criminal law, which requires the LHKPN report as initial evidence, the application of reversal burden of proof, and NCB asset recovery.

Keywords: Asset Recovery, Corruption, Illicit Enrichment, Reversal Burden of Proof.

Introduction

Law Number 31 of 1999, as amended by Law Number 20 of 2001 on the Eradication of Corruption (Indonesia Anti-Corruption Law), is limited in its coverage of corruption crimes within Indonesia. It fails to address all types of corruption comprehensively, leaving loopholes for individuals seeking to illicitly enrich themselves through deception or the misappropriation of state assets. This inadequacy becomes evident when compared to the United Nations Convention Against Corruption (UNCAC), which includes provisions for illicit enrichment.

Illicit enrichment regulations highlight the disparity between the wealth of many public officials and their official incomes, which often cannot account for the total assets they possess. This discrepancy raises suspicions about the legality of their wealth origins, suggesting it may have been acquired unlawfully. Such suspicions typically arise due to public perceptions that such wealth accumulation may involve criminal activities like corruption or money laundering, particularly when assets significantly surpass legitimate income sources.

A case in Indonesia happened on May 2023, AKBP Achiruddin Hasibuan, a senior police officer in North Sumatra, Indonesia, became embroiled in a scandal related to illicit enrichment. Initially accused of permitting his son to commit violence against a student, his conspicuous wealth showcased on social media drew public scrutiny. The Inspectorate with Propam investigated his assets following public outcry. Similarly, in March 2023, Rafael Alun Trisambodo, a Ministry of Finance official, faced allegations of illicit enrichment. Discrepancies between his assets and reported income suggested possible corruption, leading to suspicions of gratification practices amounting to Rp1.3 billion. An internal audit uncovered tax evasion and incorrect asset reporting, resulting in Rafael's

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dismissal and investigation as a corruption suspect by the KPK. This case unveiled broader economic crimes totaling Rp349 trillion within the Ministry of Finance, involving sophisticated money laundering techniques amidst unchanged investigative approaches.

Several cases that have occurred in Indonesia related to illicit enrichment have reflected a need to regulate it as a criminal act. These things have prompted calls from the community and institutions to create new legal norms to address this problem. With this background, the author explores what are the urgencies in criminalizing illicit enrichment and how the projections are about the prospects for law enforcement in Indonesia.

Problem Formulation

Based on the background which has been explained, there are 2 (two) problems that will be studied in this paper, as follows:

1) What is the urgency of criminalizing illicit enrichment in Indonesia?
2) How is the prospects for law enforcement of illicit enrichment as a criminal offense in Indonesia?

Methodology

In this study, the author uses a normative legal research method that focuses on the urgency of criminalizing illicit enrichment and the prospects for its law enforcement in Indonesia, with data collection techniques in the form of literature analysis and document studies. This study uses primary legal materials in the form of international conventions, applicable laws and regulations, other regulations that are equated, official documents or records issued by the state, and court decisions, and uses secondary legal materials in the form of legal facts, doctrines, principles of criminal law, and legal opinions of criminal law experts in books, journals, and articles, and tertiary legal materials, namely legal dictionaries and legal encyclopedias. Data analysis in this study was carried out descriptive-qualitatively.

This study uses 3 (three) approaches. *First*, the conceptual approach, referring to legal doctrine and relevant scientific perspectives. *Second*, the legislative approach, carried out by reviewing existing laws and regulations to assess their application to the criminalization of illicit enrichment and to project the prospects for its law enforcement in Indonesia. *Third*, the case approach, carried out by studying court decisions, so that it can identify the common thread that supports the urgency of criminalizing illicit enrichment.

Discussion and Results

The Urgency of Criminalizing Illicit Enrichment in Indonesia

1) International Obligation

In 2003, the United Nations Convention Against Corruption (UNCAC) was passed in Merida Mexico. This convention was adopted by the General Assembly with resolution number 58/4 on October 31, 2003 which consists of 8 chapters and 70 articles. Indonesia became one of the state parties to this convention through Law Number 7 of

2006 concerning the Ratification of UNCAC through a plenary meeting of the Indonesian Parliament on March 20, 2006.

As a state party, Indonesia has obligations regarding illicit enrichment which is regulated in Article 20 of UNCAC, based on the phrases "……, *each party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence,* ……" which implies a mandatory obligation at the level of an order. [3] This mandates Indonesia, as a state party to UNCAC, to prioritize measures or action plans for legislation, specifically requiring the criminalization of illicit enrichment as part of its national legal framework.[4] Currently, 98 countries worldwide have enacted legal measures to address illicit enrichment.[5] Countries like China and Malaysia serve as examples, where legal instruments criminalize illicit enrichment. These laws empower states to prosecute public officials who unjustifiably amass wealth, enabling imprisonment and fines. Moreover, these legal frameworks provide avenues for states to recover assets lost through corruption, thereby mitigating financial losses incurred by the state.

The 7th paragraph of the Preamble of the UNCAC states that: "*Convinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law*."

This emphasizes that illicit enrichment is a very crucial problem in the convention *a quo*. Since illicit enrichment in UNCAC is a mandatory provision, it is important for state parties to consider legislative efforts to implement the convention.

In UNCAC, there is only a description of the minimum standard regarding illicit enrichment. Even so, UNCAC still provides rules limited to a flexible definition of illicit enrichment in Article 20 of UNCAC, which states that each state party must have a mechanism for criminalizing the concept of the crime of illicit enrichment in its legislation, which mechanism is in line with the constitution and legal principles of each state party.[6]

As a convention that has been ratified by Indonesia, it has become an obligation to synergize the regulation of illicit enrichment as an urgent need in the respective legal systems. However, Indonesia has not yet regulated the provision of illicit enrichment as a criminal offense even though regulating illicit enrichment as a criminal offense is a mandate of UNCAC.

2) Legal Vacuum in Corruption Law

In Indonesia's fight against corruption, law enforcement often faces challenges from politically influential figures who can directly or indirectly influence legal proceedings. This influence may impact the course of justice or even intervene in the

[3] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, Legislative guide for implementation of the UNCAC, paragraph 3 number 12, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[4] *Ibid.*, paragraph 3 number 10.

[5] Andrew Dornbierer, *Illicit Enrichment*, (Basel: Basel Institute on Governance, 2021), pp. 44.

[6] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, art. 20, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

legal process itself. Compounding these challenges is a legal provision requiring law enforcement to seek presidential approval to prosecute certain officials suspected of corruption. Moreover, if corrupt individuals launder money by investing in legitimate businesses, they can transfer ownership to third parties, especially in foreign jurisdictions.

Former Indonesian National Police Chief, General Hoegeng, during his tenure from 1968-1971, once questioned the wealth of his officers, expressing disbelief at how their assets, such as luxurious cars and residences, could be afforded on their salaries alone.[7] Today, observing the vast wealth of many public officials compared to their official incomes raises suspicions that these assets were acquired unlawfully, potentially through corruption or money laundering. This suspicion fuels public frustration and undermines trust in the justice system, highlighting a significant gap between public expectations of justice and the conduct of state officials.

Transparency International Indonesia has examined various cases of corruption in Indonesia. The result is that it is stated that Indonesia's corruption perception index in 2023 will stagnate at a score of 34, and even its ranking will decline to 115.[8] Looking back, this stagnation has been going on for nine years since 2014. This certainly raises a big question mark over the commitment to eradicate corruption by the government and law enforcement officials.

Throughout 2023, Indonesia saw several controversial court decisions regarding corruption cases. Former Supreme Court Judge Gazalba Saleh was acquitted on appeal, raising questions.[9] Similarly, the Supreme Court annulled a case involving Surya Darmadi, who owed Rp39.75 trillion in restitution for misusing permits in oil palm plantations.[10] Notably, colossal corruption cases continued to afflict Indonesia, including PT Asabri (Rp22.7 trillion), PT Jiwasraya (Rp16.8 trillion), and the recent PT Timah case (Rp271 trillion). The 2010 case of Gayus Tambunan, a low-level tax official with assets exceeding Rp100 billion, shocked the public.[11] Despite earning a modest salary, he engaged in suspicious transactions and attempted to bribe officials during his trial[12], revealing systemic corruption within government bureaucracy. In 2022, Indonesia Corruption Watch reported 2,056 corruption case decisions involving 2,249 defendants. The average sentence for convicted individuals was 3 years and 4 months.

[7] Nurhadi, "Cerita Jenderal Hoegeng Mengembalikan Hadiah dari Istri Menteri", *Tempo*, October 14, 2021, Accessed on June 17, 2024. https://nasional.tempo.co/read/1517317/cerita-jenderal-hoegeng-mengembalikan-hadiah-dari-istri-menteri

[8] Transparency International Indonesia, *Hasil Indeks Persepsi Korupsi 2023*, (Jakarta: Transparency International Indonesia, 2024).

[9] *Vide* Gazalba Saleh (2023) 5241 K/Pid.Sus/2023.

[10] *Vide* Surya Darmadi (2023) 4950 K/Pid.Sus/2023.

[11] Kompas.com, "Gaji Gayus Tambunan "Hanya" Rp 12,1 Juta", *Kompas.com*, March 25, 2010, Accessed on June 17 2024. https://nasional.kompas.com/read/2010/03/25/15462973/~Nasional#:~:text=Inspektur%20Jenderal%20Kementerian%20Keuangan%20Hekinus,sebesar%20Rp%2012%2C1%20juta.

[12] *Vide* Gayus Halomoan Partahanan Tambunan (2011) 1198 K/Pid.Sus/2011.

State losses amounted to Rp48.786 trillion, with bribes totaling Rp376.710 billion and money laundering amounting to Rp244.728 billion.[13]

The Anti-Corruption Law of 1999, initially designed under different legal and societal conditions, now faces challenges in addressing modern, intricate forms of corruption effectively. Evolving corruption tactics exploit existing legal gaps, rendering the law increasingly inadequate against sophisticated and covert practices. Illicit enrichment, commonly linked with corruption, involves individuals unable to justify the source of their wealth. Indonesia's lack of specific laws criminalizing illicit enrichment creates opportunities for corrupt individuals to exploit these gaps. Establishing illicit enrichment as a criminal offense in Indonesian law is essential to closing these loopholes and combating corruption robustly. Criminalizing illicit enrichment would provide a definitive legal framework to prosecute corrupt activities, bolster anti-corruption measures, and facilitate the recovery of embezzled state funds. Such a move would send a strong signal across all levels of government and society that corruption is unacceptable and will be vigorously prosecuted.

3) Changes in Values and Needs

Criminal law reform addresses pressing societal needs and policy considerations, encompassing social aspects like culture and politics, and policy aspects such as criminal and social policies.[14] The reform can adopt either a policy-driven or value-driven approach. Central to material criminal law reform are issues identified by Prof. Barda Nawawi Arief: defining criminal acts and determining appropriate sanctions.[15] The inadequacy of current criminal laws in tackling crime fuels the evolution of criminal legislation.[16] In Indonesia, there's a growing call to reassess and potentially reform laws governing corruption, which persistently permeates society, adapting to new methods. Deciding on the necessity of new laws, like those addressing illicit enrichment, involves philosophical and legal evaluations. These frameworks serve as critical tools in analyzing contemporary corruption trends in Indonesia.

Through the philosophical foundation, the criminalization of illicit enrichment in Indonesia becomes very crucial, since corruption has occurred so massively in Indonesia and has infected all sectors, both private and public sectors, from the lowest to the highest level. Also, LHKPN is not carried out optimally and transparently, but on the other hand, there are many state officials who have valuations of assets beyond reasonable limits based on the logic of the income they receive as state officials.

Meanwhile, through a juridical basis, the regulation of illicit enrichment in Indonesia needs to be carried out, because many weaknesses have been found in the application of Indonesia's Anti-Corruption Law, which are:

[13] Indonesia Corruption Watch, *Laporan Hasil Pemantauan Tren Vonis 2022: Menurunnya Performa Kerja Mahkamah Agung*, (Jakarta: Indonesia Corruption Watch, 2023), pp. 5.

[14] Faisal, *et. al.*, "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Code", *Cogent Social Sciences*, Vol. 10, No.1, (2024):1-17.

[15] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep RKUHP Baru*, 2nd Ed., (Jakarta: Sinar Grafika, 2017), pp.32.

[16] M. Ali Zaidan, *Kebijakan Kriminal*, (Jakarta: Sinar Grafika, 2016), pp. 338.

1. Asset forfeiture is limited to assets directly linked to corruption crimes or obtained unlawfully, excluding assets not part of the ongoing case. This gap may allow corrupt individuals to retain assets unrelated to their legitimate income[17];
2. Restitution payments often fail to fully reimburse financial losses suffered by the state, capped at the amount derived from the corruption. In practice, these payments frequently fall short of covering actual losses[18];
3. There exists a loophole where corrupt individuals may evade restitution by claiming inability to pay, substituting the obligation with extended imprisonment. This loophole is exacerbated by delays in asset tracing and seizure during investigations, giving perpetrators time to conceal or transfer assets[19];
4. The requirement to prove corruption in court with final legal decisions before asset recovery or restitution can commence poses a significant hurdle. This delay complicates efforts to combat corruption, especially when suspects possess assets of unclear origin disproportionate to their lawful earnings.[20]

In Indonesia, the ability to confiscate and forfeit criminal proceeds and instruments is contingent upon the perpetrator being proven guilty through a final court decision. This penalty is supplementary and can only be applied if the primary punishment is imposed, based on the prosecutor's requisition and the judges' discretion.[21] To enhance the effectiveness of combating corruption, there is a pressing need to reform criminal laws governing corruption. This reform should address current deficiencies in legal instruments and law enforcement efforts, particularly focusing on improving mechanisms for asset forfeiture to recover state financial losses more effectively. Thus, illicit enrichment is the answer to all of these problems.

4) Asset Recovery

The concept of "crime doesn't pay" underscores the international community's stance against allowing corrupt individuals to enjoy the proceeds of their crimes, which could perpetuate further wrongdoing.[22] Confiscating and forfeiting these proceeds is crucial in reducing economic crime, aiming to remove the wealth that motivates corruption. Efforts include enhancing law enforcement to secure and return these assets

[17] *Vide* Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 18, sec. (1), letter a.

[18] *Vide* Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 18, sec. (1), letter b.

[19] *Vide* Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 18, sec. (2) and (3).

[20] *Vide* Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 18, sec. (2).

[21] *Vide* Law No. 13 of 2022 on the Second Amendment of Law No. 12 of 2011 on Formation of Legislative Regulations, Appendix II: Formation of Legislative Regulations: Techniques for Preparing Legislative Regulations, No. 267, pp. 86.

[22] Kimberly Prost, *International Cooperation Under The International Cooperation Under The United Nations Convention Against Corruption In Denying Safe Haven To The Corrupt And The Proceeds Of Corruption*, (Manila: Asian Development Bank, 2006), pp. 3.

through international cooperation and strengthening corruption eradication institutions.

In Indonesia, there is a pressing need to introduce illicit enrichment regulations as part of anti-corruption laws. This approach represents a new strategy to combat corruption, moving beyond targeting perpetrators to recovering assets through a "follow the money" strategy. Illicit enrichment laws are crucial because the accumulation of unexplained wealth often serves as the clearest evidence of corruption, even challenging ordinary citizens' trust.[23] However, enforcing these laws faces challenges, such as proving assets derived from corruption and addressing the ease with which such assets can be transferred or hidden before court decisions are *inkracht*. International frameworks like UNCAC provide mandates for asset recovery, particularly targeting assets linked to illicit enrichment where origins cannot be explained.[24]

Integrating illicit enrichment laws into Indonesia's legal system would bolster its anti-corruption and money laundering frameworks, overcoming current limitations in asset investigation and strategy. This regulatory step promises several benefits in strengthening Indonesia's legal arsenal against corruption, including[25]:

1. Implementing a reversal of the burden of proof system to facilitate maximal asset confiscation from criminal activities. This requires defendants to prove the legal origin of their assets;
2. Strengthening State Officials' Wealth Reports (LHKPN) with both regulatory and coercive measures, including administrative and criminal sanctions. This ensures LHKPN remains robust and prevents it from being manipulated;
3. Introducing illicit enrichment laws that simplify the burden of proof compared to Indonesia's Money Laundering Law. This eliminates the need to first prove a predicate crime to impose penalties;
4. Targeting illicit enrichment directly addresses the primary motivation behind economic crimes, particularly personal gain through wealth accumulation; and
5. Confiscating assets acquired through illicit enrichment is proposed as a strategic approach to reclaim state wealth, potentially reallocating these assets for societal justice and benefit.

Regulating illicit enrichment as a criminal act, especially for public officials and state administrators, enables a strategic asset confiscation mechanism. This approach is critical due to the significant link between bureaucratic integrity and corruption levels.

5) Implementation in Various Countries

[23] Lindy Muzila, et. al., "On the Take: Criminalizing Illicit Enrichment to Fight Corruption", *Stolen Asset Recovery (StAR) Series*, The World Bank - UNODC, (2012).

[24] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, 7th Alenia of Preamble, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[25] ICW, Miskinkan Koruptor Lewat Aturan "Illicit Enrichment", in https://antikorupsi.org/id/news/miskinkan-koruptor-lewat-aturan-illicit-enrichment, accessed on 17 June 2019.

Illicit enrichment regulations in various countries have proven successful in confiscating and recovering assets, while also reducing state financial losses from corruption.[26] Examples of these successes can be observed in several countries[27]:

a. The UK's Proceeds of Crime Act (POCA) since 2003 has enabled the confiscation of 234 million pounds sterling in criminal proceeds;
b. Australia, inspired by the UK, has similarly used its POCA to enhance law enforcement's ability to seize assets derived from crime;
c. New Zealand has followed suit with its Criminal Proceeds and Instruments Bill, modeled after successful UK and Australian practices;
d. Nigeria achieved significant asset recovery from former President Sani Abacha's corruption, totaling $800 million domestically and $505.5 million from Switzerland;
e. Peru undertook legal reforms in 2000-2001, leading to the recovery of assets linked to corruption, including $33 million from the Cayman Islands, $77.5 million from Switzerland in 2002, and $20 million from the United States in 2004, associated with corruption during President Alberto Fujimori's tenure; and
f. The Philippines successfully confiscated $624 million in assets linked to former President Ferdinand Marcos's corruption during 1986-2004, recovered from Switzerland.

Taking a look into Nigeria's journey on successfully recovered state assets linked to former President Sani Abacha's corruption during 1993-1998. Legal instruments, including the Corrupt Practices and Other Related Offenses Act, 2000, Section 44 (2), supported these efforts by enabling the prosecution of public officials for illicit enrichment. Through UNCAC from 2012 to 2020, Nigeria reclaimed USD 609,287,687.98 from Luxembourg, Switzerland, Liechtenstein, Jersey, and the United Kingdom, marking significant achievements in asset recovery and combating corruption.[28] The illicit enrichment provisions in the Nigeria's law serve as a starting point for monitoring assets held by public officials. These provisions do not independently define criminal offenses or specify penalties but instead act as an initial mechanism to detect fraud and corruption among public officials who are suspected of enriching themselves unlawfully.[29]

Based on successful experiences from other countries that have effectively confiscated criminal assets through illicit enrichment laws, Indonesia should promptly enact legislation criminalizing illicit enrichment.

[26] Andrew Dornbierer, *op. cit.*

[27] Ramelan, *Naskah Akademik Rancangan Undang-Undang tentang Perampasan Aset Tindak Pidana*, (Jakarta: BPHN Kemenkumham RI, 2012) pp. 16-17.

[28] Stolen Asset Recovery Initiative, Asset Recovery Watch Database, "Abacha II case (Luxembourg/Switzerland chapter), ID: ARW-562", in https://star.worldbank.org/asset-recovery-watch-database/abacha-ii-case-luxembourgswitzerland-chapter#disclaimer , January 2020.

[29] Law of the Federation of Nigeria No. 5 of 2000 on The Corrupt Practices and other Related Offences, art.44.

Prospects for Illicit Enrichment Law Enforcement in Indonesia

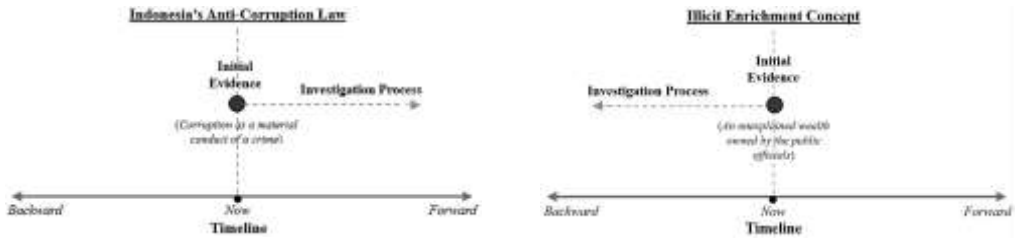
1) Material Criminal Law Perspective

If the concept of illicit enrichment is compared with the concept of corruption which causes state financial losses, then similarities between the two are found. In Article 2 paragraph (1) of the Indonesia's Anti-Corruption Law, there is an element of the offense of "unlawfully enriching oneself".[30] If only understood from a superficial perspective, this element is similar to the concept of illicit enrichment in the 9th Alenia of the Preamble of the UNCAC, namely "*illicit acquisition of personal wealth*".[31] If we dissect it more deeply and holistically, we can find a very basic difference between the two.

The Anti-Corruption Law in Indonesia positions "enriching oneself" as initial evidence under Article 2, requiring law enforcement to trace assets of suspects and their associates. This may lead to reversed burden of proof upon suspect designation, where prosecutors must still prove corruption for wealth beyond reasonable limits, though reversed proof results are supportive evidence.

Contrasting this, illicit enrichment implicates persons with assets surpassing income sources, suspecting illegal acts like corruption, potentially from LHKPN reports. Suspected parties must justify wealth origins, with suspicious transactions or excessive lifestyle hinting at corruption, outlining initial evidence. The differences are explained in the following chart:

Figure 1. The difference of the paradigm between Indonesia's Anti-Corruption Law and Illicit Enrichment



The difference between Indonesia's Anti-Corruption Law and the subsequent concept of illicit enrichment lies in the legal subject. The norm of Article 2 of Indonesia's Anti-Corruption Law is in the form of an "any person" element which recognizes the existence of *natuurlijk-person* and *rechtspersoon*, which is different with the concept of illicit enrichment which only regulates public officials as legal subjects.[32] This limitation targets the corruption committed by state officials by abusing the authority and power that the public has entrusted to them.

[30] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 2, sec. (1).

[31] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, 9th Alenia of Preamble, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[32] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, art. 20, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

Another difference is also in the sanctions applied. In the Indonesia's Anti-Corruption Law, the criminal sanctions are based on Article 10 of the Indonesia's Criminal Code.[33] However, Indonesia's Anti-Corruption Law also regulates additional penalties in other forms, which are confiscation of goods, payment of compensation, closure of all or part of a company, and revocation of all or part of certain rights.[34] This occurs based on the norms regulated by Article 103 of the Indonesia's Criminal Code as a form of implementation of the principle of *lex specialis derogate legi generalis*.[35]

Additional criminal sanctions in corruption cases are facultative, meaning they can only be applied if the primary penalty has been imposed. These sanctions, such as monetary replacement payments, hinge on the discretion of the judges. However, a significant weakness lies in cases where replacement payments are ordered but corruptly obtained assets have been spent or cannot be traced. In such scenarios, the obligation to pay replacement money may be waived, leaving a legal loophole that allows perpetrators time to dispose of or conceal their ill-gotten gains.

Illicit enrichment differs significantly from Indonesia's Anti-Corruption Law. According to UNCAC provisions like Article 20 and its 7th preamble, illicit enrichment aims to reclaim state finances lost to corruption. State parties must implement laws covering corruption offenses listed in UNCAC and facilitate international cooperation for asset forfeiture, recovery, and legal assistance. These differences are evident in three key elements: legal subjects, actions, and sanctions. Illicit enrichment which not yet integrated into Indonesia's anti-corruption legal framework offers a streamlined approach to investigating corruption, potentially strengthening Indonesia's anti-corruption efforts.

Nonetheless, there are crucial challenges in criminalizing illicit enrichment from this perspective. The political will of lawmakers plays a central role in the entire regulatory process, from initiation to enactment, and is often fraught with conflicts of interest. Lawmakers, as officials or state organizers who are subject to the rules on illicit enrichment, must establish standards, penalties, and mechanisms for addressing illicit enrichment as a criminal offense. In this context, the commitment of state officials to combating corruption must be substantial. However, if they are suspected of being perpetrators themselves, implementing these regulations becomes difficult, as it seems they are preparing their own 'funeral'.

2) Formal Criminal Law Perspective

a. The Position of LHKPN as Initial Evidence

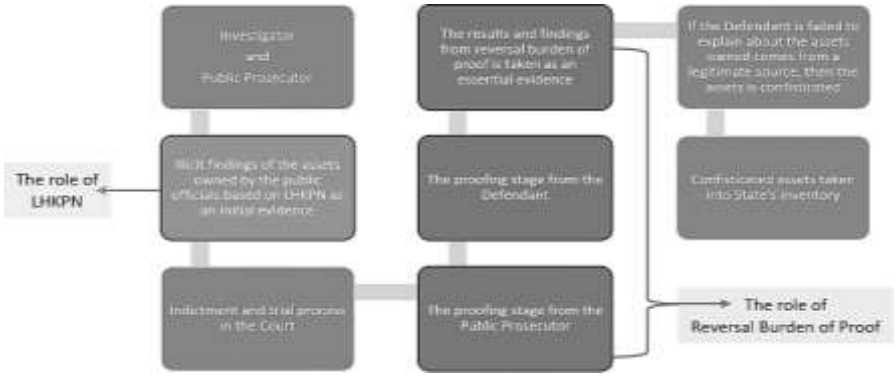
The implementation of illicit enrichment cannot be separated from the role of the State Administrator's Wealth Report (LHKPN). As the 'master key' to opening the doors to illicit enrichment, LHKPN plays a central role in the discovery of an imbalance between the assets owned by a state official and his legitimate sources of income.

When linked to illicit enrichment and reversal of the burden of proof, the LHKPN mechanism becomes the initial stepping stone in finding initial evidence in the form of

[33] Law No. 1 of 1946 on Criminal Law Regulations, art. 10.
[34] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 17 *jo.* 18.
[35] Law No. 1 of 1946 on Criminal Law Regulations, art. 103.

assets belonging to public officials which are suspected to originate from illegitimate sources that must be explained by someone suspected of committing illicit enrichment. For greater clarity, the relationship between the three can be depicted in the following chart.

Figure 2. The scheme of mechanism in handling illicit enrichment case, showing the relevance and role of the LHKPN report and reversal burden of proof.



With the role and position of the LHKPN report being initial evidence along with the reversal burden of proof, both become complementary concepts and strengthen the mechanism for investigating illicit enrichment practices and corruption in Indonesia. The need to integrate illicit enrichment with asset recording systems, such as tax returns and asset declarations, presents a unique challenge in strengthening the LHKPN as the 'main gate' for monitoring illicit enrichment. Improvements in population administration and national data centers are also necessary to support the optimal recording, monitoring, and tracking of assets, thereby reducing the risk of manipulation. Integrating these asset recording systems is expected to facilitate the enhancement of the LHKPN.

b. The Concept of Reversal Burden of Proof

UNCAC has regulated recommendations for implementing the reversal of the burden of proof in Article 31 paragraph (8) as the basis and rules for implementing the reversal burden of proof mechanism in the process of proving illicit enrichment. This mechanism places the obligation on the perpetrator to prove the origin of the assets he owns.

In Indonesia, the evidentiary system for corruption cases follows the Criminal Procedure Code, where the public prosecutor must present all valid evidence in court.[36] Additionally, the Anti-Corruption Law introduces a mechanism for reversing the burden of proof under Article 37 and Article 37A. This allows defendants to refute allegations by proving they did not commit corruption[37] and validating the legitimacy of their assets[38]. The judge considers the defendant's ability[39] or failure[40] to explain asset

[36] Law No. 8 of 1981 on Criminal Procedure Law, art. 184.
[37] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 37.
[38] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 37A.
[39] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 37, sec. (2).
[40] Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, art. 37A, sec. (2).

origins when making decisions, marking this reversal of burden of proof as a *lex specialis* characteristic of Indonesia's Anti-Corruption Law.

Indonesia's Anti-Corruption Law features a reversal burden of proof system that is both limited and balanced. It is termed limited because the public prosecutor must still substantiate their arguments in court, regardless of the defendant's ability to prove innocence. The system is considered balanced because the defendant's burden of proof is legally mandated, differing from the Criminal Procedure Code's Article 66, which follows the principle of "*actori incumbit probatio*" and "presumption of innocence".[41] This setup results in a dual-party mechanism where both the public prosecutor and the defendant play roles in proving their respective cases in corruption trials.

In Indonesia, the reversal burden of proof system is implemented in a limited and balanced manner. It is not applied purely but rather with restrictions, primarily applicable to specific types of corruption cases. This approach presents challenges in implementation, particularly since it hinges on the public prosecutor's ability to confiscate assets. If assets cannot be traced and confiscated, the burden of proof cannot be reversed, creating a legal loophole that complicates efforts to verify the origins of assets.

A challenge in applying the concept of burden of proof reversal is its close connection with human rights. This has long been a point of controversy, as the application of burden of proof reversal is considered to conflict with the principle of presumption of innocence and the principle against self-incrimination. Implementing burden of proof reversal is seen as violating the defendant's right to freely provide testimony in court. Thus, applying burden of proof reversal introduces problems at the implementation level, even though extraordinary efforts are needed to address corruption as an extraordinary crime.

c. Non-Conviction Based Asset Forfeiture Concept in Asset Recovery

Although Indonesia's Anti-Corruption Law addresses asset confiscation in corruption cases, it faces two primary weaknesses:

1. Dependence on Legal Finality, where assets can only be confiscated once a court decision with permanent legal force has been reached in the case. During ongoing investigations, including trials, asset confiscation and replacement payments cannot be enforced due to lack of executory power.
2. Discretionary Nature of Confiscation, where confiscation of assets is facultative and depends on the discretion of the judges, which leads to varying decisions in corruption cases, creating a legal loophole and potential for corruption as this discretion can be exploited or manipulated.

The effectiveness of Indonesia's mechanisms for implementing asset confiscation in corruption cases is currently in question, as they do not effectively prevent perpetrators from enjoying their ill-gotten gains, thereby failing to serve as a deterrent in criminal law. Despite these challenges, Indonesia's Anti-Corruption Law also includes provisions for civil asset confiscation under Articles 32, 33, 34, and 38C. These provisions enable the state, through the state attorney or affected agencies, to pursue

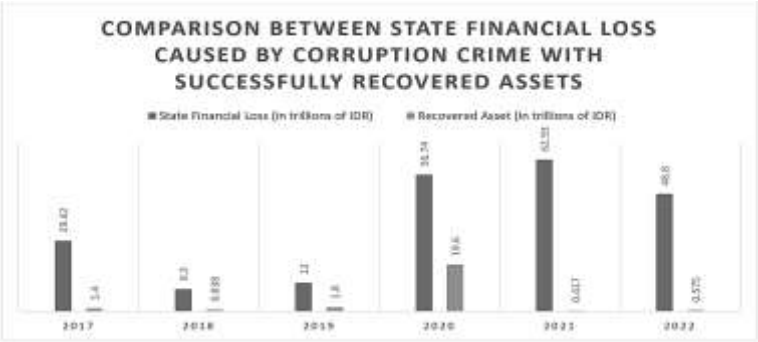
[41] Law No. 8 of 1981 on Criminal Procedure Law, art. 66.

civil lawsuits to confiscate assets linked to criminal acts of corruption. Such lawsuits can proceed against the perpetrator or their heirs if the suspect dies during investigation or the defendant dies during prosecution, contingent upon proving exact financial losses.

However, these civil confiscation procedures are bound by Indonesia's Civil Code and are applicable only to assets under the Indonesian national legal system. Assets located outside Indonesia pose significant jurisdictional challenges, potentially subject to international civil law and vulnerable to legal disputes between countries. For instance, PT Pertamina exemplifies this issue by filing a civil lawsuit seeking restitution for losses linked to corruption during Ahmad Thahir's tenure as President Director of PT Pertamina in 1970. The lawsuit targeted Kartika Thahir, Ahmad Thahir's wife and heir, after his death. Notably, assets totaling IDR 153 billion derived from Ahmad Thahir's corruption were held in Bank Sumitomo, Singapore, thereby falling under Singapore's legal jurisdiction, complicating matters of ownership and legal rights under differing national legal frameworks.[42]

In civil proceedings aimed at recovering state finances, adherence to Indonesia's civil legal framework or comparable foreign laws is mandatory, necessitating a protracted legal process to secure a final *inkracht* decision. This approach also allows defendants accused of corruption to counterclaim or seek recoupment, potentially obligating the state or affected agencies to compensate them. The overlap between civil and criminal law instruments results in inefficiencies, particularly in the application of civil mechanisms for asset confiscation linked to corruption, which hinge on meeting specific criteria outlined in Articles 32, 33, 34, and 38C. Despite these efforts, both criminal and civil mechanisms have not sufficiently facilitated the effective recovery of assets acquired through corruption. Recent data from Indonesian Corruption Watch and the DPR RI Working Meeting Report with the KPK in 2022 underscore this gap, revealing that recovered assets from corruption cases fall short of addressing the total value of state losses, as illustrated in accompanying statistics.

Figure 3. Comparison between state financial loss caused by corruption with successfully recovered assets since 2017 until 2022. [43]



[42] Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina) (1994) SGCA 105 Suit No: CA 204/ 1992.

[43] Indonesian Corruption Watch, *Laporan Singkat Rapat Kerja Komisi III DPR RI dengan Komisi Pemberantasan Korupsi*, (Jakarta: DPR RI, 2023).

The necessity for a new mechanism to recover state financial losses is evident. UNCAC introduces Non-Conviction Based (NCB) Asset Forfeiture as a method to seize assets derived from criminal activities without the prerequisite of criminal conviction.[44] This approach aims to reclaim state losses without first imposing criminal penalties on perpetrators.[45] Assets eligible for confiscation include those acquired directly or indirectly from criminal acts, even if transferred to third parties.

Asset confiscation generally takes two forms: *in personam* and *in rem*.[46] *In personam* confiscation targets individuals through the criminal justice system, requiring an *inkracht* court decision[47] demonstrating that assets stem from criminal activities.[48] In contrast, *in rem* confiscation, or NCB asset forfeiture, targets assets themselves rather than individuals. This method operates independently of criminal proceedings, focusing solely on determining whether assets are tainted by criminal conduct.[49] The distinctions between these approaches are detailed in the accompanying table.

Table 1. The Differences of Criminal Asset Forfeiture and NCB Asset Forfeiture

Criminal Asset Forfeiture		NCB Asset Forfeiture
Conducted against the Person (*in personam*) as a part of criminal charge against someone.	Act	Conducted against the Goods (*in rem*).
Imposed as part of the punishment in a criminal case (application through the mechanism of the criminal justice system).	Momentum	It can be filed either before, during or after a criminal conviction, or even in the absence of a criminal charge (application outside the criminal justice system).
Criminal punishment is carried out.	Unlawful acts	No need for criminal punishment.

[44] "United Nations Convention Against Corruption," opened for signature 11 December 2003, General Assembly Resolution 58/4 of 31 October 2003, art. 56, sec. (1), letter c, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[45] Yunus Husein, *Penjelasan Hukum tentang Perampasan Aset Tanpa Pemidanaan dalam Perkara Tindak Pidana Korupsi*, (Jakarta: Pusat Studi Hukum dan Kebijakan & Pusat Penelitian dan Pengembangan Hukum dan Peradilan Mahkamah Agung RI, 2019), pp. 6.

[46] Barbara Vettori, *Tough on Criminal Wealth Exploring the Practice of Proceeds from Crime Confiscation in the European Union*, (Berlin: Springer, 2006), pp. 8-11.

[47] Marfuatul Lathifah, "Urgensi Pembentukan Undang-Undang Perampasan Aset Hasil Tindak Pidana di Indonesia", *Jurnal Negara Hukum*, Vol. 6, No. 1, Pusat Analisis Keparlemenan Badan Keahlian Sekjen DPR RI, Jakarta, (2015): 17-30.

[48] *Ibid.*

[49] David S. Romantz, "Civil Forfeiture and The Constitution: A Legislative Abrogation of Right and The Judicial Response: The Guilt of The Res". *Suffolk University Law Review*, Vol. 28, (1994): 390.

Based on the value and the object	Relation between results and unlawful acts	Based on the object
Confiscate the interests of the defendant's property.	Forfeiture	Confiscate the object in the case of an innocent owner.
Different (criminal or civil)	Jurisdiction	Different (criminal or civil).

NCB asset forfeiture represents a shift from traditional law enforcement strategies focusing on suspects to a more effective "follow the money" approach.[50] This approach is critical in combating economically motivated crimes like corruption, which can severely impact state finances. It enables the confiscation of assets derived from criminal activities without requiring a guilty verdict from the court, thereby serving as a crucial tool for recovering proceeds from corruption, especially when assets are moved abroad.[51]

The primary goal of NCB asset forfeiture is asset recovery rather than punishment. It operates mainly through civil mechanisms to seize assets tainted by criminal activities and return them to the state. This approach complements criminal prosecution efforts, particularly in cases where criminal proceedings are not feasible or unsuccessful.[52]

Regulating NCB asset forfeiture alongside illicit enrichment is crucial. Currently, asset recovery largely depends on criminal procedures that require a court decision with executorial power. Civil mechanisms exist but also necessitate a criminal case outcome, which can be challenging if the perpetrator has evaded justice or the case is unresolved. NCB asset forfeiture addresses these challenges by providing an alternative path to confiscate assets associated with illicit enrichment, aligning with the "follow the money" strategy and overcoming evidentiary hurdles in proving guilt.

The challenges in implementing NCB asset recovery lie in the risk of potential abuse of authority during the investigation, inquiry, and asset seizure processes. This includes maintaining confidentiality provisions (e.g., bank secrecy) guaranteed by law. Additionally, the potential for abuse of power needs to be prevented, and it must be ensured that regulations on illicit enrichment are not used to unfairly target individuals. These provisions should not conflict with private property rights and must respect constitutional protections under Article 28 section (4) of the Indonesian Constitution throughout the process. Furthermore, to oversee asset transfers and financial transactions, the role of the Financial Transaction Reports and Analysis Center (PPATK) needs to be strengthened to address challenges in seizing assets transferred to third parties.

[50] R.A. Gismadiningrat, *et. al.*, "Challenges in the Implementation of Asset Recovery in the Corruption Eradication Commission: Police Science Perspective", *International Journal of Social Science Research and Review*, Vol. 6, No. 7, (2023): 480-491.

[51] Theodore S. Greenberg, et. al., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, (Washington DC: The World Bank, 2009).

[52] Dwidja Priyatno, "Non Conviction Based (NCB) Asset Forfeiture for Recovering the Corruption Proceeds in Indonesia", *Journal of Advanced Research in Law and Economics*, Vol.9, No.1, (2018):219-233.

Conclusion and Recommendation

Conclusion

Based on the research conducted and the discussions outlined earlier, the following conclusions can be drawn:

1. The urgency of criminalizing illicit enrichment for Indonesia, as a signatory of the UNCAC, is pressing due to the international obligations that must be met. On the other hand, the current Anti-Corruption Law is considered outdated for dealing with corruption crimes that are increasingly complex and sophisticated in their *modus operandi*. Criminalizing illicit enrichment is a crucial part of a broader criminal law reform needed to address contemporary challenges and provides a more effective mechanism for tracking and recovering assets obtained through corruption. By following the successful examples of other countries, Indonesia can enhance its efficiency in fighting corruption and recovering assets by implementing illicit enrichment.
2. The prospects for law enforcement against illicit enrichment in Indonesia involve updating both substantive and procedural criminal law instruments. From a substantive criminal law perspective, this update includes defining illicit enrichment as a crime, formulating the elements of the offense, identifying the legal subjects, and determining penalties. From a procedural criminal law perspective, it is crucial to establish mechanisms such as the LHKPN as preliminary evidence, implement a paradigm shift in the burden of proof, and adopt NCB asset recovery mechanisms. Anticipated obstacles in this enforcement projection include the need for political will from the government and legislature to enact new laws, the impact of the capacity and efficiency of the state administration system on the application of these laws, potential risks of abuse of power by law enforcement during investigations and prosecutions, and possible legal conflicts related to constitutional rights guaranteed by the 1945 Constitution of the Republic of Indonesia.

Recommendation

Based on the research findings, the following recommendations are proposed for the Indonesian Government and Legislative Institutions:

1. A legal framework needs to be established that specifically addresses illicit enrichment as a criminal offense.
2. The LHKPN system should be optimized and used as initial evidence in implementing illicit enrichment as a criminal offense.
3. The burden of proof should be reformulated to better align with the needs of proving illicit enrichment as a criminal offense.
4. There should be normative rules and implementation regulations that govern existing asset forfeiture mechanisms, and alternative methods such as NCB asset forfeiture should be added to support efforts in recovering financial losses to the state.

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