REVERSAL OF THE BURDEN OF PROOF AND RECOVERY OF STATE ASSETS DUE TO CORRUPTION

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ABSTRAK

Kasus korupsi terus mengalami peningkatan dari waktu ke waktu di Indonesia. Korupsi yang terjadi tidak hanya berdampak terhadap kerugian bagi keuangan negara, akan tetapi juga menghambat pembangunan serta kesejahteraan masyarakat. Melihat dampak korupsi yang begitu besar, tidaklah berlebihan jika korupsi disebut sebagai kejahatan luar biasa. Penanganan terhadap kejahatan luar biasa ini memerlukan upaya yang luar biasa pula. Upaya luar biasa yang dimaksud adalah tidak lagi memfokuskan pemberantasan korupsi pada pemidanaan terhadap koruptor, akan tetapi dengan mengejar dan menyita aset-aset ilegal hasil korupsi.

Kata kunci: Korupsi; Kejahatan Luar Biasa; Pemulihan Aset.

ABSTRACT

Corruption cases continue to increase from time to time in Indonesia. Corruption that occurs not only has an impact on losses for state finances, but also hampers development and community welfare. Seeing the enormous impact of corruption, it is not an exaggeration to call corruption an extraordinary crime. Handling this extraordinary crime requires extraordinary efforts. The extraordinary effort in question is to no longer focus on eradicating corruption on punishing corruptors, but by pursuing and seizing illegal assets resulting from corruption.

Keywords: Corruption; Extra-Ordinary Crime; Asset Recovery.

A. INTRODUCTION

Transparency International has just released the Corruption Perception Index (CPI) 2021. Indonesia's CPI is recorded to have increased by 1 point to 38 from a scale of 0-100 in 2021. This increasing value has helped to improve Indonesia's position in the global GPA ranking. Indonesia is now 96th out of 180 countries from the previous 102nd rank. Indonesia's GPA touched its highest value of 40 in 2019. This value fell 3 points to 37 in 2020. Transparency International involved 180 countries in its CPI survey. A score of 0 means the country is highly corrupt, otherwise a score of 100 indicates the country is free of corruption. This year, the world's average CPI was recorded at 43. This value has not changed for 10 consecutive years. Two thirds of countries still have scores below 50 which indicates they have serious corruption problems.[1]

These data show that although there is an increase in the CPI, it is not means that Indonesia's condition in efforts to eradicate corruption can be considered to be improving. Corruption as a crime that has multidimensional consequences for common life, is still threaten the welfare of the Indonesian people. Etty Indriati noted that due to corruption impact on many sectors

[1]Databoks, Indeks Persepsi Korupsi Indonesia Naik 1 Poin Jadi 38 pada 2021, https://databoks.katadata.co.id/datapublish/2022/01/26/indeks-persepsi-korupsi-indonesia-naik-1-poin-jadi-38-pada-2021, accessed on Thursday, March 24, 2022 At 09:20

(dimensions): environmental damage, the economy does not grow, weak government legitimacy, eroded quality of life, declining formal sector employment to substandard development.[2] Eradication of corruption must still be the focus of attention starting from the formation of anti-corruption legal politics that consistency, strengthening anti-corruption institutions (KPK), to building awareness society in the context of preventing and eradicating corruption.

This article generally focuses on the study of the formation of legal politics anti-corruption especially in the context of applying the rules on load reversal proof as the first and foremost effort (primum remedium) in an effort to return of state assets. This has not been focused on eradicating corruption, even though corruption as a an organized crime has undergone many developments, particularly regarding mode of theft of state finances and assets. Mode progression corruption demands the development of discourse in the context of related regulatory arrangements corruption so that in addition to corruption can be eradicated, state losses due to stolen assets as well can be returned to the state.

Law Number 31 of 1999 jo. Law Number 20. Year 2001 on the Eradication of Criminal Acts of Corruption (hereinafter referred to as the Anti-Corruption Law) has regulated the reversal of the burden of proof that can help the effectiveness of recovering state losses. This rule regarding the reversal of the burden of proof requires the perpetrator to responsible for the assets owned but not charged, for proven not to originate from acts of corruption. This rule will be effective if implemented consistently, unfortunately the Anti-Corruption Law itself does not regulate it completely and clearly. The provisions of the rules regarding the reversal of the burden of proof in the Anti-Corruption Law also do not running effectively because currently efforts outside of criminal law are considered more effective to run. Although there is no data that can show evidence of its effectiveness, some parties emphasize that the return of state losses, in this case state assets stolen as a result of corruption, it is more appropriate to implement it through civil law. This choice arises for at least three reasons: first, criminal law is considered will only resolve cases of corruption to the punishment of the perpetrators of criminal acts, while state losses incurred, including stolen state assets are not pay attention to the return. So, secondly, legal action, through lawsuits civil law, is considered to be an instrument that can help recover the state losses.

Third, the character of criminal law that must be placed as a last resort (ultimum remedium) in the settlement of a legal case. Considering that it will involve the principle of presumption of innocence and the principle of non-self-incrimination, criminal law should not be used as the first and foremost measure, including in the regulation of reversing the burden of proof in the context of enforcing it as a criminal law in the Anti-Corruption Law. This issue is not widely discussed, because the doctrine of criminal law as the ultimum remedium is indeed not easily refuted.

The writing of this article is not directed at changing the characteristics of criminal law that must be placed as the ultimum remedium, it will only propose alternative restrictions, especially in the context of enforcing criminal law for corruption. As already mentioned that corruption is a crime with multidimensional consequences in people's lives, criminal law, especially in the rules of reversing the burden of proof must be placed as the first and foremost effort (primum remedium) in efforts to recover state assets.

B. RESEARCH METHOD

This article uses a juridical-normative research method through an analytical-descriptive approach. The juridical-normative method is a research method that is focused on examining

[2] Etty Indriati. (2014). *Pola dan Akar Korupsi*. Jakarta: Gramedia Pustaka Utama, p. 39-40.

the application of rules or norms in positive law.[3] The descriptive-analytical approach will examine in more depth the provisions written in these positive legal norms.[4] The main legal material of this research is carried out by tracing the legal rules that regulate the reversal of the burden of proof. More specifically, the rule of law in question is a criminal law instrument in the Anti-Corruption Law. The analysis of the legal rules regarding the reversal of the burden of proof is carried out by means of a literature review of several literatures related to the principles and theories of criminal law, theories and laws of evidence as well as comparisons and criticisms of several principles of criminal law.

C. DISCUSSION

The facts regarding corruption cases, as explained in the introduction, have caused a lot of losses in various aspects of people's (public) lives, one of which is a large state loss due to many state assets being lost or stolen by corruptors. The nature of corruption as a white-collar crime, organized and transnational, has given rise to a mode of development in the form of large amounts of theft of state assets.[5]

State assets that are corrupted are kept domestically, but not a few are deliberately placed in other countries to make it difficult to disclose their criminal cases while protecting the proceeds of their crimes. In this section, we will discuss the regulatory regime for the return of state assets placed abroad, but this discussion can still be used as a basis for understanding state assets that have been harmed by criminal acts of corruption in the state.

Regulations at the international level on this matter can be found in Chapter V from Article 51 to Article 59 of the United Nations Convention Against Corruption (UNCAC). Article 51 of UNCAC affirms the return of assets as a fundamental principle in efforts to eradicate corruption which, in UNCAC, has an international context. The nine articles in chapter V cover everything from prevention and tracking, return of property ownership, forms of international cooperation for confiscation and other cooperation both bilaterally and multilaterally, to arrangements on cooperation between financial institutions to assist the effectiveness of asset recovery.

Chapter V is not easy to formulate because it involves domestic interests between countries. This chapter is also considered as the result of intensive negotiations considering that on the one hand there is a need to trace and return the wealth proceeds of corruption crimes but on the other hand the wealth has been transferred and placed to another country, which makes its handling must be in accordance with the domestic regulations of the country concerned.[6] If we look closely, even though it comes from the results of negotiations that are not easy, but the success of the formulation of rules regarding the return of assets from the proceeds of corruption crimes shows the same concern and concern that is experienced by all state members.

The assertion in UNCAC specifically as written in Article 51 that the return of assets as a fundamental principle of UNCAC emphasizes that in an effort to eradicate corruption that is complete and effective, law enforcement against it must also be comprehensive, including efforts to return all assets related to criminal acts. Even if the asset is stolen and taken from one country (country of origin) to another (custodial state), efforts to recover it must still be carried out. For this matter, UNCAC in Articles 43 to 50 in the Chapter on International Cooperation, details the pattern of cooperation that can be carried out between countries, namely, extradition, mutual assistance in criminal matters, transfer of proceedings, transfer of sentenced persons

[3] Johnny Ibrahim. (2013). *Teori dan Metodologi Penelitian Hukum Normatif*, Malang: Bayumedia Publishing, p. 295.

[4] Peter Mahmud Marzuki. (2015). *Penelitian Hukum (Edisi Revisi)*, Jakarta: Prenadamedia Group. p. 142.

[5] Romli, Atmasasmita. (2003). *Pengantar Hukum Kejahatan Bisnis*, Jakarta: Kencana. p. 91.

[6] Eddy OS Hiariej. (2008). *Pengembalian Aset Kejahatan.* Yogyakarta: Pusat Kajian Anti Korupsi FH UGM. p. 34-35.

and joint investigation. Therefore, the rules regarding the return of assets in the UNCAC must be implemented more consistently by each state member of the convention.

According to Eddy O.S. Hiariej there are 6 (six) points that must be observed in the return of assets. First, it must be acknowledged that corruption (looting) of a country's public assets occurs due to a lack of transparency and public accountability. Second, member countries (especially developing countries) need to strengthen their legal, financial and public financial management systems. Third, the political will of each member country regarding the return of criminal assets. Fourth, the need for legal reform of each member country. Fifth, the regulatory time of the legal reform is not protracted. And sixth, strengthening consistent global cooperation to prevent the existence of places that can be used to store and place assets resulting from crimes that have been committed in other countries. Once again, these six points emphasize that the return of assets is a basic principle in handling corruption crimes committed across jurisdictions. Handling is good in prevention and eradication efforts.[7]

Regulations regarding the return of losses or state assets lost due to corruption have been adapted to the provisions of the UNCAC as previously described. Indonesia has ratified UNCAC through Law no. 7 of 2006. By ratifying UNCAC, Indonesia must harmonize the Anti-Corruption Law with the provisions of UNCAC, unfortunately this has not been implemented. The revision of the Anti-Corruption Law which is currently in effect has not been carried out since 2001. Indonesia does have Law no. 1 of 2006 concerning Mutual Assistance in Criminal Matters which adheres to the reciprocal principle which stipulates that if Indonesia wants state assets placed in other countries in criminal cases to be returned to Indonesia, then Indonesia itself must have clear rules regarding the return of criminal assets brought in. to Indonesia from other countries. Although Law no. 1 of 2006 stipulates this, but until now Indonesia does not have a separate asset return law as mandated by UNCAC.

Law enforcement practices often ask, what legal domain applies to the return of criminal assets? To answer this, it is necessary to convey the difference between civil law and criminal law. As can be grammatically identified, that civil law regulates interests in interpersonal relationships. Civil law regulates civil law relations between legal subjects. Meanwhile, criminal law, as stated by Jan Remmelink, has a duty to resolve any legal issues in the form of conflicts of interest between parties who violate norms and the interests of the general public.

The practice of law enforcement in eradicating corruption often asks, what realm is involved in the return of state losses due to corruption? Answering this question, it is necessary to convey the difference between civil law and criminal law. As can be grammatically identified, that civil law regulates interests in interpersonal relationships. Civil law regulates civil law relations between legal subjects. Meanwhile, criminal law, as stated by Jan Remmelink, has a duty to resolve any legal issues in the form of conflicts of interest between parties who violate norms and the interests of the general public.[8]

Affirmation of aspects of the interests of the general public is important, because it becomes the basis for distinguishing between civil and criminal law. If this understanding is related to the regulation of the return of state assets that is carried out from corruption, then the potential loss that actually wants to be saved from this arrangement is state assets. This means it concerns the public interest. The researcher argues that because state assets were taken against the law through corruption, the regulation of returning state assets must also be within the framework of criminal law.

[7] *Ibid*, p. 37.
[8] Jan Remmelink. (2003). *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KUHP Indonesia*, Jakarta: Gramedia Pustaka Utama. p. 5.

This is to ensure the implementation of an integrated criminal justice system as offered by Herbert Packer in The Limits of Criminal Sanction.[9] An integrated criminal justice system requires complete and inseparable handling in order to ensure a fair handling of criminal cases, both against the interests of the accused and the wider public interest. However, the next question is whether this regulation regarding the return of assets should be included as a norm in criminal procedural law or even state administrative law, considering that both have the same character, one of which is to remedy violations of the law in the public interest.

Based on Packer's model related to the integrated criminal justice system, because the construction of corruption as a criminal act that causes state assets to be stolen or lost, the return of state assets related to corruption is more precisely formulated as part of criminal procedural law. This is in accordance with the notion of criminal procedural law as a series of regulations that contain the way in which the ruling government agencies, namely the police, prosecutors and courts, must act in order to achieve state goals by making criminal law.[10] If this understanding is adjusted to the current situation, then the regulation on the return of state assets from criminal acts of corruption must be regulated in a separate procedural law so that it can accommodate the Corruption Eradication Commission as one of the bodies that can handle it.

The regulation on the return of state assets still refers to the general principles as regulated in the Criminal Procedure Code applicable in Indonesia as lex generalis. For example, the provision on "returning existing assets" still refers to Article 44 paragraphs (1) and (2) of the Criminal Procedure Code that confiscated objects are stored in the State Confiscated Objects Storage House and affirms that the confiscated objects are the responsibility of the competent authority and may not be confiscated. used by unauthorized persons. Even so, considering the need for more complex handling in the context of returning state assets, it would be more complete if the arrangements were made outside of the Criminal Procedure Code as a more specific provision (lex specialis). With its nature as lex specialis, the regulation is expected to be more complete and comprehensive in order to be able to return state assets stolen in cases of corruption.[11] The complexity of regulating the return of state assets is not enough just to rely on the provisions of the Criminal Procedure Code.

Recovery of state assets that have been corrupted is an effort that has not been maximally carried out by Indonesia, including in the context of regulation. Even though the return of lost state assets can recover the bad and damaging effects of corruption crimes that occur for the public interest in many dimensions. Returning assets based on adequate, complete and clear regulatory provisions, and including rules regarding adequate and consistent handling methods, will complement efforts to deal with corruption more effectively and efficiently. Here, as Saldi Isra and Eddy OS Hiariej wrote, state political will is needed.[12] The criminal law policy (penal policy) regarding the regulation of the return of state assets due to corruption that is more advanced and adequate is urgently needed to be implemented.

So there are two problems, namely the issue of special legal arrangements regarding the return of state assets within the framework of the criminal procedure law and the question of its application or enforcement. Even if a regulation on the return of state assets has been produced in cases of corruption, can this regulation be implemented effectively, given the nature of criminal law as a last resort (ultimum remedium)? Is it possible that law enforcement in an effort to recover state assets, especially those related to criminal acts of corruption through

[9]Herbert L., Packer. (1968). *The Limits of The Criminal Sanction*, Oxford University Press, p. 149-150.
[10]R. Wirjono Prodjodikoro. (1970). *Hukum Acara Pidana di Indonesia*, Bandung: Penerbit Sumur, p. 13.
[11]Djisman Samosir. (2013). *Segenggam tentang Hukum Acara Pidana.* Bandung: Nuansa Aulia. p. 10
[12]Saldi Isra dan Eddy OS Hiariej, *Perspektif Hukum Pemberantasan Korupsi di Indonesia* dalam Wijayanto, Ridwan Zachrie. (2009). *Korupsi Mengorupsi Indonesia: Sebab, Akibat dan Prospek Pemberantasan.* Jakarta: Gramedia Pustaka Utama. p. 584.

a system of reversing the burden of proof, can be implemented as the first and main effort (primum remedium)?

Before discussing the term primum remedium, it is necessary to discuss the term ultimum remedium which has been attached to criminal law. It is not easy to find criminal law literature in which it is explained that in certain situations, the criminal law paradigm to be treated as a remedy or a last resort (ultimum remedium) can be deviated. It is known that the paradigm of criminal law as the ultimum remedium has been around for a long time. If traced historically, the paradigm of Indonesian criminal law as the ultimum remedium cannot be separated from the historical facts when Mr. Modderman, the then Dutch Minister of Justice, in the discussion on Wetboek van Strafrecht (WvS) in the Lower House (Twede Kamer).

Modderman said that "...that can be punished are violations of the law, which according to experience cannot be eliminated in other ways. The punishment should be a last resort (de straf moet blijven een ultimum remedium)."[13] At that time, not all agreed with Modderman. Lamintang noted that there were at least three great teachers who rejected Modderman's thinking, namely L.H.C. Hulsman, A. Mulder and van Bemmelen.[14]

There are two things that need to be emphasized regarding this historical fact; First, the term ultimum remedium was first uttered by a bureaucrat and was not free from debate from criminal law academics. Second, that the term ultimum remedium is not appropriate to be said as a principle or theory and is also not a norm in criminal law. For this reason, the term ultimum remedium has no binding power and therefore the author prefers to call it a paradigm.

Before Modderman, actually Merkel, a German law scholar, had said, "Der Strafe komt eine subsidiäre Stellung zu" which means that the place of criminal (law) is always subordinate to other legal remedies.[15] Not much different from Modderman's opinion above, Merkel chose to place criminal law as "second class law" in the context of its application. Through Merkel's opinion, the basic argument can also be strengthened to say that the term ultimum remedium is indeed limited to the context of implementing or enforcing criminal law. The term "effort" used by Merkel and Modderman in relation to the process of implementing or enforcing the law. If so, it is more appropriate to say that the term ultimum remedium is a law enforcement paradigm, which requires freedom of choice for law enforcers.

If the ultimum remedium is a law enforcement paradigm, then the term primum remedium (first and foremost effort) as an alternative to the ultimum remedium can also be referred to as a paradigm in law enforcement. The two are not different in the context of their position as paradigms, only they are different because they are contradictory to each other (contradictio in terminis), which makes if one is chosen, the other cannot be followed. Therefore, a fundamental reason is needed if the primum remedium paradigm is to be applied.

For this reason, it is necessary to put forward the opinion of H.G de Bunt who says that criminal law can be used as a primum remedium if a criminal act is; resulting in very large victims, recidivist perpetrators and irreparable losses.[16] For the criteria for the need for criminal law to be applied as a primum remedium, Jan Remmelink's opinion is also needed which says "... at all times the authorities must be alert and aware that criminal law can only be utilized if the existing means are not worse than the behavioral deviations that they want to overcome."[17] Mutatis mutandis, criminal law must be applied as the first and foremost remedy, if other legal remedies are ineffective.

[13]P.A.F., Lamintang. (1997). *Dasar-Dasar Hukum Pidana,* Bandung: Citra Aditya Bakti. p. 18.
[14]*Ibid*.
[15]Jan, Remmelink. *Op. Cit*. p. 28.
[16]Titis Anindyajati, dkk, *Konstitusionalita Norma Sanksi Pidana sebagai Ultimum Remedium dalam Pembentukan Perundang-undangan*, Jurnal Konstitusi, Volume 12 No. 4 December 2015. p. 877.
[17]Jan Remmelink, *Op. Cit.*

However, these so-called parameters are actually not complete. In some special crimes, such as corruption, the damaging effects that are caused have an impact on many dimensions of people's (public) lives. Dimensions of the country's economy, dimensions of social disorder, damage in the political dimension, including the dimensions of education and morals. For this reason, it is necessary to add one parameter to deviate from the ultimum remedium paradigm, namely the effect of damaging the crime committed has an impact on many dimensions. If so, complementing the parameters of Bunt and Remmelink, there are at least five parameters that can be used as the basis when the primum remedium paradigm must be applied in criminal law enforcement; First, the victims of criminal acts are very large. Second, the perpetrator is a recidivist. Third, losses due to criminal acts cannot be recovered. Fourth, other legal remedies that should be handled are ineffective. Fifth, multi-dimensional damage. These five parameters can be referred to as deviation parameters from the ultimum remedium paradigm.

According to the results of the researcher's study, Bunt made his three parameters cumulative, meaning that all three must be met. But that would contradict Bunt's own opinion, the three parameters he proposed actually stand independently of each other. It could be that the perpetrator is a recidivist but the number of victims is not much, and vice versa, the victim is a lot, but the perpetrator is not a recidivist. So according to the author, the five parameters presented above are alternative, so that even if only one parameter is met, the criminal law must be applied as a primum remedium. The discussion regarding the primum remedium paradigm with these five parameters is important to answer the question of how to place the primum remedium paradigm in the context of enforcing the rules for reversing the burden of proof, especially regarding efforts to return state assets stolen or lost due to corruption.

Basically, the proof system in the formal criminal law in the Anti-Corruption Law follows the provisions as stipulated in the Criminal Procedure Code. However, due to its nature as a special crime, there are some exceptions to the evidentiary system in the Anti-Corruption Law. According to Adami Chazawi, the exception is a matter of expanding the materials used to form the evidence guide and several systems of burden of proof that are different from the provisions of the Criminal Procedure Code.[18]

First, the expansion of the materials used to form the evidence. Article 188 paragraph (2) of the Criminal Procedure Code stipulates that the evidence of instructions can be built from the testimony of witnesses, letters and statements of the defendant. In the Anti-Corruption Law, evidence of guidance can be built not only by the three provisions as in Article 188 paragraph (2) of the Criminal Procedure Code.[19] Article 26A letters a and b of the Corruption Law stipulates that evidence can consist of: 1) Information that is spoken, sent, received, or stored electronically with optical devices or similar. 2) Documents, namely any recorded data or information that can be viewed, read, or stored electronically, in the form of writing, sound, images, maps, designs, photographs, letters, signs, numbers or perforations that have meaning. So, the evidence of guidance regulated in the framework of the evidentiary system in the Anti-Corruption Law has been expanded from the provisions of the Criminal Procedure Code. This expansion also shows that the handling of corruption cases does require a formal criminal law approach or an extraordinary procedural law approach (extraordinary approach).

Second, there are several provisions of the burden of proof system that are different from the Criminal Procedure Code. Adam Chazawi explained that in the Anti-Corruption Law there are at least five things related to this, namely:[20] 1. There is a provision regarding an inversely balanced proof (Article 37), 2. There is a provision regarding a conditionally balanced burden of proof system (Article 12 B Paragraph (1) letters a and b), 3. If the object is property that has

[18]Adami, Chazawi. (2018). *Hukum Pidana Korupsi di Indonesia (Edisi Revisi),* Depok: Rajawali Press. p. 363.
[19]*Ibid*, p. 366.
[20]Adami Chazawi, *Ibid*, p. 367-373.

been indicted, the burden of proof system is what applies is semi-reverse proof (Article 37A), 4. If the object is property that has not been charged, then the burden of proof system is reverse proof (Article 38B), and 5. Specifically it is regulated that the object is related to receiving gratuities whose value is Rp. 10,000,000,00 or more, then the burden of proof system is also reversed.[21]

The regulation regarding the reversal of the burden of proof (Dutch: omkering van bewijslast, English: reversal burden of proof) is a development in the criminal justice system, especially in relation to procedural law. As previously discussed, the main principle in the law of evidence is "who argues/complaints, he must prove". However, the massive development of forms of criminal acts makes procedural law often lack the "ability" in its task of effectively proving these forms of massively developing criminal acts.

In the international context, the regulation on reversing the burden of proof was first regulated in Article 5 paragraph (7) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, then followed by provisions in Article 12 paragraph (7) of The United Nations Convention against Transnational Organized Crime. 2000 until later in Article 31 paragraph (8) of the United Nations Convention Against Corruption 2003 (UNCAC).[22] However, Indonesia had already regulated the reversal of the burden of proof before UNCAC[23], only after the issuance of Law no. 7 of 2006, the rule of reversing the burden of proof is getting more and more legitimacy.

In Law no. 31 of 1999 jo. UU no. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, the defendant is deemed guilty until, based on the rights granted in Article 37 or the obligations in Article 12B, Article 37A and 38B of the Anti-Corruption Law, he himself can prove that he is innocent. The principle of presumption of guilt does not violate the defendant's human rights because corruption itself has violated the rights or interests of the public. Even though the defendant's position is considered guilty, so that a judicial process is then carried out (investigation, investigation, indictment, prosecution), the defendant has the means to defend himself through reversing the burden of proof. In this context, reversal of the burden of proof can be seen as a means to accommodate the human rights of corruption defendants who have been "violated" by the presumption of guilt in the Anti-Corruption Law.

Legally, the reversal of the burden of proof in the Anti-Corruption Law is regulated in Article 37. The provisions of this article read: 1) The defendant has the right to prove that he has not committed a criminal act of corruption; 2) In the event that the defendant can prove that he has not committed a criminal act of corruption, then the evidence is used by the court as a basis to declare that the charge is not proven.

Based on this provision, there are two things that need to be emphasized by referring to the explanatory article. First, as previously explained, Article 37 paragraph (1) is made as a balanced consequence of the application of reverse evidence against the defendant. For this reason, based on this article, it can be said that the Anti-Corruption Law adheres to a system of reversing the burden of proof that is limited or balanced.[24] The accused still needs balanced legal protection for violations of basic rights related to the presumption of innocence and non-self-incrimination.[25] Second, because the evidence is based on information from the defendant himself, the consequence is that the burden of reverse proof does not adhere to a negative evidence system according to law, as in the Criminal Procedure Code

Romli Atmasasmita who emphasized that the rule of reversing the burden of proof does not contradict the principle of the presumption of innocence because theoretically, the reversal of the burden of proof refers to the balanced probability theory. This theory states that efforts to uncover the origin of a person's wealth suspected of originating from a criminal act make the ownership status of the property lower than a person's own human rights. Romli also added

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[21]*Ibid*, p. 367.

[22]Romli, Atmasasmita. (2010). *Globalisasi dan Kejahatan Bisnis,* Jakarta: Kencana. p. 66-67.

[23]Oemar, Seno Adji. (1985). *Hukum Pidana Pengembangan,* Jakarta: Erlangga. p. 228-232.

[24]Mansur, Kartayasa. (2017). *Korupsi dan Pembuktian Terbalik dari Perspektif Kebijakan Legislasi dan Hak Asasi Manusia*, Jakarta: Kencana. p. 245.

[25]*Ibid*, p. 253.

that constitutionally everyone has the right to enjoy wealth, with the main condition that the acquisition of such assets is legal.[26]

The logical consequence that must first be emphasized is that the regulation on reversing the burden of proof basically balances the guarantee of the defendant's basic rights with the objectives of the Anti-Corruption Law itself in dealing with corruption. In relation to the explanation of paragraph (2) that the reversal of the burden of proof does not adopt a negative proof system, apart from the fact that the evidence is carried out by the defendant himself, there is no provision for minimum bewijs or the judge's conviction, it can also be seen as one of the political directions of corruption criminal law to ensure that the handling of criminal acts of corruption is more effective.

Apart from being based on Article 37 in Law 31 of 1999 jo. Law 20 of 2001, Article 38B paragraph (1) of Law 20 of 2001 expressly stipulates that "Everyone who is accused of committing one of the criminal acts of corruption as referred to in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15 , and Article 16 of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption and Articles 5 to 12 of this Law are required to prove otherwise against his property which has not been indicted, but is also suspected of originating from a criminal act of corruption." In Suhartoyo's language, this article can be referred to as the politics of legislative policy regarding the method of reversing the burden of proof. This discussion is important because it is related to the seizure of the defendant's assets.

Weaknesses in the regulation of reversing the burden of proof in Law 31 of 1999 jo. Law 20 of 2001 is related to the existence of Article 12B paragraph (1) letter a.[27] This provision regulates the limitation of the burden of proof which only applies to criminal acts of corruption in the form of gratification and that is also limited. Article 12B paragraph (1) letter a stipulates that a reversal of the burden of proof is carried out in cases of gratification amounting to Rp. 10,000,000.00 or more. The next limitation is that gratuities are carried out by civil servants or state officials, related to their position and the action is contrary to their obligations or duties. This limitation should not be necessary, considering that the weight of the crime of corruption cannot be seen in terms of the size of the number of gratuities received and the perpetrators of gratification can also come from non-civil servants or state administrators.

This article is contradictory in particular with the provisions contained in Article 37 paragraphs (1) and (2), Article 37A paragraphs (1) and (2) and Article 38B paragraph (1) of Law 20 of 2001 which allows that reverse evidence can cover a wider range of crimes as stipulated in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15, and Article 16 of the Law 31 of 1999 and Articles 5 to 12 of Law 20 of 2001. Apart from only expressly stipulates that gratification is possible with a load reversal system evidence, the provisions of Article 12B paragraph (1) letter a will affect its enforcement system of reversing the burden of proof in other forms of corruption become ineffective because of the indecisiveness of regulative norms.

Corruption is one of the crimes that need extraordinary handling ordinary (extra-ordinary legal approach). In its report, ICW noted several modes in criminal acts of corruption such as mark-ups, misuse of budget, embezzlement, fictitious reports, bribes, fictitious activities/ projects, extortion, abuse of authority, circumcision/cutting, gratification, extortion, double budget and mark down.[28] Corruption is also referred to as a closed crime where the perpetrator has know how to do corruption crimes.[29] Therefore, it is not easy to uncover cases in ordinary

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[26]Romli, Atmasasmita, *Op. Cit.* p. 68.

[27]Lilik, Mulyadi, *Op.cit.* p. 185.

[28]Wana Alamsyah, dkk. *Laporan Tren Penindakan Kasus Korupsi Tahun 2018*. Jakarta: Indonesia Corruption Watch, https://antikorupsi.org/sites/default/files/laporan_tren_penindakan_kasus_korupsi_2_018.pdf, accessed 24 March 2022.

[29]Ndiva Kofele-Kale. *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes.* The International Lawyer, Volume 40 Nomor 4 Tahun 2006. p. 914-915.

methods of proof. For these various modes, it must be acknowledged that the handling, especially in the evidence based on the Criminal Procedure Code will not be sufficient.

In this regard, it is necessary to convey Soerjono Soekanto's opinion, that the contents of the regulations in the a law becomes one of the factors that influence law enforcement. Soerjono said that "the law is a means to achieve" the spiritual and material well-being of society and individuals, through conservation or renewal (innovation).[30]

So, the law could be a limiting factor law enforcement itself, in this case law enforcement on corruption, because one of the provisions in the Anti-Corruption Law related to reversing the burden of proof does not quite clear or adequate.

Despite the debate about the many weaknesses in question setting reversal of the burden of proof, what is clear is that the Anti-Corruption Law has recognized and regulates that the method of reversing the burden of proof can be carried out even though limited as already described. There are three things that need to be emphasized in relation to this regulation for reversing the burden of proof: First, the defendant has the right to prove that he is not corrupt. Second, the defendant has an obligation to provide information about all of his property, property of his wife or husband, children and property of any person or corporation suspected of having a relationship with the case. Third, even though the defendant has rights (Article 37) or obligations (Article 37A and Article 38B) to prove his innocence, the public prosecutor remains obliged to prove the charges.

D. CONCLUSION

The phenomenon of corruption cases, as a crime that needs an external legal approach normal (extraordinary legal approach) that has occurred so far with all complexity, such as the growing mode of perpetrators, the number of corruption case which continues to grow, the regulation is still inadequate and the destructive consequences of criminal acts of corruption that harm many dimensions of community life (public), requires Indonesia to take serious steps in efforts to deal with the condition this. The crime of corruption has actually harmed the state and has an impact on the life and welfare of the people public welfare. The undeniable thing is that many state assets were stolen and lost due to corruption.

This condition is getting worse because of legal instruments and regulations that are capable of cracking down on corruption and regulations regarding the return of state assets are not sufficient, such as the absence of special regulations regarding the return of state assets. In addition, the rules regarding reversing the burden of proof have not been implemented explicitly and consistent. This can happen by two things, namely first, the formulation of norms that are not clear, incomplete and inharmonious and secondly, law enforcement, including in courts, have not many apply burden of proof reversal. Can also be added, politics Indonesian legislation in developing criminal law policies (penal policy) has not been good enough, especially in efforts to regulate the reversal of the burden of proof that is more comprehensive.

In addition, in Indonesia, criminal law is considered solely as a remedy or an effort the last (ultimum remedium) which led to the application of the articles of load reversal. Evidence is becoming increasingly ineffective, because it is felt that other legal fields, such as civil law, are or even administration, can be more efficient. This cannot be sustained, because of the effectiveness of handling a criminal act, it will be seen if first enforcement. The law on criminal acts is also part of the criminal law itself. That the ultimum remedium paradigm itself can be ruled out by being limited to five parameters: First, the number of victims of criminal acts is very large. Second, the perpetrator is recidivist. Third, losses due to criminal acts cannot

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[30]Soerjono Soekanto. (2012). *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Jakarta: Rajawali Press, p. 13.

be recovered. Fourth, effort other laws that are supposed to deal with are useless. Fifth, the damage that many dimensions.

In the case of corruption, with the explanation that has been given, it is necessary to revise related to a more comprehensive and broad reversal of the burden of proof arrangement. Wrong one extends the obligation to reverse the burden of proof, not just over corruption in the form of gratuities. In terms of developing a penal policy, it is also necessary to considered five parameters of paradigm deviation ultimum remedium on the rules reversal of the burden of proof that is more adequate to support and make efforts return of state assets to be more effective and efficient. Thus, the rules reversal of the burden of proof should be placed as the first attempt and main (paradigm primum remedium). At the technical level, it still takes great effort to build cooperation with UNCAC member countries in dealing with return of assets brought out of Indonesia. This will complete each proposal previously, that with mutually supportive international cooperation related return of the assets of each country stolen for corruption, then handling corruption as a whole can be more effectiveness and efficiency.

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