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Reverse Evidence: A Beacon of Hope for Pretrial Reform

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Article

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Abstract

Pretrial proceedings, inspired by the *Habeas Corpus* principle, aim to protect individuals from arbitrary coercive measures such as suspect identification, arrest, and detention. However, in practice, the burden of proof in pretrial processes falls entirely on the applicant, who must prove a negative: the illegality of the coercive action. This burden creates significant obstacles for applicants seeking redress. To address this imbalance, this research examines the concept of *Habeas Corpus*, the evidentiary system of reverse onus of proof in the Indonesian legal context, and the development of an ideal evidentiary model for pretrial proceedings. Using normative juridical methods, this study finds that *Habeas Corpus* obliges the detaining authority to justify the legality of detention; failure to do so results in the detainee's release. Similarly, reverse evidence has been applied in corruption, money laundering, and administrative cases in Indonesian courts to address challenges in uncovering organised crimes. In pretrial contexts, applying reverse evidence protects human rights, promotes transparency, and ensures accountability in the exercise of coercive state power. This approach reflects the legal principle that individuals should not be required to prove a negative, easing the applicant's evidentiary burden. By shifting the burden of proof to the respondent (i.e., the state or its officers), it upholds the principle of equality of arms, creating a more balanced relationship between individuals and the state. Ultimately, this enhances safeguards against abuse of authority and improves fairness in the justice system.

INTRODUCTION

Habeas Corpus (from Latin, meaning "we command that the detainee be brought") is a legal principle that has long been used to challenge the basis of someone's detention. The writ of *habeas corpus ad subjiciendum* historically aims to protect individuals from arbitrary detention

by forcing the state to prove the legality of someone's deprivation of liberty before the court.[1] This principle served as the initial inspiration for the establishment of the pretrial institution in Indonesia.[2]

Pretrial is an institution whose function is to test the validity of legal actions such as arrest, detention, termination of investigation or prosecution (Article 77 letter a of the Criminal Procedure Code (CPC)), as well as providing space for someone to demand compensation or rehabilitation if the case is stopped at the investigation or prosecution stage (Article 77 letter b of the CPC). The Constitutional Court expanded the authority of pretrial proceedings through Decision Number 21/PUU-XII/2014 dated April 28, 2015, which added the objects of pretrial proceedings to include the examination of the legality of "suspect determinations, searches, and seizures ".

In the pretrial context, the party who files the pretrial is called the "petitioner," while the opposing party is the "respondent." The CPC does not provide specific rules regarding exceptions to the burden of proof in pretrial proceedings. Therefore, in accordance with the principle *that the actori incumbit onus probandi*, the burden of proof lies with the pretrial applicant.[3] However, D. Y. Witanto, in his book, proposes that in pretrial proceedings, a mechanism of "limited reverse burden of proof" should be applied. In this case, the suspect or applicant only needs to prove that they have been subjected to coercive action, while the respondent is the one who must prove the legality of the action. This is because what is being disputed is a negative act, namely the alleged unlawful coercive action..[4]

Witanto provided an example of the application of this mechanism in the Hadi Purnomo case, where the judge ruled that the respondent had failed to prove that the applicant's designation as a suspect was in accordance with applicable legal provisions.[5] This mechanism becomes important because it shows the imbalance of positions between the applicant and the respondent, especially when the applicant is asked to prove a negative act. At the same time, the investigator has broader access to evidence.

The urgency of implementing reverse proof in the pretrial mechanism is becoming increasingly prominent, as many cases highlight the weaknesses in the protection of suspects' rights. ICJR's study reveals that the majority of judges, when deciding pretrial motions, primarily consider administrative aspects, such as the existence of a detention order, without examining the substantive aspects that underlie the validity of the coercive actions. The low number of petitions also indicates that pretrial detention has not become an effective means in the eyes of the public. For example, during the period 2009–2011, there were only 70 petitions at the Medan District Court, 211 at the South Jakarta District Court, and 12 at the Kupang

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1 José M. Muñoz and José Ángel Marinaro, "'You Shall Have the Thought': Habeas Cogitationem as a New Legal Remedy to Enforce Freedom of Thinking and Neurorights," *Neuroethics* 17, no. 1 (2024): 1–22, https://doi.org/https://doi.org/10.1007/s12152-024-09551-8.

2 Fitriah Faisal, "Pretrial in Indonesia: Why It Should Be Reformed," *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 10, no. 2 (2023): 70–80, https://doi.org/Doi: 10.24252/jurisprudentie.v10i2.43678.

3 Ama F Hammond and Prosper Batariwah, "An Assessment of the Doctrine of Commorientes and Its Implications for the Devolution of Testate and Intestate Property in Ghana," *Journal of African Law* 68 (2024): 261–81, https://doi.org/10.1017/S0021855323000372.

4 D. Y. Witanto, *Hukum Acara Praperadilan Dalam Teori Dan Praktik: Mengurai Konflik Norma Dan Kekeliruan Dalam Praktik Penanganan Perkara Praperadilan* (Depok: Imaji Cipta Karya, 2019).

5 Witanto.

District Court. In fact, data from the Supreme Court in 2018 recorded only 1,412 pretrial cases throughout Indonesia from a total of 412 district courts—an average of only 3 to 4 cases per court. The ICJR study in 2014 also revealed that around 85% of the 80 applications were rejected because the applicants failed to prove the illegality of detention as referred to in Article 21, paragraph (1) CPC. This reinforces the imbalance between the applicant and the respondent, where the burden of proof is entirely on the applicant to prove that negative actions, such as unlawful detention, did not occur. On the contrary, the investigator as the perpetrator of the action is actually in a more advantageous position because they have control over the evidence.[6]

A more progressive view is beginning to emerge in several rulings, such as the Calang District Court Decision Number 2/Pid.Pra/2022/PN Cag, which states that placing the burden of proving a negative act on the suspect is a disproportionate burden. This decision supports the application of the limited reverse burden of proof concept. A similar point was emphasised in the PN Sidikalang Decision Number 3/Pid.Pra/2023/PN Sdk, where the judge assessed that if the applicant has demonstrated the existence of coercive actions, then proving the legality or illegality of those actions becomes the investigator's responsibility. These two rulings serve as an important foundation in encouraging a shift towards a fairer burden of proof paradigm in pretrial proceedings. However, Witanto did not explain in depth the concept of "limited reverse burden of proof," so this idea still requires a more comprehensive study. In general, the concept of reverse proof requires the accused party to prove that they are not guilty. In the context of pretrial proceedings, this concept warrants re-examination because, based on a literature review, no research has specifically addressed this topic.

Several previous studies have discussed different topics, such as Peter Jeremiah Setiawan et al. on expiration as a reason for pretrial detention from formal and material aspects;[7] Nurbaedah on the reform of criminal procedural law post Constitutional Court Decision No. 21/PUU-XII/2014;[8] I made Wisnu Wijaya Kusuma, et al., on the validity of pretrial detention in the main case based on Article 77 CPC;[9] Dinar Kripsiaji and Nur Basuki Minarno compare the authority of pretrial detention in Indonesia with that of the commissioner judge in the Netherlands;[10] Supardi Hamid, et al. on pretrial detention as a legal remedy for suspects;[11] Lukman Hakim, et al. on protection for victims of wrongful arrest through compensation

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6 Anugerah Rizki Akbari Maidina Rahmawati et al., *AUDIT KUHAP: Studi Evaluasi Terhadap Keberlakuan Hukum Acara Pidana Indonesia* (Jakarta Selatan: Institute for Criminal Justice Reform, 2022).

7 Peter Jeremiah Setiawan, Xavier Nugrah, and Moch Marsa Taufiqurrohman, "Penggunaan Daluwarsa Sebagai Dasar Permohonan Praperadilan Di Indonesia: Antara Formil Atau Materiil," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, no. 2 (2020), https://doi.org/10.24090/volksgeist.v3i2.4125.

8 Nurbaedah Nurbaedah, "Juridical Study of Reforming the Criminal Procedural Law System Regarding Pretrial Institutions after Constitutional Court Decision in Indonesia," *Jurnal Akta* 9, no. 2 (June 28, 2022): 141, https://doi.org/10.30659/akta.v9i2.21530.

9 I Made Wisnu Wijaya Kusuma, I Made Sepud, and Ni Made Sukaryati Karma, "Upaya Hukum Praperadilan Dalam Sistem Peradilan Pidana Di Indonesia," *Jurnal Interpretasi Hukum* 1, no. 2 (September 26, 2020): 73–77, https://doi.org/10.22225/juinhum.1.2.2438.73-77.

10 Dinar Kripsiaji and Nur Basuki Minarno, "Perluasan Kewenangan Dan Penegakan Hukum Praperadilan Di Indonesia Dan Belanda," *Al-Mazaahib: Jurnal Perbandingan Hukum* 10, no. 1 (June 16, 2022): 29, https://doi.org/10.14421/al-mazaahib.v10i1.2573.

11 Supardi Hamid et al., "Reconstruction of Authority Attorney General in Disclaimer of Case for the Sake of the Public Interest in the Criminal Justice System in Indonesia," *Russian Law Journal* 11, no. 2 (April 7, 2023), https://doi.org/10.52783/rlj.v11i2.885.

mechanisms;[12] Ramiyanto and Silfy Maidianti discussing the legal standing of NGOs/CSOs in pretrial detention;[13] and Sonia Sanuarija on the role of judges in addressing legal vacuums through the principle of *ius curia novit*.[14]

The results of the literature review suggest that the concept of reverse proof has not been discussed in the context of pretrial proceedings; therefore, there is an important research gap that warrants further exploration. This research aims to answer three problem formulations: *First*, does habeas corpus use the reverse burden of proof system? *Second*, how is the reverse burden of proof regulated in the Indonesian judicial system? *Third*, what is the ideal conception of reverse proof in pretrial matters?

The urgency of this research lies in the effort to identify the burden of proof within the habeas corpus mechanism. One of the comparative materials used is the Texas Code of Criminal Procedure, which provides a normative framework for examining the construction of habeas corpus in greater depth. Additionally, the study of reverse proof is also important for understanding how the Indonesian judicial system regulates it. This research is not only relevant for evaluating existing regulations but also for formulating new, concrete concepts in the development of future pretrial frameworks, including integrating the innovative concept of reverse proof as the main focus of novelty in this study.

RESEARCH METHODS

This research employs a normative juridical method, which is suitable for doctrinal legal research, and aims to establish a conceptual framework regarding reverse proof in the pretrial mechanism. The approaches used include (1) the statutory approach, by examining the CPC and related regulations; (2) the conceptual approach, to review legal principles such as habeas corpus, burden of proof, and reverse proof; (3) the comparative approach, by comparing the pretrial mechanism in Indonesia with the *habeas corpus* system in common law jurisdictions (such as the Texas Code of Criminal Procedure); and (4) the case approach, by analysing relevant court decisions, particularly those applying the concept of reverse burden of proof. The legal materials collected comprise three types: primary legal materials (statutes, court decisions, and international instruments such as the UDHR and ICCPR), secondary legal materials (books, journal articles, and comments on procedural law), and tertiary legal materials (legal dictionaries and encyclopedias). All legal materials are analysed qualitatively, with an emphasis on the logical consistency of arguments, interpretation of legal norms, and their conformity with human rights principles. This analysis aims to reconstruct a model of proof inspired by habeas corpus, examine reverse proof in the Indonesian judicial system (particularly in corruption and administrative cases), and formulate a normative-conceptual framework regarding the ideal form of reverse proof in pretrial matters.

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[12] Lukman Hakim, Paidjo Paidjo, and Tegar Mukmin Alamsyah Putra, "Perlindungan Hukum Korban Salah Tangkap Oleh Kepolisian Republik Indonesia," *Jurnal Hukum Magnum Opus* 3, no. 1 (January 20, 2020): 35–45, https://doi.org/10.30996/jhmo.v3i1.2786.

[13] Ramiyanto Ramiyanto and Silfy Maidianti, "Legal Standing Lembaga Swadaya Masyarakat Atau Organisasi Kemasyarakatan Dalam Pengajuan Praperadilan," *Jurnal Yudisial* 14, no. 3 (March 28, 2022): 331, https://doi.org/10.29123/jy.v14i3.462.

[14] Sonia Sanuarija, "Kewenangan Praperadilan Sebagai Sarana Mencari Keadilan Bagi Tersangka Dalam Sistem Peradilan Pidana Di Indonesia (Studi Kasus Praperadilan Nomor: 24/Pid.Pra/20 B18/Jaksel)," *El-Mashlahah* 9, no. 1 (2019): 1–15, https://doi.org/10.23971/el-mas.v9i1.1117.

ANALYSIS AND DISCUSSION

Conception *Habeas Corpus* and the Evidence System

Historical Origins and Legal Development

Habeas corpus comes from Latin, which means "you have the body," namely, a court order to bring a person who is being detained to court by the party holding him.[15] As the "Great Writ of Liberty," *habeas corpus* was born from the principle of freedom first affirmed in the Magna Carta of 1215, which stated that no one could be detained without due legal process.[16] In the common law tradition, this principle evolved into a tool for protecting against arbitrary detention.[17]

The Habeas Corpus Act of 1679 is a significant development in the history of English law, strengthening the courts' role in testing the legality of detention. Initially, this writ was the prerogative of the king; however, after the Glorious Revolution, it became a tool to limit the power of the monarchy. This principle was then adopted by other countries, including the United States, which incorporated it into the 1787 Constitution as a fundamental right that can only be suspended in emergencies such as rebellion or invasion.[18]

The essence of the Habeas Corpus Act 1679 is to guarantee that every detained individual must be promptly brought before the court to test the legal basis of their detention, except in cases of treason or serious crimes.[19] In its development, the writ of *habeas corpus* has been used for various legal purposes, such as:

1. *Subpoena to testify* is an order that requires witnesses to appear in court to give testimony.[20]
2. *Habeas corpus ad testificandum* is addressed to the party holding the detainee, ordering them to bring the detainee to court to give testimony.[21]
3. *Habeas corpus ad prosequendum* is used to bring detainees to court, either for trial, to provide testimony, or for other procedural purposes, including the continuation of legal proceedings against them.[22]

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[15] Thomas Curr, "Habeas Corpus, Its Versatility on Both Sides of the 'Pond,' and When Right against Remedy Becomes Quixotic," *Global Journal of Comparative Law* 9, no. 2 (2020), https://doi.org/10.1163/2211906X-00902003.

[16] Chuks Okpaluba and Anthony Nwafor, "The Common Law Remedy of Habeas Corpus Through the Prism of a Twelve-Point Construct," *Erasmus Law Review* 14, no. 2 (2020), https://doi.org/10.5553/elr.000175.

[17] Abdiaxatov Maxmudovich, Bozorov Maqsudali Temur Rovshan o'g'li, "Problems of Realisation of the Sovereignty of the Institute" Habeas Corpus Act" in the Criminal Procedure," *Periodica Journal of Modern Philosophy, Social Sciences and Humanities* 11 (2022): 46–50, https://periodica.com/.

[18] Amanda L. Tyler, "Habeas Corpus: A Very Short Introduction (Excerpt)," *SSRN Electronic Journal*, 2021, https://doi.org/10.2139/ssrn.3933943.

[19] "Habeas Corpus Act, 1679" (n.d.), https://users.ssc.wisc.edu/~rkeyser/wp/wp-content/uploads/2015/06/HabeasCorpus1679.pdf.

[20] Chike B. OKOSA, "The Principles and Practice of Costs in Arbitral Proceedings," *International Review of Law and Jurisprudence* 4, no. 1 (2022): 38–44, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/inlrwolw4&section=10.

[21] Matthew Hughes, "Evidentiary Issues and Certificates of Appealability in Federal Habeas Corpus Petitions," *Liberty University Law Review* 14, no. 3 (2020): 487–529, https://digitalcommons.liberty.edu/lu_law_review/vol14/iss3/3?utm_source=digitalcommons.liberty.edu%2Flu_law_review%2Fvol14%2Fiss3%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages.

[22] Gregory. Winder, "Another Bite at the Apple or the Same Bite? Characterising Habeas Petitions on Appeal as Pending Instead of Fully Adjudicated," *Wm. & Mary L. Rev* 64, no. 2 (2022): 557–83, https://scholarship.law.wm.edu/wmlr?utm_source=scholarship.law.wm.edu%2Fwmlr%2Fvol64%2Fiss2%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages.

4. *Habeas corpus ad respondendum* is a court order, also known as a warrant, that requires the party detaining someone to bring the detainee to court so that they can answer the charges alleged against them.[23]
5. *Habeas Corpus ad Faciendum et Recipiendum* is a warrant to transfer a detainee from one court to another to undergo further legal proceedings. [24]
6. *Habeas Corpus ad Satisfaciendum* is an order for a detainee to carry out a court decision that has been determined.[25]
7. *Habeas Corpus ad Deliberandum et Recipiendum* is a warrant to transfer detainees from a lower court to a higher court to continue the legal process.[26]

All variants of *habeas corpus* share the same primary objective: to ensure a person's physical presence in court for the protection of certain legal interests. The difference lies in the object and specific purpose. For example, a *subpoena ad testificandum* is directed at a witness who is not in custody. In contrast, a *habeas corpus ad testificandum* is directed at the party detaining the individual to produce the detainee as a witness.

Jurisprudence and International Recognition

Habeas corpus ad subjiciendum is the most relevant form to test the legality of detention, as it directly highlights the validity of the detention action itself. This writ reflects the principle of the rule of law as stated in Article 39 of the Magna Carta, which guarantees individual freedom from detention without a legal basis.[27] In the United States, *habeas corpus* is regulated by Article I, Section 9 of the 1787 Constitution and reinforced through the Judiciary Act of 1789. At the international level, "Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) " affirm the prohibition against arbitrary detention and guarantee individual freedom.

Jurisprudence also reinforces the position of habeas corpus as a legal instrument for the protection of human rights. In the case of Ex parte Bollman (1807), Chief Justice John Marshall asserted that *habeas corpus ad subjiciendum* is part of the court's authority to assess the legality of detention.[28] Similarly, in *Stone v. Powell* (1976), the U.S. Supreme Court affirmed the origins of habeas corpus from the English common law tradition.[29] The case of ADM *Jabalpur v. Shivkant Shukla* in India during the Emergency period (1975–1977) sparked controversy, as the Supreme Court of India held that the right to *habeas corpus* could be temporarily suspended

[23] Curr, "Habeas Corpus, Its Versatility on Both Sides of the 'Pond,' and When Right against Remedy Becomes Quixotic."

[24] Jake Zurschmiede, "Habeas Corpus and COVID-19: In the Midst of a Viral Pandemic, Can the 'Great Writ' Provide Home Supervision to At-Risk Plaintiff Inmates?," *Indiana Health Law Review* 19, no. 1 (2022), https://doi.org/10.18060/26093.

[25] Rachel E Record, "Retaliation and Rushed Terrorism Legislation: Petitioners' Limited Rights in AEDPA's World through the Lens of Second or Successive Habeas Corpus Petitions," *Suffolk UL Rev* 56 (2023): 443–75, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sufflr56&section=24.

[26] Record.

[27] Mcgregor-Lowndes, Myles Hannah, and Frances, "Save the Children Australia v Minister for Home Affairs [2024] FCAFC 81," *ACPNS Legal Case Notes Series*, 2024, https://eprints.qut.edu.au/249138/.

[28] Lee Kovarsky, "THE NEW NEGATIVE HABEAS EQUITY," *Harvard Law Review* 137, no. 8 (2024), https://doi.org/10.2139/ssrn.4520056.

[29] Kovarsky.

during a state of emergency.[30] This ruling sparked intense debate about the limits of state power and the protection of individual rights while also reinforcing the importance of the habeas corpus principle in a democratic legal system.

Indonesian Pretrial and Evidentiary Burden

In Indonesia, the principle of habeas corpus is implicit in the 1945 Constitution. The right to be free from arbitrary detention is regulated in Article 28G, paragraph (1), which guarantees human rights, including protection from unlawful detention. The CPC, as outlined in Articles 77 to 83, regulates pretrial mechanisms, which align with the principles *of habeas corpus*. For example, the pretrial scope is used to examine and decide on the legality of arrest or detention. Article 82 of the CPC regulates the procedures and time for pretrial submissions.

In the implementation of *habeas corpus ad subjiciendum*, the burden of proof lies on the party detaining someone. This principle requires the detaining party or those responsible for the detention to provide clear and valid legal reasons for the detention action. If the detaining authority is unable to establish that the detention complies with legal standards, the individual in custody is entitled to be set free.[31] After the warrant *habeas corpus ad subjiciendum* issued, the detaining official is required to explain the "factual and legal reasons" underlying the detention. Based on the answers given by the detainee, the court will decide whether the detainee is eligible for bail, released, or returned to custody.[32]

Based on this explanation, the burden of proof in *Habeas Corpus* lies with the official who detains someone. Even if a detainee submits a petition to review the legality of their detention, the detaining official is still obliged to prove the legality of the detention action. This is in line with the Texas Code of Criminal Procedure, especially Chapter 11 on *Habeas Corpus*, where Article 11, Section 01 explicitly requires the detaining party to provide valid reasons why a person is being detained or has their freedom restricted (*show why he is held in custody or under restraint*).

Comparative Analysis: Habeas Corpus and Pretrial in Indonesia

Based on the previous explanation regarding the principle of habeas corpus and its implementation in the United States legal system, as well as the pretrial mechanism in the Indonesian CPC, a comparative analysis can be conducted to assess the extent to which both share similarities and differences, whether in terms of purpose, structure, or burden of proof.

Both *habeas corpus* and pretrial aim to protect individuals from arbitrary detention and ensure that restrictions on a person's freedom are based on valid legal reasons. Both serve as mechanisms for oversight of state actions and reflect the principle of due process of law.

However, there are fundamental structural differences. *Habeas corpus ad subjiciendum* is a writ or direct order from the court that can be filed by an individual, requiring the detaining party to prove the legal basis for the detention. This mechanism is more direct and originates

[30] A.N. Ray, "Additional District Magistrate, ... vs S. S. Shukla Etc. Etc on April 28, 1976," 2024, https://indiankanoon.org/doc/1735815/.

[31] Justice Rolston Nelson and Ria Mohammed Davidson, "Habeas Corpus: The Great Writ Shines On," *The Faculty of Law Journal* 1, no. 1 (2023): 47–64, https://journals.sta.uwi.edu/ojs/index.php/stalj/article/view/9029.

[32] David Kinnaird, "Habeas Corpus and Void Judgments," *SSRN Electronic Journal*, 2024, https://doi.org/10.2139/ssrn.4624001.

from the common law tradition. Meanwhile, pretrial in Indonesia is a formal mechanism regulated by Articles 77 to 83 of the CPC and carried out through specific administrative procedures. This mechanism is institutional in nature and subject to the standard structure of criminal procedural law.

Thus, although both habeas corpus and pretrial proceedings serve to protect the right to freedom, their effectiveness differs; habeas corpus offers a more direct and accountable mechanism, while pretrial proceedings in the Indonesian CPC system still face challenges, particularly in the burden of proof, which has not yet fully aligned with the principle of human rights protection.

Reverse Evidence Arrangements in the Indonesian Judicial System

The Concept of Burden of Proof and the Development of Reverse Evidence

In Roman law, the allocation of the burden of proof ("onus probandi") was straightforward—the party initiating the lawsuit bore the responsibility: *"semper necessitas probandi incumbit illi qui agit"* ("the burden of proof always lies with the claimant"). This means that the plaintiff had to prove all the facts supporting the claim. However, if the defendant raised a defence based on facts different from those presented by the plaintiff, the burden of proof shifted to the defendant. Roman jurists also emphasised that anyone raising an objection involving new facts outside the original claim bears the same evidentiary burden as the plaintiff.[33] Currently the Principle *Actori In Cumbit Probatio*, is universal in the law of evidence which requires the party making the argument to be charged with proving the argument.[34]

The incarnation of this principle is contained in several legal provisions, in civil cases these provisions are regulated in "Article 163 *Herzien Inlandsch Reglement* (HIR) or Article 283 *Reglement voor de Buitengewesten* (RBg) as well as Article 1863 of the Civil Code." A similar principle also applies in criminal law, as reflected in Article 66 of the CPC, which stipulates that defendants and suspects are not required to bear the burden of proof. From these two norms, it can be concluded that in a trial, there are at least 2 (two) opposing parties, where one party is arguing for an accusation, and this accusation must be proven by the party making the argument.[35]

The principle that forms the main foundation of the evidentiary process places the burden of proof on the party making the argument. In the context of criminal law, the burden of proof is on the public prosecutor. Through his indictment, the public prosecutor formulates accusatory arguments about a fact. These facts are then formulated in such a way as to form a chronology of a criminal event committed by the defendant.[36] If traced earlier, the process of discovering the facts presented by the public prosecutor begins with an investigation aimed at

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[33] Petr Dostalík, "Role of Arbiter in Roman Classical Law," *Studia Historica Brunensia* 71, no. 22 (2024): 9–23, https://doi.org/https://doi.org/10.5817/SHB2024-2-2.

[34] Chittharajan F. Amerasinghe, "The Principle Actori Incumbit Onus Probandi," in *Evidence in International Litigation*, 2021, https://doi.org/10.1163/9789047407775_010.

[35] Setiawan Setiawan, Nugraha Ardi Noerdajasakti and Faizin Sulistio, "The Weak Role of Prosecutors in Designating Justice Collaborators in Indonesia," *International Journal of Islamic Education, Research and Multiculturalism (IJIERM)* 5, no. 3 (2023): 863–86, https://journal.yaspim.org/index.php/IJIERM/index.

[36] Oksidelfa Yanto et al., "The Role Of Indictment Of Public Prosecutor In Eradication Of The Case Of Corruption In Indonesian Criminal Justice System," *Rechtidee* 14, no. 2 (2019): 263–87, https://core.ac.uk/download/pdf/304320750.pdf.

collecting evidence in the form of witness statements, letters, expert statements, and identifying suspects. The public prosecutor then formulated the results of the review of the facts found from the evidence as a common thread which became the foundation for preparing the arguments in his indictment.[37]

Through the trial process, these arguments are then tested to see whether they have sufficient evidence to be declared true. Evidence is examined one by one to support each argument presented by the public prosecutor. Every fact that originates from valid evidence is then referred to as a legal fact.[38] Some sources also require that, to be considered a legal fact, at least two pieces of evidence must support it.[39]

These legal facts then become the basis for consideration by the judge to determine whether the arguments put forward by the public prosecutor in their indictment are proven or not. Failure to prove one argument can result in the alleged crime not being proven. This entire process is the lifeblood of proving a criminal act, according to Indonesian criminal procedural law.[40] The obligation to present all the evidence is referred to as the burden of proof. All evidence presented is intended solely to prove arguments, so that in the end according to the law a person can be sentenced to a crime or even acquitted from legal charges.

Legal Regimes of Reverse Evidence and Challenges in Practical Implementation

In 1998, after reform in Indonesia, eradicating criminal acts of corruption became a top priority in state administration. This was done by promulgating a set of regulations to facilitate law enforcement in eradicating corruption, which was felt to have crystallised in the government bureaucracy at that time.[41] Not only does this effort expand and increase sanctions for criminal acts of corruption, but it is also demonstrated by modifying existing procedural law, one of which is the introduction of reverse evidence.[42]

Inverse proof (*reversed burden of proof*) is a legal concept where the burden of proof, which is usually on the accusing party (prosecutor), is shifted to the accused party (defendant).[43] Formal reverse evidence was first introduced in Article 37 paragraph (4) of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (Law No. 31 of 1999). The rule that can be learned is that if the defendant cannot prove that his wealth is disproportionate to his income, then this information can be used to strengthen existing evidence that the defendant has committed a criminal act of corruption. Furthermore, in paragraph (3), the defendant is also required to provide information regarding all his assets and

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[37] Suwarto Suwarto, "Consequences Of Police Investigations for Investigation Errors That Cause Someone to Become a Suspect/Defendant," *International Journal of Social Science, Education, Communication and Economics (SINOMICS JOURNAL)* 2, no. 4 (2023): 933–42, https://sinomicsjournal.com/index.php/SJ/article/view/196.

[38] Luh Rina Apriani, "Relevansi Fakta Hukum Dalam Penggunaan Sifat Melawan Hukum Negatif," *Jurnal Yudisial* 4, no. 1 (2011): 1–14, https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/199.

[39] Apriani.

[40] Simon Butt and Sofie Arjon Schütte, "Assessing Judicial Performance in Indonesia: The Court for Corruption Crimes," *Crime, Law and Social Change* 62, no. 5 (2014), https://doi.org/10.1007/s10611-014-9547-1.

[41] Vishnu Juwono, "Berantas Korupsi: A Political History of Governance Reform and Anti-Corruption Initiatives in Indonesia 1945-2014," *Doctoral Dissertation* (2016).

[42] Hari Soeskandi and Setia Sekarwati, "Pembuktian Terbalik Dalam Tindak Pidana Korupsi," *Jurnal Indonesia Sosial Teknologi* 2, no. 11 (2021), https://doi.org/10.36418/jist.v2i11.280.

[43] Sudarto, *Hukum Pidana Dan Perkembangan Masyarakat* (Bandung: Alumni, 1983).

the assets of his wife or husband, children and the assets of any person or corporation suspected of having a connection with the case in question.

Formally, the provisions regarding reverse evidence, as outlined in Law No. 31 of 1999, are still too vague to be implemented. The defendant's right to prove that the property he owns has no direct consequences. Rather, it only has the effect of increasing the judge's confidence that he committed a criminal act. Such conditions are certainly not much different from the evidentiary process in ordinary criminal cases based on the CPC.[44] So in the end the proof of criminal acts of corruption at that time was not much different from ordinary criminal acts.[45] This is certainly understandable, considering *that the original intent* behind the formation of Law No. 31 of 1999 still focuses on reformulating what constitutes acts of corruption and who the law holds accountable as *the perpetrator*. So it is very appropriate when the law of reverse proof is not yet too developed.

Significant changes to the concept of reverse proof occurred through Law No. 20 of 2001, which amended Law No. 31 of 1999 on the Eradication of Corruption Crimes. In this amendment, Articles 38B and 38C provide a legal basis for public prosecutors to allege that the defendant's assets originate from corrupt practices. Based on this allegation, the defendant is entitled to prove that the accused assets are not the result of a crime.[46]

If the defendant fails to prove the lawful origin of the assets, then the assets are considered to have originated from a corrupt activity and can be confiscated by the state. The procedural uniqueness of this provision is that the judge can hold a separate hearing so that the defendant can present relevant evidence regarding the legality of their wealth.[47]

However, this provision still upholds the presumption of innocence. Suppose the defendant is acquitted in the main case. In that case, the prosecutor's request to confiscate the property cannot be granted, even if the defendant fails to prove that the assets are legitimate. Thus, the reverse burden of proof is focused on the independent verification of wealth but still relies on the final decision in the main criminal case.[48]

Based on the norms governing reverse evidence, there are two different regimes. *First*, regarding the regime for proving criminal acts of corruption as regulated in Law no. 31 of 1999 jo. Law no. 20 of 2001. The burden of proof in this regime still rests with the public prosecutor in presenting evidence related to criminal acts against the defendant. The consequences of this regime are whether the defendant is found guilty of committing a crime, and the punishments include corporal punishment, fines, and criminal compensation. Meanwhile, the *second* regime refers to assets that are accused of originating from the proceeds of corrupt acts. This regime

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[44] M Latifah, "Kendala Penerapan Pembuktian Terbalik Dalam Penyelesaian Tindak Pidana Korupsi Di Indonesia," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 1, no. 1 (2016): 1–22, https://doi.org/http://dx.doi.org/10.22212/jnh.v1i1.272.

[45] Latifah.

[46] Yuni Priskila Ginting et al., "Implementasi Sistem Pembuktian Terbalik Tindak Pidana Korupsi Di Indonesia (Analisis Putusan Nomor 1013/Pid.B/2009/PN Sby)," *Jurnal Pengabdian West Science* 2, no. 10 (2023): 880–92, https://wnj.westscience-press.com/index.php/jpws/article/view/690.

[47] Muhammad Chaerul Risal, "Penerapan Beban Pembuktian Terbalik Dalam Upaya Penanggulangan Tindak Pidana Korupsi," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 5, no. 1 (2018), https://doi.org/10.24252/jurisprudentie.v5i2.5401.

[48] Nurhayani Nurhayani, "Pembuktian Terbalik Dalam Pemeriksaan Tindak Pidana Korupsi Di Indonesia," *Jurnal IUS Kajian Hukum Dan Keadilan* 3, no. 1 (2015): 93–107, https://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/201/0.

emphasises that the defendant prove that the alleged assets are sourced from legal proceeds. If the defendant fails to prove it, then the criminalisation of the property can be confiscated by the state.

Even though it has benefits, reverse proof must still be applied carefully. The aim of implementing reverse evidence regarding the origin of the defendant's assets is to depart from the spirit of returning lost state assets. However, it does not deny the existence of the principle of the presumption of innocence. On the one hand, the state is trying its best to restore its financial condition, but on the other hand, it must also pay attention to the defendant's fundamental rights.[49] To compromise these two interests, the burden of proof is shifted to the defendant. Because only he himself knows the origins of his assets.[50]

In the study conducted by Arhjayati and Madinah (2020) regarding Corruption Case Number 22/Pid.Sus-TPK/2018/PN Gto, it was revealed that the application of the reverse burden of proof remains primarily confined to "gratification-related offences." However, Article 38B paragraph (1) of the Anti-Corruption Law covers “a broader range of corruption crimes,” not limited solely to gratification.[51]

Moreover, there is a misconception that there is no separation between proving the main case and proving the origin of the assets. In fact, this misconception arises from the judges who examine the case. As a result, the success or failure of the defendant in proving the origin of their wealth is only considered as a reinforcement of the judge's belief in their guilt, rather than as an independent instrument of proof.

Apart from cases of criminal acts of corruption, reverse evidence is also used in cases of criminal acts of money laundering as Article 77 of Law Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering (Law No. 8 of 2010) stipulates that the defendant is obliged to prove the origin of proposal of the assets he owns. This is done to make it easier for law enforcement officials to dismantle criminal networks, which are often difficult to trace. Reverse evidence is also applied implicitly in the State Administrative Court (PTUN). In this case, the defendant (usually a state administrative agency or official) is required to demonstrate that the decision taken is in accordance with the procedures, substance, and authority determined by law. This is reflected in Article 107 of Law Number 5 of 1986 concerning State Administrative Courts, which regulates that "state administrative bodies or officials are obliged to provide evidence of the validity of disputed decisions".

Based on the explanation above, reverse evidence, whether in criminal acts of corruption, money laundering, or administrative disputes at the Administrative Court, is a system designed to overcome obstacles in proving complex cases, such as organised crime or abuse of authority.

Basis for the Application of Reverse Evidence in Pretrial Cases, and the Ideal Concept

Theoretical Justification and Procedural Challenges in Applying Reverse Evidence

[49] Vicko Taniady and Novi Wahyu Riwayanti, “Reformulasi Beban Pembuktian Terbalik Berlandaskan Asas Presumption of Guilt Terhadap Kasus TPPU Di Indonesia,” *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 1, no. 2 (2021), https://doi.org/10.15294/ipmhi.v1i2.53702.

[50] Taniady and Riwayanti.

[51] Arhjayati Rahim and Madinah Mokobombang, “Analisis Penerapan Pembuktian Terbalik Dalam Kasus Tindak Pidana Korupsi:(Studi Perkara Nomor: 22/Pid. Sus-TPK/2018/PN. Gto),” *Al-Mizan (e-Journal)* 16, no. 2 (2020).

Witanto stated that the basis for requiring reverse evidence in pretrial was because what was at issue was a negative act, namely "the invalidity of coercive measures." Although Witanto did not elaborate on this view further, this opinion aligns with the principle of *negativa non sunt probanda* (negative facts do not need to be proven), which aims to limit the unlimited application of negative propositions.[52] This principle emphasises that the party who denies a fact is not obliged to prove the absence of that fact, because denial is not evidence.[53] This principle is in line with the principle of "*Ultra posse nemo obligatur"* (no person is obliged to do more than his ability), which emphasises that things that are negative or difficult to prove cannot be an unreasonable burden of proof.[54] Thus, in the pretrial context, proving the validity of an act of coercion is the obligation of the party carrying out the act (the pretrial respondent), not the party challenging or submitting the petition. This also reflects the principle of justice, which acquits parties who are unable to prove the absence of something that is difficult or impossible to prove.

Difficulty in proving something negative is an obstacle faced in pretrial institutions. This is due to the fact that proving negative facts is very difficult, because it proves nothing. The concept of pretrial itself is rooted in the principle of *Habeas Corpus*, which aims to protect individual freedom from arbitrary detention. In its implementation, *Habeas Corpus* employs a reverse evidentiary system, where the burden of proof lies with the party detaining the individual. We can compare and review this from the Texas Code of Criminal Procedure, especially Chapter 11 on *Habeas Corpus*, where Article 11, Section 01. In this context the detaining party is required to prove the legality of their actions, including providing clear and valid legal reasons for the detention carried out. This provides the basis for the importance of developing a new paradigm in reverse evidence in pretrial cases.

This principle should also guide pretrial proceedings, where "pretrial respondents are expected to present clear and convincing evidence" demonstrating that their actions follow applicable legal procedures and do not infringe upon human rights. Furthermore, this new paradigm must also provide greater space for independent and impartial judicial supervision, as pretrial functions are a horizontal supervisory institution.[55] In this way, pretrial proceedings can develop into an instrument to protect individual freedoms from abuse of power and ensure that legal processes proceed fairly.

This research aligns with Witanto's view, which posits that pretrial ideally utilises limited reverse evidence.[56] One of the indicators of limited reverse evidence in pretrial is that "the applicant is only required to prove that he has been the subject of coercive measures, such as arrest, detention, search, confiscation, or designation as a suspect. "Apart from that, in pretrial

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[52] Salvatore Patti, *Le Prove* (Giuffre Francis Lefebvre, 2021).

[53] Chiara Giovannucci Orlandi, "Burden of Proof, Standard of Proof, and Evidence Issues under the CISG," *Journal of Law and Commerce* 38 (2020), https://doi.org/10.5195/jlc.2020.198.

[54] Achmad Ali and Wiwie Heryani, *Asas Pembuktian Hukum Perdata*, 1st ed. (Jakarta: Kencana, 2012).

[55] Erwin Susilo et al., "Pretrial Failures in Ensuring the Merit of Cases: Critical Analysis and Innovative Reconstruction," *Journal of Ecohumanism* 8, no. 4 (2024): 8602–12, https://doi.org/https://doi.org/10.62754/joe.v3i8.5477.

[56] Witanto, *Hukum Acara Praperadilan Dalam Teori Dan Praktik: Mengurai Konflik Norma Dan Kekeliruan Dalam Praktik Penanganan Perkara Praperadilan*.

proceedings regarding compensation, the applicant must also prove the losses he has suffered and the need for rehabilitation, as regulated in Article 77 letter b of the CPC."

Pretrial objects, as regulated in Article 77 letter a of the CPC, include various legal actions such as arrest, detention, search, confiscation, designation as a suspect, termination of investigation, or prosecution. In this context, "the burden of proof regarding the legality of the action lies with the pretrial respondent." For example, when the legality of detention is tested, pretrial applicants tend to have difficulty proving that the conditions of detention conflict with subjective requirements, such as concerns "that the suspect will flee, destroy evidence, or repeat criminal acts," as stated in Article 21 paragraph (1) of the CPC. This is because this subjective aspect is part of the considerations that are only controlled by the pretrial respondent. Therefore, the respondent is obliged to prove that his actions have been carried out according to procedures and fulfill applicable legal requirements.

Reverse Evidence as a Means to Ensure Fairness

The application of reverse proof can play an important role in realising the principle *equality of arms* in criminal cases, which aims to create a balance between the individual and the state.[57] This principle recognises the existence of natural inequality between the two parties, so that institutional structures and procedures are needed that can balance this inequality. Through reverse evidence, the applicant is given adequate rights and tools to dispute the coercive efforts made against him.[58]

Reverse proof "does not mean shifting the entire burden of proof to the respondent but rather giving responsibility to the respondent to prove the validity of the legal action taken, such as arrest, detention, search, confiscation or determination of the suspect." This conception is based on the principles of *due process of law* and the *rule of law*, which guarantee that every legal action by law enforcement officials must have a clear, valid, and accountable legal basis. The application of reverse evidence in pretrial ideally aims to: protecting human rights from arbitrary actions by authorities, ensuring transparency and accountability in the implementation of coercive measures, and ensuring that law enforcement actions are carried out in accordance with established procedures and protocols.

In short, in applying ideal reverse evidence in pretrial cases, the burden of proof is divided proportionally between the applicant and the respondent. *First,* the applicant is obliged to prove that the respondent actually carried out coercive measures against the applicant. *Second,* the respondent is obliged to prove that the actions taken have a clear legal basis, are carried out in accordance with valid procedures, and do not violate human rights. If the respondent is unable to prove the legality of his actions in pretrial, then the judge can grant the petition and declare the respondent's actions invalid. Based on Article 82 paragraph (3) of the CPC, a judge can order the release of a suspect if the arrest or detention is declared illegal, continue the

[57] Lucia Rusu, "The Role of the Defender in Ensuring the Immediacy of the Examination of Evidence in Criminal Procedure," *Romanian Journal of Forensic Science* 37, no. 1 (2024): 18–26, https://ibn.idsi.md/vizualizare_articol/205633.

[58] Vânia Costa Ramos, "The EPPO and the Equality of Arms between the Prosecutor and the Defence1," *New Journal of European Criminal Law* 14, no. 1 (2023), https://doi.org/10.1177/20322844231157078.

investigation or prosecution if the termination is illegal, include compensation and rehabilitation, and order the return of confiscated objects if they are not evidence

Reverse evidence is highly relevant to be applied in pretrial cases, considering the difficulty of the applicant in proving negative actions, such as inappropriate detention procedures. This concept is in line with the idea *Habeas Corpus*, which places the obligation on the detaining official to prove the legality of his or her actions. Apart from that, reverse evidence is not a new concept in the Indonesian criminal justice system, as it is applied in cases involving criminal acts of corruption, money laundering, and even cases at the Administrative Court. Constitutional Court Decision No. 21/PUU-XII/2014 also emphasises the importance of transparency by legal officials in explaining the basis for their actions. Therefore, reverse evidence in pretrial proceedings is crucial to maintain the balance of evidence, protect citizens' rights, and ensure that pretrial proceedings are a fair and impartial process.

CONCLUSION

Habeas corpus is a crucial legal instrument that protects individual freedoms from arbitrary detention by ensuring that every detention has a valid legal basis and is subject to judicial review for its validity. In the international context, habeas corpus is reflected in the UDHR and ICCPR, while in Indonesia this principle is adopted in Article 28G of the 1945 Constitution and Articles 77-83 of the CPC through pretrial mechanisms. The burden of proof in *habeas corpus ad subjiciendum* lies with the detaining party, who is obligated to demonstrate the legality of the detention; otherwise, the detainee has the right to be released.

Reverse evidence is a legal mechanism that places the burden on the defendant to prove the origin of certain assets or actions in complex cases such as criminal acts of corruption, money laundering, or administrative disputes. This mechanism aims to overcome difficulties in exposing organised crime and abuse of authority. In corruption cases, reverse evidence is comprehensively regulated in Law No. 31 of 1999. Law No. 20 of 2001 gives the defendant the right to prove the legality of their assets; if they fail, the assets are considered the proceeds of a criminal act. Reverse evidence is also regulated in the crime of money laundering (Law No. 8 of 2010) and administrative disputes at the PTUN.

The application of reverse evidence in pretrial cases aims to protect human rights, guarantee transparency, and create accountability for the actions of law enforcement officials in coercive measures such as arrest, detention, search, confiscation, or determination of suspects by placing an obligation on the respondent to prove the legality of their actions based on the principle *due process of law* and *rule of law*. This principle aligns with the principle *of non-probation of nega*tives, which relieves the applicant from the obligation to prove something negative. Additionally, it adopts the concept of *Habeas Corpus* to ensure that every legal action is carried out in accordance with established legal procedures. By dividing the burden of proof proportionally, where the applicant only needs to show that he or she is the subject of the action, this mechanism strengthens the principle of *equality of arms*, creating a balance between individuals and the state, and making pretrial proceedings an effective instrument for preventing abuse of power and ensuring equality in pretrial evidence.

Therefore, it is necessary to establish judicial guidelines for pretrial judges to consistently apply the principle of reversed burden of proof in assessing the legality of coercive actions.

Additionally, it is necessary to consider establishing a new norm in the revision of the CPC that explicitly regulates the proportional distribution of the burden of proof in the pretrial process, with the emphasis that the applicant only needs to demonstrate themselves as the subject of the legal action. This regulation will enhance the effectiveness of pretrial as a judicial control instrument to prevent the abuse of power by law enforcement officials and promote procedural justice within the Indonesian criminal justice system.

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