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Reconstruction Of The Expansion Of Criminal Sanctions For Money Laundering Crimes Through Non-Conviction Based (Ncb) Asset Forfeiture And In Rem Lawsuit

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ABSTRACT

The criminalization of money laundering (TPPU) in Indonesia remains ineffective due to its dependency on proving the original crime. This legal gap hinders asset confiscation, despite alarming data from the 2021 PPATK National Risk Assessment, which estimated IDR 44.2 trillion in criminal proceeds yet to be recovered. Traditional procedures primarily focus on identifying perpetrators, often overlooking tainted assets. In contrast, the United States and Australia apply a dual-track system combining criminal and civil mechanisms through in rem lawsuits under the Non-Conviction Based (NCB) asset forfeiture framework. This study aims to propose a reconstruction of criminal sanction expansion for money laundering using NCB asset forfeiture and in personam approaches. Employing a normative juridical method, it analyzes laws, doctrines, and comparative practices grounded in the Theory of Justice, Asset Confiscation Theory, and Alternative Punishment Theory. The findings support that combining in rem lawsuits and in personam actions offers a viable legal reform, particularly when the conventional criminal process fails to recover illicit assets. This hybrid mechanism enables the state to pursue assets directly, bypassing the necessity of criminal conviction, thus promoting legal certainty, justice, and utility. Given Indonesia's ratification of the UNCAC since 2003, it is imperative to institutionalize asset recovery mechanisms beyond the conventional criminal route. The study recommends urgent legislative reform to accommodate NCB asset forfeiture procedures and expand the legal foundation for effective money laundering enforcement in Indonesia.

Introduction

The construction of the criminalization of money laundering crimes (TPPU) is still a classic problem that has not been successful. Data from the 2021 PPATK National Risk Assessment (NRA) report, in the period from 2016 to 2020 there were 336 decisions in money laundering cases that were indicated as part of a form of economic crime where the estimated value of the proceeds of crime reached Rp. 44,200,000,000,000 (forty-four trillion two hundred billion rupiah) and had not been confiscated by the state (PPATK 2021). The results of the Indonesia Corruption Watch report stated that the trend of

corruption in 2023 is still a very significant increase, namely as many as 791 corruption cases with 1,695 people designated as suspects with potential state losses reaching Rp. 28,414,786,978,089,- (twenty-eight trillion four hundred and twelve billion seven hundred eighty-six million nine hundred and seventy-eight thousand eighty-nine rupiah). In this case, the potential assets disguised through money laundering are Rp.256,761,818,137,- (two hundred and fifty-six billion seven hundred and sixty-one million eight hundred and eighteen thousand one hundred and twenty-seven rupiah) (ICW 2024).

The ratification of Law Number 8 of 2010 concerning the Prevention and Eradication of Corruption Crimes is part of the progressive spirit towards the development of money laundering crimes that are increasingly complicated and sophisticated so that in order to eradicate this crime, special efforts are needed. There is the application of the in rem criminal system in the Non Conviction based (NCB) Asset Forfeiture system which is widely applied in America and Australia. The emergence of NCB Asset Forfeiture is based on the concept of civil forfeiture where this is due to the existence of a 'taint doctrine' or a criminal act is considered "taint" (tarnishing an asset that is used or is the result of the criminal act (Romantz, 1994). The length of the criminal justice process of the TPPU allows criminals to eliminate assets from crimes. The length of this process is reflected in the many obstacles during the investigation process in separating the crime of money laundering from the original criminal act so that some of the recommendations of the PPATK analysis cannot be immediately followed up because they are waiting for proof of the original criminal act from the perpetrator (Muhammad Junaidi 2018).

Normatively, money laundering is defined as one of all acts that meet the elements of a criminal act where the proceeds of the crime are in the form of property from various criminal acts of origin that are threatened with imprisonment of 4 years or more, committed inside or outside Indonesia, and are criminal acts according to Indonesian law. Money laundering can be done by hiding assets, avoiding investigations, and increasing illegal business profits by laundering illegal funds (Lilik et al 2017).

Although Indonesia has ratified UNCAC since 2003 and adopted several legal frameworks for asset confiscation, the implementation remains heavily reliant on proving predicate crimes in criminal court, which often delays justice and fails to secure illicit assets. This legal dependency forms a **research gap**, where the confiscation process becomes ineffective in urgent or complex cases, especially when perpetrators cannot be prosecuted in time. The **novelty** of this research lies in its proposal to integrate *Non-Conviction Based (NCB) asset forfeiture* through *in rem* lawsuits with *in personam* mechanisms as an expansion of the current Indonesian criminal legal system, inspired by successful models in the United States and Australia. This approach offers an alternative model that allows the seizure of illicit assets even without a criminal conviction, promoting both justice and effectiveness in combating financial crimes.

The objectives of this research are to analyze the weaknesses in the current legal construction of money laundering criminalization in Indonesia, propose a normative

reconstruction of asset forfeiture mechanisms through Non-Conviction Based (NCB) and in rem lawsuits, and offer a comparative review of international practices relevant to Indonesian law. These objectives aim to build a comprehensive understanding of the legal gaps and explore feasible alternatives grounded in global best practices.

The benefits of this research include providing a conceptual and practical framework for reforming Indonesia's legal system concerning asset forfeiture, contributing to the development of more effective anti-money laundering strategies, and supporting policymakers in formulating laws that are just, efficient, and aligned with international conventions such as the United Nations Convention against Corruption (UNCAC).

Research Methods

This type of research is normative juridical more predominantly descriptive analytical (Soekanto 2008) with a legislative approach (Ibrahim 2010), a conceptual approach, a case approach (Marzuki 2014), and a comparative legal approach (Eberle 2011). The research data is sourced from primary and secondary legal materials (Ali 2009), namely the 1945 Constitution, the Criminal Code, Law Number 31 of 1999 which has been amended by Law Number 20 of 2001 concerning Corruption Crimes, Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes, Law Number 17 of 2003 concerning State Finance, Law Number 7 of 2021 challenging the Harmonization of Tax Regulations, Law Number 7 of 2006 concerning the Ratification of the Anti-Corruption Convention (UNCAC) 2003, Supreme Court Regulation Number 1 of 2013 concerning Guidelines for Handling Cases of Procedures for Settlement of Applications for Property Fraud in Money Laundering and Other Criminal Acts, the Asset Forfeiture Bill and the Academic Manuscript of the Asset Forfeiture Bill, NRA PPATK 2021, The Stolen Asset Recovery Initiative (StAR) Handbook & Publication, Handbook of Restorative Justice Programmes Second Edition, as well as data taken from the results of books, journals, and expert research through a qualitative approach.

This research uses a normative juridical method with a predominantly descriptive-analytical approach (Soekanto, 2008). The juridical basis for choosing this method lies in the objective of the study: to reconstruct legal norms related to the expansion of criminal sanctions for money laundering (TPPU) through *Non-Conviction Based (NCB) Asset Forfeiture* and *In Rem* lawsuits. This approach allows the author to critically examine existing legal norms, doctrines, and comparative practices without direct empirical fieldwork.

Several juridical approaches are used in combination, including:

- Statutory approach, justified by the need to examine legislation such as Law No. 8 of 2010, Law No. 31 of 1999, and international conventions like UNCAC 2003;
- Conceptual approach, to explore legal concepts such as *tainted assets*, *criminal forfeiture*, and *in personam vs. in rem* liability;

- Case approach, to analyze judicial practices in the application of asset forfeiture, including PERMA No. 1 of 2013 and Supreme Court Circulars;
- Comparative legal approach, to contrast Indonesian practices with systems in the U.S. and Australia which apply combined criminal-civil asset forfeiture mechanisms.

The analytical framework is constructed from the integration of three key theories:

1. Theory of Justice (Rawls, Radbruch) – to justify the need for procedural fairness and moral legitimacy;
2. Theory of Asset Forfeiture – to evaluate the efficacy of existing legal instruments in tracing and recovering criminal assets;
3. Theory of Alternative Punishment – to assess the legitimacy of sanctions beyond conventional imprisonment.

All legal materials—primary and secondary—are processed using qualitative legal analysis, where materials are identified, interpreted, and thematically classified based on their relevance to asset recovery, criminal process, and due process. The final output is a normative construction that argues for the legal feasibility and urgency of implementing in rem asset forfeiture as part of criminal law reform in Indonesia.

Results and Discussion

The Construction of Criminalization of Money Laundering in the Positive Law in Indonesia

The crime of money laundering is one of the criminal acts that has a wide impact. Criminal acts with economic motives will have the potential for losses both in terms of values, stability, and the economic order of the people which will result in injury to the sense of justice in the order of people's lives. The creation of justice can be done through the application of the ideal law. According to Gustav Radbruch, justice or gerechtigkeit is one of the 3 (three) main terminologies that can be used as a goal (Sidharta 2010)

Money laundering comes from the word money laudering which comes from the English language. The term money laundering has been known since the 1930s in the United States, when the mafia bought legitimate and official companies as one of its strategies. The largest investment is laundry companies, or so-called laundromats, in the United States. This laundry business is thriving and various proceeds of crime such as other branches of business are planted in this laundry business, such as money from illegal liquor, gambling proceeds, and prostitution business proceeds (Sutedi 2008).

The main concept in the criminalization of money laundering is to implement the legal function, namely justice. The concept of justice as fairness is a way of looking at various parties in the initial situation as rational and equally neutral. In this case, the concept of justice as fairness has the main function that will determine which principle of justice will be chosen in the original position (Rawls 2011). And to strengthen the concept of justice that will be echoed, an action based on it is needed, namely the confiscation of assets (middle range theory). According to Brenda Grantland, asset forfeiture is a

fundamental way in which the government can permanently take property as a result of crime, without paying just compensation, as punishment for offenses committed by other people's property or owners in order to realize the social justice provided by the state (Grantland 2013). However, in Indonesia, money laundering is often still interpreted in the context of corruption crimes that eliminate the state's ability to carry out its duties and responsibilities, so the state is obliged to demand recovery of wealth taken against its rights even though money laundering is not only a crime from corruption but other economic crimes so it needs to be overcome by enforcing the asset forfeiture regime combined with the enforcement of the rule of law strict penalties (Yanuar 2007).

One of the positive legal bases as a practice of asset confiscation is indicated by the Attorney General's Regulation Number: PER-013/A/JA/06/2014 concerning Asset Recovery, but in its nomenclature the term Asset Recovery is used rather than asset confiscation which means a process that includes the tracing, security, maintenance, confiscation, confiscation, and release of criminal assets or State property controlled by other parties to victims or those entitled at each stage of law enforcement. The perspective of criminal policy emphasizes that in terms of crime control, it is very important to give consideration in improving the impact of crime and the consideration in dealing with it in the form of confiscation of state losses must be accelerated in the criminalization process. The state is responsible and has an obligation to realize social justice when viewed from the perspective of social justice theory, providing moral justification for the state to carry out efforts to confiscate assets from crime (Basrief 2006)

Romli Atmasasmita said that the meaning of the term, "criminal assets" or (ATP) is the subject and object of law (criminal). What is meant by assets as a subject of criminal law is an asset that is used as a means to commit a criminal act or that has assisted or supported the preparation and planning activities of a criminal act, while what is meant by an asset as an object of criminal law, is an asset that is the result of a criminal act. The juridical aspect of the meaning of the term "criminal assets" has legal consequences where ATP is seen as "detached" from its owner (criminal perpetrator) who has controlled (not owned) the asset in question. The separation of the relationship between "assets" and "asset owners" in the context of ATP confiscation through civil means means juridically that "assets" are equivalent to the perpetrators of criminal acts (Atmasasmita, 2010).

According to Black's Law Dictionary (2001), the terms seizure, confiscation, and forfeiture, are translated differently from each other. The Indonesian Criminal Procedure Code (Law No. 8 of 1981) does not provide a definition of "seizure" and "forfeiture" but only provides a definition of "confiscation" as follows: confiscation is a series of actions by an investigator to take over and/or keep under his control movable or immovable objects, tangible or intangible for the purpose of proving in investigation, prosecution and trial' (Article 1 number 16).

So that the provisions related to the confiscation of assets in their cargo, at least consist of (a) criminal forfeiture; (b) civil forfeiture; and (c) administrative forfeiture. In Indonesia, asset forfeiture using criminal law instruments (criminal forfeiture), the reference used is Article 10 jo Article 39 of the Criminal Code, which is a lex generalis,

which mutatis mutandis applies to the handling of TPPU cases while asset forfeiture using non-criminal instruments (civil forfeiture/in rem asset forfeiture) is contained in Article 67 of the Anti-Corruption Law jo PERMA 1 of 2013. Meanwhile, related to asset forfeiture using administrative instruments (administrative forfeiture) is contained in Articles 34 – 36 of the TPPU Law jo PP No. 99 of 2016 concerning the Carrying of Cash and/or Other Payment Instruments into or Out of the Indonesian Customs Area.

M. Yahya Harahap stated that the basis for the confiscation of assets was the existence of an application regulated in Article 226 and Article 227 of the Herziene Inlandsch Reglement (HIR) or Article 720 of the Reglemet op de Burgerlijke Rechtsvordering (RV) or based on the Circular Letter of the Supreme Court (SEMA) No. 5 of 1975, the granting and order of the implementation of confiscation, starting from the plaintiff's request or application, article 39 paragraph (2) of the Criminal Procedure Code (Moeljanto 2010).

Asset confiscation is a form of realization of the essence of criminal law. Crime is essentially a loss in the form of suffering deliberately inflicted by the state on individuals who violate the law. Wesley Cragg states that there are four things related to criminalization in modern society. First, criminalization is understandable and unavoidable in modern society. Second, the implementation of punishment is a reflection of the evolving criminal justice system and the types of crimes that can be imposed are inseparable from the type and character of the criminal acts committed. Strictly speaking, there is a relationship between criminal acts and criminality itself. Culpae poena par esto: the punishment must be commensurate with the crime. Third, the implementation of the criminal justice system must undergo significant reforms by referring to the implementation of the crime in western Europe and North America. Fourth, a number of penalties used must provide criteria to evaluate whether the execution of the crime is in accordance with the purpose of the punishment itself. Does the applied penalties need to be reformed towards improvement (Cattaneo et al 2011)

The entire legal construction of asset confiscation currently still has to be carried out with a preliminary process through criminals. In the Anti-Corruption Law, the process of confiscation of assets must go through a confiscation process that is preceded by the discovery of an alleged criminal act. So that the collection of evidence of the development of this case will be a clue to the expansion of TPPU because TPPU can occur at almost the same time as the original criminal act, as well as after the occurrence of the original criminal act as Article 69 of the Anti-Corruption Law. If the investigator has found sufficient preliminary evidence regarding the occurrence of the crime of money laundering and the original criminal act, then the investigation can be combined (Article 75 of the Anti-Money Laundering Law) so that the confiscation process can also be carried out at the same time, this has been strengthened by Article 141 of Law Number 8 of 1981 concerning the Criminal Procedure Law related to the merger of case files at the prosecution stage. However, if because the object of the money laundering crime is the wealth generated and requires more time for examination, often the confiscation process through criminal mechanisms will be a loophole for the suspect to resist through the

judicial process because of the limited deadline, so this makes the process of collecting assets from criminal acts not optimal.

In the examination process in the Court, the confiscation of assets through criminal mechanisms is highly dependent on the formal aspect of the defendant in proving the origin of the confiscated property, this is as Article 77 of the Anti-Corruption Law which requires the defendant to prove that his property is not the result of a criminal act. So that the defendant can prepare a sufficient basis for the property obtained. The public prosecutor is passive so that if it turns out that the TPPU layering and integration process is carried out very well, it is possible that the expected asset confiscation will not be possible. Even though Article 81 of the Anti-Corruption Law stipulates that the judge can actively order the public prosecutor to confiscate it, if in the examination sufficient evidence is obtained that there are still assets that have not been confiscated, but all are tied to the defendant to prove that his assets.

The initial stages of investigation and investigation in Article 44 of the KPK Law, for example, investigators must find sufficient preliminary evidence (two pieces of evidence). Meanwhile, the investigation phase is aimed at finding and finding evidence and suspects (Article 1 number 2 of the Criminal Code). At the investigation stage, the collection of evidence carried out by investigators must be directed as if the Original Crime can be followed by the TPPU, so that the criminal act assets can be traced. This is often ineffective because the investigator remains tied to the original criminal act. So there must be a relationship between the investigation of the original criminal act and the investigation of TPPU.

reconstruction and expansion of the criminalization of money laundering through a combination of in rem lawsuit mechanisms in NCB asset forfeiture and in personam.

The confiscation of assets resulting from criminal acts in Indonesia is currently carried out through several stages, according to Panggabean, the stages consist of: 1. Pre-prosecution followed by confiscation by the prosecutor's office/police; 2. In the process of executing the judge's decision by the Prosecutor's Office based on the judge's decision; 3. In the follow-up process for the execution of fines based on the report of the Correctional Institution (LAPAS) and the execution of substitute money according to the content of the Judge's decision (H. P Panggabean 2020).

According to Mardjono Reksodiputro, asset confiscation can be carried out in three ways, namely: 1. Criminal confiscation. This confiscation is commonly known in the form of confiscation of certain goods and if it turns out that the goods are tools used by the defendant in committing crimes, then with a criminal judgment with permanent legal force the goods are confiscated by the state; 2. Administrative seizure. This confiscation is contraband, that is, the executive (government) is given the right by law to immediately confiscate certain goods without going through a trial. For example, customs and customs actions; 3. Civil forfeiture. Civil confiscation was formerly known as the confiscation of property that was not owned by war, as well as the confiscation of "orphaned" property (weiskamer) (Porajow 2013).

Theodore S. Greenberg argues that NCB asset forfeiture—also called civil forfeiture, in rem forfeiture, or object forfeiture—is an action against the asset itself and not against an individual. According to him, the NCB asset forfeiture process is a separate action from the criminal justice process and requires a basis that the property is polluted, namely that wealth is the result or instrument of committing a crime. The definition according to Greenberg that the property to be confiscated must first be declared as tainted property is in line with the opinion of Mardjono Reksodiputro who stated, because there is a suspicion that the property is related to a criminal act, the property must be considered as tainted or dirty property. Regarding the polluted property, the government through the prosecutor as the state lawyer (hereinafter abbreviated as JPN) must be able to confiscate the state that has been taken by the perpetrator of the crime to be repossessed (Porajow 2013).

Law enforcement is looking for another method to pursue criminals, namely going for the money by cutting directly at the center of the crime (head of the serpent). They use the concept of criminal and civil confiscation as a first step. The paradigm of law enforcement carried out at that time was no longer limited to the pursuit of perpetrators, but also through the pursuit of their illegal "profits" (confiscate ill-gotten gains) (Saputra 2017).

In principle, there are two types of confiscation, namely in personam confiscation and in rem confiscation. In personam or criminal deprivation is an action directed at a person personally (individually). This action is part of a criminal sanction so that it can be carried out based on a criminal court decision. Meanwhile, in rem forfeiture is known by various terms such as civil forfeiture, civil forfeiture, and NCB asset forfeiture. The point is that a lawsuit is filed against an asset, not a person. This mechanism is a separate act from the criminal justice process and requires proof that a property has been tainted by a criminal act. This pollution is based on the taint doctrine, which is a doctrine that believes that a criminal act is considered to defile the property used or obtained from the crime (Romantz 1994)

The emergence of the NCB asset forfeiture concept is also motivated by a shift in the paradigm of law enforcement which from the beginning was oriented or prioritized by the perpetrator (follow the suspect) to be oriented to money or loss (follow the money). This is important because criminal acts such as corruption and money laundering cause financial losses for the state and therefore the money from these crimes must be immediately returned to the state, and on the other hand, there are often conditions that the perpetrators cannot be tried first.

According to Sudarto and Hari Purwadi, the most appropriate and simple way to carry out the mechanism of asset forfeiture without criminal prosecution or NCB asset forfeiture is initially the property that is suspected to be the result of a crime is blocked and withdrawn from economic traffic, namely through confiscation requested from the court. Furthermore, the property is declared as contaminated property by court determination. After being declared as a polluted property, the court then made an announcement through media that could be accessed and known by the public for a

sufficient time, which was approximately 30 (thirty) days. This period of time is considered sufficient for third parties to be able to know that assets will be confiscated by the court. If within that period there is a third party who objects to the act of confiscation, then the third party can file an objection to the court and prove with valid evidence that he is the owner of the property by explaining how the property was acquired. (Husein 2019)

The concept of an in rem mechanism in NCB asset forfeiture that will be proposed as an expansion of the criminal construction of TPPU is through several stages: 1. Making the mechanism identical with the approach of civil procedural nuances as stipulated in Article 32 paragraph (1), paragraph (2), Article 33, Article 34, and Article 38C of Law Number 31 of 1999 jo. Law Number 20 of 2001 which gives authority to the state prosecutor or aggrieved agency to file a civil lawsuit against the respondent and or his heirs from the research stage so as not to wait for the investigation process; 2. Creating data on the documentation system for the acquisition of wealth from the Personal and Corporate Tax Return reporting system for the last 3 years.

Which will be the basis for examining the fairness of Personal and Corporate income while still applying the principle of data confidentiality and self-assessment declaration in taxation because of the principles of obligation and compliance of taxpayers so that there is still a check and balance on the rights and obligations of the state and citizens; 3. Using data issued by the Financial Services Authority (OJK) and PPATK related to suspicious indicator data of financial transactions, the results of The Eurasian Group on Combating Money Laundering and Financing plenary hall, recommendations of the European Union Financial Unit Intelligence 2017; 4. Using the civil system through the mechanism of granting an interlocutory judgment to temporarily stop all or part of the transaction such as (Article 65 of the TPPU Law) for a maximum of 5 working days and can be extended to 15 working days; 5. Expansion of the civil lawsuit process as in Law Number 31 of 1999 jo. Law Number 20 of 2001 while still emphasizing on proving the assets of the perpetrators of the crime of proof (reversal boorden proof) using the civil procedure law with the pretext of unlawful acts (Article 1365 of the Criminal Code), limitation of evidence as stipulated in Article 164 of the HIR, Article 284 RBg, Article 1866 of the Civil Code and the principle of actori incumbit probbatio. Despite the logical consequences, formally the state attorney will also have to be able to prove that the assets to be confiscated are assets related to state losses in the judgment of corruption crimes that have permanent legal force (inkracht van gewis de zaak); 6. Merger and separation of Lawsuit and TPA (Original Crime) and TPPU (Money Laundering)

The form of deep expansion in the implementation of in rem and in persona is developed through the asset forfeiture model. This seizure can be carried out administratively, judicial seizure in a criminal manner, and judicial seizure in a civil manner. The placement of these assets is certainly supported by institutions that have authority. Therefore, institutional strengthening is also needed, with RUBASAN

becoming (Asset Management Institution), this institution has a function as a manager, responsible for managing asset forfeiture funds, and consolidating the asset trace system.

Conclusion

The conclusion in this study can be formulated as follows: (1) The construction of the criminalization of TPPU in Indonesia is still not effective, with the existence of a law through the legal system of asset confiscation in the Corruption Regulation Law No. 20 of 2001, Law Number 8 of 2010, Supreme Court Regulation Number 1 of 2013, Supreme Court Circular Letter Number 3 of 2013, Procedures for Settlement of Property Applications in Money Laundering and Other Criminal Acts, Regulations in the Field of Money Laundering Law Number 17 of 2003, Regulations in the field of procedural law, and ratification of International Conventions still have to be carried out with a preliminary process through criminal proceedings, so that the criminal process has not focused on the perpetrators through the process of asset confiscation and asset confiscation are only used as a mechanism for the process of fulfilling evidence to wait for the origin of criminal acts.

Therefore, from the reconstruction of the criminal justice reform of TPPU through NCB Asset forfeiture and In Personam, it is an alternative to criminal justice that can be carried out considering that the current positive legal provisions cannot accommodate the acts of criminals, thereby injuring the sense of justice for the victims and/or the state. This is contrary to the decision of the state that has ratified the UNCAC since 2003. (2) The government (executive) together with the House of Representatives (Legislature) must immediately make a formulation of arrangements for the expansion of criminal prosecution through the in rem mechanism in the NCB asst forfeiture, with the existence of this mechanism can be submitted without the need for a criminal case or can be done after the criminal case has been decided. Because in fact, a lawsuit in rem is an action against the assets of the crime itself, not only against the individual owner (In personam) but against all things related to the crime because of the "taint doctrine" where a criminal act is considered to tarnish an asset, then it can also be that the asset will also be used for other criminal acts. The combined mechanism of NCB forfeiture and In personam is a mechanism that can be applied for the expansion of the criminalization of TPPU so that political and legal encouragement is needed to create effective and ideal reforms.

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