

Legal Principle on Confiscation of Corruptor Asset According to the Indonesia Law on Money Laundering in Indonesia Criminal Legal System

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Abstract

At this present corruption case is an issue that become public consumption everyday, starting from corruption case in local level until national level. It prove that level corruption case in Indonesia in the high rank. Extra ordinary criminal sanction and effort on corruption suspect to be poor by the implementation of Anti-Money Laundering Law in fact it can't make other party to be deterrent to conduct corruption in the other time and place. On the other hand, many corruption actors feel that themselves is conducted unfair in the due process of law, also they feel have no access to justice. There are many corruption cases that the corruptor had been imposed by heavy sanction in every legal process but the sanction not equal with their conduct. This phenomenon that should be avoided by all parties whereas the crime is not equal with the legal sanction. On the other hand, the corruptor is a human being that should be respected on their human right. This matter is a main background for the author to conduct a research within refer to any legal issues, first legal issue is relate to how the legal principle of The Anti-Money Laundering Law in case of confiscation of corruptor asset either in international law or national law?, and the second legal issue is relate to how the legal concept of confiscation of corruptor asset according to Indonesia Criminal Justice system?. Those issues has two main purposes, first to analyze and finding legal principle of confiscation asset refer to Indonesia's Anti-Money Laundering Law ("UU TPPU"), and second thing are analyze and to find legal concept of confiscation asset based on Justice Principle. In the future, law enforcement should respect to the human right values, and the impose on criminal legal sanction with confiscate of corruptor asset should prove of the predicate crime.

Keywords: Legal Principle, Confiscation of Corruptor Asset, Indonesia, Criminal Legal System

1.1. Introduction

Corruption is a subject which has been widely discussed lately, whether in print media, electronics, seminars, workshops, discussions, and so on. Corruption has become a serious problem for the Indonesian people because it has become a systematic problem (from upper to lower society), resulting in a negative stigma for the nation and the people of Indonesia in the international community. "Various ways have been taken to eradicate corruption along with the increasingly sophisticated modus operandi of criminal corruption".¹ People would think that corruption has become part of life, infiltrated the system and merged with the administration of a nation. To prevent the development of corruption, the Government has basically conducted national countermeasures for corruption by using the Law No. 3 of 1971 on the Eradication of Corruption, but in fact, it comes to void. This failure is partly due to the fact that some institutions that were established for the corruption eradication do not perform their functions effectively, there are also weak legal instruments, coupled with law enforcement officers who are not really aware of the serious consequences of corruption. "Such a situation can ultimately destabilize democracy as the main joint in the life of the nation and state, cripple the values of justice and legal certainty and further away from the goal of achieving a prosperous society."² There is an opinion that states modernization breeds corruption, in which Huntington said:

- a. modernization brought about changes in the basic values of society;
- b. modernization also contributes to the development of corruption because modernization opens up new sources of wealth and power. The relation of these sources to political life is not governed by the most important traditional norms in society, whereas new norms in this respect have not been accepted by influential groups in society;
- c. modernization stimulates corruption due to the changes it causes in the field of activity of the political system. Modernization, especially in countries that promote modernization, enlarges government power and redoubles the activities governed by government regulations.³

¹ Chaerudin, Syaiful Ahmad Dinar, and Syarif Fadilah, *Corruption Prevention & Enforcement Strategy (Strategi Pencegahan & Penegakan Hukum Tindak Pidana Korupsi)*, 2nd Print, Refika Aditama, Bandung, 2009, h.1.

² *Ibid*

³ Andi Hamzah, *Combating Corruption Through National and International Criminal Laws (Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional)*, 5th Print, Rajagrafindo Persada, Depok, 2012, p. 19.

The existence of corruption in various countries has never had a positive impact, as stated by Gunnar Myrdal as follows:

- a. corruption helps to magnify and enlarge the problems concerning the lack of desire to engage in business and the lack of growth of the national market;
- b. corruption sharpens the problems of the society while at the same time weakens the unity of the nation. Also due to the decline of the dignity of the government, these tendencies jeopardize political stability;
- c. corruption leads to a decline in social discipline. The bribes not only facilitate administrative procedures, but usually also result in deliberate attempts to slow down the administrative process in order to get bribes. In addition, the implementation of development plans that have been decided, was made complicated or slowed for the same reasons.¹

"The 2007 Corruption Perceptions Index (CPI) results issued by Transparency International, a global coalition against corruption show that Indonesia is ranked 143rd with a value of 2.3. Indonesia's score decreased by 0.1 compared to CPI in 2006 (2.4). With this value of the CPI, Indonesia is included in the list of the most corrupt countries in the world along with 71 countries whose scores are below 3".² In 2014, the Indonesian Corruption Perceptions Index (CPI) published by Transparency International states that Indonesia is ranked in 107th. Indonesia has made progress in eradicating corruption more than in previous years. Corruption is seen as a very serious crime, therefore the Government of the Republic of Indonesia has normatively regulated the laws governing the eradication of corruption by the issuance of Law No. 3 of 1971 on the Eradication of Corruption. With the development of the era, Law No. 3 of 1971 on the Eradication of Corruption is considered unable to follow the development of corruption criminal mode that often occurs, so that Law No. 3 of 1971 on the Eradication of Corruption should be replaced. The amendment of Law No. 3 of 1971 concerning the Eradication of Corruption was conducted in 1999 and 2001 through Law No. 31 of 1999 regarding Corruption Eradication Jo. Law No 20 of 2001 Concerning Amendment of Law No. 31 of 1999 Concerning the Eradication of Corruption (hereinafter referred to as Corruption Act).

The term "impoverishment" is not known or commonly used, both in legislation and in the constitution. It should be understood that the word "impoverish the corruptors" is in the spirit of preventing and combating corruption. Due to the criminal sanction stipulated in the Criminal Code as well as in Corruption Law or the Anti-Money Laundering Law does not recognize punishment in the form of impoverishment for corruptors, so far, the most common punishment in the criminal law related to corruption cases is the payment of fines and penalty. "In relation to the discourse of impoverishment, the mechanism of impoverishment must be understood correctly in order to be implemented. The impoverishment is certainly intended to the corruptors' property. "Today, the public often receives information on corruption eradication patterns implemented by law enforcement officials including with the term "impoverishment of corruptors" as described above. One of the ways used by law enforcement officers in combating corruption is by ensnaring the perpetrators of corruption with the Anti-Money Laundering Law.

Basically the term "impoverishment" which is widely used by law enforcement officers is related to the confiscation of corruptors' assets by implementing the Anti-Money Laundering Law as its legal instrument. Based on the juridical aspect, the term "impoverishment" is not regulated in the criminal legislation of both the Corruption Law and the Anti-Money Laundering Law. The juridical term used in this regard is "confiscation". Many people agree that the Anti-Money Laundering Law is more effective to restore state finances in terms of asset recovery when compared with the Corruption Act. "The reason is because the Anti-Money Laundering Law uses a new paradigm in the handling of criminal acts, that is by the *follow the money* approach (to trace the flow of money) to detect Money Laundering and other crimes."³

The fundamental problem is the application of the Anti-Money Laundering Law as a legal instrument to impoverish the corruptors, it can not be separated from the history of money laundering that gave birth to the impoverishment of certain criminal actors, among others, corruptors. "The name of money laundering was born in America, a man named Al Capone, the greatest criminal in America in the past, washing black money from his crimes with the help of the genius Meyer Lansky, the Poles. Lansky, an accountant, laundered Al Capone's crime money through a laundry."⁴ Thus the origin of the name "money laundering".

In the same accord with the Al Capone phenomenon in the United States, today, Indonesia has developed the detection of corruption by using money laundering approach so that forensic auditors or corruption criminal investigators always look for the proceeds of crime/corruption that is converted into other assets. "Understanding

¹ *Ibid*, p. 20.

² *Ibid*

³ Edi Nasution & Fithriadi Muslim, Paper titled *Enforcing Corruptors with the Law on Money Laundering (Menjerat Koruptor dengan Undang – undang Tindak Pidana Pencucian Uang)*, submitted to the National Seminar and Interactive Dialogue with Theme "What and Why Corruption and Money Laundering are rampant (Apa dan Mengapa Tindak Pidana Korupsi dan Pencucian Uang Merajalela)," organized by Lembaga Pengabdian Untuk Masyarakat (LPKM) State University of Padang in cooperation with Pro Justitia Institute Jakarta and Singgalang Public Daily at Hotel Pangeran Beach, Padang, on November 19, 2011, p. 4.

⁴ Adrian Sutedi, *Money Laundering Crime (Tindak Pidana Pencucian Uang)*, 1st print, Citra Aditya Bakti, Bandung, 2008, p. 1.

preventing money laundering criminals from converting "dirty" to "clean" and confiscating the proceeds of criminal acts in any form is an effective way to combat money laundering."¹ Like with other countries, Indonesia has also paid great attention to transnational organized crime such as money laundering and terrorism. Money laundering which constitutes a criminal offense involving disguising the assets or covering up its origin with the method of concealing, transferring and spending the proceeds of a criminal offense, so it can be used without being detected that the property comes from illegal activities. Based on the experience of a number of countries it is known that in the fight against various forms of crime, the anti-money laundering approach is far more effective and efficient when combined with conventional approaches that hunt down and try to catch the culprit. In the context of the fight against crime, both individual and organized crime, the anti-money laundering approach assumes that the asset comes from criminal proceeds is the "life-blood of the crime" and the weakest "link" of the activities of the crime itself.

1.2. Legal Issues

Based on the above descriptions, then the legal issue that can be drawn is as follows:

- a. What is the legal principle of confiscation of corruptors' assets based on the international and national money laundering legal system?
- b. What is the conception of corruptors' assets based on the principle of justice that refers to the Indonesian criminal law system?

1.3. Theoretical Basis

1.3.1.1. The Theory of Legal Certainty

These rules become the limits for society in burdening or taking action against individuals. The existence and the enforcement of these rules give rise to legal certainty. Thus, the legal certainty contains 2 (two) definitions, first, the existence of a general rule to make the individual knows what they are allowed and not allowed to do, and secondly, in the form of legal security for the individual from the government's authority. Because with the general existence of these rules, the individual can know what the government can charge or do to the individual. Legal certainty is not only in the form of articles in the law, but also the consistency in judges' decisions between the judgments of one judge and the judgments of other judges for similar cases that have been decided.²

1.3.1.2. Theory of Justice

In the development of the theory of justice, the theory of dignified justice was born. The theory of dignified justice is a dimensional transformation of thought of the dominance of the old thoughts. The old thoughts often shackled, considering it was often taken for granted without being criticized. The theory of dignified justice does not negate the Renaissance in the world of philosophical law in general, but it gives context to modern legal thinking according to Indonesia's *Volkgeist* that comes from Pancasila. *Volkgeist* is the soul of the nation that has been named. The name given to the *Volkgeist* has been agreed as a first agreement, the source of all sources of the agreement, the source of all sources of law, and the philosophy of the nation, Pancasila. The theory of dignified Justice considers the *Volkgeist* or Pancasila is the inspiration of enlightenment excavated from within the soul of the nation.³

1.3.1.3. Criminal Responsibility Theory

Responsibility is the state or fact of having a duty to deal with something, so if an individual fails to fulfill the responsibility, they can be held accountable. Responsibility is the obligation of an individual to accept responsibility for their actions, while the criminal penalty is a state-deliberate punishment imposed on an individual who commits an offense or is found guilty of a criminal offense. Thus, criminal responsibility is the condition of being accountable for their actions which can be subjected to a punishment which is deliberately imposed by the nation to a person proven to have committed a criminal offense or a disgraceful act, so that the imposition of a criminal to a person proven guilty of a crime constitutes a form of criminal liability which he must accept.⁴

1.3.1.4. *Conditio Sine Quanon* Theory

In criminal law, the theory of *Conditio Sine Qua Non* does not distinguish between the terms and causes that are at the core of the birth of various theories of causality. According to Buri, the sequence of conditions that contribute to the effect must be viewed as equal and can not be eliminated from the sequence of processes of

¹ Muhammad Fuad Widyaiswara, *Recognizing Money Laundering Process Of Criminal Proceeds (Mengenali Proses Pencucian Uang (Money Laundering) Dari Hasil Tindak Pidana)*, submitted in Education and Training of BPKP Supervision downloaded from www.google.com, p.1.

² Peter Mahmud Marzuki, *Introduction to Legal studies (Pengantar Ilmu Hukum)*, 5th print, Kencana Prenada Media Group, Jakarta, 2013, p.137.

³ Teguh Prasetyo, *Dignity Justice Legal Theory Perspective (Keadilan Bermartabat Perspektif Teori Hukum)*, 5th print, Nusa Media, Bandung, 2015, p. 40.

⁴ Yudi Wibowo Sukinto, *Smuggling in Indonesia Policy Formulation of Criminal Sanctions (Tindak Pidana Penyelundupan di Indonesia Kebijakan Formulasi Sanksi Pidana)*, 1st print, Sinar Grafika, Jakarta Timur, 2013, p. 72.

consequence. The set of conditions is what causes the consequences, therefore the removal of one condition from the sequence will eliminate the whole set of conditions so that the consequences do not occur. Thus, every cause is a condition and every condition is cause. An action can be said to have a certain effect, as long as it is unthinkable regardless of the first action. Therefore, an action must be a *conditio sine qua non* for the existence of a particular effect. All conditions must be considered equal.

2. Research methods

2.1. Types of research

This research type is normative juridical research by using the source of primary law material and secondary law materials. Primary legal material is a legal material that is authoritative, that is to say, it has authority. The primary legal material is legal material that is authoritative, consisting of legislation, official records or treatises in lawmaking, and judgmental decisions, whereas secondary law material is a legal material that explains and supports primary law material, as for the materials are in the form of all publications about law that are not official documents. Publications about law include textbooks, legal dictionaries, and comments on court decisions.¹

The density of normative juridical research is in accordance with the character of distinctive legal scholarship, which lies in the study of law or legal study of positive law, which includes 3 (three) legal science layers, consisting of legal dogmatic study, legal theory, and legal philosophy. At the level of legal dogmatics, the assessment is conducted on the identification in positive law, especially the statutes, at the level of legal theory, the study of the theories that can be used is conducted, while at the level of legal philosophy, a study of matters relating to the essence (fundamental) of the law is conducted. The type of this dissertation research is a normative juridical study that examines critically and comprehensively about the confiscation of corruptors' assets based on the Anti-Money Laundering Law associated with the Indonesian criminal law system.

2.2. Problem Approach

The approaches used in this legal research are statute approach, case approach, historical approach, conceptual approach, and philosophical approach. The statute approach is conducted by reviewing all laws and regulations related to legal issues under investigation, namely corruption, and Money Laundering under the Corruption Law and Anti-Money Laundering Law. The case approach is conducted by examining cases related to the issue and has become a court decision that has had permanent legal force.

3. Analysis and Results

To date, there is no evidence to show when was of the term "money laundering" was invented. However, referring to the historical sense of the act of transforming illegal money into legal money, there are several ways to explain the term. One explanation comes from the book titled *Lord of the Rim* by American historian Sterling Seagrave. The book exploring the phenomenon of merchants behavior in running their businesses in China since 3000 BC, which in essence:

At that time, wealth was concealed by hiding, moving, and investing outside of China. Even though the term 'money laundering' was not invented yet, the principles of money laundering were founded. These included the conversion of illicit funds into movable assets and then moving them outside its jurisdiction to invest in other legal economies.²

According to another legend, the term 'money laundering' originates from the United States of America during the 1920s when organized crime used Laundromat businesses to blur the unlawful sources of its cash. The mafia (with the likes of Al Capone) generated vast amounts of cash from criminal activities. Those crimes are in the form of trading illicit drugs, murders, prostitutions, and gambling. To avoid the confiscation of their proceeds, they operated retail service businesses such as bars, vending machines, hotel, and restaurants. Through these legal businesses, the illegal money was mixed with the legal proceeds and the total amount was reported as the total earnings of the legitimate business. "By using this technique, illegal earnings were whitewashed as the money took on the appearance of a legitimate business. After this process, the money could then be used freely without attracting the attention of law enforcement authorities."³

Referring to the emergence of the norm of money laundering based on international convention as well as national law, basically the concept of money laundering is:

"The attempt or process of disguising or concealing the proceeds of a crime to alter the proceeds of the crime as to appear to be the result of legitimate activity because its origins have been disguised or hidden."⁴

¹ Peter Mahmud Marzuki, *Legal Research (Penelitian Hukum)*, Op.Cit., p. 181.

² Sterling Seagrave, *Lord of The Rim : The Invisible Empire of The Overseas China*, Putnam, 1995, p. 12

³ Peter W. Schroth, *Bank Confidentiality and The War on Money Laundering in The United States : The American Journal of Comparative Law*, Vol. 42, 1994, p. 375

⁴ Hurd, *Insider Trading and Foreign Bank Secrecy*, Am. Bus., *Journal Vol. 24*, 1996, p. 29.

The above conclusion shows that money laundering is not a stand-alone act, but an act born from a previous act of a crime. The crime in question is of course predicate crime, and the predicate crime qualification is of course very limited, which is very dependent on the crime criteria set in the laws of a country. Law No. 8/2010 concerning the Prevention and Eradication of Money Laundering Crime or UU TPPU (hereinafter referred to as "Anti-Money Laundering Law") limits the crimes of origin which may result in the crime of money laundering to 26 (twenty six) items, which are stipulated in the Article 2. The term "crime" gives the meaning that it refers to the formulation of the offense. The existence of money laundering crime does not stand alone as a crime in general, but rather a criminal act related to other criminal offenses (predicate crime). Therefore, it is appropriate if money laundering is as *conditio sine quanon* to the original criminal act as regulated in Article 2 paragraph (1) of Anti-Money Laundering Law. Crime of origin (predicate crime) and crime of money laundering (proceeds of crime) does not have the same *mens rea*, because the desire to commit the original criminal acts embodied in the actions is different from the will to conduct money laundering crimes that are normatively reflected in the provisions of Article 3, Article 4, and Article 5 of the Anti-Money Laundering Law. "Based on these arguments, the crime of money laundering does not include continued crime (*vorgezette* handling). Both of these crimes constitute as stand-alone criminal acts even if they are related to each other."¹

In the historical perspective of the Money Laundering, the establishment of a business such as bars, hotels, and restaurants is a way to avoid seizure of proceeds of crime. Through such legitimate business, the illegal funds are mixed or combined with the legal earnings of the business, so that in the end it is reported as total legitimate business income, whereas in the perspective of the national legal system as regulated in the Anti-Money Laundering Law of 2010 especially in Article 3 states:

Any Person who places, transfers, assigns, spends, pays, grants, entrusts, takes abroad, changes the form, exchanges with currency or securities or other deeds of assets known or reasonably suspected to be the proceeds of the offenses referred to in Article 2 paragraph (1) with the purpose to hide or disguise the origin of Treasury shall be subject to criminal acts of Money Laundering.

One of the crimes referred to in Article 2 Paragraph (1) of the 2010 Anti-Money Laundering Law is a criminal act of corruption, therefore, based on the provisions of Article 3 of the Anti-Money Laundering Law of 2010 it is expressly stated that the money laundering cannot be separated from the forms of criminal acts regulated in the Anti-Money Laundering Law one of which is a criminal act of corruption. Therefore, both in the perspective of the history of money laundering and the perspective of the national legal system of money laundering, then it can be concluded that the predicate crime and the money laundering are related, thus making the corruption and the money laundering inseparable. The criminal act of corruption which is the predicate crime is a requirement of the establishment of money laundering so that without any corruption crime, then the money laundering will not be born. The correlation between corruption crime and money laundering applies *Conditio Sine Quanon* Theory, ie each condition is also the cause of the same consequence so that to conduct a money laundering, it requires corruption crime, without any corruption, then money laundering also cannot be done. Therefore, in the enforcement of the law of confiscation of corrupt assets, the state through its law enforcement officers can not appropriate the assets of corruptors under the pretext of having committed the money laundering, without proven corruption. Article 69 of the 2010 Anti-Money Laundering Law states:

"To be able to conduct investigation, prosecution and examination in the trial of the crime of money laundering it is not mandatory to first prove the criminal offense of origin."

The explanation in the Article 69 of the 2010 Anti-Money Laundering Law does not clearly state what it means by "it is not mandatory to first prove the criminal offense of origin", so in my view, the meaning of the sentence is that investigators, prosecutors and judges can ignore the criminal act of money laundering with predicate crime. The existence of Article 69 of the 2010 Anti-Money Laundering Law shows that the provision explicitly places between the original crime and money laundering crime in a separate position, and this is clearly contrary to the nature of money laundering. As mentioned in the previous chapter on the history of money laundering. In the book *Lord of the Rim*, which in the book tells a brief story about the behavior of merchants in China in running its business in 3000 BC. In the context of law enforcement, justice is a variable that can not be separated from the existence of a state law. Talking about the state of the law cannot be separated from the concept of a state called the rule of law. The concept of rule of law state is the most ideal state concept today, although the concept is run with different perceptions. The theory of justice is worthy of value, like the value that Notonagaro referred to, because at least the theory has a quality, can be utilized by a large nation of its territory and its people from Sabang to merauke and from Talaud to the Rote island. The quality also means that there is something that can be used for good purpose and is become an unifying tool to understand, explain and maintain the form of the legal system of a big nation. As described above, that the theory of justice has the character of philosophy, wisdom-loving and is responsible. In that context, the theory of dignified justice rejects

¹ Romli Atmasasmita, *Business Crime Law (Theory & Practice in the Era of Globalization) (Hukum Kejahatan Bisnis (Teori & Praktik di Era Globalisasi))*, 1st print, Prenadamedia Group, Jakarta, 2014, p. 213.

arrogance but encourages self-confidence, and self-assurance of a legal system, in this case, the law is based on Pancasila. The most important thing in law enforcement in Indonesia is that the human rights of the perpetrators must also be considered and protected. If the law enforcement officers looked at the assets of Inspector General Djoko Susilo before the alleged corruption of SIM simulator of Fiscal Year 2011, and the assets of Dr. Akil Muchtar, S.H., M.H. before the occurrence of election bribery, in which the assets are allegedly from a crime of money laundering, then the law enforcement officers should conduct separate criminal verification process from the investigation from SIM simulator corruption case of 2011, and the election bribery case, so it will be fair to the legal interests of the perpetrators, as well as the perspective of true law enforcement.

The absence of any criminal investigation into Inspector General Djoko Susilo's assets before 2011, and Dr. Akil Muchtar's assets before the election bribery case, and allegedly the proceeds of money laundering crime, certainly has implications in the judgment law ruling sanction confiscation, and this arises because of the calculation of the difference in value of the Inspector General Djoko Susilo's assets before 2011 with income he had earned, which is also the same thing happened to Dr. Akil Muchtar, S.H., M.H. . In the absence of proof of predicate crime, of course, the legal process does not provide a sense of justice for the perpetrators. The confiscation of all assets of Inspector General Djoko Susilo, and Dr. Akil Muchtar, S.H., M.H. was the proceeding that did not respect the human right of the perpetrators. Provision of a deterrent effect through asset confiscation must of course still pay attention to the sense of justice with dignity, given law enforcement must avoid arbitrary attitude that defy the rule of law.

4. Conclusion

Based on the discussion in Chapter II, and Chapter III, the following conclusions are presented as:

- a. Whereas the principle of confiscation of assets of corruption actors by using legal instruments of Anti-Money Laundering Law should basically refer to the crime of corruption which is as the predicate crime so that in law enforcement, they cannot be separated. The principle of asset confiscation is firmly regulated in UNCAC and the Anti-Money Laundering Law, as well as the philosophy of the term "money laundering";
- b. That the conception of confiscation of corrupt assets based on the principle of justice must consider the human rights of the perpetrators of corruption. Therefore, the theory of liability must be the legal basis before imposing sanction of asset confiscation, meaning the assets of the perpetrators of corruption cannot be confiscated before the corruption crime is proven . Even if using the legal instruments of the Anti-Money Laundering Law, before a person is held accountable for the alleged criminal act of corruption, the criminal sanction of confiscation cannot be imposed on a person. The conception of asset confiscation with just dignity is still humanizing human dignity as well as referring to the nature of the Anti-Money Laundering Law, so that the asset confiscation by referring to the Anti-Money Laundering Law without first accounting for corruption as a predicate crime, such law enforcement it is also clearly opposed to the theory of dignified justice and the theory of legal certainty.

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