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Confiscation of Corruptor Assets Based UU 8 Year 2010 about Prevention and Eradication Of Money Laundering In National Criminal Law System

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Abstract: Confiscation of corruptor assets cannot be performed arbitrarily. It must adhere to the spirit of the TPPU Law, which means that law enforcement officers in seizing assets of the offender is still obliged to refer to the philosophy of TPPU Law to track the wealth of crimes. It means the Confiscation of assets using legal instruments of TPPU law shall be proven in predicate crime. Related to principle of justice, corruption case happened to Irjend. Pol. Djoko Susilo is one example whose assets were deprived under the pretext of using the TPPU Law as a basis for confiscation which ultimately deprived. However, it turned out that in the law enforcement process, some of his assets could not be proven to obtained from a crime or not. Obviously law enforcement clearly crashed human values, and Human Rights (HAM), which in fact the whole values are part of the value of justice, especially the dignified justice that is part of the Pancasila philosophy. In the future, law enforcement obliged to respect human rights.

Keywords: Principles, Confiscation of Corruptor Assets, Indonesia's Criminal Law System

1. INTRODUCTION

Corruption is lately highly discussed, both in print media, electronics and in seminars, workshops, discussions, and so on. Corruption has become a serious problem for Indonesian people, because corruption has become a systematic problem (from upper society to lower society), resulting in a negative stigma for the state and nation of Indonesia in the international community. "Various ways have been taken to combat corruption in conjunction with increasingly sophisticated *(sophisticated)* modus operandi of corruption".[1]

Various groups consider that corruption has become part of life, into a system and united with the administration of a state. To prevent the development of corruption, the Government basically has done the national corruption handling by using the law of Law Number 3 Year 1971 About Corruption Eradication, but in fact many fail.

This failure was partly due to the various institutions established to combat corruption does not perform its functions effectively; weak law, low law enforcement of officers who are not really aware of the serious consequences of corruption. "Such situation could eventually destabilize

[1] Chaerudin, Saiful Ahmad Dinar, and Syarif Fadilah, *Strategy & Law Enforcement Prevention of*Corruption,Cet. 2, Refika Aditama, Bandung, 2009, H.1.

democracy as the main joint in the life of the nation, crippling values of fairness and legal certainty as well as getting away from the goal to achieve a prosperous society".[2]

Huntington proposes factors that lead someone to corrupt:

a. modernization brought about changes in the basic values of society
b. Modernization also develops graft for modernization of open sources of new 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;

Modernization stimulates corruption because of the changes they cause in the field of activity of political system. Modernization, especially in countries that begin modernization more lately, enlarges government power and redoubles the activities governed by government regulations.[3]

Corruption in various countries has never had a positive impact, as stated by Gunnar Myrdal as:

a. Corruption helps to magnify and enlarge matters on the lack of desire to engage in business and the lack of growth of the national market;
b. Corruption sharpens issues pluralistic society problem, meanwhile the unity of the state getting weaker. In in addition, due to the decline of the dignity of the government, these tendencies jeopardize political stability;

Corruption resulted in the decline of social discipline. The bribes not only facilitate administrative procedures, but usually also result in deliberate attempts to slow down the administrative process so as to receive bribes. In addition, implementation of development plans that has been decided becomes complicated or slowed due to the same reasons.[4]

2. RESEARCH METHOD

This is a normative juridical research by using source of primary law material and secondary law materials. Primary legal materials are authoritative legal, means to have authority. Primary legal materials is legal material that is authoritative (binding) consisting of legislation, official records or minutes of the legislation, and the decisions of the judges, while the secondary law is legal materials that explain and support the legal materials primary, as for secondary materials in the form of all publications about law that are not official

[2] *ibid*
[3] Andi Hamzah, *KPK Through National and International Criminal*Law,Cet.Ke-5, RajaGrafindo Persada, Depok, 2012, p. 19.
[4] *Ibid*,p. 20.

documents. Legal publications include textbooks, legal dictionaries, and comments on court decisions.[5]

3. RESULTS AND DISCUSSION

3.1. Money Laundering Crime

3.1.1. The Nature of Money Laundering

To date there is no evidence to show when the term "money laundering" was found. However, with reference to the history of transforming illegal money into legal money, there are several ways to explain the term. One explanation is found in *Lord of the Rim* book as the work of American historians, *Sterling Seagrave.* The book essentially explore the phenomenon behavior of traders in China in business since the year 3000 BC, which in essence:

> "At that time, wealth was disguised, it was hidden, moved, and invested outside China. The term "money laundering" is not found, but the principles are there, changing illegal funds into asset moves then move them out of the country to be invested into other economic activities are legitimate"[6].

Another legend states that the term "money laundering" is derived from the United States about 1920s when the perpetrators of organized crime utilizing the washing machine business to cover up the source of illegal funds offenders. Mafia groups such as Al Capone generate cash in a very large number of various crimes.

The crimes are in the form of drug sales, murder, prostitution, and gambling. To avoid seizure of proceeds of crime, the perpetrators run retail business services such as bars, automated selling machines, hotels, and restaurants. Through these illegal businesses, illegal fund are mixed or combined with the results of the legal effort that ultimately reported as total revenue legitimate business. "Using this technique, illegal income becomes legal because the funds appear to be the result of legitimate efforts. Furthermore, the money can be used freely without attracting the attention of law enforcement authorities"[7].

"Another source states that the term "money laundering" began to be used after the Mayer Lanski case of 1932 in the United States. In this case, Lansky created an "offshore" account at the Swiss Bank used to conceal the criminal proceeds of the Governor of Louisiana, Hue

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5 Peter Mahmud Marzuki, *Legal*Research, *op.*, P. 181.

6 Sterling Seagrave, *Lord of the Rim: The Invisible Empire of The Overseas*Chinese,Putnam, 1995, p. 12

7 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

Long. "Lansky then set up business in New Orleans slot machines and Swiss Bank provides funding in the form of loans to Lansky & Co., so this allows illegal money back to the United States. Since then, money laundering activities have evolved by taking advantage of technological advances"[8].

"Basically, the existence of money laundering as described above is the things that lie behind the emergence of money laundering. Basically the background of combating money laundering divided by 2 (two):

a. Legal Background and
b. Socio-Economic Background
c. Legal thought to fight for money laundering began to intensify after World War II. *In a statement Attributed to Emperor Vespasian stated that:*
d. In the post-Second World War era, however, legislators started to make a criminal act which does not cause any direct harm to an identifiable victim. A great number of commercial, fiscal or environmental offences are crimes without a victim. Even though this does not mean that offenders do not reap any benefits from these crimes. On the Contrary, this type of offense often generates huge profits for removal Whose Generally the law fails to provide adequate legal mechanism.

3.1.2. The Crime of Money Laundering is Universal Values

The internationally-growing anti-money laundering regime is basically due to money-laundering practices that have cross-border characteristics. There are 2 (two) international instruments that directly relate to the process of international money laundering, namely:

a. *Viena Convention;* and
b. *Basle Committee on Banking Regulation.*

Viena Convention, published in 1988 was an early development of regulatory harmonization and international policies are made in order to prevent and combat money laundering. *Basle Committee on Banking Regulation* emphasizes the basic principles of financial regulation for the purpose of money laundering. "According to Gilmore, both *Viena Convention* and the *Basle Committee* are the instruments on a solution of 2 (two) towards the problem of money laundering."[9]

Vienna Convention creates an anti-money laundering regime within a broader context, such as the concept of money laundering, law enforcement procedures, and international

[8] Abdullahi Shehu, *Money Laundering: The Challenge of Global*Enforcement,2000, p. 2

[9] William C. Gilmore, *Money Laundering: The International Aspect, in David Hume Institute, Papers on Public Policy, Vol. 1,* No. 2, *Edinburgh University*Press,1993, p. 2.

cooperation. "The Vienna Convention also laid the foundation for increased cooperation in relation to the appropriation of proceeds of crime, extradition, mutual legal assistance, and court transfers.[10]

The restriction on the scope of the original criminal act in the Vienna Convention is a criminal act related to narcotics and illegal drugs, however the Vienna Convention provides a very significant role in raising money laundering issues on an international scale. Vienna Convention after it was also considered as a basis for intergovernmental initiatives, and other international agreements, such as "Strasbourg Convention of 1990, the Convention against the Financing of Terrorism of 2003, the Palermo Convention of 2000, and the Anti-Corruption Convention of 2003. These facts match Morgan's statement "that the Vienna Convention is an international unification effort in the fight against money laundering."[11]

In an international perspective, the anti-money laundering regime, the Basle Committee has a role in preventing banks and other financial institutions globally from the use of money laundering objectives. The principle of *Know Your Customer* is considered an effective way to prevent and detect money laundering activities. In practice, this principle is developed through 40 (Forty) recommendation issued by the *Financial Action Task Force on Money Laundering* (FATF).

In terms of addressing the problem of money laundering, Basle Committee has the advantage of approaches called *the statement of principles* and *minimum standards*. *Statement of principles* is very important for the prevention of the use of the banking system by criminals for the purpose of money laundering, while the *standard minimum* is very important in terms of supervision of international bank group that stresses the need for a more consolidated supervision.

"The *statement of principles* is the first international treaty that introduced the term 'money laundering' to the international level. This statement is intended to prevent financial institutions involved in the activities of criminals, as well as to maintain the integrity of the banking system"[12]

In principal, *statement of principles* related to instructions and ethical standards of professional behavior of banks and other financial institutions in running the business. In order to prevent the occurrence of money laundering, financial institutions must establish an identity

[10] *The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of*1988.
[11] Matthew Morgan, *Money Laundering: The American Law and Its Global*Influence,L & Bus. Rev. Am. 24, 1996, p. 7.
[12] *Statement of Principles for the Prevention of Criminal Use of Banking Systems for the Purpose of Money Laundering, Preamble* 3.

of their customers and close any accounts suspected of being used for money laundering purposes. Banks and other financial institutions should also record financial information, as well as train their staff to assist these objectives.

"Meanwhile, minimum standards was formed as a response to the rapid growth in international banking activity, and the aim is to ensure that all banks and financial institutions only supervised by the competent authority."[13]

The competent authority has had all the information necessary to exercise such control effectively, particularly in order to avoid conspiracy. In addition, such minimum standards are established as a guide for participating state banking regulators to access and obtain information from international banks. Under this International Standard, if the State Party declares that the international bank does not implement minimum standards, then the state regulator can then impose sanctions.

3. 1.3. Urgency of National Money Laundering Crime Arrangement

In the context of the national interest, the enactment of the Money Laundering Act is an affirmation that the government and the private sector are not part of the problem, but part of the problem solving, in the economic, financial and banking sectors. First of all, effort that a country must take to prevent and combat money laundering is to establish laws that prohibit money laundering and punish severely the perpetrators of these crimes.

In its development, Law Number 15 Year 2002 on Money Laundering Crime has been amended, namely based on Law Number 25 Year 2003 regarding Amendment to Law Number 15 Year 2002 on Money Laundering Crime. The amendment is based on the following matters: The development and progress of science and technology, especially in the field of communication has led to the integration of the financial system, including banking systems that offer traffic mechanism of funds between countries which can be done in a very short time. This situation is in addition to having a positive impact, also have negative impacts on people's lives, by increasing offenses nationwide and internationally by leveraging the financial system including the banking system to hide or obscure the origins of the proceeds from crime *(money laundering).*

Related to this, to prevent and eradicate money laundering crimes, Indonesia has imposed Law Number 15 Year 2002 on Money Laundering Crime. However, the provision in the legislation has not met international standards and the development of the judicial process

[13] *Basle Committee Report on Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishment, Reprinted in International Economic Law Documents,* IEL II-1 (1992)

that it needs to be changed. Therefore, prevention and eradication of money laundering can operate effectively in this law, they include:

a. The scope of the definition of financial services providers is expanded not only for everyone who provides services in finance, but also includes other services related to finance. This is intended to anticipate money laundering actors utilizing the existing form of financial services providers in the community, but not yet required to submit reports on financial transactions and at the same time anticipate the emergence of new forms of financial services providers that have not been regulated in Law Number 15 Year 2002;
b. The definition of suspicious financial transactions is expanded by including financial transactions conducted or canceled by using assets allegedly derived from proceeds of crime;
c. The restriction on the amount of proceeds of a criminal offense of Rp 500,000,000, - (five hundred million rupiah) or more or equivalent value derived from a criminal offense is removed because it is inconsistent with the generally accepted principle that to determine a criminal act irrespective of the magnitude or the small outcome of the acquired crime;
d. The Coverage of *predicate crime is* extended to prevent the development of criminal acts that generate wealth in which the criminal attempts to conceal or disguise the origin of the proceeds of crime, but such actions are not convicted. Various related laws and regulations that criminalize the origin of criminal acts, among others:

   - Law No. 5 of 1997 on Psychotropic Substances;
   - Law Number 22 Year 1997 on Narcotics;
   - Law No. 31 of 1999 on Corruption Eradication, as amended by Act No. 20 of 2001 on Amendments to the Law No. 31 of 1999 on Corruption Eradication;
   - Law No. 30 of 2002 on the Corruption Eradication Commission.[14]

"Amendment of Law Number 15 Year 2002 on Money Laundering Crime emerged because the law is on the way and the reality has not yet accommodated all the aspirations of society and the development of criminal law regarding money laundering and international standards. In addition, the legislation has gained the attention of the international community in particular *the Financial Action Task Force on Money Laundering* (FATF), and has recommended that related to the prevention and combating of money laundering and combating the financing of terrorism.

[14] Elucidation of Law Number 25 of 2003 on the Amendment of Act No. 15 of 2002 on Money Laundering.

Regarding the efforts to prevent and eradicate money laundering crimes, Indonesia recognizes the importance of such internationally accepted recommendations and standards. The recommendation becomes an important part in formulating policies on prevention and eradication of money laundering crime in Indonesia. Indonesia's efforts to meet the recommendations should be implemented to the fullest, because since June 2001 has been included in the list of *Non-Cooperative Countries and Territories (NCCT's)* together with several other countries by the FATF, even until now Indonesia is still considered in the NCCT's as a result of *the review* done by FATF.[15]

To provide an overview of Bill on the Amendment to Law No. 15 of 2002 which has been adopted as law, we reiterate the basic ideas on which the bill was drafted and the basic principles of regulation the draft of the law and the basic principles of the drafting of the draft law as follows:

1.2. Mutual assistance agreements with other countries through bilateral and multilateral issues of money laundering in order to prevent and combat money laundering. The form of mutual assistance cooperation with other countries, among others, the collection of evidence and statements of a person, including the implementation of the rogatori letter;

1.3. The inclusion of "The principle of *dual criminality"* in the Draft Law on Money Laundering which has just been approved to be set and passed into law is one of the principles that have been prevailing in the Code of Criminal Indonesia, namely that someone who does a criminal act in a country, may only be liable if the act constitutes an offense in Indonesia;

1.4. The prohibition of officials or employees of the financial services tells the other person or to the users of financial services on reports on suspicious financial transactions is being prepared or has been submitted to the Center for Financial Transaction Reporting and Analysis."[16]

3.2. Principles of Implementation of Law on TPPU

Referring to the emergence of money laundering norms based on international conventions and national laws, basically the concept of *money laundering* are:

[15] Welcome the Government for approval the Draft Law on Amendments to the Law No. 15 of 2002 on Money Laundering in the Open Plenary Session of the House of Representatives of Indonesia, dated 16 September 2003.

[16] Welcome the Government for approval the Draft Law on Amendments to the Law No. 15 of 2002 on Money Laundering in the Open Plenary Session of the House of Representatives, September 16, 2003.

"The attempt or process of disguising or concealing the proceeds of a crime to alter the proceeds of the crime appears to be the result of legitimate activity because its origins have been disguised or concealed." [17]

" The conclusion above shows that *money laundering* is not a stand-alone act, but an act that was born from the previous act of a crime. Crime is of course is the predicate *crime*, and qualifying *predicate crime* is certainly very limitedly, or highly dependent on the criteria of crimes specified in the laws of a country.

Law No. 8/2010 on the Prevention and Eradication of Money Laundering Crime (hereinafter referred to as "TPPU Law") limits that crimes of origin which may result in the crime of money laundering are 26 (twenty six) items, which are stipulated in Article 2 his. The term "crime" gives the meaning that it refers to the formulation of the offense.

The existence of money laundering does not stand alone as a criminal offense in general, but a criminal act related to another offense (predicate crime). Therefore, it is appropriate if the money laundering is a *conditio sine quanon* to the predicate offenses as set out in Article 2 (1) of the AML.

The predicate crime and money laundering *(proceeds of crime)* does not have an evil intentions or *mens rea*, because the will commit the predicate offense embodied in the act differently with the will to commit money laundering normatively reflected in the provisions of Article 3, Article 4, and Article 5 of the TPPU Law. "Based on this argument, money laundering is not a continue criminal offense *(vorgezette handeling)*. Both of these criminal acts are offenses that stand-alone though no relation to one another." [18]

" The second difference yet currently not widely known is original intent. Predicate crime are still based on the terms of the act and the author *(daad-daderStrafrecht)*. The object of money laundering crime is a property that is allegedly derived or obtained from the original criminal offense. "The difference in the object of both crimes has an impact on normative proof, that is, the proof of the original crime is against both the act and the mistake of the manufacturer, while the proof of property in the money laundering act is the acquisition of assets allegedly derived from a crime. In essence, there is a correlation between the defendant's properties against his original criminal offense." [19]

Therefore, in the case of the disclosure of money laundering crime, it must be attached to the theory of criminal liability. Criminal liability certainly cannot be separated from criminal

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

[18] Romli Atmasasmita, *Business Crime Law (Theory and Practice in the Age of*Globalization),Cet. 1st, Prenadamedia Group, Jakarta, 2014, p. 213.

[19] *ibid*

acts. "In essence, an act or a crime is a physical act in the commission of a crime or offense or act of will as a gesture, whether voluntary or forced."

Related to criminal responsibility, Van Hamel provides an understanding of criminal responsibility related to three (3) points:

a. One is able to understand the true meaning and effect of one's own deeds;
b. One is able to realize that the acts committed are contrary to public order; and
c. A person is able to determine the will to do.

Further explanation of Van Hamel's opinion is related to the 3 (three) capabilities are proposed by Van Hamel regarding the will to do. When it is linked between the will to do with the error as the most important element of accountability, then there are 3 (three) opinions. First, the indeterminist who declares that man has free will in action. Free will is the basis of a decision of will. If there is no freedom of will, then there is no mistake. Thus, there is no defense so there is no punishment. Second, the determinist states that man has no free will, so the decision of the will is determined entirely by the nature of the motives and stimuli from within and from outside, meaning that one cannot be found guilty of having no free will.[20]

> However, it does not mean that the person committing the crime cannot be held accountable for his actions. The absence of freedom of will precisely raise a person's accountability for his actions. However, the reaction to the act is done in the form of an act for public order, and not criminal in the sense of suffering. Third, the opinion that error has nothing to do with free will. Strictly speaking, freedom of will is something that has nothing to do with an error in the criminal law.[21]

" Simons stated the basis of their responsibility in criminal law is a certain Simon's opinion can be drawn a conclusion that the essence of liability in criminal law are:

1. A person's psychic state or soul;
2. The relationship between psychological state by deeds done in the Dutch vocabulary in the context of psychological state accountability translates into *toerekeningsvatbaarheid* or be held accountable or responsible ability, whereas in the context of the relationship between the psychic state of the actions undertaken, translates into *toerekenbaarheid* or accountability.".[22]

" Furthermore, criminal liability cannot be separated from 'mistakes'. Simons stated that "a person by the legislators considered that he was doing wrong, if he can realize his actions against the law, therefore, he can determine the will of such actions."

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20 Eddy OS Hiariej, *op.cit.*, P. 121
21 *ibid*
22 Satochid mammal, *Criminal*Law,Center for Student literature, p. 243

Related to the concept of 'mistake', Remmelink states that "public defamation by applying the ethical standards applicable at any given time to humans who commit inadvertent behavior that is essentially avoidable." Similarly Mezger, Mezger provides an understanding that "mistakes as a whole requirement that gives the basis of personal defamation of the perpetrators of criminal acts."[23]

Responsible a person in criminal law should open the possibility for the author to explain the background of criminal acts that have been done. If the legal system does not open such an opportunity, it can be said not occur due process of law *(due process of law)* accountable in criminal, which will eventually collide with the principles of justice.

Hart states "If a legal system did not provide facilities allowing the individual to give legal effect to Reviews their choices in such areas of conduct, it would fail to make-one of law's most distinctive and valuable contributions to social life." Hart's opinion has a free translation that if a legal system does not give everyone space to convey an explanation for his actions, then the law is seen as failing to provide valuable input on social life.

Another opinion states that criminal liability does not just mean 'right fully sentenced' but also 'rightfully Accused'. Criminal liability is first and foremost a condition in the maker's self when committing a crime. Criminal liability also means connecting between the circumstances of the manufacturer and the actions and sanctions that should be imposed. Therefore, the assessment is done 2 (two) directions. First, criminal responsibility is placed in the context of the terms of the factual (conditioning facts) of convictions, therefore contains a preventive aspect. Second, criminal liability is the result of law (legal consequences) of the existence of the factual terms, so that a part of the repressive aspects of criminal law. This is the connection between facts and conditioned air conditioning roommates legal consequences is Expressed in the statement about responsibility, which means criminal liability associated with the state being conditional on the existence of criminal and legal consequences of any such thing.

Criminal liability cannot be released from the time of the crime or *tempus delicti*. Application of *tempus delicti* has a very important meaning when a criminal had to account for his actions. In connection with this, *tempus delicti* has 4 (four) significance, they are:

a. To prove a deed is qualified as a criminal act. This is very important with the application of the principle of legality and application of principles *lex favor*

[23] Simons, *op.cit.*, P. 196

reo which means if there is a change of law, then the defendant applied the most mitigating rules

b. To determine the defendant is capable or unable to take responsibility. This is closely related to one's responsible ability;
c. To determine when a criminal offense occurred, the defendant was of age; and
d. Related to expiration or *verjaring* . Basically the expiration is calculated from the day after the criminal act occurs, but there are some crimes whose expiration calculation is not the case.

"Jonkers states that *tempus delicti* is when the action or behavior occurs or the behavior occurs and when the effect occurs." Jonkers opinion is in line with the opinion of Eddy OS Hiariej which states that:

a. "The act consists of 2 (two) aspects, namely action or behavior and consequences;
b. Action or behavior and effect is a series of events as an integral whole;
c. To ensnare the perpetrator, the date of the action or the behavior and date of the occurrence shall be clearly stated."

Criminal liability cannot be separated from criminal acts, and vice versa, a criminal offense cannot stand alone without criminal responsibility, meaning that criminal liability will shall apply if the person to whom the criminal responsibility is sought has been committed.

The theory of criminal responsibility in which there is a theory of error with the associated application of the Law on TPPU provides the juridical essence that the crime of money laundering shall be subject to criminal liability independently but must go hand in hand with the *predicate crime* (criminal offense).

3.3. Due Process of Law in Corruption and TPPU

The series of policies and arrangements that emerged in response to corruption conditions in the country were accompanied by extraordinary public attention to law enforcement against corruption offenses. Eradication of corruption is one of the reform agenda in the field of law as affirmed in the Decree of the People's Consultative Assembly of the Republic of Indonesia Number: XI/MPR/1998/Nepotism.

Considering that corruption eradication is one of the reform agenda in the field of law, "eradicating corruption is the duty of all sensible citizens, because corrupt corruption is extraordinary. Corruption is economically damaging and certainly destructive to many people including corrupt lovers. But the most destructed are the victims of unfair corruption eradication."

It seems to speaking of injustice corruption eradication is an anomaly, when the Government of the Republic of Indonesia" beating the drums of war "on the practices of corruption that takes place in a massive and systematic". However, inevitably justice is the right of everyone in front of laws that must be guaranteed by the state, including in this case are the perpetrators of corruption.

Related to the eradication of criminal acts of corruption, the efforts of law enforcement officers in confiscating assets owned by perpetrators of corruption is one of them is through the application of Law on TPPU. With the implementation of the Law on TPPU, it is expected that the ownership of assets by the perpetrators of corruption acts allegedly obtained from criminal offenses may be confiscated by the state.

However, in some cases of corruption, the assets or property of suspects of corruption is greater than the state losses or the value of money alleged by law enforcement officers to suspect criminal acts corruption. Therefore, *due process of law* (law enforcement process) must be run in accordance with the corridor, hence, there is no distortion in law enforcement.

3.4. Corruption Investigation and TPPU

3.4.1. Investigations and Corruption Investigations

As with other criminal acts, in carrying out due process of law in corruption is also mandatory through the mechanism of investigation. Nevertheless, while the scope is regulated *lex specialis* but the Corruption Act does not specifically regulate the concept of inquiry in corruption. This is evident in Article 26 of the Corruption Act states:

"Investigation, prosecution and examination in court for corruption shall be conducted under applicable criminal procedure law, unless otherwise provided in this Law."

Other legislation, KPK Law, does not regulate the concept of investigation, so the concept of investigation in the Corruption Eradication Commission Law still refers to the Criminal Procedure Code. KPK Law only specifically regulates the concept of investigators. Article 43 of the Corruption Eradication Commission Law simply states as the following:

1) Investigators are investigators of the Corruption Eradication Commission who are appointed and dismissed by the Corruption Eradication Commission.
2) The investigator as referred to in paragraph (1) shall perform the function of investigation of criminal acts of corruption. "

Furthermore, the Corruption Act also does not regulated *lex specialis* mechanism (procedure) of investigation, therefore, the procedure still refers to Article 102 KUHAP, which states:

(1) The investigator who knows, receives a report or complaint about the occurrence of an event which is' suspected to be a crime shall immediately take the necessary investigative action.

(2) In the event of being caught without waiting for the order of the investigator, the investigator shall immediately take the necessary action in order investigation as referred to in Article 5 paragraph (1) letter (b).

(3) In respect of the actions taken in paragraph (1) and paragraph (2) investigator shall prepare the minutes of the event and report it to the investigator of the law.

The mechanism of investigation in corruption cases is set more specifically in Article 44 of the Corruption Eradication Commission Law states:

(1) If the investigator in conducting the investigation finds sufficient initial evidence of alleged corruption within 7 (seven) working days, from the date of sufficient preliminary evidence, the investigator reports to the Corruption Eradication Commission.

(2) Sufficient preliminary evidence is considered to be present when found at least 2 (two) evidences, including and not limited to information or data that is spoken, transmitted, received or stored, whether ordinary or electronic or optical.

(3) In the event that the investigator performs his duties does not find sufficient initial evidence as referred to in paragraph (1), the investigator reports to the Corruption Eradication Commission, and the Corruption Eradication Commission stops the investigation.

(4) In the case that the Corruption Eradication Commission is of the opinion that the case is continued, the Corruption Eradication Commission shall conduct its own investigation or may transfer the case to a police investigator or prosecutor's office.

(5) In case the investigation is delegated to the police or prosecutor's office as referred to in paragraph (4), the police or prosecutor's office shall perform coordination and report the progress of the investigation to the Corruption Eradication Commission.

Referring to this, the procedure of investigation in the case of corruption in certain matters may refer to the Corruption Eradication Commission Law. As with any investigation, investigation procedures in corruption cases are also not *lex specialis* arranged in Corruption Act. Therefore, in the case of corruption, the investigation mechanism still refers to the KUHAP, and in certain cases it refers to the KPK Law.

In the investigation of corruption cases, which need to be examined in the investigation section is related to the seizure of the suspect's assets of corruption. Article 38 of the Criminal Procedure Code states that:

1. Foreclosure can only be done by the investigator with letter permission of the local district court chairman.

2. In very urgent circumstances when investigators must act immediately and are unlikely to obtain letter permit in advance, without prejudice to the provisions of paragraph (1) the investigator may confiscate only the movable object and shall, therefore, promptly report to the head of the local district court for his consent.

However, the seizure provisions as regulated in the Criminal Procedure Code are not aligned with the provisions of the seizure mechanism as stipulated in the Corruption Eradication Commission Law. Article 47 of the Corruption Eradication Commission Law states that:

(1) On the basis of strong suspicion of sufficient preliminary evidence, investigators may undertake without the permission of the Chief Justice of the District Court relating to the investigation task.

(2) The provisions of applicable legislation governing the conduct of foreclosure, do not apply under this law.

It should be underlined that the objects that can be confiscatedunder Article 39 paragraph (1) of KUHAP are as the following:

(1) What can be confiscated are:

a. objects or bills of a suspect or defendant wholly or partially allegedly obtained from a criminal offense or as a results of a crime;

b. objects that have been used directly to commit a crime or to prepare it;

c. objects used to prevent criminal investigations;

d. objects specially made or intended to commit a crime;

e. other objects that have a direct relationship to the crime committed.

by the investigator of the suspect's possession has met the criteria as regulated in Article 39 paragraph (1) of the Criminal Procedure Code or not

3.4.2. Investigation and Investigation of TPPU

In the context of the TPPU Law, investigation mechanisms are not explicitly regulated. The investigation in the Law on TPPU Year 2010 begins at Article 64 of which states:

1. PPATK conducts an examination of Suspicious Financial Transactions related to any indication of money laundering or other criminal acts.
2. In case of any indication of money laundering or criminal offense other, PPATK shall submit the result of examination to the investigator for investigation.
3. In conducting the investigation as referred to in paragraph (2), the investigator coordinates with the PPATK.

Unfortunately, the provision of Article 64 of the 2010 TPPU Law does not elaborate on the mechanism of the legal process of investigation conducted by PPATK, even unfortunate in the 2010 TPPU Law is the arrangement of investigation, prosecution and examination in court as regulated in its Article 69. Article 69 of the 2010 TPPU Law states:

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

The provisions of Article 69 of the 2010 TPPU Law according to the authors cannot be interpreted dogmatically, but should be examined more deeply about the meaning of "not mandatory proven first criminal offense". The clause "shall not be proven in advance of the criminal offense" if it is interpreted dogmatically as if the TPPU is an independent offense, separate from the original offense.

The provision is not in line with UNCAC which has been adopted by the General Assembly of the UN in its resolution no. 58/4, dated October 31, in Article 23 on laundering of proceeds of crime:

> "It is stipulated that each Member State shall adopt such resolution, in particular in relation to the fundamental principles of its respective national law, by including it in the law as a crime if it is committed intentionally, including such acts as the following:
>
> a. Exchange or transfer of assets, knowing that such property is the proceeds of a crime for the purpose of concealing or disguising the origin of the illicitly acquired property or of assisting a person engaged in a criminal offense in order to avoid a lawsuit against the act;
> b. Conceal or disguise the actual circumstances, sources, locations, placements, movements or possessions, known that such property is the result of a crime. "

Implementation of the provision of "not mandatory first proven criminal offense" has the potential to cause problems in law enforcement. This is clear contrary to principle *due process of law* which means due process of law is a procedure required by law as a universally applicable standard of law. relate to its historical aspect, due process is born of the Fifth Amendment and 14 of the American constitution to prevent the disappearance of life, liberty, and property rights by the state without a legal process.

"Due process produce procedures and substances of protection against the individual, so that each procedure in the *due process* test 2 (two) things, first the prosecutor's procedure has removed the life, liberty, and property of the suspect without a procedure or not, second if using procedures, procedures have been in accordance with the rules or not. " [37]

In the criminal justice system, Hebert L. Packer, in addition to introducing *due process model* , also introduced *crime control model* . Both models have their own characteristics. *Crime control models* has the characteristics of efficiency, prioritizing speed and *presumption of guilt* so criminal behavior must be dealt with immediately and the suspect is allowed to fight. This model is like a ball that is being rolled and without obstacles.

Meanwhile, *due process model* has the characteristics of resisting efficiency, prioritizing quality and *presumption of innocent* so the role of counsel is very important with the aim of avoiding punishment to innocent people. This model is likened to a person who is doing a hurdle, and both models have competing values, but not opposite.

Certainly the principle *due process of law* is a principle that does not stand alone and adheres to a principle that other namely the principle of legality. The principle of legality is the foundation of the penal law and its law enforcement. The principle of legality or in any other language is *"Nullum delictum nulla poena sine praevia lege poenali* which means no criminal act or no criminal without prior criminal law.

At least there are 4 (four) meaning of the principle of legality. First, against criminal provisions, shall not apply retroactively (non-retroactively or *nullum crimen nulla poena sine lege praevia* or *lex praevia*). Second, criminal provisions must be written and should not be criminalized under customary law (*nullum crimen nulla poena sine lege scripta* or *lex scripta*). Third, the formulation of criminal provisions must be clear (*nullum crimen nulla poena sine lege certa* or *lex certa*). Fourth, criminal provisions should be strictly interpreted and prohibited analogy (*nullum crimen nulla poena sine lege stricta* or *lex stricta*).

Anselm von Feuerbach outlines the phrase *"Nullum delictum nulla poena sine praevia lege poenali"* into three points :

a. *Nulla poena sine lege* which means no criminal without statute of criminal law;
b. *Nulla poena sine crimine* which means no criminal without crime;
c. *Nullum crimen sine poena legali* which means there is no criminal act without criminal by law. "

Based on these three phrases, this principle has 2 (two) functions:

a. Protecting which means the criminal law protects the people against the arbitrary power of the state;
b. Instrumentation, ie within the limits prescribed by law, the exercise of power by the state is expressly allowed.

Protecting is on the material penal law that refers to the first phrase (*nulla poena sine lege*) and second (*nulla poena sine crimine*). Meanwhile, the function of instrumentation is more in the formal criminal law which refers to the third phrase (*nullum crimen sine poena legali*)."

When scrutinized, the third phrase *nullum delictum crimen sine poena legali* which means "no criminal act without criminal by law" is a negative sentence. If the sentence is posited, then it becomes a statement "all criminal acts must be punished according to law". Thus, the principle of legality in criminal law covers material and formal criminal law. In the material criminal law, the principle of legality means that nothing can be punished, except for the force of the criminal code in the existing legislation before it is committed."

In relation to the meaning of the above legality principle, basically the formulation of money laundering as stated in the Law on TPPU is in Article 3 to Article 10 which states:

Article 3

Any Person who places, transfers, assigns, spends, pays, grants, deposits, brings 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 aim of hiding or disguising the origins of Assets is criminally charged for criminal acts of Money Laundering by imprisonment maximum of 20 (twenty) years and a maximum fine of Rp10,000,000,000.00 (ten billion rupiah).

Article 4

Any Person who conceals or disguises the origin, source, location, appropriation, assignment of rights, or actual ownership of any property knowingly or reasonably suspected is the proceeds of a criminal act as referred to in Article 2 paragraph (1) shall be punished for a criminal act of Washing Money with a maximum imprisonment of 20 (twenty) years and a maximum fine of Rp 5,000,000,000.00 (five billion rupiah).

Article 5

Any Person who receives or controls the placement, transfer, payment, grant, donation, custody, exchange, or use of any assets known to or reasonably suspected as a result of a crime as referred to in Article 2 paragraph (1) shall be subject to imprisonment of a maximum of 5 five) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

The provisions referred to in paragraph (1) shall not apply to Reporting Parties implementing reporting obligations as stipulated in this law.

Article 6

In the case of money laundering as referred to in Article 3, Article 4, and Article 5 shall be done by a corporation, the penalty shall be imposed on the Corporation and / or the Controlling Personnel of the Corporation.

(2) Crime shall be imposed on the Corporation if the crime of Washing Money:

a. conducted or ordered by the Corporate Controller Personnel;
b. performed in the framework of fulfilling the purpose and objectives of the Corporation;
c. performed in accordance with the duties and functions of the perpetrator or the giver of the order; and
d. conducted with the intention of providing benefits to the Corporation.

Article 7

The principal punishment imposed against the Corporation shall be a fine of a maximum of Rp100,000,000,000 , 00 (one hundred billion rupiah).

In addition to the fine as referred to in paragraph (1), against the Corporation may also be imposed additional penalty in the form:

a. announcement of judge's decision;
b. freezing of part or all of the activities of the Corporation;
c. revocation of business license;
d. dissolution and / or prohibition of the Corporation;
e. appropriation of the Corporation's assets to the state; and / or
f. takeover of the Corporation by the state

Article 8

In the event that the convicted property is not sufficient to pay the fine as referred to in Article 3, Article 4, and Article 5, the fine shall be replaced with a maximum imprisonment of 1 (one) year 4 (four) months.

Article 9

In the event that the Corporation is unable to pay the fine as referred to in Article 7 paragraph (1), the fine shall be replaced by theft of the Company's Property or Personnel of a Corporate Controller equal to the penalty of a fine imposed.

In the event that the sale of the Company's Wealth-derived Property as referred to in paragraph (1) is insufficient, the imprisonment of substitute fines shall be imposed on the Controlling Person of the Corporation by taking into account the fines already paid.

Article 10

Any Person within or outside the territory of the Unitary State of the Republic of Indonesia participating in the Trial, Assistance, or Perpetual Plans to commit the crime of

Money Laundering shall be subject to the same criminal sanction as referred to in Article 3, Article 4 and Article 5.

In the treatise, Gerindra Party Faction in conveying its views by stating:

> Therefore, independence needs to be emphasized both in the implementation and recruitment of the Chairman and Vice Chairman of PPATK, so that it cannot be influenced or intervened by other institutions and non-institutions. In terms of investigation and investigation, especially in the case of blocking of property, it is necessary to make clear rules especially for the allocation of wealth so that it is not arbitrary and not contrary to the principle of presumption of innocence. On trial in accordance with articles 84 and 85, for reversal of the burden of proof or otherwise known as an inverse proof of property allegedly derived from a criminal act of corruption, the property in question is, a supposedly alleged wealth of proceeds of original criminal offense.

This view has the meaning that the proof of money laundering cannot be separated from the original criminal offense. Proof of money laundering crime by separating by a criminal offense would potentially lead to arbitrary behavior and contrary to the principle of presumption of innocence.

3.4.3. Reversal of Corruption Proofing and TPPU

Burden of proof is basically born on the evidentiary system which refers to the provisions on the standard in the case of proving something that is related to the defendant's defendant committed the crime charged. In general the system of verifying an offense refers to a negative system *(negatief wettelijk*) as regulated in Article 183 of the Criminal Procedure Code, which in it regulates 2 (two) points :

a. There shall be at least 2 (two) valid evidences; and
b. The existence of two valid evidences that move the judge to gain confidence in the offense, and the defendant is guilty of doing so.

In Article 183 of the Criminal Procedure Code, the burden of proof rests with the public prosecutor (JPU), which is different from the Corruption Act. Corruption Act embraces a reversal system burden of proof. In reversing the specific burden of proof and the other from the law of general proof, in addition to the provisions of the parties charged to prove, contain various provisions, between other:

a. On criminal offenses or in which case the burden of proof of the prosecutor or the legal advisor or both;
b. On the basis of the burden of proof is given on the one hand, as in the reverse system, to prove the property which has not been indicted, the defendant shall prove not the

result of corruption, intended to impose or not to impose the crime of confiscation of the property which has not been prosecuted. Depending on the success or failure of the defendant to prove the source of the undisputed property;

c. Although only a few, the special corroborative law of corruption also contains about way proves, as in a semi-reverse verification system of property allegedly related to the alleged corruption case. The defendant is committed by the defendant to prove that his property, the wealth of his wife or husband or child and others, in accordance with the source of income or the additional resources of the wealth or in the case of the defendant prove that the property which has not been indicted is not the result of corruption done in his defense;

d. Concerning the legal consequences of things obtained on the evidences of parties charged with verification, such as a judge will said the indictment was not proven.

The manifestation of the principle of reversing the burden of proof is governed by Article 37 of the Corruption Act states:

Article 37 A

(1) The defendant is obligated to provide information about all of his property and property of his wife or husband, children, and property of any person or corporation suspected of having any connection with the alleged case.

(2) In the event that the defendant cannot prove the wealth disproportionate to his income or additional source of wealth, the information referred to in paragraph (1) is used to strengthen existing evidence that the defendant has committed the crime of corruption.

(3) The provisions referred to in paragraphs (1) and (2) constitute a crime or principal case as referred to in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15 and Article 16 of Law Number 31 Year 1999 on the Eradication of Corruption and Articles 5 through Article 12 of this Law, so that the prosecutor remains obliged to prove his allegations.

The meaning that the defendant is obligated to provide information about all his property which is allegedly related to the case of the accused, and if the defendant cannot prove unbalanced wealth, then it can be used to strengthen existing evidence that the defendant has committed a criminal act of corruption , which means from the perspective of proof, the burden of proof shifting to the defendant.

In this perspective, the defendant plays an active role in stating that he is not a criminal offender. Therefore, the defendant in front of a court hearing that will prepare the burden of proof, hence if the defendant cannot prove, then the defendant is found guilty of a crime.

In principle the theory of burden of proof of this type is called the theory of "Reversal Burden of Proof" (*Omkering van het Bewijlast* or *Shifting of Burden of Proof / Onus of Proof)*. Reviewed from the theoretical and practical perspectives of the burden of proof theory can be classified again into a reversal of the burden of proof that is both pure and limited (*limited burden of proof)* , essentially, the reversal of the burden of proof is a deviation of the law of evidence and also an extraordinary act against corruption.

Related to the reversal of the burden of proof, Indriyanto Seno Adji states in detail as the following:

The principle of reversal of the burden of proof is a system of proof beyond the evident theoretical conventions of universal Criminal Law (Events). In the criminal law (formal), both the continental and Anglo-Saxon systems, recognize the proof by still charging its obligations to the Public Prosecutor. It's just inside *certain cases* (specific cases) may be permitted by a differential mechanism, the Reversal Load System of Evidence or otherwise known as *Reversal of Burden Proof (Omkering van Bewijlast),* nor was it done *overalls*, but has minimum limits for the destruction of human rights protection and respect, especially the right of suspects/defendants.

Muladi asserted that the principle of reversal of the burden of proof should be done carefully; there is even a tendency to potentially violate human rights. It is stated in detail as the following:

> It is universally unknown to the existence of a general inverted proof, because it is very vulnerable to human rights violations. One cannot be accused of corruption "*proceeding"* (in the position of the defendant, only because the defendant cannot prove the origin of his property. Thus, even in this case the principle of presumption of guilt (*presumption of guilt*) in the form of *presumption of corruption*, but the burden of proof must be in the framework *proceeding* cases or specific criminal acts are being tried under the laws of the eradication of corruption in force (*presumption of corruption in certain cases*).

4. CONFISCATION OF CORRUPTION ASSETS BASED ON JUSTICE PRINCIPLES

4.1. Principles of Asset Confiscation in Tipikor and TPPU

4.1.1. Conception of Confiscation based on Corruption Law and Law on TPPU

People are increasingly restless when faced with phenomena contained in the mass media that is corrupt officials arrested and led by law enforcement officers such as the KPK for detention with style smiling and waving. On the one hand other there is also a sense of pity

and pity, but seeing the fact that the amount of state money is corrupted for personal gain, then the compassion turned into anger and pain.

Therefore, it is necessary to reverse the understanding that being corrupt is tasty, ie imposing the maximum penalty, because the corruptors have a wide network, and can procrastinate legal process. To provide the maximum deterrent effect, the investigators also streamline the application of the TPPU Law with the aim of pursuing assets of corruption that are hidden or disguised with way transfer it to another party.

In addition to the effectiveness of the Law on TPPU, it should be noted that there is a sanction of confiscation as an additional criminal form as stipulated in Article 18 of the Corruption Law states:

(1) In addition to additional criminal as referred to in the Criminal Code, as an additional criminal are:

a. Conception of tangible or intangible goods or immovable property used for or derived from a criminal act of corruption, including a company owned by a convicted person in which a criminal act of corruption is committed, as well as from goods replacing the goods;
b. repayment of a substitute amount equal to the amount of property derived from a criminal act of corruption;
c. closing all or part of the company for a maximum period of 1 (one) year;
d. revocation of all or part of certain rights or the deletion of all or any of the particular benefits which the Government may or may have provided to the convicted person.

(2) If the convicted person fails to pay the replacement money as referred to in paragraph (1) letter b within a period of 1 (one) month after a court decision having obtained permanent legal force, then the property may be seized by the prosecutor and auctioned off to cover the replacement money.

(3) In the event that the defendant does not possess sufficient property to pay the replacement money as referred to in paragraph (1) letter b, he shall be punished by imprisonment whose duration does not exceed the maximum threat of the principal penalty in accordance with the provisions of the Act."

Article 18 of the Corruption Act basically refers to the return of assets that are the result of a criminal act of corruption. Therefore, the return of assets must be based on several

reasons. As stated by Michael Levi, that the return of assets contains at least 3 (three) reasons, namely:

a. Prevention reasons (*prohylatic*) to prevent criminals from having control of illegally acquired assets to commit crimes other in the future;
b. The reason for propriety (*propriety*) that is because the offender has no right to such illegally acquired assets;
c. Priority / precedence reason is that the crime gives priority to the state to demand illegally acquired assets rather than the rights of the offender;
d. Reason of ownership (*proprietary*) that is because the asset is obtained illegally, then the state has the interest as the owner of the asset. "

In the context of criminal acts of corruption, the return of assets resulting from criminal acts of corruption refers to the process of the perpetrators of criminal acts of corruption being revoked, deprived of their rights to the proceeds/profits of criminal acts and/or deprived, deprived of their rights to use the proceeds as a means to commit other crimes.

Fleming argues that asset returns place more emphasis on some points as follow:

a. Return of assets as revocation, deprivation, and disappearances;
b. Property that is repealed, deprived, removed is the proceeds of the crime committed by the offender;
c. One of the objectives of revocation, appropriation, disappearance is so that the offender cannot use the proceeds / advantages of the crime as a means to commit other crimes.

Normative return of assets of corruption actors is also regulated in the Law on TPPU. Article 79 paragraph (4) of the TPPU Law states:

(4) "In case the defendant dies before the verdict is dropped and there is sufficiently strong evidence that the concerned has committed a Money Laundering act, the judge of the prosecution's claim decides the deprivation of the Property confiscated. "

In relation to the provisions of confiscation stipulated in the Corruption Law and the Law on TPPU, and the opinions of Michael Levi and Fleming, it can be concluded that the deprivation of property of the perpetrators of corruption should be based on the reason for decency and dignity of justice. Therefore, the confiscation of property must be harmonized with property which actually comes from corruption.

Justice of dignity in question cannot be separated from the values of Pancasila which is *volkgeist* (the soul of the nation). One of the values of Pancasila in question is of course a just and civilized humanity principle, which in turn can be concluded that the legal justice that is owned by the Indonesian Nation is justice that humanize man.

Justice based on the second principle of Pancasila is referred to as dignified justice is that even though someone is guilty legally but still must be treated as a human being. "Similarly, dignified justice is justice that balances between rights and duties. Justice which is not only materially but spiritually, then the material follows it automatically. Precious justice puts human beings as God's created creatures whose rights are guaranteed. "

4 .1.2. Confiscation based on the Drawing Bill

The main purpose of the perpetrators of criminal acts of corruption and criminal acts other with the economic motive is to get and enjoy the treasure of property from crime. Thus, in the crime with this economic motive, the wealth of the proceeds of crime is the blood that sustains the crime, way the most effective means of eradicating and preventing criminal offenses with economic motives is to kill the lives of crimes by confiscating and confiscating the proceeds and instruments of such crimes. In the current legal system in Indonesia, disclose the crime, find the perpetrator and placing perpetrators of criminal acts in prison (*follow the suspect*) proved to have no deterrent effect and was not effective enough to suppress crime rates if not accompanied by attempts to confiscate and confiscate proceeds and instruments of crime.

Seize and confiscate the proceeds and instruments of criminal acts of the offender not only transfer the assets of the perpetrators to the people but also will enlarge the possibility of the community to realize the common goal of the formation of justice and welfare for all members of the community.

This in turn prompted the Government of Indonesia to issue a policy related to efforts to accelerate the eradication of criminal acts of corruption. One of the priority policies of the Government of Indonesia is the creation of a legal instrument capable of seizing all property resulting from a criminal offense and all facilities that enable the implementation of criminal acts, especially economic crime.

Seizure and seizure of proceeds and instruments of crime, in addition to reducing or eliminating the economic motive of the offender also allows the collection of large amounts of funds that can be used to prevent and combat crime. Overall, it is will suppress crime rate in Indonesia.

4 .1.3. Conceptions of Human Rights and Asset Confiscation

Human rights are basically born since the time of Prophet Muhammad SAW. History shows that the Prophet Muhammad, and Muslims, for approximately 13 years in Mecca counted since the appointment of Muhammad SAW." As a messenger he has not have the power and political unity that control one region. Muslims became a free and independent community after

in 622 AD migrated to Medina, city previously called Yasrib. If in Mecca they were previously oppressed weak people."

"Not long after the migration to Madinah, Muhammad SAW made a political charter to organize a common life in Medina inhabited by several different classes. Prophet Muhammad SAW. It was necessary to lay down the basic rules of common life in Medina, in order to form a unity of life among all its inhabitants. The newly formed life entity was led by Muhammad SAW and become a sovereign state. "Thus, in Medina Muhammad SAW had not only the nature of Allah's Apostle, but also has the Head of State.

Scientists, especially historians, refer to the political texts made by Muhammad SAW with different terms including *treaty*, *agreement*, *constitution*, *charter* or charter. Word *charters* and more charters lead to letter official which contains a statement about something, while the word *constitution* leading to the position of the manuscript as an official document containing the subject matter of state. In the end the political manuscripts made by Muhammad SAW was created into book standardized as "Medina Charter".

Medina Charter as a whole contains 47 articles, of which the principle of equality and justice exists. The principle of equality and justice is contained in Article 25 and Article 37 of the Complete Medina Charter are as follows:

Article 25

The Jews and the Bani 'Awf are one people with the believer. For Jews their religion, and for the Muslims their religion. Also (this freedom applies) to allies and themselves, except to those who are unjust and evil. It is so will self-destructive and his family.

Article 37

For Jews there is a cost obligation, and for Muslims there is a cost obligation. They (Jews and Muslims) help in facing the enemies of this charter citizen. They give each other advice and advice. Good is not evil. Indeed, a person does not bear the punishment of the consequence (error) of his allies. Defense is given to the persecuted party.

Article 25 and Article 37 of the Medina Charter reflect that the principle of equality and justice is a part of the human rights context, which has existed long before human rights values became popular internationally. Therefore, human rights are believed to have universal value.

The universal value means not knowing the boundaries of space and time. This universal value is then translated into various national legal products in different countries in order to protect and uphold human values. "Even this universal value is confirmed in international instruments, including international agreements on human rights, such

as" *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Right* , *International Convention on the Elimination of All Forms of Racial Discrimination".*

But the reality shows that the universal values of human rights in practice have no similarity and uniformity. Interpretation *right to live* (the right to life), for example, can be applied differently from country to country. In translation of this right, each country has a different interpretation of how far the state can guarantee *right to live*.

There are several theories that are important and relevant to the issue of human rights, namely the theory of natural rights (*natural rights theory*), positivism theory (positivist *theory*), and the theory of cultural relativism (*cultural relativist theory*). According to the theory of natural rights, human rights are the rights possessed by all people, at all times and in all places, because human beings are born as human beings. These rights include the right to life, liberty, and property as stated by John Locke. Recognition is not required for human rights, either from the Government or from a legal system, because human rights are universal. Based on this reason, the source of human rights is actually derived solely from humans.

The theory of natural rights is then translated into various " *Bill of Rights* ", As enacted by the British Parliament (1689), the United States Declaration of Independence (1776), the Declaration of Human Rights and the Citizen of France (1789). "More than a century and a half later, at the end of the Second World War, the Universal Declaration of Human Rights (1948) was disseminated to the public internationally under the banner of natural rights. The legacy of natural rights can also be found in various human rights instruments in the Americas and Europe. "

Positivism theory strongly rejects the theory of natural rights. The main objection to this theory is that the natural rights of its sources are not considered clear. According to positivism a right must come from a clear source, such as from a state-made constitution or constitution.

If advocates of natural rights degrade their notions of rights from God, reason or moral presuppositions *a priori*, positivists argue that the existence of rights can only be derived from state law.

Another objection to the theory of natural rights comes from the theory of cultural relativism (*cultural relativist theory*) which views the theory of natural rights and its emphasis on universality as an imposition of a culture on another given culture name cultural imperialism.

According to the adherents of the theory of cultural relativism, there is no universal right. They feel that the theory of natural rights ignores the social basis of the identity possessed by the individual as a human being. Humans are always the product of different social and cultural environments and cultural traditions and civilizations that contain different ways of being human. "Therefore, the rights possessed by all human beings at all times and in all places are rights that make man socially disengaged (*desocialized*) and culture (*deculturized*)."

In relation to human rights with criminal justice is known a Right *"Fair Trial"*. Right over *"Fair Trial"* is something that must be taken into account in the life of democracy is an independent judicial power (*independent judiciary*) which guarantees the fair trial of all persons accused of a criminal offense.

The recognition of human rights in Indonesia is also regulated in Chapter XA of the Fourth Amendment of the 1945 Constitution, and specifically to the protection of the law is regulated in Article 28D Chapter XA of the Fourth Amendment of the 1945 Constitution which states "Everyone has the right to recognition, guarantee, protection and legal certainty fair and equal treatment before the law."

The elaboration of the provisions of the 1945 Constitution is also described in Article 17 of Law Number 39 Year 1999 regarding Human Rights which states:

person without discrimination shall be entitled to obtain justice by filing a petition, complaint and suit, in criminal, civil, or administrative cases and tried by a free and impartial judicial process, in accordance with the procedural law which guarantees an objective examination by an honest judge and fair to obtain fair and right decisions.

In relation to the perspective of criminal law, the elaboration of Article 28D Chapter XA of the Fourth Amendment of the 1945 Constitution and Article 17 of Law Number 39 Year 1999 concerning Human Rights are as follows:

a. a person shall be presumed innocent before a permanent legal court decision concerns his or her guilt; and
b. one cannot be punished without error.

That a person should be presumed innocent before a law-enforcement court ruling remains highly correlated with criminal sanctions which one of them is a sanction for plunder. Criminal sanction of confiscation certainly cannot be done without legal basis, because based on Article 28G paragraph (1) The Second Amendment of the 1945 Constitution states that:

"Everyone is entitled to personal, family, honor, dignity and property protection under his control, and is entitled to a sense of security and protection from the threat of fear of doing or not doing something that is a human right. "

The existence of state protection against its people as regulated in Article 28G Paragraph (1) of the 1945 Constitution is also strengthened with the opinion of Philip M. Hadjon regarding legal protection for the people. Legal protection for the people is divided into 2 (two) kinds of preventive protection and repressive protection. Preventive protection, people are given the opportunity to file an objection or opinion before a definitive government decision. It aims to provide protection to the rights of the people derived from the rights of individuals, and provide protection to the rights of the community based on the mutual interests of the individuals living in the community.

As stated by the previous author, that plunder is a form of imposition of criminal sanctions, and criminal sanctions themselves are part of law enforcement. In law enforcement, "the law serves as the protection of human interests, so that in order for human interests to be protected, the law must be exercised. The enforcement of the law can take place normally, peacefully, but it can also happen because of a violation of the law. "

"In this case the law that has been violated must be enforced. Through this law enforcement, the law must become a reality, and in enforcing the law there must be an element of legal certainty (*rechtssicherheit*), and justice (*gerechttigkeit*)." Legal certainty is a fair protection against arbitrary acts, which means that a person will can obtain something to be expected in certain circumstances, even people expect the existence of legal certainty, given the law in charge of creating legal certainty because it is headed for public order.

4 .1.4. Theory of Criminal Liability in Perspective of Asset Deprivation

As it is known that confiscation is one form of additional criminal sanctions in Article 18 of the Corruption Act. Article 18 of the Corruption Act states that the Confiscation of tangible or intangible, or immovable goods used for or derived from a criminal act of corruption. Since plunder is a criminal sanction, the appropriation is born of a criminal act of corruption committed by a person.

Criminal acts in general are always attached to a mistake, and error is a requirement for a person to be accountable. Therefore there is an opinion that the conviction of a person is not sufficient if the person has committed an act that is unlawful, so even if the act meets the formulation of the offense in the law, and is not justified, then it is not yet qualified to impose the criminal sanction.

For prosecution there is a need to impose a penalty, in which the person committing a crime must have an error or guilty (*subjective guilt*). The element of error in criminal law is the most important element, because it is based on principle *geen straf zonder schuld* or *liability based on fault /guilt* or *culpabilities*, then the error is the first thing to look for in any crime.

In chapter had previously been written about Moeljatno's opinion that the criminal responsibility for the deeds committed by a person is called by *criminal responsibility* or *criminal liability*. Associated with the context of doing such deeds, human beings have errors (*schuld*), because the principle of criminal liability is not punishable if there is no mistake.

Van Hamel, one of the criminal law scholars, stated that between the will to do wrong and the most important element in accountability. Van Hamel in his opinion also divides the relationship between the will, and mistakes into 3 (three) things, that is:

a. Indeterminis, that man has a free will in action. Therefore, in this indeterminist free will is the basis of the decision of the will, so that if there is no freedom of will, then there is no error;
b. Determinists, in principle, human beings have no free will, and the determination of the will is determined entirely by character, and motives that have both internal and external stimuli, ie one can not be found guilty of having no free will;
c. The third thing is opinion outside "indeterminis" and "determinis", ie error has nothing to do with free will. Strictly speaking, freedom of will is something that has nothing to do with criminal law.

Of course the legal system that does not open the opportunity for a person to make a defense or proof of his actions, it can be said there is no reasonable process (*due process*) in accounting for perpetrators of criminal acts. Absence *due process* then it is certain that the mechanism of proof of criminal liability does not occur.

Hart even asserted in his book *Punishment and Responsibility* which has been described in Chapter I, the law has always been seen as failing to provide valuable input to social life if in the practice of state law enforcement does not provide an opportunity for the offender to prove the crime. In the event of such a case, then a legal system will fail to form a law, and fail to make a valuable contribution to social life.

The accountability of a person in a criminal law does not merely constitute a lawful imposition of a criminal offense against a person, but also fully believes that the person has been held accountable for his or her crime. Even Alf Ross believes criminal responsibility has

a link between the facts as well as the provisions relating to the legal consequences that have been explicitly stated in the criminal liability mechanism.

Alf Ross's opinion is in harmony with the concept of criminal responsibility is the accountability of people against the criminal acts committed. Therefore, the occurrence of a criminal liability is always attached to a criminal act committed by a person, so criminal liability is essentially a mechanism established by the penal law to prove that the offender may be subject to criminal sanction or cannot.

Therefore, a criminal liability also cannot be separated from the element of error (*schuld*), in which error is an act that violates the system norm legislation. The existence of a condition of error in a criminal liability mechanism, then also cannot be separated from the system of imposition of criminal sanctions.

Criminal sanctions for the confiscation of assets of corruption actors as regulated in the Corruption Law, of course, in law enforcement also can not merely put forward the mechanism of reversing the burden of proof as stipulated in Article 37A paragraph (1) and (2) of Corruption Law which states in essence there is a legal obligation for the defendant to provide information about all his property and property of his wife or husband, children and property of any person or corporation alleged to have correlation with the alleged case.

In the event that the defendant cannot prove that the wealth is not equal to his income or the source of the addition of his wealth, the information is attributed to all his property or his family or corporation can be used as evidence that the defendant has committed a criminal act of corruption, so further, the assets may be seized by the state.

Indeed, Article 37A Paragraph (1) of the Corruption Law confirms that the unfairness of tracing is related to the indicted case, so that Article 37A cannot be implemented against assets not related to the case in which it is charged. However, the existence of a reversal of the burden of proof can potentially be related to the assets of corrupt criminals who are not actually from corruption.

In law enforcement, confiscation in addition to being linked to Corruption Law is also linked to the TPPU Law. It is necessary for the authors to affirm that the correlation between seizure and the TPPU Law cannot be separated from the concept of money laundering (*money laundering*). The concept of money laundering in principle is an attempt or process of disguising or concealing the proceeds of a crime to alter the proceeds of the crime as if it were derived from a legal act of law.

The emphasis of the concept of money laundering according to the author lies in the phrase "evil". The crime referred to in the concept of money laundering is of course a crime

of origin (*predicate crime*), in which the qualification of the offense is regulated in a limitative manner in the TPPU Law in each country.

The TPPU Law in Indonesia mentions one of the original crimes (*predicate crime*) is a criminal act of corruption. Attributed to the element of "crime" in the formulation of the concept of money laundering, the basic character of money laundering crime is a crime that cannot stand alone, but the criminal act of money laundering attached to the criminal act of origin which is certainly associated with the author's research substance is action criminal corruption.

Because of the crime of money laundering, and one criminal act of corruption same (inextricably linked to the theory of criminal liability), a person suspected of committing money laundering crimes cannot be held accountable independently of his alleged actions related to the TPPU Law without first or jointly conducting its proof with a criminal offense the origin.

It is in harmony with those described in the preceding paragraph that in order for a person to be held accountable for a criminal offense, it is absolute that a person has errors, and mistakes can always be inseparable from the element of will. As Romli Atmasasmita's opinion which was also previously written in Chapter II of this dissertation, that the original offense (*predicate crime*), and money laundering (money laundering) *proceeds of crime*) does not have one evil will or *mens rea* that same .

This is because the intention to commit the original criminal acts embodied in a different act with the will to commit money laundering crime. The author further clarify that the will of someone who committed the crime of corruption is clearly different from the will of someone who committed the crime of money laundering, so that a person who committed the crime of money laundering must first be proven underlying predicate offenses.

Based on the above, Romli Atmasasmita argues that money laundering crime does not include continued criminal conduct (*vorgezette handeling*), but this crime is a criminal act (perbarengan) that stands alone even if there is one relationship same other. Romli also argues between the crime of origin and the criminal act of money laundering has the distinction lies in *original intent* (true will). The original criminal act still rests on the aspect of deeds and its maker (*daad-dader strafrecht*).

The next difference is that the two crimes have a good impact on the act, and the mistake of the manufacturer, while the proof of property in the crime of money laundering is related to the acquisition of assets allegedly derived from a crime, so Romli concluded that between the defendant's properties against his original criminal offense.

Romli's opinion is related to Simons's opinion which the author has also described in Chapter II of this dissertation. Simons argues that in essence that a person according to the legislator is considered that he is guilty, if he can realize his actions against the law, therefore, he determines the will of the deeds he does.

Based on the above matters, the confiscation of corrupt assets of assets suspected to be obtained from the criminal act of corruption, whether through the burden of proof of correction in the Corruption Law and through the approach of the Law on TPPU, all must be put forward the theory of criminal liability, that is to be proven wrong perpetrator criminal act of corruption.

5. CONCLUSION

UNCAC regulates the crime of laundering proceeds (*laundering of proceeds of crime*), in which UNCAC in principle affirms that money laundering is not a stand-alone legal issue but is embedded in a criminal act of corruption which is a crime of origin (*proceeds of crime*). In the perspective of national law, basically in harmony with the principle of UNCAC, the issue of money laundering is always attached with the criminal act of origin. The mistake is the beginning to prove the existence of a criminal act of corruption which in this case is a criminal act of origin (*predicate crime*). Thus, the separation of money laundering criminal law enforcement by corruption is, of course, a denial of the law enforcement principle of money laundering.

Law enforcement is included in this case is the imposition of sanction of deprivation on corrupt assets must consider human rights from perpetrators of corruption. Therefore, the theory of accountability must be the legal basis before imposing sanction of asset deprivation, meaning that the assets of the perpetrators of corruption cannot be taken away. Even if using a legal instrument of the TPPU Law, before a person has not been held liable for alleged criminal acts of corruption, the criminal sanction of deprivation cannot be imposed on a person. Imposition of criminal sanction of deprivation by referring only to the Law on TPPU without prior accounting for corruption as a criminal act of origin (*predicate crime*), then such law enforcement is also clearly opposed to the theory of justice that is dignified justice, whose meaning is to humanize human dignity and human dignity.

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