

December 9th 2016



The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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UNISSULA PRESS

ISBN. 978-602-1145-41-8

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THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS

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ABSTRACT

In the period up to 2015 human rights crimes have evolved into the deprivation of economic rights and social property of the people through political corruption that spreads endemically. Despite the human rights was guaranteed in the 1945 amendments and various other legal devices yet our country has ratified many international conventions on human rights, but human rights violations in a variety of shades and variations remains widespread. This proves that guarantees of protection of human rights in writing still needs to be guarded by the implementation of all national components, especially public institutions such as the media, NGOs, organizations and universities.

Refund of state financial in consequence of corruption is an effort to reform and build legal institutions to prevent and combat corruption in international, regional and national levels. Asset recovery efforts must be made by the Indonesian government, because: regarding to the data losses to the state, Indonesia is considered as the country victims of corruption; The corrupted funds are funds that should be devoted in order to improve the prosperity and welfare; Funds taken by the corruptors must be returned as one of the sources of funding in the creation of public welfare; an effort of refund as a preventative measure to potential offenders.

Keywords: Corruption, Money Laundering, Asset Refund.

A. Introduction

Law enforcement in Indonesia does not yet reap the maximum results, perpetrators of crimes that harm the State finances continue to escalate, even ironically they are the officials who hold important positions in the country, and their number was so fantastic. In fact, according to senior journalist of Kompas who wrote the book "Akal Akal Akil", Budiman Tanuredjo, corruption case of Akil is one of the biggest scandals in the history of the Indonesian judiciary. It has been never happened where a judge who is also Chief Justice went to prison because guilty of corruption and money laundering involving money up to hundreds of billions of rupiah. Caught in the act anyway. The Anticorruption panel of judges stated, Akil was proven to accept the bribes as first charges, that is related to the handling of disputes election of Gunung Mas (USD 3 billion), Central Kalimantan

(USD 3 billion), the election of Lebak in Banten (USD 1 billion), the election of Empat Lawang (Rp 10 billion and US \$ 500,000), and the election of Palembang (about USD 3 billion). And there are many more cases of bribery committed by Akil and ultimately dragged Banten Governor; Atut Chosiyah and her sister.

Due to the impact of this crime exceptional then corruption was considered as extraordinary crime. Treatment toward the extraordinary offenders must be done very exceptionally, namely the laws should be adequate (able to reach any acts of corruption in various types and various levels), devices in implementing legislation must also be people who are chosen, namely people who are very professional in that field and free from corruption, including legal culture (the awareness of the public) should be able to support the implementation of these issues.¹

In the period up to 2015 human rights crimes have evolved into the deprivation of economic rights and social property of the people through political corruption that spreads endemically. Despite the human rights was guaranteed in the 1945 amendments and various other legal devices yet our country has ratified many international conventions on human rights, but human rights violations in a variety of shades and variations remains widespread. This proves that guarantees of protection of human rights in writing still needs to be guarded by the implementation of all national components, especially public institutions such as the media, NGOs, organizations and universities.²

The fierce grip of corruption that sucks the wealth of the country and weakens the national economy, resulting in a lot of people cannot enjoy a fair distribution of the country's wealth. There are still many people living below the poverty line and at the same time some people take trillion of state money, a portrait of systemic human rights violations.³

It is appropriate to reinforce the application of anti money laundering in combating corruption. Therefore, money laundering is a new paradigm in handling exceptional crime or extraordinary crime. Money laundering can open up access to streamline and enforce the Law on Corruption. Therefore, the corruption investigating apparatus at the same time will be able to access into money laundering investigators. Because corruption is a *precicate crime of money laundering*. Furthermore, they may also conduct an investigation

¹ Romli Atmasasmita, *Indonesia's Corruption Eradication Strategy, Public Lecture Papers 2003/2004 for Even Semester Faculty of Law Unpas, Bandung, 2004*, p. 6.

² Andy Hamzah (I), *Corruption in Indonesia Problems and Problem Solving*, Jakarta, Gramedia Pustaka Utama, 2015, p. 7.

³ *Studies Special Court Corruption Act conducted by the Partnership and LIPI*, Jakarta, 2008, p. 3-4.

into the corruption case with the stresses on the investigation by using the method of *follow the money* approach (follow the flow of generated money).

Money laundering is only necessary in the case involving large amounts of money, because if the amount of money is small, the money can be absorbed into the invisible circulation. The dirty money must be converted into legitimate money before the money can be invested or spent, that is a way so-called "money laundering" as stated above.⁴

If the criminal (corruptors) successfully do money laundering, then it will be possible for criminals to:

1. Stay away from criminal activities that produce the illicit money, thus it will be more difficult for authorities to be able to sue them.
2. Keep the stolen money away from criminal activity that generates money and thus can avoid confiscation and taken away the result of crime if the relevant criminal was arrested.
3. Enjoy the benefits derived from the illicit money without arousing the attention of the authorities towards them.
4. Reinvest the stolen money in criminal activities in the future or into the legitimate business activities.⁵

As an illustration, the birth of the anti-money laundering regime in developed countries at first is a response to the frustration of law enforcement officials in the fight against narcotics and drugs. The answer is partly because of anti-money laundering regime is more focused on tracking the flow of funds / stolen money (follow the money trial). Keep in mind that the results of the crime (proceeds of crime) is the "life blood of the crime", means it is the blood that feeds crime at the same time the weakest point of the chain of crimes most easily detected. The Efforts to cut the chains of this crime in addition relatively easy to do also will eliminate the motivation of the perpetrator to commit the crime because offenders' destination for enjoying the proceeds of crime blocked or difficult to do.⁶

Money laundering activity in general is a way to hide or disguise the origin of the assets acquired from the proceeds of crime, making it seems as though the wealth of the proceeds of crime as a result of legitimate activities. More detailed in Article 1 number 1

⁴ Sarah N. Welling, *Smurfs, Money Laundering, and the United States Federal Criminal Law, which was published in the oen Brent*, David Fraser and Graeme Coss, p. 201.

⁵ M. Arief Amrullah, *Money Laundering, criminal acts of money laundering*, Bayumedia, Malang, 2004, p. 71.

⁶ Reporting Center and Financial Transactions (PPATK), *Indonesia to Combat Money Laundering, Jakarta, PPATL*, 2003, p. 126.

TPPU Law, money laundering is defined as the act of placing, transferring, disbursing, spending, donating, contributing, entrusting, brought abroad, exchange, or other act on Assets known or reasonably suspected to be the proceeds of crime with intent to conceal or disguise the origin of the treasure wealth so that seems to be the legitimate wealth. TPPU Law has restricted that only the wealth obtained from 24 of the offenses and other offenses punishable by four years in prison or more as mentioned in Article 2, which can be charged with criminal sanctions for money laundering as set out in Article 3 and Article 6.

Or method *offshore or conversions* done by illegal funds transferred to the region which is *a tax haven money laundering centers* and then deposited in a bank or financial institution in the region.⁷

On the other hand pattern for the prevention of corruption is about the regulatory arrangement of impoverishment which have enormous potential to eradicate corruption in Indonesia. Humanly speaking nobody wants poor. Of course corruptors who usually live well and even in luxury tend to be afraid of being poor. Impoverishment corruptors must be confirmed in a clear rule to remain in the corridor of the principles of law and it does not lead to violations of human rights. At the time corruptors impoverished then not only he personally feels the effect, but also their families do too.

How many assets resulting from criminal acts banks that had been carried away or stored by perpetrators which are not entirely can be taken back by the authorized or its owners. Crime in the area of banking has resulted in suboptimal asset and acquisition of assets from the hands of the perpetrators through confiscation or expropriation efforts. Barriers of law enforcement, due to the absence of clear rules and firm that specifically regulates on confiscation of assets and its mechanisms or procedures. The vacuum of rules regarding assets is one of the assumptions which is not optimal deprivation of assets by the state, and this phenomenon has been much abused by the perpetrators who produce assets or wealth.

B. Anti Money Laundering Regime in Indonesia

The enactment of the Law on Money Laundering No. 15 of 2002 was a major step in building a regime of combating money laundering in Indonesia, because this Law regulates important matters such as:

⁷ Yunus Husein, *Anthology Anti-Money Laundering*, Bandung: Terrace & Library Books, 2007, p. 28.

- a. Money laundering activities stated as a crime;
- b. Reporting, investigation, prosecution and trial of criminal acts of money laundering are excluded from bank secrecy provisions as stipulated in the Banking Law;
- c. Establishment of Financial Transaction Reporting and Analysis Center (PPATK), known as the Indonesian Financial Intelligence Unit which is an independent agency in carrying out its duties and authorities to prevent and combat money laundering.
- d. A clearer legal basis for the freezing and confiscation of assets that are the proceeds of crime (proceeds of crime).

In general, there are several reasons why money laundering fought against and expressed as criminal acts.⁸

First, because of the influence of money laundering in the financial system and the economy is believed to have a negative impact on the world economy, for example, the negative impact on the effective use of human resources and funds. With the practice of money laundering, the human resources and funds much used for activities which is not valid to the detriment of society. In addition, funds many underutilized optimally, for example by sterile investment in the form of property or expensive jewelry. This happens because the money from proceeds of crime is mainly invested in countries that perceived safe to launder money, although the results are low. The proceeds of this criminal act can be switched from good economic countries to countries whose economies are less good. Because of its negative effect on the financial markets and its impact could reduce public confidence in the international financial system, money laundering could lead to instability at the national and international economy. In the meantime, sharp fluctuations in exchange rates and interest rates are also predicted as negative consequences of money laundering. In short, the negative impact of the money laundering significantly affects the growth of the world economy.

Second, the determination of money laundering as a criminal offense will make it easier for law enforcers to confiscate the proceeds of crime which is often difficult to be confiscated.

Third, the determination of money laundering as a criminal offense allows the escaped money from proceeds of crime can be prevented. Thus the orientation of combating money laundering switches from cracking down on perpetrators towards confiscating the proceeds of crime.

⁸ Guy Stessen, *Money Laundering: A New International Law Enforcement Model*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2000, p. 82.

Briefly, some important provisions in the development of anti-money laundering regime in Indonesia is set as follows:

- a. Money laundering under Article 1 paragraph 1 of Law No. 15 Year 2002 on Money Laundering as amended by Act No. 25 of 2003 (TPPU Law) is defined as: "Act of placing, transferring, disbursing, spending, donating, contributing, entrusting, brought abroad, exchange, or other acts of assets that is known or suspected to be the proceeds of crime with intent to conceal or disguise the origin of the assets so as if a legitimate wealth".
- b. The money laundering activities in general through several stages of the process, as follows:⁹
 - Placement, which attempts to put cash derived from a criminal offense into the financial system or attempt to place demand deposits back into the financial system, particularly banks.¹⁰
 - Transfer (layering), which attempts to transfer property derived from criminal acts (dirty money) that has been successfully deployed in the financial system (especially banks). By doing *layering*, it would be difficult for law enforcement to be able to know the origin of such property. This process of "layering" is detected by a *suspicious transaction report* (STR) as stated in Article 13 of the TTPU Law. A STR report requires judgment of the bank is certainly more reliable than CTR. While suspicious financial transactions are transactions deviating from the profile and characteristics of the customer as well as the habits of customers including alleged transactions carried out with the aim of avoiding the reporting of such transactions that must be done by the financial services provider.¹¹
 - Using the wealth (integration), which attempts to use the property derived from the proceeds of crime that has been successfully entered into the financial system through the placement or transfer so that seems to be the legitimate wealth, for legitimate business activities or to fund more crime.

Indonesia's anti-money laundering regime is built with the involvement of the various components, namely the complainant (Financial Service), financial industry (Bank Indonesia and Bapepam-LK), Directorate General of Customs and Excise, Money

⁹ General explanation of Law No.15 of 2002 on Money Laundering.

¹⁰ Yenti Ganarsih, *Criminalisation of Money Laundering*, print. 1, (Jakarta: Graduate Faculty of Law, University of Indonesia, 2003), p. 55.

¹¹ Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering, Article 1 paragraph (7).

Laundering (TPPU) Committee, PPATK, law enforcement (police, prosecutors and judiciary) and other parties that support such as President, Parliament, public, international institutions and other related institutions in the country such as the Corruption Eradication Commission, the Supreme Audit Agency (BPK), the Department of Forestry and so forth, Cooperation and coordination in such a way involves various state institutions and other concerned parties, could be none, must be backed by concrete action from every element involved in anti-money laundering regime through the implementation of its functions and duties as well as the role of each. Because if one of the elements of the unity of the anti-money laundering regime (as a system) are unable to perform the functions and duties as well as its role well, then it could be a loophole that could provide space for the perpetrators of money laundering to commit acts of crime, even more, they are able to develop and expand the activities of crime.¹²

In the system of law enforcement, anti-money laundering regime comes with a new paradigm. Originally orientation offense in general is pursuing criminal offenders, while the anti-money laundering regime is pursuing on the results of criminal acts. For effectiveness, money laundering laws have been equipped with special provisions, including the exclusion of bank secrecy provisions and confidentiality of other financial transactions, burden of proof reversed, and the seizure and forfeiture of assets.¹³

Regarding the perpetrators of *money laundering* can be categorized as active agents as defined in Article 3 and Article 4 UUPPTPPU and passive actors as defined in Article 5 UUPPTPPU. These provisions as well as a formulation *money laundering* offense on elements of *money laundering*.

Article 3 UUPPTPPU states "that: Every person who puts, transfer, assign, expend, pay, grant, entrusting, bring out of the country, reshaped, exchange of currency, assets or worthy paper or other acts that is known or reasonably suspected to be proceeds of crime, shall be punished for the crime of money laundering by imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp. 100,000,000.00 (one hundred million rupiah) and Rp. 15,000,000,000.00 (fifteen billion rupiah).

Article 6 UUPPTPPU states "Every person receiving or controlling the placement: transfer payments, grants, donations, storage or exchange, Assets known or reasonably suspected to be proceeds of crime, shall be punished with imprisonment of at least five (5)

¹² Yunus Husein, *Anthology of Money Laundering*, Bandung, Bandung Library Terrace & Books, 2007, p. 68.

¹³ Krisna Harahap, *Combating Corruption in Indonesia The Way Has No Ending*, Bandung: PT. Graffiti, 2012, p. 73-76.

years and a maximum of 15 (fifteen) years and a fine of at least Rp 100,000,000.00 (one hundred million rupiah) and at most Rp 15,000,000,000.00 (fifteen billion rupiah).

Article 9 states that "Any person failing to report cash in the form of rupiah Rp 100,000,000.00 (one hundred million rupiah) or more or the foreign currency value equivalent to that which is brought into or out of the territory of the Republic of Indonesia, is liable punished by a fine of at least Rp 100,000,000.00 (one hundred million rupiah) and at most Rp300,000,000.00 (three hundred million rupiah). Money laundering popularly can be described as an activity to move, use or perform any other act on the outcome of criminal acts which are often committed by organized crime (organized crime) as well as individuals who commit acts of corruption, drug trafficking and other criminal acts."¹⁴

In the TPPU Law, it is said that everyone who was inside or outside of the territory of the Republic of Indonesia who was involved in the attempt, abetment or conspiracy to commit money laundering shall be punished the same as in Article 3, Article 4, and Article 5.

In Article 5 (1) of the TPPU Law excluded for reporting parties who carry out reporting obligations. For the criminal act of money laundering as in Article 3, Article 4 and Article 5 of the TPPU Law committed by a corporation, then crime imposed on the corporation and / or Personnel Corporate Controller. Beyond the the provisions of Article 2, Article 3, Article 4 and Article 5 are other articles concerning criminal offenses relating to money laundering. Other crimes related to money laundering stipulated in Article 11, Article 12, Article 14, Article 15 and Article 16 of the TPPU Law.

C. Implementation of the Concept deprivation of Corruptors' Assets in Indonesia

The concept of deprivation or Civil asset forfeiture is used when criminal proceedings are followed by the takeover of assets (confiscation) cannot be done, which can be caused by five things: the asset owner has died, the end of the criminal proceedings because the defendant is free, criminal prosecution occurred and successful but not successful in taking over of the assets, defendant is not within the jurisdiction, asset owner's name is not known, there is no sufficient evidence to initiate a criminal complaint.

The views of Thomas Aquinas also can justify actions of the state in regulating the return of the country's assets. That premise related to what Aquinas thought as natural

¹⁴ Yunus Husein, "PPATK: Duties, Powers and Role In Combating Money Laundering", Journal of Business Law, (Volume 22, Number 3, 2003), p. 26.

justice (*justitia generalist*). Natural justice is justice according to the will of the law that must be fulfilled for the sake of public interest.¹⁵

Concerning on the regulating asset recovery mentioned above, Indonesian government has issued various regulations that could serve as the basis / foundation of the government's efforts to restore the country's financial losses as a result of corruption.

1. Law No. 31 of 1999 as amended by Law No. 20 of 2001 on the Eradication of Corruption (Corruption Law);
2. Law No. 7 of 2006 on Ratification of the United Nations Convention Against Corruption (Convention against Corruption);
3. Law. no.15 of 2002 as amended by Law No. 25 of 2003 on Money Laundering (TPPU Law);
4. Law No. 1 of 2006 on Mutual Assistance in Criminal Matters Settings.

The Efforts to recover losses to the state that using private instruments, entirely subject to the discipline of material and formal civil law, although related to corruption. Unlike the criminal process that uses a system of verifying material, then the civil process adopts a formal proof which in practice it can be more difficult than evidentiary material. In addition to corruption, especially public prosecutor, the defendant also has the burden proof, namely the defendant must demonstrate that their wealth came not because of corruption. The burden of proof on the defendant is known as *the principle Reversal of the Burden of Proof*. This principle contains that the suspect or the accused is considered guilty of corruption (*the presumption of Guilt*)¹⁶ unless he can prove that he was not committing corruption and does not cause losses to the state.

Indemnification of state financial in consequence of corruption is an effort to reform and build legal institutions to prevent and combat corruption in international, regional and national levels. Asset returning efforts must be made by the Indonesian government, because: regarding to the data losses to the state, Indonesia is considered as the country victim of corruption; the corrupted funds are funds that should be devoted in order to improve the prosperity and welfare; Funds were taken by the corruptors must be returned as one of the sources of funding to create the welfare of the people; an effort to return considered as preventative measure for potential offenders. The returning of the financial

¹⁵ E. Sumaryono, *Legal Ethics (Relevance Theory of Natural Law of Thomas Aquinas)*, Canisius, Yogyakarta, 2000, p. 160.

¹⁶ Applicability of the presumption of innocence refers to the system of examination of suspects conducted by law enforcement in the American state with the system Crime Control Model, so that since the suspects were arrested and detained, he has been presumed guilty or declare war against a country with which hire mercenaries Advocates. Romli Atmasmita, *Comparative Criminal Law*, Alumni, Bandung, 1998, p. 23.

losses to the country has already begun with making a regulation such: Corruption Law, Law No. 7 of 2006, the Law on Money Laundering and the Mutual Assistance Law. Such efforts can be made through: instrument of criminal, civil instruments and cooperation with other countries.

D. Conclusion

Corruption occurs due to abuse of authority and positions held by officials or employees for personal gain in the name of personal or family, relatives and friends. Wertheim (in Lubis, 1970) states that an official is said to commit acts of corruption when he received a gift from someone which aimed to influence him to make decisions which benefit the interests of the giver of gifts. Asset returning efforts must be made by the Indonesian government, because: regarding to the data losses to the state, Indonesia is considered as the country victim of corruption; the corrupted funds are funds that should be devoted in order to improve the prosperity and welfare; Funds were taken by the corruptors must be returned as one of the sources of funding to create the welfare of the people; an effort to return considered as preventative measure for potential offenders.

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