

# Relation of Investment Climate and Money Laundering Eradication in Indonesia

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## Abstract

*Money laundering is closely related to globalization. Money laundering has been particular concern to the international community. In its development, money laundering is increasingly complex, crossing jurisdictional boundaries, as well as to the investment climate relation in Indonesia. The results show that the legal substance of money laundering handling as associated with corruption has not been accommodated on the normative level. It is very important as an effort to optimize the eradication of money laundering. Resulting losses by bribes in the private sector are not only about the amount of money, but also create inefficiencies, increase crime, slow growth, and worsen the image and national investment climate in macro. Therefore, it is appropriate if peoples are confused about how to make the Indonesian legal system able to ensnare the perpetrators of bribery in the private sector. However, it does not mean that bribes in the private sector cannot be snared with Indonesian positive law.*

**Keywords:** Investment, Money Laundering, Policy

## 1. Introduction

Universally criminal law in various countries has recognized and arranged various crimes, both conventional crimes such as murder, theft, deceit, and embezzlement; and extraordinary crimes such as terrorism, corruption, narcotics and psychotropic as well as white collar crimes such as banking crime and money laundering. Hence, money laundering is an interesting issue for the world community and in particular the Council of Europe which was the first international organization have alerted the international community to the jeopardy of money laundering.<sup>1</sup> Prevention and oversight will not work well if conducted by country alone, therefore an international approach is needed. International cooperation is needed absolutely, both in exchange of information, as well as law enforcement, bilateral and multilateral agreements.<sup>2</sup>

Money laundering has been particular concern to the international community. In its development, money laundering is increasingly complex, crossing jurisdictional boundaries, and using increasingly varied modes, utilizing institutions outside the financial system, and even penetrated into various sectors. The former *Managing Director of International Monetary Fund* (IMF) Michael Camdessus once stated that money laundering in the world has reached 2 to 5% of gross revenue or about US\$ 600 billion.<sup>3</sup> Money laundering is the third largest business in the world after the world oil and money market. The crime of money laundering is not only working domestically but has penetrated the boundaries of domestic jurisdiction in a country. It cannot be separated by the implementation of international economic liberalization which implies the unlimited flow of finance and transactions by the territory boundaries of a country.

Money laundering is closely related to globalization. Globalization creates relationships between the earth inhabitants that beyond national and state boundaries. Globalization contains deep meaning and takes place in all aspects of human life such as economy, politics, socio-culture, law, science, and technology.<sup>4</sup> The dynamics of the accelerated economic changes have implications for the social system, and themselves enter the jurisdiction. The globalization of law is a necessity, since the crimes committed by individuals and corporations have been

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<sup>1</sup> Amrullah, M.A. (2014). *Tindak Pidana Pencucian Uang dalam Perspektif Kejahatan Terorganisasi, Pencegahan dan Pemberantasannya*, Surya Pena Gemilang, Malang. Page. 9.

<sup>2</sup> Talukdar, M. H. (2013). Economy and Transparency: The Model Invention. *Economia. Seria Management*, 16(2), 286-296.

<sup>3</sup> Imam Sjahputra, (2001), *Teori dan Kasus Money Laundering*, Harvarindo, Jakarta. p. 1.

<sup>4</sup> Roland Robertson, as cited in Pathorang Halim, (2013). *Penegakan Hukum Terhadap Kejahatan Pencucian Uang di Era Globalisasi*, Total Media, Yogyakarta. p. 7.

done by crossing country boundaries.

As well as the globalization of banks, banks as main target for money laundering because this sector that many offer services and instruments in the financial traffic that can be used to hide or disguise the origin of a fund. By the globalization of banking, then through the banking system crime flow or move beyond the boundaries of state jurisdiction by utilizing the secret factor of banks that are generally upheld by banks. Through this mechanism, crime fund proceeds from one country to another that has not yet had a strong legal system to tackle money laundering activities or even move to a country that implements strict covert provisions.

Foreign Direct Investment (FDI) is considered to be influenced not only by quantitative factors but also by qualitative factors. However, the present literature related to FDI focus more on quantitative factors rather than qualitative factors. One reason is that FDI is itself based on a quantitative benchmark (10% or more investment in equity). The qualitative factors that are related to FDI are governance, democracy, human development index etc.<sup>5</sup> In line with this, according to IMF's statistics, the results of bank-laundered crimes are estimated to be almost worth \$1.500 billion per year. Meanwhile, according to the Associated Press, money laundering resulting from drug trafficking, prostitution, corruption and other crimes are mostly processed through the banks to be converted into legal funds and it is estimated that this activity can absorb US\$ 600 billion per year. It means equal to 5% (five percent) of GDP worldwide.<sup>6</sup>

In Indonesia, the criminalization of money laundering begins by the enactment of Act No. 15 of 2002 on Money Laundering Crime. The law is stipulated after Indonesia is included in the FATFs Blacklist other than 19 (nineteen)<sup>7</sup> other countries as an uncooperative country in the effort of money laundering eradication (*Non-Cooperative Countries or Territories/NCCTs*).<sup>8</sup> Also, this law is an affirmation that the private sector is not part of the problem, but part of the problem-solving, in the economic, financial and banking sectors. This law is expected by the Money Laundering Crime to be prevented or eradicated in Indonesia.

In this context, the existence of institutions as legal structures of prevention and eradication of money laundering crime, on the one hand is a force because in terms of quantity of institutions that work will create progressiveness and effectiveness. On the other hand, the number of these institutions at the level of implementation would potentially lead to dis-harmonization, dis-synchronization and authority conflicts in the prevention and eradication of money laundering crime in relation to the investment climate in Indonesia.

## 2. The Concept of Money Laundering Crime: The Perspective of Indonesian Criminal Law

The term *money laundering*, in reality as a global phenomenon and also this term has no clear boundaries, because every country has different meanings of this crime. Both developed and developing countries, the term *money laundering* is agreed as an advanced crime of a number of original criminal acts. According to Welling,<sup>9</sup> money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate. While, Fraser<sup>10</sup> considers money laundering is quite simple the process through with 'dirty' money proceed of crime is washed through 'clean' or legitimate sources and enterprises so that the 'bad guys' may more safe enjoy their ill-gotten gains. Fraser ensures that

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<sup>5</sup> Hasan, M., Rahman, M. N., & Iqbal, B. A. (2017). Corruption and FDI Inflows: Evidence from India and China. *Mediterranean Journal of Social Sciences*, 8(4 S1), 173.

<sup>6</sup> Source: Banking Development Bulletin May-June Number 89 of 2001.

<sup>7</sup> The nineteenth of other countries are Egypt, Russia, Hungary, Israel, Lebanon, Filipina, Myanmar, Nauru, Nigeria, Nieu, Cook Islands, Dominican Republic, Guatemala, St. Kitts and Nevis, St. Vincent and Grenadines and Ukraine. N.H.T. Siahaan, (2005), *Pencucian Uang dan Kejahatan Perbankan*. 2<sup>nd</sup> Edition (Revised Edition), Pustaka Sinar Harapan, Jakarta. p. 2

<sup>8</sup> Indra J Tirtakusuma, *Op., cit.*

<sup>9</sup> Adrian Sutedi, (2008), *Tindak Pidana Pencucian Uang*, Citra Aditya Bakti, Bandung. p. 13. Check directly Sarah N Welling, *Smurfs, Money Laundering and the United States Criminal Federal Law*, in Brent Fisse, David Fraser & Graeme Coss, 1992, *The Money Trail (Confiscation of Proceed of Crime. Money Laundering and Cash Transaction Reporting)*, Sidney: The Law Book Company Limited, p. 201.

<sup>10</sup> Adrian Sutedi (I), *Ibid*. Read also David Fraser, *Lawyer, Guns and Money, Economic and Ideology on the Money Trail*, in Brent Fisse, David Fraser & Graeme Coss, 1992, *The Money Trail (Confiscation of Proceed of Crime. Money Laundering and Cash Transaction Reporting)*, Sidney: The Law Book Company Limited. p. 66.

money laundering is done simply through a “dirty” process, in which money from proceeds of crime is cleared through money laundering mechanisms. Once the money is cleared, the wicked who has committed a crime can enjoy the benefits of his/her criminal proceeds safely.

Money laundering is a series of activities and a process undertaken by a person or organization against illicit money, a money derived from a crime, intended to hide or disguise the origin of money from the government or authorized to take action against the crime, by other means and especially enter the money can then be removed from the financial system as allowed money.<sup>11</sup>

Black’s Law Dictionary,<sup>12</sup> gives explanation that money laundering as “*the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced*”. This explains that this crime is an attempt to obscure crimes from illegal transactions. Such as drugs, corruption, terrorism and other illegal sources, so that the money of the proceeds of crime becomes lawful and goes into the legitimate channels, so the original source cannot be traced.

At the present, many people know that the term *money laundering* and dirty money is very closely related. This dirty money sometimes referred to as “*illicit money*” is obtained by the perpetrators in a way that is against the law such as stealing, robbing, producing and selling drugs, cheating, corruption, and so forth. In order for law enforcement officers not to suspect that dirty money comes from the crime, then one way that can be done by the perpetrator is to practice money laundering, for example by buying a stock or property, to make dirty money that later becomes as if sourced from a legitimate business activity.<sup>13</sup>

*Money laundering* and *dirty money* are clearly show that “human language” does not always comes from reason. According to Ernst Cassirer, in addition to “conceptual language” there is also “emotional language,” and in addition to “logical language” (scientific language) there is also “poetry language.” The human language is not the first expression of thought or idea, but the expression of feelings, affections. Moreover, Epiktotes said that “what disturbs and troubles men is not things, but opinions and wishes of them.” “Words” (human language) are not meant to express the nature of things because it tends to have no objective correlation. The main task of “words” is not to describe things and not to convey ideas and thoughts, but to arouse human emotions and encourage people to take certain actions.<sup>14</sup>

The Indonesian nation agreed on money laundering as a crime of national and international dimension. This can be seen in the Section of Considers of Act No. 15 of 2002 on Money Laundering Crime that crimes that result in large amounts of property are increasing and carried out within the borders of the territory of the Republic of Indonesia as well as across state borders. The origins of property that are the result of the crime are hidden or disguised in various ways known as money laundering. Money laundering should be prevented and eradicated so that the intensity of the crime resulting in or involving large amount of assets can be minimized so that the stability of the national economy and the security of the state is maintained. It is not only a national crime but also a transnational crime, therefore it must be eradicated, such as by conducting regional or international cooperation through bilateral or multilateral forums.<sup>15</sup>

In the context of legal certainty, the term “*money laundering*” is not a simple concept, but rather complicated because the problem is so complex that it is difficult enough to formulate its criminal decisions objectively and effectively. This is reflected from the limitations of the understanding that quite a lot and vary. The boundaries of different definition are also present in countries with the same anti-money laundering (anti-money) laws.<sup>16</sup> Similarly, among the institutions and international organizations that are competent in the field of prevention and

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<sup>11</sup> Sutan Remy Sjahdeini, (2007), *Seluk Beluk Tindak Pidana Pencucian Uang dan Pembiayaan Terorisme*, Pustaka Utama Grafiti, Jakarta. p. 3

<sup>12</sup> Bryan A. Garner, 2009 *Black’s Law Dictionary*, Ninth Edition, West a Thomson business, United States of America. Page, 1125.

<sup>13</sup> There is possibility the illicit funds are also used to finance illicit activities such as commit electoral fraud, authority, and everything which is oriented to sustain power or authority and it closely linked between corruption, illicit funds, inflation, the process of impoverishment, and the creation of a floating mass with the wholeness of power. Hartojo Wignjowijo, “Money Laundering and Tingginya Investasi Asing”, *Tempo*, 20 July 1996.

<sup>14</sup> Ernst Cassirer, (1987), *Manusia dan Kebudayaan: Sebuah Esai Tentang Manusia*, Gramedia, Jakarta. Pages 39-40.

<sup>15</sup> Section Considers of the Constitution of the Republic of Indonesia No. 15 of 2002 on Money Laundering.

<sup>16</sup> Edi Nasution, *Loc It*.

eradication of money laundering crime.<sup>17</sup> Likewise, in simple language it can be said that “money laundering” is an act with cunning ways to obscure the origins of the proceeds of crime<sup>18</sup> so that the proceeds of the crime eventually appear to be derived from a legal business activity.<sup>19</sup>

Peter Lilley argues that most economic crimes are committed to get one thing, that is money.<sup>20</sup> Money or funds obtained from a criminal offense in this case the offense shall be useless unless the money of the proceeds of crime (illegal funds) can be disguised or hidden by the perpetrator alone or assisted by another party by “laundering” through the finance service provider (bank and non-bank) or using other means, so that the money or proceeds of criminal offense that have been “laundered” have become visible as if they originated from a legitimate activity. In this relation, an analogy that may be appropriate to describe the money laundering process is as the chemical theory that “*the metal can be converted into gold.*”<sup>21</sup>

By history that money laundering as a kind of white collar crime has actually been known since 1867. At that time, a pirate at the sea, Henry Every, in his latest piracy pirated the Portuguese ship of diamonds worth £325.000 (equivalent to Rp. 5.671.250.000). Then, the robbery is shared with his fellows and Henry Every’s share is invested in diamond trading transactions where the diamond company is also a money laundering company owned by other pirates on the ground.<sup>22</sup>

Although, the term *money laundering* primordially is first appeared since the 1920s when mafias in the United States acquired Laundromats after they had gained huge amounts of money from illegal activities such as extortion, prostitution, liquor and drug trade. Mafia members were asked to point out its fund sources until they engage in money laundering practices to obscure their origins. One way they do is to buy legal companies (*Laundromats*) and then combine illicit money with money obtained legally from *Laundromats* business activities. The reason for the utilization of the *Laundromats* is because the proceeds of the crime they committed in line with the results of *Laundromats* activities in the form of cash. Such a way turns out to be a great profit and very promising for the *Gangstar* leader such as *Al Capone*.<sup>23</sup>

If previously the term “*money laundering*” was applied only to financial transactions relating to organized crime, but now the limits of its definition are developed by government regulators (such as the United States Office of the Comptroller of the Currency), which includes any financial transactions resulting in an asset or value as a result of illegal acts, such as tax avoidance. Now, these illegal activities of money laundering practices are recognized as potentially committed by individuals, small and large businesses, corrupt officials, organized crime members (such as drug dealers or mafia) or certain sects, and even corrupt countries or important institutions through highly-complex networks, for example by utilizing *shell companies* based in the *offshore tax havens*.<sup>24</sup>

As result of the study it is known that organized crime groups learn from each other. They learn through advertising or accidentally it is believed that organized crime groups are spreading their ideas in organized international crime societies. The practice of money laundering is a perfect example, where money laundering has become so widespread in organized criminal groups that it is almost impossible to stop committing crimes, especially with the internet. The internet makes it more difficult to find out who is behind the scenes. Indeed, law can be enforced, employees of financial institutions can be more vigilant and government cannot too corrupt, but criminals will never change.

However, many facts show us that criminals will always find a spin way when faced with various obstacles (such as clear and firm legislation, consistent law enforcement, or rivalry among criminals) that inhibit their criminal

<sup>17</sup> Bismar Nasution, (2009), *Anti Pencucian Uang: Teori dan Praktek*, Books Terrace & Library, Bandung. Pages 14-16.

<sup>18</sup> The term “*money of proceeds of crime*” (illegal funds) means unlawful property because it is obtained in an unlawful manner. Article 1 Paragraph (13) of Act No. 8 of 2010 on Prevention and Eradication of Money Laundering (Money Laundering Acts)

<sup>19</sup> Edi Nasution, *Loc It*.

<sup>20</sup> Peter Lilley, (2003), *Dirty Dealing: The Untold Truth about Global Money Laundering, International Crime and Terrorism*, 2<sup>nd</sup> Edition, (London and Sterling, VA: Kogan Page Limited. Page 1.

<sup>21</sup> Peter Lilley, *Ibid.*, Page 49.

<sup>22</sup> Billy Steel, *Money Laundering: A Brief History, Billy’s Money Laundering Information*, Website, [http://www.laundryman.u-net.com/page1\\_hist.html](http://www.laundryman.u-net.com/page1_hist.html). Accessed on 10 July 2015.

<sup>23</sup> Edi Nasution, *Op. cit.* Compare to Sastraadmodjo, R, (2004), *Sumber Keuangan Rahasia dan Seluk Beluknya*, No Publisher, Jakarta, pp. 95-96.

<sup>24</sup> Jeffrey Robinson, “*The-Laundrymen*”, 1994-1st-Ed-HBDJ, Page. 3, <http://cgi.ebay.com>. Accessed on 30 June 2015.

activity to make money. To make money, they do whatever.

### 3. Relation between Investment Climate and Money Laundering Crime

Losses due to bribes in the private sector are not only about the amount of money, but also create inefficiencies, increase crime, slow growth, and worsen the image and national investment climate in macro. Not surprisingly, due to the severity of the impact created, until the *United Nations Convention Against Corruption (UNCAC)* as ratified by Indonesia has finally advocated for countries to criminalize bribery in the private sector.<sup>25</sup> However, until now Indonesia has not categorized bribes in the private sector as a corruption offense. Thus, any bribery actors in the private sector cannot be charged with the Corruption Eradication Act. Therefore, people are often confused about how to get the Indonesian legal system to ensnare bribe perpetrators in the private sector. However, it does not mean that bribes in the private sector cannot be charged with Indonesian positive law.

The assets as obtained from corruption are usually by perpetrator by individuals and corporations indirectly used because of fear or indication of money laundering activities.<sup>26</sup> For that reason, the perpetrators always try to hide the origins of the property in various ways, among others, to attempt to incorporate it into the banking system, attempt to conceal or disguise the origin of the property in order to avoiding tracking efforts by law enforcement officers commonly termed or popularly known as money laundering. Money laundering is always associated with property derived from a crime, so there is no crime no money laundering.<sup>27</sup>

The relation of money laundering with corruption can be seen in Article 2 paragraph (1) letter *a* that the proceeds of crime are assets acquired from corruption as committed in the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia and the crime is also a criminal act under Indonesian law. Thus, corruption is a predicate crime from money laundering. The placement of corruption as predicate crime number one (letter *a*) in Money Laundering Acts is a manifestation of the legislators who see corruption as a nation issues and have priority in handling it. Corruption eradication through the implementation of Money Laundering Acts must be done seriously by prioritizing the principles of criminal law as an integrated policy and fragmentary, partial and repressive, also it must be attempted to negate or overcome and improve the overall causation and conditions which is a criminogenic factor for corruption. Therefore, an integral strategy is required.

When observe the formulation of money laundering then it illustrates two types of criminal offense that are crimes that generate illicit money such as corruption and money laundering. Both types of criminal offenses can raise questions in the evidentiary system, whether the corruption should be proven in advance so that the money laundered can be qualified as money laundering crime. The qualification of money laundering is defined as the placement of assets known or reasonably suspected to be the proceeds of a criminal offense into a banking service provider, either on its own behalf or another person. Under this provision, the act of corruption does not need to be proved first enough if there is allegation that the illicit money comes from an act of corruption, if there is sufficient initial evidence.<sup>28</sup>

In its development, the case of corruption that occurred in Indonesia almost always followed by money laundering, namely corruption as a predicate crime. By this reality, to track the assets whose origins are obscured by the perpetrators of corruption is a situation faced to use the legal means of money laundering that aimed to eradicate corruption.<sup>29</sup> This is committed by Russia by encourage to get out of the atmosphere of a high level of corruption. In Rusia, the money from corruption was taken abroad using the money laundering process so that the money appeared to come from legal economic activity. Such conditions cause instability of financial and banking systems so that Russia fell bankrupt. Russia tries to rise from this economic downturn by criminalize

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<sup>25</sup> Andreas Nathaniel Marbun. (2017). Suap di Sektor Privat: Dapatkah Dijerat?. The Journal of INTEGRITAS, Vol. 3, No. 1, March: 53

<sup>26</sup> Bismar Nasution, *Op. cit.*, Page. 1 .

<sup>27</sup> Danil, E., & Kurniawan, I. (2017). Optimizing Confiscation of Assets in Accelerating the Eradication of Corruption. *Hasanuddin Law Review*, 3(1), 67-76. doi: <http://dx.doi.org/10.20956/halrev.v3i1.717>.

<sup>28</sup> Article 69 of Act No. 8 of 2010 on Prevention and Eradication of Money Laundering.

<sup>29</sup> See, Yunus Hussein, Eradication of Corruption through the Implementation of Money Laundering Acts, Paper presented in Training on Corruption Handling for Law Enforcement Officials and Auditors with the theme “*Strengthening Regulation, Enforcement, Integrity Assurance, and Public Participation on Local Budget in West Sumatra*” organized by the Western Territory Law Study Center of Andalas University in cooperation with the Partnership for Governance Reform in Indonesia and supported by the European Commission, held at Hotel Bumi Minang, Padang on September 22, 2005.

money laundering and establish anti-money laundering regime. Also, Russia reforming the criminal justice system and its banking system to get out of the economic crisis.<sup>30</sup> By taking the way, Russia can get out of the financial instability.

In addition, more detailed expansions related to the means used in money laundering activities are based on the Money Laundering Acts,<sup>31</sup> the providers of financial services such as banks, finance companies, insurance companies and insurance brokers, pension funds, securities companies, managers investment, custodian, trustee, as a giro service provider, foreign exchange traders, payment card operators, e-money operators and/or e-wallets, cooperatives that operate savings and loan activities, pawnshops, companies engaged in commodity trading; or the money transfer activities. Other goods and/or service providers: property companies/agents, motor vehicle traders, gems and jewelers, art and antique dealers, or auction houses.

Hence, the means used in money laundering is very complex in disguising the origin of the property of the criminal offense. With the very complexity of the means used for money laundering, require extra ordinary strategies to prevent and combat money laundering. Financial Intelligent Unit institution authorized to track illicit money, in Indonesia as a *tracker agency* in tracking the results of illicit money (the proceeds of crime) is PPATK. In addition, law enforcement professionalism is also needed to prevent and combat the money laundering.

A conception related to differences in the character of corruption are essentially deemed necessary to be clarified further as it may cause new problems. This is necessary as an attempt to identify the perpetrator in a corruption or money laundering case. As seen above then it is apparent from the prepositions and the major premise that all state losses are the proceed of a crime. The location of the differentiation of corruption is the element of State losses and elements against the law, while the money laundering of the element of action must occur cumulatively (placement, layering, and integration) as well as the acquisition of assets that cannot be proven realistically and legally valid. In addition, not necessarily also the existence of State losses, there is a crime of money laundering because someone property is not fair. Proof of the origin of property and prove the element against the law.

Above all, as results of the author research, that all cases that have been convicted as described previously are deemed to have been convicted of money laundering that *actus reus* cumulatively (placement, layering, and integration) committed a prohibited act i.e acquisition of property from corruption as its *mens rea*.

#### 4. Legal Accountability Aspect

Asset recovery in the United Nations Convention Against Corruption (UNCAC), 2003 is set out in Chapter IV article 51-59). To promote asset recovery in the handling of corruption, each country opening wider cooperative relationships, not only in law enforcement of the perpetrators but also in returning assets of corruption that are concealed in other countries, whether related to criminal or civil aspects.<sup>32</sup> Unreasonable asset as owned by officials shows the reality in the life of the nation and state, on the one hand becomes the right of every citizen but on the one hand need to be accounted for. This is as stated by Pratikno who argued that for 250 trillion the State money disappeared but recovered amount is only 15.09 trillion.<sup>33</sup>

Reverse evidentiary means that can be used in corruption through criminal procedural, then reverse evidentiary model of Anti-Corruption Convention 2003 and get acknowledgment from developed countries whether using the “*Common Law*” and “*Civil Law*” legal system are support the use of civil procedure in applying reverse evidentiary theory to the balance of probability, it means that as long as the reverse evidentiary procedure is intended to sue a person property rights over his/her property derived from corruption.<sup>34</sup> Reverse evidentiary

<sup>30</sup> See for detail, Sam Chung, 1999. “*Criminalizing Money Laundering as A Method and Means of Curbing Corruption, Organized Crime, and Capital Flight in Russia*”, Pacific Rim Law & Policy Journal Association, Vol. 8, No.3.

<sup>31</sup> Act No. 8 of 2010 on Prevention and Eradication of Money Laundering, Article 17 Paragraph (1).

<sup>32</sup> Jeane Neltje Saly, 2010. *Pengembalian Asset Negara Hasil Korupsi di Indonesia Dalam Perspektif United Convention Against Corruption 2002 (UNTAC)*, Article, Indonesia Legislation, Vol. 7.No. 4 December.

<sup>33</sup> Source: <http://www.ugm.ac.id/id/berita/8043-uang.negara.hilang.rp.250.triliun.akibat.korupsi>. Accessed on 1 November 2015.

<sup>34</sup> Razif Novwan Putranto & Law Firm, *Penerapan Azas Pembuktian Terbalik dalam Perkara Korupsi*, <http://www.rnplawfirm.com/?p=publication&id=8&title=azaz-pembuktian>, Accessed on 1 November 2015.

burden already exists in some countries such as Ireland and England. Legislators are permitted to adopt it as a precedent. Basically, this provision aims to asset recovery directly. In addition to a criminal offense, it can also be civilized as provided for in Article 53 (b) of UNCAC.

The regulation of illicit enrichment already exists in some countries, but there are still differences in interpretation between illicit enrichment and unexplained wealth. For example, the Philippines regulates the unexplained wealth but its essence is illicit enrichment and for the sake of eradicating corruption crime with Australia applying unexplained wealth even in its reality illicit enrichment occurs.

On the other hand, illicit enrichment and unexplained wealth has a different basis between them. Based on the results of research, the following shows the general description for illicit enrichment and unexplained wealth differences as follows:

**Table 1.** Differences of illicit enrichment and unexplained wealth

Concept	Subject	Object	Mechanism	Forms of Sanction
<i>Illicit Enrichment</i>	Public officials	Criminal offense to enrich themselves ( <i>in personam</i> ).	The State can only through mechanism of criminal procedural law ( <i>Conviction Based Asset Forfeiture</i> )	Criminal sanction and additional in addition to seize the property
<i>Unexplained Wealth</i>	Each person	Suspect the wealth acquired from a crime or property ownership issue ( <i>in rem</i> ).	The State can only seize property through civil procedure law ( <i>Non Conviction Based Asset Forfeiture</i> )	Depending on the Court' decision for seize the property

Source: *Indonesia Corruption Watch, 2016.*

If refers to some countries particularly Australia and some other countries, illicit enrichment known as unexplained wealth without penalization but assets that the defendant cannot prove (with reversal of the burden of proof) will be seized by the State. While the application of Illicit enrichment in China that every state official whose property exceeds the legitimate, if the difference is enormous, it may be instructed to explain the source of his/her property. If he/she cannot prove a legitimate source, a share in excess of his/her lawful income shall be deemed an illegal profit and punishable by imprisonment not more than five years or a criminal detention, and a portion of the property in excess of his/her lawful income shall confiscated.

In other countries, there are those impose criminal and administrative sanctions. From 44 countries that already have a law on illicit enrichment, 39 impose imprisonment, such as China, India, Malaysia, Brunei, Macao, Bangladesh and Egypt. Penalties range from 14 to 20 years. The average is 2-5 years and there are those who impose minimum sanctions. The relation of sanction with the amount of unexplained wealth, twenty-six of 39 countries impose varying penalty sanctions, for example 50-100% or twice of illicit enrichment, US\$500.000-1.000.000. There are 6 (six) countries that impose administrative sanctions, such as Philippines, Argentina, Chili, Columbia, El Salvador and Uganda.

In contrast to the Criminal Code and the Money Laundering Acts, it determines the minimum and maximum penalties. This can be seen, among others, in Article 3, 4, 5 and 7 which determines the imprisonment for a minimum of 5 years and maximum of 20 years and a fine of at least Rp. 1.000.000.000 (one billion rupiah) and at most Rp. 100.000.000.000 (one hundred billion rupiah).

Nowadays, in Indonesia, the arrangement of illicit enrichment substantially has been regulated in Article 79 paragraph (4) of Act No.8 of 2010 stated that if a defendant dies before the verdict of judge, where there is convincing evidence that the defendant committed the crime, then the judge can make the determination of the defendant property which has been confiscated to be seized and owned by the State. The provisions of Article 79 paragraph (4) are strongly contrary to the principle of presumption of innocence, in which a person cannot be found guilty before a judge declares that the defendant is guilty of the charge charged to him.

Based on the norm, it indicates the existence of unexplained wealth but it is preceded by illicit enrichment, as if the State conducting neglect of a person who has died, has no unexplained property and cannot be proved validly

(law). It is also as if the State cannot conduct civil confiscation *in rem* through civil procedure. In fact, the reporting properties of all State property assets are the civil liability of every State organizer.

The above table also illustrates that the conception of unexplained wealth is a legal instrument that allows the deprivation of a person assets/property in a civil procedure who has property or asset in unreasonable amount (it is inappropriate to the source of income) without being able to prove that the property is legally acquired (not derived from criminal act). Hence, unexplained wealth as a mean to account for all those who are committing criminal offense of money laundering whose criminal acts are derived from corruption to account for the origins of their assets that are unrealistic and accountable *in rem* through civil procedure. However, there is no legal provision. Such matter is an obstacle to eradicate corruption which has implication to money laundering crime to conduct pursuit of corrupt assets and unfair asset.

However, according to the author, asset returning of corruption through the civil suit shows the seriousness of the State to return the assets of corruption. A suspect or defendant who has died may still be sued to return the assets of corruption may be the State Attorney through a civil lawsuit against the heirs of the suspect or defendant as well as the involvement of the Supreme Audit Agency to calculate the State losses on corruption but the need for involvement of other institutions to calculate the value of assets that commit money laundering. The Supreme Audit Agency as an institution that has the authority to calculate State losses and not the State Development Audit Agency to calculate the loss.

If seen in terms of practicality and effectiveness of the handling of cases in accordance with the principle of fast, cheap and simple judiciary, the system that prevails so far obviously disadvantage the *justiciable*. Therefore, the handling of corruption cases that coincide with other criminal acts becomes long-winded, repetitive, and very inefficient. Since this issue enters the corridor of legal political policy, the solution lies with the government and the parliament.

The Indonesian Criminal Procedure Code as a positive law is a procedural law that is used theoretically and practice at all levels of justice in handling corruption case. Therefore, it can be said that the existence of the provisions of procedural law that is double for the investigation, prosecution and judicial perpetrators of corruption in Indonesia. On the one hand some use the Special Criminal Law (*Ius singurale/Ius Speciale*) then a special crime has a special procedural law that deviates from the provisions of procedural law in general. For this aspect, the applicable criminal procedural law is "*lex specialist*."

The objective of criminal procedure is to seek material or actual truth. In search the material truths to enforce the material criminal law, the government established law enforcement agencies, such as police, prosecutors, courts, and public institutions. After the enactment of Act No. 30 of 2002 on Corruption Eradication Commission, based on its duty and authority in eradicating corruption, it was included as law enforcement agency.

State institutions have a relationship with what Kelsen has initiated in explaining about the State institutions in which are not always in the organic form. In addition to State institutions in the form of organic, and more broadly, any position determined by law can also be called an organ, as long as its functions are to create norms and/or are operate norms of modern constitutional democracy state, in the process of policy formulation will be guaranteed if checks and balances mechanism among public policy drafting agencies went well. There are 2 (two) basic concepts in checks and balances mechanism.

The concept of *checks* comes from the classical theory of separation of powers, in which the legislative, executive, and judicial should be held by separate institutions one another. While, the concept of *balances* is intended for each ruling institution in the process of the formulation of policies have a proportion of equal authority so that no one has absolute power that is called by the distribution of power. The concept of power-sharing differs from the power-separation. The power-separation means that the power of the State is fragmented in every section, both the person or its function.

The reality shows that a pure power-separation cannot be implemented. In reality, it practicing the system of mutual supervision and mutual balance between the State powers (*check and balance system*), so that the result of *trias politica* theory is not practiced purely. The impossibility of maintaining the principle that these three organizations deal exclusively with one of the three functions. In reality factually, the relationship between branches of power is not touching each other and even the three of them are equal and control each other based on the principle of checks and balances.



According to the author, authority is a capacity to act and given to an individual by the legal order to commit certain actions. Hence, it can be said that the authority to take action is only given to certain individuals and given by the legal order to commit an action based on the law itself. Thus, the authority of the public prosecutor of the Corruption Eradication Commission to prosecute money laundering should be provided by a legal order or it can be said that the authority is required to obtain a legal basis from the legislation.

## 5. Conclusion

Legal substance of money laundering handling as associated with corruption has not been accommodated on the normative level. It is very important as an effort to optimize the eradication of money laundering. Resulting losses by bribes in the private sector are not only about the amount of money, but also create inefficiencies, increase crime, slow growth, and worsen the image and national investment climate in macro. Therefore, it is appropriate if peoples are confused about how to make the Indonesian legal system able to ensnare the perpetrators of bribery in the private sector. However, it does not mean that bribes in the private sector cannot be snared with Indonesian positive law.

The recommendation of this research are needed revisions and synchronization of legal arrangements in Indonesia, especially money laundering, corruption eradication commissions and prosecutorial acts. In order to realize the harmonization of law related to corruption eradication acts and to accommodate the legal substance of money laundering handling and to maintain the investment climate in Indonesia in general.

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