

Implementation of Collateral Confiscation (*Conservatoir Beslag*) in Order to Manifest the Restoration of Assets Obtained from Corruption

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Abstract

The purpose of this dissertation research is to study and analyze in detail: *first*, problems of restoration of assets obtained from corruption conducted by law enforcement officers. *Second*, the importance of the implementation of Collateral Confiscation in the corruption case handling system. *Third*, the model of Collateral Confiscation to increase the restoration of assets obtained from corruption in the Indonesian criminal justice system. The data used is secondary data and primary data. The results showed that the constraints affecting the difficulty of recovering assets from corruption caused by three factors. *First*, the institutional structure is not systemic, structurally weak law enforcement organizations. Attorney as an executor is still less than optimal at performing execution of substitute money as *asset recovery* because of limited facilities and infrastructure, struggled to keep track of assets that have been transferred and hidden. *Second*, factor in the substantive law, namely the absence of legislation that supports the optimization of assets seizure suspected of corruption, differences in the perception of state finances, the calculation of losses that varied complicates the implementation of the restoration of state's financial loss. *Third*, factor of cultural law of the society is still lacking and permissive by not reporting assets of the corruptor and even protect corruptor's assets. In an effort to restore the state's financial losses due to corruption, the role of Collateral Confiscation - used in civil law regime - can be applied to cases of corruption. The concept is intended for sequestration guarantees for compensation and fines from their bad faith by the perpetrators of corruption. The importance of implementing Collateral Confiscation is based on the embodiment welfare, justice, and legal certainty. In addition, there is a causal relationship of implementation of Collateral Confiscation with the principles of legal protection in terms of restoration of state's financial loss caused by corruption. As a model that is offered, it is expected that the concept of Collateral Confiscation is included in the process of revision of the Law on Corruption Eradication. In implementation, Collateral Confiscation enforced at the beginning of the judicial process (the investigation stage), ends until there is a court ruling that has permanent legal force (*inkracht*). Supporting facilities are also needed, namely the existence of depository institutions and asset administrators to better utilize and secure the country's financial losses. The institute also acts as a system integrator of the various law enforcement agencies that perform similar functions.

Keywords: Collateral Confiscation (*Conservatoir Beslag*), Restoration of Assets (*Asset Recovery*), Corruption.

A. BACKGROUND

Corruption - as an extraordinary crime - is already a serious threat to the very existence of a country and even internationally. Corruption really disrupts economic rights and the rights of society and the state on a large scale. According to the *World Bank* in 2014, the losses suffered by the world globally due to corruption reaches 1 to 1.6 trillion USD annually, of which 20-40 billion USD suffered by developing countries and transitional countries.⁴ This figure is equivalent to the *Gross domestic Product (GDP)* of the country to the 12th poorest in the world with a population of 240 million people.⁵ Indonesia included in the category of countries with high levels of corruption.⁶ One of the famous measurement is *Corruption Perception Index (CPI)* which is conducted regularly

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⁴ World Bank, the Stolen Assets Recovery Initiative: Challenges, Opportunities, Action Plans. www.unodc.org. Accessed on January 2, 2014, hours: 14:15 pm. <http://www.antikorupsi.org/id/content/kerugian-negara-akibat-korupsi-2015-sebesar-31-triliun>.

Accessed April 11, 2016 hours: 10.00.Wib.

⁵ Theodore S. Greenberg, <http://www.eurospanbookstore.com>. Accessed on January 2, 2014, hours: 20:30 pm.

⁶ In 2013, Indonesia's score increased from 30 in 2012 to 32 in 2013 with the rank 114. In 2014, Indonesia's CPI score of 34. The scores in 2014 climbed back 2 points, while ranking rose 7 ratings from the previous year (2013). Indonesia is still ranked 107th out of 175 countries surveyed. Scores Indonesia in 2015 to 36 and ranks 88th out of 168 countries measured despite the increase, in fact the situation in Indonesia has not moved much. Corruption Perception Index 2014, <http://www.ti.or.id/index>. Accessed on March 15, 2015, hours: 12:41 pm.

by *Transparency International* to some countries that were surveyed. Losses due to corruption would greatly affect the poor condition (ability) of the economy of a country, especially for developing countries, including Indonesia.

Efforts to recover state assets 'stolen' (*stolen asset recovery*) through corruption tends not easy to do. The perpetrators of corruption have extensive exceptional access and difficult to reach in hiding or laundering money (*money laundering*) resulted from corruption. Condition of *asset recovery* in 2015 that has been made by the three investigation corruption institutions (police, AGO and KPK) is still not optimal. State money that has been saved is Rp 1,2 trillion, but compared with the number of cases handled and the amount of losses incurred due to the act of corruption in 2015 which reached Rp. 3.1 trillion is not maximized and not comparable with the losses that arise as a result of corruption.¹ Restoration of the state's financial assets becomes important, especially for developing countries like Indonesia, based on the fact that corruption had robbed the country's wealth, while the resources are much-needed to reconstruct and rehabilitate the community through economic development.

Corruption is an *extraordinary crimes* so it's required to have outstanding countermeasures (*extraordinary enforcement*) and actions that are also remarkable (*extraordinary measures*). One of them is through the reception of Collateral Confiscation system (*conservatoir beslag*) as one alternative in restoration of assets obtained by corruption as outlined in the law. The concept known as Collateral Confiscation in civil law, can be developed as a collateral for *asset recovery* and implementation of criminal restitution in corruption cases. Discourse on the implementation of the concept of Collateral Confiscation has turned out to be a very interesting discourse among experts.

Indonesian criminal law has introduced the presence of a cumulation of criminal principals who has threatened for a specific criminal offense. In Act No. 3 of 1971 it's introduced as an additional form of punishment for compensation. Compensation will also be retained by Act No. 31 of 1999 as amended by Act No. 20 of 2001 on the Eradication of Corruption (Law PTPK). In Article 18 mentioned one additional criminal² other than those mentioned in Article 10 of the Criminal Code is a criminal for compensation.

Restoration of state's financial loss (*asset recovery*) will not stop even though the perpetrator was sentenced free. This can be seen in the provisions of Article 32 paragraph (2) Law PTPK stated: "acquittal in corruption cases invalidate the right to claim damages against the state finances." The sounds of Article 32 paragraph (2) above suggests, that the issue of fighting corruption is not only lies in an attempt to punish the perpetrators, but more than that was an attempt to restore the state's losses arising from the acts of corruption. In Law PTPK against criminal compensation faces some changes. Article 18 paragraph (2) states, in its decision the judge can impose additional punishment in the form of an order to the Prosecution to expropriate the property of the convict to be auctioned off to cover losses that are not paid by the convict.

In Article 18 paragraph (3) (Law PTPK) also mentions that if the defendant has no assets, then the decision will be coupled with the length of imprisonment that does not exceed the maximum threat of criminal staple. Although Article 18 paragraph (2) provides the possibility to immediately seizure possessions³ convict to pay criminal restitution,⁴ but it is not that easy. At the time the judge may expropriate property belongs to the convicted person was already there, because during the trial, the accused has been transferred or sold his property to another party, so that the execution of the decision that has been *incracht*, is difficult to implement.⁵ Current conditions indicate compensation will tend replaced with a subsidiary in the form of imprisonment for a criminal. Though convicted person has enough wealth to pay compensation.

Overcoming the problems mentioned above, it is necessary to expand the meaning and scope of confiscation. Expansion of confiscation that the author intended is to apply the concept known as Collateral Confiscation in civil law. In the concept of civil law, the purpose of Collateral Confiscation to the defendant's assets is that the

¹ <http://www.antikorupsi.org/id/content/kerugian-negara-akibat-korupsi-2015-sebesar-31-triliun>. Accessed April 11, 2016 hours: 10.30.Wib.

² Additional penalty in criminal acts of corruption can be: a. Deprivation chattels tangible or intangible or immovable goods used or obtained from corruption, including the convict's corporation where corruption took place, as well as of goods replace these items; b. Compensation will be as much as the same amount with the property obtained from corruption offenses; c. Closing all or part of the corporation for a period of one (1) year; d. Revocation all or part of certain rights or removal of all or part of particular benefit that has been or may be granted by the government to convict; e. Jika convicted person does not pay compensation within a maximum of one (1) month after the court ruling which has permanent legal force, possessions can be seized by the prosecutor and auctioned to cover the compensation. Article 18 paragraph (1) letter b (Law PTPK).

³ In Article 39 paragraph (1) Criminal Procedure Code states that the limitation seizure seizure objects can only be carried out on: Benda proceeds from crime; Materials used to commit a crime; Materials used to obstruct the investigation; Objects that are specially made to commit the crime; and other objects that have other relationships with the crime.

⁴ Criminal sanctions pay compensation losses to the state in Law PTPK the sentence imposed on the perpetrators of corruption that is intended to restore the balance that is disrupted so that the judgment becomes effective.

⁵ The transfer of wealth that is not tracked or unknown, then the apparatus in this case the Attorney as executor can not execute.

goods can not be transferred to a third party, so it stays intact until the decision is legally enforceable. If the defendant does not meet the payments voluntarily; repayment of debt or compensation, then forcibly taken from the seized goods through auction sales.¹

Incorporating the concept of Collateral Confiscation in corruption cases handling system is reaping a variety of responses from legal practitioners. Implementation of Collateral Confiscation of property is allowed legally acquired can be seized since the investigation stage. The purpose of Collateral Confiscation of the suspects' possessions is that the goods can not be transferred by the suspects to other parties, so as to keep intact until the decision is legally enforceable.

In this dissertation research the author focuses the research on asset recovery.² Efforts to return assets acquisition of corruption that has harmed state's finances carried out by first doing the Collateral Confiscation.³ Applicability of Collateral Confiscation in the process of recovering assets obtained by the act of corruption, will be able to maximize the rescue of state's financial loss of their activities during the transfer of assets which is very difficult to reach and to do deprivation. In this regard Zudan Arif Fakrullah⁴ states that the law was made for human so that the law should be able to realize the enhancement of human dignity, social welfare and create happiness for mankind. The existence of the law is also bound by space and time. Thus, the law must be built dynamically according to the human development that is in place and his time alone. To that end, the political role of the law in the formulation (formulations) Collateral Confiscation in order to restore assets obtained by the act of corruption to be very important and strategic.

In this dissertation research, some of the issues that will be examined further, are as follows:

1. What problems affecting efforts to recover assets obtained from corruption committed by law enforcement officials to be very difficult to do and not optimal?
2. Why is the implementation of Collateral Confiscation is very important to be applied in the corruption case handling system in Indonesia?
3. What kind of model of Collateral Confiscation which can increase the restoration on assets obtained by act of corruption in the criminal justice system in Indonesia?

B. RESEARCH METHODS

This study uses legal research such as doctrinal and non-doctrinal. Doctrinal legal research is used to find materials of positive law which will be used to address issues requiring the support of the ingredients of positive law. Research doctrinal law is used to answer the second research problem. As for non-doctrinal legal research is used to obtain materials that can help address issues that require data obtained through field research (empirical). Non-doctrinal legal research is used to answer the problem first and third.

To answer the first and third problems the author uses the concept of law⁵ the fourth and fifth. Law is a manifestation of symbolic meanings in social behavior as it appears in their interactions. The approach used in this study is the approach of *socio legal* the law is not only seen as a set of rules that are normative or what the text of the law (*law in the books*), but look at how law interacts with the public (*law in action*). For answer second problem, the author uses the concept of the first and second laws.

This dissertation uses some of the research approach, the approach of legislation (*statue approach*) is done by examining all the rules and regulations related to the issue under consideration. The results of the research and the study is an argument to solve the problems that are being discussed.⁶ approach to the case (*case approach*), done by the study of several cases relating to the issues that are faced which are already a court decision and is legally binding. The main concern is the decision of fines and compensation as a way of restoration of assets

¹ Sudikno Mertokusomo, *Civil Procedure Law*, Liberty, Yogyakarta, 1998, page.65.

² Return on assets that will be examined in this study is related assets as the wealth of the country that has been corrupted, darkened, and hidden as private property whose existence is disguised and the tracks removed using paths that seem legal.

³ In the civil law regime of seizure can be a guarantee in the form of money or goods requested by the plaintiff to the court to ensure that the demands of the plaintiff against the defendant may be implemented or executed if the court granted the demands tersebut. Seizure in security seizure is not intended to auction, or sell items seized, but only saved (conerveer) by the court and may not be transferred or sold by the defendant or the defendant. With the seizure, the defendant loses its authority to control the goods, so that all actions of a defendant to alienate, or transfer the goods seized is unauthorized and may be subject to criminal Article 231 and Article 232 Penal Code.

⁴ Arif Zudan Fakrulloh in Satya Arinanto & Ninuk Triyanti. *Memahami Law, Construction Up Implementation Of CTK*. First, RajaGrafindo Persada, Jakarta, 2011, Page.xviii.

⁵ Soetandyo Wignyo Subroto divided five legal concepts, each of which has a different method, five legal concepts are: first, the law is the concept of truth and justice that is both natural and universally applicable. Second, the law is a positive norms in the national's legislation system. Third, the law is what was decided by the judge inconcreto and systemized as the judge made law. Fourth, laws are patterns of institutionalized social behavior exist as a social empirik. Fifth variables, the law is a manifestation of symbolic meanings in social behavior as it appears in their interactions. Setiono, *Understanding the Methodology of Legal Research*, Legal Studies Doctoral Program UNS, Surakarta, 2005, page.20-21.

⁶ *Ibid*, page.93.

obtained from corruption and the implementation of the execution of the judgment. A conceptual approach (*conceptual approach*), this approach moved from the views and doctrines that developed in the jurisprudence. This approach is important because understanding of the views/doctrine developed in legal science can be the foundation for building legal arguments when resolving legal issues faced. Sociological juridical approach, this study emphasizes the steps of observation and analysis of empirical qualitative, it is often called the *socio legal research*.¹

Location of the research conducted is in the territory of the Republic Indonesia. Included in which the three investigation corruption institutions (police, AGO and KPK) and other institutions related to the eradication of corruption. The location of research is also conducted at various libraries, among others, the National Library, the University Library of March, Police Science High School Library (STIK), Library Commission.

Primary data, obtained by the respondents were selected *purposively* to determine the respondent and legal situation beforehand. Secondary data were obtained from primary legal materials, secondary law and tertiary legal materials. The data collected is then analyzed through three stages, namely reducing the data, presenting data and draw conclusions.² The data analysis technique used in this study is a qualitative method of normative analysis.³

C. RESULTS AND DISCUSSION

1. Constraints Not Optimally Asset Acquisition Results of Corruption

Asset search and seizure of property as a result of criminal acts of corruption committed by the police, judiciary and the Corruption Eradication Commission (KPK) is still not resulted nicely. *Asset tracing* and *asset recovery* that are performed also not maximized in the restoration of state's financial losses that have been incurred as a result of corruption. In terms of implementation of *asset tracing* conducted by three law enforcement agencies is not currently supported by facilities and infrastructure that are adequate and the human resources assigned to *asset tracing*.

Rescue the state's money obtained by the Attorney General of the Republic of Indonesia in handling corruption cases during the year 2014 has increased compared to the reception in 2013. The total number of saving the state money by the Attorney General during 2014 amounted to Rp 390 526 490 570 and 8.1 million dollars AS. Based on the data obtained, the country's financial rescue in the stage of investigation and prosecution in 2013 reached Rp 403.102,000.215, and 500,000 US dollars. Meanwhile, in 2014, state finances that were rescued reach USD 390 526 490 570 and 8.1 million US dollars.⁴

Indonesian National Police (Polri) stated that they have handled 1,330 cases of corruption (Corruption) throughout Indonesia during January to December 2013. State's money that is successfully rescued amounted to Rp.911 billion, while in 2012 only Rp.261 billion. Next, as much as Rp.941 billion of state money, saved from 1,618 corruption cases handled by the Police throughout 2014.⁵

KPK described data from the end of 2013, rescue of the state money that is returned to the state amounted to Rp.1,196 trillion, rescue of the state money generated by the KPK of about 40 cases have been legally binding (*inkrachtvangewijsde*). Regarding the budget used, this year the KPK spent \$ Rp.300,6 billion. The budget is used one of them for mobilize the 26 investigators of internal KPK and recruit 160 new employees.⁶ In total, in the year 2014 KPK conducted 78 investigation activities, 93 investigations and 77 prosecutions activities, both new cases as well as the rest of the treatment in the previous year. In addition, the execution of 44 court decisions that have permanent legal force. More than 110 billion has been put into the state treasury in the form of Non-Tax Revenue (non-tax) on the handling of the case.⁷

Based on the data that has been submitted by the three agencies investigating the crime of corruption, *asset recovery* that has been done is still not encouraging, because of the trillions of rupiah in corruption by the perpetrators of corruption in only a small part that could be saved by way of *asset recovery* remitted to the state treasury.

Attorney General Office (AGO) as a public prosecutor and the executor of assets in order restore the

¹ J.Supranto.Metode Legal Research and Statistics, Rineka Copyright, Bandung, 2003, page. 3

² Model analysis like this is done a cyclical process, inter-stage phases, so that the data collected will relate to one another and completely data to support the preparation of research reports.

³ At this stage, researchers understand and describe the law by using deductive reasoning. Of data with non-doctrinal approach / method of social research or empirical approach, the analysis conducted by using quantitative analysis with an interactive approach (interactive model analysis).

⁴ <http://nasional.kompas.com/read/2015/01/05/21315951/Penyelamatan.Uang.Negara.dalam.Penyelesaian.Korupsi.oleh.Kejagung.Meningkat.di.2014>. Accessed on March 15, 2015, at 15:00 pm.

⁵ Source: *Police public relations division*.

⁶ <http://news.detik.com/berita/2454368/sepanjang-2013-kpk-berhasil-selamatkan-uang-negara-rp-1196-t>. Accessed on January 16, 2014, at 10:20 pm.

⁷ <http://www.kpk.go.id/id/berita/siaran-pers>. Accessed on March 15, 2014, at 14:00 pm

state's finance loss only has limited number of personnel, facilities and infrastructure is also lacks on impact on the prosecutor's performance in order to maximize asset searches of corruption that has been hidden and obscured by the corruptor.

In practical terms, it also appears to have synergetic among law enforcement officers in conducting the asset search, more objects shown on the ambiguity of the case and coordination and cooperation among law enforcement agencies. A special case in terms of obscurity object caused dispute of the authority of inquiry and investigation, which resulted as in the case of the arrest of Urip between the KPK and the AGO, and as well as in the case of Joko Susilo, between the National Police and KPK. The role of judges is still less than the maximum in asset recovery efforts both in the country and those that were planted outside the country.¹

In terms of legislation, namely the absence of legislation that supports the optimization of assets seizure suspected of corruption, lack of clarity on the definition of state finances, the notion of state losses must be clear and real as well as the calculation of state's financial loss which is varied complicates the law enforcers in doing asset tracing and asset recovery in handling corruption cases. Juridical issues concerning state finances is shown on the subject of separation of SOEs wealth within the scope of the country's wealth. With the separation of wealth, according to the doctrine of legal entities has a wealth of its own, it can act in the traffic law through its coordinator, and can be sued and sue in front of a judge. By having its own wealth, the wealth of legal entity is separated from the wealth of its founder who made an investment in such legal entity.² Factors juridical in terms of state finances and state's financial losses have led to numerous debates and on the implementation of the word "may harm". State's Treasure Act, in Article 1, point 22 uses the concept of actual loss. On the other hand, the Act of Corruption uses the concept of a potential loss.

A legal uncertainty occurs in handling corruption cases due to the unclear definition of state's financial loss which also implies to institution which is entitled and authorized to state a loss of the state. In fact, the formulation of the state's loss, used as an element in corruption cases should be proved in court. There are times to prove the existence of the state's financial losses, the Prosecutor and the Police depend on the results of the audit institutions outside of law enforcement, namely the Audit Board (BPK) and the Finance and Development Supervising Board (BPKP). However, on the other hand, police investigators and prosecution investigators sometimes have their own calculation and not based on the result of audit by BPK or BPKP in calculating the amount of state financial loss is suspected or accused.

In the system of criminalization of corruption, with elements of illegally enriching, in Indonesia generally, the criminal law still following to retributive justice which is also known by the approach *in personal* (punishment of the people).³ This approach is different from illegally enriching using the approach *in rem* (punishment of assets). The approach *in rem* is in the form of civil lawsuit⁴, which is the action when the state took over the assets through a court decision in a civil case based on the evidence is stronger that those assets allegedly derived from criminal acts or used for criminal acts. Construction penal system developed lately in Indonesia still aims to reveal the crime that occurred, find the perpetrators and punish perpetrators of criminal acts with criminal sanctions, particularly "the criminal entity" either imprisonment or confinement. Meanwhile, the issue of the development of law in the international sphere such as a problem of seizure and seizure of result of crime and criminal offenses instrument has not been an important part in the criminal justice system in Indonesia.⁵

Weak criminal justice system Indonesia, causes financial loss to the restoration of state's financial loss due to corruption is still not optimal. On the other hand, the Draft Law on Seizure of Assets (Assets Seizure Bill) until today has not been passed into law. The root problem of chronic corruption in Indonesia lies not in a lack of regulations, laws, and weak legal structure, but more due to the still weak legal culture, refers to the legal awareness is the basis in the formation of the social structure. Today's society is indifferent and unhelpful in reporting assets owned by corrupt actors. In fact there are people who deliberately helped to hide, obscure assets, property belonging to corrupt actors.

¹ Absolute requirement for asset invested abroad can be returned to Indonesia is following the court ruling in Indonesia who have been legally binding. In the verdict, the judge Indonesia should explicitly include any assets that need to be restored and located in a country where the assets are now placed. So, not only refer to indiscriminate asset recovery but gave no details. Because if in general terms it will be difficult to corrupt his money was returned. This guide has been listed in an international cooperation or the Mutual Legal Assistance (MLA).

² R. Subekti, Principles of Civil Law, Cet. all 22 Intermasa, Jakarta, 1989, page. 21

³ Marwan Effendy, Legal Theory from the Perspective of Policy, Comparison and Harmonization of Laws, Reference, Echoes Persada Press Group, Jakarta, 2014, page. 113.

⁴ Return on assets of perpetrators of corruption through civil lawsuit for EFT subject to the provisions of Article 32, Article 33 and Article 34 and Article 38C of Law No. 31 of 1999 jo Law No. 20 of 2001.

⁵ Final Report Academic Manuscript Draft Law On Asset Seizure of Crime, Centre for National Development Planning Law of the National Legal Development Agency Ministry of Law and Human Rights R.I, Year 2012, page.1-2.

2. Importance of Implementation Collateral Confiscation (*Conservatoir Beslag*) In Order to Restore of Assets Obtained from Corruption

As a follow up of the UNCAC in 2003, StAR initiative has been in June 2007, describing the *challenges, opportunities* and *action plan* in an effort restoration of asset. StAR (*Stolen Asset Recovery*) is a joint program launched by the World Bank (*World Bank*) and the United Nations in particular UNODC (*United Nations Office on Drugs and Crimes*) to enhance international cooperation in implementing efforts to recover assets from corruption, as one of the breakthroughs in international law that set the foundation on recovering assets from crime (especially corruption) in developing countries.

The importance of asset recovery issues for developing countries that suffered losses due to corruption, seeing the issue as it should be given serious attention. In fact, some countries wanted the restoration of assets to be treated as a right that can not be removed or revoked.¹

Paradigm corruption eradication through the provisions of UNCAC in 2003, focuses on three main issues, that prevention, eradication, and restitution of asset (*asset recovery*).² There are two fundamental issues relating to the return on assets (*asset recovery*), namely:³

- a. Determining what treasures that must be accounted for seizure; and
- b. Determine the basis of a wealth seizure. In Article 3 UNCAC 2003 on freezing, seizure, forfeiture and return of assets that occurred caused by violation of the convention. There are few things to note such as:
 - 1) Proof of wealth is the result of a breach of the Convention (Article 31 paragraph (1) letter a).
 - 2) Verification
 - 3) Proof of the change in use in order to breach the Convention (article 31 paragraph (1) letter b) Form of wealth (Article 31 paragraph (4)).
 - 4) Proof of mixed wealth which is legitimate and which violates the Convention (Article 31 paragraph (5)).
 - 5) Proof that wealth is the acceptance or profits derived from:
 - a) Violation of the convention.
 - b) Changes in the form of wealth from the convention of violations.
 - c) Integration of legitimate wealth and violation of the convention.

In determining the legal basis of seizure, UNCAC specify that participating countries should make provision for the implementation of the seizure of wealth from the convention of violations. Indonesia as a country that has signed the UNCAC is obliged to implement the basic principles of the Convention, *inter alia*.⁴

- a. Their responsibility of governments to develop effective anti-corruption policy;
- b. The need to involve the community;
- c. The importance of international cooperation.

In the assets recovery, it's been introduced a civil way about restoration of state's assets. Compared to the criminal path is relatively easy because in terms of evidence, the government has enough initial evidence that the asset is taken to be the result of, or in connection with the crime. Implementation is what is called "*civil forfeiture*". In a matter of evidence, the government fairly calculate how income eligible for the perpetrator, then compare with the assets. If the assets exceed the amount of its income, the offender is obliged to prove that the assets were acquired legally.⁵

Easiness in evidentiary problems through civil forfeiture, is a potential alternative, because it is more effective in efforts to recover assets, although this procedure does not escape from a variety of drawbacks, such as the slow and high costs. In addition, it should be considered that the potential utilization of civil forfeiture to be followed by the bilateral agreement as well as requires a restructuring of national law.⁶ Now, asset forfeiture⁷

¹ Purwaning M Yanuar, 2007. Asset Corruption Results (Based on the United Nations Convention against Corruption 2003) Legal System In Indonesia, Alumni, Bandung, 2007, page. 10-11.

² Saldi Isra, Asset Recovery Corruption Through International Cooperation, [http:// www .saldiisra.web.id/index.php/21-makalah/makalah1/47-asset-recovery-tindak-pidana-korupsi-melalui-kerjasama-internasional.html](http://www.saldiisra.web.id/index.php/21-makalah/makalah1/47-asset-recovery-tindak-pidana-korupsi-melalui-kerjasama-internasional.html). Accessed on August 10, 2015, at 10:00 pm.

³ I Ketut Sudiharsa, Asset Corruption Crime [www.ppatk.go.id/files/61a_ artikel_IKtutSudiharsa0.pdf](http://www.ppatk.go.id/files/61a_artikel_IKtutSudiharsa0.pdf)&cd=3&hl=id&ct=clnk&gl=id. Accessed on August 10, 2015, at 10:00 pm.

⁴ *Ibid.*

⁵ Anthony Kennedy, "Designing a civil forfeiture system: an issues list for policy makers and legislators" *Journal of Financial Crime* No. 13 (2), 2006, Page.38.

⁶ Restructuring in the fields of law, among other things calls for reforms in the field of material and formal law. Field of formal law, among others, the law of civil procedure must be reformatted, given Indonesia is still using the law of civil procedure which applies only in cases of individual or private to private.

⁷ Asset forfeiture ("appropriation of assets") is a term used to describe the seizure of assets, by the State, either (1) the proceeds of crime, or (2) an instrument of crime. Instrument of crime is "property" used to facilitate a crime, for example cars used for transporting narcotics asset forfeiture ilegal. Terminology used varies in different jurisdictions. See: "Asset forfeiture", [http://www.absoluteastronomy.com/ topics / Asset_forfeiture](http://www.absoluteastronomy.com/topics/Asset_forfeiture), accessed on October 16, 2015, Time: 07:30 pm. See

is an important means of sufficient importance in efforts to recover assets (asset recovery).

In some jurisdictions, *asset forfeiture* is also referred to as "*civil forfeiture*", "*in rem forfeiture*," or "*objective forfeiture*", is an action againsts the asset itself and not to the individual (*in personam*). *Asset forfeiture* is a separate action from any criminal proceedings, and requires proof that a property was "tainted" (tainted) by a criminal act. As we know that in general, the criminal act must be determined on a balance of probabilities evidence standard. This simplifies the burden of government (authorities) to act, and that means that it is possible to get a fine if there is sufficient evidence to support a criminal conviction. Because the action is not against the individual defendants, but against the property, then the property owner is a third party who has the right to retain the property¹ is the one who would do the deprivation.²

Asset forfeiture is the seizure and expropriation of an asset through *in rem* claim or lawsuit against the asset. The concept of *asset forfeiture* is based on the '*taint doctrine*' where a criminal act is considered "*taint*" (tarnish) an asset is used or is the result of the criminal act.³ Although it has the same goal, which is to seize and take over assets from crime (*proceeds of crime*), but *asset forfeiture* is different with *criminal forfeiture* which uses the lawsuit *in personam* (the lawsuit against the person) to seize and take over an asset.⁴

Property that can be taken over is according to related types of offences which includes:

- a. Each wealth resulted from a criminal act or obtained from a criminal act; and / or,
- b. Property that is used as a tool, a means or infrastructure to commit criminal acts or supporting a criminal organization; and / or,
- c. Each property that is associated with a criminal offense or criminal organization; and / or,
- d. Wealth used to finance criminal offense or criminal organization; and / or,
- e. Everything that belongs to the offender or criminal organizations.,

Asset recovery is thus a new strategy in fighting corruption which complements the strategy which has the quality of prevention, criminalization and international cooperation. *Asset recovery* have arranged the act of restoration of corrupted state's assets which is located abroad to a mechanism of asset recovery. As the new policy, *asset recovery* is going to be a challenge for the Indonesian government. Moreover, this issue is not regulated in our legal system, so it may face legal problems of its own, both conceptually and operationally.⁵

Particular to the legal system of criminal which *asset recovery* is indirectly asset recovery process can be carried out through four (4) phases as follows:

- a. Tracking assets with the goal of identifying assets, proof of ownership of the asset, the asset storage location in relation to the capacity of criminal offenses committed;
- b. Freezing or seizure of assets which according to Chapter I Article 2 letter f Convention against Corruption (KAK) 2003 this aspect determined include a temporary ban on transferring, converting, disposition, or transfer property or temporarily bear the burden and responsibility of taking care and maintaining and supervising the asset by court decision or determination of other competent authorities;
- c. Seizure of assets which according to Chapter I Article 2 letter g Convention against Corruption (TOR) of 2003 defined as revocation for good fortune to be determined by a court or other competent authority; and
- d. Restoration and delivery of assets to victims' country.

In the conception of the implementation, the deprivation *in rem* is the effort made to cover the weaknesses and even deficiencies that occur in the deprivation of crime against efforts to eradicate crime. In

also Brenda Grantland who argued that asset forfeiture is a process in which the government permanently take away the property of the owner, without paying fair compensation, as punishment for offenses committed by the property or the owner, is one of the weapons of the most controversial in terms of law enforcement during the "War on Narcotics". Although it has come to be a trend in some last year, but asset forfeiture has actually been around since Biblical times (the Bible). See: Brenda Grantland, "Asset forfeiture: Rules and Procedures", <http://www.drugtext.org/library/articles/grantland01.htm>, accessed on October 16, 2015, at 07:40 pm.

¹ World Bank, "Non-Conviction Based Asset forfeiture as a Tool for Asset Recovery", http://www.siteresources.worldbank.org/.../Resources/Stolen_Assesst_Recovery.pdf. Accessed on October 16, 2015, at 07:30 pm. The definition of "property" under Article 2 letter d UNCAC: is the "Property" shall mean assets of every kind, whether corporate or noncorporate, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets ("Property" shall mean assets of every kind from, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets). Whereas in Article 2 point 13 of Law No. 8 of 2010 (AML Law), the term "property" is translated as "wealth", is "all moving objects or object is not moving, both tangible and intangible, acquired either directly or indirectly".

² According to Article 2 letter g UNCAC, "Seizure", which includes the imposition of fines where applicable, shall mean the deprivation of its permanent property by order of a court or other competent authority ("Seizure", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority).

³ David Scott Romantz, "Civil forfeiture and The Constitution: A Legislative Abrogation of right and The Judicial Response: The Guilt of the Res", *Suffolk University Law Review*, 1994, page. 390.

⁴ *Ibid*, page. 389.

⁵ <http://www.ti.or.id/Berita/>, September 6 2007 ", accessed on October 16, 2015, at 07:30 pm.

some cases, the deprivation *in rem* is conducted basically because it's an action *in rem* which is the action addressed to the object, not the persona/person, or in this case not requiring offenders indicted earlier in the trial. With deprivation addressed to the asset itself, the subject of offenders may not seen in this case makes the position of the parties related with the asset or even the owner of asset is considered as a third party

The concept of *in rem* can be applied in the seizure of corruption assets including the payment of a compensation for the criminal acts of corruption. Model *in rem* is in line with the provisions of Article 1132 of the Civil Code.¹ With the material guarantees as collateral for payment of penal substitutes, as well as the results of the corruption asset. To the criminal charges by the Prosecutor, typically specify how much state's financial loss be returned by the defendant to the state at the end of the trial.² The return of states's financial losses in term of crime of corruption, is possible based on the provisions of Article 18 of Law Number 31 Year 1999 jo Law No. 20 of 2001.

In civil law, purposes of seizure as a legal action taken by the court precede the principal case examination or precede the decision. The seizure often conducted during the process of the case investigation, so that it's called the exceptional act.³ Thus it can be seen that the seizure is an act of legal remedies so that the integrity and existence of assets seizure until a decision can be executed after verdict that has obtained permanent legal force. Collateral Confiscation automatically becomes the seizure of execution, if one already has a binding legal force. Therefore, Collateral Confiscation automatically has a *executorial beslag* legal force, thus *executorial beslag* process is no longer necessary.

The author believes that procedures and seizure as set out in civil law, namely Collateral Confiscation can be applied on corruption cases in order to restore result from corruption. The process of Collateral Confiscation can be done during the process of investigation, prosecution, and until the court decision. Surely the state's financial losses had to be calculated and audited by the agency that has authority to calculate the losses that have been incurred as a result of corruption made by the suspect.

Importance of seizure is intended to secure the assets obtained illegally. In terms of asset recovery, it is require to have a concept of restoration of state's financial loss through the concept of progressive law.⁴ On how to prevent crime, according to Nigel Walker can be done in three ways, through the implementation of criminal law (*criminal law afliction*), with no criminal or non penal (*prevention without punishment*), and mixtures of the two.⁵ Referring to the opinion of Nigel Walker, the progressive way to restore state's financial loss financial return is through seizure in a series of actions the investigator. This model of seizure applied by refer to the approach of deprivation *in rem*. In rem approach is effort to return state financial through seized action directed as criminal policies (*criminal policy*) that rational efforts in eradicating corruption. Criminal policy is an integral part of the wider policy which is social policy (*social policy*). The social policies include policies for social welfare (*social welfare policy*) and policies for the protection of society (*social defense policy*).

The role of politic law will determine the applicability of Collateral Confiscation as *ius constituendum* to be a part of positive law which will be applied (*ius constitutum*). Political criminal law means how to exploit or create and formulate a criminal law properly. To implement political criminal law is to conduct a recovery to

¹ In the perspective of civil law regarding the fulfillment of the terms of repayment with the strength of the guarantee under Article 1131 of the Civil Code in principle there are no debts of debtors that secured. Article 1131 of the Civil Code have confirmed it. Under the terms of Article 1132 of the Civil Code, it becomes a material jointly guarantee for all creditors. Thus, in spite of any property or assets of the debtor pursuant to Article 1131 of the Civil Code depends for any engagement made the debtor, but the creditor is not given preferential rights and separatists, but only serves as a creditor "concurrent" together with other creditors. Each one of them got a balanced distribution (pro rata) on the sale of possessions belonging to the debtor in accordance with the size of the individual receivable in accordance with the principle of *pari pasu*. The fulfillment based on the pro rata system defined in Article 1136 of the Civil Code, which reads: "Everyone indebted the same level, are paid according to the balance."

² In addition to the indictment Public Prosecutor require the inclusion of estimates of such losses, which must be supported by evidence that can be logically accepted by common sense. Because Article 143 paragraph (2) letter b Criminal Code requires the description of the indictment must be careful, clear and complete for the offense.

³ In this seizure as though the court has sentenced the defendant first. Prior to the court's own verdict. When we analyze, seizure justify decisions that have not dropped. Strictly speaking, before the court declare the defendant guilty based on the decision. Defendants have been sentenced in the form of seizure of the assets of a dispute or defendant. that's why seizure action is very ekspensional legal action. Seizure is a legal act granting exceptions, the implementation must do justice to all considerations carefully. Should not be applied indiscriminately without good reason, which is not supported by the basic facts.

⁴ Progressive law persuades the nation to review (review) ways to use law in the past. Way to use law is a combination of various factors as an element, inter alia, the mission of the law, the used of paradigm, legal knowledge, legislation, the use of certain theories, to the things that are behavioral and psychological, such as determination and care (commitment), courage (dare), determination, empathy and feeling (compassion). See: Supanto, Arsenal Progressive Law, <http://supanto.staff.hukum.uns.ac.id>. Accessed on August 28, 2015, at 22:10 pm).

⁵ Nigel Walker, Sentencing in a Rational Society, New York, 1972, page. 15.

achieve the best result of criminal law in the sense that it's fair and efficient.¹ Recovery for achieving the goal in restoring the state's financial losses due to corruption, the law requires political support in the establishment of laws which regulates about the implementation of seizure with the approach of *in rem*.

Reviewed from the theoretical approach, the implementation of *in rem* in seizure is supported by the theory of asset recovery. Seizure of corruptor's assets is as part of the legal system of restoration of assets based on the principles of social justice which gives the ability, duties and responsibilities to the state institutions and legal institutions to provide protection and opportunity to individuals in the society in achieving prosperity. Corruption is a violation of the social and economic rights broadly and endemic, it ruins national economy's principles, so based on the theory of asset recovery, it provides authority to the state institutions and legal institutions to do Collateral Confiscation as a guarantee of asset recovery resulted from corruption.

Collateral Confiscation system as a pre-emptive action to rescue suspected illegal asset is also consistent with the theory of protection (*schutznorm*) or also called the doctrine "reality". The theory used in the protection of civil law system can be utilized in the criminal justice system to eradicate corruption, particularly in the implementation of seizure with the concept of civil law. Interests of the victims to be protected refers to the community (read: state) as the aggrieved party of an act against the law. Thus the parties have no basis to do seizure which in principle is the aggrieved party itself (read: victims), in this case is the state.

Reviewed from the beneficiary theory, the implementation of *in rem* in seizure also implies the aspect of goodness and to prevent damage, suffering, or crime, and unhappiness. This purpose of principle to be the norm for actions of an individual or government policy through the legal establishment. Accordingly, many laws that give happiness to the greatest part of society will be judged as a good law. Because it is a legal duty to preserve the good and prevent crime. Specifically to maintain usability.²

The benefit of the Islamic perspective (beneficiary theory) also views the benefit of giving the widest opportunity to all development efforts and the development of the law, as long as it is not contrary to the intended beneficiaries. The benefit to be achieved is certainly consistent with the objectives of syari'ah,³ and agreed that the definition of benefit not only limited to achieve benefit, but also to avoid danger and damage. In some cases, the seizure *in rem* can be conducted because basically *in rem* is an action that addressed to the object and not against *personam* (people), or in this case not requiring the offenders that indicted earlier in the trial. With deprivation addressed to the asset itself, then the subject of offenders may not seen in this case makes the position of the parties related with the asset or even the owner of asset is considered as a third party. Therefore in this case, as the first party is the state through its agency, the second party is the assets, and the third party is the asset owner or the one related to the assets. In some cases, the seizure *in rem* is allowed to conduct because it is an action *in rem* against property, not people, and criminal evidence is not required, or both.⁴ Thus, the assets placed as a subject, not an object. This is a logical consequence of the approach *in rem* in seizure of assets.

This seizure may be called "seizure *in rem*" which is widen in definition. Seizure of this model is useful when the offender does not fulfill the obligation for compensation and the verdict has obtained permanent legal force. Seizure *in rem* which is widen, can be equalized with the concept of guarantee payment in the civil law system.⁵

Seizure in an effort to restore the assets that at glimpse similar with the act of freezing.⁶ Seizure has a wider definition than freezing. Especially seizure "*in rem*" which is widen is also related with reverse

¹ Sudarto, *Capita Selecta Criminal Law*, Alumni, Bandung, 1986, page.153.

² Muhammad Erwin and Amrullah Arpan, *Philosophy of Law*, Publisher UNSRI, Palembang, 2007, p. 42. In another study stated that Bentham argued that the objective of the law is to provide a guarantee of happiness for individuals. Bentham proposed a classification of crimes based on the gravity of the offense and the latter is measured by the resultant distress or suffering to the victims or the community.

³ Overall law (Islam) will eventually lead to a goal to be achieved. The goal is to maintain the benefit of people in the world and the hereafter later. Definition of beneficiaries in a context such as this benefit. While the benefits in terms of legal (general) is part of the objective of the law on the side of justice and certainty. While the benefits (beneficiaries) in the terminology of Islamic law to be related with the objectives of essential laws that have been agreed by legal experts. The objectives are to maintain the essential law of religion, keep the soul, keep the mind, keeping the generation and maintain the property. Fifth it is hereinafter referred to as Kulliyat al-khomsah (five points of law).

⁴ View: Final Report Academic Manuscript Draft Law On Asset Seizure of Crime, Centre for National Development Planning Law of the National Legal Development Agency Ministry of Law and Human Rights R.I, in 2012, page.27-28.

⁵ In civil law systems, not intended to punish, but rather is designed for two things. First, the status quo ante is to restore the position of the injured party. Second, to compensate the injured party due to the damage suffered.

⁶ The definition of Freezing of assets or asset freezing in criminal procedural law is not mentioned. When viewed from the goal, freezing the action more or less equal to the seizure, which both have the intention to secure the assets that in time may be returned to the owners in this country. While understanding the seizure is better known in the criminal procedure law and civil law. In the criminal procedure law, seizure is defined as stated in Article 1 Clause 16 Criminal Code is "a series of actions the investigator to take over or keep them under their control object movable or immovable, tangible or intangible for the benefit of evidence in the investigation, prosecution, and justice"

authentication system.¹ In practice, the reverse authentication system which has been determined do not use the presumption of innocence in absolute terms, but limited and balanced on the other hand the defendant must prove that their asset is not the resulted from crime and the prosecutor must also prove its claim.²

From some of the explanation above, then Collateral Confiscation should become a model of criminal procedure in order to recover the corruption assets by placed at the beginning, middle and end of the investigation conducted by the investigators and the prosecution process conducted by the prosecutor during the trial of the defendant. Rules about Collateral Confiscation can also be included in the eradicate corruption law and asset seizure legislation. If the implementation of Collateral Confiscation become a positive law which is regulated by law, the process of corruption asset recovery could be better and securing more assets from corruption for the benefit of society, the nation and the state.

Collateral Confiscation that was originally applied in civil law due to its benefit is extended to the realm of criminal law corruption, such as fines and compensation in the beginning is the concept of civil law which later gets into law the Criminal Code and Anti-Corruption. The nature of restoration of state's financial loss as a social virtue, not intended to individual's welfare, but the welfare of whole society or the goodness of the public welfare.

Expanding the implementation of Collateral Confiscation in the enforcement of restore of assets allows law enforcers to conduct a series of seizure of asset that is acquired legally by considering actual conditions, such as under the following conditions:

- a. Assets acquired illegally can not be tracked down and certainly not to do seizure.
- b. Assets acquired illegally which has transferred abroad, while there is no cooperation about restoration of asset with the related country.
- c. The defendant did not pay the compensation and fines, but the verdict has obtained permanent legal force and has passed a predetermined time limit.

The author's opinion, Law PTPK need to adopt provisions as contained in Article 1367 of the Civil Code concerning liability (*aansprakelijkheid*)³ in order to restore the compensation optimally.

Lawrence M. Friedmann, as it was quoted by Satjipto Rahardjo,⁴ states that as a system, the law consists of three subsystems that are related in enforcement. The subsystems consist of a *legal substance* (substance / law), *legal structure* (legal structure), *legal culture* (culture law). In more detail, Soerjono Soekanto⁵ analyzes there are several factors that affect law enforcement, namely: factors legislation, law enforcement factor, facilities factor or facilities community factors, cultural factors. The five factors will affect whether enforcement of the law will go smoothly or will encounter certain obstacles. Due to the various factors that interfere, then the law enforcement is difficult to achieve in the total form.

Institutional Collateral Confiscation in the criminal justice process, the act of seizure is different from civil procedural law regimes (file petition of *conservatoir beslag*). In the criminal procedure law the action was taken during the investigation conducted by the investigating authorities, in order to secure assets from corruption. According Satjipto Raharjo, there are several factors that influence the effectiveness of the law, including (1) the resources laws and regulations; correlated with legal requirements both juridical, sociological, philosophical, political and technical; (2) human resources law enforcement, regarding the readiness of the quality and quantity of human resources in the ranks of law enforcement institutions; (3) physical resources of law enforcement, in respect of the procurement of facilities and infrastructure of law enforcement; (5) other supporting resources, such as society's legal awareness and pre-conditions that need to be prepared for the law enforcement to work effectively.⁶

The first and second factor are particularly related with the implemmentation of restoration of state's financial loss in consequence of corruption. Concerning with seizure of asset the corruption, required supporting

¹ Implementation of proof as stipulated in Law No. 31 of 1999 jo. Law No. 20 of 2001 also stipulated in Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering (AML).

² So in practice the system of proof does not run purely by using absolute presumption of guilt which requires the defendant required to prove that he is innocent, but only limited to the origin of the assets which are suspected of being the result of a criminal act.

³ Aanprakelijkheid theory (theory of liability) is a theory to determine who should receive the suit (who should be sued) because of an unlawful act. Against liability on tort committed by others, in the science of law is called Vicarious Liability (responsibility of substitute). The theory of liability on tort committed by others, in the science of law can be divided into three (3) categories: 1. Theory of responsibilities boss (Respondeat Superior / a superior risk bearing theory); 2. Theory of responsibilities replacement instead of superiors for people - people who are (in) dependents; 3. Teori responsibility of substitute goods - goods that are under his charge. See: <http://appeturaruk.blogspot.com>. Accessed on August 27, 2015, at 22:40 pm.

⁴ Satjipto Rahardjo, Law, Alumni, Bandung, 2000, page. 166-167.

⁵ Soerjono Soekanto, Factors Affecting Law Enforcement, Rajawali, Jakarta, 1983, page. 5.

⁶ *Ibid.* page 6.

legislation that effectively applicable beside the readiness of law enforcement officers. Accuracy of the tracing process of asset the corruption to be very significant in order to restore of the state's financial loss.

The third factor that related with the institutions of recovery of assets the corruption . The fact is that at this time, Indonesia has not had a permanent institution that authoritative and permanent in terms of storage of seizure of assets the corruption, each law enforcement institution perform this function.

In the return of corruption assets required more optimal structure of Collateral Confiscation institutional. This structure of Collateral Confiscation institutional conducted as a party who performs the implementation of law in the application stage, starting from the investigation stage to the trial stage. In the structure of the criminal justice system, required togetherness, sincere and altruistic and positive working spirit between law enforcement officials to develop law enforcement duties within the framework of the criminal justice system (*integrated criminal justice system*).⁵⁹ In order to do Collateral Confiscation, surely the law enforcement officers must have the ability to find the suspect's assets, because the corruptors have various ways to get rid of their assets. Thus, there needs to be an effort that is more optimal to get the corruptors' asset in order to return the state's financial loss as much as possible, so that the state is not continuously injured by the criminals act that afflict the society.

Tracing the asset is intended to bring investigators and prosecutors to the information about the corruption assets which are stored or hidden. This stage can also be a collection of evidence. Thus, there is a very close connection between tracing with seizure.

3. Collateral Confiscation Model

As describe in the previous section, that the role of seizure is strategic and important in order to return the asset. Importance of seizure is intended to secure the asset which is illegal. Ahmed Sanusi stated that the seizure emphasis on the disclosure of a criminal offense, while in the context of seizure asset return is intended as part of the process in order to return assets to the beneficiaries. In this regard, the seizure of asset returned had more in common with seizure law in civil procedure law.¹

In the framework of asset recovery, required the concept of financial state return through progressive legal concepts.² In crime prevention, according to Nigel Walker can be done in three ways, which is ways implementation of criminal law (criminal law affliction), without punishment or non-penal (prevention without punishment), and combine both.³ Refer to the opinion of Nigel Walker, a progressive return of financial state through seizure action in a series of investigator actions. Model seizure applied refers to the seized approach *in rem*. *In rem* approach is effort to return state financial through seized action directed as criminal policies (criminal policy) that rational efforts in eradicating corruption. Criminal policy is an integral part of the wider policy which is social policy (social policy). The social policies include policies for social welfare (social welfare policy) and policies for the protection of society (social defense policy).

Collateral Confiscation system as a preliminary action to secure the assets that allegedly illegal are also concurrent with protection theory (*schutznorm*) or also called the doctrine "relativities". The secured theory used in civil law system can be utilized in the criminal eradicate corruption system , especially the implementation of seizure with civil law concept. The victims interests has to be protected refers to the community (read: state) as injure party due to tort. Thus the parties have basis to take seizure action is the injured party itself (read: victims), in this case the state.

The first stage, the allegations of corruption and the potential state's financial losses conducted preliminary investigation and investigation process. From the result of preliminary investigation process is to search and find corruption that can be proceed to investigation stage. After the investigation and have found at least two of evidence and indications of actual or potential state's financial losses can conducted tracing the asset that allegedly illegal. Afterward perform freezing (blocking) in order to avoid unwanted things, such as transfer act.

The second phase, after determining as a suspect, then conducted Collateral Confiscation to all suspect's asset. Certainly the conducted based on tracing results before and the amount of state's financial losses due to corruption. The conducted of Collateral Confiscation based on the local District Court permission.

The third stage, calculation process of state's financial losses performed by the entitled institutions, which is BPK and BPKP. The calculations result is become basis for evidence process in the court that state's

¹ Himawan Ahmed Sanusi, Mechanissm of Corruption Asset returned. Justice Magazine Volume 12 Number : 2 Desember 2012, page.31.

² Progressive law persuades the nation to review (review) ways to use law in the past. Way to use law is a combination of various factors as an element, inter alia, the mission of the law, the used of paradigm, legal knowledge, legislation, the use of certain theories, to the things that are behavioral and psychological, such as determination and care (commitment), courage (dare), determination, empathy and feeling (compassion) .See: Supanto, Arsenal Progressive Law, <http://supanto.staff.hukum.uns.ac.id>. Accessed on August 28, 2015, at 22:10 pm.

³ Niegel Walker. 1972. *Sentencing in a Rational Society*, New York, 1972, page. 15.

financial losses has actually occurred. Based on the calculation of (definitive) state's financial losses, then make adjustment with the entire asset that had been seized. If there is any excess value of the asset seized - from asset that allegedly derived from criminal acts - the rest remove from the list of seizure. On the other hand, if the value of the seized asset is less than the state's financial losses, while there is a asset that is not related with corruption, then the seizure remain in force in order to guarantee payment of compensation.

The fourth stage, when the verdict has obtained permanent legal force - with the evidence of a criminal offense committed - is automatically performed compensation including fines paid through asset that was seized. The mechanism is conducted by the auction process. Unless the convicted person pays directly, which is during the specified time, then the auction process is not performed. If the verdict declared that the defendant was found not guilty and the verdict has obtained permanent legal force, then the asset that had been seized returned to him.

Revision meant to the existence of the provisions of the law of corruption and also to the articles contained in the draft Law on Deprivation of assets and corruption with the substance addition of Collateral Confiscation and setting the provision. The revision of the provision must consider:

- a. The implementation Collateral Confiscation in the criminal justice system, especially in the frame of return the state's financial losses due to corruption, therefore Collateral Confiscation should be regulated by Law with reference of principles Collateral Confiscation on a civil system
- b. Investigators who tracing the assets must have a certainty conviction that supported by the fundamental fact to do Collateral Confiscation.
- c. The reference should be guided towards the treatment of seizure asset are as follows:
 - 1) The main purpose of Collateral Confiscation same as a civil law system that the concerned not transfer or assess the assets to third party. This has been one of the goals Collateral Confiscation is to maintain the integrity of the existence of asset or wealth during the examination process lasts until the verdict permanent legal force.
 - 2) The rights of seizure asset still owned by the concerned until execution of the verdict.
 - 3) Implementation of seizure must be announced to the public, with the provision that after the date of announcement of the seizure, has outlined the legal consequences, which is:
 - a) By law prohibited the suspect / defendant and his family to sell, transfer of seizure the asset to anyone.
 - b) The violation of the legal consequences as follows:
 - (1) The conduct of a sale or waiver of the seizure asset is void by law. As a result of void by law, the status of the asset is returned into the original state as of seizure asset, so that the actions or deeds of transfer of rights on assets deemed never happened (never existed).
 - (2) If a suspect / defendant / families affected by Collateral Confiscation conducted sale or transfer of rights and asset into a security object, punishable under Article 231 Penal Code. Criminal acts punishable by Article 231 of the Criminal Code are in the form of crimes by deliberately removing the goods have been sentenced to seizure according to the rules applicable legislation.¹
 - 4) The object that charged Collateral Confiscation must clearly and definitely, both the nature, the location, the measure of which is related to the identity of asset. Thus, the seizure of liability party must meet the following requirements:
 - a) Presented the documents related to the identity of the asset (asset documentary evidence).
 - b) Positive affirmative that is the status of asset belong to the suspect or the defendant.²
 - c) Seizure Parties should not mention the object of seizure in general. Because seizure is in the interests of judicial proceedings, the parties must expropriators that anonymity is clear and definite.
 - 5) The seizure should be based on strong reasons, their relevance and urgency of seizure conducted in related case. Their concern or allegation that the suspect or the defendant tried to find a way to darken or alienate their assets, which is done during the process of the case investigation. Concerns or presupposition it must be real and have an objective nature, in which:
 - a) The investigator or prosecutor should indicate the facts that the suspects or defendants to darken or alienate its assets, during the process of the case investigation.
 - b) At least, the investigator or the prosecutor showed any objective indication about in an effort to

¹ Criminal act stipulated in Article 231 of the Criminal Code is an act of seized good in the form:., release the seized goods, either sell, or transfer the goods that became the object of dispute, releasing the goods on the orders of the judge, and hide the goods are released from encumbrances.

² According to the practice - the civil system - which already exists, is considered sufficient if it has been able to explain the elements, nature, location, and measure, coupled with elements of positive affirmation that the item property concerned or at least within his force

- eliminate or alienate their assets.
- c) The reason can be objectives if they are equipped by facts or real clues
 - d) Collateral Confiscation automatically becomes execution, if permanent legal force. Therefore Collateral Confiscation automatically has legal force executorial beslag thus no longer necessary stage of the execution process.
- 6) Seizures can be done at the time tracing asset, preceded by blocking the action of certain objects. The Imposition of Collateral Confiscation also must first, the establishment of status and possessions suspects allegedly obtained from corruption. Seizure shall do without the real calculation of the state's financial losses from the BPK and BPKP.
 - 7) To all the assets owned by a suspect can be charged Collateral Confiscation. It certainly has been predicted by the investigator about the value of state's financial losses, although BPK and BPKP not determined the real calculation yet.
 - 8) If the defendant is not guilty of corruption and has permanent legal force, then the asset that have been charged Collateral Confiscation restored and returned to him. Conversely, if the verdict declared the defendant guilty committing corruption and permanent legal force, then the asset seized by the state, including the payment of compensation and penalty as decided by the courts.

In order to support the enforceability of Collateral Confiscation, required special institution that rescue and depository institutions of property assets corruption. This institution is emforced to accommodate the entire result of Collateral Confiscation on the stage of investigation based on research and tracking offender's wealth. Placing the corruption assets in a special institute will be more effective to rescue the state's financial losses. When the verdict has permanent legal force, then the process execution of compensation payment is no longer experiencing technical or procedural obstacles. The payment of compensation incorporated as a state revenue Non APBN. The process of security seizure that entered into the institution of rescue and depository of assets until the execution of the compensation and the entry into the state revenue non APBN become the Audit Board of the Republic Indonesia (BPK RI) supervisory duties.

D. CLOSING

1. Conclusions

From the results of the discussion and analysis can be drawn a conclusion, which is as follows:

- a Constraints affecting the difficulty of efforts to recover assets from corruption, influenced by the structure, Institutional corruption eradication are still fairly weak in implementation of the implementation of the law. The factors of substance, the absence of legislation that supports the optimization of seizure of assets that suspected to be obtained illegal. There are differences about the concept of classification of the offense, Varicosity definition of state finance, different perceptions about the state finance and formal offense. Moreover, frequent loss calculation varied or diverse country. Such conditions would create legal uncertainty and complicate the implementation to return of state's financial losses. In the aspect of legal culture, people are still apathetic and permissive with the reluctance to report the corruptor's asset even protect and demonstration at the time of executions of asset the corruption. Culture of law enforcement officials also has not been able to avoid the effects of corruption and collusion with the parties that relevant matter. This worsened the image of law enforcement in the society.
- b Return on asset acquisition to corruption become a problem because of the convict against his property already transferred and concealed away a day, even accidentally selecting subsidiary imprisonment. Needed a way to resolve the issue by applying the "Collateral Confiscation " in the process of investigation, prosecution and trial of corruption that aims to preserve the integrity of the existence of corruptor wealth during the examination process until the verdict has obtained permanent legal force. The Collateral Confiscation effort is conducted to ensure that there is no bad faith (bad faith) to escape and evade fulfilling the responsibility of paying fines and compensation according the verdict as their obligations. Implementation of Collateral Confiscation is based on certainty, justice and benefit. There is causality relationship in implementation Collateral Confiscation with the guarantee law protection principles. Legal protection in this matter is the state's interest in order to restore state financial lost due to corruption .In the term of interest ,Collateral Confiscation reflects a very high utility by minimizing unfavorable (affliction), due to the behavior of corruption that has eliminated the rights of the social economy. Implementation of Collateral Confiscation have gained theoretical arguments and an extension of the meaning of *conservatoir beslag* in Indonesia civil code and then applied in criminal procedural law.
- c The concept of Collateral Confiscation known in civil code, can be developed as a seizure for the execution of criminal compensation in corruption cases. An UNCAC provision in 2003 which has been ratified by Indonesia with Law No. 7 of 2006 has opened up opportunities for the Indonesian legal system to adopt the principles of *in rem* in the Act of Corruption Eradication and the draft Act of Seizure Asset. The concept of seizure that was formerly used for civil law adopted to apply the criminal law. Expansion seizure author

intent is to apply a concept model for seizure (conservatoir beslag) as known in civil law. Collateral Confiscation conducted during the process of investigation, prosecution and trial of corruption which already have the suspect and have a minimum of two evidences. In order to improve the synergy of institutional eradication of corruption must be supported by their institution asset deviation to corruption that is independent and transparent. With the existence of the Depository institutions assets will be more efficiently to utilize storage assets and to secure the state's financial losses. When verdict has obtained permanent legal force and declared the acquisition of the corruption assets taken by the state, it will be easier in administrative operational techniques incorporated as one of the State Revenue Non APBN.

2. Recommendation

On this occasion the authors convey advice as follows:

- a Institutional aspects of corruption law enforcement improved facilities, infrastructure and salary in order to work well in tracing asset and asset recovery to return state's financial losses due to corruption. Rule legislation that governing asset recovery of corruption should be certainty, so the investigator and the prosecutor at the time of the seizure and execution assets of corruptor never hesitate and ambiguous. Institutional synergy between law enforcement eradication of corruption that related to the implementation of asset tracing as part of asset recovery. In order to implement the necessary Collateral Confiscation required the unity implementation of tasks among law enforcement officers that tied in the criminal justice system (Police, Prosecutor and Justice) coupled with the Corruption Eradication Commission. The exchange of information and data that obtained is always confirmed among law enforcement officers through effective coordination.
- b Required changes and improvements of law substance related with the acquisition of corruption asset returns include the definition of state's financial loss, state finance, the authority to calculate state's financial loss and include the concept of Collateral Confiscation into legislation to eradicate corruption and seizure of corruption assets. Applicability of Collateral Confiscation is also applied to ensure the payment of fines and compensation. Thus, it will lead to certainty of receipt of payment of fines and compensation.
- c The Collateral Confiscation conducted during the process of investigation, prosecution and trial of corruption which already have the suspect and have a minimum of two evidences Institution of Collateral Confiscation, in the implementation of asset recovery, requires a system for the identification, classification, storage, management, and release of assets. Identification and classification was related with process of searching the asset (asset tracing) are performed on the stage of the preliminary investigation and investigation of corruption then become the basis for enactment of Collateral Confiscation that will be conducted. Also required institutions and management of storage corruption assets that formed specifically by the government. The presence of the depository institution assets also integrating with various authorities during storage assets are scattered in various law enforcement agencies.

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