



Disoriented Law Enforcement Against Corporations Commit Money Laundering

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Abstract: Money laundering is an extraordinary crime that has a wide impact, not only threatening the stability of the economy and the integrity of the financial system, but also endangers the joints of community and state life. Money laundering can be committed by an entity called a corporation, this is evidenced by the recognition of the corporation in Act Number 8 of 2010. In law enforcement against corporations that commit money laundering, the corporation may be sentenced to an additional crime of dissolution of the corporation, but the criminal dissolution of the corporation has an impact on an innocent person such as workers or laborers who depend on their lives to the corporation, so it is disoriented between enforcing the law or not that commit money laundering. The purpose of this study is determine the law enforcement against corporations that commit laundering acts that are substantive justice, so that appropriate punishment can be known in law enforcement. This research is legal research, that is research that seeks the truth of coherence, using statute approach and conceptual approach. The results of this study concluded, in law enforcement against corporations that commit money laundering can be done 3 (three) approaches, first non-punitive punishment, second vicarious liability and identification theory approach and third restorative justice approach with due regard to the principle of efficiency and justice that reflects the values of objectivity, honesty, impartiality, and rationality.

Keywords: Law Enforcement, Corporate, Money Laundering.

1. Introduction

At first responsibility corporate was limited in civil liability only. As a result of the strong influence of the theory of fiction pioneered by Carl Von Savigny who essentially said that the legal entity was only a fiction or legal imagination. A legal entity is a fiction, that is something that does not really exist, but people create in their imagine a legal entity that as a subject of law is the same as a human being.¹ However, along with the development of various kinds of crimes on various sector, responsibility corporate must be developed insuch a way that corporations must be held criminal liability so that the corporation can be by criminalizing corporate actions through legal instruments of the law by declaring it a criminal offense.

The changes of civil corporate responsibility to criminal responsibility against the corporation is a tendency of corporations leaves its original purpose to of human interests, as seen from the tendency to act in accordance with criminal law. At least three

¹ T Mangaranap Sirait, *Hukum Pidana Korporasi Dan Sistematisasi Penegakannya Secara Integral* (Deepublish 2022). H. 38.

stages that describe the transformation of corporations and subjects of civil law into subjects of criminal law², namely :

1. Characterized by efforts so that the nature of the offense Corporation Limited to individuals (*naturalijke person*). If a crime occurs in a corporate environment, so the crime is considered committed by its corporate controller;
2. The corporation is recognized to be able to commit a criminal offense but can be held criminally liable, in this case it is stated expressly in the statute;
3. The beginning of direct corporate responsibility began during and after World War II. In this stage, the possibility is sue the corporation and ask for liability accord to the law .

Along with the development in the information technology, trade, health, and traffic related commercial businesses, crime is growing rapidly with a variety of sophisticated and complicated modes of operation carried out by organizer corporation. So to answer the development of crime in all sectors of life, the corporation must be legal subject in criminal law and then must be equal with human being with the consequent that can be criminal liability to corporate.

In basically, there are 3 grand theories on which corporations are held criminally liable. The first is based on the theory of corporate criminal liability strict liability the main element is only *actus reus*, not *mens rea*. The second theory is that vicarious liability that is a substituteliability, which is not personal fault, but responsible of other people's actions. The third theory is the identification theory of the action and will of the director is also the action and will of the corporation.³ Then the *mens rea* of the director which is a reflection of the corporation itself is a criminal offense committed by the corporation.

The regulation of criminal liability models in Indonesia is varies, depending on the act that recognize subjects corporate and regulated in criminal provisions, ranging from narcotics act, eridication corruption act, prevention and eradication money laundering act.

Criminal by corporations that committed in the field of Economics and finance are criminal in the scope of the economy, which can be called economic crimes. Nowadays corporations increasingly important role in people's lives, especially in the economic field.⁴ Criminal in the economic field that endanger the life of the nation and state, one of them is money laundering. Which is behind it money laundering is money laundering not only threatens the stability of the economy and the integrity of the financial system, but also can endanger the joints of community life, nation, and state based on Pancasila and Constituion of Republic Indonesia 1945, so it is necessary that the existence of Act Number 8 of 2010 to prevent and eradicate money laundering.

Historically, money laundering can't be separated from the events of the 1920, at that time the perpetrators of organized crime in the United States by that money laundering with crime business the name is laundry who pioneered by Al Capone, a gangster and mafia. They are establish laundry business, the purpose is save the illegal

² Ibid. H. 39–40.

³ I Dewa Made Suartha, *Hukum Pidana Korporasi: Pertanggungjawaban Pidana Dalam Kebijakan Hukum Pidana Indonesia* (Malang: Setara Press, 2015). H. 92.

⁴ Marco Parasian Tambunan, "Pertanggungjawaban Pidana Korporasi Dalam Tindak Pidana Pencucian Uang," *Mimbar Keadilan, Jurnal Ilmu Hukum* 113 (2016). H. 101.

money. Since then, disguising the origin of the money proceeds crime is called money laundering.⁵

Money laundering is a new crime in the Indonesian criminal law system. Criminalization of money laundering has just begun the Act Number 15 of 2002 on Money Laundering. This Act was formed with the consideration among others, that crimes that produce large mounth of wealth are increasing, both crimes committed within the boundaries in Republic of Indonesia and those that cross territorial boundaries. It is also considered that the origin of the property that is the result of the crime is hidden or disguised in various ways known as money laundering. However, Act Number 15 of 2002 is ineffective so it needs to be adjusted by repealing and replacing it with Act Number 8 of 2010.⁶

Based on Article 1 point 1 of Act Number 15 of 2002 (has been repealed), money laundering is defined as the act of placing, transferring, paying, spending, donating, depositing, bringing a broad, exchanging or other crime of property that is known or suspected to be the result of a criminal offense with a view as the origin of wealth.⁷ However, based on Article 1 Number 1 in Act Number 8 of 2010, the meaning of laundering is changed to any act that meets the elements of a criminal offense in accordance with the provisions of this act.⁸ In other words, basic of that justifies the criminalization of money laundering that basically everyone is prohibited enjoying wealth obtained illegally, so that money laundering is appropriate and worthy of being criminalized by act.

Act Number 8 of 2010 on the Prevention and Eradication of money Laundering, Adresat is formulated with the terminology "every person" in the criminal provisions, while every person in Article 1 Number 9 is defined as an individual or corporation, and based on Article 1 Number 10 corporations are defined groups of people and/or organized wealth, both a legal entity and not a legal entity.⁹ Its a limited company, foundation, cooperative, firm partnership or *commanditaire vennootschap* (CV).

Corporations are likened to a double-edged sword, one side of the corporation in the traffic of the country's economy has a central and vital role, because corporations are able to improve the country's economy and improve public welfare and are even able to create as many jobs as possible which is certainly beneficial to workers. However, on the other line, corporations can become common enemies because there are corporations that carry out their functions in making profits with unhealthy ways and unlawfull, such as one of them by committing certain crimes as a predicate crime and then continued with the follow-up crime is namely money laundering which of course has the potential to principal criminal as fine punishment and may be followed by the imposition of additional criminal by the judge in the form of dissolution and/or prohibition of the corporation.

⁵ Ruslan Renggong, *Hukum Pidana Khusus: Memahami Delik-Delik Di Luar KUHP* (Jakarta: Prenadamedia, 2019). H. 92.

⁶ *Ibid.* H. 92-93

⁷ *Ibid.*

⁸ Pasal 1 angka 1 Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

⁹ Pasal 1 angka 10 Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

In line with that, Presecutor General St. Burhanuddin reminded his staff to be careful in applying the law to corporations. According to him, don't let the corporation be dissolution punishment because it will have an impact on innocent people such as workers, shareholders, consumers and other parties who depend on the corporation, including the government who are victims as injured parties if the corporation is get dissolution punishment.¹⁰ So it is can be disoriented between enforcing the law or not enforcing the law.

Based on all of the above, further study needs to be done use the problem of law enforcement against corporations that commit money laundering that is substantive justice, where law enforcement carried out by law enforcer should be attention the principle of efficiency and justice, so as not to harm the other parties outside the corporation.

The purpose of writing this paper is intended to know the law enforcement against corporations that commit money laundering substantive justice, so it can be known how fair law enforcement and the appropriate punishment imposed on corporations that commit money laundering or in other words this study will provide the prescription of correct law to the legal issues as outlined in the formulation of the problem.

2. Method

Preparation in this study using legal research. Legal research is research that finds the truth of coherence, namely whether the rule of law is in accordance with legal norms, and whether norms in orders or prohibitions are in accordance with legal principles, and whether someone's actions are in accordance with legal norms or legal principles.¹¹ This reseach used statute approach and conceptual approach. Primary legal materials used in statue that related to money laundering and will be linked to secondary legal materials in the law books, journal articles and so forth, which will be found legal concepts that are closely related to the subject of this study.

3. Law Enforcement Against Corporations That Commit Money Laundering Based on Substantive Justice

Law enforcement is the activity of translating and realizing the wishes of the law which is also the thoughts of the formers of the act (aspirations of the community) that have been formulated in the legal regulations. The law should be viewed as a human effort directed towards a specific goal. To interpret the purpose must be greatly influenced by the level of professionalism of law enforcer themselves. Therefore, law enforcer as juridical technicians should have expertise and skills in understanding what the wishes of the law in the relevant regulations. It is law enforcer who know in how to

¹⁰ Yulida Medistiara, "Jaksa Agung: Hati-Hati Sanksi Penutupan Korporasi, Bisa Berdampak Luas" Jumat, 19 Agustus 2022, 22:26 WIB, <https://news.detik.com/berita/d-6244040/jaksa-agung-hati-hati-sanksi-penutupan-korporasi-bisa-berdampak-luas>.

¹¹ Peter mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005). H. 47.

make the law a reality with attention to aspects of certainty, justice and legal protection, and as well other goals to be achieved.¹²

La patra said the criminal justice system as a criminal law enforcement, namely the interaction, interconnection and interdependence between the criminal justice system and its environment. Therefore, when talking about criminal law enforcement, it is closely related to the criminal justice system in Indonesia.¹³ Because the criminal justice system is an instrument for enforcing the law itself. V.N. Pilai defines the criminal justice system as the police, prosecutors, courts, and correctional institutions that are component parts of the criminal justice structure described as related to each other.¹⁴ So, investigators in the Police, Public Prosecutors in the prosecutor's office and judges in court determine whether law enforcement is able to realize the desires in the law itself, both certainty, justice and legal protection.

When talking about the criminal law enforcement who carried by subject the criminal justice system, then this is criminal procedural law to implement the material criminal law itself. How many provisions in Act Number 8 of 1981 on Criminal Law Procedure or here in after referred to as the Criminal Procedure Code, there are several provisions that isn't accordance with money laundering procedure law, that is the investigation of money laundering is carried out by investigators of origin. For example, the prosecutor office is investigating the original crime, so investigators from the prosecutor office will also investigate the money laundering. Other case, a police investigator or Corruption Crime Eradication Commission (KPK) investigator who investigating the original crime, so a police investigator or Corruption Crime Eradication Commission (KPK) investigator who will investigate the money laundering crime itself. In the event that the investigator finds evidence there has been a crime of money laundering and a crime of origin, the investigator combines the investigation of the origin crime with the investigation of money laundering crime and notifies to Center for Reporting and Analysis of Financial Transactions.¹⁵

In the prosecution phase, the public prosecutor according to Act Number 8 of 2010 is obliged to submit the case file of money laundering to the District Court no later than 30 working days from the date of receipt of the case file that has been declared complete. In the event that the public prosecutor has submitted the case file to the District Court, the chairman of the District Court shall form a panel of judges for the case no later than 3 working days from the receipt of the case file.¹⁶ In the judicial process of money laundering criminal, there is a deviation from the principle of proof *actori incumbit onus probandi*, which means that the judge ordered the defendant to prove that the assets related to the case are not related to the criminal offense. This provision confirms that Act Number 8 of 2010 recognizes the existence of reverse proof, where the asset is not from criminal, but from something that is lawful or in ways that are not against the law.¹⁷

¹² Kadri Husin dan Budi Rizki Husin, *Sistem Peradilan Pidana Di Indonesia* (Jakarta: Sinar Grafika, 2016). H. 41.

¹³ *Ibid.* H. 51.

¹⁴ *Ibid.* H. 10.

¹⁵ Ruslang Renggong, *Op. cit.* H. 96.

¹⁶ *Ibid.*

¹⁷ *Ibid.* H. 97.

Against the suspect at the investigation stage and the defendant who will be prosecuted in court through the prosecution process referred to in the crime of money laundering committed by the corporation, the suspect Corporation at the investigation stage and the defendant Corporation in the examination in court, then each inspection are based as stipulated in Article 11 paragraph (1) *jo.* Article 13 of Supreme Court Rules Number 13 of 2016 represented by the corporate board.¹⁸

However, all itu of these procedures are procedural justice only, law enforcement that has run so far seems strong is still oriented in the form of procedural justice which places great emphasis on aspects of regularity and the application of legal formalities alone. Accordingly, legal engineering has become a fairly strong phenomenon in almost every law enforcement in the country.¹⁹ Procedural justice is believed to only refer to the Act only, so that as long as the Act is realized justice is achieved but not necessarily the achievement of a sense of moral justice.²⁰ The moral meaning in question is not only limited to sexual and crimes such as stealing, killing and others. But the moral in this case also includes the sense of love and togetherness in maintaining community life as a mode of survival for creatures called humans.²¹

But far more substantial than the procedures in law enforcement by law enforcer against corporations that commit money laundering is the enforcement of laws that bring justice to all parties, don't let the enforcement of laws against corporations that commit money laundering result in harm to other innocent parties.

Innocent parties such as workers or laborers, consumers and third parties who cooperate with the corporation or other parties who depend on the corporation. Because if the law enforcement of money laundering committed by the corporation is delegated to the court, then if the judge who corrected, judges and decides can't realize the values of Justice comprehensively, then the judge has the potential to impose additional crimes against the corporation as Article 7 Paragraph (2) in the form of freezing part or all of the activities corporate business or dissolution and/or prohibition of the corporation.²² This will certainly have an impact on innocent people such as workers who depend on their lives to the corporation, if the corporation is closed or dissolved, the employment relationship between the corporation and the worker will be broken it self. Corporations that commit money laundering crimes, but innocent or are got to the consequences by being additional crimes.

As stated by Nigel Walker, that criminal law should not be used for (1) the purpose of retaliation; (2) against acts that do not cause victims and losses; (3) if there are still non-penal legal means that are more effective and efficient; (4) when the negative impact of crime is greater than crime; (5) if it does not get strong public support; (6) if it has been calculated will not be successful or will not be implemented. Beside that, Jeremy

¹⁸ Peraturan Mahkamah Agung Nomor 13 Tahun 2016 tentang Tata Cara Penanganan Perkara Tindak Pidana oleh Korporasi (Lembaran Negara Republik Indonesia Tahun 2016 Nomor 2058).

¹⁹ Bambang Sutiyoso, "Mencari Format Ideal Keadilan Putusan Dalam Peradilan," *Jurnal Hukum* No. 2 Vol. (2010): 217–32. H. 218.

²⁰ Irwan Yulianto, 'Tinjauan Yuridis Prinsip Ultra Petita oleh Mahkamah Konstitusi Sebagai Upaya Mewujudkan Keadilan Substantif Di Indonesia' (2017) XV *Jurnal Ilmiah Fenomena* 1614. H. 1616.

²¹ Peter Mahmud Marzuki, *Teori Hukum* (Jakarta: Kencana, 2020). H. 17.

²² Pasal 7 ayat (2) Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

Bentham said if crime don't used or realize with groundless, needless, unprofitable, or inefficacious.²³ From Nigel Walker and Jeremy Bentham said in relation to the criminal prosecution of corporations that commit money laundering, then do not let the criminal prosecution of the corporation have an impact on innocent people such as workers who will actually have a greater negative impact and bring losses. You can imagine a company that employs workers or laborers 10 thousand (ten thousand) people, then the company committed money laundering, then the company was sentenced by Judge additional criminal dissolutionan, then it can not be imagined how the fate of workers or laborers as many as 10 thousand (sten thousand) innocent people, but affected by the punishment itself.

Therefore, the judge in imposing additional penalties against corporations that commit money laundering must be wise and prudent. Moreover, the formulation of additional criminal provisions as referred to in Article 7 Paragraph (2) of Act Number 8 of 2010 is formulated facultatively, meaning that the additional criminal does not have to be imposed, because in the formulation of the article the word "can", which means it must not be done, moreover the additional criminal cannot be imposed if the main criminal not sentenced in advance. Therefore, the judge in examining, prosecuting and deciding corporations that commit money laundering must be wise and prudent and use his conscience not to impose additional penalties in the form of dissolution of the corporation or anything that harms innocent or innocent parties.

When talking about the punishment of corporations, then Penology is auxiliary science that has an important role and provides input to the criminal law, especially regarding the conviction. Penology is the science that studies about criminals in relation to punishment, that is the process of applying criminal punishment to the criminal offenders. According to Widodo, the expression Penology also includes the definition of punishment for criminals and some related matters, namely:

- a. Justification for the existence or punishment;
- b. The basis for justifying the authority of the state in punishing subjects of law;
- c. Purpose of punishment;
- d. Urgency of punishment; and
- e. Effects of punishment for the convicted and the community.²⁴

Therefore, it can be argued that through penological studies in addition to analyzing the effects of punishment both individually and socially new types of crimes can also be created and appropriate actions applied to someone who is sentenced by taking into account the characteristics of personality, social environment, and motives for committing crimes.²⁵

The punishment of the corporation must not have a negative effect or negatif impact on the wider community, therefore the Criminal Law Policy is in concreto, it is necessary to consider what criminal punishment are appropriate and fair imposed on the corporation. In law enforcement and punishment of corporations that commit money laundering, economics analysis of law can be new view for analysis and new legal break

²³ Didik Endro Purwoleksono, *Hukum Pidana : Untaian Pemikiran* (Surabaya: Airlangga University Press, 2019). H. 159.

²⁴ M. Ali Zaidan, *Kebijakan Kriminal* (Jakarta: Sinar Grafika, 2016). H. 46.

²⁵ *Ibid.* H. 47.

throughs in the view that the law is no longer seen as “right or wrong”, but as a “risk and benefit”.²⁶ Vilfredo Pareto's Efficiency by Vilfredo Pareto, states that an outcome is more efficient when one person makes it better, while not making others worse. The principle of efficiency in law both in the framework of law formation and law enforcement can be used as a facilitator an economic facilitator aimed at advancing the welfare of the community. Efficiency in this case is defined as a state in which the well-being of an individual or group increases without necessarily decreasing the well-being of other individuals or other groups.²⁷ Therefore, through the principle of efficiency economics analysis of law in relation to the conviction of corporations that commit money laundering, the conviction should not negate the welfare of innocent people such as workers or laborers when the corporation is sentenced to the additional crime of dissolution of the corporation. Other impacts on the state when the corporation is dissolved will also have an impact the country's economic rate, whether it is in state recipients in the form of taxes and non-tax state revenues that should be received from the corporation.

Money laundering is a crime that is categorized as extraordinary crime has a tremendous impact on the joints of the nation's economy and the state. Even money laundering often associated with corruption, the results of corruption by the perpetrators are hidden or disguised in such a way that the results of corruption do not seem to be obtained against the law. Therefore, it is appropriate if in Article 2 Paragraph (2) letter a of Act Number 8 of 2010 corruption put the hierarchy in the first order, because corruption is a case that gets preferential treatment than other criminal cases.

But if the counter measures are too reckless, then the results of the countermeasures are definitely not in accordance with what is expected by legal, such as negating the welfare of innocent people such as workers or laborers. Therefore, it is important to determine the appropriate punishment or criminal punishment imposed on corporations that commit money laundering for the realization of substantive justice for all parties, therefore the author offers several approaches in law enforcement against corporations that commit money laundering, namely :

3.1. Non-Punitive Approach

First, the use of criminal punishment that are non-punitive by imposing fines and administrative penalties is one of the criminal punishment or actions that are economically more suitable for the accountability of legal entities or corporations that are more involved in economic crimes,²⁸ such as money laundering. Law enforcement at the judicial stage, the judge is faced with the choice of whether to impose a crime a determined by act, or will provide a non-punitive verdict such as fines and administrative crimes such as revocation of licenses in additional crimes against corporations that commit money laundering crimes. Non-punitive verdict is a verdict handed down by a

²⁶ Zainal Arifin Mochtar dan Eddy O.S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori Asas Dan Filsafat Hukum* (Jakarta: Red and White Publishing, 2021). H. 358-359.

²⁷ *Ibid.* H. 360

²⁸ M. Ali Zaidan, *Op. cit.* H. 117.

judge in a trial process but does not impose a crime that must be carried out, such as imprisonment.²⁹

In the event that the corporation is unable to pay the fine imposed by the judge, then under Article 9 paragraph (1) the fine is replaced by the seizure of assets belonging to the corporation or the Controlling Board of the corporation whose value is equal to the fine imposed.³⁰ However, if the assets owned by the corporation or the Controlling Board of the corporation that have been seized as a substitute for the fine in question are not sufficient to cover the fine imposed, then the fine is replaced by a penalty of confinement against the Controlling Board of the corporation that takes into account the fine that has been paid, with 1 (theone) year 4 (four) months.³¹

3.2. Vicarious Liability And Identification Theory Approach

Second, the conviction of corporations that commit crimes of money laundering by using the concept of vicarious liability which requires the principle of delegation of authority and the principle of labor action is the action of the employer and the concept of identification theory that identifies the actions and will of the director is also the action and will of the corporation³², using two concept of corporations that commit money laundering can be imposed on the controlling personnel of the corporation. With the sentencing of corporate controlling personnel who are considered to have committed money laundering, it is hoped that corporate controlling personnel from negative thinking, wrong thoughts and free them from the social reality in which they are shackled.³³ Criminal imposition against corporate controlling personnel is also an alternative solution to avoid additional criminal charges in the form of corporate bribery, especially the concept of criminal liability against corporations in Act Number 8 of 2010 on Article 6 paragraph (1) formulated "and/or" against corporations and/or corporate controlling personnel, which more fully setup:

- (1) In the event of money laundering as referred to in Article 3, Article 4, and Article 5 committed by the Corporation, sentence was imposed against the Corporation and/or Personnel the controlling personnel of the Corporation.
- (2) Sentence was imposed Criminal against corporations for money laundering:
 - a. Conducted or ordered by Personnel the controlling personnel of the Corporation;
 - b. Carried out in order to fulfill the purposes and objectives of the Corporation;
 - c. Performed in accordance with the duties and functions of the perpetrator or commandant; and
 - d. Done with the intention of providing benefits to the Corporation.³⁴

²⁹ *Ibid.* H. 111.

³⁰ Pasal 9 ayat (1) Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

³¹ Pasal 9 ayat (1) *junto* Pasal 8 Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

³² I Dewa made Suartha, *Op. cit.* H. 87 dan 92

³³ Sahetapy dalam Muladi dan Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Bandung: Alumnus, 1992).

³⁴ Pasal 6 ayat (1) Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian (Lembaran Negara Republik Indonesia Tahun 2010 Nomor 122).

From this provision, the judge can impose a crime against personnel the controlling personnel of the corporation only, without having to impose a crime against the corporation itself. In the event that the crime must be imposed on the corporation according to the consideration of the judge, to avoid additional criminal dissolution of the corporation, the appropriate punishment criminal according to the author are non-punitive criminal sanctions punitif such as fines and administrative punishment as mentioned first solution above.

3.3. Restorative Justice Approach

Third, once again criminal law must also pay attention to the principle of cost and results (cost-benefit principle).³⁵ If not done carefully, it will be a waste of budget, in the sense that there is no balance between cost and benefit which is one of the principles that must be considered in law enforcement.³⁶ The enforcement of the law against corporations that do follow the criminal laundering money also have to pay attention to the cost and benefit, follow the criminal laundering money the nominal loss of the country is not so great, its 50 million rupiah that obtained by the corporation or loss in the pain state, if the criminal laundering money which is imposed delegated to the court, then the cost of the enforcement of the law begins from the stage of the investigation until the implementation of the verdict of the court is not to be balanced with the result that would be achieved, considering the cost of using the means of penal requires the cost of which is not little, and this not efficient. Therefore, if there are corporations that commit money laundering crimes whose nominal losses suffered by the state are not so large, it is enough to be resolved with a restorative justice approach using discretionary instruments that can be carried out by investigators at the investigation stage by stopping the investigation or prosecutors at the prosecution stage by stopping the prosecution after the corporation assets obtained from criminal of origin and money laundering. Settlement using restorative justice approach to corporations that commit money laundering on the basis of consideration of cost and benefit prices in order to tackling crime for criminal policy can be efficient.³⁷

Restorative Justice in question is the paradigm criminal law today. Eddy O.S. Hiariej stated, that currently criminal law paradigm is no longer oriented aspek towards retributive or retaliatory aspects but rather emphasizes aspek corrective, rehabilitative and restorative aspects. Corrective relates to the mistakes of the perpetrator that must be corrected. While rehabilitative is in order to improve the perpetrator so as not to repeat this actions in the future. While restorative on the recovery victims of crime.³⁸ Given the characteristics of laundering is a crime whose victims have an indirect impact (indirect victim), the recovery of the corporations that commit money laundering is recovering losses suffered by the state or the results obtained of crime, both from predikat crime and follow-up crime. In addition, modern criminal law enforcement prioritizes users of the follow the money and follow the asset approach by rescuing state

³⁵ Dey Ravena dan Kristian, *Kebijakan Kriminal (Criminal Policy)* (Jakarta: Kencana, 2017). H. 203.

³⁶ M. Ali Zaidan, *Op. cit.* H. 157.

³⁷ *Ibid.* H. 347.

³⁸ I Made Walesa Putra, 'Ideologi Pancasila Sebagai Dasar Tujuan Pemidanaan Dalam Pembaharuan Hukum Pidana Nasional' (2022) XVII Vyavahara Duta 55. H. 58.

financial losses and state assets that have been hidden or disguised, than in the follow the suspect approach which only seeks to find the perpetrator and then retaliate (retributive).

The regulation of restorative justice in Indonesian law is only found in Act Number 11 of 2012 concerning the juvenile criminal justice system, which is not intended for corporations that commit money laundering crimes. So there is a juridical problem because is no law that becomes a legal that requires corporations to recover the proceeds of laundering, so there is a legal vacuum. It is legal vacuum that law enforcer can use its discretion by not delegating cases to the court, but obliging the corporation to restore the situation as before, either at the investigation or prosecution stage. In principle power discretion is owned by all elements involved in law enforcement.³⁹ Therefore, it is not surprising that the scope of discretion in Act Number 30 of 2014 also includes government agency and/or government official who organize government functions within the scope of Justice (judges) and executives (investigators and prosecutors).⁴⁰

The terminology of formal legal discretion is contained in Article 1 Number 9 of the Administrative Act of government which defines “discretion is a decision and/or action that is determined and/or carried out by government officials to address concrete problems in government administration in terms of legislation that provides options, does not regulate, is not complete or unclear, and/or the existence of government stagnation”.⁴¹ Therefore, the discretion of both investigators and prosecutors not to delegate cases of money laundering committed by corporations by requiring them to recover state financial losses or return the results of money laundering is based on legislation that does not regulate it. In addition, the discretion is also based on overcoming the stagnation of government in the field of Finance and law enforcement by the executive organs, because on the other hand, such law enforcement discretion can help reduce the losses of accumulating cases in court and reduce the losses on the financial budget in law enforcement. So do not let the criminal offense of money laundering results or losses that are not so great delegated by the court, so it is not balanced between the costs incurred in the law enforcement of with the results to be achieved, it is based on the cost and benefit principle in law enforcement that has been described previously.

According to Saut P. Panjaitan, discretionary or *freies ermessen* is a form of deviation from the principle of legality in the sense of *wetmatigheid van bestuur*, which is an exception to the principle of legality.⁴² The principle of legality is a reflection of legal certainty, law enforcement that prioritizes legal certainty due to the strong influence of the flow of legism, which prioritizes the principle of legality, which makes the source of law is the Act.⁴³ The public prosecutor also has the principle of legality, which means that

³⁹ Kadri Husin dan Budi Rizki Husin, *Op. cit.* H. 136.

⁴⁰ Pasal 4 ayat (1) dan (2) Undang-undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 292).

⁴¹ Pasal 1 angka 9 Undang-undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 292).

⁴² Eri Yulikhshan, *Keputusan Diskresi Dalam Dinamika Pemerintahan: Aplikasi Dalam PTUN* (Yogyakarta: Deepublish, 2016). H. 2.

⁴³ Kadri Husin dan Budi Rizki Husin, *Op. cit.* H. 137.

he is obliged to take every criminal case to court, without the need to stop it.⁴⁴ Of course, such a law is based on the fact that law enforcement is only a mouthpiece of the law, which only achieves procedural justice. But more important than that is the enforcement of laws based on substantive justice, both must go hand in hand in order to create deal justice for all parties.

According to John Locke, executive discretion is necessary in the framework of better public life, in the case when there is a distinction between executive and legislative. It is impossible for the legislator to foresee everything that will happen in the future, therefore the executive has the right to act for the good of society on difficult matters when the act does not provide for them. Lock argued that the act should give the executive the opportunity to protect all members of society, the protection of all members of society, according to him, is a fundamental law of nature.⁴⁵ This is what Thomas Aquinas called *iclinatio naturalis*, that fundamental law has a natural tendency toward perfection.⁴⁶

In relation there is not act that regulates law enforcement using a restorative justice approach to corporations that commit money laundering crimes, investigators and prosecutors who are part of the executive power organs have discretionary funds to create and innovate in law enforcement against corporations that commit money laundering crimes, by not delegating the case bring to court, but required the corporation to restore the situation as before. By not delegating the case of money laundering, it will reduce the risk and possibility of additional criminal charges in the form of dissolution of the corporation by the judge in court, because if the criminal dissolution of the corporation is imposed, it will be bad for innocent people such as workers who depend their lives to the corporation. However, long before the concept of executive discretion by John Locke as stated above, Aristoteles proposed *equity* in the implementation of law, namely the correction of the law if the law is less precise because it is general.⁴⁷ So that discretion or *equity*, according to Aristoteles, can be used as a basis for investigators and prosecutors to enforce the law through a restorative justice approach, in the hope that between the interests of people who depend on corporations for their lives with the correction of corporate errors that commit criminal acts themselves, there is harmony and balance or impartiality to get substantive justice.

Substantive justice is justice based on values born from egal sources that are responsive to the conscience and sense of Justice of the community.⁴⁸ The character of substantive justice that rests on the 'response' of the community, goodly forms problem solving based on legal that 'explore the conscience of the community.' That is, the legal is able to recognize the will of the public and has a commitment to the achievement of substantive justice. Based on this concept, there are 4 (four) characteristics to measure

⁴⁴ Pasal 15, Pasal 137 *junto* Pasal 140 ayat (1) Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Lembaran Negara Republik Indonesia Tahun 1981 Nomor 76).

⁴⁵ Peter Mahmud Marzuki, *Teori Hukum*, *Op. cit.* H. 244.

⁴⁶ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2008). H. 92.

⁴⁷ *Ibid.* H. 95.

⁴⁸ Bambang Sutiyoso, *Op. cit.* H. 227.

whether the law itself or the enforcement of the legal contains substantive justice or not, namely the existence of objectivity, honesty, impartiality, and rationality.⁴⁹

When talking about legal that is responsive to the conscience and sense of Justice of the community, law enforcers such as investigators and prosecutors are given the opportunity to create and innovate in law enforcement by collaborating with moral values. H.L.A Hart held the view that it is important that there is a coherence between the morality of justice from the legal itself.⁵⁰ In concept of law by H.L.A Hart, Hart there are primary rules⁵¹ dan secondary rules. Secondary rules are legal norms that contain authority to legal subjects, secondary rules function to change modify until control the process primary rules.⁵² In this regard, investigators and prosecutors as law enforcers whose role is to control secondary rules can certainly change and modify the legal in order to connect the moral with the legal itself. That way, the law enforcer in question is able to understand the sense of justice in society by using his conscience, with the intention that law enforcement does hurt innocent people such as workers or laborers by being sentenced to corporate dissolution.

The principle of justice in the view of Jown Rawls is the fulfillment of equal rights to fundamental freedoms, fundamental differences. Basic differences such as economic and social differences must be arranged in such a way as to achieve positive conditions, namely the creation of a reasonable maximum benefit reasonable for everyone, including for the weak (*maximum minimorum*), so as to create what is called justice for everyone.⁵³ Therefore, in order to enforce the law against corporations that commit laundering crimes, innocent parties such as workers or workers who have lower social and economic than the corporation must be given legal protection through creation and innovation by law enforcers, with the intention of being kept away from the impact of additional criminal penalties dissolution of the corporation.

Based on the entire description of law enforcement against corporations that commit money laundering related to the legal theories of scholars or legal scholars as above, the statement of the legal theory in question is not only limited to guiding decision-making by the court and as a basis for the implementation of the duties of administrative organs, but also must involve sense of Justice. Because justice is the basic idea of legal, because justice is the embodiment of morality.⁵⁴ That way law enforcement against corporations that commit laundering crimes is directed to law enforcement that have morals. Moral that radiates a sense of love and togetherness in maintaining community life as a mode of survival for creatures called Humans. Because in fact, between the legal subject entities and other legal subject entities should not harm each

⁴⁹ M Syamsudin, 'Keadilan Prosedural Dan Substantif Dalam Putusan Sengketa Tanah Magersari (Kajian Putusan Nomor 74/PDT.G/2009/PN.YK)' (2014) 7 Jurnal Yudisial 18. H. 22-23.

⁵⁰ Zainal Arifin Mochtar dan Eddy O.S. Hiariej, *Op. cit.* H. 271.

⁵¹ Primary rules are actually legal norms that contain obligations. Specifically, the obligation for each individual who is bound by law to "do" or "not do". Dikutip dari Zainal Arifin Mochtar dan Eddy O.S. Hiariej. H. 271.

⁵² *Ibid.* H. 272.

⁵³ *Ibid.* H. 337.

⁵⁴ Peter Mahmud Marzuki, *Teori Hukum. Op. cit.* H. 17.

other, not least for the authorities who enforce the law, do not let the enforcement of the law bring harm to innocent entities or even hurt them.

Because in addition to the peak of the law enforcement that must radiate morals, Peter Mahmud Marzuki also remembered that law enforcement should also create peace and justice, namely law enforcement in which it protects the interests of entities in a balanced manner and those interests are managed in such a way that they become a beautiful and harmonious unity. Because peace will bring the stronger do not oppress the weak, who are entitled to truly get their rights and the existence of legal protection against society.⁵⁵

4. Conclusion

Law enforcement against corporations that commit money laundering crimes at every stage of investigation, prosecution and justice must look more attention to the principles of efficiency and Justice. Corporate that is criminal not to impact other innocent people like workers or laborers, resulting in a bad situation. Law enforcement is not only based on the legal alone, but also based pada on morality, love and compassion with justice in society through discretionary instruments owned by law enforcer. Law enforcement against corporations that commit money laundering can be carried out through several approaches including, First, the imposition of non-positive punishment in the form of fines and administrative punishment such as revocation of licenses. Second, criminal liability against personel corporate either by way of the concept of vicarious liability or identification theory. Third, through a restorative justice approach by requiring corporations to return the results of the original crime and laundering, while still paying attention to the size of the state's financial losses and laundering results obtained by the corporation. So that can be substantive justice who achieved that reflects the values of objectivity, honesty, impartiality, and rationality. To the judge who is examining, prosecuting and deciding corporations that commit money laundering as far as possible so as not to impose additional punishment for the dissolution of the corporation, because it will have a wide impact on the country's economy and society at large.

To formulating laws in order to immediately formulate criteria for money laundering that can be done restorative justice for the sake of stability costs and results in law enforcement of money laundering.

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⁵⁵ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*. Op. cit. H. 128-131.

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