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The Shifting of Burden of Proof on Corruption Offences in Indonesia After The Ratification of United Nations Convention Against Corruption (UNCAC) 2003

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ABSTRACT

This article describes the result of research regarding the shifting of burden of proof on Indonesia after the ratification of United Nations Convention Against Corruption (UNCAC) 2003. The article uses normative research which regulation, conceptual, case and comparative approach. Such research emphasizes interpretation and legal construction to obtain some legal norms, conception, regulation list and its implementation in concerto cases. Regulation and conceptual approach to used how to know, existences, consistency and harmonization regarding the shifting of burden of proof upon corruption offenses in legislation body. The cases approach uses comparative law regarding the reversal burden of proof upon corruption offender between Indonesia and the other countries. This research shows that the shifting of burden of proof has never yet applied for in the corruption cases Indonesia. The Indonesian corruption regulation policy, especially article 12B 37, 37A, 38B apparently it's not clear and disharmony to norm of sudden charge of fortune the shifting of burden of proof formulation in connection with United Nations Convention Against Corruption 2003 (KAK 2003). So, necessary (needs) of modification sudden charge of fortune shifting of burden of proof formulation which preventive, repressive and restorative characteristic.

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Introduction

Corruption is a part of special criminal law *(ius singulare, ius speciale or bijzonder strafrecht)*. If described, the Tipikor has certain specifications that are different from general criminal law, such as deviation of procedural law and the regulated material is intended to minimize the occurrence of leaks and irregularities to the state's financial and economic.

The United Nations Convention Against Corruption (UNCAC), 2003) describes the problem of corruption as a serious threat to the stability, security of national and international societies, undermining institutions, democratic values and justice and endangering sustainable development and law enforcement. The United Nations Convention against Anti-Corruption 2003 (hereinafter abbreviated as KAK 2003) ratified by Law No. 7 of 2006, has implications on the characteristics and substances of the combined two legal systems of *"Civil Law"* and "*Common Law*", which will affect the positive law governing corruption in Indonesia.

In addition, examined from an international perspective, basically corruption is one of crimes in the classification of the *White Collar* Crime and has consequences of complexity and the attention of the international community. The 8th UN Congress on *"Prevention of Crime and Treatment of Offenders"* which endorsed the *"Corruption in Government"* resolution in Havana in 1990 formulated the consequences of corruption:

1. Corruption among public officials *(corrupt activities of public official)*:
   a) It can destroy the potential effectiveness of all types of government programs
   b) Can hinder development
   c) Victimize individuals and groups
2. There is a close connection between corruption and various forms of economic crime organized crime and money laundering (Arief, 2007).

Conclusion of the context determines systemic, organized, transnational and multidimensional tactics in the sense of correlating aspects of system, juridical, sociological, cultural, economic inter-state and so forth. Therefore, corruption can not only be seen from the perspective of criminal law, but can be examined from other dimensions, such as legal policy perspective *(law making policy and law enforcement policy)*, Human Rights or State Administration Law. At a glance, specifically from the perspective of the Law of State Administration there is a close correlation between the corruption with the legislation product which is *Administrative Penal Law*. Through the historical aspect of *criminal law policy,* there has been a legislation in Indonesia as a positive law *(ius constitutum)* regulate corruption. Judged from a juridical perspective, corruption is an extraordinary crime (Atmasasmita, 2002):

"With due regard to the development of corruption, both in terms of quantity and quality, and after examining it in depth, it is no exaggeration to say that corruption in Indonesia is not an ordinary crime but is an extraordinary crime. Furthermore, if examined from the side effects or negative impacts are very destructive order of life of the Indonesian nation since the New Order until now, it is clear that the act of corruption is the deprivation of economic rights and social rights of the people of Indonesia.

The provisions of Indonesia's positive law on corruption are regulated in Law Number 31 Year 1999 in conjunction with Law Number 20 Year 2001. In the law, the provision of corruption cases is contained in Article 12B paragraph (1) a and b, Article 37, Article 37 A and Article 38B. When examined

Corruption Act classifies the verification into 3 (three) systems.

First, the shifting of the burden of proof or commonly used shifting *proof terminology* (Indonesia), *Shifting of the burden of proof (English), Omkering van de bewijslast* (Dutch), and *Onus of Proof* (Latin) charged to the defendant to prove himself do not do wrong. The shifting of this burden of proof applies to a bribery offense accepting gratification of a value of Rp. 10,000,000.00 (ten million) rupiah or more (Article 12B paragraph (1) a) and against unforeseen property related to Corruption (Art. 38B). When following the polarization of the law-forming thinking as a legislation policy, there are some strict restrictions on the application of shifting the burden of proof associated with a fair reward for the official. The restriction applies only to gratuities in the bribery offense, grant in the amount of Rp. 10.000.000,00 or more, relates to his position *(in zijn bediening)* and performs work contrary to obligations *(in strijd met zijn plicht)* and must report to the Corruption Eradication Commission (KPK).

Secondly, the shifting of the burden of proof is semi-inverse or in reverse proportional to which the burden of proof is placed on the defendant and the prosecutor in a balanced manner against a different object of evidence contradictory (Article 37A). Third, the conventional system in which the verification and error of the defendant committed the corruption is fully charged to the prosecutor. This aspect is carried out on the crime of bribery receiving gratification whose value is less than Rp. 10,000,000.00 (ten million rupiah) (Article 12B paragraph (1) letter b) and the main principal.

The Indonesian Criminal Law System (SHPI) in particular against the burden of proof of corruption normatively recognizes the principle of the shifting of the burden of proof against the human errors (Article 12 B paragraph (1), Article 37) and ownership of defendant property (Article 37A, Article 38 B). Chronologically, the shifting of the burden of proof originated from the evidentiary system of the Anglo-Saxon clan state was limited to certain circumstances particularly to "gratification" gifts, such as in the United Kingdom of Great Britain, Republic of Singapore and Malaysia. In the United Kingdom of Great Britain on the basis of the "Prevention of Corruption Act 1916" there is an arrangement of what is called the "Presumption of corruption in certain cases" which is redactionally reads as follows:

"*where in any proceeding against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other considerations has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Goverment Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as in mentioned in such Act unless the contrary is proved".*

In **Malaysia** on the basis of Article 42 of the Anti - Corruption Act 1997 (Act 575) ") which came into force on 8 January 1998 determines:

"Where in any proceeding against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be acepted, obtained, or attempted to be abtained, solicited, given or agreed to be given, promised or offered by or to the accused, the gratification shall be presumed to have been

corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved."

Next in **Singapore**, on the basis of the "Prevention of Corruption Act (Chapter 241)" is also affirmed as follows :

"Where in any proceeding against a person for an offence under section 5 or 6, it is proved that any gratification has been paid or given to or received by a person in the employment of the Goverment or any department there of or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Goverment or any department there of or any public body, that grafitication shall be deemed to have been paid or given and received corruptly as a inducement or reward as herein before mentioned unless the contrary is proved".

The existence of shifting of the burden of proof from the perspective of legislation policy in corruption as a provision of "premium remidium" and at the same time contains a special prevention of typic as extra ordinary crimes which require extra ordinary enforcement and extra ordinary measures then the crucial aspect in cases of corruption is effort fulfillment the burden of proof conducted by law enforcement officers. This dimension is recognized by **Oliver Stolpe** that:

"One of the most difficult issues facing prosecutors in large-scale corruption cases is meeting the basic burden of proof when prosecuting offenders and seeking to recover proceeds." (Oliver Stolpe, 2003: hlm. 1)

The determination is the *shifting of the burden of proof* from the Prosecutor to the defendant. However, although the shifting of the burden of proof is prohibited against the errors / deeds of persons and the whole offense of corruption, it is normatively permitted to graft the offense of bribery and the appropriation of the property of the corrupt. In practice this has been applied by the *Court of Appeal of Hong Kong* under the decision of PT Hong Kong Number 52 of 1995 dated 3 April 1995 in a case between *The Attorney General of Hong Kong v Hui Kin Hong* and *The Attorney General of Hong Kong* v *Lee Kwong Kut* who extended the provisions of Article 11 paragraph (1) *Hong Kong Bill of Rights Ordinance 1991*. Then by the *Supreme Court of India* in the case between *State of Madras* v *A. Vaidnyanatha Iyer (1957) INSC 79; (1958) SCR 580; AIR 1958 SC 61 (26 September 1957),* case between *State of West Bengal v The Attorney General for India (AIR 1963 SC 255, Muhammad Siddique v The State of India (1977 SCMR 503), Ikramuddin v The State of India (1958 Kar 21), Ghulam Muhammad v The State of India (1980 P.Cr. LJ 1039)* and the case of *Badshah Hussain v The State of India (1991 P.Cr. LJ 2299)* under the provisions of Article 4 *of the Prevention of Corruption Act (II of 1947).*

In essence, the Hong Kong Supreme Court and the Supreme Court of India decide the case to use the theory of burdensome reversal of probability probability principles (**Oliver Stolpe**). The theory of *balanced probability principles* places the right of the corruptors in the highest position using the most balanced probability principle with the negative proof or *beyond reasonable doubt*.

Then simultaneously on the one hand the ownership of the property of the perpetrators of corruption is applied by the principle of shifting of the burden of proof through the theory of *the lowest balanced probability principles* that its position is lower than the presumption of innocence because the wealth

of people is placed at the lowest level when the perpetrator in the position is still not rich. (Stolpe, 2003).

In essence, the shifting of the burden of proof in Indonesian corruption cases, particularly the provisions of Articles 12B, 37 and 37A, 38B, creates juridical problems.

First, the provision of Article 12B is stacked because the whole offense is not left for shifting the burden of proof.

Secondly, the provision of Article 37 is in fact not the shifting of the burden of proof because such provision is merely a right so that the existence of the article shall not affect the evidence of the defendant. Crucially it can be said, although the norm of Article 37 does not exist, but certainly the defendant still defends himself against the alleged charges against him. Furthermore, if the provisions of Article 37 are intended to constitute the law as the shifting of the burden of proof, it is related to the error of starting from the principle of *presumptions of guilt* and *self incrimination* principle. Whereas in the main torture other than gratification must use *presumptions of innocence* principle and the burden of proof still be charged to the prosecutor.

Third, the shifting of the burden of proof of the defendant's property which has not been charged (Article 38B) can only be imposed on the principal principal (Article 37A paragraph (3)) and can not be imposed on gratification in accordance with Article 12B paragraph (1) a. Furthermore it can be said that specifically to the gratification of Article 12B paragraph (1) a, then the prosecutor can not take the assets of alleged perpetrators of corruption.

Likewise, the defendant is not charged with the shifting of the burden of proof of the origin of his property. *Fourth*, after the enactment of KAK 2003, the shifting of the burden of proof is intended in the context of *civil procedure* to restore the perpetrators' property resulting from corruption.

The imposition of shifting of the burden of proof of the provisions of Article 37 with the offense gratification Article 12B correlation is the shifting of the burden of proof to the provisions of Article 37 applies to the crime of bribe receiving gratuities worth Rp. 10,000,000.00 (ten million rupiah) or more (Article 12B paragraph (1) letter a). Then correlation with Article 37A paragraph (3) that the shifting of the burden of proof Article 37 applies to evidentiary source (origin) wealth of the defendant and others outside the case of goods as well as the articles mentioned provisions of Article 37A in casu only against corruption bribery graft which is not mentioned in Article 37A paragraph (3).

Therefore, the conclusion above turns the dimensional context of shifting of the burden of proof in special SHPI Article 12B, Article 37, Article 37A and Article 38B of disharmony norm found even more connected with TOR, 2003. The shifting of the burden of proof in the legal system of **Anglo-Saxon** or **Case Law** in **Malaysia, Singapore, the UK** and others familiar with the shifting of the burden of proof is applied is limited to case-specific case *(certain cases)* relating to corruption, in particular provision (gratification) in the context of bribery.

The facts in the community are seen by many courts to break the perpetrators of corruption, but until now the shifting of the burden of proof has not yet been applied. Therefore, it is certainly interesting if examined more details about, *"how the judicial practice of the principle of the shifting the burden of proof in corruption cases Country Hong Kong and India as well as how policy shifting*

legislation against corruption legislation burden of proof in Indonesia after the entry into force of the Terms of Reference 2003". Furthermore, it is hoped that this paper will contribute positively from the theoretical, normative and practical perspectives of the shifting of the burden of future corruption evidence for formulative and applicative policies.

The State of Indonesia is a legal state *(rechtstaat)* as stipulated in Article 1 paragraph (3) of the 1945 Amendment of the Third Amendment. Conceptually, the theory of a state of law upholds a legal system that ensures legal certainty *(rechts zekerheids)* and protection of human rights *(human rights)*. In essence, a state based on law must guarantee the equality of each individual, including the freedom of an individual to exercise his / her rights.

The elementary substance in a law state besides equality is also restriction. These power limits also vary, depending on circumstances. However, the means employed to limit both interests are the law. Neither the state nor the individual is a legal subject with rights and obligations. Therefore, within a country of law, the position and relationship of the individual with the state is always in equilibrium. Both have rights and obligations that are protected by law.

Roescoe Pound mentions that there are two important needs for philosophical thinking about the state of law. *First*, the great public need for public security. The need for peace and order to manifest security encourages human beings to seek the rules that govern man against the arbitrary actions of the ruler and the individual so as to establish a solid society. *Secondly*, there is a need to adjust to the needs in the field of public security and make new compromises on a continuous basis in society because of the change and hence the need for adjustments in order to achieve a perfect law. (Roescoe Pound, 1959: pp. 107).

Law is a system, the system of norms. Criminal law is part of the legal system or system of norms. As a system, criminal law has the general nature of a system *wholes*, has *elements*, all elements are in relations and then forms a *structure*. **Lawrence M. Friedman**, mentions the legal system in a broad sense with three elements, namely structural, substance and legal culture. These three elements have a close correlation. Lawrence M. Friedman further described the three elements of the legal system as an engine of legal culture as the fuel that determines the life and death of the machine. The consequence of this aspect is that the legal culture is so urgent. Therefore, without legal culture, the legal system becomes powerless, like a dead fish lying in a basket, not like a live fish swimming in the ocean. (Lilik Mulyadi, 2012: pp. 341).

Marc Ancel mentions the XX century criminal law system still to be created. Such a system can only be conceived and perfected by the joint efforts of all well-meaning people as well as by all experts in the field of the social sciences. The Criminal Law System of the principle has four substantive elements namely the underlying value of the legal system *(philosophic)*, the existence of *legal principles*, the existence of legal norms and legal community as supporting the legal system *(legal society)*. These four basic elements are arranged in a series of unity forming a pyramid, the upper part being the value, the legal principles, the laws in the middle, and the lower part being the community. **Roeslan Saleh** mentioned that the correlation of legal principle with law hence the legal principle determining the

content of law and rule of positive law only have legal meaning if it is related with law principle. (Roeslan Saleh, 1996: p. 5). Therefore, according to **Satjipto Rahardjo**, the principle of law is the "heart" of the rule of law. (Satjipto Rahardjo, 2000: p45). **Paul Scholten** formulates the principle of law as the basic thoughts, contained within and behind the legal system each formulated in the rules of legislation and judgmental decisions, in which the individual terms and decisions can be regarded as the translation. Furthermore, according to **J.J.H. Bruggink**, then the legal principle embodies a kind of system of its own, partly included in the legal system, but others remain outside it so that the principles of law are both within the legal system and behind it. (Bernard Arief Sidartha, 1996: p. 122).

The Criminal Legislation System has dimensions of criminal punishment and penal law system. In the context of a punishment system for corrupt offenders may be interpreted as "a system of granting or imposing a criminal". Therefore, the punishment system is a criminal law enforcement system which is the scope of the criminal law system that can be seen from a functional angle and a substantial angle. The analysis from the functional angle is intended for the functioning of the punishment system as the whole system (rule of legislation) as criminal concretization and how the criminal law is enforced or operated concretely so that a corrupt perpetrator is punished by criminal law. **Barda Nawawi Arief** completely divides this punishment system from a functional angle consisting of the Substance Criminal / Substantive Law Sub-System, Formal Criminal Law, and Criminal Law Sub-system subsystem. Therefore, the three subsystems are interrelated and constitute a unity of punishment system because it is impossible for criminal law to be operated concretely with only one subsystem. Then from the point of substantive meaning of punishment system can be interpreted as the whole system of criminal law of material law for criminal punishment and implementation. All statutory rules contained in the Criminal Code as well as special laws outside the Criminal Code are essentially a unitary system of punishment, comprising of "general rules" and "special rules". (Barda Nawawi Arief, 2007: 262-263).

Criminal Law System in addition to having dimension of punishment system is functional and substantially also oriented reform of criminal law. **Barda Nawawi Arief** sees that the *penal reform* effort is essentially a *"penal policy"* field that is part and is closely linked to *"law enforcement policy", "criminal policy"* and *"social policy"*. This aspect can mean that the renewal of the criminal law is part of the legal substance renewal, the policy part of combating crime in the framework of the protection of society as social defense and social welfare and criminal law enforcement. Thus, criminal law reform should be pursued by a policy-oriented approach and a value oriented approach. (Barda Nawawi Arief, 2007: p.2) Mudzakkir mentions the renewal of criminal law through several possibilities. First, the renewal of the criminal law occurs because it is influenced by shifting elements of the legal community or a shift in the bottom up element. Secondly, because the shift in value underlying the law or the top element affects the element below it (top down). Third, the first and second combined shifts that occur in the elements of values or elements of the legal community do not automatically bring about a shift in law but the applicable law is given new perspectives according to the new value or new circumstances (Mudzakkir, 2001: 159).

The context of criminal punishment, the renewal of criminal law and the dynamics of the public against corrupt perpetrators through the shifting of the burden of proof either addressed to people's faults (mens rea) or against the origin of ownership of perpetrator property by using the theory of shifting of the burden of probability principles. Implementation of this theory still uphold human rights and criminal procedural

provisions. The theory of balanced probability principles places the right of the corruptors in the highest position using the most balanced balanced probability principle with the negative proof beyond beyond doubt. Then simultaneously on the one hand the ownership of the property of the perpetrators of corruption is applied by the principle of shifting of the burden of proof through the theory of the lowest balanced probability principles so that its position is lower than the presumption of innocence because the wealth of people is placed at the lowest level when the perpetrator is in a position not rich yet.

Methodology

This paper is the result of dogmatic law research and is reinforced by imperial legal research and the angle of its approach through statute approach, conceptual approach, case approach and comparative approach comparative approach) using deductive and / or inductive reasoning to gain and discover objective truths.

The technique of collecting materials and secondary data is done by library research (library research) and to support the existence of secondary data is also supported primer data in the form of field data obtained from observation and a series of structured interview techniques in the form of questionnaires to respondents law enforcement and theorists (Judges, Prosecutors, Lawyers and Lecturers) in Jakarta, Medan, Makassar and Denpasar. The data is then analyzed and processed qualitatively and quantitatively and written descriptively analysis

Research Results And Discussion

Implementation Of Judicial Practices On The Reversal Of Corruption Of Burden Of Proof In Hongkong And India

The practice of proving corruption cases with the shifting of the burden of proof in Indonesia has never been implemented, unlike in Hong Kong and India. In Hong Kong State there is a decision of PT Hong Kong Number 52 of 1995 dated 3 April 1995 between *The Attorney General of Hong Kong v Hui Kin Hong* and *The Attorney General of Hong Kong v Lee Kwong Kut*. Ratio decides the judgments of Hong Kong's cases (Hui Kin Kong and Lee Kwong Kut) states that although according to the provisions of Article 10 paragraph (1) letter a of the Prohibition Ordinance of Bribery Chapter 201 (*Section 10 of the Prevention of Bribery Ordinance of Hong Kong*) to the defendant did not do the corruption, but before the defendant is called to prove the origin of his wealth that far exceeds his income, the prosecutor must first prove beyond reasonable doubt, about the status of the defendant as the maid of the queen *(Senior Estate Surveyor of the Bulldogs and Lands of the Department of the Hong Kong Government)*, the relevant standard of life during the prosecution and total official income received during that period, and must also be able to prove that the life concerned can not be reached by that income.

If the prosecutor can prove it entirely, then the defendant's obligation explains how to live with the existing wealth, or how his property is under his control or how the defendant gained unreliable financial resources or assets. PT Hong Kong then decides whether these things can be counted as an excessive living standard or as a financial source that is not commensurate with its property. PT Hong Kong is of the opinion that, with such a proceeding there is no contradiction to the provisions of Article 11 paragraph (1) of the Hong Kong Human Rights Law *(Section 11 Hong Kong Bill of Rights Ordinance No. 59 of 1991)* because the person concerned has been granted the right to explain the origin the proposed ownership of the defendant's property as well as the prosecutor has been obliged to prove such matters as well as the shifting of the burden of proof on the narcotics case in the case of *Salabiaku v France 13 EHRR 379, Hoang v France 16 EHRR 53*, the case of

election results in the case of R v DPP ex parte Kebilane (2000) 2 AC 326, Brown v Scott (2001) 2 WLR 817, human rights cases on Drozd and Janousek v France (1992) 14 EHRR 745, and so forth.

The shifting of the burden of proof applied by PT Hong Kong against the defendant basically adheres to the theory of **Oliver Stolpe's** proportional balance probability shifting of proportional balance between the protection of the individual's independence on the one hand, and the deprivation of the individual's right of ownership of property wealth allegedly derived from corruption on the other. This theory essentially places the rights of corruptors in the highest position because if not placed as such it will be vulnerable to violation of the provisions of procedural law, national legal instruments and international law by using the theory of *the highest balanced probability principles* through beyond reasonable doubt. Then simultaneously on the one hand particular to the ownership of the origin of his property which is allegedly derived from the corruption offender corruption perpetrator is applied the principle of shifting of the burden of proof through the theory of balanced probability balanced *(lowest balanced probability principles)* so that his position is lower than the principle of presumption of innocence because of wealth people are placed at the lowest level when the perpetrator is still in an uninhabited position.

Bertrand de Speville declared the shifting of the burden of proof in a *"balanced probabilities"* that the prosecutor proved the defendant's wrongdoing while the defendant explained the origin of ownership of his property is not against human rights. (Bertrand de Speville, 2006: p. 4). **Nihal Jayawickrama, Jeremy Pope and Oliver Stolpe** mention there is a close correlation between the principle of presumption of innocence and the aspect of shifting of the burden of proof in terms of revealing the origin of ownership of corruption treasures. When elaborated, the correlation of these dimensions on the one hand to obtain a balance of rights between the needs of the community protects itself from corrupt practices and implicitly implicitly implies the need for a sense of security from unjust accusations, unfair disruption into the property of a person or the guilt of punishment. (Nihal Jayawickrama, Jeremy Pope and Oliver Stolpe, 2002: p. 8).

Then to practice in India based on Indian Supreme Court Decision *between State of Madras v A. Vaidnyanatha Iyer (1957) INSC 79; (1958) SCR 580; AIR 1958 SC 61 (26 September 1957)* and the ruling between *State of West Bengal v. The Attorney General for India* (AIR 1963 SC 255) decidend ratio stated that defendant *A. Vaidnyanatha Iyer* was found guilty of corruption as regulated in Article 4 *of the Prevention of Corruption Act (II of 1947)* which principally considers that based on facts in court with the burden of proof of the defendant and prosecutor has proven that what the defendant received was in the form of money of Rs. 800 is an act of corruption and not a loan.

Judged from the legal perspective of proof, the decidend ratio of the Supreme Court of India declares the burden of proof to the prosecutor before the facts of law are found that require the defendant to prove otherwise with the shifting of the burden of proof. In the a quo case the legal facts discovered by the Supreme Court of India turned out to be a sum of Rs. 800 is with the defendant so that besides the prosecutor the defendant must also prove that the money was obtained by the defendant from the victim not as a qualified provision in the criminal law but is a civil law loan. Under the provisions of *Article 4 Paragraph (1) of the Prevention of Corruption Act (II of 1947)*, although the provisions of that article determine the general principle that the prosecutor proves the alleged offense to the accused but in the case of corruption the principle may be distorted by the shifting of the burden of proof which is both the defendant and the

prosecutor to prove the guilt or innocence of the defendant.

In essence, the a quo case is identical with the case of *Muhammad Siddique v The State of India (1977 SCMR 503), Ikramuddin v The State of India (1958 Kar. 21), Ghulam Muhammad v The State of India (1980 P.Cr. LJ 1039) and the Verdict of Badshah Hussain v The State of India (1991 P.Cr. LJ 2299).* In the case of M*uhammad Siddique v The State of India (1977 SCMR 503) and Badshah Hussain v The State of India (1991 P.Cr. LJ 2299)* the basic rule states that the Supreme Court may justify the consideration of the PT ruling that argues that " marked as having been found in the defendant, the burden of proof is on the defendant as stipulated in Article 4 paragraph (1) *of the Prevention of Corruption Act (II of 1947)* to explain how the defendant received it and how the money could change hands on the defendant ".

Legislation Policy Reversal Of Burden Of Proof In Indonesian Corruption Criminal Regulation Connected To KAK 2003

In essence, the shifting of the burden of proof of the Indonesian corruption cases is stipulated in Article 12B, 37 and 37A, 38B Law Number 31 Year 1999 jo Law Number 20 Year 2001, causing problems. *First,* from the perspective of the formulation of the criminal act, the provisions of Article 12B give rise to unclear norms of the shifting of the burden of proof. On the one hand, the shifting of the burden of proof is applied to the recipient of gratification under Article 12B paragraph (1) letter a which reads, "..the value of Rp. 10,000,000.00 (ten million rupiah) or more, proof that the gratuity is not a bribe done by the gratuity recipient ". However, on the other hand it is impossible to apply to gratuity recipients because the provisions of the article expressly state the editorial, "any gratuity to a civil servant or a state officer shall be deemed to be a bribe in respect of his office and that is contrary to his duty or duty".

The existence of the principle of shifting of the burden of proof in accordance with the norms of criminal law is not directed to gratification with editorial ".. considered to accept bribes" but must be to two elements of the formulation of offense that is related to his position (in zijn bediening) and do work that is contrary to obligation (in strijd met zijn plicht). The logical consequence of the "material feit" is formulated to be the element of deliberation (bestanddelen) in one article bringing the juridical consequences of the necessity and obligation of the prosecutor to prove the total bestanddelen of the offense so that the provision of Article 12B becomes wrong stacking and instead the defendant is not left to perform the reversal of the burden of proof .

Romli Atmasasmita asserted that the provisions on gratification in the Anti-Corruption Eradication Act are strange and unrealistic and inconsistent, indicating the existence of loopholes that are unwittingly more relative to "protecting" corruptors. In addition to the dimensions above, these provisions are difficult to understand by jurists who understand the criminal law system and the techniques of legislation. The implication is that the provisions of gratification do not comply with the rules of the criminal law (genuine criminal law) because there is a requirement of KPK to determine the status of gratuities (Article 12C paragraph (4) jo Article 17 of Law Number 30 Year 2002 diametrically contradicts with the provisions in Article 12B paragraph (1) and "ending" establish the status of ownership of gratification and announce in the State Gazette is not a legal act (pro justitia) but constitutes a form of administrative action by giving a very big

discretion to the KPK, outside the court. Strictly speaking, the context dimension of Anti-Corruption Eradication Act on gratification is an *"out of court system"* approach. (Romli Atmasasmita, 2004: p. 60).

Second, the provision of Article 37 paragraph (1) which reads, *"The defendant has the right to prove that he is not committing a criminal act of corruption,"* in fact, it is not the shifting of the burden of proof because the provision is merely a right so that the existence of the article will not affect the proof that the defendant did. It can crucially be said, although the norm of Article 37 is not included in the corruption of the defendant still defends himself against the alleged charges against him. Furthermore, if the provisions of Article 37 are intended as the shifting of the burden of proof then this relates to errors that point to the principle of guilty presumption and the principle of self-blame. Whereas in the criminal act of corruption principal other than gratification must use the principle of presumption of innocence and the obligation to prove still charged to prosecutors.

Third, the shifting of the burden of proof of the defendant's property that has not been charged (Article 38B) can only be imposed on the principal criminal act (Article 37A paragraph (3)) and can not be imposed on gratification in accordance with Article 12B paragraph (1) a. Furthermore it can be said that specifically to the gratification of Article 12B paragraph (1) letter a prosecutor can not appropriate the assets of alleged perpetrators of corruption. Likewise, the defendant is not charged with the shifting of the burden of proof of the origin of his property. Subsequently, the provision of Article 37A Paragraph (2) which says, *"Where the defendant can not prove that the wealth is not equal to his income or the source of his or her wealth, the information referred to in paragraph (1) is used to substantiate the existing evidence the defendant has committed a criminal act of corruption."* Substantially, specifically the word editorial, *"... is used to strengthen existing evidence ... ",* would be less accurate because the existing evidence must have at least 2 (two) evidences as evidenced by negative, and relatively redactional word if replaced with editorial, *"... used to reinforce the judge's conviction ...".*

Fourth, that it is examined from the perspective of a special criminal law system linked to the 2003 CAC, the shifting of the burden of proof is prohibited against human error because of the potential for human rights, contrary to the *presumption of innocence* principle causing a shift into the *presumption of guilt* or the principle of *presumption of corruption.* In addition, it is contrary to the provisions of the criminal procedural law which requires the defendant not to be obligated to prove as the provisions of Article 66 of the Criminal Procedure Code, Article 66 Paragraph (1), (2) and Article 67 Paragraph (1) Subparagraph (i) of the Rome Statute of the International Criminal Court Court / ICC), Article 11 paragraph (1) of the Declaration of Human Rights, Article 40 paragraph (2b) point (i) Convention on the Rights of the Child, Principle 36 paragraph (1) a collection of principles for the protection of all persons in any form of detention or imprisonment, UN General Assembly Resolution 43/1739 of December 1988 and the International Convention and the principle of legality.

Therefore, from what has been described in the context above, the dimensions of shifting of the burden of proof of the provisions of Article 12B, Article 37, Article 37A and Article 38B are found unclear and non-harmonic norms, still preventive and repressive so that the necessary dimensions are preventive, repressive and restorative to

be in line with post-ratification of KAK 2003 through Law Number 7 Year 2006.

In KAK 2003 reversal of burden of proof is stipulated Article 31 paragraph (8) and Article 53 letter (b). The provision of shifting of the burden of proof in Article 31 paragraph (8) is aimed at freezing, seizure and confiscation from the perpetrators of corruption which states that:
"States Parties may consider the possibility of requiring that the offender of the crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings. "

The provision above determines the States Parties to the Convention may consider the possibility of requiring an offender to declare a lawful source of proceeds allegedly derived from a criminal offense or other property which may be subject to foreclosure, provided that such conditions are consistent with the fundamental principles of national law , and consistent with the nature of the judicial process and other judicial processes. From the provisions of KAK 2003, the shifting of the burden of proof is allowed through the civil line has been used in several countries such as in Italy, Ireland, the United States and so forth. This dimension is strictly said by **Oliver Stolpe** that:

"Countries such as Italy, Ireland and the United States provide, under varying conditions, for the possibility of civil or preventive confidence of assets suspected to be derived from certain criminal activity. Unlike confiscation in criminal proceedings, such forfeiture laws do not require proof of illicit origin "beyond reasonable doublt". Instead, the consider proof on a balance of probabilities or demand a high probability of illicit origin of the contradictions of the owner to prove the contrary ". (Stolpe, 2003).

In addition to the provisions of Article 31 paragraph (8), the shifting of the burden of proof is also provided in the provisions of Article 53 letter b which expressly stipulates that:

"Take such measures as may be necessary to permit its courts to order those who have commited offences in accordance with this Convention to pay compensation, damages to another State Party that has been harmed by such offenses".

In essence, the context provisions above constitute the shifting of the burden of proof of the return of assets directly by granting permission to the court. *The custodial state* instructs the corrupt offender to pay compensation or redress to a *country of origin* disadvantaged as a result of the corruption . In principle, observing the provision of shifting this burden of proof raises the crucial issue of how it might be applied to pay a certain amount of compensation or compensation to the State of origin as a result of the corruption if the perpetrator does not acknowledge the act of corruption directed against him.

The existence of this asset recovery strategy is explicitly set out in the preamble to the 2003 KAK, which stipulates that, "Determined to prevent, track and deter in a more effective manner international transfers of illegally acquired assets, and to strengthen international cooperation in asset recovery ". Concretely, the KAK 2003 shifting of the burden of proof can actually be used through 2 (two) paths namely criminal procedure *(criminal procedure)* and civil procedure *(civil procedure)*, especially to the source of property acquired by the perpetrator of corruption. The word editorial *"requires an offender to explain the legitimate source of a criminal offense",* then the procedure used is

the criminal liaison. Likewise vice versa of the word editorial, *".. or other wealth that can be subject to foreclosure,"* then implies can be used civility path. In practice, civic mechanisms have been established in Italy, Ireland and the United States, while the Singapore state penalty mechanism under the *Section 4 Singapore Confiscation of Benefits Act* and Hong Kong State under *Section 12 A Hong Kong Prevention Bribery Ordinance.*

Then in the framework of the formulation of norms of shifting of the burden of proof of corruption after the ratification of KAK 2003 characterized by the combined characteristics of *common law* system with *civil law* system, the logical consequence of legislation policy must integrate two dimensions of law enforcement against corruption through traditional criminal law regime purpose of retaliation, guidance and expediency for the wider community and the dimension of civil law regime. The dimension of law enforcement oriented to the conventional criminal law regime is more focused on the philosophy of corruption eradication that embraces Kantian philosophy by prioritizing the retributive approach and placing the interests of the State greater if compared to the interests of third parties who are harmed by the corruption. The dimension of the civil law regime, the philosophy of corruption eradication is more emphasized on the dimension of the philosophy of utilitarian philosophy which focuses on the combination of distributive justice and commutative justice. The logical consequence of this combined model of justice would, on the one hand, place a balance between the interests of the State on the one hand while on the other hand it would place the interests of a third party harmed by corruption.

In addition, in line with the philosophy and strategy of eradicating corruption post KAK 2003, law enforcement in Indonesia in the eradication of corruption is colored by the combined dimension of criminal lane through the imposition of criminal to perpetrator of corruption and civility through foreclosure, confiscation and return of assets so that Indonesia refuse to the big strategy of eradicating corruption with *preventive* point, *repressive*, international cooperation especially in *restorative* and also stipulating the position and role of private and participation of community role so that must be put forward eradication of corruption through legal system of shifting of the burden of proof which can minimize provisions that are not contrary to human rights perspective, material criminal law, criminal procedure law and international legal instruments.

Logical consequence, because KAK 2003 is a combination of criminal regime and civil regime with the point of return of assets, the formulation of norms of shifting of the burden of proof in the legislation policy of future corruption Law of Indonesia should be preventive, repressive and restorative. For that reason, it is necessary to modify the regulation of substance of the norms of shifting of the burden of post-KAK 2003 proof as shown in table 1 below.

Tabel 1:
Need to Modify Proof of Load Reversal Post KAK 2003
(n= 30 responden)

Questions	A / %	B / %	C/%
	Necessary	Unnecessary	**No Answer**
Do you think that there are needs to be a modification of shifting of the burden of proof after the United Nations Convention on Anti-Corruption 2003?	**24/80 %**	**6/20%**	**-**

Sumber: Jawaban Responden

The majority of respondents as many as 24 people (80%) answered that they want to need modification of the reversal of the burden of proof after KAK 2003 while as many as 6 people (20%) answered no need to modify the shifting of the burden of proof. In essence, the shifting of corruption case proof is urgent to do especially on aspects that are restorative.

Furthermore, by modifying the formulation of substance norms of shifting of the burden of proof with emphasis on legislation policy aligned in KAK 2003, there is a common characteristic of common law system with civil law system which essentially emphasizes philosophy of corruption eradication through kantianism philosophy by prioritizing approach retributive especially directed to errors of perpetrators and philosophy of corruption eradication that emphasizes the flow of utilitarian philosophy with emphasis on the combination of distributive justice and commutative justice so that it is expected to be in harmony with human rights perspective, material criminal law, criminal procedure law and international criminal law instrument.

Conclusion

1. The practice of shifting the burden of proof in Hong Kong (Hong Kong Verdict, between *Attorney General Of Hong Kong v. Hui Kin Hong and Attorney General Of Hong Kong v Lee Kwang Kut)* and *India (MA ruling between State of Madras v A. Vaidnyanatha Iyer (AIR 1963 SC 255, Muhammad Siddique v The State of India (1977 SCMR 503), the State of West Bengal v. The Attorney General for India (AIR 1963 SC 255, The State of India (1980 P.Cr. LJ 1039), Badshah Hussain v The State of India (1991 P.Cr. LJ 2299)* was conducted on the origin of the State of India (1958 Kar. 21), Ghulam Muhammad v The State of India ownership of perpetrators' property uses the theory of shifting of the burden probability principles so that its implementation still upholds human rights, criminal procedural law and international criminal law instruments.

2. Indonesian Corruption Laws Regulation Policy, in particular Article 12B, Article 37, Article 37A and Article 38B of Law Number

31 Year 1999 in conjunction with Law Number 20 Year 2001, there is unclear and inharmonious formulation of norms of reversing the burden of proof. The provision of Article 12B from the perspective of the formulation of bestandellen offense is fully and clearly contained in one article so that it brings the juridical implications of the prosecutor of the imperative to prove the formulation of the offense and the consequence of the article being misstated, since all the core parts of the offense left to be proven otherwise by the defendant are absent. Then the provisions of Article 37 are in fact not the shifting of the burden of proof because they are included or not the norms of the article shall not affect the defendant to defend the indictment. The provisions of Article 38B shall only be directed against the shifting of the burden of proof for property which has not been indicted and can only be imposed on the principal principal (Article 37A paragraph (3)) and shall not be imposed on gratification in accordance with Article 12B paragraph (1) a. Therefore, special to the gratification of the Prosecutor can not appropriate the assets of the alleged perpetrators of corruption, vice versa the defendant can not be charged to the shifting of the burden of proof of the origin of his property. After the enactment of KAK 2003 required a modification of the norm of shifting of the burden of proof that is preventive, repressive and restorative in nature based on the philosophy of kantianism and utilitarian philosophy.

REFERENCES

Barda Nawawi Arief. 2007. *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan,* Bandung: Kencana Prenada Media Group.

Bernard Arief Sidharta. 1999. *Refleksi Tentang Hukum.* Bandung: PT Citra Aditya Bakti.

Romli Atmasasmita. 2002. *Korupsi, Good Governance Dan Komisi Anti Korupsi Di Indonesia*, Jakarta: Badan Pembinaaan Hukum Nasional Departemen Kehakiman dan HAM RI.

Hong Kong Legal Information Institute http://www.hklii.org/cgihklii.org/disp.pl/hk/jud/en/hkca/1997/CACC000722%5f1995.html?queryz%7e+hui+kin+hong didown load pada tanggal 15 Januari 2007

In The Supreme Court of The Republic of Vanuatu, Election Petition No. 31 of 1998 melalui Vanuatu: Taranban http://www.paclii.org/vu/cases/VUSC/2004/15.html di down load pada tanggal 7 Februari 2007

Lilik Mulyadi. 2012. *Hukum Pidana Umum dan Khusus*, Bandung: PT Alumni.

Mudzakkir. 2001. *Posisi Hukum Korban Kejahatan Dalam Sistem Peradilan Pidana,* Disertasi, Program Pascasarjana Fakultas Hukum Universitas Indonesia, Jakarta.

Nihal Jayawickrama, Jeremy Pope and Oliver Stolpe, *"Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof",* Forum on Crime and Society, Vol. 2, No. 1, Desember 2002

Rahardjo, Satjipto. 2000. *Ilmu Hukum, Bandung:* PT Citra Aditya Bakti, Bandung.

Speville, Bertrand de, *Reversing the Onus of Proof: Is It Compatible with Respect for Human Rights Norms,* The Papers, 8th International Anti-Corruption Conference, di down load melalui http://ww1.transparency.org/iacc/8th_iacc/papers/despeville.html di do wn load pada tanggal 23 Desember 2006

Stolpe, Oliver, 2003. *Meeting the burden of proof in corruption-related legal proceedings,* unpublished