

## RECONSTRUCTION SETTING ABOUT THE SYSTEM OF PROFITABILITY IN THE CRIMINAL MONEY LAUNDERING

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### ABSTRACT

*This study aims to determine, review and analyse the reconstruction of regulation on reversing evidence system in money laundering crime in terms of legal system aspect. This study is also a perspective to construct Reconstruction of the ideal and adaptive reverse evidence system. This arrangement is expected to make legal breakthrough in order to make the return of state losses. The results show that the system and mechanisms in money laundering crime are still not optimal done by law enforcement officers. Various obstacles are encountered in the implementation of reverse evidence systems. Unclear arrangement of reversed evidentiary system in money laundering crime causes the applying has not been effective, can the fund give rise to contradiction. On the other hand, the institutional structure of law enforcement apparatus has not been applied synergistically, especially in the activity of disclosing the crime of weakness of asset tracking has not yet revealed the crime of origin of the weakness of trace of its original crime. Asset delineation has also not maximized the collection of evidence relating to money laundering criminal acts. The legal culture factor also supports the reconstruction of regulation on reverse evidence system in money laundering crime. That the implementation of reverse evidentiary burden in money laundering crime is a new and good method to answer the problem of crime origin in Criminal Money Laundering in Indonesia. The provisions in the money laundering law need to be revised, by requiring the original crime and money laundering in a single unit of examination in court. In the institutional aspects of law enforcement, it should be at the expense of the function of tracing assets with the carrying capacity of investigative audit.*

Keywords: Reconstruction, reversed evidence, money laundering, synergy

### INTRODUCTION

Money laundering was initially more closely linked to drug / drug trafficking crimes and other major crimes, but now money laundering crime has been linked to a massive criminal proceeds of money.<sup>1</sup> Since money laundering is one aspect of criminality<sup>2</sup> that deals with individuals, nations and countries, in turn, the nature of money laundering becomes universal and permeates the boundaries of state jurisdiction, so that the problem is not only national but also regional and international.

From the point of view, money laundering is often identified with organized crime committed by intellectuals (white collar crime) as well as economic crime.<sup>3</sup> Seen and territorial aspect, this money laundering activity is considered a transnational crime and even international crime, because the *modus operandi* is generally cross country (cross boarder).

The crime of money laundering is the result of criminal acts in the form of assets derived from corruption and other criminal acts. This indicates that money laundering has a very close relationship with other criminal acts including corruption as a predicate crime. All property allegedly derived from proceeds of crime that is hidden or disguised is a crime of money

<sup>1</sup> While in various countries including Indonesia, the money obtained from the corruption including the criminal category, then the problem of money laundering is also associated with the act of corruption.

<sup>2</sup> Why is money laundering one of the criminal aspects? The nature of money laundering is related to the background of the acquisition of a sum of money that is dark, unlawful or dirty, then some gross money is then managed with certain activities such as with the form of business, transfer or convert them to bank or foreign exchange as a step to eliminate the background of the gross fund. See: N.H.T Siahaan, *Pencucian Uang & Kejahatan Perbankan* (Edisi Revisi), 2<sup>nd</sup> Print (Jakarta: Sinar Harapan, 2005), pg. 3.

<sup>3</sup> The phrase white collar crime was first discovered by a criminologist named Edwin H. Sutherland, the concept of white collar crime was developed to show a set of criminal acts involving monetary and economic actions in a broad sense. Sutherland defines white collar crime as a crime committed by persons of high social standing and honor in their work (*crime committed by person of respectability and high social status in the course of their occupation*). See: Setiono, *Kejahatan Korporasi*, 2<sup>nd</sup> Print (Malang: Bayumedia, 2004), pg. 35

laundering. The crime of money laundering does not stand alone because the assets placed, transferred, or transferred by means of integration are obtained from a criminal offense, meaning that there is already a predicate crime.<sup>4</sup>

In its development, the crime of money laundering is increasingly complex, crossing the borders of a borderless crime, the indication of money laundering as organized crime and an increasingly varied mode, utilizing institutions outside the financial system. To anticipate this, the Financial Action Task Force (FATF) on Money Laundering has issued an international standard that is a measure for each country in the prevention and eradication of money laundering and terrorism financing known as the Revised 40 Recommendations and 9 Special Recommendations (Revised 40 + 9) FATF. These standards include the expansion of Reporting parties covering gems and jewellers/precious metals and motor vehicle traders. The release of this international standard is done because it is believed that preventing and eradicating Money Laundering crimes needs to be done regional and international cooperation through bilateral or multilateral forums so that the intensity of criminal acts that produce or involve large amount of assets can be minimized.

In practice, people who do white collar crime tend to commit the same crime over and over again if they analyse economically the profits that will be obtained will be greater than the cost incurred. Profits are calculated from the possibility of costs when caught and proven to commit crimes and the amount of punishment that will be imposed. If the cost of a crime that has been calculated is lower than the profit to be earned while committing the crime, then the person will respond by committing the same crime.<sup>5</sup>

In this law, the reverse evidence method can be applied in the criminal proceedings of money laundering cases, through the establishment of a judge or request from the prosecutor to the judge to implement the method. The application of reversed evidence in the trial can be done based on article 77 and article 78 section 1 and 2 of Law No. 8 of 2010 on the Prevention and Eradication of money laundering. The article stipulates that the defendant must be able to prove the origin of the funds owned, but through the determination of the judge. In chapters 77 and 78 it is said that the defendant must be able to prove the origin of the funds, while chapter 78 the mechanism is the judge ordering the defendant to prove it. The application of this reverse evidence cannot be applied in the case of pure corruption, but rather in cases of corruption that have a criminal element of money laundering. So this is related to the money laundering crime issue. If it is merely a matter of corruption, a reversible method of evidence cannot be applied, it may apply an inverse evidence if the charge is money laundering.

Acceptance of reversed evidence, especially in the Law on Prevention and Eradication of Money Laundering and Corruption Act is always faced with respect and guarantee of Human Rights. When associated with the principle of "presumption of innocence", the application of reversed evidence has violated the principle of "presumption of innocence" and is at once in conflict with human rights. This issue has always surfaced in law enforcement in the judicial process, especially in the court verification stage. The rejection of this limited reversing evidence implementation will certainly be one obstacle in the enforcement of prime law, especially in money laundering crimes related to corruption.

For this purpose, this paper focuses on the validity of reverse evidence principles in the Anti-Money Laundering Prevention and Eradication Act, with reference to international rules, relevant legislation and expert theories and opinions.

## DISCUSSION

### Arrangements about Reconstruction in Reversed Evidence System on Criminal Money Laundering

Juridically combating money laundering behavior begins with the enactment of Law No. 15 of 2002, Law no. 25 of 2003 and the latest is Law no. 8 of 2010 on Prevention and Eradication of Money Laundering Criminal Act.

The negative burden of evidence by adhering to the principle of *beyond reasonable doubt* which is the spirit of the legal system in Indonesia, to seek justice has not been able to answer severe and sensitive cases. Criminal Money Laundering is placed as a delicacy which is the offense is quite difficult to prove, because the eradication also means tackling the evil that lies behind him.<sup>6</sup> In Article 2 section (1) of Law Number 8 of 2010 on Prevention and Eradication of Money Laundering Crime, there are 25 categories of crimes against organized crimes.

The reversed evidence is contained in Article 77 of Law Number 8 of 2010, which gives the defendant the right to explain the allegations attached to him. This law is said to be contradictory to Article 66 of the Criminal Procedure Code which provides that prosecutors are the only ones who are duly obliged in the evidence. But when dig deeper, the principle *lex specialis*

<sup>4</sup> Adrian Sutedi, *Tindak Pidana Pencucian Uang*, (Bandung: PT. Citra Aditya Bakti, 2008), pg.182.

<sup>5</sup> Hikmahanto Juwana, *Bahan Kuliah Teori hukum*, UI Press, hlm.152.

<sup>6</sup> <http://www.agnesharvelian.com> (accessed on 5 October 2017 at 10.50 WIB).

*derogate legi generalis* can answer this assumption. Whereas the Criminal Money Laundering Law is of a special nature which will override the general Criminal Procedure Code.

Law No. 8 of 1981 on the Criminal Procedure Code does not recognize the reverse evidence system, but in the framework of justice, the suspect and/or defendant is also entitled to prove his innocence.<sup>7</sup> What is said to be a violation of human rights in terms of reversed evidence method is not entirely a benchmark for the disparity and impediments of reversed evidence. For this reason, the reason is based on respect for human rights of citizens, especially in the case of Criminal Money Laundering which is a criminal offense with a fairly difficult evidence.

The application of reverse evidentiary burden principle in Indonesia is regulated in several laws, among others: Law Number 31 Year 1999 jo. Law Number 20 Year 2001 concerning the Eradication of Corruption. In Law Number 20 Year 2001, Article 37 Section (1) it is said that: "The defendant has the right to prove that he does not commit a criminal act of corruption". Section (2) where the defendant can prove that he is not committing a criminal act of corruption, the evidence shall be used by the court as a basis for stating that the indictment is not proven.

In Article 37A Sections (1) and (2), it further reinforces the position of the burden of evidence upside down, affirming that, "The accused shall provide information concerning all of his property and property of his wife or husband, children and property of any person or corporation allegedly having a relationship with the alleged case". In the event that the defendant cannot prove that the wealth is not equal to his income or the source of his wealth, the information referred to in section (1) shall be used to substantiate the existing evidence that the defendant has committed a criminal act of corruption.

Furthermore, the provision of reversed evidence in Law Number 28 Year 1999 concerning the Implementation of a Clean and Free State of Corruption, Collusion and Nepotism, has also clearly mandated that state officials explain the origins of their property when questioned by the State Asset Wealth Check Commission. In addition, in article 17 section (2) point e, it is stated that, "If deemed necessary, in addition to requesting evidence of ownership of part or all of the assets of the State Operator allegedly obtained from Corruption, collusion or nepotism during his tenure as the State Operator, the competent authority to prove such allegations in accordance with the provisions of applicable legislation".

Article 77 of Law no. 8 of 2010 on Prevention and Eradication of Money Laundering Criminal is stated: "For the sake of examination in court, defendant must prove that his assets are not the result of a crime."

The doctrine of criminal law and international convention on the protection of human rights does not recognize reversed evidences to determine the suspect's faults. Typically, it has long been recognized that the legal system of confiscation of criminal assets through criminal-based forfeiture is carried out based on court decisions that have obtained permanent legal force.

This theory still guarantees the protection of the human rights of the suspect to be presumed innocent, otherwise it does not guarantee the protection of the defendant's ownership rights over the allegedly derived assets of the offense unless he can prove otherwise.

In reverse evidence, there is much ease and speed needed in handling money laundering, corruption and bribery. This is in line with the theoretical views of Economic Analysis on Laws that support the efficiency of law enforcement for the benefit of the state and other disadvantaged parties.

In terms of progressive legal theory, the implementation of reverse evidentiary burden mechanisms in money laundering cases can be strengthened in several ways, including:<sup>8</sup>

First, the philosophy and nature of the law is that it exists not for itself, but the law exists to provide comfort and justice for humanity. The issue of state corruption, embezzlement and money laundering carried out by State organizers, is an act of crime that has struck a sense of community justice. For that reason, the rule of law that is the status quo, it needs to be reviewed with not only pegged to the rules of the text alone. If the rule of law system has obstructed the process of seeking community justice, then it is imperative that we seek a way out by imposing a reversed evidence principle as a form of legal stance in our country. Progressive law should be viewed as a process of development and legal development that is not merely as a form of implementation of the rules, but as a manifestation of the basic essence of law as a means of human to obtain happiness and justice as a whole.

<sup>7</sup> Yusril Ihza Mahendra in his statement in Constitutional Court No. 65/PUU-VIII/2010

<sup>8</sup> Herdiansyah Hamzah, <http://anitalalahi.wordpress.com> (accessed on 5 October 2017 at 10.50).

Secondly, if we interpret the misuse of state money as an extraordinary crime, then it should be the case that the inverse evidence principle is applied as an extraordinary way, albeit contrary to the principles of presumption of innocence. The logic of law is a remarkable legal effort to cover the weaknesses of our prosecuting institutions which tend to be weak in solving corruption cases. Thus, the effort to enforce the burden of evidence upside down, we must also mean as an extraordinary remedy in building a system of state administration which is free from Collusion, Corruption and Nepotism.

### Controls in Reversed Evidence System on Criminal Money Laundering

The controls in the formation of the reversed evidence law on the crime of money laundering purely on all corruption offenses to be enacted nowadays are growing, one of which comes from the Indonesia Chief Justice of the Constitutional Court, Mahfud MD<sup>9</sup>, according to which the Act of involuntary evidences must be immediately enforced to make it more useful for the success of the eradication movement of corruption. With the enactment of the reverse evidence law, investigators at the Attorney General's Office as well as in the Police do not have to bother obtaining evidence of a person's crime. According to him, as long as the reverse evidence law has not been enacted, law enforcement officers will continue to have difficulties in conducting evidence of criminal cases in the field of corruption. On the contrary, after the law has been enacted, there will be no reason for the investigators to reject the corruption crime files for lack of evidence.

Therefore, theoretically if a reversed principle of pure or absolute evidence is applied, it is not necessary or required by the public prosecutor to prove the defendant's error. In practice, reverse evidence practices require strong initial evidence that the defendant is indicated to have committed a criminal act of corruption. This is made to minimize the chance of a suspect or defendant to prove otherwise, namely that he is innocent. The reverse evidence certainly does not violate the presumption of innocence as long as it is done by promoting the principles of truth and justice. This means that truth and justice become the principle or the highest principle (meta principle or meta theories) in disclosing and solving cases, so that if there is a conflict between one principle or principle with another principle which should take precedence.

Is it possible that the absolute reversal of evidence against all corruption offenses in a legislation can be carried out? the answer is the same as that question that is possible. However, the enforcement of a reversed law of absolute evidence into our positive law depends on the legal politics run by the state organizers. Law is a political product, as Mahfud MD puts it in his Political Law in Indonesia, that the law as a legal product is essentially a contest scene in order that the interests and aspirations of all political forces can be accommodated in political decisions and become Laws. The law born out of such contestation is easily seen as a product of the political contest scene.<sup>10</sup> This is the intention of the statement that law is a political product. While legal politics is a legal policy that will or has been implemented nationally by the government of Indonesia, including: first, the development of law that containing making and renewal of legal materials in order to be tailored to the needs: second, the implementation of existing legal provisions including the affirmation of functions institutions and legal product coaching.<sup>11</sup>

### Constraints in the Reversed Evidence System on Criminal Money Laundering

Constraints in evidence of Criminal Money Laundering also refers to the weakness of prosecutors in proving Criminal Money Laundering case. The problem begins with the prosecution that is not simple, the first concerning that money laundering crime is a follow-up crime so there is another problem that is how with core crime (predicate offence). Based on the mandate of the law, the predicate offence does not need to be proven, meaning that it is sufficient to use guidance evidence only. As a consequence the indictment should be cumulatively compiled instead of the alternative, because between predicate offense and money laundering are two crimes which, although money laundering must always be associated with its predicate offense, but money laundering is an independent crime. Therefore, in accusing money laundering crime, for example in relation to the Article 3 indictment, the predicate offence and follow up crimes are charged at the same time.

Furthermore, there is still a single charge for money laundering crime which should not be associated with the predicate offence, in this case for example the offender only relates to the indictment of Article 6, where the offender is only accountable for the act of money laundering passive ie accepting and others on known property or reasonably suspected that the property is from a crime. In the case of the offender only in relation to Article 6 then the indictment is singular or indicted alternatively with another relevant article, the important one must be in accordance with the fact that his actions are only one.

The next problem concerns the evidence of the subjective element or *mens rea* and its objective element or *actus reus*. *Mens rea* must be proven that is knowledge (know) or reason to know (worth guessing) and intended (intended). Both elements relate to elements of the defendant knowing or should suspect that the funds are derived from the proceeds of the crime and the

<sup>9</sup> <http://bataviase.co.id/node/176019>(accessed on 5 October 2017 at 12.50).

<sup>10</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia*, 3<sup>rd</sup> edition (Jakarta: LP3ES, 2006), pg.2.

<sup>11</sup> *Ibid*, pg. 9.

defendant knows about or intends to perform the transaction. To prove the element of knowing it must be clear that the perpetrator must meet knowingly and willingly, then regarding the evidence of the element should suspect it is exactly what is stated in the provision of Article 480 of the Criminal Code which explains the existence of *proparte dolus* and *proparte culpoos* (half intentionally half-negligent). The subsequent evidence is that the intended element intends to conceal the proceeds of crime, for this evidence is also difficult then the court in the United States has stated that the circumstantial evidence is sufficient to justify the existence of such elements.<sup>12</sup> So if the element is intentional and knows or should suspect that the treasure is from the crime then by itself the element is proven. In Indonesia this seems to have not been done, then the prosecutor should take the element disguise (disguising) which is more easily proven than hiding (hiding).

The attitude of the inner knowing or should be suspected (*mens rea*), must also be proven by the Prosecutor. In that connection it means that the defendant proves to be confined to only one element of wealth related to the money laundering charge, that the property is not from the proceeds of the crime. And if the defendant cannot prove the element is not necessarily that the indictment is deemed proven, because the prosecutor must still prove that all elements including the property belong to the crime, because the defendant's inability to prove that his property comes from legitimate activities does not answer (prove) what crime the treasure came from. In addition, it is necessary to be careful in reading the law that inverted evidence is only done in court, apparent with the term "defendant".<sup>13</sup> In the foregoing to be applied, it is clear that the element proved by the defendant is that the property is not derived from a crime which is only one element of the money laundering element listed in Articles 3, 4 and 5 of the Criminal Money Laundering Law No. 8 Year 2010:

Article 3:

Any Person who places, transfers, assigns, spends, pays, grants, entrusts, takes abroad, changes the form, exchanges with currency or securities or other deeds of assets known or reasonably suspected to be the proceeds of the offenses referred to in Article 2 section (1) with the aim of hiding or disguising the origin of the Assets is punished for the crime of Money Laundering with a maximum imprisonment of 20 (twenty) years and a fine of not more than Rp 10,000,000,000.00 (ten billion rupiah).

Thus, the objective and subjective elements of Article 3 which remain to be proven are: Objective elements: assigning, transferring, transferring, spending, paying, granting, entrusting, carrying abroad, changing forms, exchanging with currency or securities or other deeds: the assets that are known or reasonably suspected to be the result of a crime as referred to in Article 2 section (1).

This objective element must also be proven by the Prosecutor, meaning that the prosecutor has prepared evidence and proves in court the property is derived from what crimes as listed in Article 2 section (1). While the defendant actually proves that his property is not from a crime, it is logical that the Prosecutor must prove that even if the defendant fails to prove his property, not necessarily the element of wealth derived from the crime remains unproven, so it is also important to note that if the service does not prove the property derived from a crime then an element of Article 3 is not fulfilled and this has the potential to escape the perpetrators of the crime of money laundering and even the predicate offence.

## CONCLUSION

1. Reconstruction The regulation of reversed evidentiary system in money laundering crime in Law No. 8 of 2010 on Prevention and Eradication of Criminal Money Laundering is a major revolutionary and progressive breakthrough on law reform in eradicating Criminal Money Laundering with its original crime. That the implementation of reverse evidentiary burden in money laundering crime is a new and good method to answer the problem of crime origin in Criminal Money Laundering in Indonesia. Reverse evidence urgency has become a major agenda in handling Criminal Money Laundering in various original crimes.
2. Control of reversed evidence of money laundering in provisions concerning reversal evidence / reversal of burden of evidence is provided in Article 35 of Law Number 15 Year 2002 jo. Law Number 25 of 2003 and Article 77 of Law Number 8 of 2010. The reverse evidence of the burden of evidence is on the defendant. In money laundering crime that must be proved is the origin of property that is not derived from a crime, for example not from corruption, narcotics crime and other illegal acts. This reverse evidence is of a very limited nature, that is, it applies only to court proceedings, not to the stage of investigation. Also not on all crimes, only on serious crime or serious crimes such as corruption, smuggling, narcotics, psychotropic or banking crime.
3. Obstacles in reverse evidence system in money laundering crime in its application, reversed evidence as stipulated in Article 77 of Law Number 8 Year 2010 concerning Prevention and Eradication of Crime of Money Laundering is limited. Limited here means that what must be proven by the defendant is only limited to the origin of property that is allegedly derived from a crime. As for other elements of the crime the burden of evidence is in the Public Prosecutor. In practice

<sup>12</sup> Thomas M. Biagio, Money laundering and Trafficking: A Question of Understanding the Element of the crime and the use of Circumstacial Evidence, Univ.of Richmond Law.Rev, Vol.28:255 (1994),pg..256.

<sup>13</sup> Interview with Yenti Garnasih, on 10 November 2014.

the reversed evidentiary system does not use the principle of presumption of absolute guilt but limited and balanced where on the one hand the accused must prove that his property is not a criminal offense and that the Public Prosecutor must also prove his claim. Thus in practice the reverse evidence system is not carried out purely by using the principle of presumption of absolute guilt that requires the suspect or defendant to be required to prove that he is innocent but limited only to the origin of the Treasury which is suspected to be the result of a criminal offense.

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