

LEGAL CERTAINTY IN MONEY LAUNDERING PROSECUTIONS IN INDONESIA: A FOCUS ON CORRUPTION AS A PREDICATE CRIME

Tofik Yanuar Chandra

Faculty of Law, Universitas Jayabaya, East Jakarta, Jakarta 13210, Indonesia

Email: tyc.jayabaya@gmail.com

Abstract

The offense of money laundering is intrinsically linked to a prior criminal act, known as a predicate crime, as the assets involved, whether placed, transferred, or integrated, originate from it. Notably, when establishing a money laundering offense, it is not obligatory to establish the underlying crime first. This underscores the inherent association between money laundering and its predicate crime. This study aims to advance our comprehension of legal certainty in proving money laundering when corruption serves as the underlying offense. Furthermore, it seeks to delve deeper into the notion of ideal evidence in cases where corruption acts as the predicate crime. Employing a qualitative approach with a normative juridical perspective, the research findings reveal that Indonesia has chosen a strategy of limited and balanced reverse evidence, rather than pure or absolute reverse evidence, to protect the rights of defendants. In the context of substantiating money laundering offenses, substantial and comprehensive reforms are imperative to streamline the evidentiary process, thus ensuring legal certainty. The prompt enactment of the Draft Law on Asset Confiscation is crucial to bolster the effectiveness of law enforcement agencies in combating money laundering in Indonesia. This legislation would encompass the confiscation of assets stemming from money laundering crimes, thereby facilitating a more efficient law enforcement procedure.

Keyword: *Legal Certainty, Evidence, Corruption, Money Laundering, Predicate Crime*

Abstrak

Tindak pidana pencucian uang pada hakikatnya ada kaitannya dengan tindak pidana yang telah terjadi sebelumnya, yang dikenal sebagai tindak pidana asal, karena harta kekayaan yang terlibat, baik ditempatkan, dialihkan, atau disatukan, berasal dari tindak pidana tersebut. Khususnya, ketika menetapkan suatu tindak pidana pencucian uang, tidak wajib untuk menetapkan terlebih dahulu kejahatan yang mendasarinya. Hal ini menggarisbawahi hubungan yang melekat antara pencucian uang dan kejahatan asal. Kajian ini bertujuan untuk meningkatkan pemahaman kita mengenai kepastian hukum dalam membuktikan pencucian uang ketika korupsi menjadi pelanggaran utama. Lebih lanjut, tulisan ini berupaya menggali lebih dalam pengertian alat bukti ideal dalam kasus-kasus dimana korupsi merupakan tindak pidana asal. Dengan menggunakan pendekatan kualitatif dan berperspektif yuridis normatif, temuan penelitian menunjukkan bahwa Indonesia memilih strategi pembuktian terbalik yang terbatas dan seimbang, dibandingkan pembuktian terbalik yang murni atau mutlak, untuk melindungi hak-hak terdakwa. Dalam konteks pembuktian tindak pidana pencucian uang, reformasi yang substansial dan komprehensif sangat penting untuk menyederhanakan proses pembuktian, sehingga menjamin kepastian hukum. Pengesahan RUU Perampasan Aset yang cepat sangat penting untuk meningkatkan efektivitas lembaga penegak hukum dalam memerangi pencucian uang di Indonesia. Undang-undang ini akan mencakup penyitaan aset yang berasal dari kejahatan pencucian uang, sehingga memfasilitasi prosedur penegakan hukum yang lebih efisien.

Kata kunci: *Kepastian Hukum, Barang Bukti, Korupsi, Pencucian Uang, Kejahatan AsaL*

A. Introduction

Corruption is a criminal and unlawful act committed by individuals or corporations with the intent of personal or corporate gain, achieved by abusing their authority, opportunities, or the resources associated with their positions, resulting in a loss of state funds.¹ The unchecked increase in acts of corruption can have a significant impact on the national economy. Meanwhile, money laundering involves attempting to conceal the origin of assets acquired through criminal activities, including corruption. Corruption and money laundering often occur in tandem, posing a significant threat to the national economy.² Corruption and money laundering are frequently intertwined crimes. One of the challenges in combating corruption is the burden of proof because corruption is typically carried out systematically and in an organized manner, with perpetrators often covering for each other.³ This poses difficulties for law enforcement as those involved share common interests, mainly benefiting from acts of corruption, making it challenging to apprehend those responsible for these crimes.

Perpetrators of criminal acts of corruption often conceal assets obtained through corruption by engaging in money laundering, which can involve transferring funds through the financial system to various foreign banks or acquiring assets such as

luxury goods and immovable property like land.⁴ The regulations governing corruption are stipulated in Law Number 31 of 1999, in conjunction with Law Number 20 of 2001, which addresses the eradication of corruption crimes. Meanwhile, regulations pertaining to money laundering prevention and eradication are outlined in Law Number 8 of 2010. The combination of cases involving corruption and money laundering is a frequently employed strategy by law enforcement agencies in their efforts to combat these criminal activities. The decision to merge or separate the prosecution of such cases falls within the discretion of the public prosecutor.

The combination of cases involving criminal acts of corruption and criminal acts of money laundering must consider the existence of two distinct systems of evidence within each respective crime.⁵ In cases of corrupt practices, the principle of the presumption of innocence takes precedence, placing a legal obligation on the public prosecutor to prove the guilt of the perpetrator. In contrast, cases of money laundering, as outlined in Article 69 in conjunction with Article 77 and Article 78 of the Law on the Prevention and Eradication of the Crime of Money Laundering, operate under the principle of presuming guilt. This system shifts the burden of proof onto the perpetrator, who must demonstrate that the assets in question did not originate from a criminal act.

¹ This misconduct leads to a diversion of public resources, tax revenue, or government funds for personal or corporate benefit, resulting in a financial detriment to the state. This reduction in available state funds hampers the government's ability to provide essential public services, support infrastructure development, fund social programs, and address the needs of its citizens, thereby compromising the overall well-being and functioning of the state. See: Rasma Karklins. *The system made me do it: corruption in post-communist societies*. London: Routledge, 2016.

² Bonnie Buchanan, "Money laundering—a global obstacle," *Research in International Business and Finance* 18, no. 1 (2004): 115.

³ Nicholas J. Lord, "Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany," *Criminology & Criminal Justice* 14, no. 1 (2014): 100.

⁴ Individuals who commit acts of corruption frequently hide the assets they gain from these corrupt activities. They do this by engaging in money laundering, which can take various forms. Money laundering can involve actions like moving money through the financial system to accounts in foreign banks or using the proceeds to purchase valuable items such as luxury goods or properties like land. Essentially, they take steps to make the illicitly gained assets appear legal and legitimate by integrating them into the regular economy or by converting them into tangible assets that are harder to trace back to their corrupt activities. See: Mugarura, Norman. "Uncoupling the relationship between corruption and money laundering crimes." *Journal of Financial Regulation and Compliance* 24, no. 1 (2016): 74-89.

⁵ Peter Alldridge, "The moral limits of the crime of money laundering," *Buffalo Criminal Law Review* 5, no. 1 (2001): 279.

The merging of corruption and money laundering cases reflects a new paradigm in law enforcement against corruption, focusing on actions and wealth derived from corrupt practices.⁶

In cases of money laundering, a predicate crime is required. However, during investigations, prosecutions, and court examinations, it is not mandatory to prove the predicate crime, as specified in Article 69, Law Number 8 of 2010 of the Money Laundering Crime. In connection with this explanation, if it pertains to the case at hand, there is a money laundering offense with a predicate crime that is presented in the third indictment, which stands independently and is unrelated to the first and second indictments.⁷ Furthermore, current laws and regulations do not establish the scope or limits of money laundering offenses in cases combining corruption and money laundering. The limitations in question concern which assets can be included in cases combining corruption and money laundering. Can assets acquired before the corruption crime occurred be considered part of a money laundering offense in cases combining corruption and money laundering? This issue relates to the human rights of suspects or defendants, which must be protected by law.⁸ No one, including the state through law enforcement officials, can arbitrarily confiscate or seize the property of a suspect or accused without due regard for the method and timing of acquiring the property. Thus, the aim of this research is to enhance our understanding of the concept of legal certainty in proving money laundering when the source is a corruption offense and to delve deeper into the concept of ideal evidence in cases where money laundering originates from a corruption offense.

⁶ Michael Levi and William Gilmore, "Terrorist finance, money laundering and the rise and rise of mutual evaluation: a new paradigm for crime control?," *Financing terrorism* (2002): 87.

⁷ There can be a situation where a money laundering offense has an associated or underlying crime (predicate crime) that is detailed in the third indictment. Importantly, this third indictment is distinct and separate from the first and second indictments, and it is not connected or related to them in any way. In other words, the third indictment addresses a different instance of

B. Research Methods

The research method employed in this study is a qualitative research approach with a normative juridical perspective. This research encompasses legal norms found within legislation, court decisions, as well as norms that exist and evolve within society. The primary data sources for this research include essential legal materials, such as binding legal documents consisting of statutory regulations relevant to the research subject. Additionally, court decisions that hold permanent legal validity are considered primary legal materials. Among the laws and regulations used in this research are the 1945 Constitution of the Republic of Indonesia, the Criminal Code, the Criminal Procedure Code, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, and Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering. Secondary legal materials employed in this study are related books and relevant legal academic writings. In this regard, various references, including books on criminal law, political literature, and several other scholarly works, have been consulted.

C. Results and Discussion

1. Legal System for Proving the Crime of Money Laundering

When examined from the perspective of the criminal justice system in general, and criminal procedural law in particular, the evidentiary aspect plays a determining role in establishing a person's guilt, enabling a judge to impose a criminal sentence. The repressive

money laundering with its own distinct underlying criminal act, and it is not part of the same legal case or scenario as the first and second indictments. See: Mugarura Norman, "The institutional framework against money laundering and its underlying predicate crimes," *Journal of financial regulation and compliance* 19, no. 2 (2011): 174.

⁸ Fabian Maximilian Johannes Teichmann, "Twelve methods of money laundering," *Journal of money laundering control* 20, no. 2 (2017): 130.

approach to eradicating corruption still encounters difficulties, primarily in the prosecution of criminal acts of corruption in court.⁹ The conventional law of evidence in the Criminal Procedure Code, which is based on the principle of the presumption of innocence, no longer facilitates the prosecution of criminal acts of corruption effectively. One of the legal forms of evidentiary irregularities is the implementation of a reverse burden of proof system (*omkering van het bewijslast*/reversal burden of proof), which presumes that every person accused of committing a criminal act of corruption is already guilty of the offense.¹⁰ Consequently, in the court trial process, the defendant has the right to prove their innocence, as the standard evidentiary system does not apply. Simultaneously, the defendant bears the obligation to demonstrate that they are not guilty of the criminal act of corruption as charged by the Public Prosecutor.

In regard to the procedures for conducting trials against defendants accused of committing acts of criminal corruption, judicial practices are similar to those of typical criminal trials. However, due to the complex nature of corruption cases, with intricate evidence, caution, thoroughness, and meticulous attention to the evidence become essential. This ensures that the legal proceedings ideally align with jurisprudence, doctrinal perspectives, and the accurate application of relevant laws to the specific actions and *modus operandi*.¹¹ The procedure for conducting trials against defendants accused of criminal corruption, on a global scale and as a representative practice, involves declaring the trial open to the public. Under the order of the Chief Judge of the Panel, the Prosecutor or Public Prosecutor presents the

defendant before the court. In general criminal cases, it is not possible to proceed without the presence of the defendant, nor can trials be conducted in *absentia*. However, in corruption cases, it is permissible to proceed in the absence of the defendant.

According to Article 38, paragraph (1) of Law Number 31 of 1999, examinations and decisions in corruption cases can only proceed if the defendant has been lawfully summoned and fails to appear at the court hearing without a valid reason. This requirement involves two conditions: (1) the defendant must be legally summoned in the first place, and (2) they must be absent without a valid reason. It is important to note that this provision applies exclusively to defendants who are not detained.¹² Detained defendants are brought to trial without the need for a summons, as it is the responsibility of the Public Prosecutor to present them at the court hearing. Meanwhile, the active role of the Panel of Judges in criminal trials is to impartially seek both the formal and material truth, ensuring a fair process. Judges presiding over corruption cases must exhibit patience, precision, accuracy, and wisdom in guiding the trial proceedings, adhering to the principles of due process of law and the presumption of innocence, which are expectations shared by those seeking justice and, particularly, by trial defendants.¹³

The defendant is obligated to prove that the act committed is not an unlawful act, specifically, corruption. By placing the burden of proof on the defendant, the principle applied in cases of criminal corruption shifts from the presumption of innocence to the presumption of corruption or presumption of guilt. Consequently, the application of the Reversal of the Burden of Proof System is often

⁹ Norman Mugarura, "The institutional framework against money laundering and its underlying predicate crimes," *Journal of financial regulation and compliance* 19, no. 2 (2011): 174.

¹⁰ The burden of proving innocence falls on the accused rather than the prosecution having to prove guilt. This is a departure from the usual legal principle of "innocent until proven guilty," where the burden of proof is on the prosecution to establish guilt beyond a reasonable doubt. The "reverse burden of proof" shifts this burden onto the defendant, making it more challenging for them to prove their innocence. For more discussion, see: Hadi

Wibowo, Muhtar, "Corporate Responsibility in Money Laundering Crime (Perspective Criminal Law Policy in Crime of Corruption in Indonesia)," *JILS* 3 (2018): 213.

¹¹ Luis De Sousa, "Anti-corruption agencies: between empowerment and irrelevance," *Crime, law and social change* 53 (2010): 20.

¹² Saldi Isra, Feri Amsari, and Hilaire Tegnau, "Obstruction of justice in the effort to eradicate corruption in Indonesia," *International Journal of Law, Crime and Justice* 51 (2017): 72.

¹³ Simon Butt, *Corruption and law in Indonesia*. (London: Routledge, 2017), 36.

criticized as a potential violation of fundamental human rights. It envisions a scenario where someone accused of a criminal act of corruption must demonstrate their innocence, countering allegations of corruption or money laundering by presenting compelling arguments that the Public Prosecutor, acting as a representative of the community or government, can accept. Therefore, integrated action is necessary from law enforcement agencies within an integrated criminal justice system, where these agencies possess balanced and equal power as well as balanced and equal authority among law enforcers. This balance of power is crucial in the fight against institutional corruption, as it allows entities such as the Police, the Prosecutor's Office, and the Corruption Eradication Committee to serve as the front line in unveiling institutional corruption within the framework of prospective due process of law.

The balance of power also aligns with the provisions of Article 33 of Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, which states that 'in carrying out its duties and authority, the prosecutor's office shall develop cooperative relations with law enforcement and justice bodies, as well as state bodies or other agencies.' Thus, based on the description above, the legal facts from each trial can be used by the judge to consider the application of the reverse evidence system in the trial process for criminal acts of corruption.¹⁴ The evidentiary system, in the history of the development of criminal procedural law, reveals several systems or theories for proving alleged acts. According to the provisions of Article 37, Article 37A adheres to a limited and balanced reverse burden of proof. According to the reverse proof system pertains to the confiscation of the defendant's property acquired after committing the alleged act of

corruption.¹⁵ Property obtained after committing acts of corruption is presumed to be acquired through corrupt means unless proven otherwise.

Furthermore, there are several legal and non-legal obstacles faced by the Public Prosecutors and Judges. It can be observed that the implementation of the Reverse Burden of Proof System is not actually supported by the role or attitude of the Public Prosecutors and Judges as law enforcement officers. However, if the reverse burden of proof system is applied in the trial process of corruption cases, it does have a strength. Specifically, it can be effective for the defendant who can optimally prove that their wealth is not the result of corruption. On the contrary, the weakness of the reverse burden of proof system is considered ineffective for the Public Prosecutors because it prolongs the trial process. Meanwhile, for the defendant, if the right to reverse the burden of proof is not applied optimally, it can strengthen the evidence presented by the Public Prosecutors, proving that the defendant committed a corruption offense. The disclosure of corruption offenses, especially during the trial, does not actually encounter difficulties when integrated actions are taken by law enforcement agencies, including both the Prosecutor's Office and the Court, through an integrated criminal justice system. This means that among law enforcement agencies, there must be a balanced and equal distribution of power, as well as equal and balanced authority, to achieve a fair decision.

2. Forms of Legal Certainty in Proving the Crime of Money Laundering

The existence of corruption offenses in the positive law of Indonesia has been in place for a long time, dating back to the enactment of the Criminal Code. In cases related to corruption-related assets, it is known as Money Laundering Offenses. Money Laundering

¹⁴ Max M. Schanzenbach, and Emerson H. Tiller. "Reviewing the sentencing guidelines: Judicial politics, empirical evidence, and reform." *The University of Chicago Law Review* 75, no. 2 (2008): 715-760.

¹⁵ In cases where the reverse proof system is applied, if someone is accused of corruption, their assets or property acquired following the alleged corrupt activity can be confiscated by authorities unless they can prove

that these assets were acquired through legal and legitimate means, not as a result of corruption. It essentially shifts the burden of proof to the defendant to demonstrate the legality of their assets. See: Tri Sutrisno, "Reconstruction Setting About the System Of Profitability in The Criminal Money Laundering," *South East Asia Journal of Contemporary Business, Economics and Law* 14 (2017): 53.

cases not only threaten the stability and integrity of the economy and the state's financial system but also jeopardize the foundations of society, the nation, and the state of Indonesia.¹⁶ Over time, Money Laundering cases have become increasingly widespread and complex, spanning various sectors. The prevailing system of evidence in Indonesia, based on the Code of Criminal Procedure, is a negative evidence system according to the law. However, with the presence of Law Number 8 of 2010 on Money Laundering Crimes, a new aspect has been introduced into the evidence system because it imposes an obligation on the defendant to provide proof.

A crucial legal issue in demonstrating the effectiveness of law enforcement is the issue of evidence, which also applies to the Money Laundering Law. The process of proving criminal cases differs from civil cases, where the focus is on formal truth based on available evidence, usually using evidence in civil cases. In criminal cases that seek material truth, a negative evidence system is applied, meaning that to render a verdict in a criminal case, it is not sufficient to rely solely on evidence; the judge's conviction of the defendant's guilt or innocence is also required, and the prosecution is responsible for proving this. In the common law system, the standard of proof used is 'beyond a reasonable doubt.' This means that all criminal evidence is already in the possession of law enforcement agencies.¹⁷ There is no doubt about the defendant's guilt based on the available evidence, making it

challenging for the accused to be acquitted. The legal system in Indonesia requires the accusing party to prove the truth of their allegations through the courts. In other words, the burden of proof lies with the party making the claim or asserting a right. Such a burden of proof applies in countries with civil law systems like Indonesia.

Regarding the burden of proof according to the Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana* or KUHAP), it adheres to the ordinary burden of proof, where the Public Prosecutor is responsible for proving the charges. This aligns with the formulation of Article 66 of KUHAP, which states that the suspect or defendant is not burdened with the obligation of proof. Based on Article 69 of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering, it is not mandatory to first prove the underlying offense for the investigation, prosecution, and trial in cases of Money Laundering. Similar provisions can be found in the explanation of Article 3 of Law Number 15 of 2002, as amended by Law Number 25 of 2003. Normatively, it is clear that in examining Money Laundering cases, it is not mandatory to first prove the underlying offense. Conversely, there is no provision in the Money Laundering Law that requires the underlying offense to be proven first before examining Money Laundering cases.¹⁸

The relationship between money laundering and corruption offenses can be seen from Article 2 paragraph (1) letter (a), which

¹⁶ Ayodeji Aluko and Mahmood Bagheri, "The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria," *Journal of Money Laundering Control* 15, no. 4 (2012): 442.

¹⁷ All the evidence in a criminal case must already be in the possession of law enforcement agencies before the case goes to trial. This system places a heavy burden on the prosecution to present strong and convincing evidence to prove the defendant's guilt beyond a reasonable doubt. The judge's personal conviction plays a lesser role in this system compared to the negative evidence system. See: Simon D. Norton, "Suspicion of money laundering reporting obligations: Auditor compliance, or sceptical failure to engage?," *Critical Perspectives on Accounting* 50 (2018): 63.

¹⁸ In the process of investigating and prosecuting money laundering cases, there is no strict legal obligation to first

establish the guilt of the individual or individuals involved in the initial criminal activity that produced the illicit funds. Furthermore, there is no specific provision in the Money Laundering Law that mandates proving the underlying offense before addressing money laundering cases. The Money Laundering Law does not require investigators or prosecutors to establish the guilt of individuals in the original crime before pursuing charges related to money laundering. This approach allows law enforcement to focus on money laundering as a separate offense, regardless of whether the underlying criminal activity has been proven or not. See: Nicholas Gilmour, Tristram Hicks, and Simon Dilloway, "Examining the practical viability of internationally recognised standards in preventing the movement of money for the purposes of terrorism: A crime script approach," *Journal of Financial Crime* 24, no. 2 (2017): 263.

defines the proceeds of crime as wealth obtained from criminal acts committed within the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia, and the said criminal act is also an offense under Indonesian law. Thus, it is indeed accurate to state that there can be no money laundering without a crime that generates money or wealth. The formulation of Article 2 paragraph (1) letter (a) of Law Number 8 of 2010 on Money Laundering is applied as in the first charge and the second charge, which have a causal relationship, namely between the corruption offense in the first charge as the underlying offense and the money laundering offense in the second charge as a derivative offense, thus combined in one cumulative charge.

The crime of money laundering has characteristics or similarities with other general crimes, namely the crime of deception. The crime of appropriation is a crime that arises later after the original crime occurred earlier, for example, the crime of theft. This is what makes the crime of money laundering and the crime of appropriation regulated in Article 480 of the Criminal Code similar because they are the result of the original crime and are also independent criminal acts. The juridical basis in the Money Laundering Crime Law for providing proof of money laundering crimes is regulated in Article 69, Article 73, Article 77, and Article 78. However, the first principle that must be remembered in order to prove the crime of money laundering is Article 69 of Law Number 8 of 2010, which states that 'in order to carry out investigations, prosecutions, and examinations at court hearings regarding money laundering crimes, it is not necessary to prove the original crime first.' In practice, proof of criminal acts, according to the author, begins at the investigation level by the investigator, namely by searching, and at the pre-prosecution level by the prosecutor, if there are deficiencies in the investigation, by taking into account Article 110, paragraph (3) and

paragraph (4), by providing instructions to perfect the investigation from the investigator.

In the practice of investigation and prosecution, law enforcement officers, whether investigators or public prosecutors, are expected to adopt the principle of the presumption of guilt.¹⁹ This means they must genuinely believe that the suspect is guilty and will be convicted, which is a necessary mindset to uncover and prove a crime. Doubts should not persist for investigators and public prosecutors when building a criminal case that will eventually proceed to court. It is imperative for a case to be forwarded for prosecution only when the Public Prosecutor is confident in the evidence, they possess to secure a court verdict. Uncertainty can have severe consequences, affecting the entire legal process from the investigation's outset to the prosecution, potentially leading to the failure of the Public Prosecutor's case.

The actual process of proving a case occurs in court when all evidence presented by the Public Prosecutor is rigorously tested. Here, the principle of the presumption of innocence applies, meaning that anyone suspected of committing a criminal act is considered innocent until proven guilty by a legally binding court decision. This presumption of innocence is firmly established in Indonesian law, as outlined in Article 8 of Law Number 4 of 2004 on Judicial Power and Article 18 of Law Number 39 of 1999 on Human Rights. Notably, proving money laundering does not hinge on proving the underlying offense but is related to it.²⁰ Therefore, coordination and case conferences regarding the underlying criminal offense need to be intensified in the early stages of investigation to establish a shared understanding and interpretation of the legal framework applied to jointly handled money laundering cases.

From a technical standpoint, evidence presented in court, such as witness testimonies, may initially focus on proving the crime of money laundering. Subsequently, this may

¹⁹ Pamela R. Ferguson, "The presumption of innocence and its role in the criminal process," In *Criminal Law Forum*, vol. 27, no. 2, pp. 131. (Dordrecht: Springer Netherlands, 2016).

²⁰ Paul Nkoane, "The Prevention of Organised Crime Act: the proving of "instrumentality" in cases of obscured use of intangible things," *Stellenbosch Law Review* 27, no. 1 (2016): 182.

transition to proving the underlying offense within the same trial. This approach streamlines proceedings as witnesses provide information about both the corruption offense and money laundering in one continuous presentation. Following the prosecutor's case for money laundering, the judge allows the defendant an opportunity to prove that the assets in question are unrelated to and did not originate from the charged criminal act, permitting the presentation of appropriate evidence.²¹

In practice, Articles 77 and 78 of Law Number 8 of 2010 do not absolve the Public Prosecutor from the duty of proving money laundering charges. Instead, they emphasize the prosecutor's obligation to prove these charges, after which the judge orders the defendant to demonstrate that the assets in question have no connection to the alleged criminal act, requiring the presentation of substantial evidence. Consequently, Articles 77 and 78 do not shift the burden of proof entirely to the defendant but require the prosecutor to provide additional data regarding the defendant's financial profile, including salary, taxes, and evidence of suspicious financial transactions that do not align with that profile.

On the other hand, Article 68 of Law Number 8 of 2010 still upholds the Public Prosecutor's responsibility to present evidence during trial. It specifies that court examinations of money laundering crimes adhere to statutory regulations unless otherwise stipulated in the

law. Predicate crimes, such as corruption, are a prerequisite for a money laundering crime under Indonesian law, albeit not an absolute requirement. If the predicate crime is corruption, the first alternative provision applies, requiring knowledge that the assets subject to laundering originate from such a predicate crime.

3. The Concept of Appropriate and Ideal Evidence Arrangements

The burden of proof on the public prosecutor has been considered ineffective in combating money laundering and corruption offenses.²² Therefore, the idea emerged to adopt the "Shifting of the Burden of Proof" system, a proof process that had long existed in the Anglo-Saxon legal system.²³ After lengthy debates and discussions between the government and parliament, a middle ground was reached by implementing a limited and balanced burden shifting. According to the Law on the Prevention and Eradication of Money Laundering, the burden of proof is shifted to the defendant, who is required to prove that their wealth did not result from criminal activities, but the public prosecutor still bears the burden of proving the defendant's guilt. In Article 77, it is stated that, for the purposes of examination in court hearings, the defendant must prove that their wealth is not the result of criminal activities.

Furthermore, Article 78 of the Law on the Prevention and Eradication of Money Laundering stipulates that the defendant must

²¹ the judge gives the defendant a chance to demonstrate that the assets under scrutiny are not connected to and did not come from the criminal act they have been accused of. During this phase, the defendant is allowed to present evidence that supports their claim that the assets in question have a legitimate origin and are not linked to any criminal activity. This is a part of the legal process to ensure fairness and provide the defendant with an opportunity to refute the allegations against them. See: Samuel Sittlington and Jackie Harvey, "Prevention of money laundering and the role of asset recovery," *Crime, Law and Social Change* 70 (2018): 427.

²² Brigitte Unger and Frans Van Waarden, "How to dodge drowning in data? Rule- and risk-based anti-money laundering policies compared," *Review of Law & Economics* 5, no. 2 (2009): 953.

²³ The legal concept of "Shifting of the Burden of Proof" is a principle within Anglo-Saxon (English) common law where the responsibility to prove a fact or element of a case shifts from one party to another. Initially, the burden of proof rests with the party bringing the claim or making an allegation (plaintiff in civil cases or prosecution in criminal cases). However, it may shift to the opposing party for various reasons, such as when the defendant raises affirmative defenses, files counterclaims, statutory provisions dictate the shift, legal presumptions exist, or equity and fairness considerations come into play. The specifics of burden shifting can vary by jurisdiction and case type, with legal practitioners and judges analyzing the circumstances to determine when and how the burden shifts during legal proceedings. See: Jeffries Jr, John Calvin, and Paul B. Stephan III, "Defenses, presumptions, and burden of proof in the criminal law," *Yale Lj* 88 (1978): 1325.

prove that the wealth related to the case is not derived from or related to criminal acts as referred to in Article 2 paragraph (1) by presenting sufficient evidence. The burden of proof shifting to the defendant in money laundering cases is to prove that the origin of their wealth is not from criminal activities as stipulated in Article 2 paragraph (1). The legal basis for this reversed burden of proof is regulated in Articles 77 and 78 of the Law on the Prevention and Eradication of Money Laundering. Article 77 mentions that for the purposes of examination in court hearings, the defendant is obligated to prove that their wealth is not the result of criminal activities. The reversed burden of proof system in money laundering cases under Articles 77 and 78 is for the purpose of examination during court hearings. Therefore, the reversed burden of proof can only be applied when the court hearing is conducted.

The concept of the reversed burden of proof in money laundering cases involves a limited and balanced approach.²⁴ "Limited" means that the reversed burden of proof is applicable only to specific criminal offenses, while "balanced" implies that the public prosecutor still retains the obligation to prove their charges. There are two possibilities: either the defendant cannot prove that their wealth is not derived from criminal activities. If the defendant fails to demonstrate that their wealth is not linked to criminal activities, it may be indicative to the judge that the defendant's wealth has criminal origins. Conversely, if the defendant can establish that their wealth is not derived from criminal activities, it implies that the Public Prosecutor, responsible for prosecution, must still present a substantial body of evidence to support their charges. In a scenario where the defendant can establish their innocence while the Public Prosecutor seeks to prove the defendant's guilt, the assessment of the evidence presented during the trial rests with the judge. Therefore, the reversed burden of proof, in practice, should be applied within the evidentiary process in Corruption and Money Laundering Courts.

The limited and balanced reversed burden of proof does not significantly alleviate the burden on public prosecutors. The reason is that public prosecutors still need to prepare pieces of evidence to strengthen their charges of money laundering, and they also have the obligation to prove that the defendant's wealth is the result of a criminal act. In fact, the concept of reversed burden of proof can be used as a loophole by the defendant or their legal counsel to challenge the evidence presented by the public prosecutor. Therefore, without thorough preparation of evidence during the investigative process, the reversed burden of proof process can backfire on the public prosecutor because the defendant or their legal counsel can introduce new evidence that has not been verified with the public prosecutor beforehand.²⁵ Hence, it is necessary to enhance the professionalism and competence of law enforcement agencies, including the police, the prosecutor's office, the National Narcotics Agency (*Badan Narkotika Nasional* or BNN), the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK), the Directorate General of Customs and Excise, and the Directorate General of Taxation, so that the concept of reversed burden of proof in this law can be effectively and efficiently implemented.

The concept of the reversed burden of proof in the Law on the Prevention and Eradication of Money Laundering aims to confiscate the defendant's wealth and recover state losses through the criminal process. This process includes the imposition of fines, asset forfeiture, payment of case costs, and restitution. Each of these sanctions is imposed concurrently with imprisonment, and the execution of these decisions falls under the responsibility of the public prosecutor. The reversed burden of proof in the Law on the Prevention and Eradication of Money Laundering is indeed directed towards the wealth of the defendant suspected to be derived from criminal activities. However, it cannot be denied that this process is also related to and affects the proof of the money laundering

²⁴ Ronald J. Allen, and Alex Stein, "Evidence, probability, and burden of proof," *Ariz. L. Rev.* 55 (2013): 557.

²⁵ John, Walker, "How big is global money laundering?," *Journal of Money Laundering Control* 3, no. 1 (1999): 29.

charges against the defendant themselves. The reversed burden of proof principle also contradicts several principles of criminal law, including the presumption of innocence and the principle of non-self-incrimination.²⁶

Indonesia has opted for a limited and balanced reversed burden of proof, aiming to minimize violations of the defendant's rights. However, upon thorough analysis, it becomes evident that both the limited and balanced reversed burden of proof and the pure or absolute reversed burden of proof encroach upon the defendant's rights. The fundamental distinction lies in the fact that the pure or absolute reversed burden of proof fundamentally alters the core concept of criminal law in Indonesia. This is particularly significant given Indonesia's adoption of Law Number 39 of 1999 on Human Rights and its commitment to various international human rights conventions. It is evident that applying an absolute reversed burden of proof would create contradictions with other existing laws and international obligations.

Absolute reversed burden of proof, from a human rights perspective, clearly violates human rights. However, in the context of extraordinary crimes such as money laundering, absolute reversed burden of proof should be comprehensively regulated in the Law on the Prevention and Eradication of Money Laundering so that it can be applied during the investigation process by investigators on the suspect's wealth. Therefore, investigators must gather evidence, at least two valid pieces of evidence indicating money laundering. According to Article 74 of the Law on the Prevention and Eradication of Money Laundering, investigators of corruption as the primary offense can initiate money laundering investigations if at least two valid pieces of evidence have been found.

The concept of pure reversed burden of proof can be attempted to be applied to money

laundering or other specific crimes, but it should be accompanied by strict legal regulations and an enhancement of the quality and professionalism of law enforcement personnel in Indonesia, especially for money laundering, from institutions such as the Indonesian National Police, the Prosecutor's Office, KPK, the Customs and Excise Directorate General, BNN, and the Directorate General of Taxation. Through strict legal regulations, all law enforcement behaviors can be monitored to prevent the abuse of power for extortion or exploitation of a suspect's situation for personal or group interests. The application of pure reversed burden of proof in money laundering requires solid cooperation among law enforcement institutions and the Financial Transaction Reports and Analysis Center. This cooperation is essential to ensure that the process of pure reversed burden of proof can be executed effectively and efficiently. In addition to pure reversed burden of proof, Indonesia can also adopt the theory of shifting the burden of proof with a balance of probabilities theory. In theory, this approach does not interfere with the rights of the defendant because the prosecutor will prove the perpetrator's fault negatively, while the defendant simultaneously proves ownership of wealth using a balanced probabilities theory.

C. Conclusion

Law Number 8 of 2010 on Money Laundering Crimes introduces a new dimension to the burden of proof system. In the context of money laundering, the defendant has the obligation to prove that their wealth was obtained legally, which is known as a reversal of the burden of proof. This signifies a change in the legal orientation that associates money laundering with assets, where the defendant needs to prove the legality of their sources of wealth. Indonesia's decision to adopt a

²⁶ The reversed burden of proof principle, as applied in certain legal contexts, contradicts fundamental principles of criminal law. It notably conflicts with the presumption of innocence, which is a cornerstone of criminal justice, by shifting the responsibility onto the defendant to demonstrate their innocence instead of placing the burden on the prosecution to prove guilt beyond a reasonable doubt. Additionally, it runs counter

to the principle of non-self-incrimination, as it may require defendants to provide evidence that could potentially be used against them in a criminal case, undermining their right against self-incrimination. See: Sutrisno, Tri, "Reconstruction Setting About The System Of Profitability in The Criminal Money Laundering," *South East Asia Journal of Contemporary Business, Economics and Law* 14 (2017): 59.

“Reversed Burden of Proof” system that is limited and balanced in cases of money laundering and corruption reflects a compromise between efforts to enhance law enforcement effectiveness and protect the rights of the accused. This idea emerged after long debates and discussions between the government and parliament. The limited and balanced reversed burden of proof system allows prosecutors to have an initial advantage in showing indications of wrongdoing, but the defendant still retains the right to defend themselves. While there are views that both types of reversed proof, whether limited or pure, can violate the rights of the accused, the application of pure or absolute reversed burden of proof would significantly change the fundamental concept of Indonesia's criminal law and contradict various laws, including Law Number 39 of 1999 on Human Rights and international conventions on human rights ratified by Indonesia. Therefore, the choice of limited and balanced reversed burden of proof can be seen as an effort to maintain a balance between effective law enforcement and individual rights protection.

Absolute reversed burden of proof, when considered from a human rights perspective, clearly poses the potential for violations of individual rights. However, in the context of extraordinary criminal enforcement such as money laundering, the application of absolute reversed burden of proof must be comprehensively regulated in the Law on the Prevention and Eradication of Money Laundering. This process should enable investigators to gather at least two pieces of valid evidence related to money laundering before an investigation can commence, in accordance with Article 74 of the Law. In addition to pure reversed burden of proof, Indonesia also has the option to adopt the balanced probability principles. The enforcement of pure or absolute reversed burden of proof would result in violations of the presumption of innocence, human rights, the right to remain silent, and could lead to bureaucratic chaos. Therefore, if its implementation is considered in the near future, it needs to be thoroughly planned and calculated, especially from a political perspective.

REFERENCES

- Alldrige, Peter. “The moral limits of the crime of money laundering.” *Buffalo Criminal Law Review* 5, no. 1 (2001): 279-319.
- Allen, Ronald J., and Alex Stein. “Evidence, probability, and burden of proof.” *Ariz. L. Rev.* 55 (2013): 557.
- Aluko, Ayodeji, and Mahmood Bagheri. “The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria.” *Journal of Money Laundering Control* 15, no. 4 (2012): 442-457.
- Buchanan, Bonnie. “Money laundering—a global obstacle.” *Research in International Business and Finance* 18, no. 1 (2004): 115-127.
- Butt, Simon. *Corruption and law in Indonesia*. London: Routledge, (2017), 36-40.
- De Sousa, Luís. “Anti-corruption agencies: between empowerment and irrelevance.” *Crime, law and social change* 53 (2010): 5-22.
- Ferguson, Pamela R. “The presumption of innocence and its role in the criminal process.” In *Criminal Law Forum*, vol. 27, no. 2, pp. 131-158. Dordrecht: Springer Netherlands, 2016.
- Gilmour, Nicholas, Tristram Hicks, and Simon Dilloway. “Examining the practical viability of internationally recognised standards in preventing the movement of money for the purposes of terrorism: A crime script approach.” *Journal of Financial Crime* 24, no. 2 (2017): 260-276.
- Isra, Saldi, Feri Amsari, and Hilaire Tegnan. “Obstruction of justice in the effort to eradicate corruption in Indonesia.” *International Journal of Law, Crime and Justice* 51 (2017): 72-83.
- Jeffries Jr, John Calvin, and Paul B. Stephan III. “Defenses, presumptions, and burden of proof in the criminal law.” *Yale Lj* 88 (1978): 1325.

- Karklins, Rasma. *The system made me do it: corruption in post-communist societies*. London: Routledge, 2016.
- Levi, Michael, and William Gilmore. "Terrorist finance, money laundering and the rise and rise of mutual evaluation: a new paradigm for crime control?." *Financing terrorism* (2002): 87-114.
- Lord, Nicholas J. "Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany." *Criminology & Criminal Justice* 14, no. 1 (2014): 100-120.
- Mugarura, Norman. "The institutional framework against money laundering and its underlying predicate crimes." *Journal of financial regulation and compliance* 19, no. 2 (2011): 174-194.
- Mugarura, Norman. "Uncoupling the relationship between corruption and money laundering crimes." *Journal of Financial Regulation and Compliance* 24, no. 1 (2016): 74-89.
- Nkoane, Paul. "The Prevention of Organised Crime Act: the proving of "instrumentality" in cases of obscured use of intangible things." *Stellenbosch Law Review* 27, no. 1 (2016): 182-202.
- Norton, Simon D. "Suspicion of money laundering reporting obligations: Auditor compliance, or sceptical failure to engage?." *Critical Perspectives on Accounting* 50 (2018): 56-66.
- Schanzenbach, Max M., and Emerson H. Tiller. "Reviewing the sentencing guidelines: Judicial politics, empirical evidence, and reform." *The University of Chicago Law Review* 75, no. 2 (2008): 715-760.
- Sittlington, Samuel, and Jackie Harvey. "Prevention of money laundering and the role of asset recovery." *Crime, Law and Social Change* 70 (2018): 421-441.
- Sutrisno, Tri. "Reconstruction Setting About The System Of Profitabilityin The Criminal Money Laundering." *Southeast Asia Journal of Contemporary Business, Economics and Law* 14 (2017): 53-59.
- Teichmann, Fabian Maximilian Johannes. "Twelve methods of money laundering." *Journal of money laundering control* 20, no. 2 (2017): 130-137.
- Unger, Brigitte, and Frans Van Waarden. "How to dodge drowning in data? Rule-and risk-based anti money laundering policies compared." *Review of Law & Economics* 5, no. 2 (2009): 953-985.
- Walker, John. "How big is global money laundering?." *Journal of Money Laundering Control* 3, no. 1 (1999): 25-37.
- Wibowo, Muhtar Hadi. "Corporate Responsibility in Money Laundering Crime (Perspective Criminal Law Policy in Crime of Corruption in Indonesia)." *JILS* 3 (2018): 213.