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Money Laundering And Corruption Offences After The Constitutional Court Decision Number 77/PUU-XII/2014

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Abstract

The application to the Constitutional Court with the Constitutional Court decision number 77/PUU-XII/2014 was based on the dissinting opinion of Hakum Alecander Mawarta in the TPPU case of the Central Jakarta District Court with Case Number 10.Pid.Sus-TPK/2014/PN.JKT.PST. Based on this judicial review, the Constitutional Court stated that the existence of Article 69 in Law No. 8/2010, which states that law enforcement officials are allowed to investigate, investigate and examine ML/TF cases without proving the original crime, is questionable because it is not in accordance with the characteristics of ML/TF as a continuation of the original crime. Thus, there are juridical implications that will occur related to the prevention of ML, among others: potential acquittal of the defendant; violation of the principle of presumption of innocence, contrary to the concept of proof adopted in Indonesia and so forth. Of course, in this research, the author will reconstruct the placement of the Money Laundering Crime as Independent Crimes along with its legal implications in practice. This is because the placement of the Money Laundering Crime as Independent Crimes has given legal consequences to the legal system adopted in Indonesia, one of which is the Presumption of Innocence. This research is a descriptive analytical literature research using juridical-normative approach and qualitative deductive method. In doing so, it is concluded that the development of ML has experienced increasingly complex developments and legal breakthroughs that place ML as a stand-alone criminal offence.

Keywords: Money Laundering Crime; Corruption Crime; and Constitutional Court Decision No. 77/PUU-XII/2014

INTRODUCTION

The practice of *money laundering* originally occurred in 1980. In its development, the crime of money laundering (TPPU*) was* later classified as a *white collar crime*. (Fauzia & Hamdani, 2021b).. The rise of ML gave birth to a response from the United States Government by starting to qualify money *laundering* as a criminal offence, namely by issuing the *Money Laundering Central Act* (1986), which was then followed by *The Anmunzio Wylie Act,* and the *Money Laundering Suppression Act* (1994). (Kurniawan, 2013).

There are various formulations regarding the definition of ML, although it is stated that there is no universal definition of ML, meaning that each country may define itself according to the conditions of its country, especially in determining the type of crime originated. (Garnasih, 2015). Indonesia only regulated money laundering in April 2002 with the enactment of Law No. 15/2002 on the Crime of Money Laundering (Law No. 15/2002), which was later revised with Law No. 25/2003. After that in 2010, the anti-money laundering provisions were revised again with Law Number 8 Year 2010 (Law No. 8/2010).

There are various patterns used by criminals to enjoy, disguise or hide the proceeds of crime. In terms of theory to date, there are two ways of money laundering, namely modern and traditional methods.(Ginting & Indradewi, 2021) Although it is said that no two money laundering systems are the same, in general, the modern money laundering process consists of three stages, namely *placement, layering* and *integration.* (Emirzon, 2017). All three steps can

occur at the same time. These steps are intended to place illegal funds into the financial system, with the aim of not inviting suspicion from the authorities (Hansen, 2012). (Hansen, 2012).

ML/TF is a process of the *proceeds* of crime or, in other words, "*dirty money*" sourced from crime which is then converted into a form that appears legitimate so that its allocation can be used safely. (Nurcahyati, 2021). The previous proposition suggests that ML always seems to be synonymous with *predicate crimes* that have relevance to the ML itself, but in court proceedings, ML is often separated from the *predicate crimes/offences* that mediate the ML crime.

On 11 August 2014, a petition filed by M. Akil Mochtar in a corruption and money *laundering case* related to the legal argumentation in Judge Alexander Mawarta's *dissenting opinion* regarding the proof of *predicate crime,* which is considered important in the handling of money *laundering* cases in Decision Number 10.Pid.Sus-TPK/2014/PN.JKT.PST, was considered to have harmed the rights of the defendant as guaranteed by the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). This is contrary to the provisions of Law No. 8/2010 Article 2 paragraph (2), Article 3, Article 4, and Article 5 paragraph (1) which states the phrase "reasonably suspected" which is one of the criteria for the type of original criminal offence that allows for ML. Meanwhile, out of the nine Constitutional Court Judges, there were two judges who only relied on Article 69 of Law No. 8/2010 regarding the phrase "it is not mandatory to prove the original criminal offence".

Some criminal law experts assume that Article 69 of the Law *a quo* aims to prevent the perpetrators from quickly transferring the assets derived from the criminal offence, if they must first prove the original criminal offence, it is considered to take a long time so that it has the potential for the assets to have been transferred or hidden. Therefore, Article 69 is needed to prevent the transfer of assets resulting from a criminal offence. Marjono Reksodiputro argues as follows: "The establishment of Article 69 for investigation, prosecution, and examination in court is not required to prove the original criminal offence". The elucidation of this Article should refer to Article 480 of the Criminal Code, which is on extortion, which essentially aims to prevent a person from benefiting from another person's criminal offence. Thus, the criminal offence of storing can be prosecuted in court without having to prove that the goods are stolen goods, as long as the person knows or reasonably suspects that the goods were obtained from a crime.

If we look at several studies that also discuss the Crime of Money Laundering in Indonesia, we will find several novelty values that exist in this study. Some of the studies that discuss ML are: *First, a* research entitled "Analysis of the Prevention of Criminal Acts of Money Laundering by Bank Negara Indonesia." Written by Nur Nugroho et al. (Nugroho et al., 2020). In this study, it discusses money laundering carried out by hoarding illicit money in the bank. *Second, a* study entitled "Analysis of the Economics of Punishment for the Crime of Money Laundering in Law Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering." Written by Erma Denniagi (Denniagi, 2021). In this study, it discusses punishment based on Law No. 8 of 2010 and its economic impact, which results in a conclusion that Law No. 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering still does not fully reflect the cost and benefit principle, so it tends to create inefficient punishment.

Third, the next research entitled "money laundering criminal offences" written by Fransiska (Eleanora, 2011). Which in essence produces related to the Crime of Money Laundry is a criminal offence in the economic field which is clearly part of the crime of corruption, the crime of bribery. Of course, with these three studies when compared with this research, the research written by this author has *novelty* or novelty value, namely research that focuses on TPPU after the Constitutional Court Decision Number 77/PUU-XII/2014. Based on these differences, this article will discuss the position of Article 69 in Law No. 8/2010. Then the

formulations contained in this writing are: 1. What is the position of Article 69 as *independent crimes* in Law No. 8/2010; 2. What are the juristic implications arising from Article 69 of Law No. 8/2010.

RESEARCH METHODS

The method used in discussing this matter is the normative research method, with primary legal material consisting of laws and regulations and secondary legal material consisting of literature. The approaches used are legislative approach and conceptual approach. Research is carried out with various efforts to achieve coherence truth by connecting the results of the identification of harmony between applicable regulations and legal norms and / or principles that apply in society.(Peter Mahmud Marzuki, 2017) Researchers use data analysis using a deduction pattern to explain various regulatory norms related to legal issues first and then explain legal facts later. Data analysis is arranged systematically, regularly, logically, carefully, and explained holistically and in detail. Thus, the reasoning pattern is arranged systematically so as to reach the conclusion of the legal issues studied.

RESULT AND DISCUSSION

The Position of Article 69 of Law No. 8/2010 as *Independent Crimes*

The enactment of Law No. 8/2010 is the government's response to prevent and eradicate ML that is rampant in Indonesia. (Fauzia & Hamdani, 2021a).. Law No. 8/2010 is a follow-up to the Anti-Money Laundering regime originally regulated in Law No. 15/2002 as amended by Law No. 25/2003. The latest reform of ML in Law No. 8/2010 shows a transformation in the *penal policy in the* field of Prevention and Eradication of ML in Indonesia, especially when compared to the criminal law provisions stipulated in the Criminal Code (M. A. Yanuar, M. A. Yanuar, M. A. Yanuar, M. A. Yanuar). (M. A. Yanuar, 2021). In general, *Penal Policy* is a rational arrangement or arrangement of crime control efforts for society. (Muladi & Arief, 2018). So that the ultimate goal of the *Penal Policy* is to provide protection to the community to realise *social welfare* and *equality*. The orientation of the *Penal Policy* itself is also voiced to at least realise three things: First, the direction of criminal law policy reform; Second, efforts to prevent criminal offences; and Third, the way investigations, prosecutions, trials and the implementation of punishment must be carried out.

If seen further from the discussion above, the birth of Law No. 8/2010 is inseparable from the factors of international legal rules, in this case it can be found in the formulation of regulations in the *Financial Action Task Force on Money Laundering* (FATF) and also as a form of complement to the shortcomings of the previous legislation. Therefore, basically strengthening the prevention and eradication in the field of money laundering crimes whose spirit is the approach to the assets of the perpetrators obtained through money laundering crimes is able to restore the financial losses of the State. Which in this case the more popular term is known as *follow the money approve* (Hamdani, 2021). *The follow the* money approach is another term for the anti-money laundering approach, with the main strategy being to prioritise finding money or assets from criminal offences using the *financial* transaction analysis approach, then looking for the perpetrator and the criminal offence (Hamdani, 2021). (Hamdani, 2021). The ideal paradigm construction for law enforcement officials in applying the *follow the money* method in asset *tracing of* money laundering offenders can be described as follows:

1. One of the main elements that make the application of money laundering offences always important to be applied is the *follow the money* approach, which is more sophisticated than other criminal laws, in the provisions of the *Anti-Money* Laundering Law. The concept can

always be applied if there are allegations or suspicions of ML committed by the perpetrator, which can be used in tracing the extent to which the assets flow.

2. That for assets that should be confiscated, two perspectives are still possible, namely: (a) to assets (either the proceeds of crime or the assets of the perpetrator) that are equivalent to the amount of loss generated; and (b) to all assets (either the proceeds of crime or the assets of the perpetrator) whose acquisition, either partially or wholly, comes from the proceeds of crime. These two models each have their conceptual and juridical basis, so that each becomes a *choice of law* for *law* enforcers, as long as it has not been confirmed in and promulgated regulations related to Asset Forfeiture.
3. The Anti-Money Laundering Law has determined provisions that can be used as instruments to maximise *asset recovery* that can be used by law enforcers fairly, proportionally, and in accordance with the purpose of the instrument in order to maximise the value of assets that can be secured for the benefit of *asset recovery*.

Furthermore, if the above description is associated with the position of Article 69 in Law No. 8/2010 which reads "*To dapat dilakukan penyidikan, prosecution, dan examinan in the court of law against the act of money laundering, it is not required to prove the original criminal act first"*. Therefore, this norm is actually conceptually built in Law No. 8/2010 to focus more on the pursuit and return of assets rather than the conviction of the original crime itself, so that in general the position of Article 69 as *Independent crimes* or stand-alone criminal offences can be seen by the difference or a characteristic that lies in the object between the original crime and ML. In general, the object of the original criminal offence is the act and the perpetrator. Meanwhile, the object of ML is the wealth obtained by the criminal offence. (A. Yanuar, 2019).

The interpretation that ML is an *Independent Crimes* can be understood if a systematic interpretation is made of Articles 3, 4 and 5, and Article 69 of Law No. 8/2010. Articles 3, 4 and 5 of Law No. 8/2010 are articles that criminalise ML, each of which contains the element *"known or reasonably suspected to have originated from the proceeds of a criminal act"*. Then, if Article 69 of Law No. 8/2010 is understood using a systematic interpretation approach with the provisions of Articles 3, 4, and 5 of Law No. 8/2010 as well as the principle approach to the formation of laws and regulations as stipulated in Law No. 12/2011 on the Formation of Laws and Regulations (Law No. 12/2011), then there is nothing wrong with the formulation of Article 69 or Articles 3, 4, and 5 of the Law *a qou*. Because the use of the phrase "*reasonable suspicion*" in Articles 3, 4, and 5 does not require prior proof of the original criminal offence, this is because what will be proven is whether the element of "known or reasonable suspicion" is proven or not.

Although in *Article 6 paragraph (1) point a* and *point b (i)* in the ML criminalisation model according to the *United Nations Convention Against Trans Organised Crimes (*UNTOC), *the* element of '*knowing*' must be fulfilled, however, the interpretation of these provisions must not only look partially at the provisions, but a more comprehensive interpretation approach must be taken. *Article 6 Paragraph (2) point f* states that *"Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances"*.

This at least illustrates that the criminalisation of laundering the proceeds of crime requires the existence of *'knowledge'*, *'intent'*, or *'purpose'* which can be based on objective factual circumstances. The phrase "based on objective factual circumstances" seems to indicate that the understanding of 'knowledge', 'intent' or 'purpose' as described in *Article 6 UNTOC* cannot be absolutised, but the regulation is still based on objective factual circumstances to be able to prove the criminalisation of money laundering.

For example, in the criminalisation of Article 5 of Law No. 8/2010, if the knowledge must be considered absolute or perfect as in *Article 6 Paragraph (1) point b.(i),* it will be difficult to ensnare the perpetrator of Article 5 of Law No. 8/2010, because knowledge of the proceeds of

crime will be considered perfect at least in the event that: **(1) The perpetrator acknowledges that the assets he/she owns or *has* owned or controls are the proceeds of a criminal offence, (2) the perpetrator is an *intellectual dader* or *materiele dader* of the original criminal offence and/or ML, or (3) the perpetrator is part of a syndicate in committing the original criminal offence.** As for the three *circumstances*, the perpetrator of Article 5 as a **passive perpetrator** or as a medium for money laundering who is not directly involved in the original criminal act, it is impossible to be involved in the three circumstances. So it will be very difficult or even impossible to charge the perpetrators who are the media of money laundering with these arguments. On this basis, based on the phrase "based on objective factual circumstances", it is necessary to soften the criminalisation of ML offences in Indonesia by adding the phrase 'reasonable suspicion'. Where the element of 'reasonable suspicion' is also part of the *class of* knowledge which is graded below the element of 'known'.

The parameters for the fulfilment of the element of 'knowing or reasonably suspected' as stated in the Explanation of Article 5 paragraph (1) of Law No. 8/2010 are alternative, so that it does not require the fulfilment of all elements, but only one of them has been fulfilled, then the element of 'knowing or reasonably suspected' has been fulfilled. Many academics have tried to *compare Article 6 Paragraph (2) point f of* UNTOC with the element of 'reasonable suspicion' in the criminalisation of ML in Indonesia, stating that with the element of 'reasonable suspicion', it is clear that not a single element as in *Article 6 Paragraph (2) point f of* UNTOC is fulfilled, even including the element of knowledge.

Therefore, if it is related to the provisions of Article 69 of Law No. 8/2010 which states that in order to be able to conduct an investigation, prosecution, and examination in court against ML, it is not mandatory to prove the predicate crime, then the provisions of Article 69 do not conflict with Articles 3, 4, and 5, because the element of "reasonably suspected" does not require proof of the predicate crime. This means that from the provisions of the article, in order to resolve the ML case, it is not mandatory to prove the *predicate crime*. Regarding the proof of TPPU, the Constitutional Court affirmed that TPPU investigation can be conducted without the need to prove the existence of predicate crime first. However, after the ML is proven, the predicate crime must be proven later. (Implementation of JDIH BPK Representative of Central Java Province, 2019).

The above was confirmed by the issuance of Constitutional Court Decision No. 77/PUU-XII/2014 filed by M. Akil Mochtar. The Constitutional Court Decision No. 77/PUU-XII/2014 dated 15 December 2014 rejected all requests for judicial review of Law No. 8/2010 against the 1945 Constitution. So that the position of Article 69 as *Independent Crimes is* increasingly clear, especially in its legal considerations the Panel of Judges asserted that: "what is meant by "*not required to be proven first*" in the relevant article, namely not required to be proven by a court decision that has permanent legal force". (Junaidi, 2018).

With the provisions in the articles that have been interpreted systematically in the Constitutional Court Decision Number 77/PUU-XII/2014, it provides an overview of the perspective of proving ML offences. Concretely, in Law No. 8/2010 on the Prevention and Eradication of Money Laundering, there are at least 3 (three) possibilities for the process of proving ML, namely (a) ML is proven after the legal process or *in kracht of the* Original Crime; (b) ML is proven simultaneously by combining it with the case of the Original Crime; and (c) ML is proven without first proving the Original Crime.

Regarding point (a), it is a normal condition in proving ML/TF (Supreme Court, 2006). As for point (b), it is justified through Article 75 of Law No. 8/2010. As for point (c), it can be possible to occur, on the grounds of injustice that a person who has obviously received benefits from the criminal offence of money laundering is not prosecuted only because the original

criminal offence has not been proven first. If abstracted further, then the application of point (c) above becomes relevant to be applied in the context:

1. If the party to be prosecuted is a ML offender who is a *non-material offender of the* original crime, while the *material* offender of the original crime does not exist or is not known/found.
2. If the investigation, prosecution or trial between the original criminal offender and the *non-material* offender is conducted almost simultaneously , so that the case of a money launderer who is a *non-material offender* can be processed ahead of the original criminal *offender*, as long as the case files are separated *(splitshing)* and processed within a short time difference .

In terms of proof as in point (c), this is what is meant by *independent crime.* The interpretation of Money Laundering *Crime* as an *Independent Crime* does not mean that there is no crime of origin for the occurrence of the Money Laundering Crime, but because the *materialele dader of the* original crime does not exist or is unknown/found, but the assets that are strongly suspected of originating from the crime are controlled by other parties, whose flow of funds comes from the materialele *dader of the original crime* and is identified by *stakeholders* or by law enforcement, so that these other parties can be charged with Money Laundering Crime without the need to wait for the processing of the *materialele dader of the original crime*. Thus, it can be simply understood that point (c) is only relevant to the understanding of the proof of Money Laundering Crime in certain circumstances, not the understanding of the factual occurrence of Money Laundering Crime.

Certain circumstances as in point (c) can be exemplified by the flow of assets from the original criminal offence to hide or disguise the proceeds of the crime to someone who is not the original criminal offence and in the future it turns out that the original criminal *offender is* on the wanted list, while the party receiving the flow of funds is found or known. Then the person who received the funds can be prosecuted for alleged money laundering without having to wait for the prosecution of the perpetrator *(materiele dader) of the* original crime whose whereabouts are unknown.

Proof of the situation in point (c) can be possible, because the approach to proving money laundering offences is against assets *(proceeds of crime)* that are known or reasonably suspected to be the proceeds of crime, as is one of the essential elements in every money laundering offence. Which, with the approach to the proceeds of *crime,* it does not 'merely' have to wait for the proof or proof together with the proof of the original criminal act.

It is understood that in the criminalisation of money laundering, all of the offences require the *proceeds of crime,* as Article 2(1) of Law No. 8/2010 on the Prevention and Eradication of Money Laundering as an inherent part of the elements of money laundering offences. Article 2 paragraph (1) of Law No. 8/2010 does not only require *predicate offences,* but also *proceeds of crime* and *predicate offences,* as Article 2 paragraph (1) does not open with the phrase 'criminal offences' but 'proceeds of crime'.

The position of Article 69 as *Independent Crimes* also emphasises ML as a *concursus realis* where a person commits a criminal act and each of these acts stands alone as a criminal offence. (Hiariej, 2012). In other words, ML is a *concursus realis* that is formulated as a stand-alone offence. This means that ML can be brought to court or trial without having to prove the *predicate crime*. With the consideration of the Constitutional Court judges, the judges acknowledged that ML is an *independent crime*. Therefore, based on the description above, if it is associated with the Constitutional Court Decision Number 77/PUU-XII/2014, then according to the consideration of the seven Constitutional Court Judges, the existence of Article 69 of Law No. 8/2010 does not conflict with Article 23 paragraph (3) of the 1945 Constitution and does not conflict with the principle of presumption of innocence.

As for reinforcing the position of ML as an *Independent Crimes* through Article 69, the ratification of the Asset Forfeiture Bill can be a solution, because there is a very close relationship

between the eradication of ML and asset forfeiture. With the development of ML in an increasingly complex direction, especially Law No. 8/2010 has limitations to pursue assets suspected of originating from the proceeds of corruption, then there are still evidentiary complexities, such as having to prove "efforts to hide the origin of wealth" which are usually proven by several things, namely (Rampadio et al., 2022):

1. Non-reporting of certain money or wealth in the LHKPN;
2. Purchase of assets in the name of another person and co-operation with a notary; or
3. Transactions through corporations by disguising the source of funds.

One of the offences attempted to be regulated in the political law of combating ML is the offence of *Illicit Enrichment*, this offence at least began to be adopted in the Asset Forfeiture Bill, namely through the provisions of Article 5 paragraph (2) which stipulates that:

(2) *In addition to the Assets as referred to in paragraph (1), the Assets that may be forfeited under this Act include:*

a. Assets that are not balanced with income or not balanced with the source of additional wealth that cannot be proven legally and are suspected of being related to Criminal Assets obtained since the enactment of this Law; and

b. Assets that are confiscated objects obtained as a result of a criminal offence or used to commit a criminal offence.

The provisions in Article 5 paragraph (2) of the Asset Forfeiture Bill above, especially in letter a, show a more progressive direction of law enforcement against ML, namely the regulation of asset forfeiture obtained from "unnatural wealth" or also known as *Illicit Enrichment.* However, if it is related to Article 69 of Law No. 8/2010 which requires no need for proof of criminal origin, then this *Illicit Enrichment* offence will strengthen Article 69, because in order to be able to seize assets, it is not necessary to prove the original criminal act first. This is then in line with the paradigm of ML eradication to be developed, which is oriented towards money or loss (*follow the money*).

From the descriptions above, the author interprets that the legislator from the beginning intended the birth of Article 69 as *Independent Crimes as* a response to the conditions that may occur in ML, where the assets resulting from criminal acts must be prevented from being utilised by the perpetrator. As described by Theodore S. Greenberg, asset forfeiture or prosecution of ML without first proving the original criminal offence is based on several things (Greenberg, 2009):

1. The perpetrator of the crime has died (death automatically stops the criminal justice process).
2. The perpetrator of the crime has fled abroad (hanging criminal proceedings).
3. The perpetrator is still a fugitive, and although he can be tried in absentia, he cannot be executed.
4. Perpetrators of crimes are difficult to touch because of the very strong immunity they have (for example the century bank case and the hambalang case which have not touched the people suspected of being involved in it but are hindered by political power or very strong legal immunity).
5. The offender was unknown but the asset was found.
6. Relevant assets are held by third parties who are not charged with criminal offences but where there is evidence that the assets have been tainted.
7. Criminal prosecution cannot proceed because there is insufficient evidence.

   The above conditions show that eradication of ML will be hampered if the original criminal offence must be proven first. Therefore, it is appropriate that the Constitutional Court, through Decision No. 77/PUU-XII/2014, cancelled all of the petitioners' requests for judicial review of Law No. 8/2010, particularly regarding Article 69.

The Jurisprudential Implications of Article 69 of Law No. 8/2010 on the Prevention and Eradication of the Crime of Money Laundering

There are several points arising from the juristic implications of Article 69 of Law No. 8/2010, namely:

1. The Legal Implication of Not Requiring Proof of Original Crime in ML Cases Potentially Leads to the Release of the Defendant

No punishment without guilt, or *geen straf zonder schuld* is known as one of the important principles in criminal law. (Moeljatno, 1993). The principle of the principle of no punishment without fault is that a person can only be punished if he is proven guilty of committing an act prohibited by law. Guilt can be in the form of intent or negligence. If there is no element of guilt, then the perpetrator cannot be convicted as an unwritten legal principle adopted by most countries including Indonesia, known as *"geen straft zonderschuld"* or translated as "no punishment if there is no fault".(Saleh, 1983). Error (in a broad sense) includes three things, namely, first, intentionally, second, negligence, and third, can be accounted for (Andi, 2012). (Andi, 2012).

Criminal law theory states that every crime consists of elements (the essence of the crime) and elements (elements of the crime). The essence of the crime is the elements listed in the text of the crime, which must be included in the indictment and must be proven by the public prosecutor. Since the nature of the offence cannot be proven, the accused must be found not guilty. The core crime classification includes what is called the objective element of the crime (*actus reus*) and there is what is called the subjective element (*mens rea*). Meanwhile, the elements of unlawful acts are elements that cannot be seen in the formulation, but must be assumed to exist, but do not need to be included in the indictment and do not need to be proven unless there is doubt in the judge.

Proof of knowledge or malicious intent (*mens rea*) is a vital element in imposing sanctions on the defendant. In the context of handling a ML case, proof of malicious intent can only be made when the public prosecutor can prove that the defendant knew and or could suspect that the assets he owned came from a crime (criminal offence). Liability is a very important concept known as the doctrine of guilt, therefore a person's actions are not said to be guilty unless there is an evil mind attached to it. (Rahmi & Lubis, 2017). The norm of not requiring prior proof of criminal origin in the investigation stage as intended in Article 69 is when the investigator determines the suspect of money laundering where based on the results of the investigation conducted by the investigator, assets that do not match the suspect's profile are found. However, if the case will be upgraded to the prosecution stage, the investigator should provide evidence related to the crime of origin committed by the suspect which is the basis for the acquisition of unnatural assets.

The interpretation of Article 69 of Law No. 8/2010 has gone far beyond the intent of the article. The meaning of the words "not required to be proven in advance" in Article 69 should be interpreted to mean that in order to conduct an investigation, prosecution and examination before a court of law, it is not required to first be proven by "the existence of a court decision with permanent legal force" for the original criminal offence. Thus, the proof at the stage of investigation, prosecution or examination before the court must be carried out simultaneously with the original criminal offence, as a cumulative charge or at least as one of the elements of ML. (Nurcahyati, 2021). What is concerning in practice is that many ML cases are declared not ML because the original criminal offence is not proven, for example one of them occurs in a case like this: Defendant PT Terminal Petikemas Surabaya (PT TPS) PT TPS is a subsidiary of PT Pelindo III located in Surabaya. In the period of 2014 to 2016, PT TPS entered into a cooperation contract with PT Akara Multi Karya (PT AMK) regarding the management of the Integrated

Physical Checkpoint at the PT TPS location. The defendant PT TPS received profit sharing income of Rp14.6 billion from the cooperation. The cooperation is considered to violate several rules regarding the implementation of cooperation and services at the port. PT TPS was then charged with criminal offences but with a single charge of committing money laundering by distributing the illegal money of Rp14.6 billion as dividends to PT Pelindo III as the parent company. PT TPS was charged with ML as regulated and punishable in Article 3 *in conjunction with* Article 6 *of* Law No. 8/2010 in *conjunction with Article* 55 paragraph (1) to 1 of the Criminal Code in *conjunction with* Article 64 paragraph (1) of the Criminal Code, in his verdict (3361/Pid.Sus/2018/PN.Sby), the Surabaya District Court Judge then stated that the Defendant PT Terminal Petikemas Surabaya was not proven to have committed ML as charged by the Public Prosecutor and acquitted the Defendant PT TPS from all charges (*Vrijspraak)* (SIPPPS, 2020).

From this case, there is an affirmation that the criminal act is the *proximate cause of* ML, so that when the indictment on the original criminal act is not clearly argued, the defendant will be very easy to be acquitted. From the perspective of the theory of justice proposed by Aristotle, justice is a right that should be obtained by humans without any exceptions. Even if a person holds the status of defendant, the rights and opportunities to be shown the material truth must be treated equally with other citizens. In the context of money laundering, the defendant also has the right to be presented with evidence of the original criminal offence he has committed. It would be unfair if the judge imposes a sentence with two criminal provisions (original crime and money laundering) but only the money laundering crime is proven in court.

2. Potential Violation of the Presumption of Innocence

Law is not just a set of rules, but a building that has character and meaning (Rahardjo, 2006). Therefore, to get a very good understanding of the law it is not enough to only look at the legal regulations, but must also dig up to the legal principles. Legal principles give ethical meaning to legal regulations and legal systems (Rahardjo, 2006). (Rahardjo, 2006). The absolute elements of law are principles and rules. The power of the soul of the law lies in these two elements. Legal principles are the heart of the defence of legal life in society. The more it is defended, the stronger and more meaningful the law will be for people's lives. If the law is not based on legal principles, then the regulation will certainly lose itself from its legal nature. (Poernomo, 2000).

One of the fundamental legal principles that guides the operation of the criminal justice system is the presumption of innocence. (Hamzah, 2008). In essence, this principle emphasises that in order to uphold the objectives of the law, every criminal justice process should be based on the presumption of innocence. The presumption of innocence is a principle that applies universally and not only in Indonesian criminal procedure law but also in international criminal law. This legal principle is an absolute requirement to ensure and declare that the process carried out has been carried out in an honest, fair and independent manner (*due process of law*). (Atmasasmita, 2009). In positive law in Indonesia, the formulation of the Presumption of Innocence is stated in Article 8 paragraph (1) of Law No. 48/2009 on Judicial Power (Law No. 48/2009), namely "Every person who is suspected, arrested, detained, prosecuted, or brought before the court shall be presumed innocent before there is a court decision that states his guilt and has obtained permanent legal force."

The definition of the presumption of innocence contains 2 (two) very important meanings. First, the presumption of innocence only applies to criminal offences. Second, the presumption of innocence is basically applied to the issue of the *burden of proof* before the court where it is not the defendant who must prove his innocence, but rather the prosecutor who is supposed to prove that the defendant is indeed guilty by proving all elements of the criminal offence charged. (Ali, 2004). Article 69 of Law No. 8/2010 should be interpreted as an effort to

realise the goal of "*crime doesn't pay*" where criminals cannot enjoy the proceeds of their crime either while serving their sentence or after completing their sentence. Article 69 should not be interpreted as a tool to "impoverish the defendant" so that law enforcers can justify any means by overriding the principle of presumption of innocence. In practice in the field, in several TPPU cases, the application of Article 69 is used as a weapon to "take" as much of the defendant's wealth as possible by overriding the presumption of innocence and the principle of justice.

The following is an example of a case related to the application of money laundering which, according to the author, violates the presumption of innocence, namely: Defendant DS in the SIM Simulator case at the Korlantas Polri. DS was charged with abuse of authority in his position as the Budget User Authority (KPA) or his position as the Head of the Police Traffic Corps. As a result of DS's actions in abusing the authority of his position, the state suffered a state financial loss of Rp. 145 billion or at least Rp. 121 billion related to the procurement of the Police Driving Simulator for Fiscal Year 2011. In addition to being charged with corruption and ML for his main case in 2011, the public prosecutor also charged DS with ML in the amount of Rp. 53,894,480,929 (fifty-three billion eight hundred ninety-four million four hundred eighty thousand nine hundred twenty-nine rupiah) for the ownership of his assets obtained from 2003 to March 2010 using the old law, Law No. 25/2003. The public prosecutor did not prove the criminal offence from which the assets were obtained but only explained his income profile as a member of the National Police and the LHKPN he reported. The judge in his decision, namely in the Central Jakarta District Court Decision No.20/Pid.Sus/TPK/2013/PN.JKT.PST then stated that the defendant had legally and convincingly committed ML as charged by the public prosecutor by considering the profile of the suspect without asking the public prosecutor to prove the existence of the crime of origin.

These cases illustrate that the neglect of proving the crime of origin in ML has implications for potential violations of the presumption of innocence, the principle of justice and gives the impression of arbitrariness in the law enforcement process. These two cases show that the use of Article 69 of Law No. 8/2010 is not intended as an instrument of convenience in the TPPU law enforcement process, but rather an attempt to seize as much of the defendant's assets as possible.

Sapardjaja, a Supreme Court Justice, stated that although the application of reversal of the burden of proof is allowed in the Anti-Money Laundering Law, if the Anti-Money Laundering is not charged together with the original criminal offence, a complicated issue arises that must be examined through academic studies. If the public prosecutor charges the original criminal offence and ML together, it will facilitate the work of the judge to gain confidence and decide the defendant is guilty, because in addition to the elements of ML are proven, the original criminal offence is also very clear. That with the sufficiency of evidence and evidence submitted by the public prosecutor, the application of the reverse burden of proof is almost unnecessary. (Halif, 2017).

However much we hate the behaviour of money laundering, but the way of enforcing the law must be done correctly and in accordance with the applicable rules, it must also be in line with the theoretical basis that contains the philosophy of the existence of money laundering provisions. At least we must understand together that it is impossible for money *laundering to* occur without the existence of an original crime (*No money laundering without Predicate Offence*), besides that we must instill in our concept of thinking that TPPU is a *double crime* (*double crimes*), and the perpetrators of the original crime will be punished with two crimes at once, in which case there is a *concursus realis* as stipulated in Article 63 of the Criminal Code. (Garnasih, 2015).

In addition, Article 29 paragraph (2) of the *Universal Declaration of Human Rights* stipulates that: "In the exercise of his rights and freedoms, everyone shall be subject only to such

limitations as are prescribed by law for the sole purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of decency, order and the general welfare in a democratic society."

One form of respect for the human rights of others is not taking something that is not one's own right. Thus, in the context of ML, assets obtained as a result of a criminal offence, such as corruption, which is the right of every citizen, are taken by the perpetrators of corruption as the *illicit acquisition* of personal wealth, which can be *particularly damaging to* democratic institutions, the national economic system and *the rule of* law (*the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, the national economy and the rule of law*). Thus, ML obtained from the proceeds of corruption is also a violation by the perpetrator of a citizen's human right to acquire wealth or assets illegally.

Furthermore, quoting Artidjo Alkostar, the right to a normal trial along with his full rights as a citizen is only obtained when he is cooperative or when he does not break the law, the rest when he has exercised his rights but is not used properly, then the law has the right to enter into it to resolve the case, in a fair manner (Artidjo 2018). So that the rights that were originally obtained by the perpetrator before committing a criminal offence, are entitled to be maintained. However, when the perpetrator has abused his rights, the state has the right to take them back. Moreover, what the perpetrator did resulted in state losses. So although the existence of Article 69 of Law No. 8/2010 philosophically does not violate human rights, in practice it must still be carried out by complying with human rights signs, because the law is a human product and is carried out by humans.

3. Contrary to the Concept of Evidence in the Indonesian Criminal Justice System.

Criminal justice practice is generally divided into three stages: investigation, prosecution and trial. In the process of examination before the court, a very important thing for all parties is the matter of proof (Satria, 2012). (Satria, 2012). It is very important because if there is an argument or cross-argument between the public prosecutor and the defendant, it is the evidence that will be a reference for the judge in passing his decision. (Anshorudin, 2004). In the context of ML, not proving the original criminal offence is contrary to the conception of proof in the Indonesian criminal justice system, namely:

a. Contrary to the basic principle of proof in Indonesia. This principle is *Actori Incumbit Onus Probandi*, meaning that whoever is accused of wrongdoing must prove it. This means that the burden of proving the existence of a criminal offence rests on the shoulders of the public prosecutor, followed by the statement of the accused. (Hiariej, 2012). This principle is actually formed with the aim that investigators and public prosecutors act professionally in the law enforcement process by prioritising the principle of presumption of innocence and protection of human rights.
b. The evidentiary system adopted in criminal justice in Indonesia is *Negatief Wettelijk Bewisjtheorie* where the basis for deciding the guilt or innocence of the defendant is based on evidence that is determined limitively by law accompanied by the judge's belief. Valid evidence according to Article 184 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) are witness testimony, expert testimony, letters, instructions, and testimony of the defendant (Harahap, 2002). (Harahap, 2002). In the context of money laundering, not proving the original criminal offence will make it very difficult for judges to form their beliefs. Decisions that are based solely on the judge's conviction will create a vulnerability to the practice of arbitrariness of law enforcement officials with the *justification of the* judge's conviction.

4. A Review of the Constitutional Court's Consideration of the Material Test of Article 69 of Law No. 8/2010

In the decision of the Constitutional Court (No. 77/PUU-XII/2014 related to the examination of Article 69 of Law No. 8/2010, 7 (seven) of the 9 (nine) Constitutional Court Judges gave the opinion that if the perpetrator of the original crime died, the case would be void, and it would be unfair to the people of Indonesia if someone who had clearly received benefits from ML could not be prosecuted just because the original crime had not been proven first. However, the Constitutional Court judges stated that TPPU cannot stand alone, but must be related to the original criminal offence, so there cannot be TPPU if there is no original criminal offence. Although it is not exactly the same as ML, the Criminal Code has known the criminal offence of storing (Article 480 of the Criminal Code) which in practice since long time ago the original criminal offence does not need to be proven first. In relation to the opinion of the Constitutional Court Judge, it can be interpreted as follows:

a. The Constitutional Court judges emphasised that ML is not a single crime but a *double crime* where there can be no money laundering without an original crime.
b. Only in limited circumstances (*limitative clause*) does the original criminal offence charge not need to be proven first as stated when the defendant has passed away. Legally, this consideration should also be interpreted to mean that in normal circumstances, the law does not relinquish the responsibility of the public prosecutor to prove the original criminal offence.

Not having to prove the original criminal offence first should be interpreted that to enforce the law on ML, it is not necessary to wait for a judge's decision that is legally binding on the original criminal offence. Money laundering cases can still be tried together with the original criminal offence charges as cumulative charges. Article 480 of the Criminal Code on storing is a context exemplified by passive perpetrators whose trial does not need to wait for the verdict of the main perpetrator, but the goods under his control must still be charged and proven as the proceeds of a criminal offence.

CONCLUSION

Based on the description and exposure of the author above, there are several conclusions that the author can make, among others: *First, the* development of ML which is increasingly complex with various levels of complexity carried out by criminals has certainly become a challenge for law enforcers and policy makers to uncover ML cases, especially those that harm the state. Based on the Constitutional Court's decision NUMBER 77/PUU-XII/2014, TPPU has been placed as a stand-alone criminal offence or what is called *Independent Crimes*. This affirmation was made with the rejection of material testing of Article 69 of Law No. 8/2010. Of course, the positioning of Article 69 of Law No. 8/2010 as an *independent crime* is a response to the conditions that may occur in ML, where the assets resulting from criminal acts must be prevented from being utilised by the perpetrator. Also, positioning Article 69 of Law No. 8/2010 and ML in general as *independent crimes* can be seen from the difference or a characteristic that lies in the object between the crime of origin and ML. In general, the object of the original criminal offence is the act and the perpetrator. Meanwhile, the object of ML is the wealth obtained by the criminal offence. This is because the perpetrators of ML do not always play an active role in ML, but in ML there are also passive actors or as a medium for money laundering who are not directly involved in the original crime that also needs to be disclosed. Article 69 of Law No. 8/2010 has negated that ML is a *concursus realis* formulated as a stand-alone offence. This means that ML can be brought to the courtroom or trial without having to prove the *predicate* crime.

Secondly, the legal breakthrough that places ML as an independent criminal offence certainly has juridical implications with the legal model adopted in Indonesia, because through Article 69 of Law No. 8/2010, *the* disclosure of ML is no longer required to prove the original crime, it is enough to "reasonably suspect" that it can be processed. According to the author, the placement of ML as *Independent Crimes* will potentially violate the principle of presumption of innocence adopted in Indonesia. This legal principle is an absolute requirement to ensure and state that the process carried out has been carried out in an honest, fair and independent manner (*due process of law*). In line with this principle, of course, placing TPPU as a *concursus realis* has also violated the basic principles of evidence in Indonesia. The principle is *Actori Incumbit Onus Probandi,* which means that whoever is accused of guilt is the one who must prove it, especially since criminal law in Indonesia has favoured the *Negatief Wettelijk Bewisjtheorie* evidentiary system.

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