

The Principle of Reversing the Burden of Proof in Money Laundering Crimes

M. Arief Amrullah.

Faculty of Law, University of Jember, Indonesia.

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Corresponding Author:

M. Arief Amrullah
E-mail: arief.fh@unej.ac.id

Abstract: This article analyzes the principle of reversal of the burden of proof adopted in Article 77 and Article 78 of the Law. The purpose is to explain related to the principle of presumption of innocence (presumption of innocence), which has been adopted in Article 66 of the Code of Criminal Procedure. The normative legal research method examines authoritative texts as primary legal material and academic works as secondary legal material. The principle of reversal of the burden of proof in money laundering does not contradict the principle of presumption of innocence. On the contrary, the TPPU Law has placed defendants with legal subjects who deserve respect for their human rights to explain the origin of their assets not obtained from the proceeds of crime. The inability to explain the origin of the property does not make him guilty and criminalized. Because the Public Prosecutor is still obliged to prove his charges.

1. Introduction

Public law provisions regulate public interests (*algemene belangen*), while private law provisions regulate individual interests (*bijzondere belangen*).¹ The principle of reversal of the burden of proof in positive criminal law has been regulated in Article 37 of Law no. 31 of 1999 concerning the Eradication of Corruption as amended by Law no. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Eradication of Corruption Crimes. In its development, in connection with the promulgation of Law No. 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering (State Gazette of 2010 Number 122) dated October 22, 2010, in the future abbreviated as the TPPU Law, this principle was also adopted by the legislators into the TPPU Law as stipulated in Article 77 and Article 78 which is a positive step in placing the accused as a legal subject to defend his interests in money laundering cases related to the origin of the assets he has acquired.

The two laws (Law No. 15 of 2002 and Law No. 25 of 2003) are based on Article 99 of Law No. 8 of 2010. They were revoked and declared invalid because it was no longer under developments in law enforcement needs, practices, and international standards. Hence, it needed to be

¹ Lilik Mulyadi, "ASAS PEMBALIKAN BEBAN PEMBUKTIAN TERHADAP TINDAK PIDANA KORUPSI DALAM SISTEM HUKUM PIDANA INDONESIA DIHUBUNGKAN DENGAN KONVENSI PERSERIKATAN BANGSA-BANGSA ANTI KORUPSI 2003," *Jurnal Hukum Dan Peradilan* 4, no. 1 (March 31, 2015): 101, <https://doi.org/10.25216/jhp.4.1.2015.101-132>.

replaced with a new law (Section Considering Letter c of Law No. 8 of 2010). Observing the meaning contained in the principle of reversing the best burden of proof adopted into the AML Law, it is interesting to link it to the principle of presumption of innocence contained in Article 66 of the Criminal Code. As a comparison, namely as stated by the Council of Europe, in every discussion about reversing the burden of proof, there is always a debate concerning the system that seeks to uphold the principles of the rule of law and human rights.² This debate may be genuine because there have been criminal courts that try someone with the usual burden of proof in an attempt to confiscate someone's assets that maybe that person has never done it. However, he has been charged with a criminal offense.

For the Member States of the Council of Europe, it is important not only how to regulate the pursuit of assets, profits, or means of committing crimes but to explore ways of approaching the problem of seizing more money from suspected criminals and how to work on solving this problem within a human rights framework. However, none of these approaches have been declared inappropriate by the European Court of Human Rights and accepted as "best practice." This principle has previously been regulated in Article 35 of Law Number 15 of 2002 concerning the Crime of Money Laundering as amended by Law no. 25 of 2003 concerning Amendment to Law Number 15 of 2002 concerning the Crime of Money Laundering (*State Gazette* of 2003 No. 108) dated 13 October 2003.

Indonesia is one of the countries that is quite open to becoming a target for money laundering because, in Indonesia, there are potential factors as an attraction for money laundering actors, a combination of weaknesses in the social system and legal loopholes in the financial system.³ Bearing in mind that money laundering is one of the serious crimes committed by concealing or disguising the proceeds of illegal activities to make them appear legitimate. To prosecute the defendant in a money laundering case, the public prosecutor must prove several elements to show that the intention and involvement of the defendant in the crime of money laundering, including the origin of the funds being illegal, involvement in financial transactions, and participation in the three stages of money laundering – namely transfer, layering, and integration.

Prosecutors in money laundering cases must prove that the money was obtained through unlawful activities and then try to hide its origins to make it appear legitimate. For this reason, the prosecutor must provide evidence linking the crime to the person involved and showing that they know the funds were obtained in a way that violated the law. The existence of the prosecutor's obligation to prove the origin of the assets owned or obtained by him, as described above, shows that reversing the burden of proof is limited to reversed evidence because the prosecutor is still obliged to prove his indictment. So, it is not absolute but relative. The role of the prosecutor is still there.

Criminals are difficult to prove because they always obscure evidence.⁴ Considering that the crime of money laundering has different characteristics from ordinary crimes, as written by Yunus Husein that it is necessary to recognize that in the process of money laundering, the point is to dis-

² Council of Europe, "Burden of Proof Should Be Reversed to Allow Confiscations in Serious Offences: Warsaw Convention Report," *Criminal of the Parties to CETS 198*, (June 30, 2021), <https://www.coe.int/en/web/cop198/-/burden-of-proof-should-be-reversed-to-allow-confiscations-in-serious-offences-warsaw-convention-report>.

³ Alda Satria, Bastianto Nugroho, and Supolo Supolo, "Tindak Pidana Pencucian Uang Terhadap Perjudian Online," *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam* 4, no. 2 (October 6, 2022): 287-296, <https://doi.org/10.37680/almanhaj.v4i2.1863>.

⁴ Yuliya Zabyelina, "Reverse Money Laundering in Russia: Clean Cash for Dirty Ends," *Journal of Money Laundering Control* 18, no. 2 (May 5, 2015): 202-219, <https://doi.org/10.1108/jmlc-10-2014-0039>.

guise or hide the origin of the proceeds of crime so that it is as if there is no relationship between a person and his evil deeds, which in the end connected the assets resulting from the crimes as if they were clean with his daily actions.⁵ Proving whether or not the accused committed the act charged is the most essential part of the criminal procedure.⁶

Efforts to obscure the source of income from the proceeds of crime can be made in three ways – first, placement of assets into the financial system through banks or other financial institutions. Countries must have reporting requirements for large cash transactions, which are carried out through more significant amounts by breaking them down into smaller transactions, which is called smurfing. Another alternative approach is to physically smuggle large amounts of cash out of the country and store it in a country where reporting requirements are less stringent. Second, the stages in money laundering include what is generally referred to as layering, namely separating funds (wealth) from their origin, which is done to disguise what is real and make tracing it unclear. The third stage is integration, which requires the placement of wealth obtained from the proceeds of crime into a legitimate economy without raising suspicion of the origin of the acquisition.⁷

Because the threats or consequences arising from money laundering are severe (insidious) and can threaten various aspects or fields, both security, national and international stability, and constitute a main threat (frontal attack) against political and legislative power and a threat to the state's authority. It also disrupts and disrupts social and economic institutions, causes lax enforcement of the democratic process, undermines development and distorts the results achieved, sacrifices the population, uses opportunities for human negligence as targets, traps, and even enslaves certain groups. Community, women, and children are employed illegally in various fields, especially prostitution. This problem needs to be addressed together.⁸

According to one estimate, the proceeds from money laundering activities worldwide amount to one trillion dollars each year. The International Monetary Fund (IMF) stated that the world's total amount of money laundering is estimated to be between two and five percent of the world's gross domestic product. When using statistics for 1996, this percentage shows that money laundering ranged from US\$590 billion to US\$1.5 trillion. The lowest figure was equivalent to the value of the entire Spanish economic product. In addition, based on estimates from the Financial Action Task Force on Money Laundering (FATF), between 60 and 80 billion US dollars have been laundered in the financial system every year in Europe and North America.⁹

In its development, worldwide money laundering, according to the United Nations Office on Drugs and Crime (UNODC), was estimated at 2-5% of world GDP in 1998.¹⁰ Furthermore, 3.6% of GDP (2.3 - 5.5 percent) or around US\$2.1 trillion 2009.¹¹ The primary purpose of money

⁵ Yunus Husein. *Negeri Sang Pencuci Uang*. (Jakarta: Pustaka Juanda Tigalima, 2008) 24.

⁶ Severius Hulu et al., "PENERAPAN SISTEM PEMBUKTIAN TERBALIK DALAM TINDAK PIDANA PENCUCIAN UANG," *Jurnal Darma Agung* 27, no. 1 (April 4, 2019): 822, <https://doi.org/10.46930/ojsuda.v27i1.138>.

⁷ M. Arief Amrullah, *Tindak Pidana Pencucian Uang Dalam Perspektif Kejahatan Terorganisasi, Pencegahan dan Pemberantasannya*, (Jakarta: Kencana, Jakarta, 2020) 11.

⁸ UN Document No. E/CONF.88/2 dated 18 August 1994 and discussed at the World Ministerial Conference on Organized Transnational Crime in Naples, 21-23 November 1994 with the theme Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World, to be submitted in the 9th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Cairo, (29 April - 8 May 1995) 24-28.

⁹ M. Arief Amrullah, "The Potential of Money Laundering in the Regent Election in Indonesia," *Jurnal Cakrawala Hukum* 13, no. 3 (December 28, 2022): 231-41, <https://doi.org/10.26905/idjch.v13i3.8856>.

¹⁰ "Badan Pusat Statistik," n.d., <https://www.bps.go.id/subject/11/produk-domestik-bruto-lapangan-usaha-.html>.

laundering is to generate profits, both for individuals and groups who commit these crimes. The perpetrators will use these illicit funds to finance further criminal activities. Alternatively, in other words, through money laundering, the perpetrator tries to hide the origin and ownership obtained illegally from the results of their unlawful activities. The aim is to turn the proceeds of the crime into funds that appear to have come from the proceeds of legitimate (legal) activities.

Conceptually, the rule of law theory upholds a legal system that guarantees legal certainty (*rechts zekerheids*) and protection of human rights (human rights). Roscoe Pound said there are two essential needs for thinking philosophically about the rule of law – first, the excellent public need for public security. The need for peace and order to realize security encourages people to seek rules that regulate humans against arbitrary actions from authorities and individuals to establish a stable society. Second, there is a need to adjust to the needs in the field of public security and to make new compromises continuously in society because of changes. For that, adjustments are needed in order to achieve a perfect law.¹² There are several stages of money laundering actors, such as placement, distribution, or transfer by separating financial transactions and using assets.¹³

Based on the description above, associated with law enforcement against the perpetrators of money laundering, the TPPU Law, as stated above, regulates the reverse burden of proof. Adopting the principle of reversing the burden of proof into the TPPU Law is contrary to the principle of the presumption of innocence that has been placed in Article 66 of Law No. 81 of 1981 concerning the Criminal Procedure Code (State Gazette of 1981 Number 76) dated December 31, 1981. In the future, abbreviated as KUHAP, it stipulates, “The suspect or defendant is not burdened with the obligation to prove.” Moreover, the Elucidation of the Article states: “This provision is an embodiment of the principle of “presumption of innocence.”

Likewise, with the provisions of Article 183 of the Criminal Procedure Code, that: “A judge may not impose a sentence on a person unless, with at least two valid pieces of evidence, he obtains confidence that a crime has occurred and that the defendant is guilty of committing it.” Meanwhile, the Elucidation of Article 183 of the Criminal Procedure Code emphasizes, “This provision is to guarantee the upholding of truth, justice and legal certainty for a person.” Money laundering is an extraordinary crime that ordinary people do not commit. Therefore, it is also difficult to prove it, so extraordinary handling is also needed, one of which is applying a system of reversing the burden of proof. Implement reversal of the burden of proof to be more effective and on target in upholding the law.¹⁴ With the adoption of the principle of reversing the burden of proof into the TPPU Law, it is in the interests of the defense for the accused to prove that the assets in his possession were not obtained from the proceeds of crime, namely as formulated in 77 and Article 78 of the TPPU Law. However, does it conflict with the principle of presumption of innocence in Article 66 of the Criminal Procedure Code?

¹¹ United Nations Office on Drugs and Crime, “Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes. Research Report. - Drugs and Alcohol,” n.d., <https://www.drugsandalcohol.ie/16151/>.

¹² Roscoe Pound, *An Introduction to the Philosophy of Law*, (New Haven: Yale University Press, 1959) 107.

¹³ Milind Tiwari, Adrian Gepp, and Kuldeep Kumar, “A Review of Money Laundering Literature: The State of Research in Key Areas,” *Pacific Accounting Review* 32, no. 2 (March 20, 2020): 271–303, <https://doi.org/10.1108/par-06-2019-0065>.

¹⁴ Mochammad Fahd Akbar, “SISTEM PEMBALIKAN BEBAN PEMBUKTIAN TINDAK PIDANA PENCUCIAN UANG DITINJAU DARI ASAS HUKUM PIDANA DI INDONESIA,” (2019), <https://ejournal.unhasy.ac.id/index.php/irtifaq/article/view/623>.

2. Method

This research uses normative legal research methods, studying laws as authoritative texts as primary legal materials and academic works as secondary legal materials to support or strengthen the analysis of the primary legal materials studied.

3. Reversing the Burden of Proof

According to the Criminal Procedure Code, Indonesia's criminal law evidentiary system adheres to a negative proof system based on the law (*negative stelsel wettelijke*). As stipulated in Article 183 of the Criminal Procedure Code, a judge may not impose a sentence on a person unless he, with at least two valid pieces of evidence, obtains confidence that a crime has occurred and that the accused is guilty of committing it. According to Article 184 of the Criminal Procedure Code, what is meant by two valid pieces of evidence: a. Witness statement; b. Expert statement; c. Letter; d. Instruction; and e. Defendant's testimony.

The definition of *proof*, in general, is provisions that contain outlines and guidelines regarding ways justified by law to prove the guilt of the accused. Evidence is also a provision that regulates evidence that is justified by law which a judge may justify to prove the guilt of the accused. Court proceedings may only be used at will and arbitrarily with a clear legal basis.¹⁵ The reversal of the burden of proof stipulated in the TPPU Law, as stated, is basically to allow a defendant that the assets he has obtained do not come from the proceeds of crime so that there is a balance in showing evidence about the origin of the assets obtained by the defendant in court and not solely stated by the Public Prosecutor in his indictment.

The Council of Europe's Warsaw Anti-money Laundering and counter-terrorism financing convention committee, or what is referred to as the Warsaw Convention, has stated that reversing the burden of proof is intended to increase the effectiveness of confiscation by requiring perpetrators to show the origin of certain proceeds or other items that can be confiscated. Accordingly, the Council of Europe's Committee on Anti-money Laundering and counter-terrorism financing Conventions has asked its States Parties to effectively reverse the burden of proof regarding the origin of assets owned by accused persons. Moreover, it has also been acknowledged that the Warsaw Convention is the first international agreement covering the prevention and eradication of criminal acts of money laundering and financing of terrorism. It was signed in 2005.

Even the Financial Action Task Force on Money Laundering (FATF), in Recommendation No. 22, states that countries should consider taking steps that require the perpetrators of money laundering to show the legal origins of the assets they have obtained, as long as these requirements are under the principles of the national law of a country.¹⁶ The provisions stipulated in the Recommendation have been accepted in the Money Laundering Law, as stipulated in Article 77 and Article 78. Where the examination at the court of cases of money laundering is different from the process according to the provisions of the Criminal Procedure Code because it is under the provisions of Article 77 and Article 78 of The TPPU Law; the defendant is obliged to prove that his assets are

¹⁵ Yusuf Eko Nahuddin, "PEMBUKTIAN DALAM PERSPEKTIF HUKUM LINGKUNGAN," *Jurnal Cakrawala Hukum*, (December 31, 2016), <https://doi.org/10.26905/idjch.v7i2.1944>.

¹⁶ "The 40 Recommendations, Published October 2004," n.d., <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/The40recommendationspublishedoctober2004.html>.

not the result of a crime (Article 77). Furthermore, Article 78 stipulates: (1) During the examination at the trial court, as referred to in Article 77, the judge orders the defendant to prove that the assets related to the case do not originate from or are related to the crime as referred to in Article 2 paragraph (1). (2) The Defendant proves that the assets related to the case do not originate from or are related to the crime referred to in Article 2, paragraph (1) by submitting sufficient evidence.

By adopting the principle of reversing the burden of proof into Article 77 and Article 78 of the Money Laundering Law, does it not conflict with the provisions of Article 66 of the Criminal Procedure Code in which the presumption of innocence has been placed? In the General Explanation of the Criminal Procedure Code number 3 letter c, it is emphasized that: "Everyone who is suspected, arrested, detained, prosecuted and or presented before a court hearing, must be presumed innocent until there is a court decision stating his guilt and obtaining permanent legal force" because of the principle This is a principle that regulates the protection of human dignity and honor that has been placed in the Law on Basic Provisions for Judicial Power, namely Law Number 14 of 1970, and then maintained in Law No. 48 of 2009 concerning Judicial Powers, even though Law Number 14 of 1970 has been revoked by Law No. 48 of 2009, and still stated: must be enforced in and by this law.

The view of the Attorney-General's Department of the Australian Government states that the presumption of innocence means that it burdens the prosecutor to prove the indictment and guarantees that there is no guilt on the accused until the indictment is in court. It is the judge who declares guilt or innocence. It was further stated that Australia is part of the parties to the seven main agreements on international human rights.¹⁷ The presumption of innocence is contained in Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR). The right to the presumption of innocence is one of the guarantees concerning the legal process in Article 14. Other guarantees are the right to a fair trial, a fair hearing, and minimum guarantees in criminal proceedings, such as the right to legal counsel and not being forced to self-incriminate.

4. Reverse Proof Implementation

What is the position of the provisions of Article 77 and Article 78 of the TPPU Law? Is it contrary to the principle of "presumption of innocence," which protects against the nobility and dignity of humans, especially the accused? The next question is whether the judge who ordered the defendant to prove that the assets related to the crime of money laundering did not originate or were related to the crime he was charged with, considering that the defendant was guilty. If the defendant cannot prove that his assets did not originate from a crime, the juridical consequences do not mean that the actions charged against the defendant are proven to have committed a crime. This only applies to one of the elements regarding the origin of the assets.¹⁸ The emphasis on the evidentiary process at trial manifests the state's seriousness in eradicating money laundering problems, as evidenced by anti-money laundering regulations.¹⁹

¹⁷ "Presumption of Innocence," Attorney-General's Department, n.d., <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence#what-is-the-presumption-of-innocence>.

¹⁸ Fauziah Lubis and Nasrullah Hidayat, "Penerapan Pembuktian Terbalik Dalam Undang-Undang Tindak Pidana Pencucian Uang Di Kota Medan," *Jurnal Mercatoria* 14, no. 2 (December 29, 2021): 34-39, <https://doi.org/10.31289/mercatoria.v14i2.5554>.

¹⁹ Marco Arnone and Leonardo S. Borlini, "International Anti money Laundering Programs," *Journal of Money Laundering Control* 13, no. 3 (July 20, 2010): 226-271, <https://doi.org/10.1108/13685201011057136>.

The provisions of Article 77 and Article 78 of the Money Laundering Law have characteristics that are different from Article 66 of the Criminal Procedure Code because they only concern the origin of the acquisition of assets. Because by allowing the defendant to submit sufficient evidence that the assets related to the case did not originate or are related to a crime has raised the defendant's dignity because he has been allowed to convey his right to speak. Moreover, vice versa if the defendant is not allowed to do so. Moreover, the examination is only a way of seeking material truth so that even though the defendant has submitted sufficient evidence, the Public Prosecutor has also submitted evidence that the assets obtained by the defendant were the result of or related to a crime. , it is the process at trial that will determine the existence of material truth.

Doubts in the application of reversed proof because there is a possibility that the judge can decide *onslag van alle rechtvervolging* or acquittal (*orispracht*) if the defendant can prove he is innocent.²⁰ When associated with the provisions of Article 183 of the Criminal Procedure Code: "A judge may not impose a sentence on someone except with at least two valid pieces of evidence, he obtains confidence that a crime has occurred and that it was the defendant who did it." Meanwhile, the reversal of the burden of proof as stipulated in the Money Laundering Law is only the object, namely the origin of the assets owned by the defendant, not originating from a criminal act. Therefore, if the defendant cannot prove that his assets did not originate from a crime, then the inability to explain the origins is insufficient to make it a basis for convicting the defendant, so there is no reason to declare it contrary to the Criminal Procedure Code.

Azizah, Hanifah & Hamdan, M. & Mulyadi, Mahmud & Sunarmi, Sunarmi. (2021). Analisis Pembuktian Terbalik Pada Tindak Pidana Pencucian Uang (Studi Putusan MA NO. 1454 K/PID.SUS/2011; PUTUSAN MA NO. 537 K/PID.SUS/2014; PUTUSAN MA NO. 336 K/PID.SUS/2015).

However, it is also undeniable that there are differences of opinion and differences of understanding between legal experts and law enforcers, especially judges in Indonesia, who still think that reversing the burden of proof violates the presumption of innocence, will make it difficult application of reversing the burden of proof in the criminal justice system in Indonesia. When examined from the perspective of criminal law policy, reversing the burden of proof should contain unique prevention for acts of corruption which are categorized as extraordinary crimes which also require extraordinary enforcement and measures.²¹

Articles 77 and 78 state that for trial examination, the accused must prove that his assets are not the proceeds of a crime. The explanation of this article is stated quite clearly so that the legal construction of this law mandates that the defendant is no longer "given the opportunity" in reverse proof but is "obliged" to do so. This is the advantage of the new money laundering law over the old one.²²

²⁰ Azizah et al., "Analisis Pembuktian Terbalik Pada Tindak Pidana Pencucian Uang (Studi Putusan MA NO. 1454 K/PID.SUS/2011; PUTUSAN MA NO. 537 K/PID.SUS/2014; PUTUSAN MA NO. 336 K/PID.SUS/2015)." *Journal of Education, Humaniora and Social Sciences* 4, no. 1 (June 24, 2021): 80–87. <https://doi.org/10.34007/jehss.v4i1.588>.

²¹ Afrianto Sagita, "Pembalikan Beban Pembuktian Sebagai Kebijakan Hukum Pidana Dalam Undang-Undang Tindak Pidana Korupsi," *Jurnal Hukum Respublica* 17, no. 1 (November 11, 2017): 21–43, <https://doi.org/10.31849/respublica.v17i1.1449>.

²² Muhtar Hadi Wibowo, "Corporate Responsibility in Money Laundering Crime (Perspective Criminal Law Policy in Crime of Corruption in Indonesia)," *JILS (Journal of Indonesian Legal Studies)* 3, no. 2 (December 9, 2018): 213–236, <https://doi.org/10.15294/jils.v3i02.22740>.

5. Conclusion

The principle of reversing the burden of proof as stipulated in the TPPU Law is to provide a balance between prosecutors and defendants in conveying or proving the origin of the assets owned by the defendant that they own or obtain do not originate from the proceeds of crime, showing that the TPPU Law has respected the dignity and the dignity of the accused. So that minimizing the punishment of innocent people is proven by insufficient reasons to state that the principle of reversing the burden of proof is contrary to the principle of the presumption of innocence placed in Article 66 of the Criminal Procedure Code.

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