

# *The Reverse Burden of Proof in Indonesia's Money Laundering Crime: A Review*

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## ABSTRACT

Money laundering has become one of Indonesia's serious criminal offenses. Then, cases related to it should proceed under the specific regulation and procedure. In Indonesia, money laundering is a further crime preceded by predicate offenses. In practice, there are two main problems to apply in money laundering: first, the principles' difference between national and international criminal laws, and second, their norm contradiction. Although the money laundering crime is claimed to be a further crime, it is separated from the preceded crime in prosecution, investigation, and evidence. This study aims to review the juridical contention of the reverse burden of proof in money laundering by considering the existing challenges to apply the norms. This study confirms that there is a juridical problem in the reversal of proof mechanism in money laundering. Therefore, the government should harmonize the existing laws relating to the reverse of the burden of proof in money laundering. It is essential to reform the existing regulations by harmonizing laws related to this case. It considers the existing fragmented criminal provisions set out in the Criminal Code and special laws to indicate serious crimes. This harmonization contributes to restoring the return of the state's losses resulted from this crime. Regulatory reform is inevitable. The government then needs to strengthen diplomatic relations with other countries, especially to enforce national laws through Mutual Legal Assistance (MLA) and extradition of money laundering perpetrators.

**KEYWORDS:** Indonesian Money Laundering, Money Laundering Act, Reverse Burden of Proof.



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## I. INTRODUCTION

The United Nations Convention on Transnational Organized Crime (UNTOC) outlines that money laundering becomes a transnational crime. This convention subsequently encourages Indonesia to pass a special criminal law apart from the Criminal Code and Criminal Procedure Code by introducing Law Number 8 of 2010 on the Prevention of Money Laundering Crime (Money Laundering Act). One of its salient features is an inverted evidentiary system in the investigation process, as outlined in Article 77. As a result, the defendant becomes the party that bears the burden of proof. The reverse evidentiary system is considered arduous enough to implement money laundering because it is a further crime of ordinary crime. In other words, money laundering will not exist unless preceded by another crime. The anatomy of money laundering in such a way results in challenges in enforcing the law during investigations, prosecutions, and evidentiary. This paper argues that according to Indonesian law, the proof of criminal acts follows the Criminal Procedure Code, and the proof in the money laundering case accords to the Money Laundering Act.

The Indonesia Criminal Procedure Code grants the burden of proof to the public prosecutor. In contrast, the Money Laundering Act reserves the burden of proof to the public prosecutor and the defendant. The burden of proof indicates a considerable challenge in money laundering as it is contrary to several articles in the Criminal Code and Indonesia's evidentiary system principles.<sup>1</sup> Furthermore, applying the Money Laundering Act is still considered inefficient. That is evident from the high number of state financial losses resulting from money laundering crimes, as money laundering is included in criminal offenses that cause considerable state financial losses. In 2019, Indonesia Corruption Watch (ICW) noted that the state loss recovery efforts remained unresolved. As a result, the state loss was IDR 12 trillion, and it was only IDR 749,168 billion recovered using this Act.<sup>2</sup> The inefficient attempts will remain unresolved lasted with the uncovered corruption scandals because of the absence of the maximum efforts to recover the state losses resulting from money laundering crimes. Therefore, this paper has two main discussions. First, how the reverse evidentiary system of money laundering crimes in Indonesian law is regulated and applied? Second, to what extent barriers to applying the reverse burden of proof in the case of money laundering in Indonesia.

## II. REVERSE BURDEN OF PROOF IN INDONESIA'S MONEY LAUNDERING ACT

The positive law is defined as a collection of principles and rules of written law that apply at a specific time and place and binding in general. In this context, the positive law is

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<sup>1</sup> Cok Istri Widya Wipramita & Putu Tuni Cakabawa L, "Kekhususan Beban Pembuktian Terbalik Dalam Tindak Pidana Pencucian Uang (Money Laundering)" (2014) 3:1 Kertha Wicara at 2.

<sup>2</sup> Media Indonesia, "ICW: Penegak Hukum Jarang Gunakan Pasal Pencucian Uang," online: <<https://mediaindonesia.com/read/detail/305642-icw-penegak-hukum-jarang-gunakan-pasal-pencucian-uang>>.

specifically enforced by or through Indonesia's government or courts.<sup>3</sup> Indonesia's positive law, especially in the criminal field, is a race against the Indonesian Criminal Code and special rules guided by the Criminal Procedure Code. Money laundering in Indonesia is not explicitly outlined in the criminal code. Instead, the Money Laundering Act governs it, after the second amendment of the previous money laundering laws.

The Money Laundering Act defines money laundering as "any act that fulfills the elements of a crime under the provisions of this law." Thus, money laundering crime is all the acts prohibited according to the law, as placing, transferring, spending, paying, giving, entrusting, bringing abroad, changing forms, exchanging currency or securities, hiding or disguising the origin, source, location, designation, transfer of rights, or actual ownership of assets resulting from the crime. The elements of the money laundering crime generally include:<sup>4</sup> First, the existence of money (funds) is from an illegal outcome. Second, dirty money is processed in specific ways through a legitimate institution. Third, to eliminate traces so that the money source can not or difficult to know and track.

So it can be concluded that money laundering is a method or process of converting income originating from illegal or illegal activities into assets that appear legal according to law. The development of variations and modus operandi of money laundering crime has led to the absence of a universal and comprehensive definition of money laundering.<sup>5</sup> Money laundering in Indonesia is mostly related to predicate crimes such as corruption (26%), narcotics (21.95%), and fraud (16.67%).<sup>6</sup> The data also illustrates the relationship between money laundering and various other crimes (including transnational organized crime), so that money laundering can be called a continued crime. Given the typology and anatomy of money laundering in such a way, Indonesia must have integrated criminal law rules. To date, Indonesia also has various related regulations, such as Law Number 31 of 1999 and Law Number 20 of 2001 on Eradication of Corruption Crimes, and Law Number 35 of 2009 on Narcotics.

Indonesia's criminal law places money laundering as a special crime so that the enforcement will be exceptional, including in its evidentiary efforts known as "reverse burden of proof." The proof is one of the most critical components in law enforcement. Its importance is to determine and declare a person's guilt can be criminally dropped based on convincing evidence tools by the legislation's provisions. Inverted proof stipulated in Article 77 of the Money Laundering Act, "For examining in a court, the defendant shall prove that his property is not the result of a crime." The criminal process of money laundering can be carried out without the evidence of the predicate crime, as stipulated in Article 69 of the Money Laundering Act. This Article outlines conducting an investigation, prosecution, and examination in court hearings against money

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<sup>3</sup> Laurensius Arliman, *Penegakan Hukum dan Kesadaran Masyarakat* (Yogyakarta: Deepublish, 2015) at 34.

<sup>4</sup> Juni Sjafrien Jahja, *Melawan Money Laundering! Mengenal, Mencegah, & Memberantas Tindak Pidana Pencucian Uang* (Jakarta: Visimedia, 2012) at 7.

<sup>5</sup> Iwan Kurniawan, "Perkembangan Tindak Pidana Pencucian Uang (Money Laundering) dan Dampaknya Terhadap Sektor Ekonomi Dan Bisnis" (2012) 3:1 Jurnal Ilmu Hukum Riau at 7.

<sup>6</sup> Tim Riset PPAK, *Tipologi Pencucian Uang Berdasarkan Putusan Pengadilan Tahun 2018* (Jakarta: Pusat Pelaporan dan Analisis Transaksi Keuangan, 2019) at 2.

laundering crimes; it is not mandatory to be proven in advance of the predicate crime." The provision sparked confusion, resulting in law enforcement difficulty investigating, prosecuting, and proving money launderers.

Indonesian scholar Yahya Harahap defines "proof" as provisions that contain guidelines on the methods justified by law to prove the guilt accused against the accused.<sup>7</sup> J.C.T. Simorangkir defines "proof" as an attempt to convey many things to the judge dealing with a case. This information will be the judge's reference for making a decision.<sup>8</sup> According to Martiman Prodjohamidjojo, the proof is a whole of the legal elements of proof interrelated and connected. It influences each other in a whole or unanimity.<sup>9</sup> Based on these experts' opinions, proof can be interpreted to find a criminal case's material truth by submitting evidence valid according to law. Theoretically, criminal procedural law concerns the existence of three systems of proof, namely *Positief wettelijk stelsel*, *Negatief wettelijk stelsel*, and *Vrij stelsel* (free system).<sup>10</sup> The Criminal Procedure Code, as stipulated in Article 183, uses the *Negative Wettelijk* system,<sup>11</sup> so that the judge's conviction becomes an essential thing in addition to legal evidence. Criminal case examination according to the Criminal Procedure Code adheres to an accusatory system, so that it is the party who accuses the state of proving it, which in this case is represented by the Public Prosecutor as stipulated in Article 13

In dealing with the reverse proof, this system is known in the Anglo Saxon countries, such as England, Singapore, and Malaysia.<sup>12</sup> Reversed proof in Dutch is also known as *omkering van het bewijslast* (or in English is called shifting of the burden of proof/onus of proof),<sup>13</sup> is devoted only to the crime of gratification or bribery.<sup>14</sup> Thus, the reverse burden of proof in money laundering is the defendant's burden to prove that his possession did not originate from crimes or other illegal activities. Then, the accusatory principle is abandoned, shifted to the inquisitor principle. Thus, the defendant becomes the object of examination.<sup>15</sup>

The burden of proof is carried out not on all crimes, only on uneasy crimes in terms of proof, such as corruption, smuggling, narcotics, psychotropics, tax evasion, and

<sup>7</sup> Monang Siahaan, *Falsafah dan Filosofi Hukum Acara Pidana* (Jakarta: PT Grasindo, 2017) at 96.

<sup>8</sup> Andi Sofyan, *Hukum Acara Pidana Suatu Pengantar* (Yogyakarta: Rangkang Education, 2013) at 242.

<sup>9</sup> Siahaan, *supra* note 7 at 96.

<sup>10</sup> *Ibid* at 38. *Positief wettelijk stelsel* is the proof of the defendant based only on valid evidence according to law. It does not require a judge's conviction. On the other hand, *negatief wettelijk stelsel* is proof of the defendant based on valid evidence according to law and requires a judge's conviction. Meanwhile, *vrij stelsel* (free system) in terms of proof places the judge's conviction as the primary basis for determining the defendant's guilt.

<sup>11</sup> *Ibid* at 97.

<sup>12</sup> Wahyu Wiriadinata, "Korupsi dan Pembalikan Beban Pembuktian" (2012) 9:2 *Jurnal Konstitusi* at 325.

<sup>13</sup> Siahaan, *supra* note 7 at III.

<sup>14</sup> Wahyu Wiriadinata, *supra* note 12 at 325.

<sup>15</sup> *Ibid* at 321.

banking crimes.<sup>16</sup> The reverse burden of proof in Indonesia has been introduced in various laws and regulations. Apart from Law Number 31 of 1999 and Law Number 20 of 2001 on the Eradication of Corruption, it is introduced in Law Number 8 of 1999 on Consumer Protection. Also, Law Number 35 of 2009 on Narcotics, in Articles 97 and 98, obliges the defendant to provide information on all assets and assets of wife, husband, children, and every person or corporation known or suspected of having a relationship with the narcotics crime. The reverse evidence is limited, which means the defendant has the right to prove. However, the Public Prosecutor remains to oblige in proving the indictment due to Article 189 paragraph (4) of the Criminal Procedure Code. This Article states that the evidence in the form of information or confession of the defendant is not enough to prove the guilt alleged to him unless accompanied by another evidence tool. The evidentiary power of the defendant's description or confession is also vulnerable to being abused. Therefore, the confession should not be considered and judged as a perfect, decisive, and critical evidence tool.<sup>17</sup> Also, the responsibility of proof for the defendant is limited to rights and no obligations.<sup>18</sup> However, in this reverse burden of proof, the defendant is charged to prove that the property owned is not classified as dirty money or sourced from illegal activities. It follows Article 77 of the Money Laundering Act.

The reverse burden of proof refers to the principle of non-self incrimination or presumption of guilt. In the context, the defendant is the presumption of guilt, bearing to prove to become innocent of what it is accused.<sup>19</sup> Therefore, this reverse evidentiary system can be said to have undermined the principle of presumption of innocence based on the upheld guidelines and the basis of proof of criminal cases in Indonesia.<sup>20</sup> The point is that a person will be decided guilty if the factual data exists. Legal proceedings begin to be entangled in that person starting from prosecution, investigation, and proof since sufficient preliminary evidence to ensnare the person. Although the reverse burden of proof has undermined the presumption of innocence, it does not mean guilt has no advantage. Because according to H.L. Packer, the presumption of guilt can provide results in precise and rapid control of crime that can ultimately guarantee human rights as a whole.<sup>21</sup> Given the advantages of the presumption of guilt, an evidentiary system can apply following *lex specialis derogat lex generalis* principles; special laws or provisions negates general laws or provisions.

The paradigm of opposition to the presumption of innocence should be ruled out. Mien Rukmini considers several measurement benchmarks in interpreting the

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<sup>16</sup> Setyawati, Setyawati, Ida Ayu, "Beban Pembuktian Terbalik Dalam Perkara Money Laundering Dengan Predicate Crime Tindak Pidana Korupsi" (2014) *Jurnal Hukum Mahasiswa Universitas Brawijaya* at 10.

<sup>17</sup> Dea Andrisia Rampen, "Kedudukan Hukum dari Keterangan Terdakwa Sebagai Alat Bukti dalam Pasal 189 KUHP" (2018) *6:2 Lex Et Societatis* at 123.

<sup>18</sup> Dahlan, "Distorsi Beban Pembuktian dalam Tindak Pidana Korupsi Menurut Sistem Pembuktian" (2015) *10:1 Jurnal Hukum Samudra Keadilan* at 73.

<sup>19</sup> Siahaan, *supra* note 7 at 152.

<sup>20</sup> Wipramita & Cakabawa L., *supra* note 1 at 3.

<sup>21</sup> Siahaan, *supra* note 7 at 114.

application of the presumption of innocence<sup>22</sup> *First*, protection against the arbitrariness of law enforcement officers. *Second*, it is the court that has the right to determine whether the defendant is wrong. *Third*, court hearings should be open to the public (must not be confidential). *Fourth*, the defendant must be granted bail to defend himself fully. When the benchmark containing this right has been fulfilled, the reverse burden of proof no longer violates the presumption of guilt, especially when it is linked to exceptional crimes such as money laundering crimes.

It is significantly limited in attributing the reverse burden of proof in the Money Laundering Act. It only applies to court sessions, not during the investigation phase.<sup>23</sup> This limitation results in the defendant being only allowed to prove the source of his assets only up to the investigation stage, not to prove that he is not guilty in a case. Money Laundering Act also authorizes the PPATK and other investigators to perform further evidence of money laundering matters. As a result of proving the defendant's source of wealth, the nature of proof no longer refers to the evidence of criminal matters but civil. The proof of civil litigation focuses on formal truth. In the meantime, official documents and verifiable means should be encouraged to be a means of evidence to assess the validity or validation of ownership (the defendant's assets).<sup>24</sup> Therefore, the reverse proof system is quite different from the evidence in the Criminal Procedure Code. However, the system is legally acknowledged to apply in the case of money laundering.

The reverse proof system's application is contrary to the presumption of innocence set out in the Criminal Procedural Code. However, there are opinions based on the application of the *lex specialist derogat lex generalis* principle. It is one way to eradicate money laundering and its predicate offenses that have already been rooted in Indonesia and have hurt the country so much. However, this assumption is weak because, in practice, the reverse burden of proof in Indonesian legislation is arduous to be implemented. The reverse burden of proof cannot be applied to the perpetrator's crime because Indonesia uses a negative proof system. Alternatively, the principle of "beyond a reasonable doubt" to apply a purely reverse burden of proof finds its difficulties.<sup>25</sup> It is different when comparing the reverse proof systems applied by other countries. For example, in Hong Kong and India, the reverse burden of proof is applied with "balance probabilities," in which the public prosecutor and the defendant both have the right to prove it. In practice, the public prosecutor proves the defendant's guilt in corruption following a crime. In contrast, the defendant proved his property ownership origin.<sup>26</sup>

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<sup>22</sup> Kunkun Abdul Syukur Munawa, "Pembuktian Terbalik Sebagai Kebijakan Kriminal dalam Penanganan Tindak Pidana Korupsi" (2017) 5:2 JIGJ 224 at 241.

<sup>23</sup> Setyawati, *supra* note 16 at 10.

<sup>24</sup> Budi Saiful Haris, "Penguatan Alat Bukti Tindak Pidana Pencucian Uang dalam Perkara Tindak Pidana Korupsi di Indonesia" (2018) 2:1 Integritas at 105.

<sup>25</sup> Supriyadi Widodo Eddyono, "Pembebanan Pembuktian Terbalik dan Tantangannya (Verification Reversed Imposition and Its Challenges)" (2011) 8:2 Jurnal Legislasi Indonesia at 277-278.

<sup>26</sup> Lilik Mulyadi, "Asas Pembalikan Beban Pembuktian Terhadap Tindak Pidana Korupsi dalam Sistem Hukum Pidana Indonesia Dihubungkan dengan Konvensi Perserikatan Bangsa-Bangsa Anti Korupsi 2003" (2015) 4:1 Jurnal Hukum dan Pembangunan at 121.

The procedure for handling money laundering cases has different stages and conditions than the general case management procedure. The procedures for handling money laundering with predicate crimes can take the following forms:<sup>27</sup> *First*, the file of predicate crime with the crime of money laundering is immediately combined;<sup>28</sup> *Second*, the predicate criminal case is decided first. The money laundering crime is processed, and the money laundering decision adds and complements the predicate crime punishment.<sup>29</sup> Apart from these two forms, money laundering cases are decided before the predicate criminal case's verdict, as in case Number 57/Pid.Sus/2014/PN.Slr. where on the proof of the element of the money laundering crime, the judge proves it without first proving the predicate crime.<sup>30</sup> This kind of procedure is allowed according to Article 69 of the Money Laundering Act. However, it results in considerable problems, especially in legal certainty and sanctions to perpetrators deemed unclear. Ideally, proving the crime of money laundering requires evidence closely related to the predicate crime as a basis for imposing sanctions and convicting the defendant of money laundering. So at least if the money laundering is to be terminated, the predicate criminal justice process must have passed the stage of collecting evidence. If not, the problem will impact the enforcement of money laundering laws. It will not run effectively, even appearing less controlled, which creates a dual system in the procedure, namely those in the Indonesian Criminal Code and those outside the Indonesian Criminal Code.<sup>31</sup>

The significant difference between the evidentiary procedure of money laundering and general crime, in general, has a severe impact on the efforts to eradicate money laundering crimes. This impact is potentially beneficial and can also continue to affect the law's effectiveness and even the state's economic condition. Given that proof is the most critical stage in criminal law, law enforcement can maintain the reverse burden of proof properly, impacting the national economy. Its careful and appropriate application can protect the country's finances and the public economy. It also ensures legal certainty for the perpetrator in the case of the lifting of criminal sanctions.

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<sup>27</sup> Jaringan Dokumentasi dan Informasi Hukum Pusat Pelaporan dan Analisis Transaksi Keuangan, *Ringkasan Eksekutif Kajian Hukum "Penerapan Delik Pencucian Uang Untuk Tujuan Pemidanaan dan Asset Recovery"* (Jakarta, 2019).

<sup>28</sup> According to Article 75 Law No. 8 of 2010, it may be implemented. See also Article 141 of the Indonesia Criminal Procedure Code.

<sup>29</sup> This thought also refers to traditional thinking in the application of criminal law.

<sup>30</sup> Halif Halif, "Pembuktian Tindak Pidana Pencucian Uang Tanpa Dakwaan Tindak Pidana Asal" (2017) 10:2 Jurnal Yudisial at 175.

<sup>31</sup> This issue was discussed in the National Legal Development Planning Report in Criminal Law and the Criminal System by the Department of Law and Human Rights (2008). To date, this discussion remains sustaining.

### III. BARRIERS TO APPLY THE REVERSE BURDEN OF PROOF IN INDONESIA'S MONEY LAUNDERING CASE

According to Gustav Radbruch, the law in its purpose needs to be oriented to three things: first, legal certainty; second, fairness; and third, utility.<sup>32</sup> Law enforcement at investigation, prosecution, and examination in court must have these three objectives.<sup>33</sup> According to Lawrence M. Friedman, law enforcement includes three sub-systems: the legal substance sub-system, the legal structure sub-system, and the legal culture sub-system.<sup>34</sup> These three elements influence law enforcement's success in a country that synergizes with one another to achieve law enforcement goals.<sup>35</sup> One of the three sub-systems is the legal substance sub-system, including legal material, including statutory regulations. A legal substance is crucial, especially in Indonesia, which is still thick with the civil law system's principles. Laws and regulations need to be well-formed, precise, harmonious, efficient, and open. In considering the importance of these regulations, in any formulation of laws and regulations, it is necessary to refer to Law Number 12 of 2011 on Legislative Drafting, as amended to Law No. 15 of 2019.

Fair enforcement occurs as if the harmonization between the values expressed in the product of law or legislation and human behavior makes it a guideline. In Indonesia, the criminal policy is related to penal policy in preparation and improvement of legislation, still partial, patchy, not comprehensive, and systematic to have implications for law enforcement's obstruction.<sup>36</sup> So not least that these regulations become new problems, such as overlapping with other rules or those regulations are not in line with the Indonesian Constitution and Pancasila. There are no exceptions to the laws governing money laundering crimes that have undergone several changes and enhancements. Money laundering was first enacted in Law Number 15 of 2002 on Money Laundering Crimes, which was later replaced by Law Number 25 of 2003. Law Number 25 of 2003 continued to apply in ratified Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Crimes.

The current Money Laundering Act lasted weaknesses in harmonization with various regulations and international conventions. Based on the 1969 Vienna Convention, in Article 27, states parties may not make their countries' laws justify or not comply with international treaties. The development of a legal system, especially penalties in Indonesia, must be harmonized with international law. Given that money laundering is a transnational crime, each country must promote international cooperation in dealing with and preventing it. Increasing international cooperation can be made by harmonizing the regulations regarding money laundering in each country's

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<sup>32</sup> Oeripan Notohamidjojo, *Soal-soal Pokok Filsafat Hukum* (Salatiga: Griya Media, 2011) at 33.

<sup>33</sup> Budimansyah, "Rekonstruksi Dari Penegakan Undang-Undang Menuju Penegakan Hukum Demi Keadilan Yang Substantif" (2020) 1:2 Jurnal Hukum Media Bhakti at 182.

<sup>34</sup> Lawrence M Friedman, *American Law: An Introduction* translated by Wishnu Basuki (Jakarta: PT. Tatanusa, 2001) at 6-8.

<sup>35</sup> Lutfil Ansori, "Reformasi Penegakan Hukum Perspektif Hukum Progresif" (2018) 4:2 Jurdis 148 at 150.

<sup>36</sup> Ahmad Jazuli, "Pembangunan Pertahanan dan Keamanan Demi Penegakan Hukum di Indonesia: Kewibawaan Suatu Negara" (2016) 16:2 Jurnal Penelitian Hukum de Jure at 193.

parties regarding elements and sanctions. Since its introduction by the United Nations in 1988 in the Vienna Convention on the Illicit Trafficking of Narcotics and Psychotropics, the world has viewed money laundering as a multidimensional crime. The Money Laundering Act has become increasingly strategic and relevant to the United Nations Convention Against Corruption, ratified in 2006. By ratifying the Anti-Corruption Convention, the Indonesian government must fulfill all its obligations. These obligations include preventing corruption and regulating money laundering in the domestic policy, including reverse evidentiary systems.

In the 2003 UN Convention on Anti-Corruption, participants are very cautious in discussing the reverse burden of proof outlined in Article 31, number 8. It reflects the attitude of the participant's delegation at the conference discussing the draft convention. It is exemplified by ceasing to obtain unanimity to the provision stipulated as part of the convention. It considers that the reversed evidentiary provisions violate the presumption of innocence and the privilege against self-incrimination. The most significant objections are mainly from EU countries and the US. The objections concern their respective countries' constitutions and EU member states' attachment to the European Convention on Human Rights, which expressly prohibits reverse evidentiary provisions. However, to accommodate the delegation of participants to include provisions in the convention, non-mandatory obligations are compiled. The formulation of the sentence "may consider the possibility," which politically has a different meaning from the sentence "shall consider."<sup>37</sup>

As a result, the Money Laundering Act should consider international roles such as the FATF recommendation relating to the crime of money laundering.<sup>38</sup> The reason is that the crime of money laundering is a cross-border crime. It is not uncommon for Indonesia to need other countries' roles related to a money laundering case in its punishment. Indonesia has implemented Mutual Legal Assistance in Criminal Matters (MLA) with other countries. However, there are still differences in norms and principles in labeling money laundering in Indonesia's criminal system. According to the UNTOC, money laundering is a serious crime. As a result, every state party is obliged to address it, as outlined in Article 2. and violations stipulated by Articles 5, 8, and 23. Indonesian Criminal Law only recognizes the ordinary offenses and crimes, while serious crimes are exempted. Consequently, punishing serious crimes in Indonesia should be based on respective laws rather than the Criminal Code. It also applies to money laundering that has a specific law rather than follows the Criminal Code. Harmonizing statutory regulations between states will help apply MLA. Law enforcement will be less effective without international cooperation in law enforcement against money laundering. Especially when crimes were made outside the certain national jurisdiction. Although

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<sup>37</sup> Mansyur Kartayasa, *Korupsi & Pembuktian Terbalik: Dari Perspektif Kebijakan Legislasi dan Hak Asasi Manusia* (Rawamangun, Jakarta: Kencana, 2016) at 216.

<sup>38</sup> FATF, in its discretion, responds to growing concerns about money laundering.

UNTOC is binding only on party countries, it can promote law enforcement against transnational crime, including money laundering cases.<sup>39</sup>

The establishment of any regulation, especially mandatory law, pays attention to one principle of formulation clarity.<sup>40</sup> The principle requires at least a law to be established with a clear and understandable legal language not to cause a wide range of interpretations in its execution. In this case, The Money Laundering Act has not fulfilled the formation principle because it is still much misperception, *inter alia*, about its substance concepts and phrases. One of them is outlined in Article 69 of the Money Laundering Act. It allows investigation, prosecution, and examination at money laundering court hearings even though the crime was proven. However, Articles 77 and 78 of the Money Laundering Act stipulate that the defendant has the obligation of reverse proof to prove that the assets in his possession are not the result of a crime. The two provisions are unclear for what situation and how these articles should be applied. There are many different understandings by law enforcers in applying the two articles.

It was previously stated that money laundering is a further crime. The conviction of the files can be combined with predicate crimes or decided after the predicate criminal conviction. However, in practice, sometimes money laundering cases can be decided in advance of the predicate crime.<sup>41</sup> A further crime is defined as "Continuous Actions," in which there is a close relationship between those acts. The series of acts must be considered follow-up actions. The concept contradicts Article 69 of the Money Laundering Act, which states that money laundering can be proven without predicate crime. The crime of money laundering is unclear whether it is a continued crime or a principal crime that can stand alone even without any other criminal acts. Thus, when the defendant cannot prove his assets did not originate from a crime, the judge may decide that the defendant's assets are derived from a crime. This interpretation can confirm that money laundering is a further crime but does not explain further the application of the sanctions if a money laundering crime is a concurrent crime. In the Criminal Code, Chapter IV governs concurrently (*concursum*), which consists of three provisions: (a) Article 63, Combined in Actions (*Concursum Idealis*); (b) Article 64, Continuing Acts (*Voortgezette Handling*); (c) and from Articles 65 to 69, Combinations in Several Acts (*Concursum Realis*).<sup>42</sup> However, the conviction is often mild and not by the ideal law's rules and application in reality. As a result, there is no guarantee of justice and legal certainty for perpetrators of money laundering due to differences in handling cases for each law enforcer. The potential for not achieving the sanction goal is a deterrent effect.

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<sup>39</sup> Stefanus Reynold Andika, "Penegakan Hukum Terhadap Pelaku Tindak Pidana Lintas Negara Melalui Perjanjian Ekstradisi (Suatu Catatan Menarik Untuk Diskusi)" (2019) 16:2 *EraHukum* at 328.

<sup>40</sup> See Article 5 of Indonesian Law Number 12 of 2011 on Legislative Drafting.

<sup>41</sup> Sabrina Hidayat, "Tinjauan Yuridis Kewenangan Komisi Pemberantasan Korupsi Melakukan Penyidikan Penggabungan Perkara Tindak Pidana Korupsi dan Pencucian Uang" (2018) 1:2 *HOLREV* 180 at 186.

<sup>42</sup> Dian Ayu Victoria Septiana & Dwi Saputro, "Tinjauan Tentang Penerapan Dakwaan Komulatif Subsidiar oleh Penuntut Umum dan Metode Pembuktiannya" (2016) 4:1 *Verstek: Jurnal Hukum* at 81

Against Article 69 of the Money Laundering Act, it remains a norm conflict to Articles 2, 3, 4, and 5. The conflict relates to the phrase "proceeds of crime," considered contrary to the phrase "...not to be proven beforehand the predicate crime.." in Article 69. The conflict will result in legal uncertainty as it mentions that a person's asset is defined as the result of a crime when the predicate crime is not proven in advance. Article 2 of the Money Laundering Act indicates that there must be a predicate crime to deal with the element of money laundering.<sup>43</sup> Another important criminal element in money laundering funding can be known as long as been proven to be a predicate crime. However, Article 69 it makes the fulfillment of this element contradictory.<sup>44</sup>

The Money Laundering Act's material content should not cause conflict between norms because guarantees of legal certainty are necessary to protect and create community peace. Legal certainty is also a requirement that law enforcement can run properly to establish order in inter-human associations in society.<sup>45</sup> However, there is a conflict about the specificity of proving in money laundering. It follows Article 69 and Article 75 of the Money Laundering Act, which raises concerns if the two articles stand alone. Article 69 expressly states that money laundering offenses can be processed in advance even if the predicate crime has not been proven. Nevertheless, article 75 states that money laundering and predicate crimes can be committed simultaneously. So both chapters seem contradictory or contradictory. By scrutinizing Article 69 to Articles 77 and 78 of the Money Laundering Act, money laundering cases can be processed in advance from the predicate crime if there is sufficient preliminary evidence. However, this definition of "sufficient preliminary evidence" requires property possession or suspicion of the predicate crime result. As a result, there must still be an element of proof of the predicate crime and cause the crime of money laundering can not stand alone. Romli Atmasasmita's statement strengthens this opinion. As outlined in Article 69 of the Money Laundering Act, money laundering is contentiously linked to Articles 77 and 78. It obliges suspects to prove that their assets were obtained from activities legal or not. It contains a contradiction in the substance of the norm between Article 69, which states that there is no need to prove a predicate crime. Articles 77 and 78, the defendant is obliged to prove whether the assets are from the predicate crime or not.<sup>46</sup>

Furthermore, it is related to evidence tools. There is an expansion of the definition of evidence tools from what is determined by the Criminal Procedure Code. Article 73 paragraph (2) of the Money Laundering Act states proper evidence tools as stipulated in the Criminal Procedure Code. It also recognizes as evidence tools in the form of information spoken, transmitted, received, or stored electronically with optical devices or tools similar to optics and documents. The provision stipulates the recognition of personal electronic media information as evidence of money laundering. However, there

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<sup>43</sup> Apriliani Arsyad, "Analisis Yuridis Penegakan Hukum Tindak Pidana Pencucian Uang" (2014) 5:2 Jurnal Ilmu Hukum Jambi at 45.

<sup>44</sup> Hana Krisnamurti, "Pembuktian Tindak Pidana Pencucian Uang (Money Laundering)" (2015) 14:1 Wacana Paramarta: Jurnal Ilmu Hukum at 10.

<sup>45</sup> Jazuli, *supra* note 36 at 193.

<sup>46</sup> Halif, *supra* note 30 at 242.

is no regulation regarding the source of wealth obtained from cyber-crime results like hacking in evidence of money laundering crimes. Proof of the criminal element of money laundering will not be achieved either because of the perpetrator's success in breaking the criminal link with his assets. In distancing the origin of wealth from crime, money launderers often use complex, diverse, invisible, and secret transaction schemes. In addition to using complex financial systems, money launderers often exploit the weaknesses of complex and difficult-to-access technology systems.

The reverse proof is a step so that legally legal citizens' rights are not taken away by the state. These rights are guaranteed in Article 17 of the Universal Declaration of Human Rights regarding the right to own property, and it cannot be arbitrarily deprived. This guarantee of ownership rights causes problems in the application of asset expropriation.<sup>47</sup> In terms of property rights, a person cannot be convicted only for suspicion of owning property. Unless, a person explains it in the court to argue that the property was obtained by lawful means. Besides, Article 11 paragraph (1) of the Universal Declaration of Human Rights outlines everyone charged with a penal offense has the right to be presumed innocent until proven guilty in court. He has had all the guarantees necessary for his defense. Article 11 paragraph (1) of this Article is where the presumption of innocence is set out. At first glance, there are several problems of human rights violations that may arise with reverse evidence.<sup>48</sup>

The reverse proof is a step so that the state does not deprive legally legal citizens' rights. These rights are guaranteed as outlined in Article 36 paragraph (2) of Law Number 39 of 1999 on Human Rights. It states that no one's property may be seized arbitrarily and unlawfully. In Article 67 of the Money Laundering Act, prosecutors can file the case to the district court to dispute the assets known or suspected from a crime. The provision allows for the seizure of assets without funding by the state at the request of investigators. If depriving assets without funding results in legal certainty, the action is arbitrarily included in the seizure. It is made without a statement of error and punishment for the perpetrator of the crime. Moreover, Article 36 of the Human Rights Act does not explain what the arbitrary criteria are. The Act of deprivation referred to Article 67 of the Money Laundering Act remains under the investigator's authority. It weakens the guarantee, as outlined in Article 36 (2) of the Human Rights Act. Human rights guarantees and law enforcement are mutually aligned. There has not been a meeting point, especially in implementing the criminal evidence of money laundering.

The Money Laundering Act lasted contention in interpreting conflict of norms, which indirectly have implications for the maximum application of the reverse burden of proof. These constraints are further disputed by the limited access to information, the narrow scope of the whistleblower and the type of report, and the lack of exact duties

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<sup>47</sup> Theodore S Greenberg, ed, *Stolen Asset Recovery: An Acceptable Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington DC: World Bank, 2009) at 21.

<sup>48</sup> Imelda FK Bureni, "Kekosongan Hukum Perampasan Aset Tanpa Pemidanaan dalam Undang-Undang Tindak Pidana Korupsi" (2016) 45:4 *Masalah Masalah Hukum* at 292.

and authority of the law enforcement.<sup>49</sup> There are also other inhibitory factors, which have implications for applying proof of money laundering cases. The obstruction factor leads perpetrators to hide the crime proceeds to escape from being detected in law enforcement through technology. The modus operandi of money laundering has evolved along with the development of technology, which until now. The *first* was to use Electronic Money (electronic money), which is difficult to track because it does not have serial numbers like traditional money. Also, the cypher technology in the E-Money transfer process makes it more difficult to know the origin. *Second*, it uses an Internet Bank (I-Bank) that provides international financial facilities. Every transaction is done comfortably and securely over the internet. *Third*, the three Internet Casinos (Internet Gambling), where the site is not regulated or supervised by the government at all, some of which do not ask for consumer identification.<sup>50</sup>

Based on the 2003 International Narcotics Control Strategic Report (INCSR) issued by the US Department, the more advanced a country's economy and financial system, the more crimes. Moreover, the most common crime committed through a country's financial system is money laundering. The use of financial institutions in money laundering crimes can be in the form of investing and transferring money from the proceeds of crime such as money from corruption, bribery, fraud, banking crimes, capital markets, and others into deposits, traveler cheque purchases, stocks, bonds, mutual funds, and other financial instruments.<sup>51</sup> Even with advanced technology facilities, it is increasingly difficult for law enforcement to prove money laundering. Evidence of the proceeds of crime is easily manipulated through cybercrime. These developments underline the changes that occur in the provisions of money laundering crimes. Moreover, money laundering can cover outside the jurisdiction of Indonesia until entering the jurisdiction of other countries (crossborder). Virtual currency means to encourage actors to transact with false identities increasingly.<sup>52</sup> Currently, money laundering activities have crossed jurisdictional limits. It offers high confidentiality by using various financial mechanisms where money can move through banks and money transmitters. Business activities can even be sent abroad to become clean-laundered money.<sup>53</sup> Also, the application of reverse proof is susceptible to harm to the prosecution process because the perpetrator has the opportunity to engineer the source of his property acquisition. Perpetrators engineer the source of wealth by presenting evidence that law enforcement has not successfully obtained the prosecution process.<sup>54</sup>

Efforts to reform the existing regulations are needed. The reform of these regulations will later focus on efforts to synergize with other regulations, especially with

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<sup>49</sup> Dhoni Erwanto & M Zen Abdullah, "Penerapan Undang-Undang Pencucian Uang dalam Penegakan Hukum Terhadap Pelaku Tindak Pidana Narkotika" (2017) 9:1 *Legalitas: Jurnal Hukum* 143-161 at 151.

<sup>50</sup> I Ketut Sukawati Lanang Putra Perbawa, "Tindak Pidana Pencucian Uang Dalam Sistem Perbankan Indonesia" (2015) 5:1 *Jurnal Advokasi* at 48-49.

<sup>51</sup> Kurniawan, *supra* note 5 at 3.

<sup>52</sup> Tim Riset PPATK, *supra* note 6 at 25.

<sup>53</sup> Yunus Husein, *Bunga Rampai Anti Pencucian Uang* (Bandung: Books Terrace & Library, 2007) at 3.

<sup>54</sup> Haris, *supra* note 30 at 105.

various criminal law regulations inside and outside the Criminal Code and the Criminal Procedural Code. Regulatory reform is essential. However, it needs to build and strengthen diplomatic relations with other countries. This attitude especially aims to enforce national laws through Mutual Legal Assistance (MLA) and extradition of money laundering perpetrators.

#### IV. CONCLUSION

Money laundering in Indonesia is a special crime. Hence, law enforcement requires extraordinary efforts that are different from other general crimes. It includes the effort of evidence, which recognizes a shift in the defendant's burden to prove his assets' source. However, the regulations regarding reverse proof in money laundering cases are regulated by the Money Laundering Act; there are various conflicts with other criminal law regulations. Among them is that money laundering has not been established as a serious crime category directed by the UNTOC. It has an impact on evidentiary efforts related to the jurisdiction of other countries. Besides, it has norm contradictions in the phrase "proceeds of crime" referred to Articles 2, 3, 4, and 5, and 69 in the phrase "it is not obligatory to prove the predicate crime first." Apart from these articles, other inhibiting factors have implications for applying evidence in money laundering due to technological advances. It results in variations of the modus operandi used by perpetrators in disguising and hiding the proceeds of crime so that law enforcement officials do not detect and trace it. Therefore, it is essential to reform the existing regulations by harmonizing laws related to this case. It considers the existing fragmented criminal provisions set out in the Criminal Code and special laws to indicate serious crimes. Regulatory reform must then build and strengthen diplomatic relations with other countries, especially to enforce national laws through MLA and extradition of money laundering perpetrators.

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#### COMPETING INTEREST

The authors declare that they have no competing interests.

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