THE PRINCIPLE OF THE REVERSE BURDEN OF PROOF REGARDING CRIMINAL ACTS OF CORRUPTION IN THE LEGAL SYSTEM IN INDONESIA

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Abstract
In Law Number 31 of 1999 which was amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, Indonesia regulates the reverse evidence system. The question is, whether the implementation of this system is effective in preventing or even eliminating criminal acts of corruption as a whole in Indonesia. This research uses a legal theoretical framework as a tool for social reform introduced by Roscoe Pound and adapted by Muchtar Kusumaatmadja for the Indonesian context. According to this concept, law must function as a tool to reform and resolve social problems, including corruption crimes. The reverse evidentiary system, which is a specific policy in Indonesian corruption law, deviates from general evidentiary norms in legal procedures.

Keywords: reverse evidence, criminal acts, corruption.

INTRODUCTION

Law not only aims to create justice but also legal certainty, which is the foundation of the rich positivism developed by Hans Kelsen in the 19th century. Although legal certainty is important, the creation of social order is a prerequisite for the realization of fair justice in society.[1]Muchtar Kusumaatmadja defines law as a collection of principles and rules that regulate social interactions aimed at maintaining order and achieving justice, including institutions and processes that actualize these norms in society.[2]

The judiciary in Indonesia, which includes all processes from investigation to execution, is the main mechanism for upholding justice. However, the legal structure in Indonesia, which is still heavily influenced by the Dutch colonial legacy, is often considered not to reflect the aspirations of contemporary Indonesian society. In particular, laws regulating corruption such as Law no. 31 of 1999 and its amendments to Law no. 20 of 2001, is considered not optimal in reflecting the need to be effective in eradicating corruption.[3]

Corruption cases, both in Indonesia and in other countries, tend to be complex and difficult to prove. This condition is exacerbated by multi-interpretative legislative policies which often create gaps in the application of the law. Even though the law emphasizes that corruption is an extraordinary crime that requires extraordinary measures, the reality of its implementation often does not reflect this, especially for the crime of bribery which is still considered an ordinary crime.[4]There is an argument that the use of reverse burden of proof can be effective in eradicating corruption. However, this approach also raises controversy

[1]Kelsen, Hans. General Theory of Law and State. Harvard University Press, 1945.
[2]Kusumaatmadja, Muchtar. "The Concept of Law: The Arrangement and Achievement of Justice." Law Journal, vol. 10, no. 3, 1999, pp. 234-249.
[3]Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Corruption Crimes.
[4]Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes.

regarding basic legal principles such as the presumption of innocence and the right not to discriminate against oneself. Adjustments in Law no. 21 of 2001 regarding Law no. 31 of 1999 which includes Articles 37 and 37A seeks to create a balance by applying a limited reverse burden of proof, maintaining legal protection for the accused while still ensuring that the Prosecutor fulfills his obligation to prove the charges.

Many people think that the system of proof for Corruption Crimes in Law Number 31 of 1999 which was amended by Law Number 20 of 2001 (hereinafter referred to as UUPK) is better, because it adheres to a reverse proof system. With the idea that the reverse system is easier to prove the alleged Corruption Crimes, so it is automatically easier to eradicate corruption. This opinion turns out to be not entirely correct. It is true that the UUTPK adheres to a reverse evidence system, but questions such as what is meant by a reverse system, how is it implemented, what standards of evidence are used and so on, questions like that are not easy for everyone to answer.

Regelement of Strafvordering (RSv) and HIR (formerly) as well as the KUHAP, as well as all of them adhere to a system or theory of evidence based on the law negatively (negatief wettelijk) which we can conclude based on Article 183 of the KUHAP.1 The standards of evidence are (1) must at least two pieces of valid evidence, and (2) from this evidence the judge is convinced that the defendant is guilty of committing a criminal act. With these conditions, the judge can impose a sentence. Corruption criminal law is a lex specialis, so that regarding evidence there are 3 different burden of proof systems. The first is the reverse system, the second is the ordinary system (such as the Criminal Procedure Code), the third is semi-reverse or it can also be called a reverse balanced system.

METHOD

The method applied in problem analysis in this paper is normative legal research. This involves breaking down an existing problem and then studying it through legal theories[5]which are relevant and relate them to the legislation in force in current legal practice. Because this is normative research, the data source used is secondary data consisting of legal material, both primary and secondary. The approach used in this research includes historical, legislative and conceptual approaches. Analysis of legal material is carried out descriptively, analytically and argumentatively.[6]

RESULTS AND DISCUSSION

Reversal of the Burden of Proof in Positive Law in Indonesia

The reversal of the burden of proof is regulated in article 31 paragraph (8) and Article 53 letter (b) of the United Nations Convention against Corruption (UNCAC). These provisions provide options for participating countries to consider the type of burden of proof. This article is more appropriate as a suggestion to participating countries to consider shifting

[5]Soerjono Soekanto and Sri Mamudji, 2001, Normative Law Research A Brief Overview, I edition Print V, PT Raja Grafindo Persada Jakarta, , p 13-14
[6]Amirudin and H Zainal Asikin, 2003, Introduction to Legal Research Methods, PT Radja Grafindo Persada, Jakarta, p 118

the burden of proof to the defendant that his wealth originates from legitimate proceeds. Because perhaps the participating countries already have burden of proof provisions in their constitutions or other regulations.[7]

This means, as far as possible, participating countries place the burden of proof on the defendant if there are provisions in the constitution and formal regulations in a participating country, as long as these requirements are consistent with the basic principles of national law, and also consistent with the nature of the judicial process and other judicial processes. Examples of reverse burden of proof already exist in several countries such as Ireland and England. Legislators are permitted to adopt it as a precedent28. Basically, this provision aims for direct asset recovery. Apart from criminal matters, it can also be carried out civilly as regulated in article 53 letter (b) UNCAC. In the Human Rights (HAM) approach, the implementation of this principle will give rise to implementation conflicts, especially regarding property rights.[8]

In human rights terminology, apart from the right to life and freedom, property rights are fundamental rights that must be protected and respected. If this is violated, then a human rights violation has occurred. Ownership of property is a person's basic right, the State must protect it. property and ask him to explain in court the legal evidence of ownership. This is clearly very contrary to the legal principles of presumption of innocence and non-self-incrimination. The essence of eradicating corruption is parallel and does not conflict with human rights principles.[9]

Therefore, the aim of punishment is not only to punish but also to improve the situation in order to provide a deterrent effect for perpetrators and deterrence for people who have not done anything that is forward-looking and at the same time has deterrence. In handling criminal acts of corruption, these two objectives are often not achieved because the classical approach is still used[10]and neoclassical[11]. Many courts give sentences that do not improve the situation and at the same time serve as a deterrent and deterrence to the perpetrator in the future. In fact, many corruption case decisions in court provide relatively low sentences.[12]

[7]Hartanti, Evi, 2007, Corruption Crimes, Printing: First, Edition: Second, Sinar Graphic, Jakarta
[8]Herbert L. Packer, The Limits of the Criminal Sanction, Stanford University Press, California, 1968
[9]Fais Yonas Bo'a, "Pancasila as the Source of Law in the National Legal System Pancasila as the Source of Law in the National Legal System," Constitutional Journal 15, no. 1 (2018): 27–49
[10]The classical school that emerged in the 18th century was a response to the ancietn regime in France and England which gave rise to a lot of legal uncertainty, legal inequality and injustice. This school has an indeterminism ideology regarding human free will which emphasizes the actions of criminals so that the law is desired. criminal act (daad-strefrecht). In principle, the classical school only adheres to a single track system in the form of a single sanction, namely criminal sanctions. This school is also retributive and repressive towards criminal acts because the theme of this classical school, as stated by Beccarian, is that the criminal doctrine must be in accordance with the crime.
[11]The neo-classical school which also developed in the 19th century has the same basis as the classical school, namely the belief in human freedom of will. This school believed that the punishments produced by the classical school were too severe and damaged the spirit of humanity that was developing at that time. Improvements in the neo-classical school are based on several judicial policies by formulating minimum and maximum sentences and recognizing the principles of extenuating circumtances.
[12]Elisabeth Nurhaini Butarbutar, "The Importance of Evidence in the Legal Discovery Process in Civil Courts," Mimbar Hukum 22, no. 2 (2010): 347–59,

According to data from Indonesia Corruption Wach in the period II Semester 2012 to Semester I 2013, of the 753 cases monitored, the majority were given light sentences, namely 4 defendants were sentenced to probation, 185 defendants were sentenced to one year, 167 defendants were sentenced to 1-2 years and 217 the defendant was sentenced to 2-5 years data. The rest were sentenced to 5-10 years (35 defendants) and 5 defendants were sentenced to more than 10 years. There were 143 defendants who received acquittals.[13]

The low level of punishment for corruptors is starting to be answered with a "follow the money" approach by proposing "impoverishing corruptors" in the context of recovering state losses (asset recovery). Recovery of state losses can be carried out through civil (lawsuit) and criminal channels. The criminal route can be taken by first punishing the perpetrator and then confiscating his assets (conviction-based asset forfeiture) and without punishing the perpetrator (non-conviction based). A criminal approach can use the Money Laundering Law and other laws such as the Corruption Law and the Law on Illicit Enrichment.

According to Global Financial Integrity estimates, developing countries lost between USD 723 billion and USD 844 billion on average annually through illegal money flows ending in 2009. Half of that amount came from corruption and illegal enrichment activities carried out by public officials. When Indonesia underwent an assessment in implementing the United Convention Against Corruption (UNCAC), the Assessment Team (assessors) from the United Kingdom and Uzbekistan suggested that Indonesia have provisions regarding illicit enrichment.

Apart from that, it is also recommended that Article 12 B of Law No.31 of 1999 and its amendments regarding Gratuities be abolished. In UNCAC, which was ratified with Law N0.7 of 2006, it regulates the punishment for illegal enrichment. UNCAC believes that making regulations regarding Illicit Enrichment (IE) is not only to prevent and eradicate corruption but also for international cooperation and optimal asset recovery. The complete UNCAC setting reads."

Illicit enrichment Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, committed when intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her legal income. UNODC data shows that there are around 43 countries that have provisions regarding illicit enrichment, such as Argentina (since 1964) and India. The United States is one of the countries that does not yet have a law on illegal enrichment.[14]

[13]Bambang Heri Supriyanto, "Law Enforcement Regarding Human Rights (HAM) According to Positive Law in Indonesia," Al-Azhar Indonesia Social Institutions Series 2, no. 3 (2014): 151–68, https://jurnal.uai.ac.id/index.php/SPS/article/view/167/156
[14]Kartayasa, Corruption and Reverse Evidence from the Perspective of Legislative Policy and Human Rights

Reverse Evidence Loading System for Corruption Crime Cases

In the Indonesian legal system, law enforcement aims not only to achieve justice but also legal certainty, as supported by Hans Kelsen's recht positivism theory. Justice in society can only be achieved through the creation of order which acts as a basic prerequisite. Muchtar Kusumaatmadja defines law as a series of principles and rules that regulate social interaction to maintain order and justice, including its implementation through relevant institutions and procedures.[15]

In judicial procedures in Indonesia, especially in corruption cases, the evidentiary system regulated in Article 183 of the Criminal Procedure Code is applied. This system requires at least two valid pieces of evidence to establish the defendant's guilt. However, there is a common misperception that the corruption criminal procedural law has fully implemented a reverse evidence system. In fact, there is limited application of the reverse burden of proof system.[16]In the context of corruption, the law establishes specific policies where the burden of proof may vary depending on the value of the transaction in question. For example, in cases of receipt of gratuities of a certain value, the burden of proof falls on the accused, indicating an adaptation of general evidentiary principles to specific crimes such as corruption.

The principle of presumption of innocence must still be respected, it does not automatically burden the prosecutor with proof. The application of this principle does not prevent the application of reverse evidence that can be justified technically and ethically, as long as it is within the corridor of protecting the defendant's human rights. Normative and technical matters in criminal procedural law must go hand in hand, allowing a person to remain presumed innocent but placing the burden of proof of alleged guilt on the defendant based on clear rules.

Especially in corruption, where the principle of reverse evidence is applied only in the realm of court trials, based on sufficient initial evidence from investigators. This shows recognition of the complexity and special nature of corruption as a crime that requires a different approach compared to ordinary crimes. However, its regulation and implementation must always be oriented towards the principles of justice, public benefit and legal certainty which not only fulfill religious norms but also applicable social norms.

In discussing the ordinary evidentiary system such as in the Criminal Procedure Code, to prove a criminal act, the burden of proof lies entirely on the Public Prosecutor. Where the public prosecutor acts as a tool to prove corruption offenses against the defendant, while the defendant is not obliged, in the sense of being passive. However, in the accusator system, by law the defendant has the right to deny the charges and prove otherwise. Regarding the ordinary burden of proof system, this is based on the principle of no crime without fault (presumption of innocence) in criminal procedural law which is regulated in Article 8

[15]Kusumaatmadja, Muchtar. "Understanding and Objectives of Law in the Indonesian Socio-Cultural Context", Journal of Law & Development, no. 34, 2004
[16]Republic of Indonesia Law no. 31 of 1999 jo. Republic of Indonesia Law no. 20 of 2001 concerning Eradication of Corruption Crimes.

Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power and general explanation of number 3 letter c of the Criminal Procedure Code .

In the formulation of norms in Article 8 (1) of Law Number 48 of 2009 concerning Judicial Power it is very clear that the presumption of innocence applies from the time a person is suspected, arrested, detained, prosecuted until the court hearing. And if in the allegation the defendant is deemed innocent, then the defendant is charged by the prosecutor, then the charges are imposed on the defendant to prove that what he is accused of is true. Because in enacting the law according to the mandate of the law it clearly states that every person is considered innocent until their guilt is proven by a court decision that has permanent legal force.[17]

Meanwhile, the final support apart from the three articles above regarding reverse evidence is in article 38 B, which states:[18]

a. Every person charged with committing one of the criminal acts of corruption as intended in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15 and Article 16 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes and Articles 5 to Article 12 of this Law, it is mandatory to prove otherwise regarding property owned by him that has not been charged, but is also suspected of originating from criminal acts of corruption. (2)
b. "In the event that the defendant cannot prove that the assets as intended in paragraph (1) were not obtained due to a criminal act of corruption, the assets are deemed to have been obtained as a result of a criminal act of corruption and the judge has the authority to decide that all or part of the assets are confiscated for the state."

By applying the principle of reverse evidence as intended in article 12 B paragraph (1) letter a, from the explanation of article 37 of Law Number 31 of 1999 and article 37 of Law Number 20 of 2001, it can be seen that the two laws apply proof inverted which is limited or balanced with the following elements:[19]

1. The defendant of a criminal act of corruption has the right to prove that he has not committed a criminal act of corruption, as intended in article 37 paragraph 1 of Law No. 31 of 1999 as amended by article 37 paragraph (1) of Law no. 20 of 2001.
2. Those accused of criminal acts of corruption have the obligation to provide information regarding all their assets and the assets of their wife or husband, children and the assets of any person or corporation suspected of having a connection with the case in question, as intended in article 37 paragraph (3) of Law no. 31 of 1999 as amended by article 37 paragraph (1) of Law no. 20 of 2001.

[17]Alfitra, Law of Evidence in Criminal, Civil and Corruption Proceedings in Indonesia, (Jakarta: Achieve Hope of Success, 2011), 23
[18]Martiman Prodjohamidjojo, Application of Reverse Evidence in Corruption Offenses (UU No. 20 of 2001), (Bandung: Mandar Maju, 2009), 83
[19]Ermansjah Djaja, Eradicating Corruption with the Corruption Eradication Commission (KPK) Normative Review of Law no. 31 of 1999 junto UU no. 20 of 2001 version of Law no. 30 of 2002, (Jakarta: Sinar Graphic, 2008), 128

The Corruption Eradication Commission public prosecutor still has the obligation to prove his charges, as intended in article 37 paragraph (5) of Law no. 31 of 1999 as amended by article 37 paragraph (3) of Law no. 20 of 2001

CONCLUSION

The reverse evidence in returning state financial losses due to criminal acts of corruption is the government's repressive, preventive and restorative efforts in relation to recovering state financial losses due to acts of corruption. As part of recovering state finances, the public prosecutor, who is the state's representative in law enforcement, has the burden of proving the defendant's assets which are suspected to have come from criminal acts of corruption to prove that the assets were obtained through halal means.

The legal basis for applying the principle of presumption of innocence is regulated in article 8 of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power in conjunction with Law Number 48 of 2009 concerning Judicial Power and the Criminal Procedure Code. Meanwhile, the legal basis for applying the principle of reverse evidence is regulated in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, article 37 and Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999, articles 37 and 37 A

REFERENCES

Adami Chazawi, SH (2008). Corruption Crime Evidence Law. Bandung: Alumni.

Alfitra. (2011). The Law of Evidence in Criminal, Civil and Corruption Proceedings in Indonesia. Jakarta: Achieve the Hope of Success.

Amirudin & Asikin, HZ (2003). Introduction to Legal Research Methods. Jakarta: PT Radja Grafindo Persada.

Bambang Heri Supriyanto. (2014). Law Enforcement Regarding Human Rights (HAM) According to Positive Law in Indonesia. Al-Azhar Indonesia Social Institutions Series, 2(3), 151–168.https://jurnal.uai.ac.id/index.php/SPS/article/view/167/156

Butarbutar, EN (2010). The Importance of Evidence in the Legal Discovery Process in Civil Court. Law Pulpit, 22(2), 347–359.

Djaja, E. (2008). Eradicating Corruption with the Corruption Eradication Commission (KPK) Normative Review of Law no. 31 of 1999 junto UU no. 20 of 2001 version of Law no. 30 of 2002. Jakarta: Sinar Graphics.

Fais Yonas Bo'a. (2018). Pancasila as a Source of Law in the National Legal System. Constitutional Journal, 15(1), 27–49.

Kelsen, H. (1945). General Theory of Law and State. Harvard University Press.

Kusumaatmadja, M. (1999). Legal Concepts: Arrangement and Achievement of Justice. Law Journal, 10(3), 234-249.

Kusumaatmadja, M. (2004). Understanding and Objectives of Law in the Indonesian Socio-Cultural Context. Journal of Law & Development, 34.

Martiman Prodjohamidjojo. (2009). Application of Reverse Evidence in Corruption Offenses (UU No. 20 of 2001). Bandung: Mandar Maju.

O. Bidara, SH (1984). Civil Procedure Law Articles 118 to Article 245 Compared to Articles 142 to Article 314. First Printing. Jakarta: Pradnya Paramita.

Packer, H.L. (1968). The Limits of the Criminal Sanction. Stanford University Press.

Soerjono Soekanto & Mamudji, S. (2001). Normative Legal Research: A Brief Overview. Edition I Print V. Jakarta: PT Raja Grafindo Persada.

Sumaryanto, D. (2009). Reversal of the Burden of Proving Corruption Crimes in the Context of Recovering State Financial Losses. Jakarta: Pustaka Raya Achievement.

Wahyu Wiriadinata. (2012). Corruption and Reversal of the Burden of Proof. Constitutional Journal, 9(2), June 2012.

Wirjono Projodikoro, Prof. Dr. (1985). Criminal Procedure Law in Indonesia. Bandung: Wells.