

The Principle of the Reverse Burden of Proof of Corruption Crimes in the Legal System in Indonesia

Aulia Rahman Hakim^{1*}, Indra Utama Tanjung²,

^{1,2}Legal Studies, Panca Budi Development University

^{1*}auliahakim@dosen.pancabudi.ac.id, ²indratj@dosen.pancabudi.ac.id.

Abstract

This research aims to examine the application of the principle of reversal of the burden of proof in the context of criminal acts of corruption in Indonesia, especially in recovering state financial losses. Reversal of the burden of proof is a strategy adopted to facilitate the process of recovering illegally obtained assets, as stipulated in the Anti-Corruption Convention which advises participating countries to consider this approach if consistent with national legal principles. This research uses normative legal methods to describe existing problems, linked to legal theories and applicable laws and regulations. The approaches used include historical, legislative and conceptual approaches. The analysis was carried out descriptively, analytically and argumentatively.

In the context of Human Rights, the reversal of the burden of proof creates a dilemma, especially in relation to property rights, which fundamentally must be protected and respected. This research also considers the effectiveness of reversing the burden of proof in reducing criminal acts of corruption and the deterrent effect it has on perpetrators. Apart from that, a comparison of approaches between preventing corruption and imposing heavier sanctions to recover state losses was also discussed. The findings show that, although the system of reversal of the burden of proof has been implemented, challenges in its implementation are still relevant, especially in ensuring that this approach does not conflict with human rights principles.

The conclusion of this research emphasizes that reversal of the burden of proof can be an effective tool in eradicating corruption, as long as it is carried out by taking into account the balance between the need to repair state losses and protecting the human rights of the accused. Recommendations are aimed at improving the legal framework that supports the effective implementation of reversal of the burden of proof, which integrates legal, social and human rights aspects more harmoniously.

Keywords: Reversal of the Burden of Proof, Corruption Crimes, Positive Law, Human Rights, Return of Assets.

INTRODUCTION

Law has the main objective of creating legal certainty, in accordance with the principle of *recht positivism* developed by Hans Kelsen in the 19th century. However, achieving justice in society remains the fundamental and historical goal of law, with the condition that order must first be created in society. According to Muchtar Kusumaatmadja, law is defined as the totality of principles and rules that aim to regulate interactions in society to maintain order and achieve justice, including through institutions and processes that guarantee the real application of these rules.

The order that is created allows justice to be upheld, especially through the justice system which includes stages starting from investigations by investigators, such as the police or KPK, to the process of executing sentences. In Indonesia, criminal justice follows a strict and formal process, involving public prosecutors and judges in trials, and includes further legal efforts such as appeals and cassation.

However, laws and regulations in Indonesia are considered not yet fully aspirational or relevant to the desires of contemporary society. Many of these laws are Dutch colonial legacies that are considered outdated and do not reflect the aspirations of the Indonesian nation today. A specific example of this is the anti-corruption law which contains a limited reverse verification system, which is considered ineffective in preventing corruption.

The law for eradicating corruption, as stated in Law no. 31 of 1999 and subsequent amendments, Law no. 20 of 2001, classifies corruption as an extraordinary crime that requires extraordinary measures. However, in practice, not all forms of corruption such as bribery are considered extraordinary crimes, and therefore, do not always require extraordinary legal measures.

In an effort to strengthen anti-corruption laws, Law no. 21 of 2001 has changed the formulation of Article 37 of the previous Law, trying to balance the reverse evidentiary system with protecting the rights of the accused, respecting the principles of presumption of innocence and non-self-incrimination. However, if the defendant cannot prove the origin of his wealth, the prosecutor is still required to prove his charges, indicating that the reverse evidence system adopted is still limited and balanced.

In general, there is a misconception that a reverse verification system will make it easier to eradicate corruption. Even though this system was adopted in the UUTPK, its application remains complex and requires further clarification regarding the standards of evidence and how to apply them. In Indonesia, the evidentiary system is regulated in the Criminal Procedure Code, which adheres to the principle of negative evidence, requiring at least two pieces of valid evidence before the judge can determine the defendant's guilt.

In the context of corruption criminal law which is the *lex specialis*, there are three systems of burden of proof: the reverse system, the ordinary system as in the Criminal Procedure Code, and the semi-reverse or reverse balanced system. Thus, efforts to fight for justice through law in Indonesia remain a dynamic process and require continuous adaptation to the needs and aspirations of society.

METHOD

The method used to discuss the problems in this paper is normative legal research, namely research that describes existing problems, which are then discussed by studying legal theories and then linking them to the laws and regulations that apply in legal practice. (Soerjono. 2001) Because it uses normative research, the data source is a secondary data source in the form of legal materials, both primary and secondary legal materials. (Amirudin. 2003) The types of approaches used are historical approaches, legislative approaches and conceptual approaches. Analysis of the legal materials obtained is descriptive, analytical and argumentative.

RESULTS AND DISCUSSION

A. Family planning

Reversal of the burden of proof in positive law in Indonesia as regulated in the Anti-Corruption Convention article 31 paragraph (8) and Article 53 letter (b). This provision gives participating countries the option to consider a type of burden of proof that is more in line with their respective national constitutions or regulations. This means that states are encouraged to consider placing the burden on defendants to prove that their wealth was derived from legitimate sources, especially if this is consistent with national legal principles and judicial processes. This reverse burden of proof has been implemented in some countries such as Ireland and the UK, allowing legislators to adopt this as a precedent. The main purpose of this provision is to facilitate asset recovery. (Hartanti. 2007)

In the context of Human Rights (HAM), implementing the principle of reversing the burden of proof can give rise to conflicts, especially in relation to property rights. The right to property is considered a basic right that must be protected and respected. If a person is asked to prove legal ownership of property without prior evidence of wrongdoing from the authorities, this may conflict with the principles of presumption of innocence and non-self-incrimination. Therefore, eradicating corruption must be in line with and not contradict human rights principles. (Herbert. 1967)

In the context of law enforcement, the aim of punishment is not only to punish but also to improve the situation, provide a deterrent effect, and prevent crimes in the future (forward-looking) and has a preventive nature (deterrence). However, these two objectives are often not fully achieved because the courts tend to use classical and neoclassical approaches in handing down sentences. Data from Indonesia Corruption Watch shows that in the period II Semester 2012 to Semester I 2013, of the 753 cases monitored, the majority of defendants were given relatively light sentences. (Fais Yonas Bo'a. 2018)

A "follow the money" approach with "impoverishment of corruption" has been proposed to strengthen efforts to recover state losses. This recovery can be carried out through civil and criminal channels, including through the Money Laundering Law and the Law on Eradicating Corruption. The criminal approach involves punishing the perpetrator and then confiscating the assets (conviction based asset forfeiture) or without punishing the perpetrator (non-conviction based).

According to estimates from Global Financial Integrity, developing countries lost between USD 723 billion and USD 844 billion each year through illicit money flows ending in 2009, to which corruption and illegal

enrichment by public officials contributed greatly. When Indonesia underwent an assessment of the implementation of the United Convention Against Corruption (UNCAC), the assessment team from the United Kingdom and Uzbekistan suggested that Indonesia include provisions regarding illicit enrichment.

UNCAC, which was ratified by Indonesia with Law no. 7 of 2006, includes provisions regarding criminalization of illicit enrichment. This provision aims not only to prevent and eradicate corruption but also to facilitate international cooperation and optimal asset recovery. More than 43 countries have provisions regarding illicit enrichment, including Argentina (since 1964) and India, while the United States does not yet have a law regarding illicit enrichment. (Elisabeth Nurhaini Butarbutar. 2010)

B. Reverse Evidence Loading System for Corruption Crime Cases

The reversal of the burden of proof, as regulated in article 31 paragraph (8) and article 53 letter (b) of the Anti-Corruption Convention, provides flexibility for participating countries to adapt to the legal rules existing in the constitution or other laws. This article suggests that participating countries consider reversing the burden of proof regarding the origin of the defendant's wealth, if this is in accordance with the basic principles of national law and the applicable judicial process. This reversal of the burden of proof has been implemented in several countries, such as Ireland and England, as a precedent in legal practice. The main objective is to facilitate asset recovery. (Bambang Heri Supriyanto. 2014)

From a human rights perspective, the principle of reversing the burden of proof can give rise to conflicts, especially regarding property rights, which is one of the basic rights that is protected. The state is obliged to protect property rights and must not only be based on suspicion without concrete evidence that requires the owner to legally prove ownership in court. These actions may violate the principle of presumption of innocence and the right not to prove one's own guilt (non self-incrimination). Therefore, efforts to eradicate corruption must be carried out without ignoring human rights principles.

The main aim of punishment is not only to punish, but also to improve the situation and provide a deterrent effect and prevent criminal acts in the future (forward-looking) with a preventive nature (deterrence). However, often the classical and neoclassical approaches adopted by the courts do not achieve this goal. Data from Indonesia Corruption Watch for the period II Semester 2012 to Semester I 2013 shows that the majority of the 753 cases monitored resulted in relatively light sentences. A "follow the money" approach with a "corruption impoverishment" strategy is proposed to increase recovery of state losses, which can be done through civil and criminal channels. (Wirjono. 1985)

According to Global Financial Integrity, developing countries lost between USD 723 billion and USD 844 billion annually due to unauthorized money flows until 2009, with most of the losses coming from corruption. UNCAC, which Indonesia ratified through Law no. 7 of 2006, recommends the implementation of provisions regarding illicit enrichment. These provisions are considered essential for international cooperation and optimal asset recovery. Currently, around 43 countries have regulations on illicit enrichment, including Argentina and India, while the United States does not yet have similar regulations. (Adami. 2018)

The implementation of the rules for the evidence system for Corruption Crimes in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, many people consider it to be the right and better step because the system of evidence in Corruption Crimes against defendants can be easy to prove the crime. Because corruption offenses are applied using two systems at once, namely the evidentiary system in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 and the Criminal Procedure Code (KUHAP). The two theories in applying the legal system of evidence in cases of criminal acts of corruption are the usual ones in the Criminal Procedure Code, limited and balanced and using a negative evidence system according to law (negatief wettelijkovertuiging).

However, not all opinions from various groups are correct. Because it is not uncommon for us to find other opinions regarding the rules for reverse evidence which are considered to have problems in their implementation in the corruption procedural law justice system in Indonesia. This is because it does not apply a pure/full reverse proof system (zuivere omskeering bewijstlast), but rather uses an ordinary, limited and balanced proof system.

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 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.

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

- 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.
- 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 reverse which is limited or balanced with the following elements: (Ermansjah. 2002)

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.
3. 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

THANK-YOU NOTE

Thank you to the parties who have supported the implementation of this research.

BIBLIOGRAPHY

Adami Chazawi, SH., Law on Evidence of Corruption Crimes, Bandung Alumni 2008, p. 1

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

Amirudin and H Zainal Asikin, 2003, Introduction to Legal Research Methods, PT Radja Grafindo Persada, Jakarta

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>

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

Elisabeth Nurhaini Butarbutar, "The Importance of Evidence in the Legal Discovery Process in Civil Courts," *Mimbar Hukum* 22, no. 2 (2010)

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

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)

Hartanti, Evi, 2007, Corruption Crimes, Printing: First, Edition: Second, Sinar Graphic, Jakarta

Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press, California, 1968

Kartayasa, Corruption and Reverse Evidence from the Perspective of Legislative Policy and Human Rights

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

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

Prof. Dr. Wirjono Projodikoro, SH., Criminal Procedure Law in Indonesia, Sumur Bandung Publishers, Twelfth Printing, 1985

Soerjono Soekanto and Sri Mamudji, 2001, Normative Law Research A Brief Overview, I edition Print V, PT Raja Grafindo Persada Jakarta

Wahyu Wiriadinata, Corruption and Reversal of the Burden of Proof, *Constitutional Journal*, Volume 9, Number 2, June 2012