

THE INFLUENCE OF THE CONSTITUTIONAL COURT DECISION AGAINST COMBATING MONEY LAUNDERING IN THE CONTEXT OF CRIMINAL LAW REFORM

Somawijaya

Faculty of Law, University of Padjadjaran Bandung Indonesia
Jln. Dipati Ukur No. 35 Bandung, Indonesia
Email: soma_unpad@yahoo.co.id

Ajie Ramdan

Constitutional Court of Indonesia
Jln. Medan Merdeka Barat No. 6 Jakarta
Email: ajie_lawunpad@yahoo.co.id

Abstract

According to Moeljatno, Criminal Law is a part of a country's legal system that prohibits certain acts with the threat of sanction for those who break said laws, determines when and in what cases such punishments should be imposed upon those who commit said acts and determines precisely how punishments should be carried out in the event that a person is accused of such acts. This paper will analyse Constitutional Court Decision No. 77/PUU-XII/2014 and Decision No. 21/PUU-XII/2014 regarding Criminal Law reform. Looking to the theory of procedural criminal law, an indictment of cumulative charges of money laundering requires that the underlying predicate offences be proven. If, for example, the predicate offence is corruption, the corruption must be proven as multiple crimes have been committed by the same suspect, namely corruption leading to money laundering. the Decision of the Pretrial Judge of the Court of South Jakarta, Sarpin Rizaldi, and Constitution Court Decision No. 21/PUU-XII/2014 on the review of Article 77 of Act No. 8 Year 1981 concerning the Law of Criminal Procedure broadened the range of pretrial objects and greatly affected the principles of formal criminal law.

Key words: Criminal Law, Cumulative Charges, Pretrial, Money Laundering, Corruption

I. INTRODUCTION

The reform era criminalization of money laundering in Indonesia was conducted on March 25, 2002 with the enactment of Law No. 15 of 2002 on Money Laundering. The criminalization of money laundering are also relevant to the government's determination to tackle corruption and narcotics crime in Indonesia. In 1997 Indonesia has ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, in the Convention, among others, stated that the country that has ratified the need to criminalize money laundering.¹ According to Moeljatno, Criminal Law is a part of a country's legal system that prohibits certain acts with the threat of sanction for those who break said laws, determines when and in what cases such punishments should be imposed upon those who commit said acts and determines precisely how punishments should be carried out in the event that a person is accused of such acts.

To whom is addressed the criminal law or criminal law adresat Who? What was intended only for offenders rules of criminal law and hence they punished? Or is addressed to the law enforcement agencies to enforce the rules so that there is traffic on the social life of a country? In addition to the legal, human life in a morally guided human society itself, governed also by religion, by the rules of propriety, decency, customs and other social norms, said by Mochtar Kusumaatmadja.² The existence of such sanctions can not be separated from other areas of the law if people are to obey them. These sanctions give Criminal Law a unique place within the law as a whole, namely that, according to scholars, Criminal Law should be seen as an *ultimatum remedium*, the last effort in improving the actions of the people, and naturally its implementation should be with the tightest possible restrictions. In Indonesia, those acts which are considered criminal are subject to the Principle of Legality, namely, all criminal acts are determined by the legislation (Article 1 Paragraph (1) of the Criminal Code). For those who have committed a criminal act and are faced with sanctions,

¹ Yenti Garnasih, *Kriminalisasi Pencucian Uang*, Universitas Indonesia Fakultas Hukum Pascasarjana, 2003, p.169.

² Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiel Dalam Hukum Pidana Indonesia*, Bandung: Alumni, 2008, p.1.

it is still not certain that all such individuals should receive punishment. Indeed, in the punishment of those accused of criminal conduct, there is the principle, “no punishment where there is no fault” (*Geen straf zonder schuld*) which reflects the principle in English Criminal Law, *Actus non facit reum, nisi mens sit rea*, an act does not make a person guilty unless the mind is guilty. According to Article 281 Paragraph (1) of the 1945 Constitution, the right not to be prosecuted based on a retroactive law is a basic human right and as such may not be reduced under any circumstances.

Simons defines a criminal act (*strafbaarfeit*) as any act which faces the threat of sanction, which is against the law, which is considered an offence and which is conducted by an individual who is competent to take responsibility. Van Hamel defines *strafbaarfeit* as an act conducted by a person that is against the law, that is liable for punishment and that is committed with intent. If seen in the light of these explanations, we can see the follow:

1. that ‘*feit*’ in ‘*strafbaarfeit*’ refers to behaviour or conduct;
2. that *strafbaarfeit* is related to wrongdoing by an individual.

The Criminal Act of Money Laundering is an effort to obscure the origins of the proceeds from criminal activity such that it appears to have been earned through legitimate efforts. The process of money laundering follows the stages of placement, incorporating the illegitimate gains into the financial system, layering, moving the money through a series of complex transactions in order that the funds are harder to trace, integration, returning the now seemingly legitimate funds back to the owner, who can now use the money safely. Constitutional Court Decision No. 77/PUU-XII/2014, which rejected the review of Article 2 Paragraph (2), Article 3, Article 4, Article 5 Paragraph (1), Article 69, Article 76 Paragraph (1), Article 77, Article 78 Paragraph (1) and Article 95 of Act No. 8 Year 2010 concerning the Prevention and Eradication of Money Laundering became a legal instrument that strengthened the foundation of the law for the Police, KPK (Commission for the Eradication of Corruption) and attorneys to uphold Criminal Law and combat money laundering, because according to Article 69 of Act No.8 2010, in order to conduct an investigation, prosecution and court

proceedings, it is not necessary to prove the predicate offences first. Thus the case of Money Laundering as criminal conduct has become quite the debate: does the act stand alone or is it connected to other acts? The Constitutional Court also issued Decision No. 21/PUU-XII/2014, which reviewed Article 77 of Act No. 8 Year 1981 concerning the Criminal Code, which generated some controversy in the area of formal criminal law when the Court determined that the naming of suspects should be a pretrial object. Following this decision, the district courts received many pretrial suits from those accused by the KPK in corruption and money laundering investigations. Thus, Decision No. 77/PUU-XII/2014 indeed strengthened the efforts of the Police, the KPK and attorneys in the war on Money Laundering, but Decision No. 21/PUU-XII/2014 offered an extra challenge to investigators whereby accusations must be reviewed by a pretrial judge against two items of evidence before moving trying the case.

II. DISCUSSION

Definition of Money Laundering

Money laundering, according to Jeffrey Robinson in *The Laundryman*, is “all about sleight of hand”. It’s a magic trick for wealth creation. It’s perhaps the closest anyone has ever come to alchemy.” Money Laundering is in fact a fairly recent term, first used in newspapers in connection with the Watergate scandal in the USA in 1973. The first use in a context of court proceedings or law came in 1982 when it appeared in relation to the case of the US vs. \$4,255,625.39 (551 F Supp. 314 1982). Since then, the term has entered into common usage. According to Sarah N. Welling, money laundering begins with the possession of “dirty money”, which can come from two sources. The first source of dirty money or illegitimate that Welling offers is tax evasion, whereby money is made through legitimate means, but the full amount is not reported to the Government for the purposes of calculating taxes, so that fewer taxes are paid than should be. The second source of dirty money is income from illegal means. Examples of illegal means are dealing in narcotics or trafficking narcotics, illicit gambling, bribery, terrorism, prostitution, arms trafficking, alcohol, tobacco or pornography

smuggling, illegal immigrant trafficking and white collar crime, which includes corruption. The KPK's investigations of suspects in alleged corruption cases often involve money laundering, where the monies received through corruption are moved around to hide their illegitimate origins.

Money laundering can be termed a money laundering or money laundering, panning money or also called the cleanup money from the illegal transactions (gross). Law No. 15 of 2002 and Law No. 8 of 2010 on money laundering, the term money laundering referred to money laundering. The word Money in Money Laundering variously termed, in the form of dirty money, tainted money, hot money or black money.³ In Constitutional Court Decision No. 77/PUU-XII/2014, dated 15th December 2014, page 204, the Court stated its opinion on money laundering as follows: "Money laundering indeed does not stand alone but must be seen in connection with the predicate crime. For how can there be money laundering without a predicate crime?" Thus we can conclude that there are differences of opinions regarding Money Laundering amongst legal practitioners and experts, particularly where the proof, seizure and confiscation of illicit funds are concerned. In many ways, these problems are derived from the ambiguities in Act No. 8 Year 2010.

The Process of Money Laundering

It is not easy to prove an instance of money laundering due to the immense complexity inherent in the activity. However, experts have classified the stages of the process as follows:

1. *Placement*

This is the act of taking funds earned through illegitimate means and incorporating them into the financial system of the relevant country so that they be combined with "clean" or legitimate funds. This can be done by smuggling the dirty money overseas and depositing it into a bank account with clean money. Other variations include depositing cash into a deposit

³ N.H.T. Siahaan, *Money Laundering & Kejahatan Perbankan*, Jala Penerbit, 2008, p. 5-6.

account, into company shares or converting and transferring the money through foreign currency.

Once the money has been deposited into a bank account, it can be transferred to other accounts either in the same country or even overseas. Thus, the money does not just enter into the country's financial system but becomes combined with the global system.

2. *Layering*

The second stage involves removing the traces and obscuring the origins of the dirty money. This can be done by transferring funds from multiple accounts to different locations or from one country to another, and often multiple transactions are made, fragmenting the funds and making their origins much harder to trace. Layering often includes transferring money in foreign currencies, buying shares and making derivative transactions amongst other techniques. In fact, the depositor of layered funds is often not the initial owner, as the funds might have already gone through several stages of layering previously.

Through these transactions, the owner of the funds attempts to remove all connections between the funds and the initial illegitimate means through which they were acquired so that, after a complex series of movements and transactions, the monies can no longer be traced back to their origin by financial authorities or law enforcers.

Often, funds are transferred by or between dummy companies, relying on bank privacy policies and attorney client privileges to hide the individual's identity through complex transaction networks.

3. *Integration*

This is the consolidation of funds that have gone through the stages of placement and layering so that they can be used safely in legitimate activities without them having any traceable connection to the illegitimate activities through which the funds were first acquired. These funds can be

said to have been laundered and are now clean. This stage is sometimes called reparation or spin-drying. The launderer can now safely invest this money in real estate, luxury assets or business ventures.

The stages of money laundering can be geographically concentrated. For example, the placement stage is usually, though not always, conducted in the country of the funds' origin, i.e. the country in which the illicit activity that generated the dirty money was committed. Meanwhile, layering often involves offshore financial centres, regional business centres or world banking centres, places where the financial or business infrastructure is sufficient for the needs of the money launderer. At this stage, the money might simply be moved from account to account through increasingly complex transfers so that traces of the funds become harder to find. Finally, integration can happen in the country of origin or, if the investment opportunities in that country are limited, in another country.

Money Laundering and Corruption

Lately, money laundering is receiving increased global attention. This attention has been triggered by the growing frequency of cases, meanwhile many countries have not yet implemented systems to combat money laundering or even declared it a problem that needs to be combatted. Furthermore, the most conservative estimates of money laundered after being earned through such activities as narcotics trafficking, arms trafficking, bank fraud, counterfeiting and the like amount to US\$600 billion per year. On 22nd June 2001, FATF (Financial Action Task Force), an organisation aiming to free banks from money laundering practices has placed Indonesia along with 19 other countries, on a black list as Non-Cooperative Countries or Territories (NCCTs) in the fight against money laundering. The other nineteen countries are Egypt, Russia, Hungary, Israel, Lebanon, The Philippines, Myanmar, Nauru, Nigeria, Niue, Cook Island, The Dominican Republic, Guatemala, St. Kitts and Nevis, St. Vincent and the Grenadines, and Ukraine. If Indonesia and the other countries on the list do not control money laundering, the FATF will continue to impose increasingly strict

punitive measures. It is not impossible that they will bring sanctions in the form of disallowing the said countries from performing such banking transactions as transfers, L/C, overseas lending and others.

In Constitutional Court Decision No. 77/PUU-XII/2014 of 15th December 2014, page 204–205, the Constitutional Court of the Republic of Indonesia stated, regarding the opinion that money laundering cases do not require the proof of predicate crimes, as follows:

“Considering that, according to Article 69 of Act 8 2010, there is no necessity to prove predicate crimes, should the applicant request that predicate crimes be proven first, the Court supposes that in cases where the perpetrator of the predicate crime has died and as a result the case has been closed, then the recipient of the laundered money can never be tried pending the proof first of the predicate crime. There is a injustice when an individual who is known to have profited from money laundering cannot be tried only because the predicate crimes have not first been proved. The people of Indonesia will surely condemn that such an individual be allowed to escape justice thus. Nevertheless, the crime of money laundering does not stand alone but must be related to predicate crimes, for how can there be money laundering with no predicate crime? If the predicate crime cannot be proved first, it should not prevent the trial of the money laundering case. While it is not exactly the same, in the Criminal Code it has been recognised (Article 480 of the Criminal Code) that in the case of fencing, predicate crimes need not be proved first. Based on these considerations, the Court concludes that the applicant’s argument a quo has no legal grounds.”

This decision from the Constitutional Court was a breath of fresh air in the fight against money laundering. The aforementioned Act No. 8 of 2010 was not written to combat predicate crimes but is a formulation that can and should be used to maximise the imposition of predicate criminal acts articles because the usual modes and characteristics of money laundering are seen as multiple crimes in that they are a combination of the predicate crimes and the money laundering itself. Moeljatno states that in defining criminal acts, as it is a compound word, the basis of understanding is to be found in the second word, in this case “act”. It is clear that the term Criminal Act refers to the act and not to any person

implicated in said act, even though there is an undeniably close relationship between the act and the actor that cannot be severed. Therefore, a Criminal Act can be defined as an act that is prohibited and has the threat of punishment for any person who breaks violates the prohibition. In principle, any criminal act must consist of a physical wrongdoing, as there must be a cause and effect inherent in the act. Aside from the cause and effect, the act must also consist of a condition that brings to rise some motivation for the act. Such motivating conditions can, according to van Hamel, be categorised either as intrinsic or extrinsic. Furthermore, acts can be subjectively criminal or objectively criminal.

According to Article 2 Paragraph (1) sub-paragraph (a) of Act No. 8 Year 2010, proceeds of criminal acts are those financial gains that are acquired from, amongst others, corruption. The origin of the word corruption, according to Fockema Andreae in Andi Hamzah, is the Latin *corruptio* or *corruptus* (Webster Student Dictionary; 1960), which is in turn derived from the Old Latin *corrumpere*. The word later came to Indonesian through the Dutch *corruptie* as *Korupsi*. According to Benveniste in Suyatno, one form of corruption is “mercenary corruption”, that which is conducted with the intention of seeking personal profit through the abuse of power or authority. For example, in the case of a tender, a committee member has the authority to decide on the winner and either explicitly or implicitly states that participants must pay a bribe in order to win the tender. If a bribe is indeed given, the committee member’s actions fall under the category of mercenary corruption. A bribe does not have to be in the form of money. Corruption when there is freedom of discretion in a particular decision but, although the decision seems legitimate, it is not acceptable practice in the eyes of the members of the organisation is called discretionary corruption.

From the perspective of the law, the definition of corruption is clearly defined in no less than 13 articles of Act No. 31 Year 1999, later amended by Act No. 20 Year 2001 concerning the Eradication of Corruption. Based on these articles, corruption can be described in 30 forms, which determine in detail the list of acts which can bring about sanctions for criminal acts of corruption. The 30 forms of corruption can be categorised in the following groups:

1. corruption of state finances
2. bribery
3. embezzlement within office
4. blackmail
5. deception
6. conflict of interest in procurement
7. gratification

The criminal act of money laundering can originate from the criminal act of corruption as the predicate offence. The main issue which has not yet been agreed upon amongst legal practitioners and experts is the importance of proof of the predicate offence (e.g. corruption) in implementing the provisions regarding money laundering. Experts form two main groups, those who believe that proof of the predicate offence is not necessary and those who believe that it is and that cumulative charges of the predicate offence and the money laundering should be brought in a single indictment. The first opinion is based primarily on Article 69 Act No. 8 Year 2010, which states that “in order to conduct an investigation, prosecution and court proceedings, it is not necessary to prove the predicate offences first.” Meanwhile, the second view refers to provisions of Articles 3 and 4 and Article 5 Paragraph (1) of Act No. 8 Year 2010, which contains the phrase, “proceeds that are known to derive from criminal acts as referred to in Article 2 Paragraph (1)”. Indeed, there are those who claim that the predicate crimes referred to in Article 2 Paragraph (1) Act. No 8 2010 is in fact the “causa” that gives rise to the very act of money laundering that is determined in Articles 3 and 4 and Article 5 Paragraph (1) of the Act. That is that to prove the criminal act of money laundering, as referred to in Articles 3 and 4 and Article 5 Paragraph (1), always requires proof of the predicate crime, as referred to in Article 2 Paragraph (1), the proceeds of which are the object of the money laundering offence itself.

The decision of the Constitutional Court that money laundering offences do not require proof of the predicate crimes introduced a new challenge in criminal

law enforcement. It is not easy to investigate a case of money laundering if the predicate offence (e.g. corruption) must precede and if the use or channelling of the proceeds of said predicate offence is a subsequent crime. That is, there cannot be a case of money laundering where there is no predicate offence. Elements of an offence can either be objective or subjective, whereby in a criminal trial these elements must be proven in accordance with the principle that an act does not make a person guilty unless the mind is guilty (*Actus non facit reum, nissi mens sit rea*). Taking as examples Article 3, Article 4 and Article 5 of Act No. 8 Year 2010, the *actus reus* and *mens rea* must be proven as they are the elements (*bestanddelen*) of the offence. In this case, the aforementioned elements are the proceeds of illegitimate conduct, for example corruption. As such, the corruption must take place first and foremost, and only at such a time as the proceeds are used or channelled does the subsequent crime of money laundering occur. Thus, the predicate crime must be proven, and according to criminal law theory, both crimes must be indicted at once and in a single trial in the form of cumulative charges. The bringing of cumulative charges in a single indictment in this manner is made possible by the provisions of Article 141 of the Criminal Code, which refers to combining cases in an indictment. In the case of such cumulative charges, each individual act must be proven, even though the offence is adapted to the provisions on concurrent offences (*samenloop*) in Article 63–71 of the Criminal Code.

Article 141 of the Criminal Code, which authorises the public prosecutor to combine cases in a single indictment if at the same time, or within a reasonable time frame, cases are received containing any of the following features:

- a. several criminal acts committed by the same individual,
- b. several criminal acts connected to one another, or
- c. several criminal acts that are not directly connected to one another but have some indirect relationship between them.

The main objective of cumulating charges, with regard to sentencing, is the basis for determining the severity of the sentence to be handed down with

consideration to the severity of the sanctions imposed in the provisions of the indictment. That is why the matter of cumulative charges is a doctrine of *samenloop van strafbaar feiten*, meaning that the severity of the sentence handed down to the offender facing multiple charges, has committed several acts that face charges. Thus, according to Constitutional Court Decision No. 77/PUU-XII/2014 and Article 69 Act No. 8 2010, it is not necessary to prove predicate crimes when bringing charges of money laundering. However, according to criminal law theory, a cumulative indictment for money laundering requires proof of predicate crimes because multiple crimes have been committed by the same individual, one leading to the other, so that while they are not the same crime, they are related crimes. According to Prof. Dr. Romli Atmasasmita a Professor of Criminal Law who teaches across the Faculty of Law in Indonesia and in various agencies, one of them about the criminal justice system. In various writings often said that the investigation, prosecution, and court upfront examination is a series of one another can not be separated.⁴ Therefore, money laundering can not be separated by the Crime of origin.

The inclusion of the crime of money laundering in the criteria, because its acts result in losses. Semakkin economic losses will increase when linked to globalization. Globalization has spurred not only a legitimate economic activity between countries but also fueled illegal activities. The crime of money laundering in international accounting concept also resulted in the current account deficit, leading to statistical error and possibly lead to secret money. Money laundering is a process to conceal the source of money derived from crime, so that criminals can freely use the money safely. In this case as well be used to finance certain as that of organized crime. Money laundering thus supporting the development of a crime, which means that will result in a huge loss to the community. Criminalization do not solely intended for revenge, it means that in looking at the problem is not only to provide a sanction alone but more than that, it should also think about the effectiveness of sanctions. Besides criminalization should have broader goals, such as maintaining financial

⁴ Putusan MK No. 77/PUU-XII/2014, p. 142.

stability, confidence in the financial institutions. Given the nature of the follow-up crimes of criminalization is ultimately expected to tackle major crime (core crimes). For example, to catch the perpetrators laundering of proceeds of crime organized crime is expected to be the main perpetrator was arrested anyway.⁵

Furthermore, the Constitutional Court Decision in question was not unanimous; two justices gave dissenting opinions. Justice Aswanto and Justice Maria Farida Indrati held the following opinion:

“the word “not” in Article 69 is inconsistent and could be interpreted as contrary to Article 3, Article 4, Article 5 Paragraph (1) of Act No. 8 2010, which in principle state that in order for an individual to be charged with money laundering, the monies involved must have originated from some predicate offence or offences; in other words, there can be no money laundering without a predicate offence. Thus, if an individual is charged with money laundering without proof of a predicate offence, it is contrary to the principle of presumption of innocence as defined in General Explanation of Criminal Procedure Point 3 Sub-paragraph c and Article 8 Paragraph (1) of the Regulations of Judicial Power and later reiterated by M. Yahya Harahap, S.H. in “Discussion on the Problem and Application of The Criminal Code in Investigation and Prosecution” (Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan), which states, “the suspect should be given the position of a person who possesses basic human dignity. The suspect should be consider the subject, not the object. As such, that which is under investigation is not the suspect. It is the criminal act that is the object of investigation; the investigation is aimed at the acts that have been committed. The suspect must be considered innocent, in accordance with the principle of presumption of innocence, until such a time as the court passes a finalised decision.” Thus, the principle of presumption of innocence must be upheld to the highest by a nation of Rule of Law and democracy as defined in Article 1 Paragraph (3) of the 1945 Constitution.”

Pretrial in the Context of Money Laundering and Corruption

The ruling of Pretrial Justice of the South Jakarta Court, Sarpin Rizaldi with regard to several pretrial petitions from Komjen (Pol) Budi Gunawan invalidated any further decision or stipulation from the Respondent (KPK) related to the naming of suspects by the Respondent (KPK). This ruling was further strengthened

⁵ Yenti Garnasih, *op.cit.*, p.72-73.

by Constitutional Court Decision No. 21/PUU-XII/2014, which reviewed Article 77 Act No. 8/1981 concerning the Criminal Code. The use of the term pretrial in the Criminal Code differs from the literal meaning. “Pre” means before or preceding, such that pretrial means before the trial or preceding the investigation. According to Oemar Eno Adji, the organisation *Rechter Commissaris* (in charge of preliminary investigations) was established in Central Europe in response to the proposal of Judges and holds the important authority to deal with coercion (*dwang middelen*) detention, foreclosure, shakedown of legal bodies and houses and the inspection of documentation.

Pretrial is a new mechanism in Indonesia’s law enforcement system. Every new item must have a particular mission and motivation. There must be some objective, something that is hoped to be achieved. Nothing is established without the drive of a particular purpose. Such is the case with the institutionalisation of the pretrial mechanism. It aims to uphold the law and to protect the rights of those accused at the level of investigation and prosecution. In the implementation of criminal investigation, the law authorises the public prosecutor to apply coercive measures in the form of arrest, detention, seizure and so on. Any coercive measure applied by the investigator or public prosecutor towards the suspect is, in essence, treatment of the following nature:

- a coercive measure taken against the suspect that is justified by the law in the implementation of criminal investigation,
- as a coercive measure justified by the law, any coercive act is a deprivation of liberty and freedom and a limitation of the rights of suspect.

Because coercive measures imposed in the enforcement of the law are limitations on freedom and the suspect’s rights, such measures must be taken responsibly in accordance with due process of the law. Coercive measures taken contrary to the law are a violation of the suspect’s rights and as such are illegitimate. However, how can we assess the legitimacy of coercive measures and identify those that are illegal? An authority must exist to determine the legitimacy of coercive measures taken against suspects. This authority belongs to the pretrial mechanism. Pretrial duties in Indonesia are limited. Article 78,

which is related to Article 77 of the Criminal Code, states that it is the authority of the district court to examine and decide on the following:

- a. the legitimacy of arrests, detention, cessation of investigations or of prosecution.
- d. The reparation or rehabilitation of an individual whose criminal trial has been ceased at the investigation or prosecution level is a pretrial object. Pretrial is conducted by a single judge appointed by the chief or chairman of the district court and assisted by a court clerk.

Constitutional Court Decision No. 21/PUU-XII/2014 broadened the pretrial authorities. In its decision, the court stated,

“When the Criminal Code was established in 1981, the naming of suspects was not a crucial or problematic issue for the people of Indonesia. At that time, the meaning of coercive measures was conventionally limited to arrest, detention, investigation and prosecution. Today however, the meaning has been broadened or modified, one example of which is the definition, “the naming of a suspect by the investigator”, which is conducted by the state as a means of attaching the label or status of “suspect” to an individual without any clear limitation of time, such that the individual is forced by the state to accept said status with no opportunity to implement any legal effort to assess the legality or purity of purpose of the naming. Meanwhile, the law should adopt the objectives of justice and practicality at once so that should the social environment become more complex, the law should be further clarified in a scientific manner through the use of better language (Shidarta, 2013: 207–214). In other words, the principle of caution should be maintained at all times by law enforcers in the naming of suspects. In order to fulfil the objectives of the law, it is essential that the rule of law and the protection of the rights of suspects during investigation and prosecution be upheld in the pretrial process (vide legal opinion of the Constitutional Court in Decision No. 65/PUU-IX/2011 dated 1 May 2012, juncto Decision No. 78/PUU-XI/2013 dated 20 February 2014) with due regard to the values of human rights contained within Act No. 39/1999 concerning Human Rights and the protection of human rights enshrined in Chapter XA of the 1945 Constitution. As such, any conduct of the investigator that does not observe the principle of caution and is seen to violate human rights are grounds for the suspect to seek the protection of pretrial institution, although this is limited by provisions of Article 1 Point 10 and Article 77 Point a of the Criminal Code. Meanwhile, the naming of suspects is a part

of the investigation process, wherein lies the possibility of arbitrary actions by the investigator that amount to deprivation of human rights. Whereas Article 77 Point a of the Criminal Code is one regulator of the legitimacy of the cessation of investigations. Meanwhile, the investigation is in and of itself, according to Article 1 Point 2 of the Criminal Code an action of the investigator with the purpose of collecting evidence to shed light upon the events of the crime and with which suspects can be identified.”

Constitutional Court Decision No. 21/PUU-XII/2014 received dissenting opinions from 3 justices, Justice I Dewa Gede Palguna, Justice Muhammad Alim and Justice Aswanto. The naming by the KPK of suspects of corruption is often related to money laundering cases. The decision from Pretrial Judge Sarpin Rizaldi along with Constitutional Court Decision No. 21/PUU-XII/2014 brought new hope for suspects named by KPK. They had the opportunity to challenge or review the statements made by KPK based on two items of evidence. On 6th April 2015, the KPK faced 5 pretrial hearings brought by suspects and witnesses investigated by the KPK. The 5 hearings were brought by former Head of Commission VII DPR RI Sutan Bhatoegana, former Mayor of Makassar Ilham Arief Sirajuddin, former Managing Director of Pertamina Suroso Atmo Martoyo. Other cases were brought by Siti Tarwiyah, who was referred to as the mistress of the Chief of DPRD Bangkalan Fuad Amin Imron, and former Minister for Religion Suryadharma Ali. Suroso Atmo Martoyo.

In Europe, we find institutions established specifically for the function of conducting the pretrial process, such as the *Rechter Commissaris* in the Netherlands and *judge d’instruction* in France, which, aside from determining the legitimacy of arrests, detentions, seizures, etc., they also have the authority to conduct examinations of cases. For example, the public prosecutor in the Netherlands can request the judge’s opinion on a case, whether it is appropriate for the case to be ruled out with reparations or not. Although there is a similarity with the *Hakim Komisar* (Judicial Commissioner), the authority of the pretrial institute is limited. The *Judge d’Instruction* in France has a broad authority in preliminary investigations, including the investigation of defendants, witnesses and items of evidence. The *Judge d’Instruction* also makes official reports, conducts

house searches, arrests, detentions and closures of certain locations. Following the preliminary investigations, the *Judge d'Instruction* determines whether there is good enough reason for the case to be taken to court. If reason is found, the *Judge d'Instruction* sends the case with an accompanying letter called an *ordonance de Renvoi*; on the other hand, if reason enough is not found, the defendant is released with an *ordonance de non lieu*. In the Criminal Code, there is no provision for the pretrial judge to conduct preliminary investigations. The pretrial judge does not conduct preliminary investigations, searches, seizures or other activities that come under preliminary investigation nor determine whether a case has reason enough to make it to trial.

Pretrial Judge Sarpin Rizaldi's decision regarding the illegitimacy of KPK's naming of suspects and Constitutional Court Decision No. 21/PUU-XII/2014 reviewing Article 77 of Law No. 8/1981 concerning the Criminal Code together broadened the objects of the pretrial process and thus played an important role in formal criminal law in the context of criminal law reform. With *Staasblad* No. 44/1941 of the *Herziene Indische Reglement*, the term *Regter-commissaris* became disused until Prof. Oemar Seno Adjie, Minister for Justice, brought the term back in 1974 in reference to draft criminal procedure laws submitted to the DPR. Ultimately though, the *hakim komisaris* was annulled by the State Secretariat and later replaced by the pretrial institution.

Nevertheless, the notion of the Judicial Commissioner is still discussed in limited terms amongst academics. The discussion has gathered interest since the ratification by the International Covenant for Civil and Political Rights (ICCPR) through Act No. 12/2005. One of the provisions of the covenant suggested that any coercive measures taken by the law enforcement apparatus must immediately be brought for hearing. The Justice Commissioner is necessary to prevent arbitrary actions from the law enforcers in the application of coercion. This concept was further strengthened government's revision of the Criminal Code (*KUHAP 2011*), wherein Chapter IX and X of the bill referred to the Judicial Commissioner as having the authorities that far exceeded those of the pretrial institutions as

found in the existing Criminal Code. The Judicial Commissioner was brought into being with the intention of giving a greater guarantee of protection of the rights of suspects in criminal proceedings. The Judicial Commissioner exists to avoid differences in opinion regarding the validity of legal conduct in preliminary investigations, i.e. arrests, detentions, searches and seizures, as these actions are related to the rights of suspects, such as freedom, liberty, ownership of wealth and the protection of peace and security. With reference to the ruling from Judge Sarpin Rizaldi and Constitutional Court Decision No. 21/PUU-XII/2014 the Judicial Commissioner should be institutionalised immediately through the revision of the Criminal Code with the goal of guaranteeing the protection of the rights of suspects in criminal trial proceedings.

III. CONCLUSION

Based on criminal law theory, money laundering is, in essence, a subsequent crime that requires a predicate crime, such as corruption, making it profoundly difficult to prove without first proving the predicate crimes. This view is upheld by criminal law theory, which authorises the cumulation of charges where there are multiple offences that are either directly or indirectly related, such as a predicate offence of corruption leading to the subsequent offence of money laundering, and by the dissenting opinions relevant to Constitutional Court Decision No. No. 77/PUU-XII/2014, which referred to the principle that, since money laundering requires proceeds from illegitimate means, there could be no money laundering where there was no predicate offence. Decisions of the Constitutional Court, with regard to judicial review, take the form of *Declaratoir Constitutief*, meaning that they create or abolish new laws. As such, Hans Kelsen referred to these decisions as Negative Legislators. As a *declaratoir* no particular apparatus is needed to implement the decisions of the Constitutional Court. Constitutional Court Decisions often create new norms, such as Decision No. 21/PUU-XII/2014, which greatly impacted the criminal law reform with regard to the eradication of money laundering by broadening the scope of the pretrial institution.

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