

ДОСВІД ЗАРУБІЖНИХ КОЛЕГ



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REVERSAL BURDEN OF PROOF ON CORRUPTION IN INDONESIA

Corruption becomes the greatest enemy most countries face including Indonesia. Commitment to eradicate corruption significantly increases yet it would be meaningless if it is not supported by adequate legislation to implement the law effectively. Reversal burden of proof essentially aims to facilitate law enforcers to seek and disclose assets a suspect owns allegedly as corruption crime. The principle of reversal burden of proof was originated from Anglo-Saxon countries and this still applies to certain cases such as bribery-related gratifications as Malaysia and Singapore implement. In Indonesia, provisions on the principle of reversal burden of proof have been long recognized even since 1960 on the first law on corruption crimes. Nevertheless, for more than a half of century, the provision on reversal burden of proof has never been implemented. It occurs since articles which govern the issues barely provide clear regulation. It only mentions the principle yet never issues an implemented regulation to support the principle. In regards to this, the research is aimed at investigating, seeking and analyzing the weaknesses in implementing the principle of reversal burden of proof in corruption crimes recently as well as discussing obstacles in law enforcement.

Keywords: perspective; reversal burden of proof; corruption; conviction; breakthrough.

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Перенесення тягаря доведення корупційних злочинів у законодавстві Індонезії

Корупція стає найбільшим ворогом багатьох країн світу, в тому числі Індонезії. Боротьба з корупцією сьогодні істотно посилюється, але вона є марною, якщо не забезпечена відповідними

законодавчими нормами. У цих умовах тягар перенесення доведення в основному спрямований на те, щоб допомогти правоохоронним органам знаходити й розкривати активи, якими володіє підозрюваний і які отримано злочинним шляхом. Принцип перенесення тягаря доведення походить з англо-саксонської правової системи і досі застосовується щодо деяких злочинів, таких як хабарництво, в Малайзії та Сінгапурі. В Індонезії положення принципу перенесення тягаря доведення набули чинності в 1960 р. з прийняттям першого закону про корупційні злочини. Проте впродовж більш ніж півстоліття ці законодавчі положення ніколи не застосовувались. Це пояснюється тим, що статті, які стосуються цього принципу, не забезпечують його регулювання.

Тож метою статті є аналіз недоліків у реалізації принципу перенесення тягаря доведення в корупційних злочинах, а також шляхів їх усунення в правоохоронній роботі.

Ключові слова: перспективи; перенесення тягаря доведення; корупція; переконання; прогрес.

Introduction. Corruption crime has been familiar to all countries around the world. In Indonesia itself, this crime becomes the priority to eradicate since it is an old crime to Indonesian people. The term corruption was introduced in Indonesia since 1957 when it was the first time mentioned in the Regulation of Indonesian Force Army of Republic of Indonesia Number PRT/PM/06/1957. This showed that corruption at that time had been considered as a crime to eradicate and it was not adequate to only be regulated in Criminal Code. Corruption, collusion and nepotism over years existed as the impact of low and poor government commitment to eliminate. It has become a chronic disease and even most people are not aware of it. To bring up reform spirit, the government issued Law Number 31 of 1999 on Corruption Eradication. This became the starting point of new government to fight against corruption crime. However, regardless the adequate and relevant rules and regulations, it is not an easy task to do. Ironically, the corruption crime remains high and tend to keeps increasing in spite of intensively high commitment of government to eradicate. Apparently, corruption is an iceberg phenomenon which only shows the small portion on the surface yet and the rest remains covered. By the better people's awareness of this crime, it enable them to see, fight against and report any form of corruption crime in their neighborhood. Reversal burden of proof was initially introduced in Law Number. 8 of 2010 on Money Laundry. The system is not applied to all kinds of crime but specialized crimes. Basically, the reversal burden of proof is constructed to assist prosecutors disclose and prove the complaint for best result in accordance with code, truth, justice and legal assurance. Fact disclosure in white collar crimes is not easy task to do regardless the reversal burden of proof gave the task for the defendant to prove themselves not guilty. This transfer of responsibility is limitedly executed particularly those which deal with gratification, and the defendant's statement on all properties owned by husband, wife, children and cooperation allegedly related to the crime¹.

Theoretical Concept. Evidence is strategic point during the criminal justice process yet the proof itself is a process which is apt to human right violation. If Criminal Code Procedure is viewed as filter to keep state authority and individual

¹ Harry Mukti. (2011). Reversal Burden of Proof in Corruption Crimes through Juridical Sociological Perspectives. *Humaniora. Journal*. Vol. 8. No. 2. Surabaya: Erlangga University. Pg. 72.

right protection in balance, the reversal proof system constitutes core filter since it is during the evidence process to determine whether the evidence would acquit, innocent or found guilty.¹ Indonesian Criminal Code Law employs theory of evidence based on law negatively (*negatiefwettelijk*) in which Article 183 of Criminal Code Procedure (here inafter refers as KUHAP) determined that Judges shall not decide verdict upon somebody unless two credible means of proof have proved them that a criminal act occurs and the defendant is found guilty.

Indonesian Criminal Procedure adopted reversal burden of proof system as implemented by common law-employing countries. The system is applied since the increasing corruption crime is almost untouchable by law. Besides, it is believed that the system of reversal burden of proof as an effort to disclose corruption crime easier. In the provision of Article 37 Law Number 31 of 1999 on the Corruption Eradication states.

According to Lilik Mulyadi the provision of reversal burden of proof in Indonesia actually is not truly so since what stipulated in the Article 37 is not reversal of proof but a defendant's right to deny which implies whether the provision exists or not, the denial could possibly proceed. Related to *mensrea* (guilty mind) based on presumption of innocent and self-incrimination principles, it would be contradictory as in major criminal act, the reversal burden of proof can only applied in gratification not others. Besides, the presumption of innocence shall be employed while the proof becomes the prosecutor's duty.

In regards to this, the application of reversal burden of proof in Indonesian legislation system shall not be justified as an intervention upon individual basic right and a violation of International Covenant on Civil and Political Rights, even when it deals with the presumption of innocence principles. This system is not aimed at reducing the content and provision of the governing Law but it stands alone upon state interest and the law works for nation interest and expectation proving that it works in accordance with the legal provisions. Accordingly, reversed evidence is not meant the reversed indictment, rather, the authority attached to it which is from the state and is implemented in accordance with the law. Hence, one's basic right in non-self-incrimination cannot partially interpreted; it should be broader viewed. In particular context, the one's authority along with the right and responsibility shall be regarded. Therefore, the implementation of non-self-incrimination in narrower sense implies legal right and responsibility in accordance with the legal function which provide boundaries. The implementation of reversal burden of proof on Indonesian legislation system shall not be justified partially opposed to the principle of non-self-incrimination and its relation with the presumption of innocence since its implementation is not for the person but rather the authority the state gave to him/her.

Law on Corruption Crime Eradication employs provision of special reversal burden of proof on the bribery to ease the evidence process. It is implemented by

¹ Danil Elwi. (2012). *Corruption, Concept, Crimes and its Eradication*. Jakarta: Rajawali Pers. Pg. 193.

assuming that corruption and gratification is considered beyond the law for involving white collars, economic criminals and elites. Hence it is not easy to prove even this effort has to be encountered by conflict of interest of power which involves those bureaucrats. Consequently, it is predictable that corruption crimes becomes beyond the law and untouchable by law.¹

The method of reversal burden of proof is an evidence law alternative viewed as effective legal means to chase wealth as result of crime and recover it to the state. However, the implementation of this model should involve the two functions as follows:

1. This model aims to assist the evidence process of assets derived from crime but it cannot be implemented since it violates suspect/defendant's right.
2. This model does not contain repressive objectives through punishment process, but, rehabilitative and recovery.

Methodology. Since the object of the research is law then it belongs to juridical research by focusing on the implementation of reversal burden of proof system in corruption crimes. Besides, this applies juridical method in broader sense by using empirical method. The juridical method itself can be viewed in either broader or narrower sense. The method which only observe the logical and systematic relation among a whole set of norms is included in narrower sense. Meanwhile, if it also includes the social effect as well as the significance of social background, then it is included in broader sense. Particularly, this is a descriptive analytical research since it attempts to explain the practice of reversal burden of proof implementation in corruption crimes along with the obstacles which eventually describe the improved implementation of reversal burden of proof in corruption crime.

The data analysis were conducted by applying descriptive qualitative and content analysis method through utilizing law interpretation, law principles and law theories. The analysis was done to reveal the implementation of reversal burden of proof in corruption crimes.

Results and Findings. Throughout 2016, Corruption Eradication Commission handled corruption cases based on culprit's position who involves legislative members either in central or regional level as many as 23 cases of which 10 cases involve echelon I, II and III officials while 8 cases involve regents and/major along with their vices. In the meantime, the commission successfully recovered 497.6 billion rupiahs and it has been returned to the state in the forms of Non Tax State Revenue. Among those cases, some are briberies, goods and services supply and money laundering

Law enforcement on the bribery barely implement the provision of reversal burden of proof. Through interview is identified that the prosecutor prefers utilizing common evidence principle while to strengthen the complaint, the prosecutor anticipates it by adding articles on Money Laundering crimes. The informants stated that

¹ Margareth Carla Rampengan. (2015). Functions of Report of Audit Findings (LHP) of National Audit Board (BPK) in Corruption Crimes. URL: <http://ejournal.unsrat.ac.id/index.php/lexcrimen/article/download/1575/1267>.

the reversal burden of proof in Indonesia is hardly implemented this time due to the limited legislations governing the implementation in details. Until present, there is no bill of reversal burden of proof nor academic draft on this issue.

Legislative body seems reluctantly encouraging the government to propose the bill of reversal burden of proof. As a result this idea is still in the level of academic thought as the effort to help asset recovery by corruption. The most considerable thing is the risk of the implementation since if it is not properly implemented, it will acquit the defendant as long as he can prove that the wealth he owns is not derived from corruption or bribery.

In its development, the law awareness by the society significantly increases along with their awareness on rights. Thus a complaints cannot be just neglected. The increased awareness on human rights also influences people perception on the reversal burden of proof.

Through the approach if doctrines and comparison on the penal system (including Law Number 31 of 1999 Article 37 and its explanation), the meaning of “limited” “*specialized*” of the system implementation are as follows:¹

1. Reversal burden of proof is limited to bribery-related gratification cases only excluding other crimes in corruption crimes.

2. Other crimes in Law Number 31 of 1999 as contained in Articles 2 to 16 remains on prosecutor.

3. Reversal burden of proof is limited to only “confiscation” of crimes accused to anyone as contained in Articles 2-16 of Law Number 31 of 1999. It is also noteworthy that the proving system of the alleged offense in Articles 2-16 of Law Number 31 of 1999 remains on prosecutor. If the defendant is, according to prosecution, proven to have committed any of the offences and his or her properties are confiscated, then the defendant is required to prove that his or her properties are not derived from a corruption crime.

4. That the limited reversal burden of proof adheres to its *Lex Temporis*, that is, this system shall not be applied retroactively, being potential to violate human rights, to violate legality principles and to induce so called *Lex Talionis* (retaliation).

5. That the limited reversal burden of proof shall be in accordance with “*Daad-daderstrafrecht*” principle.

6 From this definition, the reversal burden of proof system shall not violate the accused principal rights. The implementation of the system, yet, is inevitable particularly the minimized rights of “dader” related to non self-incrimination and presumption of innocence. Still, the minimized rights is avoided, being potentially eliminated. If it occurs, it believes that the system of reversal burden of proof potentially violates human rights.

The principle of reversal burden of proof has been always opposed to presumption of innocence. However, regarding how it implemented and philosophical values, this paradigm shall be put it aside.

¹ Wahyu Wiriadinata. (2012). Preversal Burden of Proof in Corruption Crimes. *Jurnal Legislasi Indonesia*. Vol 9. No. 2 Constitutional Court, Bandung. Pg. 328.

Several measures in interpreting the implementation of presumption of innocence are explained as follows:¹

1. Protection from mistreated state officers such as Police Department, Attorney General, Corruption Eradication Commission and court parties including judges;
2. That it is the court which deserve to declare whether a defendant guilty or innocence;
3. The trial shall be publicly open;
4. That the accused/defendant shall be given right of self-defense.

The results by utilizing Soekanto's notion reveal why the reversal burden of proof principle has not been implemented effectively in Indonesia for the following reasons:

1. Legislative Factor:

The existing legislation considered vulnerable and do not accommodate legal assurance to implement the system in the effort of law enforcement. Basically, the implementation of reversal burden of proof in corruption crimes is limited so the provision is similar to the right granted to the defendant to propose a self-defense. This principle is not so strict that it influences the implementation done by law enforcers. The legislation which should have been a basis of law enforcement is not able to be the guidelines for the law enforcers to achieve its philosophical values.

2. Law Enforcers Factor:

Due to the lack of legislation provisions to implement the principle of reversal burden of proof in corruption crimes, it brings the effect on the law enforcers. Combatting corruption crimes requires credible, intelligent, professional and high-committed human resources.

3. Law Culture and Society Factor:

People participation is the crucial element in the effort of law enforcement in corruption. The more actively people provide information dealing with alleged assets of corruption crime, the easier a law enforcer to perform their duty.

Social factor is closely related to the culture of law within society and toward the law enforcement. Lawrence M. Friedman explained that culture of law concept constitutes human attitude on the law and system of belief, values, thought, and expectation. In other words, culture of law² is social thought circumstance and social strength which determine how a law is implemented, avoided or violated. Without the culture of law, the law system itself cannot stand by its own.

Concluding Remarks. The research results provide novelty in terms of fact findings on the ineffectively implemented principle of reversal burden of proof. It occurs since the public prosecutors think that the legislation provision on the implementation of reversal burden of proof in corruption crimes is not served in details, that is, does not meet the principle of *lex scripta* dan *lex stricta*. Dealing

¹ Mien Rukmini. (2003). Human Rights Protection through Presumption of Innocence and Equality before Law Principles in Indonesia Criminal Justice System. Bandung : PT Alumni. Pg. 105.

² Achmad Ali (2003). Deterioration of Law in Indonesia (Causes and solutions), Jakarta: Ghalia Indonesia. P. 9.

with pure corruption crimes, the prosecutor is obliged to propose evidence that the defendant is proven to have committed corruption crime. He or she shall provide proof the corruption as predicate offense. Consequently, the process is not effectively and efficiently proceeded and it is not suitable with the justice principles which is quick and inexpensive. Furthermore, the obstacles prosecutor encounters in applying this system is caused by legislative factor and law enforcers. The legislative factor comprises the lack of legislation provisions which govern the implementation of reversal burden of proof in corruption crimes. As a result, many assume that to implement the principle requires the evidence of predicate offense. Meanwhile, the provision of reversal burden of proof as stipulated in Law Number 8 of 2010 on Money Laundering Eradication and Prevention firmly stated that the predicate offense is not necessarily proven in prior to implement the reversal burden of proof principle in money laundering. Similarly, the law enforcer factor is closely related to the legislative factor. As a result, prosecutor prefers to apply the provision on money laundering rather than corruption crime to achieve principle of quick and cheap process by minimizing the risk of defendant acquitted.

From the analysis, it is identified the principle of reversal burden of proof is not implemented to prevent defendant acquitted if he or she can prove that his or her assets are not derived from corruption crimes. Therefore, the best solution for this is to encourage government as well as legislative body immediately formulate the Law on Reversal Burden of Proof to accelerate corruption crime justice which is massive that enables the law enforcers to implement the principle confidently.

In formulating Law on Reversal burden of proof shall consider common law and particular law principles to meet shared spirit between law enforcers and society to avoid misperception among them.

Nevertheless, this research has constraints in terms of related studies in reversal burden of proof since there are still few of research discussing similar topic. In regard to this, a research concerning about how legislation provisions which govern the principle of reversal burden of proof in corruption crime is recommended to be conducted. It comes from the assumption that the reversal burden of proof principle is aimed at assisting law enforcers in performing their tasks.

References:

1. Elwi, Danil. (2012). Corruption, Concept, Crimes and its Eradication. Jakarta: Rajawali Pers.
2. Mukti, Harry. (2011). Reversal Burden of Proof in Corruption Crimes through Juridical Sociological Perspectives. *Humaniora. Journal*, Vol 8, No. 2. Surabaya: Erlangga University.
3. Rampengan, Margareth Carla. (2015). Functions of Report of Audit Findings (LHP) of National Audit Board (BPK) in Corruption Crimes. URL: <http://ejournal.unsrat.ac.id/index.php/lexcrimen/article/download/1575/1267>.
4. Rukmini, Mien. (2003). Human Rights Protection through Presumption of Innocence and Equality before Law Principles in Indonesia Criminal Justice System. Bandung : PT Alumnus.
5. Wiriadinata, Wahyu. (2012). Preversal Burden of Proof in Corruption Crimes. *Jurnal Legislasi Indonesia*, Vol 9, No. 2. Constitutional Court, Bandung.

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Перенос бремени доказывания коррупционных преступлений в законодательстве Индонезии

Коррупция становится величайшим врагом в большинстве стран мира, в том числе и в Индонезии. Борьба с коррупцией сегодня существенно усиливается, но она оказывается бессмысленной, если не подкреплена надлежащим законодательством, которое должно обеспечивать эффективную реализацию закона. В этих условиях бремя переноса доказывания в основном направлено на то, чтобы помочь правоохранительным органам находить и раскрывать активы, которыми владеет подозреваемый, полученные преступным путем. Принцип переноса бремени доказывания берет начало в англо-саксонской правовой системе и все еще применяется в некоторых случаях, таких как взяточничество, в Малайзии и Сингапуре. В Индонезии положение, касающееся принципа бремени доказывания, было введено в 1960 г. с принятием первого закона о коррупционных преступлениях. Тем не менее, на протяжении более полувека положение о переносе бремени доказывания никогда не применялось. Это происходит потому, что статьи, которые регулируют данные вопросы, едва обеспечивают четкое регулирование. В них только упоминается о данном принципе, но не установлен механизм реализации. В связи с этим целью нашего исследования является анализ недостатков в реализации принципа переноса бремени доказывания в коррупционных преступлениях, а также путей их устранения в правоохранительной работе.

Ключевые слова: перспективы; перенос бремени доказывания; коррупция; убеждение; прогресс.

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