

Strengthening the Indonesian Money Laundering Regime through Embodying the Pancasila Principles

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Abstract

This work is aimed at exploring and creating an appropriate approach in strengthening anti-money laundering regime in Indonesia. For structuring the legal framework of anti-money laundering, this work will embody the Pancasila values, such as justice, harmony (coherence and congruence), equality and civilised-based humanity. For visualising those objectives, this work will apply normative (statute and conceptual approach) and empirical legal research. In detail, this work will elaborate and discuss the history of Indonesian anti-money laundering, as well as compare the existing Indonesian money laundering regime and the Pancasila-based Anti-Money Laundering Regime. The comparison will be focused on the weaknesses and the strength of two regimes, by emphasising some relevant issues, such as validity, recognition, legal certainty, harmony, and justice. In addition, this work will discuss the approach to coherence the diametrical norms in between the existing Indonesian money laundering regime and presumption of innocence principle. In the end, this work offers a regulatory model that may accommodate various interests for justice.

1. Introduction

The act of money laundering can be categorized into one of white collar crimes. In the Indonesian economic structure, money laundering² has indeed affected the national economy sector. The Influence posed by money laundering could jeopardize the effectiveness of the operating system and economic policy. This can be seen from the sharp fluctuation of exchange rates and interest rates that ultimately can lead to public distrust of the Indonesian financial sector. This is justified because the money generated from the money laundering can be transferred from relatively better-off countries to other countries that experience economic downturn. In order to realize the legal certainty, the Indonesian government has tried to combat money laundering through various productions of legislations.³

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² The term Money Laundering comes from Money and Laundering. Money is : 1. The medium of exchange authorized or adopted by a government as part of its currency coins and currency are money, 2. Assets that can be easily converted to cash, 3. Capital that is invested or traded as a commodity, 4. Funds; Sums of money. Laundering is defined as The Federal crime of transferring illegally obtained money through illegitimate persons or accounts so that its original sourced cannot be traced.” Garner, A. Bryan, Black’s Law Dictionary, seventh edition, West Group: St. Paul, Minn, 1999 p. 1021

³ These efforts can be seen from the government’s commitment and seriousness in eradicating money laundering since 2002 through the enactment of the Law No. 15 of 2002 on Money Laundering, which was then amended by the Act No. 25 of 2003 and further regulated in the Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering. Unfortunately all of the legislation products above are inseparable from international influences that impose international standards of anti-money laundering laws model. The acceptance of this model is intended solely to lift Indonesia from the list of non-cooperative countries in the eradication of money laundering. In addition, the enforcement of money laundering laws in Indonesia can not be separated from the influence of International world panic that sees Indonesia not fully comply with 40 recommendations

As regards the terminology, money laundering belongs to a derivative crime or follow-up crime or accessory whereas the criminal offense of money laundering that precedes the crime is known as predicate crime on money laundering. This criminal act is preceded by a felony or misdemeanor that results in the possession of money or assets⁴ illegally. Furthermore, the result of the crime or the said crime was laundered through various activities such as placing, transferring, diverting, spending, paying, granting, depositing, bringing overseas, changing shape, and exchanging the currency or securities⁵.

The purpose of this paper is focused on evaluating the model of anti-money laundering⁶ regime in Indonesia, which is based on an international standard transplant model for eradicating money laundering. In addition, this paper also aims to create a model of eradicating money laundering based on an Indonesian character. This is intended to ensure the presence of fairness and balance for all parties, i.e. international interests, national interests, or the State, as well as societal interests. Achieving the attainment of this goal is imperative because the legal transplant model contains burden proof principles⁷. Thus, investigation is only focused on the accessory crime or follow-up crime⁸, allowing a person found guilty in the absence of a legally binding verdict⁹.

In the context of Indonesian positive law, the application of the above principles leads to a conflict of interests and normative clash (conflict of norms) because these principles are contrary to the principles of presumption of innocence, principles of legality, and the principles of fairness. It is clear that conflicts or erroneous legal enforcements above can worsen the quality of legal enforcement in Indonesia. This happens because the complexity of problems faced by the legal officers in the field is not in accordance with the norms and principles that should be respected and enforced.

Failure to settle the complexity of the problems in the law enforcement will result in the legal uncertainty and injustice. Constitutionally, this failure means that the government has failed to provide equitable, certain, legal protection for everyone, as set forth in the Constitution of 1945 section 28 (d) (1). Theoretically this means that the government has failed to nurture the truth to the bearers of law because there is a sharp gap between theory and practice.

and eight special recommendations from the FATF. As a result, the formulation of legislation is inconsistent and disharmonious with the provisions of other legislations that already exist and are being applied in Indonesia. This in turn has resulted in a conflict of interest and legal norms clash (conflict of norms). Naively, the deviation in the Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering or the second regime of anti-money laundering has become a positive law in the criminal justice system in Indonesia.

⁴ Results of criminal act include assets obtained from the crime activities, such as, a. corruption; b. bribery; c. narcotics; d. psychotropic substances; e. smuggling of labor; f. smuggling of migrants; g. banking crimes; h. crimes in capital markets; i. in the field of insurance; j. customs; k. clearance; l. human trafficking; m. illicit arms trafficking; n. terrorism; o. abduction; p. theft; q. embezzlement; r. fraud; s. counterfeiting; t. gambling; u. prostitution; taxation-related crime; w. forestry-related crime; x. environmental crimes; y. marine and fisheries crimes; or z. Another criminal offense punishable by imprisonment of 4 (four) years or more, carried out in the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia and the offense is also considered as a criminal offense under the laws of Indonesia. See: Law No.8 / 2010, article 2.

⁵ See: Law No.8/2010, article 3.

⁶ Money laundering is an act of transferring, using or conducting other acts based on the result of a criminal act that is often carried out by criminal organizations, and individuals who commit crimes, such as corruption, drug trafficking, forestry crimes, environmental crimes and other criminal acts. The action was intended to conceal, disguise or obscure the origin of the money derived from the criminal act so that it can be used as legitimate money without being recognized as an asset originating from illegal activities. See: the Law No.8 / 2010, article 1 (1); 2 and 3

⁷ See: Law No.8/2010, article 77 stated that: "for the interest of the legal enforcement in the litigation process, the suspect is obliged to proof that he or she or their treasuries are not stemmed from the criminal actions."

⁸ See: Law No.8/2010, article 69, stated that: "to investigate, to prosecute and to examine a case of money laundering in the litigation process, the investigators (i.e., police and persecutor) has no obligation to prove that it's the original core crime".

⁹ It is necessary to note that the money laundering case is the accessory case or derivative case. It is not the core crime. Logically, it is impossible to investigate the derivate case or the accessory case (i.e., money laundering) without its core crime. In practice, the investigator seized all the treasuries of the suspect without proving its core crime earlier. Clearly, this action is unfair legal action and contradicts to the presumption of innocence principle.

On the one hand, we teach everyone about the principles of fairness, legality, and the principle of presumption of innocence and so forth. On the other hand, ironically, we allow even legalize the law enforcement practices that are contrary to the principles mentioned above¹⁰.

As regards the above issues, this paper aims to design a model of eradicating money laundering that has an Indonesian-based character. To visualize these objectives, this writing will implement a normative approach focusing its research activities on norms or rules pertaining to money laundering. The data used for the analysis are referred to the primary and secondary data or legal materials. Technically, the sources of data are taken from various legislations, jurisprudences, journals, articles, comments and annotations that discuss and analyze models of money laundering. All data and legal materials collected will be analyzed qualitatively based on legal thinking (*juridisch denken*).

Furthermore, to provide reinforcement to the scientific and philosophical validity of this idea, the researcher offers the integration of the basic values of Pancasila. The integration of the basic values of Pancasila is the basis for not only the philosophical validity but also as scientific and constitutional consequences that maintain that all legal products in Indonesia must be based on Pancasila and the Indonesian Constitution of 1945. Thus, it is appropriate to state that the design and creation of a model anti-money laundering regime should have an Indonesian-based character. This can only be realized through the embodiment of the fundamental values of Pancasila that guarantee justice and equity for civilized mankind.

2. Re-examining the Existing Indonesian Money Laundering Regime

The Indonesian money laundering regime need to be re-examined as it is a part of the foreign products which contains the contradictive and over protective elements. It validate the authority of the investigator (i.e., police or prosecutor) to investigate, to prosecute and to examine a case without proving the predicate crime or origin core crime. In addition, it introduces the burden proof to the suspect. This regulation tends to shift the burden of the investigation to the suspect. Those examples are crucial issues that contradict to the general legal principles in Indonesia, such as the presumption of innocence and the legality principle. Considering those weaknesses, it is relevant to re-examine the existing Indonesian money laundering regime.

2.1. Transplantation Case of the Money Laundering Regime in Indonesia: Finding the Truth through Historical Review

The existence of the application of regulation against money laundering in Indonesia is essentially a transplant of international standards against money laundering that aims to prevent and eradicate the crime. Indonesia and some other countries that join and become members of Financial Action Task Force (FATF) have particularly applied transplants of international standards (legal transplants, legal borrowing or legal adoption).¹¹

In addition, the birth of the Law on the Prevention and Eradication of Money Laundering was triggered by the lack of legal arrangements contained in the legislation on money laundering crimes in Indonesia. Basically, the birth of international legal regime concerning money laundering is aimed at eradicating money laundering crimes. This was marked by the release of the United Nations Convention against Illicit Traffic in Narcotic drugs and Psychotropic Substances in 1988 (Vienna Convention of 1988). Based on its legal principles, the framework of the recommendations from FATF and the development of international scale crime are used by the State of Indonesian to combat anti-money laundering regime.

2.2. Normative problems in Indonesian Money Laundering Regime

The principle of the legal enforcement of anti-money laundering regime applied in the Indonesian criminal justice system is resulted from the FATF recommendations to combat the International-scheme crime.

¹⁰ See: the content of the provisions of law that pertains to the eradication of money laundering in the international law model.

¹¹ The term legal transplant was introduced by Alan Watson to refer to a process of borrowing or taking over or moving the law from one place or country or nation to another place, country or another nation, in which the law is then applied in a new place together with the law that already exists. The transplant of law can also occur because of the necessity to transform international agreements (agreement in the form of law making). Alan Watson, *Legal Transplants An Approach to Comparative Law*, Scottish Academic Press, America, 1974, p. 22. Borrowing Roscoe Pounds view, Watson wrote: "... and Roscoe Pound could write: "History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law".

This is also interpreted as the scheme for embodying legal certainty for eradicating the occurrence of crime in Indonesia, particularly in relation to the source of funds that finance crimes. Viewed from its impact, money laundering that pertains to the acts of financing various types of crimes (follow-up crimes), is indeed quite worrisome for Indonesia. The government of Indonesia is therefore urged to address these matters quickly through the enforcement of money laundering applied to the criminal justice system. This enforcement of law is started from the criminalization, disclosure process of money laundering cases up to the punishment and the use of witnesses for the culprits. This is certainly inseparable from a verification process.

The issues of verifying the enforcement of criminal law in handling money laundering cannot be separated from the principles of verification contained in the Indonesian criminal procedure law. These principles are known as: *negatief Wettelijk Bewijsleer* or negative verification system. *Positief Wettelijk Bewijsleer* means that no other instruments of evidence — in this case the judge's convictions — are required. There are many other methods of proving evidence recognized by the law. Conviction In Time (*Bloot Gemoedelijke Overtuiging*) the verification system solely on the conviction and the judge is not bound by the tools available evidence, Conviction In Raissonne (*Beredeneerde overtuiging*) i.e. systems that implement evidence based on a belief that the judge and the reasons that led to convictions The belief in the proof is not tied to the tools of proof recognized legitimate law but it can use tools other evidence that exists outside the law as a reason for affirming judges. *Conviction In Time (bloot Gemoedelijke overtuiging)* is a verification system solely based on the judge's conviction and not bound to the available verification instruments. *Conviction In Raissonne (Beredeneerde overtuiging)* is a system that is based on the judge's conviction and the logical reasons that lead to the convictions. The verification is tied not only to the evidence recognized by legitimate law but also other kinds of evidence available outside the law as a reason that affirms the judge's conviction.

2.2.1. Conflict of Norms: The Existing Criminal Principle vs the Existing Indonesian Money Laundering Regime

The conflict of norms refers to the clash between the existing criminal principle and the existing Indonesian money laundering regime. The existing criminal principles such as presumption of innocence, and legality principle contradict to the existing Indonesian money laundering regime, article 69 and 77. Under article 69, of the Indonesian money laundering law, the investigator has authority to prove the derivative crime or accessory crime without proving the predicate crime. This is clearly contradicted to the presumption of innocence principle. This article also contradicts to the legality principle. The clash of norms cannot be addressed by issuing the new regulation on the anti-money laundering law, but the government should address the conflicted norms through coherencing the contradictory norms. Technically, the norms should consider the principles. Not the legal principles follow and validate the wrong norms. Theoretically, the norms or regulation should embody the higher principles, such as justice, humanity, and legal certainty. Not the justice that should be sacrificed to enforce the regulation.¹²

2.2.2. Questioning the Legal Certainty of Indonesian Money Laundering Regime

It seems clear that conflicts of interest between the model of laws and norms of anti-money laundering international standards and some of the principles of law that has become standards in the repertoire of embodying the practical law in Indonesia have resulted in the legal uncertainty. First, by allowing and legalizing the provisions of Law No. 8 of 2010, article 77 of the reversed burden of proof, the government has ignored the general legal principle that becomes the most basic legal certainty and justice. This is contrary to the constitutional provisions of Article 28 (d) (1) that place a positive obligation on the State to protect every person in obtaining the fundamental rights, such as the right to obtain equitable legal protection and legal certainty.

¹² When we found the tension between the norms and the principles, we need equity to integrate them into effective and just regulation. Aristoteles in his passage, Ethics, considers the nature of equity and its relation to justice. He maintains that when rules and principles produce injustice, the equity has role to prevent the law from adhering too rigidly to its own rules and principles. Thus, the equity allows judges using legal principles in order to promote justice. See: Alan Beever, "Aristotele on equity, law and justice", Legal Theory, 10 (2004), 33-50, Cambridge University Press. See also: Justice as Virtue, Stanford Encyclopedia of Philosophy, available at: <http://plato.stanford.edu/entries/justice-virtue/#5>

Additionally, the government has also legalized the law enforcement to investigate follow-up or accessory crimes without proving first the existence of the core subject of the crime or predicate crime or original crime core. This stipulation clearly provides a very large space for the law enforcement to act in any way against the suspected or alleged crime results. Legally, it cannot be justified because someone can be said to be guilty only when he/she has been judged, or convicted or found guilty by the trial that has a legal permanent power (*inkracht*). Thus, such a phenomenon of law enforcement reveals the existence of a gap (loophole) in upholding the truth and justice. This loophole appears due to the asymmetry between the ends and means. On the one hand, the government attempts to enforce the law and combat money laundering to protect the national interests. On the other hand, the government uses approaches that can risk distortion, negligence and contempt of the most fundamental human rights.

In this regard, this article questions the legality or validity of the Law No. 8 of 2010, particularly Article 69 and 77, on the Prevention and eradication of money laundering.

2.2.3. Unclear Norms in Indonesian Money Laundering Regime

With reference to the explanation and elaboration in section 2.2.2 above, the law of anti-money laundering of Indonesia includes not only uncertainty but also obscurity of the rules of law. How could possibly the bearers of legal action do what they should not have done? They had are forced to do things that they believe not written in the anti-money laundering laws Indonesia as mentioned in chapters 69 and 77 above.

3. Creating the Appropriate Mechanism in Indonesian Anti-Money Laundering Regime

The arising problems that bring about the implications for the rule of law in Indonesia pertains to the arrangement of norms applied in the anti-money laundering regime in Indonesia. It has experienced a number of changes as it does not have consistency in the arrangement of money laundering concerning arrangements regarding the understanding of the proceeds of crime is a predicate crime is not a priority and a priority in the proof of money laundering. This framework certainly differs and has deviated from the legal framework set out in the Criminal Code that has been institutionalized in the Indonesian criminal justice system. In the criminal law the principle of legality (*crimen sine praevia delictum poenali*) applies. This principle means that “No crime exists and no punishment applies without a pre-existing penal law”. Whether a person committing mistakes can be imprisoned depends on whether he has a fault or not. To show the meaningfulness of mistakes - which become a requirement to impose criminal punishment — offenses should be understood as the state of psychological relation between the sanity state of the maker and the elements of the offenses. Because of these actions, mistakes are included within the legal responsibility (*Schuld is de verantwoordelijkheid rechtens*).

When the Law on the Prevention and Eradication of Money Laundering is closely observed, it still contains many weaknesses, including the weakness contained in Article 77 of the Law about reversing the burden of the proof as the basis for the application of the principle. The Law states about “the principles of allegedly committing the crime of money laundering’ but it does not explicitly regulate what if the defendant cannot prove it. The aforementioned Article only states that for the sake of the trial the defendant must demonstrate that his property is not resulted from a crime. Other article should also mention if the defendant cannot prove his property, then immediately it will be confiscated or directly considered as evidence of the crime. As regards the issue of proving the evidence, there is a significant difference between Indonesia and the United States. In the US, the law progressively suggests that the evidence or user support (Circumstantial Evidence) is enough to justify the existence of the elements of money laundering.

3.1. Preparation and Planning for Eradicating Money Laundering Activities

The precise mechanism of anti-money laundering regime in Indonesia concerns the harmonious application of several proof principles as it involves an influential legal system in its application. Indonesia, as a country that applies a civil law system, is still bound to the codification of law, i.e. Criminal Code. Although the proof of money laundering is conceptually stipulated in the legislation that adopts a reverse authentication, the act of law enforcement must surely meet the following principles: *first*, the criminal act is deliberately aimed to convert or transfer of goods resulting from a criminal activity or participation, with the aim to conceal unlawful nature of the goods, or help someone who is involved as an intermediary in such an activity to eliminate the legal consequences of such activities.

Second, the defendant covers up the real situation, source, location, transfer, mobilization, the rights of ownership or goods, where the person herein knows that the goods originate from a criminal activity or results of participation in such an activity. *Third*, as regards the acquisition, possession, or use of the goods, the defendant knows that the goods originate from criminal acts or results of participating in such an activity. *Fourth*, the defendant practices any act of participation in the activity that brings about an attempt to perform, help, confederate, facilitate and provide advice to the actions mentioned above.

3.2. Implementation Systems in Anticipating Money Laundry

The Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering requires that the most important thing is that 'there is already sufficient preliminary evidence'. Article 77 states that "For the purpose of court trial, the defendant must demonstrate that the wealth is not resulted from a crime". The grammatical interpretation of this article implies that a form of proof authentication adopted by the Law on Money Laundering is named perfect reversed proof because it implies that it is only the defendant who must demonstrate that the his/her wealth is not resulted from a crime. If we look at closely, the appearance of provisions set forth in Article 77 of the Law is the repetition of the provisions of Article 35. Article 35 of the Law formulates that "the defendant is given a chance to prove their wealth that does not come from criminal acts". This provision is known as the principle of reversed burden of proof. The provisions of Article 35 of this Law seem to contradict one another, i.e. Article 35 states that the defendant 'must prove' whereas the explanation of Article 35 states the defendant 'is given a chance to prove'. In this regard, the author argues that an explanation is required when the content of an article is unclear. When the statement in a chapter is unclear, then the explanation of the contents of the article is referred to. The difference between the contents of article with an explanation of an article must be able to become a loophole that can be used by officials for personal gain or blackmailing the defendant. One of the preambles of the Law of Prevention and Eradication of Money Laundering states "that the act of money laundering should be prevented and eradicated so that the intensity of the crimes that generate or involve a large amount of wealth can be minimized. Thus, the stability of the national economy and security can be maintained". Moreover, the general explanations of the paragraphs 4 and 5 state that "The act of money laundering is harmful to society as well as extremely detrimental to the country because it can affect or damage the national economy or the financial stability of the country as the variety of crimes increases.

3.3. Control System in Anti Money Laundering Regime

The control of the anti-money laundering regime can be implemented by the government and society. The government can design two approaches: (i) normative approach; and (ii) institutional approach. The normative approach can be manifested through evaluating, examining the implementation of the rules of antimoney laundering. While the institutional approach, can be conducted through optimising the institutional capacity. In this respect, the government can remodel the existence of the related institution in anticipating the money laundering activities. In addition, the government can refunctionalise the related institution such as police, prosecutors, ministry of justice, ministry of finance, banks, Financial Services Authority (known as OJK), money changer institution, mortgage, institutions and so forth. All institutions should work in a comprehensive and integrated teamwork for eradicating the money laundering activities. While related to the society control, the government could improve the awareness of society to participate in preventing and eradicating the money laundering activities. This can be done through the controlling of a direct and cash transaction or by encouraging the society to report any suspected activities in economic transaction manually, i.e., cash transaction.

4. Designing the Appropriate Indonesian Money Laundering Regime

The design and creation of the legal framework for the prevention and eradication of money laundering should be based on legal thinking. The concept of legal thinking was first introduced by Meuwissen Bruggink in his book entitled *Recht Reflecten* translated by Arief Sidhartha with the *Law of Reflection* title.

Meuwissen idea has also been developed by Hayyan ul-Haq, in various writings¹³ and lecture about the legal reasoning, epistemology and methods in law¹⁴. In the concept of legal thinking, each bearer of law must base their law practices on legal action in the meta-theory. Theoretically, the meta-theory of the law enforcement practice is rooted in dogmatic laws, namely the laws or regulations in force. Following that, the dogmatic law is only valid if it is based on a meta-theory of law. In this case, all of the laws or rules of law must base on the theory pertaining to the objects arranged. Later, theories of law must rely upon a meta-theory of the law philosophy. In the context of Indonesian, Haq further states that our legal philosophy must be based on the philosophy of Pancasila. It is clear that the laws that we want to build and strengthen is the legal system based on Pancasila. Thus, the system of prevention and eradication of money laundering should also be based on the values and legal postulates contained in Pancasila. In this context, I am of the opinion that it is time that we organized, initiated and built a legal system of money laundering that has the characters of Pancasila.

4.1. Considering National Interest in Indonesian Money Laundering Regime

The national interest in Indonesian anti money laundering regime is reflected by the strong commitment of the Indonesian government in protecting national economic. It has been noted that the money laundering actions can cause instability of economic development. The unstable economic development can be seen from the unpredictable rates of foreign exchange, unstable banking rates, and unstable macro economy of a nation¹⁵. In this context, the government has interest to protect the stability of economic. In this context, the government has interest to protect the stability of economic.

As regards, the government needs to regulate and control the money laundering actions that may possibly destroy the foundation of national economic. It is necessary to note that the measurement or the tools in achieving the goal should be symmetrical. In this context, the goals and the method or the tools should strengthen each other not ignore or even negate each other. The method in protecting the national interest should consider the fundamental values of Pancasila as the Grand norm of Indonesian positive laws. In this respect, the fundamental values, such as justice and humanity should be embodied in the regulation of the Indonesian anti-money laundering regime. Thus, it is not appropriate for the government to legalise and endorse the article 69 and 77 of the Law No.8/2010, in order to protect the economic stability as a part of national interest by sacrificing the fundamental rights of the people.

4.2. Embodying Pancasila Values in Indonesian Money Laundering Regime

Embodying Pancasila as the grand norm of Indonesian positive laws into the Indonesian money laundering regime can refer to legal technic in visualising and formulating the preposition and statement of the anti-money laundering laws. In this respect, we need to choose the most ideal values that may guarantee the justice and legal certainty and usefulness of the laws. Under the Indonesian legal paradigm, the Pancasila contains the most ideal values that sustain justice and civilised humanity and harmony. Those values should be understood and appreciated as the meta-norms in the Indonesian positive laws.

4.2.1. Justice

Justice has been appreciated as the soul of law. Aristoteles maintains that virtue reflects the justice. As it is the highest values in law, so justice should be the core element of law. In reviewing the Indonesian money laundering regime, the government should consider the justice principle as indicator or control instrument to implement the enforcement of anti-money laundering. Therefore, the justice is not the ethical and theoretical guidance in enforcing the law, but it is a practical guidance in implementing anti-money laundering regime.

¹³ Hayyan ul Haq, *Strengthening philosophical and Axiological Legal Framework in the Corporate Social Responsibility Regime in Indonesia*, Konstitusi Press, 2013. See also: Hayyan ul Haq, *Ideality in the Embodiment of Law (Idealitas Pengembangan Hukum)*, *Republika*, 17 November 2005; Hayyan ul Haq, *Managing Uncertainty and Complexity in the Utilization of Biodiversity through the Tailor-Made Inventor Doctrine and Contract Law*, Presented at International Workshop Managing Uncertainty and Complexity in Biodiversity and Climate Change, University Catholic Louvain La-Neuve, Belgium 15-16 June 2006, available at:

<http://biogov.uclouvain.be/bioinst/NEW%20N%20PAPERS/ULHAQ%20HAYYAN%20PAPER%202.pdf>

¹⁴ Hayyan ul Haq's public lecture in the Stadium General on Legal, Reasoning, Epistemology and Method in Law and Legal Writing, Post-Graduate Program, Master of Law, Universitas Muhammadiyah Sumatera Utara, on 28 February 2015.

¹⁵ See: the Law No. 8/2010, the consideration section

In Indonesia, justice also a part of the core principles in Pancasila. In Indonesian legal paradigm, based on Law No. 12/2011, the highest norm in Indonesia is the 1945 Constitution that contains Pancasila in its preamble. To see the role of Pancasila in the constitution, we can find in all body of the constitution that reflect the essence of Pancasila, including protection of fundamental rights that guarantee public access to just and certainty-based legal protection. Thus, all positive norms should be based on justice. The failure of the government to create and maintain justice at the practical level will reflect the failure of the government to implement the 1945 Constitution consistently.

4.2.2. Integrating all Interests based on Justice and Civilised Humanity

The Indonesian money laundering regime should integrate all interests of all related parties in enforcing anti money laundering regime. In this respect, the government should integrate and accommodate all interests, either foreign interest, national interest, and people interest. The integration should be based on the justice and civilised humanity.

By referring the above concept, all investigation activities should maintain the justice and civilised humanity. It means that the government cannot introduce the article 69 and 77 of the money laundering law. This is because the laws contradict to the justice and humanity. It is not humanise if someone take or seized other's properties or treasuries without evidences. To seize others properties without legal basis (rechts entitlement), will posit the government's action as a robbery action. In order to embody the civilised humanity, the government should prevent the introduction of those articles. The failure of the government to prevent those articles will seed a new tyranny in legal enforcement.

4.2.3. Harmony (Coherence and Congruence)

Harmony is required to create effectivity in legal enforcement. For creating harmony, the government should review all diametrical values and norms. It is can be manifested through eliminating or invalidate the other contradictive norms. In this point, to invalidate, we need to consider the goals between the two norms. If one norm has a higher goal or the goal can be achieved through implementation the other norms, so the lower goal should be stated as invalid. This invalidation is required to ascertain that the only one norm has validity without contradict with other positive norms.¹⁶ This is the core principle in maintaining the harmony in the existing norms and legal enforcement.

4.3. Integrating all Interests for Justice in Indonesian Anti-Money Laundering Regime

The transplant model of anti-money laundering regime has given an impact to the national legal system in the eradication of money laundering. Even if the government's aim to protect the national interest is understandable, yet the pragmatic approach through this transplant, in practice has given rise to new legal problems, i.e. the conflict between the international interests and the national law. The international interest can be seen from the emergence of various issues, such as human rights, environment, democracy, and so forth. In relation to the issue of human rights, an example can be drawn when someone gives donations to a religious institution, then the action may be suspected as an act to participate in the financing of terrorist acts. The adoption of transplant for such an arrangement cannot be justified based on national law, because the national law is subject to the principle of legality and the presumption of innocence. From this example, we can see clearly that the provisions of international law on anti-money laundering are contradictory to national law that has already been systematized in the criminal law.

Similar thing can be seen in the environmental issues. For example, we have seen many criminal environmental offenses, such as illegal logging, using or investing the results of crime in the banking world. In this context, investigators should prove the principal environmental criminal acts, and the follow-up criminal offenses. But in practice, oftentimes investigators prove the principal criminal offenses and the follow up criminal offenses (accessories) separately. In this case, investigators focus only on the crime of money laundering whereas the follow-up crime act is often proved using the burden proof method. As a result, this reverse authentication causes the suspect to be burdened with the proof. Furthermore, the authentication of proof results in injustice because someone is convicted without ensuring the existence of a court decision that has a legal permanent power.

¹⁶ Hayyan ul Haq's public lecture in Stadium General on Legal Reasoning, Epistemology and Method in Law and Legal Writing, University of Muhammadiyah Sumatera Utara (UMSU), on 28 February 2015

The above example shows that the system of proof authentication applied in the anti-money laundering regime is only shifting the burden of proof that should become the responsibility of the law enforcement apparatus, not the suspect.

In restructuring the system for eradicating money laundering, the government should consider not only the insistence of outsiders, but also the values of Pancasila as the foundation of ideological and philosophical foundation of the Indonesian nation. In one of the principles of Pancasila, it is formulated that justice becomes an imperative norm in the formulation of public policy and preparation of regulations, including a system management to combat money laundering. Thus, eradicating money laundering must consider the principle of fairness. The application of the principle of justice can be realized through the setting models laundering money. The models and stages rest upon a balance between the interests of the State with the rights of the suspects who should be protected by the government.

The failure to protect the rights of suspects will bear a paradox in the embodiment of the practical law, i.e., the rule of law, in Indonesia. This paradox occurs because on the one hand the government intends to protect the national interests. On the other hand, the attempt to secure national interests was done by sacrificing the suspect's interests that are part of human rights. It is clear then that the accommodations for the money laundering model through transplants are contrary to the values of justice that become the basic principles in the law enforcement in Indonesia.

In order to avoid conflicts of interest and conflict of norms above, the researcher proposes that the government should bind the whole clauses or provisions of law or norms that conflict with each other. To facilitate the coherence of norms diametrically (known as diametrical norms), the government must base all policies and settings, including the eradication of money laundering, on the highest positive legal norms, namely Pancasila and the Constitution of 1945. This view is based on theoretical considerations, that all regulations and policies, including government policies in the areas of administration and State finance should be based on the constitution. In this context the government can perform the constitutionalization of all norms and rules that are contrary to the Constitution of 1945. The term constitutionalization is intended to categorize all positive legal rules or norms that are considered contrary to the provisions of law and its higher legislations. For example, in the Indonesian constitution of 1945 Article 28 regulates that the government's obligation is to protect the fundamental rights of its citizens, namely the right to get legal protection, legal certainty and justice. Theoretically, the change of the above legal provisions into meta-norms will provide the State with positive obligation to take any action for maintaining the coherency of all laws, rules and policies under the Constitution of 1945¹⁷.

The standard of justice in the anti-money laundering regime in Indonesia, deriving from the fifth principle of Pancasila, emphasizes the attainment of social justice for all Indonesian people. Considering Pancasila functioning as the fundamental law of the Republic of Indonesia, then all policies and regulations related to national development, legal protection, and law enforcement must be sourced from Pancasila and the Constitution of 1945. Thus, all the rules transplanted from outside, including the rules of laundering money using international standards, should be adjusted or aligned or cohered with the source of positive law or norms applicable in Indonesia. This coherency should consider the interests of society, including the rights or interests of suspects.

Protection of the rights of suspects can be realized through the balancing of national interests and the suspects' interests, including the handling of predicate crime cases, such as corruption and money laundering cases. In practice, investigators often seek to prove the underlying crime offenses like money laundering without performing prior verification to the predicate crime offenses. This approach has resulted in many errors, such as: (i) breach of the principle of presumption of innocence; and (ii) breach of the principles of justice. Supposedly, the investigators must first prove the predicate crime first. Then, they have to prove the follow-up crime (accessory).

5. Closing Remarks

The pattern of eradication of money laundering in Indonesia is referred to the model of money laundering that is adopted from international standards. The adoption of such an international standards-based model has resulted in a clash and contradiction between the transplanted norms and the existing applicable legal norms in Indonesia.

¹⁷ Hayyan ul Haq, "Konstitusionalisasi Kontrak Perdata", Tempo, 6 November 2006, available at: <http://www.tempo.co/read/news/2006/11/06/05587151/Konstitusionalisasi-Kontrak-Perdata>

The clash of norms occurs not only at the level of principle, but also at the level of norms or rules and practices of the law enforcement.

Undoubtedly, that theoretically the collision of norms triggers injustice which in turn will result in the paradox or contradiction between the norms. This paradox comes from asymmetrical mismatch between ends and means. On the one hand the government's goal for transplanting the norms with international standards is to protect the national interest, but on the other hand, the method used may jeopardize the protection interests and the rights of suspects. Violations of the rights of the suspects will boil down the violation of the constitution that actually obliges the government to protect the fundamental rights of citizens, including the suspects, particularly in obtaining certain, fair legal protection treatment.

In order to protect the national interests as well the interests of suspects and thus maintain the consistent implementation of the Constitution of 1945, the government should perform evaluation and cohering all products of legislative laws and statutory regulations that are contrary to the constitution. With this in mind, the government can take any action in order to maintain the coherency. The government may cancel, delay, speed up, eliminate, add and reduce articles or provisions that potentially could alienate the citizens, including the suspects, in obtaining legal protection with equitable certainty.