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Sociological implication of *pro parte dolus pro parte culpa* form of fault in the formulation of passive money laundering

Implicação sociológica da forma de falha pro parte dolus pro parte culpa na formulação da lavagem de dinheiro passiva

Implicación sociológica de la forma Pro Parte Dolus Pro Parte Culpa de la falta en la formulación del blanqueo de capitales pasivo

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Abstract

This research determines and analyzes the sociological implications of the provisions of the passive money laundering in Article 5 paragraph (1) of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering formulated in *pro parte dolus pro parte culpa* form of fault. Normative legal research with the statute and conceptual approaches was used. The results showed that the sociological implication of the formulation of provisions in

question is that it can cause state budget overspending for disproportionate interests. With the existence of a large state budget expenditure, especially for the implementation of imprisonment against the criminal act of negligent passive money laundering, the state budget which should be used for the welfare of the community is reduced.

Keywords: Sociological implication; Pro parte dolus pro parte culpa; Passive money laundering.

Resumo

Esta pesquisa determina e analisa as implicações sociológicas das disposições da lavagem passiva de dinheiro no artigo 5 º parágrafo (1) da Lei número 8 de 2010 sobre a prevenção e erradicação da lavagem de dinheiro formulada na forma de culpa pro parte *dolus pro* parte culpa. Foi utilizada pesquisa normativa legal com o estatuto e abordagens conceituais. Os resultados mostraram que a implicação sociológica da formulação das disposições em questão é que ela pode causar gastos excessivos do orçamento do Estado para interesses desproporcionais. Com a existência de um grande gasto do orçamento do Estado, especialmente para a execução de penas de prisão contra o ato criminoso de lavagem passiva e negligente de dinheiro, o orçamento do Estado que deveria ser utilizado para o bem-estar da comunidade é reduzido.

Palavras-chave: Implicação sociológica; *Pro* parte *dolus pro* parte culpa; Lavagem de dinheiro passiva.

Resumen

Esta investigación determina y analiza las implicaciones sociológicas de las disposiciones sobre blanqueo pasivo de activos del artículo 5 inciso 1 de la Ley Número 8 de 2010 sobre Prevención y Erradicación del Blanqueo de Capitales formuladas in pro parte dolus pro parte culpa en forma de culpa. Se utilizó investigación jurídica normativa con el estatuto y enfoques conceptuales. Los resultados mostraron que la implicación sociológica de la formulación de las disposiciones en cuestión es que puede provocar un gasto excesivo del presupuesto estatal para intereses desproporcionados. Con la existencia de un gran gasto del presupuesto estatal, especialmente para la implementación de la prisión contra el acto delictivo de blanqueo de capitales pasivo negligente, se reduce el presupuesto estatal que debe ser utilizado para el bienestar de la comunidad.

Palabras clave: Implicación sociológica; Pro parte dolus pro parte culpa; Blanqueo de capitales pasivo.

1. Introduction

Crime is a common social phenomenon in society. One form of crime that has become a social phenomenon in this advanced civilization is money laundering. In Indonesia, money laundering is categorized as a new dimensional crime that was not initially viewed as a despicable act. Therefore, money laundering is called *mala prohibita*, instead of *mala in se* (Husak, 2008). In the academic paper of Bill Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering is stated that the system and mechanism for law enforcement of money laundering or anti-money laundering regimes are different from conventional criminal law enforcement. Disclosure of criminal acts and perpetrators of money laundering is more focused on tracing the flow of funds/illicit money (follow the money) or financial transactions (Pusat Pelaporan dan Analisis Transaksi Keuangan [PPATK] & Dewan Perwakilan Rakyat Republik Indonesia [DPR RI], 2011).

It is also mentioned in the general explanation of Law Number 8 of 2010 in the concept of anti-money laundering where the perpetrators and the proceeds of criminal acts can be found through tracing. Then, the proceeds are confiscated for the state or returned to the authorized parties. The consideration of letter b of Law Number 8 of 2010 also states that the prevention and eradication of money laundering requires a strong legal basis to ensure legal certainty, the effectiveness of law enforcement, and tracing and returning assets resulting from criminal acts. The last clause “tracing and returning assets resulting from criminal acts” is a manifestation of the concept of *follow the money* in Law Number 8 of 2010. What is written in the academic paper, general explanation, and consideration of letter b of Law Number 8 of 2010 constitutes the background for the formation of Law Number 8 of 2010.

In principle, this indicates a different and special character in law enforcement on money laundering. It is also a paradigm that distinguishes between money laundering criminal law enforcement and conventional criminal law enforcement. The difference lies in the paradigm used. Money laundering criminal law enforcement adopts *follow the money* approach while conventional criminal law enforcement uses *follow the suspect* approach (Kristiana, 2015).

Based on the experience of Indonesia and other countries, exposing criminal acts, finding the perpetrators, and imprisoning them (follow the suspect) are less effective to reduce the crime rate without efforts to confiscate and seize the proceeds and instruments of crime. In this case, allowing a criminal to retain control over his proceeds and instruments provides an

opportunity for him or other related parties to enjoy the proceeds and reuse the instruments or even develop his act. (Yusuf, 2013).

Meanwhile in Indonesia, the practice of the law is still commonly controlled by a legal regime that is oriented towards the perpetrator (follow the suspect), instead of the money (follow the money). Law enforcement efforts using money laundering instruments still clash with the old paradigm walls (Kristiana, 2015). Strictly speaking, if the law enforcement on money laundering is consistent with the background of the formulation of Law Number 8 of 2010, there should be a paradigm shift from *follow the suspect* to *follow the money*, or at least a combination of the two.

Law enforcement requires a very large fund, from the inquiry, investigation, prosecution, court examination to the implementation of court decisions, even including the cost of education or training of law enforcers, law enforcement facilities and infrastructure, etc. (Nelson, 2020). In other words, the state has spent a lot of budget on the criminal justice system from the beginning to the end (Santoso, 2020).

Concerning the spirit of the initiation of Law Number 8 of 2010 as contained in the academic paper, general explanation, and consideration of letter b of Law Number 8 of 2010 with the formulation of provisions for passive money laundering in Article 5 paragraph (1) of Law Number 8 of 2010 with *pro parte dolus pro parte culpa* form of fault, there is a contradictory logic. On the one hand, the spirit of the initiation of this law calls for tracing and returning assets resulting from criminal acts; on the other hand, the formulation of provisions for passive money laundering in Article 5 paragraph (1) of Law Number 8 of 2010 has the potential to increase the expenditure on the state budget in law enforcement, instead of trying to trace and return the proceeds of criminal acts. This argument rests on the premise that the construction of Article 5 paragraph (1) of Law Number 8 of 2010 results in negligent passive money launderers (*culpa*) to experience the same process as intentional passive money launderers (*dolus*).

The similarity of legal treatment for these two types of money launderers lies in the investigation until the imprisonment. These processes indeed require a significant amount of the state budget. Therefore, the discussion of this article aims to find out the sociological implications of the provisions of passive money laundering in Article 5 paragraph (1) of Law Number 8 of 2010 formulated in the *pro parte dolus pro parte culpa* form of fault.

2. Methodology

The methodology used in this study is a literature review over a period of one year and six months. The source used as research material is in the form of statutory regulations supported by relevant literature. Thus, the research is qualitative. Qualitative methods are those in which interpretation by part of the researcher with his opinions about the phenomenon under study (Pereira AS et al., 2018).

3. Results and Discussion

3.1 Inconsistency towards the paradigm of the anti-money laundering regime

The paradigm adopted in the anti-money laundering regime is the *follow the money* approach. However, when referring to Law Number 8 of 2010, the basic idea of the law formation is not fully embodied in some of the substances contained in it. It can even be said that there are inconsistencies with the basic idea of the formation of Law Number 8 of 2010.

The basic argument is in Law Number 8 of 2010 consisting of two categories of criminal acts, namely money laundering as regulated in Articles 3, 4, and 5 paragraph (1) and other related crimes as regulated in Articles 11, 12, 14, 15, and 16. The form of criminal sanctions imposed in these articles is imprisonment, formulated both singly, Article 11 and Article 16, and cumulatively, imprisonment or fines in articles 3,4,5,12,14, and 15.

Apart from the difference in the formulation system for imposing the sanctions, formulated both singly and cumulatively, imprisonment remains a sanction that takes precedence in Law Number 8 of 2010. This phenomenon is not only found in Law Number 8 of 2010 alone, but it also has become a trend in existing legislative policies so that the expression of types of criminal sanctions, especially imprisonment as the most common sanction, is not an exaggeration.

According to Barda Nawawi Arief, the legislative policy in determining imprisonment is one of the links in the entire law enforcement process in crime prevention efforts. However, in its development, many have questioned the benefits of imprisonment in overcoming crime. Therefore, if the policy chosen for crime prevention is imprisonment, then it should be based on reasonable and accountable considerations (Arief, 2010).

In this context, the author does not reject the existence of imprisonment sanctions entirely in legislative policies, especially Law Number 8 of 2010; however, what should be

criticized is specifically the category of money laundering crime as referred to in Articles 3, 4, and 5 paragraph (1) of Law Number 8 of 2010. The subjective element in these articles is the *pro parte dolus pro parte culpa* form of fault. This means that the legislators looked at these offenses, apart from being committed on purpose, they could also be committed because of negligence, but the threat of sanctions was equalized.

The main problem is the criminal act of passive money laundering as regulated in Article 5 paragraph (1) of Law Number 8 of 2010 which can be done intentionally and due to negligence. For intentional passive money laundering, imprisonment sanction is appropriate and rational, but not for negligent passive money laundering. Andi Hamzah even argued that criminal sanction is too light for negligence; there should be other sanctions. It is considered as the last remedy (*ultimum remedium*) (Hamzah, 2010).

Besides, in relation to the basic idea of the formulation of Law Number 8 of 2010, the stipulation of the form of imprisonment as a sanction imposed in negligent passive money laundering contradicts the basic idea of the formation of Law Number 8 of 2010. This is because imprisonment is a costly sanction. As an illustration, the author refers to the findings of Choky Ramadhan stating that more than Rp500 billion of the Indonesian state budget sourced from public taxes is spent out just for the foods of prisoners and convicts. It can be up to trillions of rupiah if it includes the salary of prison wardens and the cost of the rehabilitation program. Prison financing is so large that it burdens the people from taxes paid to the state given that these taxes can be used for financing other beneficial sectors such as education, health, and creating a crime-free environment (Ramadan, 2016).

This is counterproductive to the basic idea that Law Number 8 of 2010 to recover as much state losses as possible, which is a waste of state money. Such problems are the scope of two central problems in criminal policy using penal (criminal law) means, namely the problem of determining what actions should be criminalized, and what sanctions should be used or imposed on the offender (Muladi & Arief, 2010). It is related to the criminal law policy in the form of criminalization against passive money laundering, especially negligent passive money laundering, and the determination of the sanctions for this crime

One effort to overcome crime is to use criminal law with the criminal sanction (Arief, 2010). Thus, the high operational costs of imprisonment are included in the scope of crime prevention costs. This phenomenon became a concern in the 1975 Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva. In the congressional report, it was mentioned that the cost of crime control had eroded a huge proportion of the existing budget and resources in a country; even in developing countries, the

budget and resources allocated in crime prevention are greater than in developed countries. Financing for crime prevention and control ultimately becomes a burden on the people in the form of higher taxes, as well as other urgent needs to be put aside because the existing budget is allocated for crime prevention and control (United Nations [UN], 1915).

Based on the data from official statistics, the budget allocation for internal order in developing countries is still greater than the health budget allocation; it also includes the budget for crime prevention and control (UN, 1915). This refers to the opinion of Mardjono Reksodiputro stating that the notion of public order includes the issue of protecting the community against crimes that have harmed and troubled the community (Reksodiputro, 1993). Thus, strictly speaking, efforts to control crime require huge costs; even for this purpose, it must divert budgets that should be used for other important sectors.

From the explanation above, the important point is, considering the seriousness of negligent passive money laundering, sanctions other than imprisonment should be imposed because it would be counterproductive against the background of the formation of the appropriate sanctions imposed on the offender, in which the objective and basic idea of the formation of Law Number 8 of 2010 is to return as much state financial losses as possible. However, the imprisonment for negligent passive money laundering will spend out the state budget only for very minor offenses.

Even as previously mentioned, in the politics of criminal law in the future as stated in article 70 paragraph 1 letter o of the Criminal Code Bill, negligence in criminal acts is the reason not to impose imprisonment. Furthermore, referring to Article 36 paragraph (2) of the Draft Criminal Code, it interprets that a criminal act committed due to implicit negligence is an exception for imposing imprisonment.

In this case, the author fully agrees with Sholehuddin's opinion on the sanctions in criminal law that must be oriented towards the objective of punishment (Sholehudin, 2007). The objective in this context is the condition to be achieved. The objective can be pre-formulated formally; it can also be directly fought for informally without an assertion (Saleh, 1987). From the system perspective, “objective” occupies a central and fundamental position. It is the soul of the criminal system (Arief, 2017). However, the problem is the objective of the punishment in question is currently not in the legal system in Indonesia; the purpose of the current punishment is still a concept formulated in the Draft Criminal Code. Nevertheless, it is not an obstacle to formulating a good legislation product nor is it interpreted as a justification for legislators to impose sanctions in legislative policies that are not based on rational considerations at all.

The solution to the absence of a criminal objective as part of the national criminal law regime is that the legislators should understand the basic ideas and objectives of the formation of law and then make it a guideline for determining the objectives of sanctions in the formulation of laws. This effort allows the imposition of sanctions to be in line with the objective of law formation.

In the context of the passive money laundering crime, which, according to Article 5 paragraph (1) of Law Number 8 of 2010, can be committed intentionally or due to negligence, separating the regulations for these two types of crime should be considered before determining the sanctions.

Regarding intentional passive money laundering, the sanction imposed currently has been appropriate, imprisonment accumulated with fines. The cumulative formulation of sanctions indicates the adoption of the social principle, which focuses on the protection of the community; therefore, it is normal only if the imprisonment and fines can be imposed together (Amrullah, 2014).

However, the sanctions imposed against negligent passive money laundering need to be studied more deeply. According to Bentham, punishment is inefficacious when directed against individuals who could not know the law, who have acted without intention, who have done the evil innocently, under an erroneous supposition, or by irresistible constraint (Bentham, 1871). The point to be underlined from this statement is that the sanction for a criminal who commits the crime unintentionally is ineffective. It can also mean that the punishment of a negligent crime is ineffective. Therefore, the formulation of criminal sanctions imposed on passive money laundering should be considered in the criminal law policy in the future.

3.2 Sociological implications of the formulation of Article 5 paragraph (1) of Law Number 8 of 2010 with *pro parte dolus pro parte culpa* form of fault

Gustav Radbruch puts forward that there are three basic values of law, namely justice, utility (usefulness), and legal certainty. These values are also often referred to as legal objectives. Satjipto Rahardjo compares these basic values with the three variables that function as an assessment of the validity of the law equally. These variables include philosophical, sociological, and juridical aspects.

The comparison scheme illustrates the relationship between the three basic values and the three aspects of assessing the validity of the law. The specific forms of relationship in

question include, first, the relationship between justice and philosophical aspect; second, the relationship between utility (usefulness) and sociological aspect; third, the relationship between legal certainty and juridical aspect (Rahardjo, 1991). However, the author limits the discussion by emphasizing the second relationship, especially concerning the form of criminal sanctions imposed on negligent passive money launderers.

The utility of the law can be seen from the economic side of the law. In the context of criminal law, the essence of this relationship was stated by Romli Atmasasmita that the development of economic analysis on special law against criminal law is a new force that can improve the morale of criminal law to be used efficiently and meaningfully to improve community welfare. This can occur if criminal law experts seriously pay attention to the advantages and disadvantages of the use of criminal law, which has been seen as an instrument that can have a deterrent effect and stop crimes that occur in society. The new perspective of the economic analysis approach to criminal law changes the paradigm of classic criminal law (right and wrong) to economic-based criminal law (the impact of criminal law on the social and economic aspects) (Atmasasmita & Wibowo, 2017).

To prevent crime with criminal law, the state needs a large cost, which is also a concern at the fifth UN Congress as previously mentioned. It includes the operational costs of implementing imprisonment. In Indonesia, financing for such purposes is included in the scope of state expenditure, sourced from the state budget.

This is an implementation of Article 11 paragraph 2 of Law Number 17 of 2003 concerning State Finance stating that the state budget consists of revenues budget, expenditure budget, and financing. Meanwhile, paragraph 3 of the law states that state revenue consists of tax revenue, non-tax revenue, and grants. Tax revenue always has the biggest contribution to state revenue (Dewan Perwakilan Rakyat Republik Indonesia [DPR RI], 2019). That is why taxes are called the backbone of the state budget (Soeriaatmadja et al., 2010). Article 1 point 1 of Law Number 6 of 1983 concerning General Provisions and Tax Procedures defines tax as a mandatory contribution to the state that is owed by an individual or entity which is compelling under law, without receiving direct compensation, and used for the state needs for the greatest prosperity of the people. From the above explanation, the costs of crime prevention including operational costs of imprisonment are finally borne by the people in the form of taxes.

Meanwhile, the tax has three functions in a country, budget function (*budgeter*), regulatory function (*regularend*), and a social function. The budget function (*budgeter*) of taxes is to get as much money possible into the state treasury for state expenditure needs. The

regulatory function (*regularend*) means that taxes function as a tool for driving society in the economy to improve people's welfare. This function uses taxes to encourage and control community activities to be in line with government plans and desires. The social function means the recognized right of private property and its use that must not conflict with the interests of the community. In other words, the amount of tax collection must be adjusted to one's ability to achieve the highest fulfillment of needs after being deducted (by the absolute) for primary needs (State, 2017).

The budget function is basically in line with the concept of *follow the money* in Law Number 8 of 2010 which seeks to increase state revenue. This view is also stated in the academic paper of Bill Number 8 of 2010 that, with consistent enforcement of the law on money laundering, the state will be able to confiscate assets resulting from criminal acts so that the state receives significant additional income for useful activities. Furthermore, it is hoped that, with the enforcement of the law to eradicate money laundering, state income from the tax sector will increase. On the other hand, with consistent law enforcement that reduces the crime rate, the micro-economic activity becomes more efficient because the high-cost economy generated by criminals is reduced (PPATK & DPR RI, 2011). As a comparison, the development of an anti-money laundering regime in Australia is also oriented to increasing state tax revenue, resulting in many cases of tax evasion that have been successfully disclosed and increased state income from taxation (PPATK & DPR RI, 2011).

Strictly speaking, the government increases state revenue through many ways, including taxes and law enforcement against money laundering oriented to pursuing the proceeds of crime and returning it to the state (if the state is injured). From this logic, with the existence of large state budget expenditures, especially for the operationalization of imprisonment against negligent passive money laundering, the government's efforts to increase state revenue, especially from the tax sector, and to recover state losses through law enforcement money will be useless. It is like filling water in a bucket with a hole at the bottom for watering plants. Instead of hoping that all the plants are watered evenly so that they grow well, we waste extra energy with undesired results.

Such thinking is in line with the economic approach to law, which places efficiency as the main principle for assessing whether a rule of law or policy or a court decision can be accepted or rejected. Whether law or policy or court decision is efficient or not can be determined by comparing the benefits and costs (Rahmadi, 2015).

If this conception relates to legal objectives, it is identical to legal objectives in the form of utility. Utility as a legal objective is the essence of the utilitarianism school of

teachings initiated by Jeremy Bentham. According to Bentham, utility is an abstract term. It expresses the nature or tendency of something to prevent evil or to gain kindness. Evil is misery or the cause of misery. Kindness is pleasure or the cause of pleasure. What is in accordance with the utility or interest of an individual tends to increase the amount of happiness. What is in accordance with the utility or interest of society tends to increase the amount of happiness of the individuals who make up that society (Bentham, 1971).

Utility, according to Bentham, is the principle that approves or rejects any action whatsoever that appears to increase or decrease one's happiness with interests affected by the action. If the interested party is an individual. The utility principle must be designed to increase his happiness. Meanwhile, if the interested party is the community, the utility principle must be directed to their happiness. In utilitarianism, the tool of right and wrong is the greatest happiness for most people, which is known as the greatest happiness for the greatest numbers (Marzuki, 2008). Regarding crime and punishment, from the perspective of criminal utilitarianism, it has no justification value if it is imposed to simply add more suffering or loss to society (Harkrisnowo, 2003). The use of criminal sanctions must be excluded if it is groundless, inefficacious, unprofitable, or too expensive, and needless (Bentham, 2000).

Based on the explanation, a common thread that can be drawn is the *follow the money* approach in Law Number 8 of 2010 has the same mission as the government's efforts to collect taxes, which aims to increase state revenue. The state revenue as stated in the state budget is eventually used to fulfill the welfare of the community.

With the existence of types of criminal sanctions in the form of imprisonment attached to Article 5 paragraph (1) of Law Number 8 of 2010, negligent passive money laundering will only waste the state budget for disproportionate interests. The state budget allocated for this purpose should be used for other interests of the wider community. This contradicts Bentham's thinking, which states that laws that bring happiness to the largest part of society will be considered good laws (Rasjidi & Rasjidi, 2016).

This is an implication of the formulation of Article 5 paragraph (1) of Law Number 8 of 2010 in *pro parte dolus pro parte culpa* form of fault, the consequence of which is intentional and deliberate passive money laundering are both punishable by imprisonment which is accumulated with fines. The problem is that the criminal act of passive money laundering which is committed due to negligence is liable to imprisonment. Thus, this idea should be the concern of legislators, especially in the effort to revise Law Number 8 of 2010

in the future so that the sociological aspect is also taken into consideration in formulating future legislative policies.

Therefore, the sociological implication of pro parte dolus pro parte culpa form of fault in Article 5 paragraph (1) of Law Number 8 of 2010 is the selection of the form of imprisonment for negligent passive money laundering will spend out the state budget only for very minor offenses. In other words, it will only waste the state budget for disproportionate interests. With this large state budget expenditure, especially for the operationalization of imprisonment against negligent passive money laundering, the government's efforts to increase state revenue, especially from the tax sector, and to recover state losses through law enforcement money will be useless. The state budget allocated for this purpose should be used to achieve public welfare, such as health, education, etc. In other words, the state budget that should be used for people's welfare is reduced.

4. Conclusions

The sociological implication of the formulation of the *pro parte dolus pro parte culpa* form of fault in the formulation of Article 5 paragraph (1) of Law Number 8 of 2010 is that it has the potential to waste the state budget for disproportionate interests. With the existence of a large state budget expenditure, especially for the implementation of imprisonment against the criminal act of negligent passive money laundering, the state budget which should be used for the welfare of the community is reduced.

As a recommendation for the future, it should be that the crime of passive money laundering which is carried out on purpose and the crime of passive money laundering which is carried out because of negligence is formulated separately in different provisions, and the sanctions imposed on both must be proportional. For passive money laundering which is committed due to negligence, it is necessary to formulate the threat of monetary sanctions, both types of criminal sanctions and treatment sanctions. Criminal sanctions that are monetary in nature can be in the form of fines, while treatment sanctions can be in the form of confiscation of the proceeds of crime.

And it is necessary to think about adopting an out of court settlement mechanism, especially for passive money laundering committed due to negligence. Because with such a mechanism, it will save the law enforcement budget, which is in line with the paradigm of the anti money laundering regime which prioritizes the return of state financial losses for

predicate offenses that harm state finances, and returns to those who are entitled, for those whose original crimes are detrimental the interests of the individual.

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