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CONFISCATION AND THE CONCEPT OF INDEPENDENT CRIME IN HANDLING MONEY LAUNDERING CRIMES: A COMPARISON OF INDONESIA AND MALAYSIA

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Abstract

This study focuses on the regulations in Indonesia and Malaysia regarding the handling of money laundering crimes, specifically through the concept of independent crime and the confiscation of assets involved in money laundering. In Indonesia, the regulation of handling money laundering is outlined in Article 69 of Law Number 10 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes. In Malaysia, it is regulated under Article 4 paragraphs (3) and (4) of the Anti-Money Laundering and Terrorism Financing Act of 2001. The method used in this study is normative juridical, involving a review of the regulations pertaining to the independent handling of money laundering and asset confiscation in both countries. The concept of independent handling and confiscation is designed to facilitate law enforcement in eradicating money laundering crimes. Finally, the study aims to identify the similarities and differences in the concepts of independent handling and confiscation in each regulation. The findings reveal that both countries apply the independent handling concept in combating criminal acts. However, the approaches to confiscation differ between the two countries.

I. Introduction

Money laundering is an act by changing and hiding money in the form of cash or assets obtained from a serious crime or often called illicit funds, which are made as if they come from legitimate or legal sources (Purnomo and Soponyono, 2015). This of course aims solely to provide benefits to the perpetrators of *money* laundering (Wahyuningsih, 2013). The act of money laundering is increasingly heard in Indonesia, which is then regulated in this act related to the crime of corruption.

Through the definition of money laundering above, there are 3 (three) main components in committing money laundering, namely the first is the existence of the perpetrator, then the criminal offense or crime that produces money or property, and the money or property that is the result of the crime (Husein, 2008). The existence of these three things has a close relationship with the act of money laundering. Therefore, the handling of money laundering cases should not be separated from these three things to determine whether someone commits money laundering or not.

The crime of money laundering will be born after there is illegal money or property first, and then the laundering. The existence of illegal money or property must be obtained from a crime (predicate crime). Therefore, the act of money laundering is said to be a follow up crime because it's existence arises after the commission of the predicate crime. If there is no predicate crime, then there should be no money laundering crime.

Through the explanation above, in handling money laundering crimes, it should be necessary to prove the predicate crime first. To prove whether or not there has been a predicate crime, a series of examinations are needed in court based on the evidence presented before the court to further determine by the judge whether a person has committed a criminal act. The examination certainly requires a long time, starting from the stages of investigation, investigation, prosecution, trial examination, legal efforts, until the *incraht* decision from court. Handling money laundering cases by waiting for the proof of the predicate crime first will take a very long time. This is a challenge in the eradication of money laundering, because every criminal, especially here the perpetrator of money laundering, certainly has the intention to avoid himself from the legal traps that will come to him. Therefore, there are efforts made by the perpetrator to eliminate traces or origins of money or property by continuing to launder the money or property until it appears that the money or property comes from legitimate activities. This certainly makes it difficult to trace back the money or property.

To overcome this, the concept of handling money laundering *independently* emerged, where the handling of money laundering, namely investigation, prosecution, and trial examination can be carried out without the need to wait for the proof of the predicate crime first. This is currently implemented by Indonesia through the provisions of Article 69 of Law Number 8 Year 2010 on the Prevention and Eradication of Money Laundering Crimes. Article 69 states that law enforcers can investigate, prosecute, and examine in court for money laundering cases without the obligation to first prove the predicate crime.

However, in reality, the concept triggers debate in terms of interpretation and implementation, especially among legal practitioners and academics. This difference of view is divided by the thought that the nature of the act of money laundering as a follow up crime is lost due to the *independent* handling of money laundering, on the other hand, money laundering must be handled quickly so that the perpetrator does not have time to try to eliminate traces of his money laundering actions.

Each country has its own regulations in eradicating crimes that occur in the life of the country, one of which is money laundering. Each regulation in a country is formed through the process of law formation by the legislative body by looking at the worldview,

characteristics of the community, nation, and country concerned (Atmasasmita, 1989). In each rule from various countries, of course, there are similarities and differences, where these similarities and differences actually become the basis for each country to make legal comparisons of itself against other countries with the aim of learning and sharing from the strengths and challenges faced by each country.

Comparative law is a method of investigation by comparing one legal institution from one legal system with a legal institution, which is more or less the same from another legal system. Legal comparison is carried out by looking for similarities or tertium comparasionist on the object being compared. Tertium Comparationist is a way of comparing the same thing on what is to be compared. This is done by identifying the comparative framework that we want to do (Lecture on History and Comparison of Criminal Law by Prof. Dr. Topo Santoso at Faculty of Law, University of Indonesia, May 4, 2023). Through this comparison, the elements of similarity and difference of the legal system can be found.

The study of comparative law is closely related to the development and understanding of national law. This is especially true for courts and lawmakers. Soedarto said that the usefulness of comparative law, namely: (Atmasasmita, 1989)

1. Unification of Law;
2. Learn how to harmonize the law;
3. Prevent chauvinism of national laws and pursue international cooperation;
4. Conduct an understanding of foreign law;
5. Assist in national law reform.

The comparisons discussed here are legal comparisons for the purposes of legislation and lawmaking. Grossfeld gives examples of when legislators borrowed ideas from foreign law. For example, the company law in the French Commercial Code of 1807 was the enactment of the charter system and formed the basis of Prussian company law in 1843 (Peter de Cruz, 1993). The comparative method has its uses, particularly for practitioners and the judicial process in filling gaps in legislation or case law in providing background and origins of legal rules and concepts that have been inherited or transplanted from other jurisdictions, in matters not already covered by legislation.

Therefore, this article aims to conduct a legal comparison between two countries, especially Indonesia and Malaysia. Malaysia is one of the countries that has problems with money laundering. Indonesia and Malaysia adhere to different legal systems, therefore of course each country has a different way of dealing with money laundering crimes. As we know that Indonesia adheres to the *civil law* legal system, while Malaysia adheres to the *common law* legal system.

Through the explanation above, the author is interested in conducting a legal comparison between Indonesia and Malaysia. The comparison is focused on the provisions of the concept of *independent crime* and the confiscation of assets that are the object of money laundering. It is hoped that this comparison is not just to find out how the law of a country, but as a lesson and adopt some provisions that are not yet owned by a country.

2. Research Method

The research method used in this research is normative law, which is scientific research that is structured by finding truth based on scientific logic from a normative perspective (Ibrahim, 2011). Normative legal research is the process of obtaining a rule of law, legal doctrines, legal principles as an answer to the problems that arise (Marzuki, 2005). This normative juridical method is used to further explore the positive law on the crime of money laundering between the two countries, namely Indonesia and Malaysia.

3. Results and Discussion

Money laundering is an effort made by someone to hide the origin of the assets obtained from a criminal offense, so that the assets are made as if they come from a legitimate or legal source. Therefore, in the criminal act of money laundering, a predicate crime is required as a condition for the occurrence of money laundering. However, in practice, the predicate crime does not always run easily to be proven first before handling money laundering crimes. This can happen if the money *laundering* case is not *self laundered*, where the perpetrator of the predicate crime and the money laundering crime are different people. Some possibilities that occur, namely if the perpetrator of the predicate crime is undergoing legal proceedings related to the predicate crime; the perpetrator of the predicate crime is on the Wanted Person List; the perpetrator of the crime died.

On this basis, the term money laundering as an *independent crime* emerged. *Independent crime* is a phrase *consisting* of two words, namely *independent* which means the absence of influence on anything, while *crime* which means certain actions, whether due to negligence or not, which fall into the category of offenses and can be prosecuted and sentenced. Therefore, we can conclude that *independent crime* is an offense that cannot be influenced by other things (stand alone).

The concept of money laundering as an *independent crime* actually arises on the basis of the idea that distinguishes between the object of the predicate crime and the money laundering crime. In the predicate offense, the object is the act of a person who committed the crime, while in money laundering, the object is the property allegedly obtained from a criminal offense. As a result of these *differences*, there are implications for the nromative proof, where in predicate crime that needs to be proven is the perpetrator's actions, while in the money laundering crime what is proven is the illegality of money or property (Yanuar, 2019). However, it should be understood that money laundering as an *independent crime* does not rule out the existence of the predicate crime, but because it has been found that there are assets suspected of originating from criminal acts under the control of other people, then the person can be charged with money laundering without waiting for the proof of the predicate crime.

The concept is expected to make it easier for law enforcement officials to process money laundering offenses *without* waiting for the predicate crime to be proven. To find out the origin of assets suspected of being derived from criminal acts, it takes a long time for law enforcers to trace them further. If it is to be traced further, the asset has the opportunity to disappear or run out due to the perpetrator who continues to transact (or laundering) the asset. In reality, the asset becomes untraceable even though the investigator has made maximum efforts to trace the asset (Supreme Court, 2006). Therefore, this concept allows law enforcement to accelerate the handling of perpetrators of money laundering crimes to close the gap for him in trying to release himself from legal traps by eliminating his traces of committing criminal acts. Therefore, the application of the concept of *independent* handling of money laundering crimes is a must in an effort to eradicate money laundering crimes.

3.1 Regulation of the Concept of *Independent Crime* in Handling Money Laundering Crime in Indonesia

Currently, the crime of money laundering in Indonesia is regulated in Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering. The law is the result of an amendment to the previous law, namely Law No. 15 of 2002 on the Crime of Money Laundering, which was later amended by the issuance of Law No. 25 of 2003 on the Amendment to Law No. 15 of 2002. The birth of the law regulating money laundering

is the result of international pressure that requires Indonesia to make arrangements in terms of eradicating money laundering, because if Indonesia does not immediately make these regulations, then Indonesia is threatened with international sanctions by FATF (Garnasih, 2017).

Money laundering offenses are regulated in articles 3 through 5 of the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering for money laundering offenses committed by individuals and articles 6 through 9 for money laundering offenses committed by corporations. Related to the predicate crime in the law is regulated in article 2 paragraph (1) and (2) of the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering, which contains 26 types of predicate crime in limitation and applies openly to all other types of criminal acts that are punishable by imprisonment of 4 (four) years or more.

After experiencing several changes to the regulations on money laundering in Indonesia, finally the regulation of handling money laundering in Indonesia adopted the concept of independent crime included in the provisions of Article 69 of Law Number 8 of 2010 on Prevention and Eradication of Money Laundering Crimes. This is a convenience in the field of law enforcement because of the flexibility obtained by law enforcers in eradicating perpetrators of money laundering, especially against money laundering whose the predicate crime has not been proven.

Article 69 of Law Number 8 of 2010 on the Prevention and Eradication of the Criminal Act of Money Laundering states that law enforcers can investigate, prosecute, and examine in court for money laundering cases without the obligation to first prove the predicate crime. The provisions of the article are also reaffirmed through Constitutional Court Decision Number 77/PUU-XII/2014 and Constitutional Court Decision Number 90/PUU-XIII/2015, which basically both decisions do not require law enforcement to first prove the predicate crime in proving the crime of money laundering.

If you look at the provisions of Article 69 of the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering, the intention of the law by not requiring law enforcers to first prove the predicate crime means that the provisions of the laundering crime contained in Article 3, Article 4, and Article 5 are stand-alone criminal acts. This shows that law enforcers do not need to prove through a court decision that has legal force to determine the existence or absence of the predicate crime (Kristiana, 2015).

3.2 Regulation of the Concept of *Independent Crime* in Handling Money Laundering Crime in Malaysia

In a move to fill the legal void relating to money laundering, the Malaysian Government finally enacted their legislation, the Anti-Money Laundering Act (AMLA) in July 2001, and it came into force in 2002. This was Malaysia's first law to provide for multiple enforcement Agencies comprising of the Anti-Corruption Agency, Central Bank, The Narcotics Bureau, Police, Securities Commission and others (Singh N, 2001). However in 2007, the AMLA has been renamed as Anti-Money Laundering and Terrorism Financing Act 2001 (AMLATFA).

In AMLATFA 2001, the crime of money laundering is regulated in Article 4 paragraph (1) letters a, b, c, d, and Article 4 paragraph (2) for objective factual purposes. Unlike Indonesia, Malaysia separates the forms of offense and types of punishment for crimes committed by corporations, therefore Article 4 paragraphs (1) and (2) apply to money launderers, both individuals and corporations. As for the predicate crime in this law, it is regulated in the second schedule of AMLATFA which consists of 119 types of predicate crime in limitation, and does not apply openly to other types of criminal offenses as in Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering.

Malaysia itself does not recognize the terminology of independent crime in money laundering, but only regulates the terminology of money laundering. However, if we look at Article 4 paragraph (3), it is said that in the case of the purposes of any legal proceedings under this law, where the proceeds of unlawful activities are derived from one or more unlawful activities, it is not necessary to prove that the proceeds are derived from certain unlawful activities (AMLATFA 2001, Art. 4(3), as cited in Sofian & Nadine, 2022). Through this article, it can be understood that AMLATFA opens the handling of money laundering through an independent concept by providing legal handling procedures for money laundering cases in Malaysian courts with no need to prove it first or in the sense that there is no need to wait for the results of the predicate crime act to be proven.

Further in Article 4 (4), it is stated that a person may be convicted of an offense under paragraph (1) irrespective of whether a conviction has been given in respect of a serious or foreign serious offense or that a prosecution has been initiated for a serious or foreign serious offense (AMLATFA 2001, Art. 4(3), as cited in Sofian & Nadine, 2022). It is understood from the contents of the article that any person can be convicted for breaching the provisions of Article 4 (1) of AMLATFA 2001 in relation to a serious offense or serious foreign offense. However, it should be noted that due to the link between the predicate crime and the crime of money laundering, investigations relating to money laundering are usually carried out in conjunction with investigations into the predicate crime. Law enforcers tasked with investigating the predicate crime will also investigate money laundering offenses related to the predicate crime (bnm.gov.my, 2024).

In addition to providing regulations related to money laundering crimes, AMLATFA 2001 is also equipped with other provisions related to the handling of money laundering crimes, one of which is the provision regarding confiscation of assets suspected of being related to criminal acts. Provisions regarding confiscation are regulated in Article 44 paragraph (1). It is said that, subject to Article 50, that law enforcement agencies may issue a warrant to confiscate or freeze property belonging to any person, or any terrorist financing property, wherever the property is located if:

a. An investigation has been initiated in relation to the unlawful activity.
b. Or one of them:
   1) The law enforcement agency has reasonable grounds to suspect that an act of money laundering or terrorism financing has been or is being or will be committed by that person; or
   2) Law enforcement authorities have reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrument of an offense.

As for confiscation, AMLATFA 2001 provides a maximum time limit for confiscation. This is set out in Article 44 paragraph (5), which says that an order made under paragraph (1) shall cease to have effect after 90 (Ninety) days from the date of the order, if the defendant has not been charged with an offense under this Act or a terrorism financing offense, as the case may be.

3.3 Comparison of Money Laundering Criminal Regulation Between Indonesia and Malaysia

Through the explanation of the two regulation related to the handling of money laundering crimes in the two countries, it can be seen that both countries provide space for law enforcers to apply the concept of independent handling in the eradication of money laundering crimes. Although Malaysia does not recognize the terminology of independent crime, but through the provisions in Article 4 paragraph (3) and (4) which basically says that for the purposes of legal proceedings or even a person can be convicted of a money laundering offense regardless of whether there is a sentence or has begun prosecution for

the predicate crime.

This similarity is possible because Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering and Anti-Money Laundering and Financial Terrorism Act 2001 were both formed based on the FATF recommendations issued by the FATF as a guideline for its member countries in making a money laundering law. The recommendation is in recommendation 30 and Immediate Outcome (IO) 7 which provides arrangements regarding the mechanism for handling money laundering through the Stand Alone Money Laundering mechanism, which is defined as the prosecution of money laundering crimes independently (Jayasekara, 2018).

Despite the similarities in the laws of each country, there are many differences between the two laws. Because as explained earlier, Malaysia has a more complete and detailed law that the entire discussion relating to the eradication of money laundering crimes, such as freezing, confiscation, and seizure of property involved in, or derived from money laundering and terrorism financing activities, and so on are integrated into one law.

However, in this article the author wants to focus on the discussion related to confiscation. Confiscation is one of the important things in handling criminal acts related to money, especially here the crime of money laundering. Money as an object that is often used by perpetrators in committing money laundering can move, change shape, and move across borders and even across countries very easily and quickly. The movement of money that takes place quickly, effectively and efficiently makes the reporting of suspicious transactions need to be carried out immediately to prevent the movement of money suspected of originating from criminal acts from becoming more widespread and difficult to trace. Therefore, it is necessary to handle quickly in combating money laundering so that the assets can be immediately traced and confiscated without the need to wait for the proof of the predicate crime act first.

Confiscation is the temporary takeover of an item (asset) from a person's possession for law enforcement purposes. Confiscation is one part of the forced deprivation of other people's rights. The application of confiscation here actually violates human rights. In the criminal act of money laundering, the purpose of confiscation is to keep money or property suspected of originating from criminal acts away from the perpetrator for his efforts to eliminate or destroy, or take over the money or property to other parties.

Malaysia provides provisions related to confiscation into AMLATFA 2001. This is contained in the provisions of section 44 subsection (1) which basically authorizes law enforcement to confiscate or freeze property upon the commencement of an investigation against such person in connection with the commission of an offense, or if there are reasonable grounds to suspect that an offense has been, is being, or will be committed by any person, wherever property may be, or is in his possession, under his control or due from any source to him.

Whereas in Indonesia, the provision of confiscation of money or property that is the object of money laundering is not included in the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering, but gets a separate regulation, which is regulated in the Criminal Procedure Code. According to Article 1 point 16 of the Criminal Procedure Code, confiscation is a series of actions carried out by investigators to take over and or keep under their control movable or immovable objects, tangible or intangible, which are intended for the purposes of evidence in investigation, prosecution and justice.

As for the procedure in conducting confiscation, in accordance with Article 38 of the Criminal Procedure Code, law enforcers confiscate money or property after obtaining permission from the chairman of the local district court. However, if faced with urgent conditions, confiscation can be carried out by the investigator first, while still reporting the

confiscation action to the chairman of the district court for further approval.

Based on Article 39 paragraph (1) of the Criminal Procedure Code, it is stated that objects that are related to criminal offenses are as follows:

1. The suspect's or defendant's property or assets, in whole or in part, are suspected of being derived from a criminal offense;
2. Objects that are used, either directly or indirectly, to commit a criminal offense or to prepare for it;
3. Objects that have been used to obstruct the criminal investigation process;
4. Objects made specifically to commit a criminal offense;
5. Other objects that have a direct link to the criminal offense and are carried out without related signs.

Through the explanation of this provision, we can see that in handling money laundering cases, Indonesia and Malaysia provide different confiscation procedures. In Indonesia, confiscation can be carried out when the money laundering crime case has entered the investigation stage, therefore the one who has the right to conduct confiscation is the investigator. Not only that, to conduct confiscation, investigators need to get approval from the chief justice first.

Unlike Malaysia, not only at the commencement of an investigation, but AMLATFA provides an avenue for seizure when law enforcement on reasonable grounds finds that an offense has been, is being, or will be committed by any person, anywhere. This means that confiscation enforced in Malaysia can be done sooner before the *investigation* process begins.

Confiscation applied by Malaysia in AMLATFA 2001 narrows the space for perpetrators of money laundering in an effort to eliminate traces or origins of their property suspected of originating from criminal acts before law enforcement conducts an investigation or investigation against them. The process of identifying the money or property will also be easier to do because the money or property is in the possession of law enforcement.

Through this explanation, the author argues that the application of confiscation carried out by Malaysia by providing convenience for law enforcement officials in handling money laundering crimes without the need to wait until the investigation process or permission from certain institutions to confiscate assets suspected of originating from criminal acts. It cannot be denied that currently the movement of money or assets in money laundering takes place so quickly, so it is necessary to handle money or assets quickly.

4. Conclusion

In combating money laundering, the concept of handling money laundering as an independent crime in Indonesia and Malaysia is similar. Although the two regulations have the same concept, in terms of effectiveness, AMLATFA 2001 in Malaysia has advantages over the Law Number 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering, especially in terms of confiscation, by providing law enforcement with the opportunity to conduct seizures in advance if reasonable grounds are found that an offense has been, is being, or will be committed. Confiscation imposed in Indonesia is considered timeconsuming because law enforcers need to wait for the case to enter the investigation stage first. This can provide a loophole for the perpetrator to again disguise the origin of the money or property he owns.

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