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Conflict of Law Culture Consequence Law Transplantation in Indonesia Money Laundry Regulation

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ABSTRACT

Legal Transplantation in eradication criminal law money laundering framework in Indonesia for the first time was did in 2002 with legislated Law No. 15 of 2002 on Money Laundering and Eradication Money Laundering and then in October 2003 amendment with Law No. 25 of 2003 and then regulated in Law No. 8 of 2010 on Prevention and Eradication Money Laundering Crime. Legal transplantation is carried out by incorporating international standards into the national legal system, particularly into Law of Money Laundering and Eradication Money Laundering. In addition, legal transplantation was also carried out under the pressure of Financial Action Task Force (FATF) which resulted from the assumption that Indonesia has not fully obeyed 40 Recommendations and 9 Special Recommendations from FATF. The type of research used is doctrinal legal research or normative legal research, namely legal research using secondary data sources whose emphasis on theoretical and analytical qualitative. Based on the results of research due to legal transplantation resulted in a conflict of legal value in the criminal law system in Indonesia which is oriented to "follow the suspect" rather than "follow the money" especially in law enforcement anti money laundering regime. Likewise has resulted in a legal culture clash which is a reflection of the legal discipline of socio-political aspects.

ABSTRAK

Transplantasi Hukum dilakukan dalam kerangka pemberantasan tindak pidana pencucian uang di Indonesia pertama kali dilakukan pada tahun 2002 seiring dengan diundangkannya Undang-Undang Nomor 15 Tahun 2002 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang, kemudian pada bulan Oktober 2003 diubah dengan Undang-Undang Nomor 25 Tahun 2003 dan selanjutnya diatur Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang. Transplantasi hukum dilakukan dengan memasukkan standar internasional ke dalam sistem hukum nasional, khususnya ke dalam Undang-Undang Pencucian Uang dan Pemberantasan Tindak Pidana Pencucian Uang. Selain itu, transplantasi hukum juga dilakukan di bawah tekanan Financial Action Task Force (FATF) yang diakibatkan oleh anggapan bahwa Indonesia belum sepenuhnya mematuhi 40 Rekomendasi dan 9 Rekomendasi Khusus dari FATF. Jenis penelitian yang digunakan adalah penelitian hukum doktrinal atau penelitian hukum normatif, yaitu penelitian hukum dengan menggunakan sumber data sekunder yang menitikberatkan pada teoritik dan analitis kualitatif. Berdasarkan hasil penelitian akibat transplantasi hukum mengakibatkan terjadinya konflik nilai hukum dalam sistem hukum pidana di Indonesia yang lebih berorientasi pada “ikuti tersangka” daripada “ikuti uang” khususnya dalam penegakan hukum rezim anti pencucian uang. Demikian juga telah mengakibatkan benturan budaya hukum yang merupakan cerminan disiplin hukum dari aspek sosial politik

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I. INTRODUCTION

The crime of money laundering as a crime white collar crime has been known since 1867. But money laundering arose when Al Capone, one of the great mafia in the United States, in 1920, started the business of Laundromats. Before 1986, money laundering was not a crime. In 1980, millions of proceeds of crime went into legal business and other economic ventures. Even the practice of money laundering is no longer as simple as that of Alcopne or Meyer Lansky Therefore, a Financial Action Task Force (FATF) was established in 1989 by the G7 countries intended to develop and implement policies in the field of prevention and eradication of money laundering crimes. The FATF has set policies in the areas of regulation, finance and law enforcement and is outlined in 40 + 9 FATF recommendations. The FATF then sued the combined states to eradicate money laundering. In his demands mentioned;

1. That a country should have a law establishing money laundering as a crime.
2. Financial Service Provider must be able to identify and report suspicious financial transactions.
3. Each country has a Financial intelligence unit

As a form of FATF recommendation, the eradication of money laundering practices in Indonesia begins with the birth of Law No.15 of 2002 on Money Laundering Crime which was then amended with Law No.25 of 2003, further regulated in Law No.8 of 2010 on Prevention and Eradication Money Laundering Crime. Inception of money laundering legislation in Indonesia can not be separated from the influence of international standards related to anti money laundering which is intended to exit from the list of countries that are not cooperative in eradicating money laundering crime.

The crime of money laundering in Indonesia is essentially a form of transplantation of international standards that must be done in the eradication and prevention of money laundering in Indonesia which must be done as required by the state of Indonesia, as a country that has joined and become a member of FATF. In addition, the creation of money laundering law in Indonesia is inseparable from the growing international pressure for legal unification for all countries in the world, since the predicate crime actors have a varied modus operandi, making it very difficult to prove the link between crimes committed and losses suffered by the state.

Legal transplantation has become a trend in legal development in many countries, including in Indonesia. Law transplants in each country have been conducted for varying reasons in the formation of the law. One of the reasons used for legal transplantation is to adapt to global or international trends to facilitate economic, technological, social and political change. Legal transpalnts intended, namely the moving of a rule or a system of law from one country to another, or from one person to another have common history since the earliest recorded history . Simply put, "the transferring or borrowing of law between legal systems"

Legal transplantation as part of a country's legal politics is highly dependent on the political will of the country. That is, if the country requires a relatively quick policy to reform law, accompanied by awareness as part of the world community, then a legal transplant becomes one of the necessary policies. Thus legal transplantation is initiated by the state so that they are not isolated from the world order.

However legal transplants have been conducted for various reasons such as the reasons for development or legal reform using foreign legal systems, mutual relationships between two or more countries, of course, have a positive and a negative side. The fundamental and fundamental issue of legal transplantation into Law of Prevention and Eradication Money Laundering Crime is the dominance of one law or legal system, where the Indonesian legal system has its own structure, substance and culture that is different from the common law system. Given the transplantation of law requires change and legal renewal as well as it can not be denied anymore.

II. RESEARCH METHOD

This research used doctrinal law method or normative juridical research (legal research). Normative juridical research is research that refer to norm contained in legislation rule, Internasional convention, treaty, court decision and norm that life in society. Normative legal research is a study commonly used in the development of legal science commonly referred to as legal dogmatic. As argued by Marzuki, the scope of legal issues in legal dogmatics is the practical aspect of law science, namely, first: the occurrence of multiple interpretations of the text of the rules; second, there is a legal vacuum: third, there is a difference in interpretation of facts (Based on the type of research is legal research, the problem approach used is the statute approach which is done by reviewing the laws and regulations concerned with legal issues. Because of this research using legal method of normatif (legal research) which prioritize in library study, the legal material used is primary, secondary and tertiary legal material .

III. RESULT AND DISCUSSION

a. Background History of Transplantation in Indonesia

The transplantation of law in Indonesia, which basically had begun during the Dutch East Indies government, is still continuing today. The difference is, during the Dutch East Indies government law transplantation more imposed transplantation, but today law transplantation occurs in voluntary transplantation. However, it does not mean that all forms of transplantation that occur today are voluntary. The strong dominance of developed countries against the world economic order and the strong influence of supra-state, has resulted in the government of Indonesia with "forced", transplant the law.

According to Wignjosoebroto the state forced to accept a legal transplant is in a vicious circle because it will be caught in serious trouble to escape from colonial influence, since the new law has not been prepared, while the existing law is inconsistent with the soul of the nation forced to accept a legal transplant, as if in a vicious circle because it would be trapped in serious trouble to escape from colonial influence, given that the new law had not been prepared, while the existing law was inconsistent with the soul of the nation, since its sprit was oppressive and exploitative. Recognizing the potential of such resistance in Indonesia the Dutch colonial government once applied a compromise as seen in the application of Regerings reglement 1854, especially Article 75 which reflects the liberal ideas of Europe. The form of the compromise is;

1. Let temporarily enact indigenous laws (customs) that are not contrary to European (Dutch) legal principles;
2. Applying European law (Netherlands) gradually

But the politics of compromise colonial law is only temporary, since legal politics not only speaks of Ius constitutum (law is that it is the books) but also ius constituendum.

b. International Standard Transplant Dilemma Against the Criminal Law System in Indonesia.

International standard transplantation related to money laundering crimes in Indonesia has a dilemma that has an effect on the implementation of anti money laundering regime in Indonesia. The dilemma meant on the one hand that money laundering transplant is a necessity and necessity for Indonesia to exit from a country that is allegedly one of the countries considered as a money launderers paradise. This is seen from the FATF recommendation that Indonesia is included as a country list of uncooperative nations in the fight against money laundering.

The dilemma of international standard transplantation in the legislation related to money laundering in Indonesia is experiencing problems in Indonesia's criminal law system because many contradict the longstanding legal regime, before the birth of money laundering legislation. The criminal law regime in Indonesia is more oriented towards "follow the suspect" than "follow the money". Follow the suspect meant that the process of criminal law enforcement in Indonesia that law enforcement minds such as investigators, prosecutors and judges still think that law enforcement is paradigm that

against assets sourced or related to criminal acts which then called "Criminal Assets" can only be seized or seized if there has been criminalization of the offender in the principal case. If the orientation of law enforcement is still on the perpetrator, then any policy on the assets of the crime can only be done after the criminalization of predicate crime, which in the context of money laundering is referred to as the crime of the original case, as long as there is no punishment against the perpetrator of the crime in the case origin, then anything related to the asset can not be performed, such as foreclosure. Given all legal action on criminal assets must wait for the criminal prosecution, it will potentially reduce the achievement of criminal and criminal purposes. This is given that one of the objectives of criminal prosecution in which there is an asset is to save the asset or return the asset.

The orientation to follow the suspect in the criminal law system in Indonesia must have hampered the internalization of anti-money laundering law regime, since the anti money laundering regime is totally independent of criminal prosecution. The money laundering law regime has departed from a "follow the money" oriented punishment, so that the imposition of a criminal proceeding should not wait for the imposition of a criminal case against a predicate crime case that is the source of the money laundered. Based on the orientation of "follow the money" is an asset, then the position or control of the assumed asset is the result of a criminal act becomes important. Therefore, in the money laundering pro-cedure system embraces a burden-proofing system, the defendant is given an opportunity to prove that his or her property is legally acquired and not the result of a crime. The money-oriented money laundering regime is very different from the ground of thinking within the criminal law system oriented to the fellow the suspect concerned in disclosure of a criminal offense. The orientation of follow the money is to focus on assets, so to disclose the crime of money laundering does not have to start from what criminal incidents occur and then trace the assets resulting from the crime, but can start from the assets that are found, to then look back to whether the assets are obtained legally or not, technically to prove whether the asset was obtained legally or not to be the burden of proof of the defendant.

Based on the above description, which becomes a dilemma, is in its implementation in law enforcement. UUPPTPPU law enforcement has raised the problem, that is, especially the absence of paradigm shift thinking by law enforcement officers in Indonesia who still think to orientation follow the suspect as described above, and not yet thinking to follow the money orientation as embraced in the Act of Criminal Act of Washing Money.

Therefore, for law enforcement of money laundering to be effective in Indonesia law enforcement officers must immediately change the way of thinking in dealing with law enforcement of money laundering that has been built on the new regime.

c. Changes of International Standard Transplantation in Enforcing Anti Money Laundering Regime in Indonesia

1. Shape Transplant Stand

International standard transplantation into UUPPTPPU does not occur by itself by incorporating the provisions of international standards at the time of ratification of the legislation, but transplantation in money laundering legislation commences from the drafting of the law, by incorporating considerations international standards, regulations, or norms that have been referred to the Law No.8 Year 2010. For example in the section weighing the Law No. 25 of 2003 on the crime of money laundering in the letter a, and Law No.8 of 2010 on (UUPPTPPU), in consideration Letter c is clearly mentioned, namely:

"That in order to prevent and eradicate money laundering effectively, Law No. 15 of 2002 on Crime of Money Laundering should be adjusted to the development of criminal law on money laundering and international standard, as well as Law No. 8/2010 on Prevention and Eradication of Money Laundering Crime, in the case of Letter c, states that Law No.15 Year 2002 on Crime of Money Laundering as amended by Law No. 25 Year 2003 need to be adjusted to the development of international law enforcement, practice and standard requirement so that need to be replaced by new law ".

If the basic consideration is given, that the two laws stated above that the purpose of adopting or transplanting international standards is to make prevention and eradication of money laundering in Indonesia effective. It is understandable that the FATF recommendations are largely a general framework which includes among others; the role of the national legal system, the criminal law system and law enforcement, the role of the financial system in combating money laundering, as well as international cooperation.

Furthermore, it can be described some FATF recommendations that have been transplanted into Law No.8 Year 2010 (UUPTPPU), among others:

40+ 9 Recommendation of FATF		Law RI No 8 Year 2010 on PPTPPU	
11	States should criminalize money laundering under the UN Convention on illicit trafficking of narcotics and psychotropics, (Vienna Convention), the Palermo Convention. States should enforce money laundering crimes for all serious crimes which are pridicate crimes.	1	(Article 2 paragraph (1), and 2)
22	The State shall ensure that; a. The intended and known elements that are known to be proved are in the crime of money laundering consistency with the standards laid down in the Vienna convention. b. Criminal sanctions and if this is not possible, civil or administrative sanctions must be against legal persons. This does not prevent the criminal, civil, and parallel state legal proceedings against legal persons. This does not prevent the criminal, civil or state administrative process parallel to legal persons in the countries in which such sanctions apply. Legal person should be charged more effective, proportionate and dissuasive sanctions. Such actions shall not prejudice criminal sanctions against individuals. Propesional measures and confiscation		2), (3) a. Articles 3, 4, 5 and 7.10 Article 30 paragraphs (1), (2), (3), (4) and (5) b. Article 35 paragraph (1) (and (4).
22	I. States shall adopt measures as provided for in the Conventions and Palermo, including the enactment of legislation, in order for the authorities to confiscate money laundered or original criminal property, objects used in or intended to commit offenses , or any other property, without harming a third party by law. Such acts shall be authorized to; a. Identify, track and evaluate confiscated property.	22	Article 69, 70.71. 79 paragraph (4), (5). (6), and Psl 81

	b. Provide provisional measures such as blocking and seizing, preventing the occurrence of any transactions, transfers or exchanges of such property; c. Take action to prevent or avoid the occurrence of actions that harm the ability of the State to restore confiscated property; and d. Perform any appropriate inverse action. States may consider adopting measures which allow the property or items of proceeds to be confiscated without a criminal verdict or require the offender to prove the origin of the allegedly estimated property should be confiscated, provided that the conditions are consistent with the respective principles of national law. II. Measures performed by Financial Institutions and Non-Financial Institutions and professional institutions to prevent money laundering and terrorist financing.		

2. Anti-Money Laundering Law Enforcement Laws Caused the Conflict of Legal Culture

a) Conflict of Legal Value

Legal culture is a human attitude towards law and legal system in which there is trust, thought, and hope. As Friedman has, the legal culture is as the values and attitudes of members of the public as they relate to the law.

Legal culture is like a gasoline that drives all the elements contained in the machine, the structure and substance of the law. The norms or rules written in laws or regulations are not fully enforceable and enforced according to legal logic but are strongly influenced by the interests, perceptions, attitudes and culture of the community reflected in their beliefs, values, thoughts and expectations.

As a result of transplanting international standards linked to the anti money laundering regime in Indonesia resulted in a conflict of legal value. As an example of a conflict of legal value values can be seen in Article 69 confirming that a criminal offense with a strong suspicion of money laundering is not necessary to be proven (by) the prosecutor. This provision is to affirm that the objective of UUPPTPPU 2010 is not on the acts (faults) of the defendant, but rather to property that is allegedly derived from or related to a crime (origin). The obscurity of Article 69 and Article 78 of the UUPPTPPU 2010 on the one side of the criminal offense shall not be proven by the public prosecutor but on the other hand, the defendant shall prove his / her property is not derived from or related to a criminal act (origin) which is only probable cause principle. This provision has led to disharmony of the legal norms governing it and the uncertainty in the law enforcement process. Likewise in practice has created a new legal problem that is a conflict of interest between international and national interests. Adoption of the above international standards is of course not justified under national law, as national law is subject to the principle of legality and the presumption of innocence. Thus indicating that the international standard on anti money laundering, contradictory to the national law that has been synergized in Indonesian criminal law.

Thus the occurrence of collisions of the value of legal value in transplant this law is based on the not yet terkoherensinya diametric norms money laundering with the highest norms of Pancasila and UUDRI 1945. This is in line with Article Law No.12 of 2012 on the Establishment of Legislation which has positioned "Pancasila as the source of all sources of state law". Law sources defined "something (such as a constitution treaty, statute, or custom") the provide authority for legislation

and for judicial decisions; a point of origination for law or legal system "(Garner, 2000). Conceptually, the source of the law is not limited to the laws and regulations set forth in Law No. 12 of 2012 or the laws of the state, but includes written and unwritten legal sources outside of Law no. 12 of 2012. This is further emphasized in the explanation of Article 2 of Law No.12 of 2012 which is "Placing Pancasila as the basis and ideology of the state as well as the philosophical basis of the state, so that any material content of legislation should not be against the values that contained ".

Therefore, based on theoretical consideration that all government regulations and policies must be based on the source of Pancasila and the 1945 Constitution, thus all rules transplanted from foreign systems, including the rules of combating money laundering crimes that use international standards must be adjusted and harmonized with regulations legislation, including the 1945 Constitution and Pancasila.

In conducting legal transplants specifically related to the anti money laundering regime in Indonesia, the government should integrate and accommodate all the interests of the parties concerned in enforcing anti-money laundering law. In integrating the anti-money laundering law system, the government does not just accept external pressure, but also must be adjusted and harmonized with the values of Pancasila as the ideological base and philosophical foundation of the Indonesian nation. Because one of the principles of Pancasila, has formulated the principle of justice to become imperative norms in formulating and preparing every public policy and rules, including in arranging the system of eradicating money laundering crime. Thus, in conducting transplant law anti money laundering regime must refer to principle justice that rests on the principle of the balance of state interests and the interests of the people.

b) Conflict of Legal Culture

The word culture has many meanings such as; group identity, nation, race, company policy, culture, art and writing, lifestyle, mass-produced artefacts and rituals. Legal culture is one part of a vast human culture. The legal culture is the common common response of a particular society to the legal phenomena. This response is a unified view of the value of values and legal behavior. Thus a legal culture shows the pattern of individual behavior as a member of society that describes the same response (orientation) to the living law of the society concerned.

The legal culture has characteristics that reflect varying legal disciplines (such as rigid legalism or legalistic non-formal), the most fundamental aspect of the legal culture in the field of criminal law is not the social aspect, but the socio-political aspect, even the high-level politics, the it reflects and explains how each person judges himself, not in relation to others but in relation to the state. When considered in depth, the relationship is a top-down relationship, but it does not mean that the state can simply impose legal reform or introduce new legal or institutional concepts that are inconsistent with the foundations of an existing legal culture.

The public does not view relations with the state based solely on legal culture, but also considers it a further basis for their existence and as legitimacy of criminal law norms and the state's efforts to establish and enforce it procedurally. The problem faced in the legal culture with regard to legal transplantation is that there is a genuine examination of the new law transplant procedure into a pre-adopted legal system so that the new law is acceptable to the public and has legal effectiveness. As an example of legal culture that has been institutionalized in the process of criminal law enforcement in Indonesia and has been accepted by Indonesian society, among others, criminal law system that has been subject to civil law system and customary law system. So the effort made so that a new law can be accepted and does not conflict with the culture in Indonesia is to harmonize the value of legal and legal norms adopted from the international standard into the national legal system.

c) Legal Harmonization as a Form of Effort to Avoid the Conflict of Legal Culture

Harmonization derived from English harmonize means to make or be harmonious, commensurate, balanced, fit and integrated. The word harmonization comes from the word harmony

which in Indonesian means "taste statement", "action", "idea" and "interest of harmony", "harmony" can also mean harmony, or be aligned.

Harmonization of the law is an effort or process of adjusting the principles and legal system, in order to realize the simplicity of law, legal certainty and justice. Harmonization of the law as a process in the formulation of legislation, overcoming the contradictory and irregularities among legal norms in the legislation, so that the formulation of harmonious national laws, in the sense of harmonious, harmonious, balanced, integrated and consistent, and adhering to principles then LM Gandhi says law harmonization includes adjusting legislation, government decisions, judge decisions, legal systems, justice and equality, legal clarity, without obscuring and sacrificing legal pluralism if necessary.

The background behind the harmonization of law in Indonesia according to due to several things; first, it is bound by international agreements to be followed by member countries; secondly, Indonesia is in the process of becoming an industrial country, the more an industrial-oriented country, the more a country needs modern legal infrastructure, it must be admitted that modern law is nothing but the law which is known in the United States as well as in a number of countries in Europe so inevitably the adoption of the law of the country to meet the needs of an industrial country. Standing on the statements of law formation is influenced by the question of values and morals. According to Jeremy Bentham the public good becomes the goal of the legislator, the general benefit being the basis of his reasoning, to know the genuine good of society is to form the science of legilization, the science is achieved by finding a way to realize that goodness. Thus, the goal of government and the objectives of the law must be the greatest happiness of the community or the happiness of society.

Indonesian law is a law that inherits the western tradition most of the arrangements of life aspects explain the changing of values in punishment, moreover the western tradition offers prescriptive values that are potentially different from the previously held local tradition Reflecting on the situation described above, the systemic step of harmonizing the national law relates to the transplantation of law, based on the paradigm of Pancasila and the 1945 Constitution which gave birth to a constitutional system with two fundamental principles, the principle of democracy and the principle of legal state which realized the legal system of national with three components, legal substance, legal structure along with its institutional, and legal culture. Systemic steps on one side can be described in the harmonization of legislation and on the other hand is implemented in the framework of law enforcement. Through the harmonization of law, will form a legal system that accommodates the demand for legal certainty and the realization of justice. Likewise in law enforcement, harmonization of law will be able to avoid overlap for judicial bodies exercising judicial power, with government bodies authorized to perform judicial functions according to legislation.

IV. CONCLUSION

International standard transplantation into UUTPPU has resulted in a legal culture clash of non-harmonious Indonesian criminal law system with money laundering legislation. The criminal law regime in Indonesia is more oriented to "follow the suspect" while UUTPPU is more oriented to "follow the money". This situation affects the criminal law enforcement process in Indonesia conducted by law enforcers such as investigators, public prosecutors and judges who are still paradigmatic to assets sourced or related to money laundering crime. Therefore the effort to be taken to avoid the result of law transplant in UUTPPU in the form of legal culture clash is to harmonize the law by considering the framework of Indonesian criminal law system and in accordance with the legal culture of Indonesian society.

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