



Theoretical Implication of Pro Parte Dolus Pro Parte Culpa Wrongdoing in the Formulation of Passive Money Laundering

Aditya Wiguna Sanjaya¹; I Nyoman Nurjaya²; Prija Djatmika³; Masruchin Ruba'i⁴

¹ Doctor of Law Candidate, Faculty of Law, Brawijaya University, Indonesia

² Professor, Lecturer in the Faculty of Law, Brawijaya University, Indonesia

³ Doctor, Lecturer in the Faculty of Law, Brawijaya University, Indonesia

⁴ Professor, Lecturer in the Faculty of Law, Brawijaya University, Indonesia

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Abstract

This research is aimed at determining and analyzing the theoretical implications of passive money laundering as regulated in Article 5 paragraph (1) of Law Number 8 of 2010 which is formulated in the form of a pro parte dolus pro parte culpa wrongdoing, indicated by the phrase “that he knows or reasonably suspects”. Normative legal research with the statute and conceptual approaches was used. The legal materials used were primary legal materials (Law Number 8 of 2010) and the secondary materials were all relevant literature and publications in the legal field. The results show that the formulation of the criminal act of passive money laundering in the form of a pro parte dolus pro parte culpa wrongdoing as referred to in Article 5 paragraph (1) of Law Number 8 of 2010 contradicts the theories of errors and criminal proportionality. In this case, there seems to be a gap between *das sollen* and *das sein*. In this context, *das sollen* is in the form of the theories of errors and criminal proportionality, which have standards regarding the formulation of rules of law, while *das sein* refers to the existing rule of law, namely Article 5 paragraph 1 of Law Number 8 of 2010.

Keywords: *Theoretical Implication; Forms of wrongdoing; Criminal Act; Money Laundering*

Introduction

In science, theory plays an important role to better summarize and understand an issue. Things that at first seemed scattered and independent can be put together, and their relationship can be proven significantly. Thus, the theory explains by organizing and systematizing the problems concerned. Theory can also contain subjectivity, especially when dealing with a fairly complex phenomenon such as law (Rahardjo, 1991).

In legal science, theory sets the middle layer between legal dogmatics (bottom layer) and philosophy of law (top layer). The logical consequence of the “middle” role of legal theory is it bridges the philosophy of law, which is very abstract, about all the theoretical reflections of legal studies with dogmatic law science with studies limited to positive law in a state legal system. Thus, legal theory sets the “middle role” in the theoretical discipline of the layers of legal science (Atmadja & Budiarta, 2018).

The consequence of the construction of stratified layers of legal science in a hierarchical system, namely between legal philosophy, legal theory, and legal dogmatics, makes the philosophy of law a meta-theory of legal theory, and legal theory as a meta-theory of legal dogmatics (Bruggink, 1999). Metathesis refers to a discipline using another science as its object of study (Gijssels & Van Hoecke, 2000) or a science whose object is other sciences (Efendi, et al., 2016). Thus, the study object of legal theory is legal dogmatics, and the legal theory itself is the object of study of the philosophy of law. Consequently, the higher layers of legal science dictate (the law dictate), cover, or enrich the lower layer, and so on systemically (Prasetyo, 2017).

Legal theory can be called a genus, which means discussing legal science in a broader and general context. Meanwhile, some theories develop in each scientific field of law which can be referred to as species, for example, theories in criminal law, civil law, constitutional law, etc. Thus, the theory that develops in each field of law has a narrower and more specific scope.

The matter of wrongdoing can be seen as a general legal theory as well as a legal theory that develops in certain fields of legal science. One theory developed in criminal law is the theory of errors; even in criminal law, matters concerning wrongdoings are manifested in the form of a fundamental principle, *geen straf zonder schuld* (no crime without error).

By understanding the essence of a principle, the position of wrongdoing as a principle indicates its essential role in the criminal law. The principle of *geen straf zonder schuld* adhered to in the criminal law aims that a person who has committed a criminal act is not necessarily responsible and convicted. Whether a perpetrator should be held accountable and sentenced can only be determined if he is proven guilty.

In connection with the principle of no crime without error, theoretically, there are two forms of wrongdoing in criminal law, namely intention (*dolus, opzet*) and negligence (*schuld, culpa*). These forms of wrongdoing are an operationalization of no crime without error. In practice, without intention or negligence, penalties cannot be imposed. These two forms of wrongdoing set the basis for determining offenses committed intentionally and due to negligence.

In principle, intentional and negligent wrongdoings have different gradations of demerits. *Memorie van Toelichting* states that *Schuld* (*culpa, faute, Fahrlässigkeit*) is in al de artikelen van het tweede boek, waarin deze uitdrukking voorkomt, de zuivere tegenstelling van *opzet* aan de eene, van *toeval* (*casus*) aan de andere zijde, which means negligence in all chapters of the second book, from which this expression is obtained, is, the opposite of intention and coincidence (Smidt, 1891). Referring to the statement in *Memorie van Toelichting*, intention is

the opposite of negligence; thus, it is normal if negligence is considered as lighter than intentional wrongdoing.

Different gradations of demerits between intentional and negligent wrongdoings can be understood if they have implications in determining sanctions. This relates to one notion of wrongdoing, which is the measure in determining and imposing sanctions in criminal law. Thus, it can be rationally accepted if the criminal sanction for negligence offenses is formulated to be lighter than intentional offenses.

Strictly speaking, theoretically, negligent wrongdoing (*culpa*) is considered lighter than intention (*dolus*) so that it is directly proportional to the severity of the criminal sanction (*strafmaat*), that is, offenses with negligence (*culpa*) should be sanctioned lighter than the intentional wrongdoing (*dolus*), thereby conforming to the principle of proportionality.

However, in the context of legal dogmatics, namely the provisions on the criminal act of passive money laundering as regulated in Article 5 paragraph (1) of Law Number 8 of 2010, the acts of passive money laundering with intention and due to negligence shall be liable to the same sanctions, maximum imprisonment of 5 years and a maximum fine of Rp1,000,000,000 (one billion rupiah). Such a formulated offense is known as *pro parte dolus pro parte culpa*.

Given the position of legal theory as a meta-theory of legal dogmatics and positive law as part of legal dogmatics, legal dogmatics should be compliant with legal theory. In this respect, legal theory acts as *das sollen* while legal dogmatics acts as *das sein*. Because in essence, dogmatic jurisprudence discusses legal issues with reference to the prevailing positive rules of law so that it is “as is” (*das sein*) in nature. Meanwhile, legal theory does not analyze law with reference to the applicable positive law but rather refers to the theoretical proposition through deep reasoning so that, in contrast to dogmatic jurisprudence, legal theory sees law as “what it should be” (*das sollen*) (Fuady, 2013).

Therefore, legal theory aims to explain “that is how the law should be”. Thus, legal theory is more theoretical than dogmatic jurisprudence and has a broader horizon. Legal theory sees and analyzes law from the outside of the law (interdisciplinary) which is different from dogmatic jurisprudence which is from within (Efendi, et al., 2016).

As a result, when there are deviations in legal dogmatics, legal theory is the controller. It will become a tool to straighten out the deviations, even as a guardian, so that legal dogmatics does not deviate from what it should be. Sidharta said that one scope of legal theory is criticism of positive legal norms. He added that theoretical law development functions as an intellectual means to guide practical legal development activities (Sidharta, 2013). Meanwhile, from the perspective of legal theory as the science of legal dogmatics, it is relevant to what Popper stated that science has a function to uncover the truth (Meuwissen, 2013). In this context, if there is false positive law, it is the legal theory that is tasked with exposing the untruth.

The opinion of Sidharta and Popper as mentioned above is basically related to the inherent analytical function of legal theory, which is carried out by breaking down the role and performance of language in the law, the structure of legal norms, institutions, and the process through which legal order is built (Kusumohamidjojo, 2016).

Through an analytical approach, legal theory seeks to ensure that a legal building can function as a normative unit that is controlling and not as a jungle of incoherent necessities. Thus, legal theory not only tries to understand and criticize mere positive law but also tests the potential deviations in the application of law and re-examines the relevance of legal norms to achieve justice. Finally, legal theory tries to formulate a fairer law (Kusumohamidjojo, 2016). Similarly, the developing theories in criminal law also function to analyze the dogmatics of criminal law, which can take the form of criminal rules of law or court decisions on criminal cases.

1. Based on this background, this article explores the theoretical implications of passive money laundering as regulated in Article 5 paragraph (1) of Law Number 8 of 2010 formulated in *pro parte dolus pro parte wrongdoing*.

Method

The aim of legal research is to find the truth of coherence, whether the rule of law is in accordance with legal norms, whether the norm, which is an order or prohibition, is in accordance with legal principles, and whether one's action is in accordance with legal norms (not only according to the rule of law) or legal principles (Marzuki, 2014). Normative legal research, carried out by studying literature, was used (Soekanto & Mamudji, 2013), with the statute and conceptual approaches. The legal materials used were primary legal materials (Law Number 8 of 2010) and the secondary materials were all relevant literature and publications in the legal field.

Result and Discussion

Pro parte dolus pro parte wrongdoing in the formulation of the criminal act of passive money laundering is viewed from the perspective of theories of errors and criminal proportionality.

Based on the function of legal theory in analyzing legal dogmatics, this article analyzes the rule of law, namely Article 5 paragraph (1) of Law Number 8 of 2010. The provisions in the article, especially regarding the form of wrongdoing formulated in *pro parte dolus pro parte culpa* way, are seen from a theoretical perspective. In this case, the analysis is directed at a review of the *pro parte dolus pro parte culpa* wrongdoing in Article 5 paragraph 1 of Law Number 8 of 2010 from the perspective of the theories of errors and criminal proportionality.

The formulation of Article 5 paragraph (1) of Law Number 8 of 2010 is as follows, every person who receives or controls the placement, transfer, payment, gift, donation, safekeeping, exchange or use of assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1) shall be liable to a maximum imprisonment of 5 (five) years and a maximum fine of Rp1,000,000,000 (one billion rupiahs).

Based on this, three acts are liable to the article as shown in the following table:

Table 1. Actions Included in the Scope of Article 5 Paragraph (1) of Law Number 8 of 2010

Act I	Act II	Act III
Every person who receives or controls the placement, transfer, payment, gift, donation, safekeeping, exchange, or use of assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)	Every person who receives or controls the placement, transfer, payment, gift, donation, safekeeping, exchange, or use of assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)	Every person who uses assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)

The elements of the three acts are described as follows:

- 1) Every person who receives or controls the placement, transfer, payment, gift, donation, safekeeping, exchange, or use of assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)

The elements are described as follows:

- a) Objective Element
 - Element of action :receiving the placement, transfer, payment, gift, donation, safekeeping, exchange.
 - Object :assets
 - Accompanying element :as the result of a criminal act of Corruption, Bribery, Narcotics, Psychotropics, Labor smuggling, Migrant smuggling, in banking, capital markets, insurance, customs, excise, human trafficking, illicit arms trade, terrorism, kidnapping, theft, embezzlement, fraud, counterfeiting of money, gambling, prostitution, taxation, forestry, environment, maritime affairs, and fisheries, or other criminal acts liable to imprisonment of 4 (four) years or more, committed inside or outside the territory of the Unitary State of the Republic of Indonesia and considered as a criminal offense by Indonesian law
- b) Subjective Element
 - Element of error : that he knows or reasonably suspects

- 2) Every person who receives or controls the placement, transfer, payment, gift, donation, safekeeping, exchange, or use of assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)

The elements are described as follows:

- a) Objective Element
Element of action : controlling the placement, transfer, payment, gift, donation, safekeeping, exchange.
Object : assets
Accompanying element : as the result of a criminal act of Corruption, Bribery, Narcotics, Psychotropics, Labor smuggling, Migrant smuggling, in banking, capital markets, insurance, customs, excise, human trafficking, illicit arms trade, terrorism, kidnapping, theft, embezzlement, fraud, counterfeiting of money, gambling, prostitution, taxation, forestry, environment, maritime affairs, and fisheries, or other criminal acts liable to imprisonment of 4 (four) years or more, committed inside or outside the territory of the Unitary State of the Republic of Indonesia and considered as a criminal offense by Indonesian law
- b) Subjective Element
Element of error : that he knows or reasonably suspects
- 3) Every person who uses assets that he knows or reasonably suspects as the result of a criminal act as referred to in article 2 paragraph (1)

The elements are described as follows:

- a) Objective Element
Element of action : uses
Object : assets
Accompanying element : as the result of a criminal act of Corruption, Bribery, Narcotics, Psychotropics, Labor smuggling, Migrant smuggling, in banking, capital markets, insurance, customs, excise, human trafficking, illicit arms trade, terrorism, kidnapping, theft, embezzlement, fraud, counterfeiting of money, gambling, prostitution, taxation, forestry, environment, maritime affairs, and fisheries, or other criminal acts liable to imprisonment of 4 (four) years or more, committed inside or outside the territory of the Unitary State of the Republic of Indonesia and considered as a criminal offense by Indonesian law
- b) Subjective Element
Element of error : that he knows or reasonably suspects

The phrase “that he knows or reasonably suspects” indicates that the form of the error in the formulation of the offense is *pro parte dolus pro parte culpa*. With this formula, there will be two possibilities, namely: First, the offender knows that what is received, controlled, or used is the proceeds of a criminal act; thus, the perpetrator commits the act intentionally. Second, the offender should suspect that what is received, controlled, or used is the proceeds of the criminal act, meaning that the offender does not know whether what is received, controlled, or used is the proceeds of the crime. In this case, the perpetrator commits the act because of negligence. Strictly speaking, the offense can be committed either intentionally or because of negligence.

Meanwhile, the sanction formulated in the offense is a maximum imprisonment of five years and a maximum fine of one billion. It means that both intentional or negligent acts are liable to the same sanction, maximum imprisonment of five years and a maximum fine of one billion. This is as shown in the following table:

Table 2. Construction of Article 5 Paragraph (1) of Law Number 8 of 2010

Article 5 Paragraph (1) of Law Number 8 of 2010	The offender knows that what is received, controlled, or used is the proceeds of a criminal act.	Intention	Maximum imprisonment of five years and a maximum fine of one billion
	The offender reasonably suspects that what is received, controlled, or used is the proceeds of a criminal act.	Negligence	

In theory, intentional and negligent wrongdoings have different gradations of demerits so that the severity of the sanctions to be imposed should also be differentiated based on the principle of proportionality.

In this context, wrongdoing is a special limit in determining the form and duration of punishment. It is considered proportional if the punishment is imposed on the offender within the limits of his guilt. Conversely, it can no longer be proportional if the punishment is imposed beyond the limit (Huda, 2011).

Andrew von Hirsch said that the principle of proportionality is said to be a requirement of fairness. If so, reducing its role in the determination of penalties would make the resulting *scheine* less just (Hirsch, 1992). Thus, it can be emphasized that disproportionate criminal sanctions are a real injustice. Even sanctions that are disproportionate, too severe or light and complicated will encourage injustice as well as people to take the risk of more disobedience to the law (Sholehuddin, 2007).

Therefore, the determination of criminal sanctions must not be carried out arbitrarily and using arbitrary methods. Considering that the criminal law made based on legislation is binding for all people, to guarantee legal certainty and uphold the principle of proportionality in criminal law, this determination must be considered carefully with a rigorous methodology so that it can be accounted for scientifically (Marbun & Laracaka, 2019).

Thus, the principles of no crime without error and proportionality must stand side by side, inseparable from one another. From the principle of no crime without error in the context of theory, it has given birth to forms of wrongdoing, namely intention and negligence, both of which have different essence. From this difference, there is a proportion that reflects the level of demerits in each form of wrongdoing.

According to Fletcher, these two principles are important to justice. This is evident in his opinion which mentions two important principles of justice; first, that only the guilty should suffer conviction and punishment; and, secondly, that the extent of punishment should be proportionate to the crime committed (Fletcher, 2000). Therefore, in the implementation, it is forbidden to impose criminal sanctions on an innocent person, and the imposition of sanctions must be measured based on the seriousness of wrongdoings made by the perpetrator (Zulfa & Adji, 2011).

The theory that is closely related to proportionality in punishment is the desert theory or commonly known as the theory of criminal proportionality. This theory seems identical to the retributive theory, but it is not. The desert theory explains the conception that the underlying reason for retribution is not revenge but the severity of the sanctions based on the seriousness of the criminal acts. Thus, the appropriate sanction must be proportional to the actions of the offender and the level of loss incurred (Sholehuddin, 2007). From this perspective, the difference between retributive theory and the desert theory is that the retributive theory only emphasizes retaliation (revenge) while the latter does not emphasize it but expects sanctions proportional to the violations committed.

According to Andrew von Hirsch, a desert model is a sentencing scheme that observes the proportionality principle: punishments are scaled according to the seriousness of crimes (Hirsch, 1992). Meanwhile, according to Douglas Husak, criminal justice should implement a theory of desert, which requires *inter alia* that the severity of the punishment should be proportionate to the seriousness of the crime (Husak, 2003). Thus, according to the proportionality theory /desert theory, the punishment must be proportional to the seriousness of the offense.

Meanwhile, the criterion for seriousness depends on two aspects, losses incurred by the crimes and wrongdoings of the perpetrator. Therefore, the conception of separation between action and wrongdoing adopted by dualistic theory is still relevant to be used in determining the level of seriousness of offenses.

However, there is an opinion which states that the desert theory defines proportionality differently in theory and practice. In proving the element of error, judges are faced with facts which are variables that must be considered to measure a person's wrongdoing. Every criminal case has its variables that are different from others. Therefore, the imposition of sanctions becomes so varied and the meaning of proportionality becomes relative (Zulfa & Adji, 2011).

The author does not fully agree with this opinion if the proportionality is only for the application stage. However, the meaning of criminal sanction proportionality cannot be seen narrowly only in the application stage, but also in the formulation of legislative policies. This formulation is one of the links in law enforcement planning (Arief, 2007). It is also the most strategic stage of the "penal policy". Therefore, there should be no errors/shortcomings in this

stage they are strategic mistakes that can hinder efforts to prevent and overcome crimes at the application and execution stages (Arief, 2007).

In the formulation of Article 5 paragraph (1) of Law Number 8 of 2010, the substance is a criminal act, namely passive money laundering, consists of two forms of wrongdoing. Thus, because there is only one aspect of the act, there is no other action that can be compared to determine the level of seriousness; therefore, to determine the level of seriousness, it is enough to compare the aspects of the wrongdoing alone, namely between intention and negligence. Intentional wrongdoing is certainly more serious than negligence.

Based on this main concept, the proportionate formulation of criminal penalties should be distinguished intentional passive money laundering from the negligent one. Of course, more severe sanctions should be formulated to intentional passive money laundering.

Based on the explanation, it can be said that, theoretically, the implications of the formulation of *pro parte dolus pro parte culpa* wrongdoing as referred to in Article 5 paragraph (1) of Law Number 8 of 2010 contradicts the theories of errors and criminal proportionality. Even, if it is drawn at a more philosophical level, the formulation of the article contradicts the principles of errors and proportionality.

This is mainly because the issue of legal principles is at the level of the philosophy of law (Marzuki, 2014), and, like the layers of legal science, legal theory is at a level below the philosophy of law. Consequently, it is a meta-theory of legal theory. Thus, the theory of errors is derived from the principle of errors, and the theory of criminal proportionality is derived from the principle of proportionality.

Because it deviates theoretically, the formulation of the *pro parte dolus pro parte culpa* wrongdoing in the formulation of article 5 paragraph (1) of Law Number 8 of 2010 can be said to be a weakness in the formulation stage. This weakness will have a domino effect, which will also have an impact on the application and execution stages.

The theoretical implication of the formulation of an offense of *pro parte dolus pro parte culpa* has been implicitly thought by Rimmelink and Nieboer, stating that the formulation of a *pro parte dolus pro parte culpa* offense has one weakness: both *culpa* and *dolus* variants shall be liable to the same criminal law (Rimmelink, 2003). Similarly, Romli Atmasasmita states that in the context of money laundering which has used the formula, in addition to “that he knows”, it is “that he reasonably suspects” which is different, even contrary to the *dolus* or *culpa* doctrine (Atmasasmita, 2017).

It can be concluded that there is a gap between *das sollen* and *das sein*. In this context, *das sollen* is in the form of the theories of errors and criminal proportionality, which have standards regarding the formulation of rules of law, while *das sein* refers to the existing rule of law, namely Article 5 paragraph 1 of Law Number 8 of 2010.

Conclusion

The theoretical implication of the formulation of *pro parte dolus pro parte culpa* wrongdoing as referred to in Article 5 paragraph (1) of Law Number 8 of 2010 is that it contradicts the theories of errors and criminal proportionality. In a more philosophical level, the formulation of the article contradicts the principles of errors and proportionality.

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