

Reconstruction Regulation Reversal Burden of Proof Criminal Case in Indonesia's Legislation

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Abstract- This journal aimed at investigating the problems of reconstruction of reversal regulation of the burden of proof for criminal case in legislation in Indonesia which so far does not reflect harmony and ideal regulation reconstruction of the burden of proof for criminal case with basic reflection of the harmonic legal values based on human right protection. The results concluded, indicates entirely the reconstruction disharmony of the reversal regulation of the burden of proof from each law does not regulate clearly and concretely about the application consequences of the reversal of burden of proof. The reversal regulation of the burden of proof today the regulation substance does not correspond with the value of legal certainty as well as the regulation does not accommodate the human right protection in balanced manner, in the term of human right value manifestation that correlate with the reversal regulation of the burden of proof still not proportional. Reconstruction of reversal regulation of the burden of proof is appropriate with the legal certainty value as the regulation must able to accommodate the human right protection in balanced manner by using reversal concept of burden of proof which is limited and balanced in nature, the regulation reflects the fair legal certainty value manifestation and the reversal regulation substance of the burden of proof more comprehensive and give implication to the effective law enforcement process.

IndexTerms— disharmony, reconstruction, reversal of the burden of proof.

I. INTRODUCTION

Proof is an effort done to test the truth of event. The relation with the criminal law, proof is one of essences of the criminal law, because it is known that proof is a formal law done to enforce the material law itself. It is manifestation of the state effort to enforce the material criminal law itself.¹ Proof is the essence of criminal case court session, it is because in the criminal law different with the civil law which finds the formal truth, but the found truth is material truth, it means the truthful truth².

Generally the regulation about proof in the criminal case is regulated in Law No 8 of 1981 about Law of Criminal Procedure hereinafter refers as KUHAP. Principle of system of evidence that is followed in KUHAP is system of evidence based on law negatively (*negatiefwettelijk*), suitable with the stipulation of Article 183 of KUHAP. Furthermore, one of fundamental things in the context of evidence which is regulated in KUHAP is regulation about the burden of proof which become the duty of public prosecutor. Suitable with the stipulation of Article 66 of KUHAP states that “the suspect or

defendant is not burdened with proof”. It is suitable with the explanation of Article 66 of KUHAP as reflection of presumption of innocence.

Today, relates with the regulation of criminal law along with the time, either from material criminal law context or formal criminal law also be regulated out of law stipulation which is codified in the Criminal Code (KUHP) and KUHAP. Relates with the regulation substances either in the form of material or formal criminal law stipulation clearly will bring consequences for the prevail of the *lexspeialis derogate legi generalis*. It can be understood that the codification concept of criminal law either material or formal, can not be separated from the special criminal law regulation. In this relationship can not be separated from the always changing and developing societal life.³

One of formal criminal law regulations especially which relate with proof also deviate with the fundamental principles in KUHAP which affirmed in the article 66 of KUHAP is the regulation about the reversal of the burden of proof. The reversal of the burden of proof actually is a new paradigm especially in effort of the burden of proof for criminal case which is difficult to prove. It is done because at the regulation substance in the reversal of the burden of proof, it is understood the duty for defendant to prove from the prejudgment from the public prosecutor, so there is assumption that it will facilitate in proving a criminal case. There are more than one law especially which have separated regulation relate with the proof especially that regulate the reversal of the burden of proof.⁴ For more details about regulation of the reversal of the burden of proof from each law, can be seen in table below.

³AdamiChazawi, *Op.Cit*, page 2

⁴Law which regulate about the reversal of the burden of proof, Law No. 31 of 1999 about The Corruption Eradication juncto Law No.20 of 2001 about The Change for Law No 31 of 1999 about Corruption Eradication (than called as Law of Corruption), Law No 8 of 2010 about Prevention and Eradication of Money Laundering (then Called as Law of TPPU), Law No.8 of 1999 about Consumer Protection (hereinafter called as Law of Consumer Protection/UUPK) and Law No.35 of 2009 about Narcotic (hereinafter called as Law of Narcotic)

¹AdamiChazawi, *Law of Evidence of Corruption*, (Bandung: Alumni, 2008), page 4

² Eddy O.S. Hiaiej. *Theory and Law of Evidence*, (Jakarta: Erlangga, 2012) page 7

Table 1
Regulation Comparison of The reversal of Burden of Proof

Law No 31/1999 juncto Law No.20/2001 (Law of Corruption)	Law No.8/2010 (Law of TPPU)	Law No.8/1999 (Law of Consumer Protection)	Law No.35/2009 (Law of Narcotic)
<p>Article 12B Paragraph 1 Each gratification to civil servant or state administrator considered as bribery, if relates with their post and contrary with their duty and task, with stipulation as follows:</p> <ol style="list-style-type: none"> a. Whose value Rp 10.000.000,00 (ten million rupiahs) or more, proof that the gratification is not bribery done by the receiver b. Whose value less than Rp 10.000.000,00 (ten million rupiahs) the proof that the gratification done by the public prosecutor <p>Article 37</p> <ol style="list-style-type: none"> 1. The defendant has right to prove the he does not do corruption 2. In case the defendant able to prove that he does not do corruption, then the proof is used by the court as base to state that the indictment is not proven <p>Article 37A</p> <ol style="list-style-type: none"> 1. The defendant is obliged to give explanation about all his wealth and the wealth of his wife or her husband, his children, and wealth of each person or corporation that is suspected has relation with the case indicted. 2. In the case the defendant unable to prove about the unbalanced wealth with income or the wealth sources, then the explanations as given in paragraph (1) are used to support the existing evidence that the defendant has done corruption 3. The stipulation as given in paragraph (1) and paragraph (2) is criminal act or principal case as stated in Article 2, article 3, article 4, article 13, article 14, article 15, and article 16 of Law No 31 of 1999 about the eradication of Corruption and Article 5 to Article 12 of this Law, so the public prosecutor is obliged to prove his or her indictment. <p>Article 38B</p> <ol style="list-style-type: none"> 1. Each person who is charged do mistake or corruption as stated in Article 2, article 3, article 4, article 13, article 14, article 15 and article 16 Law No 31 of 1999 about the Eradication of Corruption and Article 	<p>Article 77 For the interest of inspection by court, the defendant must prove that his or her wealth is not from corruption</p> <p>Article 78</p> <ol style="list-style-type: none"> 1. In the inspection in the court session as stated in article 77, the judge command to the defendant to prove that his or her wealth that relate with the case not from corruption as stated in article 2 paragraph (1) 2. The defendant prove that his or her wealth that relate with the case not from or relate with the criminal act as stated in article 2 paragraph (1) by proposing enough evidence. 	<p>Article 22 The proof toward the presence or absence of mistake in in the criminal case as stated in article 19 paragraph (4), article 20 and article 21 is the burden and responsibility of the doer without closing possibility for the prosecutor to give proof.</p>	<p>Article 97 For the interest of investigation or inspection in the session, the suspect or defendant obliged to give explanation about all his or her wealth and the wealth of husband, wife, children and each person or corporation that is suspected relate with the narcotic case and narcotic precursor done by the suspect or defendant.</p> <p>Article 98 Judge has authority to ask the defendant to prove that all his or her wealth and the wealth of wife, husband, children and each person or corporation not from the criminal act of narcotic and precursor of narcotic done by the defendant.</p>

<p>5 to 12 of this Law, obliged to prove the contrary his or her wealth that is not charged yet but suspected come from corruption.</p> <p>2. In case the defendant unable to prove that his or her wealth as stated in article (1) obtained not from corruption, the wealth is considered as come from corruption and the judge has right to seize a part or all of the wealth for the state.</p> <p>3. The seizure claim for the wealth as stated in article (2) is proposed by the public prosecutor when read his claim to the principal case.</p> <p>4. Proof that the wealth as stated in article (1) not from corruption is proposed by the defendant during read his defense in the principal case and can be repeated at the memorandum of appeal or cassation</p> <p>5. Judge is obliged to open special session to investigate the proposed proof by defendant as stated in article (4)</p> <p>6. If the defendant is freed or stated free from all charges from the principal case, then the seizure charge of wealth as stated in article (1) and article (2) must be rejected by the judge.</p>			
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From the table above, relates with the reversal regulation of the burden of proof from each law can be known that the reversal regulation of the burden of proof is regulated differently. From the comparison of reversal regulation of the burden of proof, there are 4 law that regulate about the reversal of the burden of proof. First in Law of Corruption there are 4 articles which regulate about the reversal of the burden of proof (article 12B paragraph 1, article 37, article 37A, and article 38B). Then the reversal of the burden of proof then also be regulated in Law of TPPU which is regulated in 2 articles (article 77 and article 78). The reversal of the burden of proof also be regulated in Law of Consumer Protection which is

regulated in article 22 and the last, also be regulated in Law of Narcotic which is regulated in 2 articles (article 97 and 98).

Observed deeply then the reversal regulation of the burden of proof from each law stated above showed incomplete regulation and can not be applied easily in the law enforcement. It gives inconsistency and vagueness for law regulation. Even the reversal of the burden of proof is an crucial special regulation.

It can be said as crucial when look more deeply that the reversal of the burden of proof already an exception in the criminal law principle that also relates with the human right protection, so the reversal regulation of the burden of proof should be regulated in a clear and objective regulation.

Indeed actually law violate the human right, but to more maximize the implementation of human right then the law is used to protect the human right. If we understand further, principally the reversal regulation of the burden of proof in the criminal case actually also gives implication to the deviance toward the respect to the human right especially to the defendant. It is based on stipulation on the reversal of the burden of proof that degrade the presumption of innocence that actually the principle already become the fundamental principle in the national or universal law construction. From the human right side, the presumption of innocence in the judicial process is part of human right of the suspect or defendant who experience the judicial process.

It is because the presumption of innocence has been accepted as part of the respect to the human right, and relate with the goal of criminal procedure law today or KUHAP is born to prevent the arbitrariness of the apparatus to the defendant or suspect. With the principle of human right protection that relates with the criminal policy to follow and implement the reversal system of the burden of proof, then it will shift the perspective of presumption of innocence become the presumption of innocence principle.

Beside that, many special laws that regulate the reversal of the burden of proof which is explained previously give impact to the law enforcement process. Instead the reversal of the burden of proof as urgency that should be regulated and implemented for the attainment of law goals but actually the matter is not suitable with the aspiration because the essence of the reversal of the burden of proof regulate the different regulation substances. The consequences of the different regulation substances also cause the law certainty will not be reached which influence to the non embodiment of justice.

Actually, the main problem in many special laws that regulate the reversal of the burden of proof is the inconsistency of what is the usage of the reversal of the burden of proof itself, which if known at glance that the reversal regulation of the burden of proof has similar goals to facilitate the proof process. But problems emerge when the regulation formulation relate with the reversal of the burden of proof is different so become multi interpretation. The reversal of the burden of proof has overridden the law principle which actually become the foundation of the law regulation itself especially about proof as relates with the presumption of innocence, so the stipulation regulation construction about the reversal of the burden of proof should be clear and easy to implement by respecting the essence value of norm in it.

If the reversal regulation of the burden of proof as today, it is feared will implicate to the disturbance of the justice juridically and the law certainty become lower. Although it has been regulated about the reversal of the burden of proof in each special law, it does mean the matter assure a law certainty. It is based on that the regulation formulation still produce multi interpretation will impact to the law uncertainty directly will also impact to the law justice. To anticipate for the law enforcer that able to enforce by using blinders will cause the law regulation understanding not holistically and comprehensively. It is dangerous because the essence of the reversal of the burden of proof actually not regulated clearly and concretely.

It needs regulation updating especially the reversal regulation of the burden of proof that suitable with the national law values of Indonesia. Formulation of the law and regulation

should consider the creation of law which create the law goals, law justice, law benefit and law certainty in harmony.

From the explanation above, so it should be done investigation deeply about the reconstruction of the reversal of the burden of proof in the criminal case and its relation with the updating of criminal procedure law in Indonesia which gives emphasis to two crucial legal issues, that relate with the urgency of the reversal regulation of the burden of proof in the criminal case and reconstruction of the reversal regulation of the burden of proof in the updating of criminal procedure law based on legal values which based on national law system.

Formulation of the problem

Relates with the matters, then the problem under research is the construction of the reversal regulation of the burden of proof for criminal case in the legislation in Indonesia so far does not reflect a harmony and reconstruction of the reversal regulation of the burden of proof for ideal criminal case which reflect the harmony of legal values that based on the human right protection.

Research purposes

This study aims to assess and analyze the construction of the reversal regulation of the burden of proof for criminal case in the legislation in Indonesia so far does not reflect a harmony and reconstruction of the reversal regulation of the burden of proof for ideal criminal case which reflect the harmony of legal values that based on the human right protection.

Research methods

The investigation is normative law research, by using statute approach and comparative approach. The used legal materials are primary, secondary and tertiary legal materials. The used theory for analysis : purpose of law, human right and criminal law policies theories.

II. RESULTS AND DISCUSSION

Disharmony of the reversal regulation of the burden of proof for criminal case in the legislation in Indonesia

The context of the reversal regulation of the burden of proof in the criminal case already known that the reversal regulation of the burden of proof is a special regulation that already regulated because it is needed in handling a case, especially in proving the criminal case which difficult to prove. It is known in the background explanation of the problem, that the reversal regulation of the burden of proof has been regulated not in harmonic from each law that regulate it.

Although has been regulation in each special law, it does not mean the reversal regulation of the burden of proof is regulated by not considering the harmony and the essential values of the reversal of the burden of proof itself, by recalling the essence of the reversal of the burden of proof is to facilitate the proof process and also relate with the principle of human right that is guaranteed in Constitution 1945, then with requirements should be regulated in the extraordinary legal instrument, where the legal instrument should give guarantee for the legal protection to protect the legal interest in balanced manner especially with the human right.

Relates with the disharmony, especially in the reversal regulation of the burden of proof, it is known that the reversal regulation of the burden of proof which is regulated in the special law (out of KUHP and KUHAP), and more than one law. Considering the substance of the reversal regulation of the burden of proof from each law, it does not show a harmonic value from the essential values of the reversal. Separated from

the characteristic of criminal act that actually as special criminal act, then it does not mean the regulation can not be excepted without unclear legal ratio.

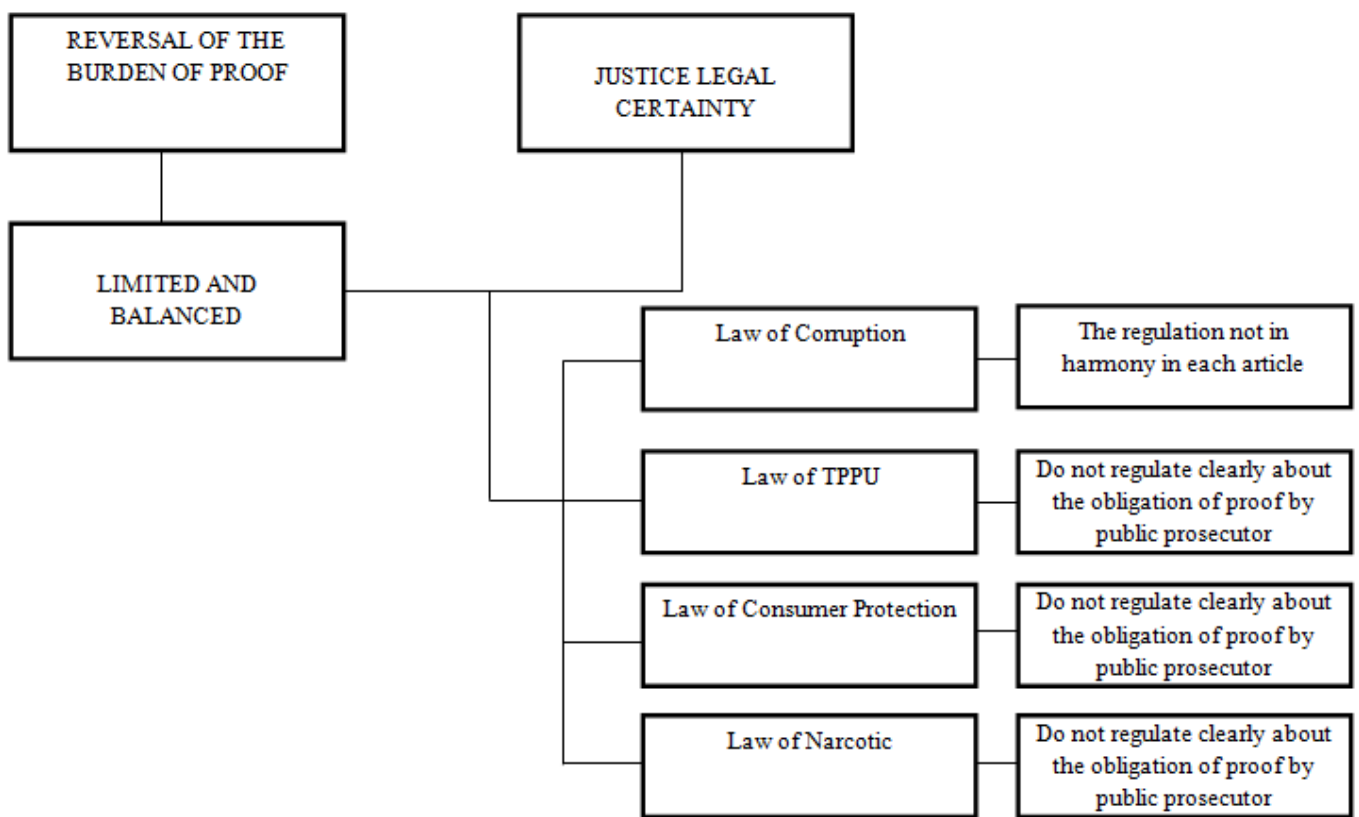
Although the reversal regulation of the burden of proof is used to prove a special criminal act from the reversal itself, where the essence of the reversal is to facilitate the proof process for criminal act which difficult to prove and with requirement should give emphasis to the criminal act whose the handle is special in nature or extraordinary measure.

Furthermore, if considering further about the reversal regulation of the burden of proof in each special law, it is known that the regulation substances do not regulate clearly and concretely, so it impacts to the implementation of the law especially toward the application of the reversal. So the law

application become not in harmony with the essences of the reversal, that is to facilitate the proof process of the criminal act which difficult to prove.

About the juridical implication about the disharmony of the reversal regulation of the burden of proof, firstly relate with the disharmony of the reversal from each law has been regulated in the Constitution 1945 especially that relate with the protection of human right. Considering that the existence of the reversal regulation of the burden of proof indirectly giving implication toward human right owned by the defendant or suspect. In narrow understanding, only placing in the context of the defendant rights, then the application of the reversal is contrary with the human right.

Figure 1
Reversal Regulation Conformity Of The Burden Of Prof In Criminal Case With The Value Of Just Law Certainty



From the figure above it can be understood the relationship between the reversal regulation from each law still show the incompatibility with the reversal concept of the appropriate burden of proof, in this case the reversal of the burden of proof that is limited and balanced. From all reversal regulation of the burden of proof if refer to the law certainty value perspective, implication for the vagueness of the reversal regulation of the burden of proof can not be implemented easily. Whereas if looking at the urgency of the reversal regulation of the burden of proof is done to facilitate the proof process for criminal case which is difficult to prove. Then the reversal regulation of the burden of proof become not efficient.

About the reversal application of the burden of proof is not easily to apply in this case supported by the opinion of YudiKristiana that stated one of the reversal regulations of the

burden of proof at the Law of TPPU still does not regulate completely whether the reversal in this TPPU prevail absolutely or not.⁵ From the opinion it can be understood that entirely the reversal still not complete and clear. Then, Yunus Husein stated that so far the procedure law regulation about the reversal of the burden of proof still lack so often produce different perception between the law enforcers and other stakeholders, such as whether the reversal is right or obligation, what thing that should be proven and what thing that should be proven by the public prosecutor, what evidence that can be used and when the opportunities for the defendant to do the

⁵YudiKristiana, *Eradication of Money Laundering Criminal Act: Progressive Law Perspective*, (Yogyakarta: Thafamedia, 2015) page 273

reversal. It should be regulated so there will be same perception between the law enforcers and the justice seeker.⁶

Therefore, at least it can be understood that entirely the reversal regulation of the burden of proof should be done reconstruction so the reversal suitable with the just law certainty, the regulation should able to accommodate the human right protection in balanced manner and the regulation can be applied.

Reversal regulation reconstruction of the burden of proof for criminal case

Reversal regulation reconstruction of the burden of proof is an answer for the substantial problem relate with the compatibility of the reversal regulation with the just law certainty value, the regulation should able to accommodate the protection of human right in balanced manner and facilitate the application.

It need to be made more clearly that basically the reversal regulation reconstruction is based on the paradigm to facilitate the proof process. Previously, if investigate from all reversal regulation of the burden of proof at the legislation in Indonesia, it seem has paradigm to facilitate to sentence punishment.

Between to facilitate the proof process with to facilitate to sentence punishment is different thing. The difference relates with to facilitate the proof process then it gives emphasis to the efforts to give solution to give facilitation in doing proof. Of course, if facilitate the proof process not only simplify the reversal regulation of the burden of proof.

Another case with the paradigm to facilitate to sentence punishment, if look at glance it is same with to facilitate the proof process. It is based on the logical ratio that basically when someone is sentenced then automatically the person has been proven do criminal act. If begin from the logical ratio like that then it is not appropriate thought. Basically the paradigm to affiliate to sentence punishment give more emphasis to the simplification process, and finally the regulation especially to facilitate the proof process give more emphasis to the thought how the defendant unable to free from the punishment and should be sentenced.

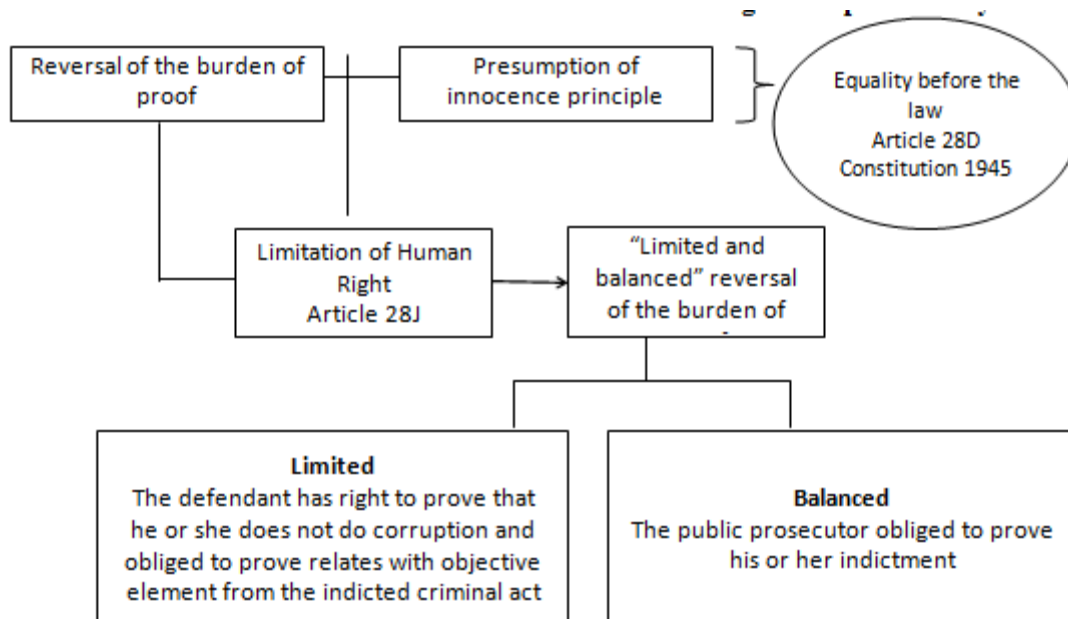
Back to the truth of criminal law which is material in nature then the truth should be disclosed relates with the act or criminal act should based on the truthful truth. Therefore, the reversal regulation base for the burden of proof should be interpreted with paradigm to facilitate the proof process with goal to disclose the truth of criminal act that is difficult to prove.

Relates with the reversal regulation reconstruction of the burden of proof in legislation in Indonesia, there are several aspects that should be considered. First, relates with the just law certainty value, the regulation should able to accommodate the protection of human right in balanced manner, the reversal should be limited and balanced. To know the basic reason for

the appropriate reversal regulation of the burden of proof is limited and balanced, it can be seen in the figure below.

Reversal Bases for Limited and Balanced Reversal of The Burden of Proof Which Suitable with the Protection of Human Right Proportionally

⁶ Yunus Husein, *KUHAP Bill in Effort To Prevent and Eradicate Corruption*, source: <http://www.antikorupsi.org/sites/antikorupsi.org/files/doc/umum/yunus%20husein-RUU%20KUHAP%DLM%20RANGKA%20MENCEGAH%20DAN%20MEMBERANTAS%20KORUPSI.pdf>, downloaded on 22 December 2015, page 7



From the figure above, it can be known that the appropriate reversal of the burden of proof is limited and balanced. It is known that the intentions of limited in proof means the defendant is given choice whether want to do proving or not, so in here the context is the right to prove relate with all element of the indicted criminal act to him or her. But in other side, when the defendant choose not to prove then the defendant is given obligation to prove partly from his criminal act especially at the determined elements (not subjective elements) from the indicted criminal act.

Then relates with the intention of balanced is the position of the defendant should be in line with the public prosecutor. It means when the defendant prove then the public prosecutor can not be freed from his obligation in proof. It is actually related with the specialty of the proof done by the defendant, it is known that the done proof by defendant limited at the determined element (not subjective elements) with other words the next element relate with the subjective element then the public prosecutor should prove the presence of the subjective element whether present or not. So in case the reversal of the burden of proof become balanced between the position of defendant and the public prosecutor. Beside that, relates with the balancing based on the proof division of the indicted criminal act elements, it is not violate absolutely to the non self incrimination.

Second, relates with the reconstruction based on the reversal regulation of the burden of proof can be applied easily in the implementation. It is known that from the explanation about the regulation relates with the reversal of the burden of proof at each law has figured that the regulation is not regulated clearly and firmly. It implicates to the process of law enforcement especially at the criminal case proof. The base for the reversal regulation of the burden of proof actually to facilitate the proof of criminal act that difficult to prove. Of course, with this base the reversal regulation of the burden of proof should be clear and concrete comprehensively so can be implemented easily.

Based on the opinion of SuerjonoSoekanto, stated that the disturbance to the law enforcement come from law caused by:⁷

- a. Do not follow the principle of the prevailing law
- b. No implementing regulation that is needed to implement the law
- c. The vagueness of the words means in the law which cause the criss cross in the interpretation and implementation

Reviewing the opinion of SoerjonoSoekanto relates with the reversal regulation of the burden of proof from each law that regulate it, it has been known that many regulation substances that still criss cross in the interpretation so does not reflect the law certainty. It is suitable with the explanation above that will implicate to the law enforcement especially in manifesting the substantive justice.

Relates with the clear and comprehensive reversal of the burden of proof, then the regulation should regulate several matter that underlie the reversal based on the just law certainty value. The matters that should be regulated in the reversal in the criminal act as follows:

- a. The consequences for the implementation of the reversal of the burden of proof.
- b. The obligation or role of the public prosecutor should be present in the reversal regulation of the burden of proof.
- c. Relates with the burden of proof which is given to the defendant, then the matter that should be proven relate with the determined elements (not subjective element) from the indicted criminal act by the public prosecutor.

From important things that are regulated in the reversal regulation of the burden of proof at the criminal act then reconstruction that should be manifested at the law regulation in the future (*iusconstituendum*) that is more appropriate if regulated, the regulation as follows:

⁷SoerjonoSoekanto, *Factors that influence the law enforcement*.(Jakarta: Rajawali Pers, 2012), page 17

Articles Formulation of the reversal regulation of the burden of proof in *Ius Constituendum*

Article X

1. Regarding toward the criminal act which is specialized its proof through mechanism of the reversal of the burden of proof, then the stipulation as follows:
 - a. Defendant has right to prove that he did not do the indicted criminal act by the public prosecutor.
 - b. In case the defendant use his right to prove and able to prove that he did not do the indicted criminal act by the public prosecutor then the proof is used by the court to support the existing evidence.
 - c. In case the defendant does not want to use his right to prove that he did not do the indicted criminal act by the public prosecutor then the defendant is obliged specially relate with the objective element from the indicted criminal act by the public prosecutor.
 - d. Stipulation as given in letter (c) is used to support the existing evidence
 - e. In case the reversal of the burden of proof then the public prosecutor is obliged to do proof

III. CONCLUSIONS

Based on the above discussion, it can be concluded:

1. Entirely, disharmony of the reversal regulation of the burden of proof from each law does not regulate firmly and concretely about the consequences of the implementation of the reversal. Beside that, the reversal regulation of the burden of proof today the substance do not compatible with the just law certainty value, the regulation does not accommodate the protection of human right in balanced manner, that means the manifestation of the human right protection value that relates with the limitation of human right that relate with the reversal regulation of the burden of proof still not proportional.
2. The appropriate construction of reversal regulation of the burden of proof with the just law certainty, the regulation should able to accommodate the protection of human right in balanced manner is by using the reversal concept of the burden of proof that is limited and balanced, so the regulation reflects the manifestation of just law certainty value and the substance of the reversal regulation of the burden of proof more comprehensive and gives implication to the process of effective law enforcement.

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