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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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"Legal Reconstruction in Indonesia Based on Human Right"

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Abstract

There needs to be an effective way of establishing a community justice system. This is a model of the local community, its existence received formal recognition by the state. Against criminal acts regulated in the Criminal Code, the settlement is at its final point through the justice system involving investigators (babinkamtibmas), (traditional leaders), (community leaders) given the opportunity to reconcile the parties. The role of the victim or her family remains to be considered on the other side. Acts that do not have a counterpart in the Criminal Code but which are considered as despicable acts by the community can also be resolved by the community themselves through a judicial system which they form themselves. In practice, the parties are given the opportunity to choose a solution through the village or state courts. If there is no agreement, then the state court takes over the settlement of the case but if it is finished through a community court then the case is considered finished and the community court must be the first and last court because there must be an agreement in accordance with the Criminal Code Bill **d) there is a settlement outside the process** .

PRELIMINARY

Recognizing all the weaknesses of the rule of law in the past, the first and foremost agenda is to restore or restore the intensity of the law. This step is important, because the current law has been severely hampered in its efforts to regulate and provide protection and justice.[541] That the law basically aims to provide the greatest happiness to as many people as possible (to provide the greatest happiness devided among the greatest numbers). For Indonesia, Indonesia's own legal objectives have been formulated expressly in the 1945 Constitution as follows.[542]

To form an Indonesian government that protects all Indonesian people and all Indonesian blood and to promote public welfare, educate the nation's life, and participate in carrying out world order based on freedom, eternal peace and social justice.

In line with the thought of the goals of Indonesian reformation in 1998, there was a desire to change that reflected justice in the emphasis on legal and economic political reforms, until now it appeared especially in the political field, namely the change in the system of state institutions from the central to the rural areas that used to use a centralized division and decentralization, changed to the regional autonomy system that is the existence of BPD at the village level as well as the economic system changed with the existence of a free market until the existence of Bung DES (Village Bank).

But what about legal reform so far seems to be stuck in a place, especially in terms of fair law enforcement, especially the victims

541 *Esmi Warasih, Pranata Hukum dan Paradigma Kekuasaan menuju Paradigma Moral*
542 *Sadjipto Rahardjo Ibid 1998 a*

and the community at the grassroots level.

Starting from the framework of understanding above, according to enlightenment philosophers, the legal order, which is in the minimum form, meets the following criteria. First the law must not only be a tool to achieve rationality, but the law itself must be rational. And, rational law is a law that is truly able to realize the purpose of its presence in the social environment where it is indeed needed. Second, to ensure that rational laws can achieve their objectives, they must be supported by efficient actions by their legal implementation tools. Third, the importance of inserting substance into legal form is very closely related to the influence of the social structure of society. because there the law should realize its goals.

Therefore, if you do not want to fail, then the legal reform that has been attempted since 1998, must also refer to the understanding framework as mentioned above. That means, reform must be an attempt to make law as an institution that is able to carry out its work in accordance with the needs and demands of the times. Legal reform is an on going process and is not a change in a set of values by replacing them with another set of values to be the basis for a legal system. Fundamental changes start from the set of values and continue to the level of substance, structure, procedure, and legal culture.[543]

And the most urgent thing for law enforcement in rural areas is more focused on structural devices. Accompanied by policies to provide training, techniques, law enforcement so that the community is encouraged to participate and be skilled in problem solving techniques and build a team that involves a component of civilian personnel.

Although positive criminal law in Indonesia in principle cannot be resolved outside the court except in certain cases. but in practice often criminal cases are resolved outside the court through a variety of apparatus discretion or through a mechanism of deliberation / peace or an agency of forgiveness in the community.[544] The practice of settling criminal cases outside the courts so far has no formal legal basis, so there is often a case where informally there has been a peaceful settlement (though through traditional legal mechanism). but it is still being prosecuted according to applicable law.

Here it means that reforms should have a clear vision if they do not want to just partially change the law. Just an example, the vision of the Undip Faculty of Law Reform Center is to place the legal order on the basis of the "Moral Paradigm", replacing the old legal paradigm based on the "Power Paradigm". The moral paradigm is in the form of a set of egalitarian, democratic, pluralistic, and professional values to build "civil society" (civil society). Therefore, efforts to reform the law should be placed on the basis of the new paradigm.

Perhaps there is no better and more appropriate way to describe Indonesian society today except by saying that our society is changing rapidly and is quite basic. Indonesia is a society undergoing reform, which can be interpreted as a change in form. or it can also be interpreted as rearranging the elements of a community life order, which has certainly disturbed the existing value system.

As a result of the lack of awareness of the content of these values as a single unit or value system in the legislation, so that the determinants of social life often feel unclear. In fact, it is often felt to be unfair because the content of the material is interpretative or only contains the main problems, and then the government is given broad scope to make interpretations, including the various lower implementing regulations. But in practice, these opportunities tend to take sides or reflect the will of the ruling parties.

543 *Esmi Warasih, Potret Hukum Modern dalam Transformasi Sosial, 1996.*
544 *Prof Dr Gunarto SH MH. Kuliah Mediasi Penal dalam Penyelesaian Sengketa diluar Pengadilan, 2019.*

At present law enforcement is not only used to compare patterns of relationships and existing rules but must be accepted as a more modern concept that has to make a social change even more so that the law is used to channel and maintain the results of decisions economic politics and patterns of behavior that exist in society and create new social behaviors.

Along with the rapid development of technology, the political economy is increasingly rapid, it is necessary to pay attention to the acceleration of effectiveness in the framework of fulfilling equitable justice by fixing law enforcement governance, especially in the country where we are currently waiting for the passing of the new and very urgent KUHP Bill to immediately improve law enforcement. on cases that are mild or considered minor in relation if left unchecked it will create bad habit behavior so that it is considered legitimate or justified.

As is often the case in the community of minor criminal offenses as follows: petty theft, minor abuse, and violations that become a dilemma for law enforcement if the case is not resolved in accordance with applicable law which results in the parties between the victim and the perpetrator not feeling satisfied.

DISCUSSION

1. Handling of Minor Crimes

a. Current Light Criminal Arrangements are assumed to be a kind of protection from the existence of enforcement which is not proportional to criminal acts (the loss) is considered not serious. back in the Criminal Procedure Code which then applies in Indonesia which originated from the colonial period which is still maintained

b. Light criminal proceedings according to the Criminal Procedure Code:

1. Delegation of Minor Crimes is carried out by investigators without a public prosecutor.

2. Investigators are taking over public prosecutors.

3. Within 3 days the investigator confronts everything that is needed in the trial starting from the minute the examination is completed for the investigator.

4. If the accused is not present the judge can submit the decision without the presence of the defendant.[545]

c. Process for Resolving Minor Crimes through FKPM through mediation / restoration:

1. Receive complaints / reports of residents by recording in the village incident book.

2. Discuss / Determine the right time for settlement by way of consensus agreement.

3. FKPM can determine when a meeting is held or invite both parties to meet.

4. After an agreement was made a letter of agreement was made known by the chair of FKPM and the Village Head.

d. The advantages of the Light Criminal Procedure carried out by FKPM are more practical, including:

1. The faster settlement is not wordy.

2. Cheaper and more touching sense of justice.

2. Settlement of Minor Crimes according to Customary Justice

The principle of legality which is a social foundation and a culpability (individual error).

545 http://pn-Klaten.go.id//*Prosedur Perkara Pidana Ringan*//

That is, there is a more fundamental principle that is the chapter on punishment by aligning and formulating articles about the purpose of criminal punishment and guidelines for crimes with the intended purpose:

a. As an integral part of the criminal system.

b. As a guideline and basis for pilosopis and justification of punishment.

c. Pragmatic so as not to be lost or not forgotten in criminal practice.

The essence and purpose of punishment must be contained in the principle of the continuity of community protection and the formation / improvement of individuals and not merely to tell and humiliate human dignity.[546]

a. With the aforementioned criminal guidelines, it is necessary to separate or split or divide the system and method of punishment as a basis for the legality principle, especially in articles relating to minor crimes.

b. Even though an act has fulfilled the elements of the offense formulation in the law can be declared not a criminal offense if there are reasons as follows:

c. a. Does not pose a public danger or very little social danger.

d. b. Not dangerous to the community or the danger is very small.

e. There are circumstances that negate the elimination of criminal liability.

f. The absence of material unlawful nature.

Where it is mentioned in the Criminal Code 2004-2007 concept simplified in article 7, the contents of which are as follows:[547]

(1) Criminal provisions in Indonesian laws and regulations apply to Indonesian citizens who commit crimes outside the territory of the Republic of Indonesia.

(2) The provisions of paragraph (1) do not apply to crimes that are only threatened by a fine of category 1 or category 2. So this exception in paragraph (2) of article 7 of the 2004-2007 Criminal Code concept is a minor crime based on equality before the law.

3. Ideas for Settlement of Minor Crimes in Accordance with Customary Institutions

In many cases resolved in the adat system there are also 2 possibilities, namely the first settlement of customary law by the community is recognized and legalized by state law through the court. Both cases are considered finished and the state law does not touch the case. One of the forms of settlement to be discussed is the settlement by restoration of justice and the new KUHP concept, namely the demise of the prosecution has been extended, among others if:

d) there is a solution outside the process;

e) maximum penalties have been paid for criminal offenses which are only threatened with many category II fines;

f) maximum penalties have been paid for crimes threatened with imprisonment of up to 1 year or maximum fines of category III.

Where the process outside the court is more effectively delegated or formalized to be carried out in the village administration by activating a police communication community forum in which there is an integrated apparatus with the following organizational structure:

546 *Prof. Dr. C. Dewi Wulansari, SH., MH., SE., MM, Hukum Adat Indonesia, 2010.*
547 *Prof. Dr. Barda Nawawai Arief SH. Perkembangan Ajas Hukum Pidana Indonesia, Hal 39, 2008.*

4. Settlement of a Case That Can Be Modeled

Today's police force has tried to apply this fourth model in all criminal acts, especially in the crime of property. Through a new institution called public complaints, the police are given the opportunity to summon the parties involved in a criminal case. If in the summoning stage the offender is willing to obey the law by recovering the loss suffered by the victim, the case is considered finished and does not need to proceed to the next process. As for the basis of dumas is the Republic of Indonesia National Police regulation No. 2 of 2012 concerning how to handle public complaints within the Republic of Indonesia National Police. This is actually not in accordance with the aforementioned regulation, because in the case of regulation, community complaints, hereinafter referred to as dumas, are complaints from the public, government agencies, or other parties that contain information, complaints, dissatisfaction, or deviations from the performance of the national police that require instant or written information. further handling and settlement. Apart from the mistakes in the implementation of the law, ideas and breakthroughs made by police investigators should be appreciated.[548]

This fourth model does not escape but also still contains weaknesses, although it will probably succeed in overcoming the accumulation of cases in court. This model is still weak in dealing with feelings of injustice in the midst of people who feel disturbed by the existence of a disgraceful act that has no equivalent in written criminal law.

Therefore, it is also necessary to propose a fifth model by establishing a community justice system. Although this is a model of local communities, its existence is formally recognized by the state. With regard to the criminal acts regulated in the Criminal Code, the settlement is still through the criminal justice system with records ranging from investigators to judges being given an opportunity to reconcile the parties. The role of victims and / or their families remains to be considered. On the other hand, actions which have no counterpart in the Criminal Code but which are considered to be a despicable act by the community are resolved by the community themselves through a judicial system which they have formed on the basis of the legitimacy of the state. In the event that an act is deemed to be an interlocutory deed in both systems, both social and modern systems, the parties are given the opportunity to choose, resolve with customary justice, or state justice. If there is no agreement, then the state judgment will take over the settlement of the case.

CONCLUSION

Discussing village courts / traditional justice institutions actually existed long before Indonesia's independence as in article 3a ROS.1847 No. 23 jo 1848 No. 47 Chapter 7. IS (indische Staatregeling) took effect from January 1, 1920 that adat judges in Java and Madura were given the name Dorpsrechter (village judge or village court). However, in 1945 that the customary judicial regulations were not enforced bearing in mind the current situation of the Indonesian people experienced turmoil, then it was contained in Law No. 1 of 1951 that the customary judiciary of the judiciary, especially for indigenous groups in the context of upholding and implementing their customary law was declared abolished and its implementation channeled in the general court then the customary criminal law is only applied for a while, that is, as long as a new national KUHP has not been enacted.

548 *Dr. Erdianto Efendi, SH., M.HUM., Hukum Pidana Adat, 2018.*

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Interpretation Human Rights Law Against The Teaching Material In Corruption Criminal Offenses

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Abstract

During this time the issue of corruption seen in isolation from human rights. Even in the discussion of the anti-corruption agenda. The perspective of human rights have received less attention. When in fact, could be one of the human rights analysis tool against corruption because corruption has claimed, namely for individuals, society and the State. By using as a human rights perspective in view and analyze corruption, it can show the victim and obligations that must be met by the State. Through the analysis of human rights. Elucidation of Article 2 Paragraph (1) of the Law of the Republic of Indonesia No. 31, 1999 On Combating Corruption by the Constitutional Court in its Decision dated July 25, 2006 No. 003 / PUU-IV / 2006 was declared contrary to Article 28 D Paragraph (1) of the 1945 so the explanation of Article 2 paragraph (1) of Law No. 31 of 199 otherwise do not have binding legal force. The author argues, the Constitutional Court when a judicial review of the law tend to be viewed from the angle of the interests of the suspect or defendant's rights rather than viewed from the side benefit of the victims of corruption. The purpose of writing this article is to determine the nature of the development of doctrine against the law in the Law on Corruption and human rights know the interpretation of the teachings of the nature of the substantive law against corruption. The Constitutional Court when a judicial review of the law tend to be viewed from the angle of the interests of the suspect or defendant's rights rather than viewed from the side benefit of the victims of corruption. The purpose of writing this article is to determine the nature of the development of doctrine against the law in the Law on Corruption and human rights know the interpretation of the teachings of the nature of the substantive law against corruption. The Constitutional Court when a judicial review of the law tend to be viewed from the angle of the interests of the suspect or defendant's rights rather than viewed from the side benefit of the victims of corruption. The purpose of writing this article is to determine the nature of the development of doctrine against the law in the Law on Corruption and human rights know the interpretation of the teachings of the nature of the substantive law against corruption.

Keywords: Corruption, Human Rights, against the material law

Background

Indonesian state is the state based on law (rectsstaat) and not by power (machtsstaat). In Article 1 (3) of the 1945 after the amendment also stipulates that Indonesia is a country of law. The formula by Supomo mean that the State should be subject to the laws, regulations, laws, and applies to all state agencies and fittings.[549] Further, he said that the State law guarantees legal order in society, which means that the State give legal protection to the public, between law and power there is a

549 *Teguh Prasetyo and Ari Purnomosidi, Building Law Based on Pancasila, Nusamedia, Bandung, 2014, p. 1*

reciprocal relationship.[550]

In the system of rule of law their appreciation and commitment to uphold human rights and guarantee all citizens equal before the law (equality before the law), set forth in Article 27 paragraph (1) 1945 Constitution affirms "all citizens are equal before the law and government and shall abide by the law and the government, without exception ".

Endowed by the Almighty God of reason and conscience which gives the ability to distinguish the good and the bad that will guide and direct attitudes and behavior in living her life. With reason and conscience that, then people have the basic freedom to decide their own behavior or actions. In addition, to compensate for the freedom of the human family have the ability to be responsible for all actions. Basic freedom that is called human rights that are naturally as a gift of God Almighty.[551] So the notion of human rights is often understood as a natural right that is carried by humans since humans are born into the world.[552]

Law of the Republic of Indonesia Number 39 of 1999 on Human Rights, Article 1 stated "human rights are a set of rights attached to the nature and existence of the human family as a creature of God Almighty and it is His grace that must be respected, upheld and protected by state, law and government, and everyone for the respect and protection of human dignity. "Thus, the denial of human rights is to deny human dignity.[553]

During this time the issue of corruption seen in isolation from human rights. Even in the discussion of the anti-corruption agenda. The perspective of human rights have received less attention. When in fact, could be one of the human rights analysis tool against corruption because corruption has claimed, namely for individuals, society and the State.[554]

By using as a human rights perspective in view and analyze corruption, it can show the victim and obligations that must be met by the State. Through the analysis of human rights, corruption discourse can be cleaned from the study in the form of numbers and calculations technical and legal analysis manipulative. Through human rights, corruption eradication strategy also can be enriched to be directed to hold the State (official) against a number of corrupt practices that constitute human rights violations.[555]

Eradication of corruption through legislation initiated since the enactment of Law No. 24 Prp of 1960, which still creates difficulties in combating corruption since before proving the elements to enrich themselves, or others, and so on ... but must prove also an element of "crimes or violations" so with no evidence of the elements, it can be said even though according to the public sense of justice is a corrupt act and the perpetrators should be convicted so as to not be able to prove the element of "crime or offense" then the perpetrator can escape criminal liability corruption. Furthermore, in its development, Law Number 24 Prp of 1960 amended and replaced with shrimp Law No. 3 of 1971 is to change the element of "crimes and violations" is replaced by "against the law" in the explanation of Law No. 3 of 1971 implies a formal and meteriil in order to more easily obtain proof of the acts that can be punished.

Furthermore, Act No. 3 of 1971 is changed and replaced by Act 31 of 1999 on Corruption Eradication that reinforce the meaning of "unlawful" as outlined in the ex-

550 Mukthie Fajar, Type State of Law, Cet. Second, Bayu Media Publishing, Malang, 2005, p. 7

551 Ms Noor Bakry, Citizenship Education, Student Library, Yogyakarta, 2011, p. 228

552 Bahder Johan Nasution, 2014, the State of Law and Human Rights, Mandar Maju, Bandung, p. 129

553 Rob Pasaribu, 2015, the Human Rights Approach (HAM) in Combating Corruption, Library Science, Yogyakarta, p. 327

554 Bambang Waluyo, 2014, victimology protection of victims and witnesses, Sinar Grafika, Jakarta, p. 61

555 Stanley Adi Prasetyo, Human Rights and Justice in Implementing Human Rights Obligations, paper presented at the training prioritizing human rights approach in combating corruption in Indonesia for judges throughout Indonesia, Yogyakarta, November 18 to 21, 2013, page 11, quoted from Robert Pasaribu, Op. cit., p. 330.

planation of Article 2 Paragraph (1) of the Law of the Republic of Indonesia No. , 31 year 1999 on Corruption Eradication, as amended by Act 20 of 2001 on the Amendment of Act No. 31 of 1999 on Corruption Eradication, namely:

"What is meant by" unlawfully "in this Article includes unlawful act in formal sense as well as in material sense, that although such actions are not regulated in the legislation, however, if such actions dianggab reprehensible because it does not correspond to the sense of justice or norm -norma social life, then such actions can be imprisoned ".

However, towards the implementation of the substantive legal doctrine against the nature of many legal experts believe there are implications for the principle of legality. Thus, in the development Elucidation of Article 2 Paragraph (1) of the Act 31 of 1999 by the Constitutional Court in its Decision dated July 25, 2006 No. 003 / PUU-IV / 2006 was declared contrary to Article 28 D Paragraph (1) of the 1945 so that the Company Article 2 (1) of Act No.31 of 199 otherwise do not have binding legal force.

As a result of Constitutional Court Decision No. 003 / PUU-IV / 2006 dated July 25, 2006 The narrowing of the interpretation of the element of "unlawful" limited "against the law" based on the written law, so that the decisions of the Corruption Court after the birth of the Constitutional Court Decision much acquitted the accused on charges of Article 2 Paragraph (1) of Law No. 31, 1999 due to the element "against the law" can not be proven even if his actions result in financial losses of the State.

Human Rights contained in Article 28 letters A through Article 28 A of the Constitution of 1945. The article did not set about rights as a victim of acts of Corruption. The definition of the victim, for example: an individual, community, and country. So naturally when the Constitutional Court when a judicial review of the legislation, then it is viewed from the angle of the interests of human rights of the suspect or the accused rather than viewed from the side benefit of the victims of corruption, it is seen in some of the Constitutional Court Decision No. 013 / PUU-I / Decision 2003 at the core of the perpetrators of criminal acts of terrorism can not be subject to legislation retroactive,

In this paper the authors will discuss the development of the teachings of nature against the law in the Law on Corruption and human rights interpretation of the teachings of the nature of the substantive law against corruption

B. DISCUSSION

1. The development of properties teachings against the law in the Law on Corruption

The formulation of the doctrine of nature against the law contained in the Act No. 31 of 1999, the outline does not show a significant difference when compared to the previous corruption legislation. In connection with the application of the doctrine of positive functions unlawful nature of the material is the provision of Article 2 paragraph (1), because it explicitly "against the law" are defined as follows:

Article 2 (1) of Law No. 31 of 1999 determines:

Any person who acts unlawfully enrich themselves or another person or a corporation that could harm the state finance and economy, is liable to imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years, and a minimum fine of Rp. 200.000.000, - (two hundred million rupiah) and at most Rp.1.000.000.000, - (one) billion rupiah).

The provisions of Article 2 paragraph (1) of Law No. 31 of 1999 is a mere adoption of the elements contained in article 1, paragraph (1) letter a of Law No. 3 of 1971 with a few changes. The concept is against the law from the beginning has been formulated in

that article. Textual elements of "unlawful" is very different from the formulation of previous corruption legislation, namely Law No. 24 Prp of 1960 on Investigation, Prosecution and Investigation of Corruption. By forming corruption Act 1971, elements of the law against itself instead intended to replace the element of "committing a crime or offense" contained in Article 1 (a) of Law Number 24 Prp of 1960. The complete article reads:

Individual acts with or for committing a crime or offense to enrich themselves or another person or entity that directly or indirectly detrimental to the finances or the economy of the country or region or harm another legal entity which uses capital or concessions from the state or society.

The existence of an element of a crime or offense must be proven prior to convict on an offender, has resulted in many of the perpetrators is not covered by criminal law. Evidentiary requirements elements of crimes or offenses such, it has given rise to difficulties in combating corruption[556]. If the first ingredient is not proven, it thus can not be said to have occurred corruption, although according to the deed community's sense of justice are corrupt and the perpetrators should be convicted[557].

With the construction of such a law, in fact, do not effectively reach various acts according to the community's sense of justice are corrupt and should be convicted. To include corrupt behavior which is not affordable by the law of corruption, the law-forming corruption formulate such a way that includes actions to enrich themselves, another person or entity unlawfully. Elements unlawfully in Law No. 3 of 1971 contains broad sense, which is intended to cover the weaknesses of the elements of crimes or offenses in the previous corruption legislation.

Interest expansion of these elements, is solely to facilitate evidence at the trial sebagamana can be found in the Company Law No. 3 of 1971, namely:

With memngemukakan means against the law which implies a formal and material, it is intended to make it easier to obtain proof of the acts that can be punished, that enrich themselves or another person or entity, rather than meet the requirements to prove the prior existence of a crime / offense as hinted by Law Number 24 Prp of 1960.

Further to find out what is against the law as an element, in the explanation of Law No. 3 of 1971 is confirmed:

Law against it does not mean doing acts that can be punished, but it is a means to carry out acts that can be punished. Semnetara acts that can be punished itself is an act of enriching oneself, another person or entity.

In the literature of criminal law, it is still found a difference of opinion regarding the nature teachings against the law. Such differences have spawned their two senses, namely the unlawful nature of the formal (formele wederrechtelijkheid) and unlawful material (materiele wederrechtelijkheid)[558].

The application of the teachings of nature against the law meteriil in legislative policy in Indonesia has entered a new development, which is marked with the enactment of Law No. 31 of 1999 on Corruption Eradication. Against the hum of the material in this law be interpreted as acts of misconduct by a feeling of community justice must be prosecuted and convicted. Nevertheless, there is one aspect in these corruption legislation, namely the implications of the teachings of the nature of the substantive legal fight against the principle of legality[559].

Elucidation of Article 1 (1) of Law No. 31 of 1999 affirms, even though an act is not regulated in the legislation, howev-

556 Andi Hamzah, 1986, the Indonesian Corruption Problems and Solutions, Jakarta, Gramedia, p. 38
557 Elwi Danil, 2014, Concept Corruption, Crime and eradication, King Grafindo Persada, Jakarta, p. 139.
558 ibid, Thing. 143
559 ibid, Thing. 149

er, if such actions are deemed reprehensible because it does not match the sense of justice or norms of social life in the community, then such actions can be imprisoned ,

The application of the doctrine of positive functions unlawful nature of the material is considered contrary to the principle of legality as a fundamental principle of state of law, and is also a cornerstone of criminal law teacher. Therefore, the rejection of the principle of legality as a principle and understanding of the field of criminal law is contrary to the meaning of criminal law itself[560].

Doctrine unlawful nature of material with a positive function adopted by Law No. 31 of 1999 among experts criminal law deemed to give rise to legal uncertainty, so that it would constitute a violation of the principle of legality. Therefore, a positive function of the teachings of nature against the substantive law in the context of the principle of legality may not be applicable.

But if it is related to the characteristics of the legislation eradication of corruption as a criminal law statute specifically, the application of a positive function of the nature of the unlawful material should be considered as an exceptional nature. Such frameworks will become increasingly important when it comes to the characteristics of corruption as "extraordinary crime", then the application of a positive function of the nature of the unlawful material can be positioned as an "extraordinary crime instrument".

Attributed to the fact that flourish today, when eradication of corruption just rely on the terms of unlawfully formal, so many actors misconduct by feelings of justice are corrupt and state financial harm on a massive scale is not affordable by the provisions of law which exists. Consequently doer of the deed deemed corrupt and reprehensible it becomes not sentenced. So it should be understood that the purpose of putting the principle of "materiele wedderrechtelijkheid" as a special instrument that is to simplify the process of proving corruption trial.

Although there are rational reasons for applying a positive function of the doctrine against the substantive law in combating corruption, but rather the debates academic and political debate that is quite intense when formulating into policies legislation has almost become a futile for practice interests. This is because the Constitutional Court of the Republic of Indonesia in its Decision No. 003 / PUU-IV / 2006 states that the application of the teachings of nature against the law as something that is contrary to the constitution. Therefore, the Constitutional Court of the Republic of Indonesia decided that the explanation of Article 2 (1) of Law No. 31 of 1999 as amended by Act No. 20 of 2001 declared invalid.

2. Interpretation of Human Rights against the teachings of Unlawful Material properties in Corruption

Corruption is a universal phenomenon, which is attached and has been part of the history of human civilization for centuries past. Almost no single country in this world, both developed and developing countries free from corruption[561]. In some developing countries conditions of corruption is very serious and troubling, therefore, natural that the United Nations (UN) put the problem of corruption and efforts to overcome as an important agenda in various congress on "The Prevention of Crime and the Treatment of Offenders" , The members of the United Nations realized that the crime of corruption has gone beyond the territorial boundaries of each country[562]. To achieve the effectiveness of combating corruption in the Declaration, encouraged member states adopt the necessary legal provisions to the extent they have not been regulated by the respective legal systems.

560 *Ruslan Saleh, 1983, criminal acts and criminal liability: The Two Basics in Criminal Law, New Literacy, Jakarta, p. 46*

561 *ibid, Thing. 135*

562 *Edi Setiadi and Rena Yulia, 2010, the economic Criminal Law, Graha Science, Yogyakarta, p. 68*

Renewal of criminal law on corruption can be incorporated into prevention efforts such as the declaration recommended above. In that context, the provisions of criminal law that is no longer conducive to reduction efforts need to be reformed with due regard to the principles of law that reflects the rule of law. Legal reform in Indonesia, to tackle the problem of corruption is characterized by the formation of Law No. 31 of 1999 on the eradication of corruption, as amended by Act No. 20 of 2001 regarding the amendment of Law No. 31 of 1999 which is a replacement Act Law No. 3 of 1971.

There is some progress in the corruption law of 1999, which, if seen in a theoretical perspective can invite various academic discussions. In connection with this, then this paper tries to put forward an aspect which is quite interesting, especially concerning legislative policy in formulating a positive function of the teachings of nature against the law matriil (materiele wederrechtelijkheid), which from the beginning tend to be in contact with the principle of legality as a fundamental principle and " teacher cornerstone "of criminal law[563].

Doctrine unlawful nature of material arranged on the Explanation of Article 2 (1) of Law No. 31 of 1999 on Corruption Eradication, as amended by Act No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of Corruption in the science of criminal law doctrine known as unlawful material properties in a positive function.

Further elucidation of Article 2 paragraph (1) is tested to the Constitutional Court under Article 28D (1) 1945. The Constitutional Court holds that the explanation of Article 2 paragraph (1) of Law No. 31 The year 1999 was a deviation from the principle of legality that is contradictory to Article 28D (1) 1945 concerning the "right to recognition, security, protection and legal certainty".

MOJ stated: Article 28D (1) recognize and protect the constitutional rights of citizens to obtain insurance and legal protection is for sure, with which in the field of criminal law is translated as the legality principle contained in Article 1 (1) of the Criminal Code, that this principle is the demand for legal certainty where people may be prosecuted and judged on the basis of a legislation that is written (lex scripta) that had previously existed.

MOJ arguments about the unconstitutionality Explanation of Article 2 (1) of Law No. 31 of 1999 as contrary to Article 28D (1) 1945: the concept of unlawful material (materiele wederrechtelijk), which refers to the unwritten laws in the size of propriety, prudence and precision that live in the community, as one of the norms of justice, is a measure which is not certain, and vary from one community environment specific to the environment other communities, so that what is against the law in one place might elsewhere be accepted and recognized as legitimate, and not against the law, according to the measure known in the life local community.

MOJ analysis of gravity of this case is a conflict between the explanation of Article 2 paragraph (1) of Law No. 31, 1999 with the principle of legality is lex scripta. The teachings of nature against the substantive law in its function positive in itself is well known and is not regarded as contrary to the Human Rights as reflected in the discussion "that there is a possibility for an act qualified as a criminal offense is not based on criminal law that went before, but by "the general principles of law Recognized by civilized nations (Art.7. [2] of the European Convention for the protection of Human Rights and Fundamental Freedoms and the general principles of law Recognized by the comunity of nations (Art.15. (2) ICCPR). "this provision has historically parallel with the justification for the Nuremberg Trial[564].

563 *Elwi Danil, Op. Cit., P. 136*

564 *Titon Slamet Kurnia, 2015, Interpretation of Human Rights by the Constitutional Court of the Republic of Indonesia, Mandar Maju, Christian University Satya Discourse, p. 225*

But the current consensus in accordance with international practice, these rules have limited applicability because the area is more oriented to the seriousness of the crime a concern, namely the extraordinary crimes. As for example in the case of terrorism MKRI insist that terrorism is not extraordinary crimes, so that the Bali bomb terrorist entitled to enjoy the protection of human rights, namely the right not to be prosecuted under laws that apply retroactively (MOJ Decision No. 013 / PUU-I / 2003). Furthermore, in the case of the Human Rights Court that governs the presence of an ad hoc human rights court for cases of gross human rights violations before the enactment of legislation in terms of the right to be free from criminal laws retroactive. In this case MOJ in its Decision No. 065 / PUU-II / 2004 rejected the judicial review of the Applicant on the grounds of Article 28, first paragraph (1) of the 1945 Constitution should not be read separately but must be read in conjunction with Article 28 A (2) of the 1945 Constitution, and the MOJ opinion that genocide and crimes against humanity are extraordinary crimes that should not be allowed to go unpunished. It can be concluded MKRI exclude the application of the principle of non-retroactivity of the crimes against humanity that are extraordinary crimes.

The next question is whether the corruption status is not the same as crimes against humanity, while on the other hand policynya legislators have stated in Law No. 31 of 1999 that corruption is extraordinary crime, so that in applying the principle of legality MOJ was inconsistent in issuing a decision in which the crime of terrorism can not be retroactive, while crimes against humanity can be retroactive. In applying the teachings of the nature of the substantive law in the fight against corruption is the corruption crimes parameters specific criminal offense is an extraordinary crime (extra ordinary crimes) that require exceptional handling anyway, reference to the Rome Statute of the International Crime Court as justification for the principle of non retroactivity pengabsolutan also interlinked with the case of Rwanda and Yugoslavia because the Rome Statute was intended to apply prospectively to prosecute criminal offenses in accordance of its jurisdiction ratione materiae only to the member states. Which in principle teachings against the nature of the substantive law may be applied eksepsionis or particular circumstances of the particular crime and the crime of extraordinary (extraordinary crimes).

C.CONCLUSION

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