Law Development Journal
SINTA 3 Degree No. 225/E/KPT/2022 dated 07 December 2022
ISSN: 2747-2604
Volume 6 No. 2, June 2024, (226-238)

The Discretion of Internal Prosecutor Apply in Article 2 & 3 for Law Eradication of Corruption

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Abstract. *The criminal act of corruption is the favorite as if it never gets old, precisely the term extraordinary crime corruption, in addition, the perpetrators of criminal acts of corruption are mostly legal subjects who play a role based on the authority they have. However, it is not uncommon for prosecutors to use the type of subsidiary charge in prosecuting them to determine Article 2 as the primary charge and Article 3 as a subsidiary charge, even though it is clear that the perpetrator has abused their authority and resulted in financial losses to the State. This is a concern for the author to research facultatively on charges of subsidiarity for violations of Article 2 and 3. In this research, the author uses a type of Normative Juridical research, namely legal research that is oriented to secondary data and refers to legal material sources such as Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. The results of the research explained that the type of subsidiary indictment by making Article 2 the primary indictment and Article 3 the subsidiary indictment is a form of prosecutorial discretion in eradicating criminal acts of corruption effectively and efficiently so that it is unlikely that the defendant will escape criminal responsibility. Furthermore, Article 3 is the systematic lex specialist of Article 2 of the Corruption Eradication Law, because in criminal acts of corruption, the element "against the law" is the genus, while "abuse of authority" is the species.*

Keywords: *Corruption; Discretion; Prosecutor; Public.*

1. Introduction

Corruption is a problem faced by almost all countries, both developed and developing countries (Manihuruk et al., 2022) and Indonesia is no exception. After the enactment of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (Corruption Eradication Law) criminal statistics show that corruption cases are increasing in Indonesia (Efendi, Adhari, et al., 2023). This statement is proven by the

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Corruption Eradication Commission's criminal statistical records from cases that have been finalized with the following data (Efendi, Utamy, et al., 2023):

Table 1

Inkraht	2015	2016	2017	2018	2019	2020	Total
District Court	16	43	71	94	113	52	389
High Court	6	13	5	10	11	4	49
Supreme Court	15	14	8	5	14	14	70

Based on the data obtained by the author from the Corruption Eradication Committee above, it is clear that there is an increase in cases every year and the cases recorded in these criminal statistics are only a small portion of the corruption cases that have not been uncovered. Furthermore, the high number of corruption cases can be seen based on the type of case over the last 6 (six) years as follows (Komisi Pemberantasan Tindak Pidana Korupsi, 2023):

Table 2

Type of Case	2018	2019	2020	2021	2022	2023	Total
Procurement of goods and services	17	18	27	30	14	54	160
Licensing	1	0	0	2	0	0	3
Gratification	169	119	55	65	100	63	571
Levies/Extortion	4	1	0	0	1	1	7
Budget Abuse	0	2	6	3	0	0	11
Money Laundering Crime	6	5	3	7	5	8	79

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KPK Obstruction	3	0	0	1	0	2	6

The table above shows that in 2023 there will be an increase in corruption cases based on the type of case in the field of procurement of goods and services. Furthermore, the legal facts about the increase in corruption cases in Indonesia can be seen based on the type of position as follows (Efendi, Utamy, et al., 2023):

Tabel 3

Type of Position/Profession	2018	2019	2020	2021	2022	2023	Total
Members of the DPR and DPRD	103	10	22	29	35	1	200
Head of Institution/Ministry	1	2	4	1	2	3	13
Governor	2	1	0	1	1	1	6
Mayor/Regent and Deputy	30	18	8	13	5	7	81
Echelon I –IV	24	26	18	20	47	53	118
Judge	5	0	0	1	6	2	14
prosecutor	0	3	0	0	1	0	4
Police	0	0	0	1	1	0	2
Lawyer	4	1	0	1	3	2	11
Private	56	59	31	18	27	44	235
Etc	31	33	20	28	10	15	137
Corporation	4	1	0	1	1	0	7

In the table above, criminal statistics also show that in 2023 several professions

will experience an increase in corruption cases among echelon officials, the private sector, and other professions (Efendi, Utamy, et al., 2023). If analyzed, the classification of cases above is a criminal act of corruption with the motive of abusing authority or power.

Regarding the implementation of Article 2 and 3 of the Corruption Eradication Law, a lot of research has been carried out by previous researchers, at least it can be mapped into three groups of types of research.First, research on the material legal aspects of Article 2 and 3 (Triyanto, 2017) (Berlian Tarigan, 2020)(Monintja, 2020), Second, research on Article 2 and 3 from the formal legal aspect regarding the application of these two articles(Setiyawan, 2014)(Abdul Fatah ; Nyoman Serikat Putra Jaya; Henny Juliani, 2017)(Daniel Hasianto Hendarto, Ismunarno, 2021)(Budiman, 2017)(Manihuruk et al., 2022). Third, research on Article 2 and 3 based on the Constitutional Court Decision(Nafirdo Ricky Qurniawan, 2020)and (Prahassacitta, 2018).

After analyzing the research mapping above, the author has not found research on the position of Article 3 as a systematic lex specialist of Article 2 of the Corruption Eradication Law and the tendency of Public Prosecutors to use the type of subsidiary charges that are considered to be the most effective form of indictment (Roni Efendi, 2021) by making Article 2 the primary indictment and Article 3 a subsidiary indictment. Even though it is very clear that the suspects committed criminal acts of corruption by abusing their authority.

The next problem is that the use of these types of subsidiary charges or alternative charges is not imperative, but rather facultative as a prosecutor's discretion in eradicating criminal acts of corruption. So it is important to examine the ambiguity in the application of Article 2 and 3 of the Corruption Crime Law so that it is there are differences in understanding, reasoning, and interpretation of the formulation of Corruption Crimes in these two articles among legal circles (both from professional circles such as advocates, between law enforcers (judges), as well as criminal law experts who are proposed as experts in criminal cases. corruption crime.

2. Research Methods

The type of research that the author uses in this article is normative juridical (legal research), namely research carried out by examining secondary materials (Mestika Zed, 2007). Legal research which includes legal principles, reviewing and researching statutory regulations (Efendi, 2019)related to the Prosecutor's discretion in implementing Article 2 and 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. The data collection technique used in normative juridical research is the single method used in normative legal research (Manihuruk et al., 2022). The

data collection tool used in this research is a literature review, which is a tool for solving problems by tracing data from previous research studies and analyzing them qualitatively based on the analysis of the data in this research qualitatively based on the prosecutor's discretion in implementing Article 2 and 3 of the Law Eradication of Corruption Crimes.

3. Results and Discussion

The crime of corruption is a crime that can be categorized as a crime of gross human rights violations because the impact of this crime can disrupt the country's economy and also hinder the country's development and even this crime can also disrupt the world economy. Combating corruption is a crucial objective for governments to eliminate corruption, collaboration, and favoritism. Corruption is a monstrous and well-structured offense that demands exceptional efforts to put an end to it. Besides being a nationwide priority, the elimination of corruption is also a worldwide concern (Boge Triatmanto ; Suryaning Bawono, 2023).

Corruption is still a plague in most countries in the world today. Corruption exists in all countries, no matter how advanced their social and economic systems are, and is also a major obstacle to democratization and good governance. Throughout the world, local administrations are becoming more corrupt. In Indonesia, the phenomenon of corruption is growing root. Post-Soeharto era, the program for eradicating corruption aimed to increase the degree of transparency and governance (Ade Pranata, 2022).

These several situational characteristics of governance are unique to the context of developing countries such as Indonesia. Governance is often criticized for presenting weak institutions, low transparency, low accountability, low control of corruption and poor regulatory quality. This is due to several challenges including ICT infrastructure, human resources and the environment (Sabani et al., 2019).

Corruption is one of the most epidemic problems in Indonesian Governance that hinder sustainable development of the country. The practice is widespread across public organizations. In almost all comparative studies of corruption between countries, Indonesia sits at the top of the pyramid, coming in at 89% CPI. In response, the Indonesia government over the years commissioned The Corruption Eradication Commission (KPK) to stamp out corruption in all sectors of the economy (Sabani et al., 2019).

Based on the 2023 annual report, the Corruption Eradication Commission shows that Indonesia is still shackled by criminal acts of corruption. The KPK report can be classified based on the type of action starting from investigative activities total of 257 (two hundred and fifty-seven) cases were carried out, consisting of

96 (ninety-six) remaining cases in 2022 and 161 (one hundred and sixty-one) cases in 2023 (Korupsi, 2023). Activities for transferring cases to the prosecution stage (P-21) were carried out 129 (one hundred and twenty-nine)(Deputi dan Eksekusi Komisi Pemberantasan Korupsi, 2023).

The next KPK report is that prosecution activities were carried out in 181 (one hundred and eighty-one) cases, of which 129 (one hundred and twenty-nine) cases with Sprin.Juk was published in 2023(Deputi Penindakan dan Eksekusi Komisi Pemberantasan Korupsi, 2023b). Furthermore, the cases that have permanent legal force (Eintracht van gewijsde) in December 2023 are 113 (one hundred and thirteen) cases (Deputi Penindakan dan Eksekusi Komisi Pemberantasan Korupsi, 2023).

The data above is the handling and enforcement of criminal acts of corruption carried out by the Corruption Eradication Commission as a special apparatus in the field of corruption. In law enforcement efforts in Indonesia, especially in the process of eradicating corruption, the Corruption Eradication Commission does not work alone, but several other law enforcement agencies also have the authority to eradicate corruption, namely the police and prosecutors. With so many law enforcement agencies assigned, it is hoped that it can provide maximum results so that corruption cases in Indonesia can be eradicated optimally (Ni Putu Gita Loka Chindiyana Dewi et al., 2021). The criminal acts of corruption recorded above are a small part of the criminal acts of corruption that have not been revealed (hidden number of crimes)(Elwi Danil, 2014).

So, to optimize the eradication of corruption, good cooperation is needed by all elements of the nation, especially prosecutors. A prosecutor is an official who is authorized by law to act as a public prosecutor and implement court decisions that have permanent legal force. Meanwhile, the Public Prosecutor is a prosecutor who is authorized by law to carry out prosecutions and carry out the judge's decisions (Roni Efendi, 2022). So, based on their authority, prosecutors can make extraordinary efforts to eradicate criminal acts of corruption holistically and comprehensively by:

3.1. Prosecutor's Discretion in Determining the Type of Charge

Of the thirty types of criminal acts of corruption mentioned in The Law on the Eradication of Corruption Crimes, Articles 2 and Article 3 are among those that have sparked a lot of discussions, eventesting in the Constitutional Court it is also an article that is often used by public prosecutors, such as the 'prima donna' article. Article 2 paragraph (1) of the Corruption Law states that every person who unlawfully commits an act of enriching himself or another person or a corporation which can harm state finances or the state economy shall be punished with imprisonment for a minimum of 4 years and a maximum of 20

years and a fine of at least 200 million rupiahs and a maximum of 1 billion rupiahs. Furthermore, Article 3 states that every person who, to benefit himself or another person or a corporation, abuses the authority, opportunity, or means available to him because of his position or because of a position that can harm state finances or the state economy is subject to life imprisonment or imprisonment. a minimum of 1 year and a maximum of 20 years and/or a fine of at least 50 million rupiah and a maximum of 1 billion (FNH, 2016).

So in practice, the two articles in the Corruption Eradication Law have been effective in ensnaring perpetrators of corruption. The text of the article is very broad and acts against the law are also very broad. These two articles both ensnare perpetrators of criminal acts of corruption. The difference is, in Article 3, the perpetrator can be charged if he has the authority, whereas in Article 2, every person referred to in the article is broader and more general. There is nothing wrong with the formulation of the norms, except that there is a problem of criminal threats in Article 3. Article 3 defines abuse of authority, but the minimum threat is lower than an unlawful act. If Article 2 paragraph (1) carries a maximum prison sentence of 20 years and a minimum of four years, while Article 3 has a maximum penalty of 20 years, the minimum is only 1 year (FNH, 2016).

The criminal threat formulated for Article 3 should be higher than Article 2. This is because acts of corruption committed in Article 3 must have authority first, and there is an abuse of authority so that the act of enriching oneself, another person, or the corporation is detrimental to the state.

There already isestablishment of the Supreme Courtin several decisions, and was mentioned, among others, in decision no. 1038 K/Pid.Sus/2015. The Supreme Court thinks that state losses above 100 million will be subject to Article 2 of the Corruption Eradication Law. If the public prosecutor uses alternative charges, Article 2 or Article 3, then what is more appropriate, according to the judge in this case, is Article 2 paragraph (1) of the Corruption Eradication Law.

The formulation of the indictment must be in line with the results of the investigative examination, however, the prosecutor still has the freedom to formulate an indictment that can be juridically accountable. The prosecutor's discretion in optimizing the eradication of corruption includes determining the most appropriate, effective, and efficient type of indictment. Moreover, criminal acts of corruption are committed with the motive of abusing authority by violating Article 3 of the Corruption Eradication Law. So the type of indictment that is considered appropriate is a subsidiary indictment, namely a form of indictment that consists of two or more charges that are arranged or lined up sequentially, starting from the most serious criminal charges to the lightest criminal charges of corruption. In general, in terms of theory and practice, the

form of a subsidiary charge is used or filed if the criminal act that occurs gives rise to a consequence and the resulting consequence includes or is tangential to several provisions of the criminal article which are almost adjacent to each other on how to commit the criminal act. So, if you use this type of subsidiary charge, you need to pay attention (Roni Efendi, 2021):

a. The indictment must start from the sequence of the criminal act with the most serious threat as the primary indictment, namely Article 2 of the Corruption Eradication Law which serves as the main indictment or the first accusation. Next, some charges are lighter in threat as subsidiary charges, namely Article 3 of the Corruption Eradication Law.
b. The method of examining subsidiary matters in court is carried out based on priority, namely starting with the primary indictment and so on.

Furthermore, based on the letter from Attorney AngungMuda for Special Crimes Number: B-4016/F.3/Ft.1/11/2023 dated 13 November 2023 regarding Controlling the Handling of Corruption Crime Cases. Following up on the results of the 2023 Special Crimes Sector Technical Working Meeting at the Directorate of Prosecution regarding the Letter of the Director of Prosecution Number: B-567/F.3/03/2012 dated 19 March 2012 regarding the indictment which alleges violations of Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law in number 2 states that criminal charges proving subsidiary charges can only be carried out through the case title mechanism at the High Prosecutor's Office. Further developments are based on the Circular Letter of the Attorney General of the Republic of Indonesia Number: SE-001/A/JA/02/2019 dated February 21 2019 concerning Control of the Handling of Corruption Crime Cases in letter E is determined (Surat Edaran Jaksa Agung RI Nomor: B-4016/F.3/Ft.1/11/2023, 2023):

a. The District Prosecutor's Office handles criminal corruption cases, the resolution of which is the responsibility of the Head of the District Prosecutor's Office.
b. The High Prosecutor's Office handles criminal corruption cases, the resolution of which is the responsibility of the Head of the High Prosecutor's Office.

3.2. The Implementation of Article 2 and 3 of the Corruption Eradication Law in a Systematic Lex Specialist Manner

Disparities in punishment in handling criminal acts of corruption often give rise to legal uncertainty. Legislative products that should be a reference open up opportunities for inconsistencies in the application of the law and disparities in punishment. In the Corruption Law, there are several similar offenses but the criminal threats are different. This problem resulted in judges imposing different sentences for the same case. There is a reverse logic built by the creators of the Corruption Eradication Law. Offenses that contain an element of intent are

subject to lighter penalties than offenses of negligence(Setiyawan, 2014) namely regarding the qualifications and rationality of the differences in the provisions of Article 2 and 3 of the Corruption Eradication Law.

The qualifications for criminal acts of corruption are as stated in Article 2 and 3 of the Corruption Eradication Law. If detailed further, according to Article 2, what is meant by the crime of corruption has the following elements (Triyanto, 2017): Each person; Unlawfully; Carrying out acts of enriching oneself or another person or a corporation; Which can be detrimental to state finances or the country's economy. The criminal threat is imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years a fine of at least 200,000,000 (two hundred million rupiah) and a maximum of IDR 1,000,000,000,- (one billion rupiah).

Meanwhile, according to Article 3, the elements of criminal acts of corruption are as follows: Every person; to benefit oneself or another person or a corporation; Abusing the authority, opportunities, or facilities available to him because of his position or position; which can be detrimental to state finances or the state economy. The criminal threat is imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years a fine of at least 100,000,000 (one hundred million rupiah) and a maximum of IDR 500,000,000,- (five hundred thousand rupiah);

If we analyze Article 2 and 3 above, there are differences and similarities. The similarity between the two articles (Article 2 and 3) lies in the inclusion of the element "Every Person" and the element "can harm the state's economy and state finances". The difference lies in the formulation of Article 2 which includes the sentences "unlawfully" and "enriching oneself or another person or a corporation", while the formulation of Article 3 includes the sentence "Misusing the authority, opportunity or means available to him because of his position or status." ” and “benefit oneself or another person or a corporation” (Triyanto, 2017).

In other words, Article 3 does not contain the other core parts of Article 2, namely: Unlawful; Carrying out acts of enriching oneself or another person or a corporation. However, Article 3 contains a core part that is different from the two core parts of Article 2 of the Corruption Eradication Law, namely:

a. Abusing authority, the opportunities or means available to him because of his position or position.
b. to benefit oneself or another person or corporation.

Article 3 which contains the core part, namely: "Misusing the authority, opportunity or means available to him because of his position or position" is one species of and therefore does not have the same meaning as the core part,

namely: "unlawfully" of Article 2 of the Eradication Law. Corruption Crime (Triyanto, 2017).

The crucial difference concerns the element of "abuse of authority" as part of the core offense (bestanddeldelict) in Article 3, while the element "against the law" is part of the core delict (bestanddeeldelict) in Article 2 of the Corruption Eradication Law. The core part of the offense (bestanddelen) and the elements of the offense are different things. This was stated by Van Bemmelen by interpreting "bestanddelen" as an explicit element in the formulation of the offense, while "element" is inherent in the formulation of the offense. Meanwhile, Hazewinkel-Suringa uses the term "Samenstellen de Elementen" which is the same as "Bestanddelen", while "Kenmerk" is the same as "element" (Triyanto, 2017).

Indriyanto Seno Adji describes the elements of Article 3 as follows: "Abusing authority" as "bestanddeldelict" and "with the aim of profit." as "element delict". "Bestanddeldelict" is always related to acts that can be punished (strafbare handling), while the elements of the offense do not determine whether an act can be punished or not. As is known, the element "Abuse of authority" is included as a core part of the offense (bestanddeeldelict) in Article 3 of the Law(Triyanto, 2017).

So the practice of applying Article 2 and 3 of the Corruption Eradication Law in one indictment in a subsidiary manner is justified with the aim of lex specialist systematic. Legal problems in dealing with the growth of special criminal law outside of codification gave rise to the development of the principle of lexspecialisderogatlegigenerali into lexspecialis systematic. This principle is to answer if there is a conflict between one law and another law, both of which are special criminal laws, for example, tax criminal law and corruption crimes as regulated in Article 2 and 3 (Hiariej, 2021). If seen from the criminal law aspect, the systematic lexspecialis principle has three provisions. First, the criminal provisions in the law deviate from existing general provisions. Second, the law regulates formal criminal law which also deviates from the provisions of criminal procedure. Third, the adrasat or legal subject in the law is special (Amalia, 2023).

There are only two provisions relating corruption to state financial losses in the corruption law, namely Law No. 1 of 2023 and Articles 2 and 3 of the Corruption Eradication Law. However, these two articles are often used as articles to ensnare perpetrators of corruption who are strongly suspected of causing state financial losses. Meanwhile, regarding bribery, bribery is a form of corruption that is considered not detrimental to state finances because it does not require the calculation of state financial losses (Amalia, 2023).

4. Conclusion

The high rate of corruption in Indonesia is a collective responsibility to eradicate it and we cannot just stand idly by and leave it entirely to law enforcement officials. This is what is called optimization and synergy of all elements in the context of eradicating criminal acts of corruption, all elements have a strategic position, including the Prosecutor. So, to eradicate criminal acts of corruption in Indonesia, prosecutors can make efforts by their authority, namely carrying out prosecutions using a type of subsidiary charge which makes Article 2 a primary charge and Article 3 a subsidiary charge. This can be done because of the closeness of the formulation of norms between Article 2 and 3 of the Corruption Eradication Law. The text of the article is very broad and acts against the law are also very broad. These two articles both ensnare perpetrators of criminal acts of corruption. The difference is, in Article 3, the perpetrator can be charged if he has the authority, whereas in Article 2, every person referred to in the article is broader and more general. Furthermore, the practice of applying Article 2 and 3 of the Corruption Eradication Law in one indictment in a subsidiary manner is justified with the aim of lex specialist systematic because in criminal acts of corruption, the element "against the law" is the genus, while "abuse of authority" is the species. Thus, every act of abuse of authority is definitely against the law. During a court examination, if it turns out that the elements of the offense in Article 3 are not proven, does Article 2 need to be proven? This does not need to be further proven, because the element of "abuse of authority" is not proven, then mutatis mutandis the element of "against the law" is not proven.

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