RLJ Ratio Legis Journal
ISSN 2830-4624
published by
Master of Law, Faculty of Law
Universitas Islam Sultan Agung
Volume 3 No. 3, September 2024

Legal Politics of Determining Criminal Acts of Corruption Based on State Losses Arise from Unlawful Actions

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Abstract. *Realizing the complexity of corruption problems in the midst of a multidimensional crisis and the real threat that will definitely occur, namely the impact of this crime. So the crime of corruption can be categorized as a national problem that must be faced seriously through a balance of firm and clear steps by involving all potentials in society, especially the government and law enforcement officers to determine corruption cases from an unlawful act. The problems raised in this study are how to apply the legal policy of determining corruption based on state losses that originate from unlawful acts in current positive law, what factors can be used to determine corruption based on state losses that arise from unlawful acts and how the legal policy of determining corruption based on state losses that arise from unlawful acts in positive law in the future. The study uses a normative juridical method with qualitative analysis. The results of the study indicate that the meaning of unlawful in this broad sense is the absorption of the meaning of unlawful (onrechtmatige daad) in civil law which in the regulations of the central war authorities is considered as a form of other corruption (other than criminal acts) and can use the concept of materiality in determining state losses as a basis for determining unlawful acts.*

Keywords: *Corruption; Legal; Politics; State.*

1. Introduction

Corruption is included in the qualification of criminal acts this can be seen from the form of criminal threats for perpetrators of corruption in Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption (Law Number 20 of 2001) namely in the form of imprisonment. Didik Endro Purwoleksono explained briefly that a criminal act is a crime (misdrijven) if the type of punishment is imprisonment while the type of criminal offense is a fine.

One of the reform agendas initiated by the reformers is to eradicate Corruption, Collusion and Nepotism (KKN). At the time the reform was rolled out, there was a belief that the laws and regulations that were used as the basis for eradicating corruption were no longer considered appropriate to the needs of the community. This can be seen in the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XI/MPR/1998 Concerning the Implementation of a Clean and Corruption-Free State, Collusion and Nepotism. Decree of the People's Consultative Assembly of the Republic of Indonesia Number VIII/MPR/2011 Concerning Recommendations Direction Policy on Eradication and Prevention of Corruption, Collusion and Nepotism and point c of the consideration of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption which is stated as follows: "That Law Number 3 of 1971 concerning the Eradication of Criminal Acts of Corruption is no longer in accordance with the development of legal and community needs, therefore it needs to be replaced with a new Law on the Eradication of Criminal Acts of Corruption so that it is expected to be more effective in preventing and eradicating criminal acts of corruption."

Follow-up to the Decree of the MPR RI. No. XI/MPR/1998, several laws and regulations have been ratified and enacted as a legal basis for preventing and prosecuting corruption. This effort began with the enactment of Law Number 28 of 1999 concerning the Implementation of a Clean and Corruption-Free State, Collusion and Nepotism. The considerations of the law explain that the practice of corruption, collusion and nepotism is not only carried out between state administrators and other parties. This can damage the joints of community life, nation and state and endanger the existence of the state. So a legal basis is needed to prevent it.

Improvements in the field of legalization were also followed by the enactment of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption. As a refinement of Law Number 3 of 1999 concerning the Eradication of Criminal Acts of Corruption. 1971 Regarding the Eradication of Criminal Acts. The considerations of the law explicitly state that criminal acts of corruption are very detrimental to state finances or the state economy and hinder social development, so they must be eradicated in order to realize a just and prosperous society based on Pancasila and the 1945 Constitution. In 2001, Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption was refined again and amended by Law Number 20 of 2001. This refinement is intended to further guarantee legal certainty, avoid diversity of legal interpretations and provide protection for the social and economic rights of the community, as well as fair perpetrators in eradicating criminal acts of corruption.[1].

[1]Hartanti, E. Criminal Acts of Corruption. Jakarta: Sinar Grafika. 2005. P. 30.

Realizing the complexity of corruption problems in the midst of a multidimensional crisis and the real threat that will definitely occur, namely the impact of this crime. Then the crime of corruption can be categorized as a national problem that must be faced seriously through a balance of firm and clear steps by involving all potentials in society, especially the government and law enforcement officers.

The increase in uncontrolled corruption will bring disaster, not only to the national economy, but also to the life of the nation and state. The results of the Transparency International Indonesia survey show that Indonesia's ranking is ranked 126 out of 180 countries surveyed. The results of the Transparency International assessment in 2008 showed that Indonesia's ranking has increased and this fact is very concerning, because the legal apparatus and various supervisory institutions that have been built are still not running effectively.[2].

Corruption in Islamic law is regulated in Jinayah fiqh. Jinayah is an act or deed of a person that threatens the physical safety and body of a human being and has the potential to cause harm to human self-esteem and wealth so that the action or deed is considered haram to be carried out and the perpetrator must even be subject to legal sanctions, either given in this world or Allah's punishment in the afterlife.

Embezzling state funds in Islamic law is called Al-ghulul, namely stealing ghanimah (war booty) or hiding some of it (to own) before handing it over to the distribution point, even if what is taken is something of relatively small value, even just a piece of thread and a needle.

2. Research Methods

3. Results and Discussion

3.1. Implementation of Legal Policy for Determining Criminal Acts of Corruption Based on State Losses Originating from Unlawful Acts in Current Positive Law

The definition of 'against the law' in Article 2 paragraph (1) as a means in addition to the differences in perception, there are other problems in understanding the function of 'against the law' in the article. Although 'against the law' is mentioned as an element of the crime in Article 2 paragraph (1), its function is not as a

[2]Junjungan, M., Marlina, Implementation of Criminal Law Criminal Corruption in Labuhan Batu Regency (Case Study at Labuhan Batu Police Department), Mercatoria, Vol. 6 (2). 2013. Pp: 117-132

kernbestanddeel (core element of the crime), but only as a means to achieve prohibited acts, namely acts of enriching oneself, or others, or a corporation. The function of against the law as a 'means' can be seen from the explanation of the element of against the law in several previous regulations.

Thus, the perpetrator will be deemed to have been proven to have committed the crime of corruption in Article 2 paragraph (1), without first testing whether there is an unlawful nature in the act of enriching oneself, or another person, or a corporation, which he/she has committed. In fact, the relationship between the unlawful nature and the act of enriching oneself, should be able to show whether or not there is an unlawful nature in the act carried out by the perpetrator, as the main requirement for someone to be punished for committing a crime.

The problem in applying the element of 'against the law' in Article 2 paragraph (1) becomes increasingly complicated, when the Public Prosecutor (JPU) in practice uses it simultaneously with Article 3, either with a subsidiarity indictment model, or an alternative indictment model. The use of Article 2 paragraph (1) as a primary indictment contains its own complexity related to proving the element of 'abusing authority' in Article 3, because the scope of Article 2 paragraph (1) is actually broader than Article 3 of the PTPK Law. The fundamental question is, what should be used as the criteria to differentiate the application of the two crimes.

To overcome this problem, the Supreme Court has established a legal formulation which is stated in the Supreme Court Circular (SEMA) Number 7 of 2012. In the SEMA, the Supreme Court Justices agreed to use the criteria of the amount of state losses as the basis for applying Article 2 paragraph (1) or Article 3 of the PTPK Law. If the state loss is less than 100 million rupiah, then Article 3 is applied in the case, and if it is more, Article 2 is used. However, the presence of the SEMA still does not end the differences of opinion that occur.

The term 'unlawful' (wederrechtelijk) is found in the formulation of several crimes in the Criminal Code (KUHP), to describe the illegal nature of an action or a certain intention. 3 The term 'wederrechtelijk' which indicates the illegal nature of an action or deed is found in the following articles: Article 167 paragraph (1), 168, 179, 180, 189, 190, 198, 253-257, 333 paragraph (1), 334 paragraph (1), 335 paragraph (1) number 1, 372, 429 paragraph (1), 431, 433 number 1, 448, 453-455, 472 and 522 of the Criminal Code. Meanwhile, the use of the word 'wederrechtelijk' to indicate the illegitimate nature of an intention/purpose (oogmerk) can be found in the following articles: Article 328, 339, 362, 368 paragraph (1), 369, paragraph (1) 378, 382, 389, 390, 466 and 476 of the Criminal Code.

The word 'against the law' is also found in various regulations on criminal acts of corruption. In these regulations, 'against the law' is also used to indicate the illegal

nature of an act, as seen in various formulations of criminal acts of corruption in Against the Law/PMH) in civil law.

The first regulation that specifically regulates corruption is the Regulation of the Military Authority over the Army Region No. Prt/ PM/06/1957 concerning the Eradication of Corruption. In this regulation, corruption is defined as an act committed by anyone, whether for personal gain, the interest of others, or the interest of an organization, and which directly or indirectly causes losses to the state's economic finances. Furthermore, the Asset Inspection Agency was also formed, based on the Regulation of the Military Authority over the Army Region No. Prt/PM/08/1957.

The interpretation of 'against the law' in the material sense with this positive function, namely expanding the scope of the formulation of the crime, has been declared non-binding by the Constitutional Court (MK) in 2006. In the Constitutional Court Decision No. 003/PUU-IV/2006, dated 25 July 2006, the Constitutional Court considered that the explanation of Article 2 paragraph (1) was contrary to the 1945 Constitution, because it gave rise to legal uncertainty. The Constitutional Court was of the view that Article 28 D paragraph (1) protects the constitutional rights of citizens to obtain certain legal guarantees and protection - in criminal law translated as the principle of legality.

However, court decisions issued after the issuance of the Constitutional Court Decision, apparently still apply the definition of unlawful in a broad sense, namely formal and material (with a positive function). As the highest court institution, the Supreme Court itself has also emphasized in its decision, No. 103 K/Pid/2007, dated February 28, 2007, that based on la doctrine du sens clair, the definition of 'unlawful' in Article 2 paragraph (1) must be interpreted in a formal and material sense.

3.2. Factors that can be used to determine criminal acts of corruption based on state losses resulting from unlawful acts.

Convention Against Corruption (UNCAC) as ratified by Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Against Corruption, 2003), the Corruption Law which regulates one type of corruption crime in several different articles with different threats of sanctions has given rise to different perceptions among law enforcement officers in the selection or use of certain articles. The regulation regarding sufficient preliminary evidence is also considered open to multiple interpretations because it gives rise to the perception of whether each element in an article must be accompanied by sufficient preliminary evidence or not. Another problem is the development of regulations in Law Number 1 of 2023 concerning the Criminal Code (KUHP) which has the potential to be disharmonious with the Corruption Law (for example, the regulation regarding the calculation of state

financial losses which in the new Criminal Code can only be carried out by state auditors). The recovery of assets resulting from corruption that are located abroad is also often problematic because it encounters resistance from third parties, so it is necessary to consider a mechanism for canceling the transfer of assets to third parties (the use of the actio pauliana doctrine in bankruptcy law).

In addition to the above problems, problems were also found that arose from the institutional law enforcement for corruption crimes. Law enforcement for corruption crimes in practice is carried out by several institutions. The police are tasked with conducting investigations and inquiries into corruption crimes based on Article 14 letter g of Law Number 2 of 2002 concerning the Police. Meanwhile, the prosecutor is tasked with being an investigator and prosecutor as regulated in Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia as amended by Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia. Meanwhile, the KPK is tasked with conducting investigations, inquiries, and prosecutions of Corruption Crimes. The KPK's duties are as regulated in Article 6 letter e of Law Number 30 of 2002 concerning the Corruption Eradication Commission as amended several times, most recently by Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission. Meanwhile, the authority to prosecute is carried out by the Corruption Crime Court which is the only court authorized to examine, try, and decide corruption cases.

The implementation by several institutions needs to be investigated in depth to see the effectiveness and achievement of the objectives of law enforcement for corruption. The potential for disharmony of authority between institutions can also hinder the optimization of law enforcement for corruption. In addition, the effectiveness of supervision of the performance of the Police, Prosecutor's Office, KPK, Supreme Court, and the Directorate General of Corrections of the Ministry of Law and Human Rights in handling corruption is also considered less than optimal (National Police Commission, Prosecutor's Commission, KPK Supervisory Board, Judicial Commission, Supreme Court Supervisory Body). Furthermore, in several cases, the effectiveness of the performance of law enforcement for corruption cannot be said to be optimal, this occurs because of behavioral issues (integrity) of law enforcement officers so that they have not gained maximum trust from the public (there are cases of corruption involving law enforcement officers), as well as the lack of coordination between law enforcement officers which is reflected in investigations, prosecutions, and verdicts that have not been maximized. The competence of human resources of existing law enforcement officers is also something that needs to be continuously improved, this can be seen, for example, from the less than optimal application of money laundering articles in corruption cases.

Several issues found in the enforcement of corruption laws, both normative and implementative issues as described previously, became the starting point for the implementation of legal analysis and evaluation carried out by the National Legal Development Agency in 2023. In addition, Commission III of the Indonesian House of Representatives in a Working Meeting with the Minister of Law and Human Rights on September 5, 2022, specifically highlighted the institutions and processes of law enforcement (Police, Prosecutors, and KPK) and proposed the formation of an omnibus law for law enforcement officers in order to create the same perception in law enforcement. Furthermore, with the decline in Indonesia's CPI score in 2022, President Joko Widodo gave direction that this would be a correction and evaluation by the government so that in the future Indonesia's CPI would be better.

Therefore, the National Legal Development Agency through the National Legal Analysis and Evaluation Center as stipulated in the Regulation of the Minister of Law and Human Rights Number 41 of 2021 concerning the Organization and Work Procedures of the Ministry of Law and Human Rights has the task of carrying out legal analysis and evaluation. The legal analysis and evaluation activities carried out are interpreted as Monitoring and Review activities as mandated by Law Number 13 of 2022 in conjunction with Law Number 15 of 2019 concerning the First and Second Amendments to Law Number 12 of 2011 concerning the Formation of Legislation. Legal analysis and evaluation/monitoring and review are efforts to assess the law, in this case legislation as positive law, so that the achievement of the planned results, the impacts caused, and their benefits for the Unitary State of the Republic of Indonesia are known.

One of the main mandates in eradicating corruption is the return of state financial losses. State losses as a result of criminal acts of corruption are more emphasized on material or real losses. It is clear that there has been a state loss. The question is, why should the state financial loss be returned by the perpetrators of corruption? For this reason, it can be analyzed from the 22 thoughts of Utilitarianism put forward by Jeremy Bentham, with the principle *the principle of utility* which sounds *the greatest happiness of the greatest number* (the greatest happiness of the greatest number of people). This principle of utility becomes the norm for personal actions or government policies through the formation of laws. Thus, laws that provide the greatest happiness to the greatest part of society will be considered good laws. Therefore, the task of law is to maintain goodness and prevent evil. Specifically, maintaining utility[3].

Thomas Aquinas' view can also justify state action in regulating the return of state assets. That the basis of his thinking is related to what Aquinas considers general

[3]Muhammad Erwin and Amrullah Arpan, Philosophy of Law, (Palembang: UNSRI, 2007), p. 42

justice (justitia generalis). General justice is justice according to the will of the law which must be fulfilled for the public interest.[4].

In relation to the regulation of asset return mentioned above, the Indonesian government has issued various regulations that can be used as a basis/foundation in the government's efforts to return state financial losses as a result of criminal acts of corruption. The efforts referred to are regulated in: Law No. 31 of 1999 as amended by Law No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption (Corruption Law), Law No. 7 of 2006 concerning the Ratification*United Nations Convention Against Corruption*(Anti-Corruption Convention), Law 15 of 2002 as amended by Law No. 25 of 2003 concerning Money Laundering Crimes (TPPU Law) and Law No. 1 of 2006 concerning Mutual Assistance in Criminal Matters.

1) Obstacles faced in the Eradication of Criminal Acts of Corruption, Especially in Determining State Losses Preceded by Unlawful Acts

a. The lack of witnesses to support the proof of corruption cases.

b. Limited facilities and infrastructure in eradicating criminal acts of corruption.

c. The investigative audit process / calculation of state losses by authorized officials takes a relatively long time.

d. The application of subsidiary charges to Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law tends to be less than appropriate.

e. Differences in understanding between public prosecutors and judges regarding evidence in trials at the Corruption Crimes Court.

2) Solutions to the Obstacles Faced in Eradicating Criminal Acts of Corruption, Especially in Determining State Losses Preceded by Unlawful Acts

a. Maximizing witnesses who support evidence in corruption cases.

b. Taking advantage of the limitations of existing facilities and infrastructure.

c. Accelerate the investigative audit process / calculation of state losses by providing accurate data.

d. The application of subsidiary charges against Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law is appropriate.

e. Exploring the differences in understanding between public prosecutors and judges regarding evidence in trials at the Corruption Crimes Court.

[4]E. Sumaryono, Legal Ethics (The Relevance of Thomas Aquinas' Natural Law Theory), (Yogyakarta: Kanisius, 2000), p. 160

3.3. Legal Policy of Determining Criminal Acts of Corruption Based on State Losses Arise from Unlawful Acts in Future Positive Law

State losses are not only in the form of tangible or real state losses, but there are also potential state losses. This means that this state loss has not occurred, but this loss can occur in the future. The BPK in making the audit report also distinguishes between tangible state losses which mean they have occurred and those in the form of potential or which will occur. Therefore, BPK auditors certainly already understand what is meant by potential state losses.

What is said as potential state loss is a loss in the future and has not yet occurred. This potential arises because there is already a possibility that a state loss will occur if a project is continued. If a project is not continued with the same method and can eliminate the potential state loss, then the potential can be said to be lost.

According to the BPK auditors, if it is only potential, the BPK auditors will not immediately report to law enforcement officers that there is a state loss that is indicated to be in the realm of corruption. Because according to Mr. Wahyu Prabowo, the point of view must be distinguished. If viewed from the auditor's point of view, then as long as the potential state loss can be returned and the potential can be eliminated, the BPK will not have a problem with it. However, if viewed from the legal perspective of corruption cases, it is true that even though it has not occurred, if it has entered the element that can harm the state, it is included in the criminal act of corruption. Meanwhile, the BPK only reports state losses that have occurred or are tangible to law enforcement officers that contain elements of corruption.

Although not included in the criminal act of corruption, the BPK can still calculate state losses in the form of potential. This can be seen in the BPK Report on the Summary of Audit Results for Audits with Specific Purposes. In the report, the BPK presents the percentage of cases of potential state losses. In the Summary of Audit Results for Semester I of 2014 for Audits with Specific Purposes, the BPK presents cases of potential state losses that occurred, namely:

1) Non-conformity of work with the contract but payment for the work has not been made in part or in full.

2) Receivables or loans or revolving funds that are potentially uncollectible.

3) Assets are controlled by another party.

4) Other potential losses.

From the informant's explanation of the calculation of potential state losses, it can be obtained that in making calculations it depends on the type of potential case. Therefore, the calculation of potential state losses can be done in the following manner:

1. To calculate potential cases of state losses in the form of work that does not conform to the contract but payment for the work has not been made in part or in full, the state losses can be calculated from the value of the contract stated.

2. Then, to calculate the case in the form of potential losses in the form of receivables or loans that are potentially uncollectible, the potential loss can be calculated from the amount of receivables that have not been paid.

3. Meanwhile, for assets controlled by other parties, state losses can be calculated and determined based on the asset value stated in the financial report, namely the initial purchase value of the asset or historical cost.

4. Conclusion

The meaning of unlawful in this broad sense is the absorption of the meaning of unlawful (on rechtmatige daad) in civil law which in the central war ruling regulations is considered as another form of corruption (other than criminal acts). Factors that can be used to determine corruption based on state losses arising from unlawful acts include: The lack of witnesses to support the proof of corruption cases. Limited facilities and infrastructure in eradicating corruption, the application of subsidiary charges to Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law tends to be less precise, and Differences in understanding between the public prosecutor and the judge in terms of proof in trials at the Corruption Court. Calculation of state losses can be done using the comparison method. In this method, a comparison is made of the amount that should have been spent or received by the state with the amount that was actually received or spent. Therefore, the concept of materiality is used in determining state losses. Third, the method of calculating potential state losses also depends on the type of case. For the calculation of Non conformity of work with the contract but payment for the work has not been made in part or in full, the BPK uses the value basis contained in the contract to calculate state losses. For receivables or loans or revolving funds that are potentially uncollectible, they can be calculated based on receivables that have not been paid. And finally for assets controlled by other parties, historical cost is used for the assessment of the assets.

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