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The Applicability of Article 4 of Anti-Corruption Law and the Theory of Tort

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Abstract

Article 4 of the Indonesian Corruption Law stipulates that the return of state financial losses does not eliminate the criminalization of the perpetrators of criminal acts as referred to in Article 2 and Article 3. What about the suspects or defendants who return the results of corruption related to the theory illegitimacy? There are two theories about the illegitimacy which are; the theory of illegitimacy against the formal law and the theory of illegitimacy against the material law. The theory of illegitimacy against the formal law, providing an understanding that an action, act, or activity is said to be against the law when against the rules set in the law. While through the Decision of the Supreme Court, Indonesia adheres to this theory. According to this theory, an action, act, or activity is said to be against the law when it is against the rules established in the law and according to the conditions is a disgraceful act or illegal. The decision of the Supreme Court provides the criteria for the loss of unlawful nature because of the factors of the state not being harmed, the society served and the defendant not making a profit. With the enactment of this theory, the existence of Article 4 of the Indonesian Corruption Law, becomes invalid with the condition that the results of corruption and its benefits have been returned by the perpetrators of corruption.

Keywords: Indonesian Corruption Law; Returning the Benefits from a Corruption Act; Theory of Illegitimacy Against the Material Law.

Introduction

Indonesia has asserted in its constitution as a state of law so that the existence of law becomes important as a basis for carrying out the authority or good relationship between the government and its people and between communities.[1] In ordinary criminal cases, only one individual loses. However, corruption has a detrimental impact on a very broad scale.[2] Thus the objective of the Law is to give justice to everyone and to realize a legal justice it must be understood the nature of the law.[3] Government efforts in the above matter are forming the Corruption Eradication Commission (KPK) to ensure justice for all Indonesians. Authorized institutions are important and decisive in order to maintain harmony between cases that occur in Indonesia.[4] The KPK has again arrested the Red Handed Operation (OTT) of the Director General of Sea Transportation of the Ministry of Transportation with the initials ATB, which took place on Wednesday (08/23/2017) night until Thursday (24/8/2017). From the ATB residence which has been designated as a suspect, the KPK secured (the juridical term "seized") as many as 33 bags containing money in rupiah and foreign currencies. The value is around Rp. 18.9 billion. Besides dozens of bags containing money, the KPK also confiscated evidence in the form of accounts with a balance of Rp. 1.174 billion, and four ATM cards from three different banks. "So the total money found at Mess is around Rp. 20.74 billion," Deputy Chairman of the KPK Basaria said in a press conference at the KPK Building, Kuningan, Jakarta, Thursday (08/24/2017).

ATB are suspected of accepting bribes and subject to Article 12 letter a or letter b or Article 11 and Article 12 B of the Republic of Indonesia Law Number 31 of 1999 concerning Eradication of Corruption Crimes jo of Republic of

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[1] Mohamad Rifki, 'Mengkaji Legalitas Peraturan Mahkamah Agung No 2 Tahun 2012 Tentang Penyusuaian Batasan Tindak Pidana Ringan Dan Jumlah Denda Dalam KUHP' (2018) 16 Era Hukum.[148].

[2] Edi Toet Hendratno, 'Kebijakan Pemberian Remisi Bagi Koruptor Suatu Telaah Kritis Dari Perspektif Sosiologi Hukum' (2014) 44 Jurnal Hukum dan Pembangunan.[526].

[3] Meldy Ance Almendo, 'Prinsip Keadilan Dalam Tanggung Jawab Negara Terhadap Korban Tindak Pidana Karena Pelaku Tidak Menjalani Pemidanaan' (2016) 31 Yuridika.[20].

[4] F Limahelu, 'Suatu Perbandingan Mengenai Korupsi/Penyuapan Di Jepang Antara Aspek Hukum Dan Non-Hukum' (1990) V Yuridika.[162].

Indonesia Law Number 20 of 2001 concerning Amendments Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Corruption Crime. What's interesting about the OTT is that the KPK offers a sentence for ATB if he is willing to become Justice Collaborators (JC) or suspects who work together to dismantle their cases. This offer applies if ATB meets a number of conditions. One of the conditions is to dismantle the involvement of other parties, including corruption in the Ministry of Transportation.

What about the suspect or defendant, who returned the results of his corruption with his own awareness, is it to be lost in the nature of being against the law of corruption or are things that alleviate the criminal? Based on Article 4 of Act Number 31 of 1999 concerning Eradication of Corruption Crime (State Gazette of the Republic of Indonesia of 1999 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 387) in conjunction with Law Number 20 Year 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crime (State Gazette of the Republic of Indonesia of 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 5140; for the latter two of these Acts are called Anti-Corruption Law) formulated

> "The return of state financial losses or the economy of the country does not eliminate the participation of the criminal offender as referred to in Article 2 and Article 3.
> Explanation of Article 4
> In the event that the perpetrators of corruption as referred to in Article 2 and Article 3 have fulfilled the elements of the article in question, then the return of state losses or the state's economy does not abolish the criminal against the perpetrator of the crime. The return of state or state financial losses is only one of the mitigating factors".

Based on the provisions of Article 4 and Explanation of Article 4 of the Anti-Corruption Law above, it appears that this Act explicitly stipulates that even if the suspect/defendant has returned the "corruption results", this does not eliminate the lawlessness of the crime committed by the suspect/defendant. Based on the description above, this paper provides a description of whether the provisions of Article 4 of the Anti-Corruption Law are in accordance with the teachings or theories of the nature of the law that is adopted in the Republic of Indonesia. When

or in what cases can the theory of lawlessness be applied or can override Article 4 of the Anti-Corruption Law.

Theory of Tort

The author asserts that the term used is a crime and not a criminal act or criminal event or offense. Author's argument: First, all laws relating to criminal provisions refer to the nature of criminal acts. For example:

1. Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Corruption Crimes jo of Republic of Indonesia Law Number 20 Year 2001 concerning Amendment to Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Corruption Crimes.
2. Law of the Republic of Indonesia Number 15 of 2003 concerning Determination of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism into Law
3. Law Number 21 of 2007 concerning Eradication of Crime in Trafficking
4. Republic of Indonesia Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes
5. Law of the Republic of Indonesia Number 9 of 2013 concerning Prevention and Eradication of Crime of Terrorism Funding.

Secondly, there are 2 books on the Criminal Code, namely Book I on General Provisions and Book II on Criminal Acts. The meaning of crime here according to the author is the existence of actions or actions or activities or movements that are suspected or suspected of violating criminal statutory provisions. In criminal law, it is important that there is an unlawful nature of actions or actions or activities or movements and is known as mens rea (malicious intent of the perpetrator).

Some scholars views related to the meaning of the nature of being against the law are outlined below. There are scholars who call it against the law, the nature of acts against the law. First, according to Dutch, against the law is *wederrechtelijk* (weder: contrary to, against; recht: law). Second, in the opinion of experts regarding the notion of breaking the law, among others:

1. Simon: Tort means that it is against the law in general.
2. Noyon: Tort means being contrary to the subjective rights of others.
3. Pompe: Tort means contrary to the law in a broader sense, not only contrary to the law but also with unwritten law.

4. Van Hamel: Tort is on the ground or without rights/authority.[5]

Lamintang argues that the difference between experts is partly because in Dutch language Recht can mean legal “and it might mean” rights. “He said, in Indonesian, the word *wederrechtelijk* means” illegally “which can include the notion” contrary to law objective “and” contrary to other people’s rights or subjective law“.[6] *Hoge Raad* on January 31, 1919, NJ 1919, W. 10365 argued, among others, as follows: “*onrechmatig*” no longer only means what is contrary to the rights of others or contrary to the legal obligations of the perpetrator, but also what goes against both morality and propriety in community relations.[7]

According to the author, by referring to the above view, then acts against the law are acts that have robbed, endangered 5 other people’s legal interests, namely: life, body or body, independence, honor, and property.[8] Views or theories or teachings about the nature of the tort law, namely:

1. A formal view

In short, according to this formal view, it is said that there is an act or action or activity or movement that is against the law, when:

a. These actions or actions or activities or movements have complied with the prohibition of law.
b. If there are exceptions, even this is regulated by law. This means that the action or action or activity or movement is not against the law, it must be strictly regulated in the law.
c. According to this view, law = law (written).

2. Material view

According to this material view, the action or action or activity is against the law, when:

a. The action or action or activity or movement is not against the law is that the

[5] P.A.F Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Citra Aditya Bakti 1997).[153-180].
[6] *ibid.*
[7] Leden Marpaung, *Asas Teori Praktik Hukum Pidana* (Sinar Grafika 2005).[44].
[8] Didik Endro Purwoleksono, *Hukum Pidana* (Airlangga University Press 2013).[5-6].

act has been in accordance with the prohibition of law and violates the norms or facts in society.

b. Law is a law and an unwritten law

This view is influenced by a well-known civil case, namely the case of LINDENBAUM COHEN ARREST (Arrest H.R. Netherlands 1919).

According to Hoge Raad, the act of breaking the law (onrechtmatige daad) is not only an act that contradicts (wet) the law but also acts deemed from community relations are inappropriate. There are 2 functions of the illegal nature of the procedure: first, the negative function, the nature of violating the law materially in its negative function is used as the reason for removing the crime from an act outside the law, meaning an act that has been declared prohibited by law but the act can be excluded by an unwritten law so that the deed becomes illegal or becomes a crime. Second, the positive function, the positive function of the material against the law, that is the action or action or activity or movement is not prohibited by law, but by the community it is considered wrong, based on Article 1 clause 1 of the Criminal Code, the principle of legality, is not an act criminal and still cannot be convicted.

Referring to the nature of the law against the material law above, there are several consequences, namely: First, the law regulates that actions or actions or activities or movements are criminal acts, but the public does not criticize, so that actions or actions or activities are not punished. Second, the law does not stipulate that actions or activities or movements constitute a criminal act even though the community denounces, then actions or actions or activities or movements can still not be punished. Third, the law stipulates that actions or activities or movements constitute a criminal offense and the public denounces actions or actions or activities or movements, then actions or actions or activities or movements can be punished. Fourth, the Act does not regulate actions or actions or activities as a criminal offense and the public does not denounce actions or actions or activities or movements, so that actions or actions or activities or movements are not punished. The Supreme Court of the Republic of Indonesia, in its decisions, acknowledged the nature of

opposing material law:[9]

First, the nature of violating the law materially in its negative function is used as an excuse for the removal of an act outside the law, meaning an act that has been declared prohibited by law but the act can be excluded by an unwritten law so that the deed is lost against the law or become a crime. Examples of Supreme Court jurisprudence that show that the Supreme Court follows a negative legal viewpoint through the Supreme Court Decision related to the Machroes Effendi Case contained in the Decision of the Supreme Court of the Republic of Indonesia Number 42K/Kr/1965 January 8, 1966:[10]

> "An action, in general, can be lost in character as tort not only based on a provision in legislation but also based on principles of justice or unwritten and general legal principles; in this case, for example, the factors: the state is not harmed, the public interest is served and the defendant himself does not make a profit".

Secondly, it also acknowledges the nature of opposing material law in a positive function, as in the decision No. 275K / Pid / 1983 dated December 29, 1983, in the corruption case of Bank Bumi Daya. The Supreme Court clearly defines the nature of opposing material law, namely according to propriety in society. Especially in cases of corruption if a civil servant receives excessive facilities and other benefits with the intention that he misuses the power or authority inherent in his position. That according to the Supreme Court is an act against the law because according to decency is a despicable act or an act that pierces the feeling of justice of many people. This was stated in the decision No. 275K/Pid/1983 dated December 29, 1983, in the corruption case of Bank Bumi Daya. Referring to the Supreme Court Decision above, there are 3 elements or conditions that cause the loss of the illegal nature of a crime, namely: the defendant is not benefited, the state is not harmed and the community is served.

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[9] Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiil Dalam Hukum Pidana Indonesia* (Alumni 2001).[25].

[10] *ibid.* Yurisprudensi Decision of the Supreme Court of the Republic of Indonesia Number 71/K/1970 27 May 1972; Decision of the Supreme Court of the Republic of Indonesia Number 81/K/Kr/1973 30 May 1977.

Restitution in Corruption

1. **As *Clementie***

Article 197 of the Criminal Procedure Code expressly regulates about the judgment verdict shall contain:

a. The head of the verdict reads: "For Justice Based on the One God";
b. Full name, place of birth, age or date, gender, nationality, place of residence, religion, and occupation of the accused;
c. Charges, as contained in the indictment;
d. Considerations are arranged concisely about the facts and circumstances along with the evidence obtained from the examination in the court which are the basis for determining the defendant's fault;
e. Criminal charges, as contained in the claim letter;
f. The article of legislation that forms the basis of convictions or actions and articles of statutory regulations which are the legal basis of decisions, accompanied by burdensome conditions and those that alleviate the defendant (bold and italics from the writer/writer);
g. The day and date of the meeting of the panel of judges unless the case is examined by a single judge;
h. Statement of the defendant's fault, the statement has been fulfilled by all elements in the criminal act formulation accompanied by their qualifications and convictions or actions are taken;
i. The provisions for which case fees are charged by stating the exact amount and provisions concerning evidence;
j. A statement that all the letters turned out to be fake or a description of where the falsehood was located, if there was an authentic letter considered false;
k. The order that the defendant be detained or remain in detention or be released;
l. Day and date of the decision, the name of the public prosecutor, the name of the judge who decides and the name of the clerk;

Second, the non-fulfillment of the provisions in paragraph 1 letters a, b, c, d, e, f, h, i, j, k and I of this article result in the decision being null and void.

Third, decisions are implemented immediately according to the provisions of this law. Indeed, the Criminal Procedure Code does not provide further details of what is meant by the incriminating and mitigating conditions of the defendant, however, by looking at the Court's decision, either at the District Court, High Court or at the Supreme Court, when the defendant returns the criminal act, including corruption it then alleviate the element of crime. One example of a Corruption Criminal Court Decision at the Surabaya Class District Court specifically, Number 57/Pid.Sus/TPK/2014/PN SBY, on July 3, 2014, in one of the legal considerations decided on mitigating matters, namely the

defendant has returned funds of Rp. 25.000.000 from State losses of Rp. 104.000.000. Referring to the verdict of the corruption Court above, when the defendant has returned a portion of the proceeds of the crime of corruption, this has become a supplementary factor or things that have alleviated the defendant's self. What if all the results of corruption were returned, whether as mitigating factors or could actually eradicate the trait against criminal law?

2. Unfulfilment of Corruption Element

As explained above, that by referring to the Republic of Indonesia Supreme Court Jurisprudence, there are 3 elements or conditions that cause the loss of the illegal nature of a crime, namely: the defendant is not benefited, the state is not harmed and the community is served. In essence, by acknowledging the view of the nature of opposing the material law, according to the author if all the results of corruption are returned by the suspect or defendant, it can be used as a factor that eliminates the crime against criminal law, so that the suspect or defendant does not need to be punished. The author's argument:

1. for corruption, there must be state losses.
2. This is a logical consequence of the Constitutional Court Decision Number 25/ PUU-XIV / 2016, which briefly decides:
3. The Constitutional Court's ruling abolished, namely by stating that the word "can" in a criminal act of corruption contradicts the 1945 Constitution and does not have binding obligations.
4. Corruption is a material crime and is no longer a formal crime.
5. The meaning of material crime here is that there must be a consequence that is prohibited by law, namely the existence of "state financial loss" or "state economy".
6. Although there is an action or action or activity carried out.
   a. against the law, and
   b. enrich yourself or other people or a corporation has been fulfilled in real terms,
   c. However, if the consequences are prohibited, namely that it is detrimental to the country's finances or the country's economy has not or has not occurred or cannot be calculated.[11]

[11] Didik Endro Purwoleksono, 'Tipikor Pada Korporasi Dan Putusan Mk Nomor 25/Puu-Xiv2016', *Forum Hukum PT Pembangkitan Jawa-Bali* (2017).

No Longer Considered as Corruption

The return of all proceeds of criminal acts along with the profits obtained from the results of corruption by the perpetrators resulted in no state loss. As the views of the Supreme Court above, the element of crime are no longer fulfilled

The Element of Enrichment

In the author's opinion, the return on the results of corruption can cause the defendant to be disadvantaged, with the following conditions:

1. The suspect or defendant returns all proceeds of corruption;
2. The suspect or defendant returns all bank interest, deposits, the proceeds of profits obtained from the results of corruption;
3. Including here, the wealth of the parties who benefit from actions or actions or corruption activities of the suspect or defendant. This means that the suspect or defendant returns all profits obtained by another party, whether family or corporation, because of actions or corruption activities of the suspect or defendant;
4. In other words, when a suspect or defendant returns only a portion of the proceeds of corruption, which means the suspect or defendant continues to benefit, this is only a mitigating factor and not an offense. Suspects or defendants can still be processed and sentenced.

Benefiting the Society

It can be predicted that by returning all the results of corruption along with interest, the benefits obtained from corruption, then become State funds. In other words, with the return of corruption results, the State gets fresh funds for financing development, which ultimately can be used by the community. For example for the construction of highways, where people can use the highway to carry out daily activities.

Time and Consequences of Restitution

Referring to the Supreme Court jurisprudence above, the return time can be made:

1. Before an investigation is conducted

   Of course with the return of all the results of corruption along with the profits

obtained by the suspect prior to the investigation, and then referring to Article 4 of the Anti-Corruption Law, It seems clear here there is no corruption. The return of all proceeds of corruption along with the profits obtained by the suspect prior to the investigation indicates a good intention of the suspect or defendant so that the missing nature of the mens rea or the malicious intent of the suspect or defendant makes no corruption.

2. At the time of the investigation

   Of course with the return of all the results of corruption along with the profits obtained by the suspect or defendant at the time of the investigation, and then referring to Article 4 Anti-Corruption, It seems clear here that there is still corruption.

The return of all proceeds of corruption along with the profits obtained by the suspect at the time of the investigation, shows the good intent of the suspect, so that the nature of the mens rea or the suspect's malicious intent is lost, making no corruption. The investigator, in this case, can stop the investigation of the suspect by issuing a Notice of Progress on Investigation Results (SP2HP), arguing that this case cannot be increased to an investigation.

At the time of the investigation

The return of all the results of corruption along with the profits obtained by the suspect at the time of the investigation, shows the good wishes of the suspect so that the nature of the mens rea or the suspect's malicious intent is lost, making no corruption. Investigators in this case can stop the investigation of the suspect by issuing an Investigation Termination Order (SP3). The reason for SP3 based on Article 109 of the Criminal Procedure Code is that SP3 is issued when:

1. Not a criminal offense;
2. Not enough evidence;
3. The case is stopped for the law:
   a. Suspect died;
   b. Expired;

c. *Ne bis in idem.*

Thus, by missing out on the law-breaking nature of corruption, it can be said that the case is not corruption.

At the time of the examination before the trial

The return of all the results of Corruption along with the profits obtained by the defendant at the time of the examination in front of the court, then this can be a court decision to release the defendant from all legal claims (*onslag van recht vervolging*).

1. If the court is of the opinion that from the results of the hearings, the defendant's mistake for the action that was indicted against him was not legally and convincingly proven, the defendant was acquitted.
2. If the court is of the opinion that the act indicted against the accused is proven, but the act is not a criminal offense, then the defendant is free from all lawsuits.
3. In the case referred to in paragraph 1 and paragraph 2, the defendant who is in detention status is ordered to be released immediately as well, except because there are other valid reasons, the defendant needs to be detained.

The defendant should also be returned all the results of corruption along with the benefits obtained by the defendant at the time of the examination before the court, which means missing the lawless nature of corruption, then what was charged was proven, but because of the lawlessness of Corruption, so it was not corruption, is free from all lawsuits (onslag van recht vervolging) and not a free verdict (vrijspraak). Free verdict (vrijspraak) is dropped when one of the elements charged is not convincingly proven.

The Theory of Nigel Walker and Jeremy Bentham

From the theoretical framework, the views of the 2 Scholars below can be used as theoretical analyzes related to the loss of the nature of the law against corruption, namely the theory put forward by Nigel Walker and Jeremy Bentham. Nigel Walker writes criminal law should not be used for: First, the purpose of retaliation. Second,

for action that does not cause victims and/or losses. Third, when there are other facilities that are more effective and with fewer losses in dealing with deeds that are considered despicable. Fourth, if the negative impact of the criminal is greater than the crime. Fifth, if you do not get strong public support. Sixth, if it has been calculated it will not succeed or will not be implemented.

The return of all proceeds of CORRUPTION along with the profits obtained by the suspect or defendant, this brings the consequences:

1. Does not cause casualties and/or losses, in this case, there is no state loss.
2. There are still other facilities that are more effective and with fewer losses in dealing with deeds which are deemed despicable, in this case, the state does not need to issue more cost to process, convict and feed drinkers to convicted corruption.

Jeremy Bentham wrote the criminal should not be applied/used if "groundless, needless, unprofitable, or inefficacious.[12]

Cease of Investigation

The return of all the results of corruption along with the benefits obtained by the suspect or defendant to the State, this has the consequence that the state is not burdened with finance to process and feed suspects/defendants/convicts detained, convicted. The facts in the field between the results of corruption and the return of the results of corruption are not balanced. This means that the costs incurred by the State to process corruption perpetrators are not balanced with the return of state financial losses.

On the other hand, by being processed, the suspect/defendant/convicted party will tend to refuse to return the corruption result and instead prefer to undergo a substitute sentence in the form of imprisonment rather than paying compensation. When they left LP, they remained rich. Even though the Prosecutor as a state lawyer has the right (or obligation) to do a civil suit to the convicted person, after the

[12] Barda Nawawi Arief, *Bunga Rampai Hukum Pidana* (2nd edn, Citra Aditya Bakti 2002).

court decision has obtained permanent legal force and it is known that there are still property of the convicted person suspected or reasonably suspected of also originating from corruption for the state (see Article 38 C of the Corruption Act), but in reality, until now, there has never been a civil lawsuit from the Prosecutor as a state law to the convicted person.

Conclusion

Based on the description above, it can be concluded that the suspect or defendant who returned the enrichment resulted from corruption along with the benefits he gained with his own awareness, first, it did not fulfill the element of corruption; thus, is not a crime. Secondly, the provisions of Article 4 of the Corruption Law can be deviated or not enforced, with other words not only those which alleviate the defendant's sentence, but the defendant does not need to be convicted or released.

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