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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.

PROCEEDINGS
The 5th International Conference and Call for Paper Faculty of Law 2019
Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

Interprestation Teaching Of Human Rights Laws Against Material In Corruption Provisions

Burham Pranawa, Hartiwiningsih, Hari Purwadi
burham_9@yahoo.com
Program Doktor Ilmu Hukum Universitas Sebelas Maret
Jl. Ir. Sutami No. 36A, Jebres, Surakarta, Jawa Tengah, 57126

burham_9@yahoo.com

Abstrac

So far, the problem of corruption is seen separately from human rights. Even in the conversation about the corruption Eradication agenda. Human rights enforcement perspective lacks attention. When in fact, human rights can be one of the tools of analysis of corrupt practices corruption Because always causes casualties items, namely for individuals, communities, and the State. By using human rights as a perspective in viewing and analyzing corruption, it can show victims and obligations that must be fulfilled by the State. Through human rights analysis. Elucidation of Article 2 paragraph (1) of the Law of the Republic of Indonesia No. 31 of 1999 concerning Eradication of Corruption by the Constitutional Court in its Decision dated July 25, 2006 Number 003 / PUU-IV / 2006 was declared Contrary to Article 28 D Paragraph (1) of the 1945 Constitution so that the Elucidation of Article 2 paragraph (1) of Law 31 Year 199 declared not to have binding legal force. The author is of the opinion that the Constitutional Court when conducting a judicial review of the law tends to see more from the point of view of the rights of suspects or Defendants rather than looking at the interests of Victims of corruption. The purpose of writing this article is to find out the development of the teachings against the law in the Corruption Act and to know the interpretation of human rights cases against the teachings of the nature of the material unlawful acts in corruption.
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Keywords: Corruption, Human Rights, against material law

A. 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.[505] Further, he said that the State law guarantees legal order in society, which

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

means that the State give legal protection to the public, between law and power there is a reciprocal relationship.[506]

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.[507] 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.[508]

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.[509]

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.[510]

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.[511]

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

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

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

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

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

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

511 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.

Corruption Eradication that reinforce the meaning of "unlawful" as outlined in the explanation 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, para-

graph (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.[512]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.[513]

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).[514]

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.[515]

512 Andi Hamzah, 1986, the Indonesian Corruption Problems and Solutions, Jakarta, Gramedia, p. 38

513 Elwi Danil, 2014, Concept Corruption, Crime and eradication, King Grafindo Persada, Jakarta, p. 139.

514 *ibid*, Thing. 143

515 *Ibid, p. 149*

Elucidation of Article 1 (1) of Law No. 31 of 1999 affirms, even though an act is not regulated in the legislation, however, 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.[516]

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".[517]

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.[518]

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.[519]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

516 Ruslan Saleh, 1983, criminal acts and criminal liability: The Two Basics in Criminal Law, New Literacy, Jakarta, p. 46
517 Elwi Danil, Op. cit., p. 153
518 Ibid, p. 154
519 Ibid, p. 135

the territorial boundaries of each country. [520]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.

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.[521]

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

520 *Edi Setiadi and Rena Yulia, 2010, the economic Criminal Law, Graha Science, Yogyakarta, p. 68*
521 *Elwi Danil, Op. Cit., P. 136*

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.[522]

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

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) ..

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