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Criticism of the Norm Formulation of Article 3 of the Corruption Crimes Act

Amiruddin

Lecturer Faculty of Law, Universitas Mataram Indonesia

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Abstract

Every norm formulation must be clear (lex certa) so that there are no opportunities for multiple interpretations, therefore in the formulation of norms it must be based on the theory of norm formulation. Article 3 of the Corruption Crime Act is one of the articles which is the object of this study. The formulation of norms of Article 3 of the Corruption Crime Act is analyzed using the norm formulation theory, namely the Subject of the norm, the Object of the norm, the Operator of the norm, and the Condition of the norm. With this theory in the end it can be concluded that the formulation of the norms of the article is the formulation of the right norm or the formulation of the norm that is not right.

Keywords: *Formulation of Norms and Theories; Corruption Crimes*

Introduction

Starting this article, I begin by quoting the complete formulation of Article 3 of the TPK Law as follows:

> Any person who has the purpose of benefiting himself or another person or a corporation, misusing the authority, opportunity or means available to him because of a position or position that can be detrimental to the country's finances or the country's economy, is liable to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

Norms formulated in Article 3 of the TPK Law, if read in passing, do not appear to have any weaknesses or weaknesses, for this reason, in writing, I will analyze the norms of Article 3 of the TPK Law using the norm formulation theory, which consists of:[1]

a. Subjects of Norms, i.e. who are the targets of these norms (legal subjects)

b. Object norms, ie regulated behavior (actions)

[1] Maria Farida Indrati S, *Ilmu Perundang-Undangan*, Jilid 1, Kanisius, Yogyakarta, 2007, h. 98.

c. Norm operator, which is a prohibition norm

d. Norm conditions, which are conditions that mean the act is done with an inner attitude or an intention.

Based on the norm formulation theory above, it can be analyzed whether the formulation of norms contained in Article 3 of the Corruption Crime Act can be categorized as fulfilling the norm formulation theory criteria?

Result and Discussion

1. Subject Norms Article 3 of the Corruption Law

Based on the formulation of Article 3 above, I am of the opinion that there is a mistake with the norm subject formulated by Article 3, that is "everyone", because according to Article 1 number 3 the TPK Law referred to as "everyone" is an individual or corporation. Based on the formulation of "everyone", then the question can be asked, whether individuals or corporations can abuse the authority, opportunities or facilities available to him? In my opinion the only ones who can abuse the authority, opportunity or means available to them are those who have the authority, namely the Civil Servants, State Officials and the administration of the state, so that individuals who are not Civil Servants or corporations cannot abuse the existing authorities, opportunities or facilities. because they do not have the authority either from the law (attribution), delegation, or from the mandate.

In law enforcement practices of corruption, often the provisions of Article 3 of the TPK Law are also imposed or applied to those who are not civil servants, state officials, or state administrators, such as entrepreneurs or providers of goods and services that are indicated to have committed criminal acts of corruption with illogical arguments, such as the sentence is lighter than the application of Article 2 of the TPK Law where the sentence is more severe, namely a minimum sentence of 4 years while Article 3 of the TPK Law has a minimum sentence of 1 year. Whereas individuals who are not civil servants do not have the authority either from attribution, delegation or mandate.

The policy of applying Article 2 paragraph (1) or Article 3 of the TPK Law is based on SEMA No. 7 of 2012 as amended by SEMA No. 3 of 2018 concerning the value of state losses, provided that:

a. If the value of state losses is above Rp. 200,000,000, then Article 2 paragraph (1) applies

b. If the value of state losses up to Rp. 200,000,000, then Article 3 of the TPK Law is applied

In my opinion, SEMA No. 3 of 2018 contradicts the norm or behavior object regulated in Article 3 of the TPK Law, namely "abusing the authority, opportunity or means available to him because of his position or position", because the application of article 2 or Article 3 of the TPK Law is not based on the size of the loss the state, but is based on the type of criminal offense that was violated.

2. Objects of Norms Article 3 of the Corruption Law

The object of norms or behaviour regulated in Article 3 of the TPK Law is "misusing the authority, opportunity or means available to him because of his position or position".

In the TPK Law or criminal law in general there is no explanation regarding "abuse of authority", but the concept is explained in the science of administrative law.

Before the enactment of Law No. 30 of 2014 concerning Government Administration, the concept of abuse of authority used by law enforcement officials is sourced from the doctrine or opinion of scholars in the field of administrative law.

Relying on existing legal sources, namely the first legislation; second, jurisprudence; third, the doctrine/opinion of scholars; fourth, treaties or agreements, then the concept of abuse of authority that should be followed or that is a reference for law enforcement officials in criminal acts of corruption is the concept of abuse of authority that has been regulated in Law No. 30 of 2014 concerning Government Administration.

Article 17 paragraph (2) of Law NO: 30 of 2014 concerning Government Administration, stipulates that prohibitions on the abuse of authority include:

1. Prohibition of exceeding authority;
2. Prohibition of mixing authority; and / or
3. Prohibition of acting arbitrarily

Furthermore, what is categorized as an act beyond authority is:

1. Act beyond the term of office or the deadline for validity of Authority;
2. Act beyond the territorial limits of the Authority; and / or
3. Acting contrary to statutory provisions

The actions of government bodies and / or officials which are categorized as confusing authority are:

1. Acting outside the scope of the field or material provided for Authority; and / or
2. Acting contrary to the stated purpose of the Authority.

Whereas the actions of government bodies and / or officials which are categorized as arbitrary are:

1. Act without authority; and / or
2. Acting contrary to the Court's Decision which has permanent legal force.

The legal consequences of each act of abuse of authority mentioned above, are:

1. If the action or decision is carried out in excess of authority and is carried out arbitrarily, then the action or decision will be UNAUTHORIZED if it has been tested and there is a court decision that has permanent legal force.
2. If the action or decision is carried out by mixing authority, then the action or decision is CANCELED if it has been tested and there is a court decision that has permanent legal force.

Supervision of acts of abuse of authority according to Article 20 of Law No. 30 of 2014 is carried out by APIP (Government Internal Supervisory Apparatus). APIP Monitoring Results can be in the form of:

1. There are no errors;

2. There are administrative errors; or

3. There are administrative errors that cause state financial losses.

If there is an administrative error in the results of APIP's supervision, a follow-up in the form of administrative improvement is carried out in accordance with the provisions of the legislation.

If the results of APIP supervision have administrative errors that cause state financial losses, then the state financial losses will be refunded no later than 10 (ten) working days from the date of decision and issuance of supervision results.

Reimbursement of state losses is borne by the Government Agency, if the administrative error occurs not because of an element of abuse of authority. While repayment of state losses is charged to Government Officials, if the administrative error occurs due to an element of abuse of authority.

In the case of corruption criminal cases related to the abuse of authority which causes state losses, often the suspect or legal advisor wants to first test the abuse of authority through the State Administrative Court. But on the other hand the TIPIKOR Court continues to investigate the case of abuse of authority, by referring to SEMA No. 4 of 2015 concerning Procedure Guidelines in the Evaluation of the Abuse of Authority that states that the Court (TUN) has the authority to receive, examine, and decide upon an assessment of whether there is an abuse of authority in the Decree and / or Acting of a Government Official before the criminal process.[2]

Therefore, if the abuse of authority has begun to be examined at a Corruption Court hearing, the TUN Court will no longer have the authority to examine and decide upon the abuse of authority.

3. Operator Norms Article 3 of the Corruption Crime Act

Operator Norms or prohibition norms from Article 3 of the TPK Law are "can harm the country's finances or the country's economy". Based on provisions of Article 1 number 22 of Law No. 1 of 2004 concerning the State Treasury, the definition of state/regional loss is the reduction of real, definite amounts of money, securities, and real goods as a result of unlawful acts of intentionally or due to negligence.

Although the concept of state loss is formulated in Article 1 number 22 of Law no. 1 of 2004 expressly emphasizes the reduction in real, definite amounts of money, securities and goods, but in practice (before 2016) this was ignored, because the norm operators of Article 3 of the TPK Law were formulated with the phrase "can be detrimental to state finances or the country's economy ". This is then interpreted that the state loss does not have to be real, but it is enough if it has the potential to cause state losses. Because of such an interpretation, in 2016 the provisions of Article 2 and Article 3 of the TPK Law were submitted to the Judicial Review to the Constitutional Court, and through the Decision of the Constitutional Court No. 25 / PUU-XIV / 2016 dated 25 January 2016, the Constitutional Court stated

[2] Lihat Pasal 2 ayat (1) SEMA No. 4 Tahun 2015.

that the element of adverse state finances is no longer understood as an estimate (potential loss) but must be understood to have actually happened or actual loss to be applied in criminal acts of corruption.[3]

Thus, the element "can harm the country's finances or the country's economy" must be interpreted as a real state loss and a definite amount.

The problem that arises then is who has the constitutional authority to calculate state losses?

Initially what was used by law enforcement officers to calculate and assess state losses was the Financial and Development Supervisory Agency (BPKP), but in the trial of the Corruption Court, the authority of the BPKP was always questioned about its legality to calculate and state the state's losses. Then in 2012 a judicial review was submitted to the Constitutional Court, through the Constitutional Court Decision No. 31 / PUU / 2012, the Constitutional Court is of the opinion that the KPK can not only coordinate with BPKP and BPK in the context of proving a criminal act of corruption, but can also coordinate with other agencies, even be able to prove itself outside the findings of BPKP and BPK, for example by inviting experts or by requesting material from the inspectorate general or a body that has the same function from each government agency, even from other parties (including companies), who can demonstrate material truth in calculating the financial losses of the State and / or can prove case that he was handling.[4]

Thus, according to the Constitutional Court that not only the BPK and BPKP even the Inspectorate General or other auditors can carry out calculations and assessments of state losses.

Then in 2016 through the Supreme Court Circular Letter (SEMA) No. 4 of 2016 which is a guideline for the Chair of the District Court and the Chairperson of the Court of Appeal, states that the authorized institution declares whether there is a state financial loss is the Supreme Audit Board that has constitutional authority while other agencies such as the Financial and Development Supervisory Agency / Inspectorate / Working Unit Regions still have the authority to conduct audits and audits of State financial management but are not authorized to declare or declare State financial losses.

Thus, in my opinion that SEMA No. 4 of 2016 reaffirms the provisions of Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Supreme Audit Board and at the same time provides guidance for judges in examining and deciding TIPIKOR cases that the agency authorized to calculate and declare whether there is state loss is BPK. In line with the provisions of Article 10 paragraph (1) of Law no. 15 of 2006 stipulates that the BPK is authorized to assess and / or determine the amount of state losses caused by intentional or negligent acts committed by the treasurer, the manager of the BUMN / BUMD, and other institutions or bodies that carry out management of state finances.

Therefore, every Corruption Case handled by the Corruption Eradication Commission (KPK) always uses the results of calculations and determination of state losses from the BPK, but the Corruption Case handled by the Police Investigator or the Prosecutor's Office generally still uses the BPKP to calculate and assess whether there is a loss countries, should use the results of BPK's calculations and assessments because in each Province there are already BPK Representative Institutions.

4. Norms of Article 3 of the Corruption Law

Requirement 3 or provision of Article 3 of the TPK Law is the inner attitude of a tendency which is a malicious intention (mens rea). This evil intention is a form of error *(schuld)*, namely intentional

[3] Lihat, Put. MK. No. 25/XIV-XIV/2016, hlm. 113.
[4] Lihat, Put MK No. 31/PUU/2012,hlm. 54.

(dolus/opzet). In Article 3 the TPK Law is intentional *(dolus/opzet)* formulated with the phrase "with the aim of benefiting oneself or another person or corporate relations".

Dolus/operation is not performed on the prohibited nature of conducting. *Dolus/opzet*, is always associated with action, effect, and element of offense. In *dolus* there is always something unknown and unknown. On this basis, the theory of *dolus* from Simons and Van Hamel emerged, namely the theory of will and the theory of knowledge.

4.1 Theory of Will (Wilstheorie)

According to *Wilstheorie*, Simons stated that intentionality is the will directed towards the realization of actions formulated in the law. To prove whether an action was intended (willens) or not by the defendant, two things need to be proven:

a. There must be a match between motives (reasons) to act with the objectives to be achieved;

b. There must be a causal relationship between motives, actions and goals.

To prove the two things above is indeed not easy and takes time and energy, because what must be proven is the correspondence and causal relationship between motives, actions and goals to be achieved.

4.2 Knowledge Theory (Voorstellingstheori)

According to van Moorel's Voorstellingstheori, intentional is the will to act by knowing the elements contained in the formulation of the law. Thus, to determine whether or not there is intentionality, according to this theory, lies in the question: does he (the perpetrator) know, insyaf, or understand, if an action is carried out will have an effect. To prove whether an act was known (wetens) or not by the defendant, it is necessary to prove two things:

a. There is a causal relationship between motives and goals;

b. There is a relationship between knowledge, realization and consequences and the conditions that accompany it.

To prove it shorter, because what is proven is only related to the knowledge or conviction of the accused.

Thus, the element "with the aim of benefiting oneself or another person or a corporation" means that there is an intention within the perpetrator to carry out acts whose purpose is to benefit oneself or another person or a corporation. So the limitation of the element "benefit oneself or another person or a corporation" is not located in the material but lies in the non-material benefits. Whereas the limitation of the element of "enriching oneself or another person or a corporation is not the nominal amount of money but whether there is additional wealth coming from state money.

Conclusion

Based on the explanation above, it can be concluded that the formulation of norms from Article 3 of the TPK Law is the formulation of norms that are not based on the theory of norm formulation, so that mistakes can be applied to the intended subject of Article 3 of the TPK Law.

The formulation of Article 3 of the TPK Law is as follows:

> Every Public Servant, State Administrator, or State Official who for the purpose of benefiting himself or another person or a corporation, misuses the authority, opportunity or means available to him because of a position or position that can harm the state finances or the economy of the country, shall be liable to a life imprisonment a life or imprisonment of at least 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

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