



Analysis of Decision of Constitutional Court Number 003/PUU-IV/2006 Regarding the Explanation of Elements of Unlawful Article 2 of the Act

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Abstract

However, in 2006 a Constitutional Court Decision Number 003/PUU-IV/2006 was issued which stated that the elucidation of Article 2 of the Corruption Law had no binding legal force. In other words, the element against the law in Article 2 can only be interpreted as an element against the formal law. According to the author, the existence of the quo decision is a setback in eradicating corruption in Indonesia. This is because with the existence of a quo decision, the elements against the law in Article 2 of the Corruption Law cannot reach the existing *modus operandi* in corruption crimes because the elements against the law in Article 2 of the Corruption Law cannot be interpreted as elements against material law. Based on this description, the researcher Based on this description the researcher is interested in analyzing the Constitutional Court Decision Number 003/PUU-IV/2006 regarding the explanation of the elements against the law of Article 2 of the Corruption Law.

Keywords: *Corruption Crime; Unlawful Elements; Legality Principle*

Introduction

Indonesia is one of the countries with high corruption cases. Corruption is also one of the criminal acts that is in the spotlight in Indonesia. Corruption is not a new thing in Indonesia. Corruption in Indonesia has even been classified as an extraordinary crime (extra-ordinary crime), not only state finances and state potential, but has also destroyed the pillars of socio-cultural, moral, political, and the legal order of national security.¹ On the other hand, regardless of the type of corruption, whether it is corruption in the form of abuse of power, corruption in the form of acts against the law, corruption in bribery, both givers and recipients, in the end it will end in money problems.² Judging from the nature of the act, crime then develops into two classifications, namely crimes according to law (*mala in se*) and crimes according to law (*mala prohibita*). The rationale for classifying crimes into *mala in se* and *mala prohibita* is an act that is morally reprehensible (violating moral principles) and at the same time violating the law. Meanwhile, crimes that include *mala prohibita* are acts that are declared unlawful by law. Usually

¹ Ermansjah Djaja, **Memberantas Korupsi Bersama KPK (Komisi Pemberantasan Korupsi)**, Sinar Grafika, Jakarta, 2010, hlm .13.

² Yudi Kristiana, **Tehnik Penyidikan & Pemberkasan Tindak Pidana Korupsi**, Thafa Media, Yogyakarta, 2018, hlm. 1.

this type of crime is related to a violation of a law that concerns the public interest (regulatory offenses or public welfare offenses).³

Corruption crimes are regulated in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, hereinafter referred to as the Corruption Act. In the Corruption Law, corruption crimes can be classified into 7 types of offenses, viz⁴:

1. Related to state finance/state economy;
2. Bribery;
3. Embezzlement in office;
4. Blackmail;
5. Fraudulent act;
6. Conflict of interest in procurement; And
7. Corruption related to gratuity.

However, among the seven types of offenses that attract attention is the criminal act of corruption related to state losses as stipulated in Article 2 paragraph (1) of the Corruption Law which states "Anyone who unlawfully commits an act of enriching himself or another person or a corporation that can harm state finances or the country's economy, shall be punished with life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000.00 (two hundred million Rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)". One of the elements contained in the article is the element against the law. In the elucidation of Article 2 of the Corruption Law, it is explained that what is meant by an element against the law is an element against the law in a formal or material sense.

However, in 2006 a Constitutional Court Decision Number 003/PUU-IV/2006 was issued which stated that the elucidation of Article 2 of the Corruption Law had no binding legal force. In other words, the element against the law in Article 2 can only be interpreted as an element against the formal law. According to the author, the existence of the quo decision is a setback in eradicating corruption in Indonesia. This is because with the existence of a quo decision, the elements against the law in Article 2 of the Corruption Law cannot reach the existing *modus operandi* in corruption crimes because the elements against the law in Article 2 of the Corruption Law cannot be interpreted as elements against material law. Based on this description, the researcher Based on this description the researcher is interested in analyzing the Constitutional Court Decision Number 003/PUU-IV/2006 regarding the explanation of the elements against the law of Article 2 of the Corruption Law.

Legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues faced⁵. The type of this research is normative research. Normative research is research to test a written norm or provision that applies. Normative research can also be said to be research conducted by examining library materials or secondary data.⁶ This study uses three approaches, namely the statutory approach, the conceptual approach, and the case approach. The legal material analysis technique in this study uses a systematic interpretation technique. Systematic interpretation is interpretation by taking into account other legal texts. In this study, the types of legal sources used consist of two kinds, namely primary legal materials and secondary legal materials.

³ Hanafi Amrani, **Politik Pembaruan Hukum Pidana**, UII Press, Yogyakarta, 2019, hlm. 32.

⁴ Wicipto Setiadi, **Korupsi di Indonesia (Penyebab, Bahaya, Hambatan, dan Upaya Pemberantasan, Serta Regulasi)** Vol. 15, No. 3, Fakultas Hukum Universitas Pembangunan, 2018, hlm. 254-260.

⁵ Peter Mahmud Marzuki, **Penelitian Hukum, Cet. 2**, Kencana, Jakarta, 2008, hlm. 93.

⁶ Irawnsyah, **Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel**, Mirra Buana Media, Yogyakarta, 2021, hlm. 42.

The consequence of the existence of the Constitutional Court Decision Number 003/PUU-IV/2006 is that the public prosecutor is obliged to seek written rules as a basis for proving the elements against the law in Article 2 of the Corruption Law. This is because in the quo decision the judge stated that the elucidation of Article 2 of the Corruption Law does not have binding legal force, as the judge's consideration in the quo decision stated "...Considering that based on the description above, the concept of against material law (material *wederrechtelijk*), which referring to unwritten laws in terms of decency, prudence and accuracy that live in society, as a norm of justice, is an uncertain measure, and varies from one particular social environment to another, so that what is against the law in one place it may be accepted and recognized as something legitimate and not against the law, according to standards known in the life of the local community, as stated by Expert Prof. Dr. Andi Hamzah, S.H. in court;

Considering that therefore the elucidation of Article 2 paragraph (1) of the first sentence of the PTPK Law is inconsistent with the protection and guarantee of fair legal certainty contained in Article 28D paragraph (1) of the 1945 Constitution. Thus, the Elucidation of Article 2 paragraph (1) PTPK Law as far as the phrase "Unlawfully" in this article includes acts against the law in the formal sense as well as in the material sense, that is, even though these actions are not regulated in statutory regulations, if these actions are deemed disgraceful because it is not in accordance with a sense of justice or the norms of social life in society, then the said act can be punished, "must be declared contrary to the 1945 Constitution."

In his consideration of the quo decision, he argued that if the element against the law in Article 2 of the Corruption Law is interpreted as against material law, then this is contrary to the principle of legality. According to the researcher, there was a judge's mistake in interpreting "against the law" in the elucidation of Article 2 of the Corruption Law. In this case, it is necessary to distinguish between the definition of a crime and the disgraceful nature (against the law) of an act which is one of the elements in the complexity of the elements of a crime.⁷

In the elucidation of Article 2 of the Corruption Law, what is meant by "against the law" is the objectelict or the core element of an offense. By paying attention to the formulation of provisions regarding corruption as contained in Article 2 paragraph (1) of the Corruption Law which states "Any person who unlawfully commits an act of enriching himself or another person or a corporation that can harm state finances or the country's economy, shall be punished with imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)", it can be concluded that the elements contained in Article 2 are:

1. Everyone;
2. Unlawfully;
3. Committing acts of enriching oneself or another person or a corporation;
4. Such actions may harm the state's finances or the country's economy.

Based on the description of these elements, it can be concluded that "unlawful" in the provisions on corruption is one of the elements which is a means to commit acts of enriching oneself or other people or corporations. Thus, as a legal consequence of the formulation of provisions on corruption, even though an act has "harmed the state's finances or the country's economy". But if it is done not against the law, the act of "enriching oneself or another person or a corporation" is not a criminal act of corruption as referred to in Article 2 of the Corruption Law.⁸ Against the law as a *bentelict* or an element of *delict* is not only found in Article 2 of the Corruption Law. This is also contained in several offenses in the Criminal Code. One of them is contained in Article 378 of the Criminal Code which states "Whoever with the intention to unlawfully benefit himself or others, by using a false name or false dignity, with deception, or a series of

⁷ Adami Chazawi, **Hukum Pembuktian Tindak Pidana Korupsi**, Media Nusa Creative, Malang, 2018, hlm.325.

⁸ R. Wiyono, **Pembahasan Undang-Undang Pemberantasan Tindak Pidana Korupsi**, Sinar Grafika, Jakarta, 2012, Hlm. 39.

lies, moves other people to hand over something to him, or in order to give a debt or to write off a receivable, is punishable by fraud with a maximum imprisonment of four years". Based on the provisions of Article 378 above, the elements can be described as follows;

1. Whoever;
2. With the intention of benefiting oneself or others;
3. Unlawfully;
4. By using a false name or false prestige by deception or series of lies;
5. Motivate other people or hand over something to him, or to give debt or write off debt.

In practice, in proving elements against the law against Article 378 of the Criminal Code, public prosecutors do not have to seek written rules as a basis for proving elements against the law. In other words, the element against the law in Article 378 of the Criminal Code can be interpreted as an element against material law. However, if the element against the law in Article 378 is interpreted as against material law, can it be said that it is contrary to the principle of legality? of course not, this is because "unlawful" in Article 378 is a *benstandelict* or the core element of the offense. A person cannot be charged with using Article 378 of the Criminal Code if that person benefits himself by breaking the law (against material law) without being followed by other elements as stated in points 4 and 5. Likewise with "against the law" in Article 2 of the Corruption Law. A person cannot be subject to Article 2 of the Corruption Law if the actions of the defendant are only unlawful without fulfilling other elements, namely benefiting themselves or others and causing losses to state finances.

The nature of against the law which is an element of a criminal act can be sourced from the values that exist in society. Such elements against the law are commonly referred to as elements against material law. Talking about the nature of against the law from a proof point of view, cannot be separated from how the fact that elements against the law are formulated/written down as part of the complexity of the elements of a crime. Likewise, what meaning must be given, it cannot be separated from the complexity of other elements of a criminal act. Views regarding elements against positive material law must still be seen within the framework of the criminal act formulation. Therefore, in relation to evidence, the element against the law is not an absolute element. Such a view cannot be said to be contrary to the principle of legality.

When referring to the definition of the principle of legality, there is a common perception among criminal law experts that the definition of the principle of legality is that no act can be punished except on the basis of criminal provisions according to existing laws.⁹ Sudarto argued that there are two things contained in the principle of legality. First, that a criminal act must be formulated in laws and regulations. Second, these laws and regulations must exist before the occurrence of a crime.¹⁰ Criminal acts must be determined through law, but the disgraceful nature of the act or the unlawful nature which is one of the elements of a crime does not absolutely have to be rooted in written rules.¹¹

This provision is as stated in Article 1 paragraph (1) of the Criminal Code. From this definition, what is important to study is the meaning of "convicted acts". Regarding the word "act" in Article 1 paragraph (1) of the Criminal Code, Noyon and Langemeijer state that the intended act can be both positive and negative. Positive action is defined as "doing something". While negative actions are defined as "not doing something". Not doing what is someone's obligation or known as omissions.¹² Furthermore,

⁹ Eddy O.S Hiariej, 2007, *Pemikiran Rummelink Mengenai Asas Legalitas*, Jentera Jurnal Hukum, Edisi 16 – tahun IV, April-Juni 2007.

¹⁰ Eddy O.S. Hiariej, *Asas Legalitas & Penemuan Hukum dalam Hukum Pidana*, Penerbit Erlangga, Jakarta, 2009, Hlm. 24.

¹¹ Adami Chazawi, *Ibid.*, hlm. 325.

¹² Fraser Sampson, 2001, *Blackstone's Police Manual Crime*, Blackstone Press Limited, hlm 10.

regarding criminal acts, Enschede defines it as "human behavior that fulfills the formulation of an offense, is against the law, and can be reproached".¹³

Presumably it can be accepted that the positive material nature of unlawfulness contained in the formulation of certain criminal acts is not the same as positive material criminal acts, namely crimes from a social angle that need to be prevented by punishing the perpetrators. The nature of being against the law as an element of a crime does not only have to be interpreted as contrary to written law, but can also conflict with the values that exist in society. So if the element against the law in Article 2 is interpreted as an element against the material law, then this cannot be said to be contrary to the principle of legality, because "against the law" is a *benstandelict* or the core element of the offense.

Conclusion

Based on the discussion above, it can be concluded that "against the law" in Article 2 of the Corruption Law is a "benstandelict" or the core element of an offense. Against the law in Article 2 is one of the elements which is a means to commit acts of enriching oneself or other people or corporations. So that a person cannot be subject to Article 2 of the Corruption Law if the actions of the defendant are only unlawful without fulfilling other elements, namely benefiting themselves or others and harming state finances. Views regarding elements against positive material law must still be seen within the framework of the criminal act formulation. Therefore, in relation to evidence, the element against the law is not an absolute element. Such a view cannot be said to be contrary to the principle of legality. That way, if the element against the law in Article 2 of the Corruption Law is defined as an element against material law, then this does not conflict with the principle of legality.

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