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Strengthening Teaching of Nature the Material Unlawfulness in Eradicating Criminal Acts of Corruption in Indonesia

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Abstract: The Constitutional Court through Decision number 003 / PUU-IV / 2006 states the Explanation of Article 2 paragraph (1) of Law number 31 of 1999 is contrary to Article 28 D Paragraph (1) of UUD 1945 so that the explanation of Article 2 paragraph (1) of Law No. 31 of 1999 does not have binding legal force. As a result of the Constitutional Court Decision Number 003 / PUU-IV / 2006 dated July 25, 2006, it narrowed down the meaning of the interpretation of the " unlawfulness " element which was limited to "unlawfulness" based on written law only. The main problem in this research is to answer why the Constitutional Court Decision No. 003 / PUU-IV / 2006 concerning judicial review of the teachings of the material unlawful nature of criminal acts of corruption has not yet been maximally effective to eradicate corruption in Indonesia. The purpose of this study is to arrange what steps should be taken to find a model of strengthening teachings of nature material unlawfulness in eradicating of corruption in Indonesia. The type of research used is doctrinal or normative legal research, with approaches: conceptual approach, statute approach, case approach, and historical approach. Based on the results of the study it can be concluded that the strengthening of strengthening teachings of nature material unlawfulness in eradication of corruption is carried out by reconstructing regulations, returning the principle of returning the formal legality principle adopted by the Constitutional Court to the legality principle in accordance with the Indonesian ideology.

Index Terms: Against the law, corruption, Indonesia.

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I. INTRODUCTION

Corruption is one of violation of law. The upholding of law among the public especially held by their conviction to submissive voluntarily and because of the belief that submissive to the law will accelerate the achievement of the goal desired together,[1] namely the implementation of a government free from collusion, corruption and nepotism.

The increasing uncontrolled corruption will bring disaster not only to the life of the national economy but also to the life of the nation and state in general. Widespread and systematic corruption is also a violation of social and economic rights of the community, and therefore all criminal acts of corruption can no longer be classified as ordinary crimes but have become extraordinary crimes, so the efforts of eradication can no longer be done in an ordinary way, but is demanded by extraordinary methods.[2]

The regulation regarding eradication of corruption is regulated in the Republic of Indonesia Law No. 31 of 1999 concerning the Eradication of Corruption Crime as amended by Law No. 20 of 2001 concerning Amendments to Law No.31 of 1999 concerning Eradication of Corruption Crimes. In the Explanation of Article 2 Paragraph (1), it is stated that what is meant by violating the law in this Article includes acts unlawfulness in the formal meaning and in the material meaning, even though the act is not regulated in the legislation, but if the deed is disgraceful because not in accordance with the sense of justice or norms of social life of the community, then the act can be punished. However, in the development of the application of the teachings the material unlawfulness, in its development the Explanation of Article 2 paragraph (1) of Law No. 31 of 1999 by the Constitutional Court in its Decision of 25 July 2006 Number 003 / PUU-IV / 2006 was declared contrary to

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[1]Andi Hamzah, *Bunga Rampai* Hukum *Pidana dan Acara Pidana, Ghalia Indonesia*, Jakarta, 1986, page 195
[2]Republic of Indonesia, *General Explanation of Law Number 30 of 2002 Concerning Corruption Eradication Commission*.

Article 28 D Paragraph (1) of the 1945 Constitution so that the Elucidation of Article 2 paragraph (1) of Law No. 31 of 1999 is declared to have no binding legal force. As a result of the Decision of the Constitutional Court Number 003 / PUU-IV / 2006 dated July 25, 2006, it narrowed the meaning of interpretation of elements unlawfulness which limited based on written law only.

The research is relevant to Komariah Emong Sapardjaja in his dissertation entitled "The Doctrine of the Nature Material unlawfulness in Indonesian Criminal Law" in 2003. The author is examining the material unlawful teachings focusing on corruption after the decision of the Constitutional Court No: 003 / PUU-IV / 2006 and going to reformulate or re-enact nature's teachings the material unlawfulness that had been in force which was then judged by the Constitutional Court.

In other hand, this research also correlate to disertation from Tjandra Sridjaja Pradjonggo in entitled "Nature unlawfulness in Corruption Crime" in 2010, in this research, the author is examining the material unlawful teachings focusing on corruption after the Constitutional Court Decision No: 003 / PUU-IV / 2006 and strengthening or re-enforcing the nature of the teachings material unlawfulness that once took effect which was then judged by the Constitutional Court in terms of five pillars (Pancasila) justice.

Problems Statement in this research :

A. Why the Constitutional Court Decision No. 003 / PUU-IV / 2006 concerning judicial review of the teachings of the material unlawful nature of criminal acts of corruption has not yet been maximally effective to erradicate corruption in Indonesia ?

B. How to strengthen the teachings of the material unlawfulness to erradicate corruption in Indonesia ?

II. METHODOLOGY

The type of research used is doctrinal or normative legal research which uses legal concepts regarding the principles of truth and justice that are natural and universally valid. Research approach: conceptual approach, statute Approach, case approach, and historical approach. Data sources use secondary data sources and primary data sources. Secondary data sources consist of primary legal material: legislation, secondary legal material: consisting of legal literature, legal research journals, legal writing reports both print and / or electronic media and tertiary legal materials: dictionaries and encyclopedia. Data collection methods with library studies and interviews. Qualitative normative data analysis method, carried out by discussing legal norms, doctrine with data obtained from research objects that have been inventoryed. Then conclusions will be deductively drawn.

III. DISCUSSION

A. Factors influencing Decision of the Constitutional Court No. 03 / PUU-IV / 2006 causes the maximum effectiveness in eradicating criminal acts of corruption

1. An action that is unlawfulness in a criminal act of corruption that is detrimental to state finances but not listed in the legislation cannot be punished

The decision of the Constitutional Court to change the legal paradigm to eradicate criminal acts of corruption from those who adhere to the teachings material unlawfulness is a doctrine against formal law. The Constitutional Court based on the principle of legality contained in Article 1 paragraph 1 of the Criminal Code "no action can be punished except for the strength of criminal rules in legislation that existed before the act was committed." Or known as "nullum delictum, nulla poena, sine pravia lege poenali ".

One of the principles of the Constitutional Court's decision is known as the term erga omnes, meaning that the decision is binding and must be obeyed by all Indonesian citizens, both those who submit applications and those who do not submit applications. Therefore, with this principle, law enforcement officials who carry out the process of eradicating non-corruption crimes that use teachings material unlawfulness or who process perpetrators of corruption that are not regulated in legislation are actually a form of violation of law so that law enforcement officials will reject reports, complaints or events of someone who is indicated to have committed an act unlawfulness that is not listed in writing in the laws and regulations even though the act can be detrimental to the state's finances or the country's economy.

2. Law Enforcement Officials have to Work Extra because Acts that are Suspected or that are Charged as Corruption Must Meet Formal Elements that Are So Limited

The modus operandi of the perpetrators of corruption is also growing rapidly to be able to always look for loopholes so that the law cannot be snared, so that special techniques or procedures are needed to uncover a crime that causes state financial losses (corruption), thereby causing difficulties for officials law enforcement in the level of investigation, investigation and prosecution which is the spearhead of eradicating corruption.

From interviews conducted by the author, the Corruption Eradication Commission and the Attorney General's Office of the Republic of Indonesia tend to be affected by the Decision of the Constitutional Court No. 003 / PUU-IV / 2006 which uses meaning unlawfulness in corruption is the formally unlawfulness or The written unlawfulness. Law enforcers must look for acts of corruption that are clearly against the law written in the laws

and regulations. Therefore, that with this understanding law enforcement to eradicate corruption will result in ineffectiveness.

B. Strengthening teachings of the material unlawfulness in eradication of corruption in Indonesia

Discussing the strengthening teachings of the material unlawfulness in eradicating of corruption in Indonesia, the writer will first examine and analyze the Decision of the Constitutional Court No. 003 / PUU-IV / 2006 dated July 25, 2006. Amar Decision of the Constitutional Court in its Decision No. 003 / PUU-IV / 2006 dated July 25, 2006 which in principle states the Elucidation of Article 2 paragraph (1) of the Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Law Number 20 of 2001 along the phrase reads, *What is meant by the unlawfulness in this Article includes acts against the law in the formal meaning and in the material meaning, even though the act is not regulated in legislation, but if the deed is considered despicable because it is incompatible with a sense of justice or norms of social life in society, then these actions can be punished in* **contravention of the 1945 Constitution of the Republic of Indonesia and actions have binding legal force**.

Consideration of the Constitutional Court No. 003 / PUU-IV / 2006 stated[3]:

- Article 28D paragraph (1) recognizes and protects the constitutional rights of citizens to obtain guarantees and definite law protection, with which in the field of criminal law is translated as the principle of legality contained in Article 1 paragraph (1) of the Criminal Code, that principle constitutes a claim legal certainty in which people can only be prosecuted and tried on the basis of a written legislation *(lex scripta)* which already exists;
- This requires that a criminal act has an element against the law, which must be written in advance, which formulates what actions or consequences of human actions are clearly and strictly prohibited so that they can be prosecuted and punished, according to the principle *nullum crimen sine lege stricta*;
- The concept is the unlawfulness formally written (formele wederrechtelijk), which requires lawmakers to formulate as carefully and in detail as possible (*vide Jan Remmelink*, Hukum Pidana, 2003: 358) is a requirement to guarantee legal certainty (*lex certa*) or also known with the term *Bestimmheitsgebot*;

Based on the Decision of the Constitutional Court Number 003 / PUU-IV / 2006 according to the writer it contains weaknesses including "Mahkamah Constitution Decision stating the Explanation of Article 2 Paragraph (1) of Law 31 of 1999 Jo. Law No. 20 of 2001 contrary to Article 28 D Paragraph (1) The 1945 Constitution recognizes and protects citizens' constitutional rights to secure guarantees and law protection by basing the principle of legality adopted by article 1 paragraph 1 of the Criminal Code which contradicts the principles in the Indonesian criminal law system". The Constitutional Court adheres to the principle of legality which was born from the classical flow in criminal law with the aim of protecting individual interests. In fact, in criminal law, crimes that result in public security and welfare as a tangible manifestation of modern flow in criminal law, namely protecting the public, the principle of legality does not apply absolutely.

The Constitutional Court is of the opinion that the Elucidation of Article 2 paragraph (1) of Law No. 31 of 1999 Jo. UU no. 20 of 2001 contradicts Article 28 D paragraph (1) of the 1945 Constitution recognizing and protecting the constitutional rights of citizens to obtain guarantees and definite law protection, but this opinion is contrary to Article 18 B paragraph (2) of the second amendment to the 1945 Constitution which reads: The State recognizes and respects customary law community units along with their traditional rights insofar as they are still alive and in accordance with the development of society and the principle of the unitary state of the Republic of Indonesia, which is regulated in law. While the position of Article 18 B paragraph (2) of the 1945 Constitution is higher than Article 1 paragraph (1) of the Criminal Code.

The Constitutional Court does not see or forget that customary law is one of the sources of criminal law under Article 5 paragraph (3) b of the 1951 Emergency Law No. 1 (abbreviated as UUDar 1951/1), concerning temporary measures to organize the Composition, Power and Events of Civil Courts in Indonesia. The rules and law values originating from customary law are mostly in an unwritten state and they are still recognized in the Indonesian criminal law system.

According to the Jurisprudence regarding the teachings the material unlawfulness also adopted by the Judiciary in Indonesia including;

Decision of the Supreme Court of the Republic of Indonesia on December 15, 1983, No. 275K / Pid / 1982 in the Corruption case at Bank Bumi Daya in its contents: The Supreme Court clearly gives the meaning of being against the material law, namely: according to propriety in society, especially in cases of corruption, if a civil servant receives excessive facilities and other benefits from another person with the intention that the civil servant uses his power or authority inherent in his position in a deviant manner, it is an "act unlawfulness", because according to the decency it is a despicable act or an act that pierces the hearts of many people.[4]

As a special judicial institution formed through the constitution, the constitutional court also has

[3] Constitutional Court Decision Number 003/PUU-IV/2006 dated July 24, 2006,page 75

[4]Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiil dalam Hukum Pidana Indonesia*, Alumni, Bandung, 2013, page 162

special characteristics, which are final and binding[5], so that the Constitutional Court's decision is said to be a negative legislator with an erga omnes. [6]

After the Decision of the Constitutional Court Number 003 / PUU-IV / 2006 stating the Explanation of Article 2 paragraph 1 of Law No. 31 of 1999 was declared to have no binding legal force, because contrary to Article 28 D paragraph (1) of the 1945 Constitution, then the nature of the law the unlawfulness adopted by the Act of corruption was shifted from the teachings against material law to the teachings formal unlawfulness. By shifting the meaning of the teachings nature the unlawfulness into the formal unlawfulness, it is caused in a weakening in the process of eradicating corruption, because the meaning of opposing formal laws caused in the narrowing of the meaning the unlawfulness which means that against written and unwritten law is turning the unlawful which means only the written unlawfulness.[7]

In strengthening the teachings of material unlawfulness in eradicating criminal acts of corruption in Indonesia, the writer returned to adhere to the law values of the Pancasila. Among the legal systems which force in the world, namely (*Romano Germano System*, namely the civil law system, *the Socialist Law System*, namely law system in Socialist – Communist countries, Eastern Europe, also called Socialist-legality, *Common Law System*, namely the law system is also the Anglo Saxon legal system, *the Non-western Law System*, which includes: *Islamic Law, Hindu Law, Japan Law, African Law, Traditional systems* adopted by Continental European countries), [8] State law of Pancasila born of a mixture of western legal systems, customary law and Islamic law.[9]

Pancasila justice is a justice characterized or based on values and based on the identity and characteristics found in the Pancasila. The values that form the basis of Pancasila justice are: the One Godhead, just and civilized Humanity, Indonesian Unity, Popularism led by wisdom of wisdom in representative deliberation, social justice for all Indonesian people.[10]

The politics of Indonesian law in re-enforcing the principle of legality that is not absolute has proposed the Concept of New Book I RKUHPid (Draft Criminal Code) in 2017 Article 2 paragraph (1) and (2), which reads[11]: "(1) Provisions as referred to in Article 1 paragraph (1) does not reduce the validity of law living in community which determines that a person deserves to be convicted even if the act is not regulated in the legislation. And (2) Laws that live in the community as referred to in paragraph (1) apply as long as they are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general law principles recognized by civilized society and in the place of law that lives."

In connection with the basis and reasons mentioned above, according to the writer, strengthening the teachings the material unlawfulness is done by reconstruction of regulations by returning the principle of formal legality adopted by the Constitutional Court to the principle of legality in accordance with Pancasila as the ideology of the Indonesian nation, so the writers offer that the teachings material unlawfulness in eradicating corruption are valid again, the Government and Indonesian's Representatives form laws that can re-enforce the principle material unlawfulness in the eradication of criminal acts of corruption.

IV. CONCLUSION

Factors affecting decision of the Constitutional Court number 03 / PUU-IV / 2006 causes the maximum effectiveness to eradicate corruption due to:

1. An action that the unlawfulness in a criminal act of corruption that is detrimental to the state's finances but not listed in the laws and regulations that cannot be punished is a consequence of the Constitutional Court Decision No. 003 / PUU-IV / 2006 which applies the principle of legality absolutely, therefore, inhibiting the substance of the eradication of criminal acts of corruption.
2. Law enforcement officials must work extra because the actions alleged or charged as corruption must fulfill such a limited formal element. Law enforcers do not have the basis to continue handling corruption cases that have an unwritten element of fighting the law, especially Corruption Eradication Commission and the Prosecutor who has a view to handle such cases with a written legal basis.

Strengthening of teachings material unlawfulness in eradicating criminal acts of corruption is carried out by way of the reconstruction of regulations by returning the principle of formal legality adopted by the Constitutional Court to the principle of legality in accordance with Pancasila as the ideology of the Indonesian nation. so the authors offer that the teachings material unlawfulness in eradicating corruption are valid again, the Government and Indonesian's Representatives form a law that can reintroduce the principle material

[5]Khelda Ayunita, *Pengantar Hukum Konstitusi dan Acara Mahkamah Konstitusi*, Mitra Wacana Media, Jakarta, 2017, page 147
[6] *Ibid*., page 149
[7] Constitutional Court Decision Number 003/PUU-IV/2006 dated July 24, 2006, page 75
[8]I Dewa Gede Atmadja, *Op. Cit.*, page 122.
[9]*Ibid*., page 123
[10]*Ibid*. Page 109
[11] National Alliance for Criminal Code Reform, *Draft Criminal Code*, Results of Discussion Working Committee Draft Criminal Code of the Indonesian's Representatives on February 24, 2017

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