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Legal Certainty and Norms Conflict of Corruption In Indonesia: A Reflection in Legal Reform of Corruption Eradication

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Abstract-- *This article examines the effectiveness of criminal acts of corruption in Indonesia due to the influence of overlapping and over-criminalization between regulations, too general and the high complexity of the formulation of article regulations related to criminal acts of corruption which resulting in judicial processes which are considered to still lack of legal certainty due to varying legal interpretations. This article uses socio-legal research using the statute approach, case approach, and comparative approach. The results of the study illustrate that there is an urgency to revise the current corruption law because Indonesia as a party of the United Nations Convention Against Corruption (UNCAC) should refer to the convention namely the state loss element which is not included as one of the elements in corruption and various interpretations of the law, namely the existence of several cases where people were prosecuted for corruption due to administrative errors, which it was also judged by the Constitutional Court to contradict Article 28D Clause (1) of the 1945 Constitution related to guarantees, protections, and fair legal certainty and appropriate treatment also the same treatment before the law*.

Keywords—*Overlapping, Corruption, Legal Certainty.*

I. INTRODUCTION

Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Establishment of Regulations Legislations regulate the Principle of Regulations Legislations, which stipulates that in forming Regulations and Legislations must be based on the principle of formation of legislation which includes clarity of objectives; appropriate institutional or forming organs; conformity between type and material content; can be implemented or not; usability and efficacy; transparency of formulation; and openness. [1]

In consideration of Law Number 20 of 2011 concerning Amendments to Law Number 31 of 1999 about Eradication of Corruption, among others states that widespread corruption, not only harms the country's finances but also has been a violation of social and economic rights of the community at large, so that criminal acts of

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corruption need to be classified as a crime whose its eradication must be carried out extraordinary; that to the better guarantee of legal certainty, avoid the diversity of judicial interpretations and provide protection to the social and economic rights of the community, as well as fair treatment in eradicating criminal acts of corruption, it is necessary to make changes to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. But the fact is with the enactment of Law Number 31 of 1999 in conjunction with Law Number 20 of 2011, corruption cases in Indonesia were not reduced but instead increased. [2]

Data from the Indonesian Police Headquarters Criminal Investigation Agency recorded that as of September 2012, 353 corruption cases had been successfully investigated by investigators. Of that amount, around 70 percent of them are findings in the field of procurement of goods and services. This figure is far from the projection of Bareskrim Mabes Polri this year, which targets to handle 604 corruption cases, higher than last year's 475 corruption cases On the other hand, Indonesia Procurement Watch (IPW) conveyed the results of a survey of bribery in the procurement of government goods/services conducted by IPW on 5 Jabodetabek (*Jakarta Bogor Depok Tangerang Bekasi*) Cities with the result that 89% of the supply of products and services or business partners of government partners bribed to get tenders. [3]

In 2006 a Judicial Review was conducted by the Constitutional Court on Law Number 31 of 1999 concerning Eradication of Corruption Crimes in conjunction with Law Number 20 of 2011 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (hereinafter referred to as the Anti-Corruption Eradication Act) especially Article 2 paragraph (1) and Article 3, which in its decision Number 003/PPU-IV/2006 dated July 25, 2006, The Constitutional Court has canceled the Elucidation of Article 2 Clause (1); and Article 3 (insofar as the word "can") which considered contrary to Article 28D Clause (1) of the 1945 Constitution that states "Every person has the right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law." But the fact is, there are still many corruption cases where the prosecutor sues the defendant on charges of violating Article 2 or Article 3 of the material unlawful nature resulting in legal uncertainty for the defendant and his family. Other legal uncertainties due to various interpretations of the law are the existence of several cases where people were prosecuted for corruption due to administrative errors.[4]

Besides, in the United Nations Convention Against Corruption (UNCAC), the element of state loss is not included as one of the parts in corruption, but in the Law on the Eradication of Corruption in Indonesia, the component of state loss becomes so central/main in handling corruption cases, rather than enriching itself / others. Even though Indonesia is one of the countries that ratified the United Nations Convention Against Corruption (UNCAC) with the enactment of Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 (Convention of the United Nations Anti-Corruption, 2003) so that it should be a type of corruption which regulated in the Corruption Eradication Act referring to the convention. [5]

The types of criminal acts of corruption regulated in UNCAC (Article 15 to Article 25) consist of 1) Criminal acts of bribery of national public officials; 2) The crime of bribery of foreign public officials and officials of international organizations; 3) The crime of embezzlement, misappropriation or transfer of wealth or in other ways by a public official; 4) The corruption of influence trading; 5) criminal misuse of function; 6) The

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criminal offense enriches illegally; 7) bribery in the private sector; 8) The crime of embezzlement of wealth in the private sector; 9) The crime of laundering the proceeds of crime; 10) Conceal the results of criminal acts of corruption; 11) The law impedes the judicial process. [6]

Although Law Number 31 of 1999, in conjunction with Law Number 20 of 2011, replaces Law Number 3 of 1971 concerning corruption, but Law Number 11 of 1980 concerning Crimes of Bribery has never been revoked or canceled even though bribery is a type of corruption in all state parties in the convention so that two overlapping laws are governing the same matter. The phenomenon of the gap between the laws aimed at eradicating corruption and the increasing number of corruption cases means that it is necessary to look back at the effectiveness of the Corruption Eradication Law in combating corruption in Indonesia. Another problem is the legal certainty and justice of every citizen with the case that the process of handling is still using Article 2 Clause (1) and Article 3 against the material law that is regulated in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 which was canceled by the Constitutional Court. The obscurity of a problem falls within the jurisdiction of administrative and criminal law. All these conditions induce the new Corruption Crime Act shall be formed because the Corruption Eradication Act, which is currently in force is not in accordance with the times.

II. RESULTS AND FINDING

Legal Unlawful Material Corruption Act Law Number 31 of 1999 Jo Law Number 20 of 2001

The teachings against the material law are adhered to by Law Number 31 of 1999 Jo Law Number 20 of 2001 concerning Eradication of Corruption in Indonesia is contained in Article 2 Clause 1, which reads: "Any person who unlawfully commits acts of enriching himself or someone else or a corporation that can be detrimental the country's finances or the country's economy is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiahs) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah) ". which in the elucidation mentions "What is meant by against the law" in this Article includes acts against the law in the formal sense as well as in the material sense, i.e., even though the act is not regulated in statutory regulations, but if the act is deemed to be disgraceful because it is not appropriate with a sense of justice or the norms of social life in society, these actions can be criminalized. In this provision, the word "can" before the phrase "the country's finances or the country's economy" indicates that a criminal offense is a formal offense, that is the existence of a criminal act of corruption is sufficient by fulfilling the elements of the act that have been formulated not by the arising of consequences. [7]

The considerations of lawmakers include elements against the law in both formal and material terms in Law Number 31 of 1999 Jo Law Number 20 of 2001 concerning Eradication of Corruption Crimes is to reckon that corruption occurs widespread and systematic, not only harming the country's finances and the country's economy but also constituting violations of the social and economic rights of the community at large so that it is classified as an extraordinary crime, then its eradication must be done unusually. Therefore, this corruption law is expected to be able to eradicate criminal acts of corruption that have been occurring in Indonesia in an

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"extraordinary" manner and based on the explanation of Article 2 Clause 1 contained in the Corruption Law that acts against the law can be implemented to perpetrators of corruption with or without statutory provisions that are not written based on "if the act is considered despicable because it is not in accordance with a sense of justice or the norms of social life in society" and this certainly brings the consequences of creating legal uncertainty in its implementation which also contradicts the human rights of citizens of the state as mandated by the 1945 Constitution specifically in Article 28D paragraph (1) as explained in the previous sub-chapter.[8]

In-Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crime, especially Article 2 and 3 which adheres to the teachings against material law in a positive function has been carried out by the Constitutional Court in its decision Number 003/PPU-IV/2006 dated July 25, 2006. In this ruling, the Constitutional Court has stated that Article 2 Clause 1 of Law Number 31 of 1999 Jo Law Number 20 of 2001 concerning Eradication of Corruption Crimes has contravened the 1945 Constitution, especially Article 28 letter D. In examining and deciding the teachings of the material unlawful nature in a positive function in the Corruption Act. If the element of legal action contained in Article 2 Clause 1 of Law Number 31 of 1999 Jo Law Number 20 of 2001 concerning Eradication of Corruption if linked to De Schutznorm's Theory which states that an act that is not protected by norms of violated legal interests is outside the formulation of offense, will also mean that it does not fulfill the unlawful nature in terms of criminal law and that the Article has been declared by the Constitutional Court of the Republic of Indonesia as a provision that has no legal force and is contrary to the highest state constitution of Indonesia, namely Article 28 D paragraph 1 of the 1945 Constitution. To create legal certainty and justice as well the use of the Corruption Law on elements of acts against it must be clear and in detail regulated in the formulation of the legislation so as not to create a comprehensive interpretation so that it will not violate human rights both protected in the 1945 Constitution or in the human rights law. [9]

In-Law Number 31 of 1999 Jo Law Number 20 of 2001 concerning Eradication of Corruption if not formulated in detail against the law after the decision of the Constitutional Court of the Republic of Indonesia will undoubtedly lead to excessive use of all legal issues. For example, such as employees or state officials who carry out their duties in accordance with existing procedures without elements bribery and any gratuity that later arises as a state loss, just use the law on corruption so that it will result in overlapping between other administrative laws and corruption and does not reflect legal certainty so that it is undoubtedly very contradictory to the purpose of the principle of legality as stated by Muladi, especially on legal certainty, creates justice, and most importantly, prevents abuse of power and strengthens the rule of law which is one of the basic concepts of the rule of law. For this reason, the formulation of legislation needs to be detailed and precise as well as synchronous and harmonious, both in the horizontal and vertical sense of the Indonesian legal system, so that they do not overlap and cause excessive interpretation. [10]

The Study of State Finance and Detrimental State Finance Definition

In the life of the modern state, there is a division between private finance and public finance, the division and differentiation aims to distinguish management mechanisms and their utilization, while also concerning the mechanism of accountability. Private finance, which is very identical to personal finance, is, of course, subject to the provisions of civil law, and of course, it also involves the issue of accountability. This is certainly very

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different from public finance, considering that it concerns the public interest that is in it. Public finances, which are then better known as state finances, get an extraordinary arrangement along with the issue of accountability.Legally, the notion of state finance in Indonesia has been regulated in Law Number 17 of 2003 concerning State Finance. From the definition of the state finances above, it still focuses on the material side of the country's finances themselves and has not yet touched the formal hand and authority related to state finances. Whereas in the case of corruption, matters relating to matters of the formal side and authority are crucial to determining whether there is a criminal act of corruption. [11]

Whereas relating to the Detrimental State Finances, has various types of views. This matter solely because the viewpoints reached from the definition itself as well as the basis of understanding of state finances are also diverse. One thing that should be used as a benchmark is that state losses are not always related to corruption or vice versa that crime is only part of the cause of state losses. State losses, in general, can occur due to several reasons, namely: 1) As a result of criminal acts of corruption; 2) As a result of the actions of the government apparatus or other factors resulting in state losses but not as a criminal act of corruption or financial situation that causes losses. State losses can arise not only from corruption, but many also occur due to actions or other factors that ultimately cause the state to suffer losses. However, such activities or other factors cannot be categorized as criminal acts of corruption. Actions or other factors that can cause losses to the state are as follows: damage to state property, civil claims, claims for compensation for state administration, due to the economic situation, and natural disasters. Damage to state property certainly causes losses to the state, but it can occur due to human or natural factors, as an example is the factor of wear and tear on state-owned equipment due to the age factor of prolonged usage. State losses can also arise due to civil and state administrative justice demands filed by the public and filed a lawsuit in court. Losses can also occur due to the economic situation, for example, the country's gold reserves will fall in price, and the country suffers heavy losses when the value of gold on the world gold market experiences very significant price reduction.[12]

State losses have two dimensions, namely between state assets and liabilities. In terms of assets itself, Paton states that, in principle, assets can be defined as wealth in physical form or other forms that have value for a business entity. This understanding puts forward the material side of assets in a tangible form. At the same time, a more macro opinion expressed by Vatter and the *Ikatan Akuntan Indonesia* (IAI) considers Assets as benefits generated by defining assets as future economic benefits in the form of potential services that can be changed, exchanged, or saved. IAI and Vatter's opinion is almost similar to the understanding used by *Standar Akutansi Indonesia* which states that assets are economic resources that are controlled and / or owned by the government as a result of past events and from which future economic and / or social benefits are expected can be obtained, both by the government and the community alsocan be measured in money units, including non-financial resources needed to provide services to the general public and resources maintained for historical and cultural reasons. [13]

Based on the description above, it can be said that the state loss from the asset side is a condition where a decrease in the value of an entity's assets does not produce future economic benefits or if as long as future economic benefits do not meet the requirements, or no longer meet the criteria, to be recognized in the balance sheet as an asset. While normatively, the definition of state loss is based on Article 1 Clause 22 of Law Number 1 of 2004 concerning the State Treasury. While on the other side of the state, a loss is an obligation which according to Kam, is interpreted as a necessity for the business unit to hand over assets/services to other parties

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in the future as a result of past transactions. This opinion was further developed by the FASB (Financial Accounting Standard Board), which states that liabilities represent sacrifices for future economic benefits that may arise due to the present obligation of an entity to hand over assets or provide services to other objects in the future as a result of past transactions.[14]

Ikatan Akuntan Indonesia provides an understanding of the obligations that must be borne is that of current corporate debt arising from past events, the settlement of which is expected to result in an outflow of company resources concerning economic benefits. From some of the opinions above, the state lost in the context of obligations that must be borne by the state is due to a state / regional obligation that should not exist, for example, debt to a third party related to a fictitious purchase of a vehicle. State financial losses also occur in the case of state / regional obligations that are greater than they should be. Since there are two sides to the state's loss based on the country's assets and liabilities, the state's losses also include the potential or possible side of future losses that must be borne by the state as a result of acts in the present or past. This naturally encourages legal liability for the occurrence or emergence of potential future state losses which are more tangible and not speculative, because potential state losses are calculated based on excess obligations that should not be borne by the state.[15]

Along with the Constitutional Court Decision, which annulled the Elucidation of Article 2 Clause (1) and Article 3 of the Anti-Corruption Law, the Anti-Corruption Law needs to be immediately revised. Even though the Supreme Court has issued rules regarding this material teaching, the rules have substantively revived what has been canceled by the Constitutional Court, so that creates legal uncertainty for justice seekers. According to Soekanto the main problem of law enforcement lies in the factors that influence it, namely: 1) The legal factor itself (the law); 2) Law enforcement factors, namely those who form or apply the law; 3) Factors of facilities that support law enforcement; 4) Community factors, namely the environment in which the law uses or is applied; 5) Cultural factors, namely as a result of work, creativity and taste based on a human initiative in the association of life. [16]

Conflict of Norms: Critical Notes and Evaluation in the Corruption Act

The three laws regulate state finances. Adopting Jamin Ginting's explanation of the notion of detrimental to state finances in corruption, it is explained that several cases that have been decided in the first-degree court have a different application of regulations regarding the definition of state finances. The definition of state finances is indeed spread in several existing laws and regulations in addition to the provisions in the Corruption Eradication Act, among others also contained in Law Number 17 of 2003 concerning State Finance, Law Number 19 of 2003 concerning State-Owned Enterprises, Law Number 1 of 2004 concerning the State Treasury, Law Number 49 Prp. 1960 concerning the Committee on State Receivables Affairs and implicitly contained in Government Regulation Number 14 of 2005 concerning the Elimination of State / Regional Receivables. The fundamental problem is that state finance is linked to state losses in criminal acts of corruption, namely how the notion of state finance is linked to elements of state losses in corruption, whether state-owned enterprise which its management is based on a Limited Liability Company Law (*UU Perseroan Terbatas*) can be categorized in the State financial provisions in the Eradication Act Criminal Acts of Corruption, and if there is a loss to state-owned enterprise, which law will be used to assess the occurrence of the financial loss? [17]

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Article 1 paragraph I of Law Number 17 of 2003 concerning State Finance defines state finance as all rights and obligations of the state that can be valued in money, as well as everything in the form of cash or in the form of goods that can be made as state property in connection with the implementation of these rights and obligations. Another narrower definition in Article 1 Clause 1 of Law Number 19 of 2003 concerning state-owned enterprise states that state inclusion is the separated state assets. When the state's wealth has been divided, the wealth is no longer entered into the realm of public law but into the realm of private law. Article 2 letter g of Law Number 17 of 2003 concerning State Finance includes state assets / regional assets that are managed alone or by other parties in the form of money, securities, accounts receivable, goods, and other rights that can be valued with money including assets that are separated in the regional state-owned companies. [19]

State assets separated in this sense are in the form of participating shares owned by the state in SOEs, not constituting SOE assets themselves because SOEs are subject to the provisions of Limited Company Law (*Hukum Perseroan Terbatas*). If so, state finances in SOEs, which are subject to the requirements of the provisions of Limited Company Law, are only limited to separated assets, that is, the amount of paid-up capital or amendments. For example, if the government holds a 50% stake, then the 50% inclusion, do not interpret the SOE assets identical to state assets so that the rules on liability for state losses in SOEs/ ROEs (Region-Owned Enterprise) refer to the provisions of Law Number 1 of 1995 concerning Limited Company and Law Number 19 of 2003 regarding SOEs (State-Owned Enterprises). Understanding of state finances in SOEs or ROEs is often identified with government assets so that all SOEs / ROEs loans and debts are receivables and debts from the government, even though the correct understanding is the wealth that is separated by the government in SOEs / ROEs is part of the country's wealth. The wealth of the country is equal to "paid-up capital" or "change" (net equily). [20]

Law number 1 of 2004 concerning the State Treasury states "State / Regional receivables are amounts that must be paid to the Central / Regional Government and/or Central / Regional Government rights that can be valued in cash as a result of agreements or other consequences based on applicable laws or regulations other legal consequences, "with the understanding that SOEs and ROEs are not included in the State receivables because the acquisition results are not paid and deposited to the government, and such receipts do not constitute receipts reported to the state or regional budget (*ABPN or APBD*). If an illustration is taken that state money participates in a SOEs which is subject to the provisions of Law Number 1 of 1995, the participation of State stocks with the stocks of other parties is the same, meaning that in a company there is a mixture of assets originating from shareholders into a unit that is declared as company assets. The question is, can the state money deposited as an investment in ownership of a company still be referred to as state money? If the state enters as capital participation in the form of stocks in a company, then the money can no longer be referred to as state money that stands alone without any legal ties to the money of other parties, because the money has been turned into company property. Consequently, if the company suffers a loss, it cannot be said "there has been a loss on state finances," and logically, it is also impossible to separate the use of company assets from certain shareholders. Therefore, if an SOE (*BUMN Persero*) suffers a loss caused by the SOEs Management in carrying out its duties, there will be no impact of state financial losses in terms of state finances as acts of corruption as regulated in the Corruption Eradication Act.[21]

In the practice of criminal law enforcement against banking crimes, there is a tendency to include the handling of banking cases in the area of criminal law provisions regarding corruption, in addition to

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criminal provisions in the banking laws themselves. For example, the criminal justice process for violators of Bank Indonesia Liquidity Assistance (BLBI) tends to be brought into the criminal law area regarding corruption. Such an application needs to be held proportionally, and a basis is required to justify it. In terms of procedural conveniences contained in the corruption law, the use of the corruption law against crime in the banking sectors can be understood. Likewise, in terms of the flexibility of the formulation of the law regarding criminal acts of corruption, which allows many actions that can detrimental the country's finances to be categorized as criminal acts of corruption. However, in terms of legal certainty, such a tendency can create juridical problems in relation to the existence of banking laws, which explicitly formulate the act as a crime that is threatened by a criminal act.[22]

To conduct a juridical analysis of the issue, the position of the banking law itself as a statutory regulation in the field of administrative law that contains criminal sanctions shall deserve attention. By using the classification done by Sudarto, the banking law can also be qualified as a special criminal law. Therefore, the banking law has the same status as the corruption eradication law, which is equally qualified as a special criminal law. The next issue is how banking crimes regulated in banking laws can develop into corrupt acts restricted in the corruption eradication law. In contrast, both laws are classified as specific criminal laws. This problem can be resolved through the teachings that develop to Article 63 Clause (2) of the Criminal Code, which contains the nature of the principle of "lex specialis derogate generali." This principle is very important for criminal law, which in the doctrine can be distinguished between logical specificity (logicalche specialiteit) and systematic specificity (systematiche specialiteit). However, what is closely related to the problem being discussed in this paper is systematic specificity.

Based on the understanding of the principle of "lex specialis derogate generali" according to the systematic specificity as described above, the banking criminal acts specifically regulated in Act Number 7 of 1992 as amended by Act Number 10 of 1998, cannot develop or change as a criminal act of corruption, even though there are elements of corruption in it. Just as an illustration, the following case can be put forward: an employee of a state bank (SOE) who requests or receives rewards, bribes or gifts relating to services to customers in a credit disbursement relationship. Acceptance of gifts or bribes in the construction of criminal corruption law that meets the formulation of Article 5 Clause (2) of Law Number 31 of 1999 as amended by Law Number 20 of 2001. In conditions like the one in the illustration above, that is the importance of understanding the principle of "lex specialis derogate generali" according to systematic specificity. Despite this legal construction, it does not mean that there are absolutely no forms of banking crime that can be developed into corruption. Banking crimes as regulated in Article 49 Clause (2), Article 50, and Article 50A of the Banking Law in essence and certain cases can develop into criminal acts of corruption.

III. CONCLUSION

There is an urgency to revise the current corruption law because Indonesia as a ratifying country of the United Nations Convention Against Corruption (UNCAC) should refer to the convention namely the state detriment element is not included as one of the features in criminal acts of corruption and various legal interpretations namely, there are several cases where people were prosecuted for corruption due to administrative errors in which the Constitutional Court judged that it was contrary to Article 28D Clause (1) of the 1945 Constitution related to guarantees, protections and certainty of fair law and equal treatment before the

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law. To immediately compile/formulate a Corruption Crime Act that does not contrary to Article 28D of the 1945 Constitution in place of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. This was done to create the principle of legal certainty and a sense of justice.

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