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Determination Authority of State Financial Loss in Criminal Acts of Corruption Post Constitutional Court Decision Number 25/PUU-XIV/2016

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ABSTRACT: The Constitutional Court (MK) issued Decision Number 25/PUU-XIV/2016 on January 25, 2017. This decision states clearly that the word "can" in Article 2 paragraph (1) and Article 3 of Law Number 31 Year 1999 jo. Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption (UU Tipikor) is unconstitutional and lacks legal force. With the elimination of the word "can," a person can only be said to have violated Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law if the person's actions resulted in real state losses, or losses of the nature of actual loss, and not to accommodate state losses that are still potential, or potential losses.

A. RESEARCH BACKGROUND

The foundation for measures to prevent and eradicate corruption is Law Number 31 of 1999 concerning the eradication of criminal acts of corruption, as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the eradication of criminal acts of corruption. The first alteration happened on July 24, 2006, when the Constitutional Court declared in its ruling Number 003/PUU-IV/2006 that the Elucidation of Article 22 Paragraph (1) of the Corruption Crime Act was contrary to the constitution, resulting in it becoming a legal norm. The term "can" was removed from Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended by Law No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption by the Constitutional Court in its decision number 25/PUU-XIV/2016 (UU Tipikor).[1]

As a result, the corruption offense has been transformed from a formal offense to a material offense with a consequence, namely that the element of state financial loss must be calculated in a real/certain manner. This means that the enforcement of the offenses in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts Corruption has shifted its meaning since the a quo decision because it has been declared invalid and contrary to the 1945 Constitution.

This petition was submitted by seven civil servants and retired civil servants from across the country. Because they were indicted based on the *a quo* provisions, three of the seven Petitioners characterized themselves as victims as a result of the enforcement of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999. Meanwhile, the other Petitioners contend that *a quo* provision could jeopardize their constitutional rights as State Civil Apparatus (ASN). As ASN, the Petitioners frequently make choices about policy implementation, such as implementing development initiatives in their particular regions. The policy could be sanctioned if these provisions are fulfilled. [2]

The Petitioners' concerns, particularly to the phrase "can" and the phrase "or another person or a corporation" being applicable. The Petitioners allege that it is impossible for state authorities to not make decisions aimed at implementing development projects in their particular regions, and that it is equally difficult for project organizers (tender winners) to not benefit from the projects they implement. So that the Petitioners can be subjected to *a quo* norm at any time, even if they are capable of performing their duties and functions as ASN in accordance with the rules and regulations.

[1] The Court's Decision stated; "Stating the word 'can' in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption is contrary to the 1945 Constitution and has no binding legal force". (Constitutional Court Decision Number 25/PUU-XIV/2016 p. 116). This decision was not taken unanimously. There were four Constitutional Justices who submitted dissenting opinions, namely I Dewa Gede Palguna, Suhartoyo, Aswanto, and Maria Farida Indrati. In essence, these four judges rejected the review of Articles 2 and 3 of the Anti-Corruption Law. They reasoned that the two articles proposed were not in conflict with the 1945 Constitution and remained as a formal offense.

[2] Constitutional Court Decision Number 25/PUU-XIV/2016 p. 6-8

B. PROBLEM FORMULATION

The research problem can be defined as follows, based on the problem's background:

1. What implications does the abolition of the word "can" from Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999, as amended by Law Number 20 of 2001, have on the law enforcement process for the criminal act of corruption, as stated in the Constitutional Court Decision Number 25/ PUU-XIV/2016 dated January 25, 2016?
2. How is law enforcement process against the Criminal Acts of Corruption for the use of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 after the Constitutional Court Decision Number 25/PUU-XIV/2016?

C. RESEARCH OBJECTIVES

This research, which was conducted using an analytical descriptive method, aimed at explaining legal issues as mentioned in the research problem and attempt to understand in-depth studies of legal issues and the reasons behind the occurrence of legal problems. It is hoped that the results of this study will give birth to prospective thoughts in the framework of legal reform related to legal issues that are the focus of research.

Based on the formulation of the research problem, the purpose of this research is to discover, analyze, and explain:

1. Implications for the law enforcement process for the criminal act of corruption for the abolition of the word “can” in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 as contained in the Decision of the Constitutional Court Number 25 /PUU-XIV/2016 dated January 25, 2017.
2. The process of law enforcement against the Crime of Corruption for the use of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 after the Decision of the Constitutional Court Number 25/PUU-XIV/2016.

D. DISCUSSION

At least four benchmarks are taken into account since the MK's legis ratio shifts the meaning of substance towards corruption violations. The four benchmarks are (1) *nebis in idem* with the previous Constitutional Court Decision Number 003/PUU-IV/2006; (2) the emergence of legal uncertainty in formal corruption offenses, leading to their conversion into material offenses; and (3) the relationship/harmonization between the phrase "may harm state finances or the state economy" in the criminal approach to the Anti-Corruption Law and the administrative approach in Law Number 30 of 2004 concerning Government Administration and (4) there is an alleged criminalization of the State Civil Apparatus (ASN) by using the phrase “can harm state finances or the state economy” in the Anti-Corruption Law. [3]

Although the Constitutional Court did not grant the Petitioners' entire petition, it did provide an interpretation that one of the elements of a corruption offense was a "actual loss" (real state loss) rather than a "potential loss" (potential state financial loss or estimated state financial loss), as regulated and practiced previously. This is what changes the definition of the offense in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law from a formal and material to a material offense.[4]

. In practice, the Public Prosecutor (JPU) frequently uses the provisions of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law in indicting corruption suspects. According to the Independent and Advocacy Institute for Judicial Independence (LeIP), 735 corruption cases were reviewed and decided at the cassation level in 2013. Based on the number of instances, 503 cases (68.43%) employed the provisions of Article 3 of the Anti-Corruption Law to apprehend corrupt officials, while the other cases (approximately 147 cases or 20%) used different provisions. It is worth noting that the Petitioners' assertions that the provision "may affect state finances or the state economy" are considered contrary under the 1945 Constitution. In fact, the use of the provisions of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law by the Public Prosecutor to indict corruptors is very common, as indicated above and as has become public information. These measures are being used to save the state's finances and economy, not the other way around. As a result, the Petitioners' request that the a quo provision be declared unconstitutional under the 1945 Constitution creates a contradiction with public fact. [5]

However, if the element of offense "can damage state finances or the state economy" is issued in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, this presents a new challenge for the roles and responsibilities of the Police, Attorney General's Office, and the Corruption Eradication Commission (KPK) in fighting corruption. As a result of the Constitutional Court Decision Number 25/PUU-XIV/2016, which invalidated the phrase "can" in the sentence "can harm state finances or the state economy," as stated in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, the offense that was formally an offense

[3] Constitutional Court Decision Number 25/PUU-XIV/2016 p. 101-104

[4] Fatkhurohman, *Pergeseran Delik Korupsi dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, Jurnal Konstitusi*, Volume 14, Nomor 1, Maret 2017.

[5] Emerson Yuntho, et.al, “*Penerapan Unsur Merugikan Keuangan Negara dalam Delik Tindak Pidana Korupsi*”, (Research Result Report, Indonesian Corruption Watch, 2004), p. 19.

has now become a material offense. Because the definition of state loss is no longer a potential loss but must be a true loss (actual loss).

The Constitutional Court believes that applying the element of state loss using the idea of actual loss provides more legal certainty that is fair and consistent with attempts to synchronize and harmonize legal instruments, which is one of the reasons for its ruling. [6] If the consideration of this decision is an effort to enforce material law because it prioritizes real losses, then the question becomes whether the consideration of this decision is a form of substantive justice that the Constitutional Court has lauded by relying on progressive law to achieve expediency and legal justice. If this is the case, the product of this idea will, of course, be focused at preventing and eliminating corruption, which is a common enemy that may be faced by anyone at any moment. [7]

As previously stated, in practice at the corruption investigation and judicial levels, a person is frequently detained and sentenced for violating the Anti-Corruption Law's Articles 2 and 3, even though real state losses have not been proven. According to the Constitutional Court Decision Number 25/PUU-XIV/2016, the element of "harming state finances or the state economy" must be materially proven, and judges must consider establishing all criminal components in Articles 2 and 3 of the Anti-Corruption Law while making conclusions.

So far what has happened is that if it is proven that the element is against the law and enriches oneself, a person is immediately considered proven and sentenced, even though the element of state loss does not exist or is not proven, it can only be "estimated" (potential loss).

The Constitutional Court's decision No. 25/PUU-XIV/2016 clearly limits and restricts the ability of investigators and judges to apprehend corrupt officials, but it also defines and improves legal protection, clarity, and justice for all parties. People can no longer be penalized unless there is a written rule of law in place and actual evidence of state losses. People cannot be arbitrarily arrested and detained without being prosecuted, thereby putting an end to rumors of wrong investigations and trials. The law's impact on future practice is that, before conducting investigations into corruption cases, law enforcement officers must be able to prove the existence of real state losses.

Based on the Circular Letter of the Supreme Court Number 4 of 2016 concerning the implementation of the formulation of the results of the Plenary Meeting of the Supreme Court in 2016, it is stated in Part A number (6) of SEMA 4/2016 that the State Audit Board (BPK), which has constitutional authority, is the agency authorized to declare whether there is a loss of state finances. This means that audit agencies other than BPK are not permitted to declare whether or not there has been a loss of state funds. Other auditing bodies, such as BPKP, are solely allowed to audit and scrutinize state financial management. Of course, this brings its own debate about how governmental funds are calculated and how corruption is eradicated. The ASN, for example, must first await the conclusions of the BPK audit regarding state losses; the KPK's operations will undoubtedly be hampered as a result of their inability to wait for the BPK audit's results; this, of course, will have an impact on the progress of corruption eradication.

Moreover, regarding the length of time taken by BPK to audit state losses; if the BPK takes too long to conduct the audit, it will, of course, have an impact on the KPK's efforts to prevent and combat corruption. As a result, the KPK is extremely reliant on the BPK. Actually, there are no problems or conflicts of norms in the substance of Articles 2 and 3 of the Corruption Law regarding the word "can," the problem that becomes problematic is related to proving the existence of an element of state loss, which has an impact on the difficulty of investigating cases of criminal acts of corruption because it must first prove the state loss. As a result of the abolition of the word "can" in the Constitutional Court Decision Number 25/PUU-XIV/2016, the result is that if the prohibited consequences, namely harming state finances or the state economy, have not or have not occurred, while other elements, such as opposing the law and enriching oneself, another person, or a corporation, have been fulfilled in real terms, then there has not been a criminal act of corruption.

Since the Constitutional Court's decision is *erga omnes* (meaning it affects all people), any decision involving criminal law must consider the principles of criminal law. To support the concept of the rule of law as referred to in Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution, the formulation of a criminal offense must comply with the principles of *lex previa* (not retroactive), *lex certa* (must be clear), *lex stricta* (must be firm), and *lex stripta* (must be written). The creation of such a criminal charge would be in violation of our constitution if the foregoing principles were not followed. Because it is unclear, has multiple interpretations, expands authority, and creates legal uncertainty, the formulation of the offense that does not meet the requirements above is plainly detrimental to citizens. [8]

[6] Constitutional Court Decision Number 25/PUU-XIV/2016 p. 83
[7] Fatkhurohman, *ibid* p. 21.
[8] Amir Syamsudin, *Putusan MK dalam Penegakan Hukum Korupsi*, Harian Kompas 02 February 2017.

E. CONCLUSION

1. The Constitutional Court's decision Number 25/PUU-XIV/2016 is worth discussing further because it has altered the nature of eradicating corruption in Indonesia, particularly in terms of how to prove Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law in court after this decision, and it also raises concerns in the law enforcement of corruption if it is linked to the implementation of the articles in Law Number 30 of 2014 concerning Government Administratio There was a change in the part "can be detrimental to state finances and the state economy" after the Constitutional Court's decision. Prior to the issuance of the Constitutional Court's decision, Article 2 paragraphs (1) and 3 of the PTPK Law were included as formal offenses, which did not require the consequences in the form of financial losses and the state's economy. However, after the issuance of the Constitutional Court's decision, Article 2 paragraph (1) and 3 of the PTPK Law became a material offense, requiring that there must be consequences in the form of financial losses and the state's economy. Thus, there is a change from potential loss only to actual loss.
2. The formulation of Article 2 paragraph (1) and 3 of Law no. 31 of 1999 was changed to a formal offense by the Constitutional Court through Decision No. 25/PUU-XIV/2016. It is reasonable to state that, the qualification of the offense referred to Article 1 paragraph (1) letters a and b of Law no. 3 of 1971 is a material offense. Amendment of Articles 2 and 3 of Law no. 31 of 1999 became a material offense, containing several juridical consequences, namely (1) elements of state financial losses or the state's economy must be visible/realized/real (actual loss); (2) to be considered a corruption offense, it must first determine whether there is a real loss; and (3) to determine whether or not there is an element of state loss, it must go through the procedures carried out by the agency that has the authority to do so.

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