

The Transplantation of Compensation in Civil Law to Public Law in Criminal Acts of Corruption

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Abstract:

Background: The state needs state finances in carrying out state governance to achieve the country's goals. The administration of this government is used for personnel expenditure, goods expenditure, capital expenditure, debt interest payments, subsidies, grants, social assistance, other expenditures and expenditures to the regions. The budget for the procurement of government goods / services can provide benefits to the community if it is used in accordance with laws and regulations, but the procurement of government goods / services does not achieve its objectives due to the criminal act of corruption in the government procurement sector. Given that corruption has taken away state finances which are the right of the state so that the state loses its ability to carry out its obligations and responsibilities for the welfare of society, the return of state finances is a key issue besides the prevention and eradication of corruption. This research investigate transplantation of compensation in civil law into public law in criminal acts of corruption.

Materials and Methods: The type of research used is normative legal research. Normative legal research is defined as research that refers to the legal norms contained in statutory regulations and court decisions. The legal materials used in this research were collected through literature study and document study. Literature study conducted to find sources of materials related to concepts, doctrines and legal principles that are considered to add clarity to the problem and direction of the relevant discussion in this study.

Results: This research find that the substitute money penalty is different from the fine because the penalty does not aim to recover state financial losses, but aims to burden someone who violates the provisions of the corruption eradication law by paying a certain amount of money or assets so that it is felt as a loss by the maker himself, so that order in society was restored. Therefore, the corruption eradication law has stated that the minimum and maximum threat values of criminal fines have been determined in the formulation of offenses.

Conclusion: Therefore, the corruption eradication law has stated that the minimum and maximum threat values of criminal fines have been determined in the formulation of offenses by translation compensation in private law to public law.

Key Word: civil law, compensation, corruption, public law, public procurement.

Date of Submission: 03-04-2021

Date of Acceptance: 17-04-2021

I. INTRODUCTION

The state needs state finances in carrying out state governance to achieve the country's goals. The administration of this government is used for personnel expenditure, goods expenditure, capital expenditure, debt interest payments, subsidies, grants, social assistance, other expenditures and expenditures to the regions (transfers to the regions). Goods and capital expenditures are carried out through government goods / service procurement activities. The activity of procuring government goods / services is one of the activities that requires a large allocation of state finances for the procurement of construction, goods, services and other services for government administration. As a comparison, in 2019, the state budget for the 2019 fiscal year is planned at Rp. 2,461,112,052,481,000.00 (two quadrillion four hundred sixty-one trillion one hundred and twelve billion fifty-two million four hundred and eighty-one thousand rupiah) [1] where the budget for the procurement of government goods / services is Rp. 860,972,909,362,716, - (eight hundred and sixty trillion nine hundred seventy-two billion nine hundred and nine million tiga hundred sixty-two thousand seven hundred and sixteen rupiah), which consists of Rp. 333,990,782,420,447, - (three hundred thirty-three trillion nine hundred ninety billion seven hundred eighty-two million four hundred twenty thousand four hundred and forty-seven rupiah) for the procurement of coal / services in the central government and Rp. 526,982,126,942,269, - (five hundred twenty-six trillion nine hundred eighty-two billion one hundred twenty-six million nine hundred forty-

two thousand two hundred and sixty-nine rupiahs) for the procurement of coal / services in the regional government. [2]

In 2020, the state expenditure budget for the 2020 fiscal year is planned for IDR 2,540,422,500,559,000.00 (two quadrillion five hundred forty trillion four hundred twenty-two billion five hundred million five hundred and fifty-nine thousand rupiah) where the allocation is for the procurement of goods / government services on February 8, 2020 is Rp. 501,585,930,990,062, - (five hundred one trillion five hundred eighty-five billion nine hundred thirty million nine hundred ninety thousand sixty-two rupiah) [3] used for government goods / services procurement activities, which consist of Rp. 217,386,822,177. 996, - (two hundred and seventeen trillion tasks hundred eighty-six billion eight hundred twenty-two million one hundred seventy-seven thousand nine hundred and ninety-six rupiah) for the procurement of goods / services in the central government and Rp. 284,199,108,812,066, - (two hundred eighty-four trillion one hundred ninety-nine billion one hundred eight million eight hundred twelve thousand sixty-six rupiah) for the procurement of goods / services in the government in the regions. [4]

The budget for the procurement of government goods / services can provide benefits to the community if it is used in accordance with laws and regulations, but the procurement of government goods / services does not achieve its objectives due to the criminal act of corruption in the government procurement sector. According to Dwi Susanto, the amount of government procurement of goods / services that was corrupted was around 30% of the total budget. [5] One example of a criminal act of corruption in the procurement sector that is detrimental to state finances is corruption in the procurement of Electronic KTPs which resulted in state financial losses of Rp. 2.3 trillion of the total project funds budgeted at Rp. 5.9 trillion, which means that almost 50% of the budget for the procurement of this Electronic KTP has been corrupted. This corruption in the procurement of Electronic KTPs not only results in state financial losses but also results in the right of citizens to have Electronic KTPs and not to obtain state services because they do not obtain Electronic KTPs. Another example of PBJ's corruption case is the corruption case of the development project of the National Education, Training and Sports Facilities Center (P3SON) in Hambalang or known as the Hambalang Case which resulted in state financial losses of Rp. 706 billion. The criminal act of corruption resulted in the National Center for Education, Training and Sports Facilities (P3SON) not being used. [6]

Indonesia has ratified several international conventions to eradicate corruption. One of them is the United Nation Conventions Against Corruption (UNCAC) 2003 through Law of the Republic of Indonesia Number 7 of 2006 concerning Ratification of the United Nation Convention Against Corruption, 2003 (United Nations Convention Against Corruption, 2003). UNCAC 2003 has three main objectives: (a) Promote and strengthen efforts to prevent and eradicate corruption efficiently and effectively; (b) Promote, facilitate and support international cooperation and technical assistance in the prevention and eradication of corruption, including asset recovery; (c) Promote integrity, accountability and the appropriate management of public affairs and public property rights. Based on these objectives, there are five scopes of activities included in UNCAC, which are as follows (a) Prevention of corruption; (b) Investigating and prosecuting corruption cases; (c) Freezing assets resulting from corruption; (d) Confiscation of assets resulting from corruption; (e) Return of assets resulting from corruption.

Based on the objectives and scope of the corruption eradication strategy at UNCAC, not only is the prevention of corruption limited to the aspects of corruption and prevention, but it is broader than that including the prevention of money laundering. The corruption eradication strategy at UNCAC shows that the effectiveness of tackling corruption can only occur if the five strategies above are carried out comprehensively by a country. [7] UNCAC also provides several recommendations to participating countries to make laws and regulations such as criminalization of illicit enrichment, efforts to return assets (asset recovery), either with a conviction-based or non-conviction-based asset forfeiture (NCB Asset Forfeiture) mechanism, and trading influence that has not been regulated in statutory regulations, including in Indonesia.

Given that corruption has taken away state finances which are the right of the state so that the state loses its ability to carry out its obligations and responsibilities for the welfare of society, the return of state finances is a key issue besides the prevention and eradication of corruption. In this case, assets resulting from corruption are the right of the state which must be returned to the state and it is the state that has the right to manage state assets or assets and be used as much as possible for the prosperity and welfare of the people. [8] The return of assets proceeds from corruption is an urgent matter to restore the state's ability to carry out its obligations and responsibilities for the welfare of society.

II. MATERIAL AND METHODS

The type of research used is normative legal research. Normative legal research is defined as research that refers to the legal norms contained in statutory regulations and court decisions. [9] Normative legal research is research conducted by examining library data using secondary data sources, both in the form of primary and secondary legal materials as well as tertiary legal materials. [10]

This research is analytical prescriptive in nature, which means that this research does not only describe by analyzing a condition or symptom, both on positive and empirical legal grounds, but also this research provides the proper regulation (*das sollen*) and solves legal problems. The legal materials used in this research were collected through literature study and document study. Literature study conducted to find sources of materials related to concepts, doctrines and legal principles that are considered to add clarity to the problem and direction of the relevant discussion in this study.

III. RESULT

The Concept of Indemnity in Civil Law

In general, compensation is known in the field of civil law. The concept of compensation in law is known in 2 (two) areas of law, namely (a) compensation for default of contracts and (b) compensation due to statutory engagement including compensation for illegal acts. [11]

Article 1243 of the Civil Code states that compensation for expenses, losses and interest due to non-fulfillment of an agreement will only begin to become compulsory if the debtor, after being declared negligent in fulfilling the agreement, or if something he has to give or make can only be given or made within a grace period. which he had done. This article intends to explain why a person can be burdened with paying compensation. The determination of the commencement of the calculation of compensation payments depends on whether or not a period is used as a benchmark for negligence of a party. [12]

Based on Article 1243 of the Civil Code, Subekti stated that compensation is often detailed in three elements, namely cost, loss and interest. Costs are all real costs or costs that have been incurred by one party. Loss is a loss due to damage to goods belonging to the creditor due to negligence of the debtor, while interest is a loss due to loss of profit. [13] Likewise, according to R. Setiawan, the Civil Code details losses (in a broad sense) into 3 (three) categories, namely (a) costs, (b) losses (in the narrow sense) and (c) interest. Meanwhile, according to Nieuwenhuis, the loss is a reduction in the assets of one party which is caused by an act (doing or allowing) that violates the norm by the other party.

Losses suffered by a person can be broadly divided into two parts, namely losses to oneself and losses to one's property. Meanwhile, the loss of property itself can be in the form of real losses experienced as well as loss of expected profits. Even though the loss can be in the form of personal (physical) loss to a person or loss to property, if it is related to compensation, both can be valued in money (assets). Likewise, because the loss of property can also be in the form of loss of expected profit, the meaning should be the reduction or absence of one party's assets, which is caused by an act (doing or allowing) that violates the norm by the other party. [14]

Cost is any cost that has to be incurred in real terms by the injured party, in this case as a result and there is an act of default, for example in a sale and purchase contract, where the seller is in default, so that the buyer tries to buy the same goods from another party with a higher price, then the price difference is a cost component that must be reimbursed by the seller. Meanwhile, what is meant by loss (in a narrow sense) is a state of decline (reduction) in the value of the creditor's assets as a result of default on the part of the debtor. Furthermore, what is meant by interest is the profit that should have been obtained but was not obtained by the creditor because of the default action on the part of the debtor. [15]

The requirements set by the Civil Code so that losses occur (in a broad sense) are (a) Component of loss The component of loss that can be compensated consists of costs, losses (in a broad sense) and interest; (b) Starting point of compensation or commencing where a payment for compensation is required is that since it is declared in default, the debtor continues to neglect his obligations, or against something that must be made or given, since the time the grace period has passed in which the debtor can make or give said; (c) Not for reasons of force majeure. New debtors can be requested for compensation if the default is not due to reasons that are classified as force majeure, namely in the following cases: a. Due to predictable reasons According to Article 1244, if there are unexpected things (proof on the part of the debtor) that cause failure to perform the contract, this is not a category of contract interpretation but is included in the category of force majeure, the legal provisions of which are different. at all, unless the debtor has a bad faith, in which case the debtor is still held responsible; b. Due to coercive circumstances, another reason a debtor is considered to be in a state of force majeure so that he does not need to be responsible for the contract not being executed is if the contract is not fulfilled due to compulsion, as regulated in Article 1245 of the Civil Code; c. Because the act is prohibited, if it turns out that the (achievement) that the debtor must perform is prohibited by the applicable laws, then the debtor is not liable to pay compensation (Article 1245 of the Civil Code); (d) When a loss occurs. In principle, the losses that must be compensated by the debtor in the event of achievement of a contract as in Article 1246 of the Civil KIH are losses in the form of losses that have actually been suffered, and the loss of profits that should have been enjoyed by the creditor; (e) Foreseeable loss, to be able to provide compensation to the creditor, the loss incurred must be expected to occur or could have been predicted from the time the act that caused the loss was committed. This provision does not apply if the contract is not fulfilled due to deception committed by him (Article 1247 of the Civil Code); (f) The loss is a direct result, the creditor can request compensation from the

debtor who performs a failure on a contract only limited losses and loss of gain that are a direct result of the default. Even so, the failure to fulfill this contract occurred because of a fraudulent act by the debtor (Article 1248 of the Civil Code).

The result of an act against the law is that the loss occurs for the victim, the loss must be compensated by people who are charged by law to compensate for the loss. Justinian stated that the law that regulates civil compensation has long been known in the history of law. The form of compensation for acts against the law known by law is (a) Nominal compensation, if there is a serious unlawful act, such as an act that contains an intentional element, but does not cause real harm to the victim, then the victim will be given a certain amount of money according to his sense of justice without calculating the actual amount of the loss; (b) compensatory damages is compensation which is a payment to the victim for and equal to the loss that has actually been experienced by the victim from an act against the law. Therefore, compensation like this is also called actual compensation. For example, compensation for all costs incurred by the victim, loss of profit / salary, illness and suffering, including mental suffering such as stress, shame, falling in good name, and so on; (c) Punitive damages, which is compensation in a large amount that exceeds the actual amount of loss. The large amount of compensation is intended as a punishment for the perpetrator. This punitive compensation is appropriate for serious deliberate cases. For example, it is applied to severe persecution.

Compensation for actions against the law is regulated in Article 1365 of the Civil Code (BW). Article 1365 of the Civil Code, which states that every act violating the law which results in loss to other people, obliges the person who, due to his fault, causes a loss, to compensate for the loss. According to Ahmadi Miru and Sakka Pati that: "Article 1365 is the most popular article relating to illegal acts, namely the provision which obliges people who commit acts against the law to compensate those who have suffered losses due to these illegal acts. The responsibility for making compensation payments to the party who experiences the loss can only be done if the person who has committed an illegal act is a person who is legally responsible (no excuse for forgiveness). Theoretically, it is said that claims for compensation based on the reasons for violating the law can only be made if it fulfills four elements, namely: a. there is an act violating the law; b. there is a loss; c. there is a relationship between loss and illegal acts; and D. There is a mistake".

Actions against the law in civil law which in Dutch are called *onrechmatige daad* and in English is called tort. The purpose of establishing a legal system which is then known as illegal acts is to be achieved as in the Latin proverb "*Juris praecepta sunt haec honeste vivere, alterum non laedere, sum cuique tribuere* (live honestly, do not harm others, and give others their rights). Based on Article 1365 of the Civil Code, what is meant by an act of breaking the law is an act that is against the law committed by a person who due to his fault has caused harm to the person. Several definitions of illegal acts are (a) Failure to fulfill something that becomes an obligation other than a contractual obligation or a quasi contractual obligation that issues the right to claim compensation; (b) An act or not doing something that results in loss to other people without prior legal relationship, in which the act or not doing something is either an ordinary act or it can also be an accident; (c) Failure to fulfill an obligation imposed by law, which obligation is aimed at everyone in general, and by not fulfilling that obligation, compensation may be requested; (d) A civil wrong, in which an indemnity can be prosecuted which is not in default of the contract, or default of trust obligations, or default of other equity obligations; (e) A loss that is not caused by default on the contract, or an act that is detrimental to the rights of others, which is created by law that does not arise from the contractual relationship; (f) An act or not doing something that violates the law violates the rights of others created by law, and therefore a compensation can be sued by the injured party; (g) Acting against the law is not a contract.

Article 1365 of the Civil Code also requires an element of guilt (*schuld*) for an act against the law, where the element of guilt is deemed to exist if it meets one of the 3 (three) conditions below: 1. There is an element of intent, or 2. There is an element of negligence (negligence, *culpa*); 3. There is no justification or excuse for excuses, such as being overmatched, defending oneself, being insane and so on. According to Djoko Prakoso that usually based on Article 1365 of the Civil Code, if a person has committed an unlawful act and has been proven guilty, then prosecution can be carried out against him. [16]

In terms of severity, degree of guilt of the perpetrator of an act against the law, then an act against the law committed with an intentional element has a higher degree of guilt than an act against the law committed with an element of negligence. In an act against the law, a new intentional element is deemed to exist when the deliberate act has caused certain consequences to the victim's physical and / or mental or property, even though it has not been deliberate to injure (physically or mentally) the victim.

The element of deliberation has elements, namely (a) the awareness to do: (b) there is a consequence of the action, so it is not just an act; (c) awareness to do, not only to cause a consequence, but also the belief that the action will inevitably lead to the consequence. An act is committed deliberately if there is the intent of the perpetrator. The term intent is defined as a desire to produce a certain result. So on purpose, there is an intention in the heart of the perpetrator to cause certain harm to the victim, or at least be able to know for sure that the consequences of his actions will occur.

Whereas an act against the law with an element of negligence, the perpetrator has no internal intention to cause harm, maybe even a desire to prevent the loss. An act against the law committed by negligence, must meet the elements, namely (a) There is an act or neglecting something that should be done; (b) There is a duty of care; (c) The precautionary obligation is not carried out; (d) There is a loss for another person; (e) There is a causal relationship between the act or not doing the action and the losses that arise. The next requirement that must exist in Article 1365 of the Civil Code is that there must be losses resulting from acts against the law.

Losses caused by actions against the law can be in the form of material losses or immaterial losses. Material loss is the loss that has been suffered and the benefits that should be obtained. For example, a loss for damage to a truck means that in addition to paying the cost of repairing the truck, it is also an obligation to replace the truck's income while it is in the repair shop. Meanwhile, immaterial losses are a number of non-material losses such as fear, loss of life's pleasures, loss of hands that can no longer be used for earning a living and so on.

The compensation in the civil law is adopted as compensation in the criminal law. The Criminal Procedure Code recognizes two types of compensation, namely (a) compensation for the actions of law enforcement officials and compensation for the actions of the suspect / defendant and (b) compensation for the actions of the defendant can be seen in Article 98 paragraph (1) KUHAP The act which forms the basis of the indictment in the examination of a criminal case by a district court causes harm to another person, then the head judge at trial may decide at the request of that person to combine the claim for damages to that criminal case.

Substitute Money Crime in Corruption Crime

If it is related to the penalty of compensation money, the penalty for compensation money is compensation in the criminal law contained in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the Eradication of Corruption and the penalty of compensation money is a form of compensation because the criminal act of the defendant is an illegal act that harms state finances so that the defendant is responsible for compensating the state's financial losses.

The substitute money penalty is different from the fine because the penalty does not aim to recover state financial losses, but aims to burden someone who violates the provisions of the Corruption Eradication Law by paying a certain amount of money or assets so that it is felt as a loss by the maker himself, so that order in society was restored. [17] Therefore, the Corruption Eradication Law has stated that the minimum and maximum threat values of criminal fines have been determined in the formulation of offenses. The highest possible fines are in Article 2 and Article 3 (corruption offenses against state finances) and Article 12 (among others: acceptance of bribes by state officials, civil servants, and judges) and Article 12B (gratuities), which is Rp. 1 billion, while for other offenses, the maximum penalty of fine ranged from Rp. 150 million, Rp. 250 million, Rp. 350 million, Rp. 600 million, and Rp. 750 million.

IV. CONCLUSION

The substitute money penalty is different from the fine because the penalty does not aim to recover state financial losses, but aims to burden someone who violates the provisions of the Corruption Eradication Law by paying a certain amount of money or assets so that it is felt as a loss by the maker himself, so that order in society was restored. Therefore, the Corruption Eradication Law has stated that the minimum and maximum threat values of criminal fines have been determined in the formulation of offenses.

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Robertson Pakpahan, et. al. “The Transplantation of Compensation in Civil Law to Public Law in Criminal Acts of Corruption.” *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 26(04), 2021, pp. 01-06.