Jurnal Ilmu Sosial dan Pendidikan (JISIP)
Vol. 8 No. 2 Maret 2024
e-ISSN : 2656-6753, p-ISSN: 2598-9944
DOI: *10.58258/jisip.v7i1.6685/http://ejournal.mandalanursa.org/index.php/JISIP/index*

Analysis of the Application of Unlawful Act Elements in Corruption Crime Cases against North Sulawesi Bank Debtors (Review of Decision Number 11/Pid.Sus-TPK/2021/PN Gto)

Frengki Uloli[1], Rafika Nur[2], Asdar Arti[3]
Universitas Ichsan Gorontalo

Article Info
Article history:
Received : 25 January 2024
Published : 01 March 2024

Keywords:
Bad credit
Corruption
Against the law

Abstract
This research was conducted to determine the extent to which material criminal law was applied in the panel of judges' consideration of elements of unlawful acts in cases of criminal acts of corruption where the defendant was a debtor who had defaulted (bad credit) on his loan installments. Knowing the extent to which judges provide legal considerations using the lex specialist derogate generally principle approach, as well as the existence of contradictions between Constitutional Court Decision Number 003/PUU-IV/2006 in the criminal justice practice order. The results of this research show that judges still apply unlawfulness in a positive function first without conducting an in-depth study and truly exploring whether the act is indeed an act that is considered evil and reprehensible to the wider community. Judges, in looking at the unlawful nature of material law, must consider the unlawful nature of the law in its negative function, not only in its positive function, so that actions carried out, even though they meet the formulation of an offense but do not violate negative material law, can be used as a justification that does not harm the state, does not benefit themselves, other people and corporations and the perpetrator's legal obligations are not subject to punishment.

Info Artikel
Article history:
Diterima : 25 Januari 2024
Publis : 01 Maret 2024

Abstrak
Penelitian ini dibuat untuk mengetahui sejauh mana penerapan hukum pidana materil dalam pertimbangan majelis hakim pada unsur perbuatan melawan hukum dalam peristiwa tindak pidana korupsi dengan terdakwa adalah debitur yang mengalami gagal bayar (kredit macet) atas angsuran pinjamannya. Mengetahui sejauh mana hakim memberikan pertimbangan hukum melalui pendekatan azas lex spesialis derogate generaly, serta adanya pertentangan antara Putusan Mahkamah Konsitusi Nomor 003/ PUU-IV/2006 dalam tatanan praktek peradilan pidana. Hasil penelitian ini menunjukkan bahwa hakim masih menerapkan sifat melawan hukum dalam fungsi positif terlebih dahulu tanpa melakukan kajian yang mendalam dan benar-benar menyelami apakah perbuatan tersebut memang merupakan perbuatan yang dianggap jahat dan tercela bagi masyarakat luas. Hakim dalam memandang sifat melawan hukum materiil harus mempertimbangkan sifat melawan hukum dalam fungsinya yang negatif, bukan hanya dalam fungsi yang positif, sehingga perbuatan yang dilakukan walaupun memenuhi rumusan delik tetapi tidak melawan hukum materiil negatif dapat dijadikan sebagai alasan pembenar yang tidak merugikan negara, tidak menguntungkan diri sendir, orang lain dan korporasi serta kewajiban hukum pelaku tidak dikenakan pemidanaan terhadapnya.

Corresponding Author:
Name of Corresponding Author,
Frengki Uloli
Universitas Ichsan Gorontalo
Email: anky3487@gmail.com

1. INTRODUCTION

In essence, the principles contained in various banking transactions are civil, both in the form of Credit Engagements and other types, which begin with an agreement. According to Article 1233 of the Civil Code, an agreement is created by agreement or by law. A bank credit agreement is an agreement to hand over money. This preliminary agreement is the result of an agreement between the lender and recipient of the loan. This agreement is a consensual obligation which is controlled by the Banking Law and the General Section of the Civil Code.

The engagement consists of 2 (two) parties, namely in this case the bank and its customer, both as depositors and depositors and as creditors and debtors. In business, these agreements usually contain various business clauses, including, among others, regarding "risk", not only limited to broken promises (default) or negligence (ingebreke stelling), it can also be due to factors beyond one's ability (force majeure). The debtor's lateness or inability to fulfill his obligations is an act of default which is further regulated in article 1238 of the Civil Code, which states "The debtor is negligent, if he is declared negligent by means of a warrant or similar deed, or for the sake of his own obligation, namely if This stipulates that the debtor must be considered negligent with the expiration of the specified time." Conditions that can be categorized as acts of default are:

a. Not doing what he said he would do;
b. Carrying out what he promised but not as promised;
c. Did what was promised but was late;
d. Doing something that according to the agreement is not allowed to be done.

The conditions above are seen as acts of breach of contract which are still within the realm of civil law. Apart from acts of tort, in the realm of civil law there are also known unlawful acts as regulated in article 1365 of the Civil Code, which states that "every act that violates the law and brings loss to another person, requires the person who caused the loss through his fault to compensate for the loss" . Even Hoge Raad in Arrest Cohen-Lindenbaum has expanded the definition of against the law with the aim of achieving objectivity in a sense of justice for society that is every act that causes negligence or violations of other people's rights or is contrary to the perpetrator's legal obligations or existing good morals or propriety in society it can be seen as an act against the law.

Thus, the terminology of unlawful acts is broader than breach of contract, and the terminology of unlawful acts in practice has also been applied in criminal law. In this connection, there are differences in perceptions regarding bad credit, whether it is included in the qualifications of default or whether it can be categorized as an unlawful act which is the domain of criminal law, especially corruption.

This condition happened to the debtor PT. Bank SulutGo Limboto Branch, which had to languish in prison because it failed to pay (bad) on its credit installments. In case Number 11/Pid.Sus-TPK/2021/PN Gto, the court sentenced the defendant to 6 years and a fine of IDR 500,000,000.00 (five hundred million rupiah) subsidiary to 6 (six) months in prison. Apart from that, the defendant is also burdened with paying compensation money with the order "Ordering the defendant to pay replacement money in the amount of IDR 4,700,000,000.00 (four billion seven hundred million rupiah) within 1 (one) month after the court decision which has obtained permanent legal force. "If you don't pay the replacement money, your property can be confiscated by the Prosecutor and auctioned off to cover the replacement money, and if your assets are insufficient to pay the replacement money, then you will be sentenced to imprisonment for 4 (four) years and 6 (six) months."

2. RESEARCH METHOD

According to Johnny Ibrahim, normative legal research is a scientific research procedure to find the truth based on the logic of legal science from its normative side (Marzuki, 2008). The approaches used in this research are the statutory approach, conceptual approach, analytical approach and case approach (Ibrahim 2006:300). MethodThe reasoning chosen is the deductive reasoning method, namely things formulated in general that are applied to specific circumstances.

In this research, the author criticizes general legal theories and then draws conclusions that are in accordance with the legal issues studied, namely the application of the Specialist

Lex Principle in banking corruption cases. The aim of this research is to consistently analyze the position of unlawful acts from the perspective of the lex specialist principle.

3. RESEARCH RESULTS AND DISCUSSION (12 Pt)

3.1.Legal Reasoning of Judges on Elements of Unlawful Acts

The Constitutional Court Number 003/PUU-IV/2006 dated 25 July 2006 has decided that the formulation of the Explanation to Article 2 paragraph (1) of Law Number 31 of 1999 which relates to elements of material unlawful acts that are contrary to the 1945 Constitution and therefore does not have binding legal force. This decision slightly reduces the existence of the spirit of law enforcement of criminal corruption, but if we examine it more deeply, the Constitutional Court Decision Number 003 /PUU-IV/2006 does not completely cancel the nature of material unlawfulness in criminal acts of corruption, this is due to the tendency of judges to view criminal acts of corruption. as a disgraceful act so that this will directly lead the judge to dig deeper into whether the act is materially against the law or not, because the judge's attitude in criminal cases is known as the active judge principle, meaning that even if the public prosecutor does not raise certain things to the court, he If the judge considers all these things that he needs to know, the judge because of his position (ex officio) must also consider matters that were not brought forward by the public prosecutor. This active judge system is also known as the Eventual Maxim.

There is an obligation for judges to follow the dynamics of law and understand the laws that exist in society as confirmed in Article 5 of Law no. 48 of 2009 concerning Judicial Power. Strictly speaking in Article 5 of Law no. 48 of 2009 concerning Judicial Power states "Judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society".

The existence of this provision allows law enforcers to view from a legal perspective not only as written norms but also unwritten norms or living law implemented by law enforcement.

Application of article 5 of Law no. 48 of 2009 concerning Judicial Power is the rationale for judges in deciding bad credit cases as criminal acts of corruption. On the other hand, the public prosecutor in his indictment only argued that the defendant's actions were contrary to the Bank's Standard Operating Procedures, not contrary to certain laws. Not to mention that the court examination never even explored how big the losses experienced by the region were, does the region experience a decrease in dividend receipts every year? This also escapes the principles of proof.

3.2. Specialist Lex Principle Approach in Implementing the Elements of Unlawful Acts

The settlement model for financial and banking cases that includes criminal aspects in the context of macroeconomic policy seems to have become a decision that is difficult to avoid, especially in crisis situations in the financial and banking sector, even though this settlement model is difficult for the wider community to accept and is seen as inconsistent with or contrary to the public's sense of justice. (Social justice) as opposed to restorative justice. This resolution model should be observed by experts and criminal law experts as a paradigm shift from the classical paradigm to a new paradigm that prioritizes a restorative-rehabilitative approach.

The fundamental problem of the paradigm shift mentioned above is the extent of the legal implications that arise for the criminal law system that has been used for approximately 57 (fifty seven) years in Indonesia. The legal implications for the substance of laws and regulations in the financial and banking sector require a study of

the inclusion of criminal provisions in these laws and regulations. The second legal implication is to what extent should the restorative approach still be maintained if in financial and banking cases sufficient evidence is found of state financial losses that have the potential to endanger the resilience of the financial and banking climate? This legal implication is directly related to the substantive law and procedural law that will be applied to the case.

In the context of the second legal implication regarding the discovery of state financial losses in financial and banking cases, the author quotes the opinion of Prof. Andi Hamzah, who differentiates between lex specialist which is confronted with lex generalis such as Law Number 31 of 1999 in conjunction with Number 20 of 2001 to the Criminal Code, and lex specialist which only applies and is aimed at certain legal subjects such as Law Number 7 of 1992 in conjunction with Law Number 10 1998 concerning Banking, and Law Number 8 of 1995 concerning Capital Markets. In relation to Prof.'s opinion. Andi Hamzah, the question that arises is whether Law Number 31 of 1999 in conjunction with Number 20 of 2001 can immediately be applied to criminal acts in the banking or capital markets which meet the elements of state financial loss? Prof. Andi Hamzah is of the opinion that the Corruption Law does not apply immediately, but must apply the criminal provisions contained in the Capital Markets Law first, because Law Number 8 of 1995 and Law Number 31 of 1999 in conjunction with Number 20 of 2001 are two legal regimes different. Law Number 8 of 1995 is a legal regime that applies to certain legal subjects, namely capital market players, as stipulated in the General Provisions in the Law. Meanwhile, Law Number 31 of 1999 in conjunction with Number 20 of 2001 is a special law (lex specialist) on the Criminal Code which is aimed at every person (anyone) who fulfills the elements of a criminal act of corruption. The norm is Article 63 paragraph (2) of the Criminal Code.

Prof's opinion Andi Hamzah can be justified in the context of the division of legal regimes that exist to date, but on the other hand, the general principle that has been recognized for a long time must also be taken into account regarding the use of criminal law as a tool that is ultimum remedium and not primum remedium. According to Dr. HG de Bunt in his book "strafrechtelijke handhaving van milieu recht, 1989", criminal law can be a primum remedium if:

a. Casualties were huge
b. Recidivist defendant
c. Losses cannot be recovered (irreparable).

Regarding prudential banking, Indriyanto Seno Adji stated that if it involves violations of prudential banking principles, the offense is regulated in the Banking Law, and cannot be interpreted as a corrupt act. Indriyanto's view is based on the principle of systematische specialitet or systematic specificity so that violations of banking prudential principles are an area of banking crime, not corruption. According to Indriyanto, the administrative penal law is based on the principle of legality and this is to avoid concursus and it is also necessary to remember that the principle of systematic specificity has become a legislative norm as stated in Article 14 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes states that every person who violates the provisions of the Law which expressly states that a violation of the provisions of the Law is a criminal act of corruption, the provisions stipulated in the Corruption Eradication Law apply.

In the context of Criminal Law, the term "Administrative Penal Law" is all legislative products in the form of legislation (within the scope of) Administration

(State) which has criminal sanctions, as is the case with training themes related to Administrative Criminal Law. Therefore, all such legislative products, such as Laws on Electricity, Forestry, Customs, Finance, Tax, Environment, Telecommunications, Fisheries, Mining, Capital Markets, Banking and so on are products called Administrative Penal Law as long as there are provisions governing them criminal sanctions and Administrative Penal Law, in terms of the function of Criminal Law, are interpreted as Criminal Law which is Special Extra criminal law.

Actions that are seen as violations of administrative legislative products are often called, for example, Banking Crimes, Mining Crimes, Forestry Crimes, Capital Market Crimes, and Immigration Crimes and so on. Problems and questions arise when violations of Administrative Penal Law products (as Extra Special Criminal Law) are perceived as other Special Crimes, namely Corruption (as Intra Special Criminal Law). The primary question is: Can a violation of administrative penal law be an absorptive act of a criminal act of corruption with patterns called one materiele daad and the materiele daad being the same, from the perspective of violating several laws? The answer to this question is not just a matter of practical experience, but the relevance and strength of law enforcement's understanding of the principles of Criminal Law (Book I of the Criminal Code) which are very dynamic in implementing the resolution of such dynamic cases. The representation of this answer is related to practical and academic studies of the relationship between Banking Crime which is also Administrative Penal Law, with the scope of Administrative Law (State) such as the Central Bank Law (Bank Indonesia), as well as the scope of other Administrative Penal Law, for example Banking Crime and miscellaneous administrative regulations (from Special Criminal Laws that are Extra to the Criminal Code), all of which have been converted into Corruption Crimes that have been absorbed as Special Criminal Laws that are Intra to the Criminal Code.

"Overheidsbeleid" is interpreted as State Apparatus Policy. The exercise of authority within the meaning of policy is now often tested materially within the scope of State Administrative Law (HAN) or Criminal Law. State Apparatus Officials and BUMN Officials experience obscuring directions of meaning when carrying out their duties, functions and authority are faced with problems between aspects of Criminal Law which have a correlation with their administrative function (or civil function), so that law enforcers often understand the wrong meaning of their functions, duties and The authority of State apparatus officials and BUMN officials is a criminal act, although sometimes the meaning of the Criminal Law area cannot be separated from the issue of implementing this function. It is not uncommon for State Apparatus Officials and BUMN officials to experience doubts in carrying out their functions and authority, especially in carrying out their authority policies which are perceived by law enforcers as corrupt policies or corrupt acts that hide behind policies, and this is what gives the Government the idea to submit a proposed Draft Law. Law on Protection of Officials. There is no intention to protect or provide immunity for officials from corrupt acts, but this simply provides clear boundaries regarding the implementation of "Policy", "Policy" or "Beleid" from a Policy perspective which is considered a criminal act of corruption. Indeed, the understanding of "materiele daad" and authority are legal disciplines that have different characteristics, but they share the same misperception, namely whether materiele daad falls within the area of State Administrative Law or Criminal Law (Corruption Crime).

The development between State Administrative Law and Criminal Law has entered the "gray area" with all the technical difficulties with the criminalization process, even now giving rise to debate among criminal law experts, legal practitioners

and academics. The final example of the Sisminbakum polemic in the realm of State Administrative Law or Criminal Law, between Prof. Dr. Yusril Mahendra, SH with the Indonesian Attorney General's Office Why not, the decisions of State Officials both in the context of "beleid" ("vrijsbestuur") and "diskresi" (wisdom - "discretionary power") have become an arena for academic study to be used as reasons for rejection or justification for punishment in areas Criminal law. The principle of material unlawful acts has undergone extensive shifts, in fact this shift is considered to be in the direction of destruction of conventional principles in Criminal Law. Even academically, the principle of Material Unlawful Acts through positive functions is often implemented incorrectly by first-level judicial bodies whose understanding is very limited, such as the case of Burhanuddin Abdullah, Akbar Tandjung, Syahril Sabirin and 3 former Directors of Bank Indonesia, Directors of PLN, Directors of Bank Mandiri (Nelloe cs), PIMPRO as well as cases involving members of the DPRD and Regional Heads (Governor, Riau, South Kalimantan, East Kalimantan, North Sumatra, South Sumatra, West Java, Bengkulu etc.) and Regents/Regents/Mayors in various regions in Indonesia with various kinds of disparities in punishment, on the one hand they are subject to punishment but on the other hand they are acquitted or released from all legal charges, which even results in this decision giving rise to a pros and cons approach in society.

Indeed, the understanding that develops in judicial practice is not as easy as academic studies provide solutions. In the framework of State Administrative Law, the parameters that limit the free movement of authority of State Apparatus ("discretionary power") are détournement de povouir (abuse of authority) and abus de droit (arbitrary), whereas in the area of Criminal Law there are also criteria that limit Free movement of State Apparatus authority takes the form of elements of "wederrechtelijkheid" or violation of law and "abuse of authority" or "abuse of power". The problem is when a State Apparatus commits an act that is deemed to abuse authority and is against the law, which means which will be used as a test for deviations from this State Apparatus, State Administrative Law or Criminal Law, especially in cases of Corruption Crimes. Understanding related to determining jurisdiction is still very limited in judicial practice.

The nature of an unlawful act is the term "onrechtmatigheid" which has the same meaning as the term "wederrechtelijkheid", even for the author, it is more accurate to say that the broad definition of "onrechtmatigheid" in the field of civil law has the same meaning as the meaning of criminal law against the term "materiele wederrechtelijkheid". The term "wederrechtelijkheid" in some literature is sometimes interpreted with other terms, such as "without its own rights", "contrary to law in general", "contrary to someone's personal rights", "contrary to positive law" (including Civil Law, Administrative Law) or "abuse of authority" and so on. For the author, formal unlawful acts are more focused on violations of written laws and regulations, while an act is said to fulfill the elements of material unlawfulness, if the act is a violation of the usual norms of decency or propriety that exist in society. In other words, every act that is considered or seen as reprehensible by society is an act that is materially against the law.

In dealing with conflicts between legal norms (legal antinomies), the principles of conflict resolution (preference principle) apply, namely:

1. Lex superiori derogat legi inferiori, namely higher legislative regulations will paralyze lower legislative regulations;
2. Lex specialis derogat legi generali, namely specific regulations will override general regulations or specific regulations must take precedence;

3. Lex posteriori derogat legi priori, namely the new regulations defeat or paralyze the old regulations.

Sudikno Mertokusumo, stated that judicial practice also faces antinomy (or conflict) that occurs between law and law, with the description:

a. Conflict between the old law and the new law and the new law does not revoke the old law, so the new law applies (lex posteriori derogate legi priori).
b. If there is a conflict between laws of different levels, then the law of a higher level applies (lex superior derogate legi inferiori).
c. Conflict between the law and a court decision, what applies is the court decision (the principle of res judicata pro veritate habetur or the judge's decision must be considered correct). Conflict between law and customary law, then customary law takes precedence.

In the Bad Credit Case at Bank SulutGo, criminal practices cannot be applied, because in reality the debtor is bound by a civil agreement, there is a mortgage which has executorial power which must take precedence. In fact, with a criminal approach, the potential for executorial power over mortgage rights can be ruled out. Apart from that, as a consequence, the Bank will experience a loss of public trust, because at any time any customer who experiences problems or fails to pay can be sentenced to prison/imprisonment. Isn't it true that Article 19 paragraph (2) of the Human Rights Law confirms that "No person, based on a court decision, may be sentenced to prison or imprisonment based on an inability to fulfill an obligation in a debt and receivable agreement." Thus, it is appropriate that efforts to resolve bad credit at banks focus more on handling them in a civil manner, rather than being charged with criminal acts of corruption on the pretext that the bank has capital participation from State Money or Regional Money.

4. CONCLUSION

Based on this research, the author has a first view, the existence of the nature of being against material lawIn the verdict of the judges of the Corruption Court and the Supreme Court, it is still seen as a core part of enforcing criminal law on corruption. This itself is not appropriate but is still enforced, even though the teaching of material unlawfulness has been canceled by the decision of the Constitutional Court, but the decision of the Supreme Court of the Republic of Indonesia still adheres to the teaching of acts. against the material law (materiele wederrechtelijkheid) in several of their decisions proves that at the level of criminal justice practice judges still use the teaching of the nature of being against the material law as an element of a criminal act which is inherent in the elements of the act even though it is not formulated expressly, at the level of judicial practice the existence of the nature of being against the material law is proven has made it easier for judges to impose penalties where in fact the act is not formally against the law, but the act is materially proven, this is what makes the nature of material contravention of the law still adhered to in criminal justice practice in Indonesia.

Second, there has been a shift from Ultimum Remedium to Primum Remedium, where in dealing with bad loans it seems as if enforcing criminal acts of corruption is the most important step in punishing violators, in fact this is not the case, there are two aspects that must be considered, namely the level of public trust in banks, and the role of the State in creating economic stability and suppressing inflation through providing capital to the people will be hampered, because later the people will not dare to apply for loans from banks due to the fear that if they fail to pay they will end up in state prison.

5. BIBLIOGRAPHY

Atmasasmita, Romli, 2012 Pengantar Kejahatan Bisnis, Paradigma Hukum Pidana Dalam Perkembangan Tindak Pidana di Bidang Keuangan dan Perbankan di Indonesia, Kencana, Jakarta, 2003Marwan Effendy, Kapita Selekta Hukum Pidana Perkembangan dan isu-isu actual dalam kejahatan finansial dan korupsi, Referensi, Jakarta.

Adji, Indriyanto Seno, 2002, Korupsi dan Hukum Pidana, Ed.2-Cet.2, Kantor Pengacara & Konsultan Hukum Prof. Oemar Seno Adji & Rekan, Jakarta.

Effendy, Marwan, 2012, Kapita Selekta Hukum Pidana Perkembangan dan isu-isu actual dalam kejahatan finansial dan korupsi, Referensi, Jakarta.

Fuady, Munir, 1996, Hukum Perkreditan Kontemporer, Citra Aditya Bakti, Bandung.

Panggabean, H.P, 2014, Penerapan Teori Hukum dalam sistem peradilan Indonesia, analisis pengembanan ilmu hukum sistematik yang responsive untuk penanganan case law (hukum kasus) yang terjadi akhir-akhir ini, Alumni, Bandung.

Putusan Mahkamah Konstitusi Nomor 62/PUU-XI/2013 tanggal 18 September 2014.