

A implicação da prova de carga de inversão no ato criminal da corrupção

The implication of reversal burden proof on corruption criminal act

La implicación de la prueba de carga a reversa en la ley penal de corrupción

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Resumo

A polêmica da ratificação da Constituição da KPK (Comissão de Erradicação da Corrupção) indicou as boas intenções do governo e das pessoas da sociedade por meio de suas respectivas percepções, que concluem se o KPK está ficando mais forte ou mais fraco. O objetivo desta análise é examinar a implicação do sistema de prova de ônus reversível no ato criminal de corrupção na lei indonésia. A reversão da prova de ônus, conforme determinado na Lei PTPK e na Lei KAK de 2003, deixa problemas em sua implementação, por meio de pesquisa jurídica normativa com o estudo de leis e comparações, é obtido algo novo que é uma diretriz para os juízes darem pareceres sobre os resultados de verificação de ativos e ações. Implicações de atos e bens comprovados ou não comprovados do réu, mediante a reversão do ônus da prova de comportamento criminoso que afeta muito a sanção recebida pelo réu, que inclui penalidades de prisão, sanções criminais por multas e sanções criminais adicionais na forma de retorno do estado perdas financeiras.

Palavras-chave: Implicações; Reversão do ônus da prova; Decisão do juiz.

Abstract

The polemic of the ratification of KPK (Corruption Eradication Commission) Constitution indicated the good intentions of government as well as people in society through their respective perceptions which in conclusion whether the KPK is getting stronger or become weaker. The aim of this analysis is to examine on the implication of reversal burden proof system on corruption criminal act in Indonesian Law. Reversal of the burden proof as determined in the PTPK Law and the 2003 KAK Law leaves problems in its implementation, through normative legal research with the study of laws and comparisons, something new is

obtained which is a guideline for judges in giving verdicts regarding the results of verification of assets and actions. Implications of proven or unproven acts and assets of the defendant through reversing the burden of proof of criminal criminal behavior which is greatly affects the received sanction by the defendant which include imprisonment penalties, criminal sanctions for fines and additional criminal sanctions in the form of returning state financial losses.

Keywords: Implications; Reversal of the burden of proof; Judge's decision.

Resumen

La polémica de la ratificación de la Constitución de la KPK (Comisión de Erradicación de la Corrupción) indicó las buenas intenciones del gobierno y de las personas en la sociedad a través de sus respectivas percepciones que, en conclusión, si el KPK se está fortaleciendo o debilitando. El objetivo de este análisis es examinar la implicación del sistema de prueba de carga de reversión en el acto criminal de corrupción en la Ley de Indonesia. La reversión de la prueba de carga según lo determinado en la Ley PTPK y la Ley KAK de 2003 deja problemas en su implementación, a través de la investigación legal normativa con el estudio de leyes y comparaciones, se obtiene algo nuevo que es una guía para que los jueces emitan veredictos sobre los resultados de verificación de activos y acciones. Implicaciones de actos y bienes comprobados o no comprobados del acusado al revertir la carga de la prueba de conducta criminal criminal que afecta en gran medida la sanción recibida por el acusado que incluye penas de prisión, sanciones penales por multas y sanciones penales adicionales en forma de estado de retorno pérdidas financieras.

Palabras clave: Implicaciones; Inversión de la carga de la prueba; Decisión del juez.

1. Introduction

Since Indonesia being established in 1945, with an experience of being colonized country by Netherland for 350 years. Thus, the founding of country known as *The Founding Father* have been agreed that Indonesia being established based on the system of civil law, and this determination of system make a great influence on Indonesian Criminal Law system, whether it general criminal law or special criminal law.

Ratification polemic of Constitution number 19 of 2019 regarding the KPK (*Corruption Eradication Commission*) become a longer problem, and each of side which is

government and people in society claimed different opinion. According to government side, under the new constitution of KPK, KPK will get stronger. In the other hand, people side claims that the ratification of KPK Constitution will make KPK become weaker.

Suparman Marzuki stated that around 2007 the authority and task of KPK on destroying corruption criminality keep being blocked by hard resistance of every opposing side of KPK, the resistance activity even become bigger, more concrete and more diverse in 2017 compared to the previous years. It is done by individual as a defendant of corruption from the outside of institution and other sides within certain agenda, and it was done at the same time from many people and it makes KPK almost falling apart.(Marzuki, n.d.)

The existence of regulation on corruption criminality inside the draft of criminal law (R-KUHP) becomes another problem, which is: private sector corruption, foreign bribery, illicit enrichment, and trading of influence are not included inside R-KUHP. The same as some regulation inside the constitution law number 7/2006 regarding 2003 convection of Anti-Corruption.

Constitution of Anti-Corruption more urgent to be revised than the constitution of KPK (*Corruption Eradication Commission*) the reason of it has been explained by Prof Romli Atmasasmita (one of the initiator of KPK Constitution), and Zainal Arifin Mochtar (Ant Corruption Activist), such as: first, Anti-Corruption Constitution is a material law and the renewal must take precedence, second, as a delayed task more than 13 years, Anti-Corruption Constitution must be related to 2003 KAK Constitution which has been ratified with Constitution number 7/2006, third, there are many corruption criminal substance that is not following the development of times.

For the first time in the system of criminal justice in Indonesia, there is a reversal of burden proof as what happen in case of Bahasyim Assifie (former official of Tax Officer) on 2nd February 2011. Jakarta Selatan State Court sentencing Bahasyim Assifie within the punishment of 10 (ten years) in prison, and penalty payment of 250.000.000 rupiahs (two hundred million rupiahs) and the court demand to take Bahasyim properties over 61billion and 681.153 US\$ will be taken to the country properties. According to the panel of judges, Bahasyim proved to take bribes, Bahasyim breaking the article number 3 clause (1) Constitution number 15/2002 concerning on Money Laundering. The final decision on Bahasyim Assifie case will be an impactful case for the effort of corruption eradication because the case handling uses reversal of burden proof system.(Sumaryanto, 2019)

The next case happen on Mandiri Bank breaker cases¹ which is decided by Bandung State Court Judges on August 2018, the cases start from Tirta Amarta Bottling Company (TAB) Rony Tedy apply for credit on Mandiri Bank. Rony and Tedy fabricated their financial document as they have an official assets and account credit around 1,1 trillion rupiahs, therefore their credit application on 2008-2012 being approved and they obtain the total amount of 1,8 trillion. And based on the submitted evidence, the judges found the right decision for defendant. By the court, Rony Tedy was being punished for 20 years in prison and Juventius being punished for 10 years. And there are some other judges' decisions on corruption criminality (see Table 1).

Table 1: Judge decision on corruption criminality

	Name of Convict	Blame	Verdict
1.	Akil Muchtar (Ketua dan Hakim MK)	Take the bribe more than 60 billion of election dispute 10 regions in Constitutional Court	Lifetime Punishment
2.	Mary Purba(CNN Indonesia, 2019) (Judges of <i>ad hoc</i> Tipikor Medan)	bribe of corruption criminality management in Medan District Court	Imprisonment for 6 years Penalty Payment 200 million rupiahs
3.	Zumi Zola(Zhacky, 2018) Jambi's Governor	giving a bribe to 53 members of DPRD Jambi on 2014-2019	Imprisonment for 6 years Penalty Payment 500 million rupiahs
4.	Nur Alam Sulawesi Tenggara's Governor	giving an illegal agreement of PT Anugrah Harisma Barakah (AHB) business permission for 40 billion rupiahs	Imprisonment for 12 years
5.	Ratu Atut Choisiyah Banten's Governor	Managing the process of budgeting of medical devices. country losses about 79	Imprisonment for 5 years, 6 months Penalty Payment of 250

¹ *Hakim Bebaskan 7 Terdakwa, Forum Keadilan*, No. 11, Tahun XXVIII/04-17 Nopember 2019, h. 28-

		billion rupiahs	Million Rupiahs
6.	Rita Widyasari Regent of Kutai Kertanegara	taking a gratification of project permit about 110 billion rupiahs	Imprisonment for 10 years Penalty Payment 600 million rupiahs
7.	Yahya Fuad Regent of Kebumen	Taking a bribe	Imprisonment for 4 years Additional Punishment: Revocation on Political Rights about 3 years
8.	Ahmadi Regent of Bener Meriah	Giving a bribe to Aceh's Governor (Irawadi Yusuf for 1.050 billion rupiahs)	Imprisonment for 3 years Penalty Payment 100 million rupiahs
9.	Abdul Latif Regent of Hulu Sungai Tengah	taking a bribe of RSUD Damahuri Barabai construction	Imprisonment for 6 years Penalty Payment of 300 million Rupiahs
10.	Djoko Susilo(Waluyo, 2013) Former of Kakorlantas Mabes Polri	Project of Driving License Simulator of 2011, country losses of 121,830 billion Rupiahs	I. Imprisonment for 10 years Penalty Payment of 500 million rupiahs + wealth and property suspected as corruption criminality around 2003-2010 with a total of 54,6 billion rupiahs and 60 000US\$ II. Imprisonment 18 years Penalty Payment 1 billion Replacement money 32 billion

Source: Author.

According to some judges' decision toward some official who has done corruption criminality, there are difference on giving the decision (disparity) of imprisonment, penalty payment and additional punishment like recovery of state financial losses. The differences of giving those decisions happen because every case has its own characteristics.

Based on the explanation above, there is a legal issue occurred about the system of burden proof reversal on corruption criminality according to the constitution of corruption eradication within the implication of burden proof reversal inside the decision of corruption criminality law in Indonesia.

2. Methodology

Methodology used in this research is legal normative methodology, with the approach of statute approach. Statute approach helps to indicate the regulation of relevant law within the cases approach and various law judgments regarding the case of corruption criminality, and the legal material used is primary legal materials: Criminal Law, the law of Corruption Eradication, 2003 convection law of anti-corruption and some decision of Anti-Corruption Court. From the material of Primary and secondary law which taken by systematic procedures, analysis can be done using descriptive analysis, which explaining an analysis toward the implication of burden proof reversal of corruption criminality.

3. Discussion

Based on the constitution number 31 of 1999, regarding the eradication of corruption criminality, reversal of burden proof have 2 (two) characters, first regarding the wealth of individual become the obligation of a convict to prove and if it related to corruption criminality, the convict have a right to “prove” his behavior is not include as the action of corruption criminality.

For the first time in the history of criminality justice, reversal of burden proof applied. And that happen on the case of Bahasyim Assifie, the former of tax official which on 2 February 2011 being sentenced of 10 years imprisonment and paying penalty for 250 million by Jakarta State Court. The court commands to confiscate all the wealth of Bahasyim within the overall total 61 Billion rupiah's and US\$681.

The proof of Corruption Assets

Based on the article number 37A clause (1) constitution number 31 of 1999, regarding the eradication of corruption explained that “defendant has an obligation to give an information about every owned property or wealth and the property of their wife/husband, children and the property of every individual or corporation who is related with the case” it

means for the wealth of defendant, there is a limited and balanced reversal burden proof between the public prosecutor and the defendant or the defendant's legal counsel.

Those provisions contain some meaning such as:

- a. Property owned by defendant can be charged inside the indictment letter
- b. Defendant has an obligation to prove that his property is not obtained by doing criminal act such as corruption.

Defendant was charged by prosecutor of doing a corruption within the subsidiary charges which is violating the article number 2 clause (1) sub b *jo* article number 18 clause (1) content a, b, article (2), (3) constitution number 31/1999 *jo* Constitution number 20/2001 *jo* article number 55 clause (1) the first sentence *jo* article number 64 clause (1) of Criminal Code, and subsidiary violating article number 3 constitution 31/1999 *jo* constitution number 20/2001 *jo* article number 55 clause (1) *jo* article number 64 clause (1) of Criminal Code. Therefore, in this aspect, prosecutor will prove the right indictment starting from primary indictment. If primary indictment successfully to be proven, there will be no subsidiary indictment and vice versa.

In substance of this verification, public prosecutor will prove any offense element of primary indictment which explained that “every individual who breaks the law to enrich themselves or other corporation, and that act can cause any harm to state financial, and it is done together (*deelneming*) and those actions include as continuity (*voorgezette handeling*)”

Article number 183 constitution number 8/1981 inside the Code of Criminal Procedures is the principles of negative proof. However, these principles will be an opposites principle if it done by defendant under the case of *gratification* and *bribery* as what explained inside the article number 12 B Constitution number 31/1999 and constitution number 20/2001, which is on reversal of burden proof there must be minimum 2 (two) kind of evidence to make sure there is no corruption as criminal act and the defendant are proven to be not guilty.

Criminal code does not rule about how the law decided a criminal punishment and how judge choose the right punishment as what written in article 193 Code of Criminal Procedures that established that “if the court has a decision that the defendant or accused person is guilty and proved that he is doing the charged criminal act, thus, the court has the right to decide any punishment for him or them”.(A Djoko, 2009)

The proof of defendant act

According to the constitution of corruption eradication article 37 clause (1), stated that “every defendant has right to prove whether he has done corruption criminality or not”, It means if the defendant using his right to prove that his act is not include as corruption, thus he can use a limited and balanced reversal burden proof, and if the defendant not using his right, there will be no reversal of burden proof or it will be conventional proof

Public prosecutor have an obligation to prove every mistake of defendant whether it is intentional (*dolus*)or unintentional (*Culpa*), thus whether there is any effort to proof or not from defendant and his lawyer, public prosecutor still able to explain the mistake of defendant.

If the defendant using his “rights” there will be a reversal of burden proof regarding the action of defendant, and if it happen when the defendant and his lawyer can prove that his action is not include as a corruption, it can influence his criminal sanction, but if he can not prove his criminal act, it will influence his criminal sanction either. Furthermore, if defendant choose to not uses his “rights”, there will be a conventional proof happen which is (public prosecution proving the mistakes of defendant)

Reversal of Burden Proof according to 2003 Constitution

According to constitution number 7/2006 concerning on Anti-Corruption Convention 2003 (KAK 2003), the system of burden proof reversal is include inside article number 31 clause (8) and article number 53 (b). Provision of reversal burden proof on 2003 KAK Constitution strictly intended toward coagulation, deprivation and confiscation of Corruption Criminal Subject’s property and wealth.

Article number 31 clause (8) 2003 KAK Constitution stated that : *State parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to conviction, to the extent that such a requirement is consistent with fundamental principles of their domestic law and with the nature of judicial and other proceedings*

The important keyword inside 2003 KAK constitution article 31 clause (8) is claiming the owner right of a person and his property that is a result of corruption criminal act. That formulation of article is “*non-mandatory obligation*” therefore; the implication

depends on the attitudes and political commitments of government and its national law system which is ruled by the intended country

Reversal of burden proof is also written inside article 53b 2003 KAK Constitution, which strictly deciding that: “take a needed action to permit every court to give any decision for criminal subject which is obtained by convention to pay any compensation for country that has been victimized by corruption criminal act”

The context provision above include as a reversal burden proof toward the direct asset recovery through a permission for every state court to decide any sentence of penalty payment from corruption criminal subject to pay amount of money for aggrieved country. In reversal burden proof system, the corrupted asset/money still carried by defendant, therefore, beside the judge decision to give any prison punishment or penalty payment. there is another additional punishment by returning back the country assets (only material loss)

Implication of Judge Decision

The development of criminality punishment purpose has rapidly increased especially on its influence of Penology knowledge which is study of growth, meaning and benefit of giving a criminal punishment; however the influence of penology itself did not really occur. Nowadays, there are some writing of penology that explained about the development and the implementation of “*correction*” as an effort to face people who has their criminal decision of being imprisoned, with a progressive method has eliminated the old criminality punishment characteristic to the new characteristic of criminality guidance and coaching.

The developments of correction in Indonesia exist since 1964/1966. The word “pemasyarakatan” means correctional facilities as a way to serving a sentence or punishment within the guidance or coaching for all the inmates. Barda Nawawi Arief(Arief, 2005), stated that the system of giving criminal punishment divided into two point of views, first according to functional point of view, criminal punishment system is every rule of constitution which is viewed from functional/operational/concrete side also and a whole system that ruled about

. According to the writer, if defendant proven to be guilty on doing any criminal act, it will implicate on his sanction of imprisonment and penalty payment, and if judges are able to prove defendant wrongdoing whether it *Culpa* or *Dolus* it will affect defendant sanction’s giving.

Reversal of burden proof related with the process of recovering state losses. It is information of defendant which proves whether his wealth and property is a result of corruption or not. If the defendant successfully prove that his wealth is not the result of criminal act, because he obtain it not from corruption criminality, it will not affect the prosecutor's testimony

If defendant cannot prove the balance between their incomes and the wealth and property they owned, and if defendant cannot prove their wealth is not the result of corruption, thus, prosecutor can use the situation to claim that defendant is proven to be wrong, and positively doing corruption criminal act. Furthermore, if there is a balance between defendant's salary income and his total amount of wealth and property. Therefore, the state court will not be able to take all his property.

According to eradication of corruption constitution, reversal of burden proof will be actively participate if defendant realize that he has the right to show up what he has done is not included as corruption criminal act. Furthermore, if defendants able to prove that all his properties are not the result of corruption, it will lighten his punishment (not removing his punishment, only making it easier). However if defendant choose to not using his right to prove any mistake on verification (conventional verification) while prosecutor as the one who is able to prove that defendant properties is not the result of corruption, it will not help to lighten his punishment, defendant just do not have any obligation to pay amount of penalty payment as the system to recover any state losses, and there is another case when defendant choose to use his right, but he cannot prove that his act and his properties are not criminal act, thus defendant will receive any cumulative act which include as main punishment (imprisonment and penalty payment), additional punishment (giving some amount of replacement money).

According to the theory of absolute (*Retribution Theory*) giving a view of Criminality as a revenge of their mistakes, in line with JE Sahetapy(M, 2003), Explained that this theory views a criminality act as revenge act for criminal act.

While according to Nigel Walker(M, 2003) Inside his book *Sentencing in A Rational Society*, confirms that other assumption was built with the basic of retributive which means the amount of sanction given has to be related with the amount of disadvantage caused by criminal subject. This assumption included inside constitution and its system which gives

smaller number of maximum criminal sanction for unsuccessful business than the success business.

Related to recovery of state financial losses by the process of reversal burden proof, the process of giving punishment by takes a penalty payment and taking replacement money. While the main sanction can be prison punishment (imprisoned the criminal subject) and giving a penalty payment to recover state financial losses. Considering that corruption is a criminal act related to the country financial and the country economic has a big impact from it, therefore in corruption criminal act, country is the victim.

Criminal Law has never been decided the purpose of judging criminal punishment. During this era, the plan of making criminal punishment purpose is just a theoretically planning. The design of national criminal constitution has been agreed by the purpose of giving criminal punishment inside the constitution article 50 (1) which concluding on fourth reason of criminal law purpose such as:

- a. Prevent the criminality act with giving more strict law norm for the sake of society;
- b. Giving a good guidance for criminal subject to make them a good and useful person for society

Finishing the conflict caused by criminality act, recovering the society balance and brings a sense of peace inside society; and resolving any guilty feeling of criminal subject.

4. Conclusion

The inverse proof of defendant's property is an obligation for defendant, while the proof of defendant behavior or defendant's mistake is defendant's rights (if defendants take their rights, there will be an inverse proof happen).

While the implication toward the proof of defendant's behavior and defendant's wealth will be really influence toward the amount of received sanctions by defendant, the sanctions of prison punishment and penalty payment punishment is the implication of defendant's mistake being proved, and the defendant's wealth as the result of corruption is an implication of additional punishment which is the form of recovering state financial losses.

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