



Ratio Legis of Legal Differences between Ad Hoc and Career Judges in Indonesian Corruption Courts

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Abstract

Corruption is a severe problem for every country in the world. This is related to the modus operandi and the impact of corruption that can destroy the economic order of a country. Realizing the consequences of corruption, we need extraordinary treatment in coping with corruption, one of which is by establishing an anti-corruption agency. This provision is adopted in Indonesian law in Law No. 46 of 2009 concerning the Corruption Court which was established based on the provisions of Article 35 of Law No. 30 of 2002 concerning the Corruption Eradication Commission (KPK) and based on the decision of the Constitutional Court No. 012-016-019/PUU-IV/2006 dated December 19, 2006. However, in the provisions of Article 1 and Article 10 of Law No. 46 of 2009 concerning the Court of Criminal Acts of Corruption, a provision distinguishes the legal position between ad hoc judges and career judges, which limits the principle of independence of judicial power, especially for ad hoc judges. This legal research used normative juridical approach. The data used were primary and secondary data which were analyzed using quantitative method. It was found that, first, the Corruption Court was established because of public distrust of the general court which examines and decides on corruption cases, low verdicts, non-transparent handling, and low integrity of legal apparatus; second, the meaning of ad hoc deviates to a particular purpose, instead of temporary or impermanent as its juridical interpretation.

Keywords: *Judge; Court; Corruption; Independence*

Introduction

Corruption is a widespread problem in all countries and is a major problem to be addressed immediately. It has now become a global issue around the globe. Corruption has an extremely dangerous effect, especially in contributing to the poverty rate of a country and hampering the poor from access to

development. As a result, they cannot change their life, leading to social inequality occurs where the rich can live prosperously while the poor are still poor (Dominio & Ortug, 2011).

There are various definitions of corruption in each country. Some define it as an unlawful act, some define it as a fraudulent act, and others even define it as a psychological illness. Syarun Rozin defines corruption as behavior that deviates from the theory of duties from a position intentionally to gain profits in the form of wealth or money for individuals, families, close family, or other interests (Rozi, 2001). Although the definition of corruption varies in each country, it can be concluded that corruption is a fundamental problem. The only difference is its level and degree in each country (Dwiverdi, et al, 1999). Therefore, corruption is a general idea that describes an organized, independent system in performing duties in destroying the economy of a country. The focal point of corrupt behavior is when public stakeholders try to take personal advantage or pursue political interests and advantages in performing their duties.

The approach to the crime of corruption must be conducted by understanding corruption as a social disease without exception; if it is allowed, it will become a systemic social disease. If it has become a systemic disease, the solution to the law enforcement approach must be done. The law enforcement approach to coping with corruption is a preventive tool. One of the effective ways to deal with corruption is by law enforcement. Therefore, combating corruption by law enforcement must be earlier than the implementation of other policies (Buscaglia, 1999). One strategy to combat corruption with a law enforcement approach can be done by establishing an anti-corruption agency or court. In coping with corruption, the anti-corruption court must have the following criteria (Buscaglia, 1999):

1. It is a special agency that was originally established in the general court which later became a special court dealing with corruption issues.
2. The institution has a spirit for combating increasingly systemic corruption.
3. It has the legal knowledge and economic analysis so that it can analyze someone who commits corruption and violates the law.

Handling corruption using judicial institutions, according to Robert Klitgard, is one way of coping with corruption. Overcoming corruption with anti-corruption court institutions is included in the neo-economic frame, namely making an anti-corruption court institution a controller or legal institution to control corruption in a country (Klitgard, 1988). Thus, the establishment of an anti-corruption court is also a means to eliminate poverty.

In Indonesia, overcoming corruption using court institutions is stipulated in the Corruption Crime Court (TIPIKOR Court). The corruption court is established under the provisions of Article 35 of Law No. 30 of 2002 concerning the Corruption Eradication Commission (KPK) and based on the decision of the Constitutional Court No. 012-016-019/PUU-IV/2006 dated December 19, 2006. In the consideration of its decision, the Constitutional Court was in line with Law No. 4 of 2004 concerning judicial power and stated that special courts could only be established by a separate law. The Corruption Court is a special court located in the general court and the only court that has the authority to pass on judicially cases of criminal acts of corruption whose prosecution is conducted by the public prosecutor (Sibarani, 2013). This special court is established within the general court environment. The main purpose of establishing the Corruption Court is to eradicate corruption (Sibarani, 2013).

Philosophically, the establishment of a corruption court is based on the existence of special judges for special courts for corruption who have expertise with the aim that in future corruption cases related to the procurement of goods and services, land, taxation, and damage to natural resources can be tried and examined professionally and objectively and does not depend on the statements of expert witnesses (Hertanto, 2014). This philosophical foundation is implemented in the form of special judges in corruption cases that consist of career judges and ad hoc judges whose selection and appointment

requirements are different from general judges. Related to the differences between ad hoc judges and career judges in corruption courts as stipulated in the provisions of Article 1 and Article 10 of Law No. 46 of 2009 concerning the Court of Criminal Acts of Corruption, the provisions of the articles can threaten and reduce the principle of independence of judicial power, especially for ad hoc judges in corruption courts. The difference between ad hoc judges and career judges in corruption courts should be avoided as it can threaten the independence of ad hoc judges for corruption.

Methods of Research

This used normative juridical method with primary, secondary, and tertiary library data. The data collected were analyzed systematically. For further analysis, descriptive analysis was performed from secondary data processes related to the research problem. The data were then compiled, described, and interpreted to draw a conclusion related to the conflicts of norms and ratio legis from the rules regarding ad hoc judges in corruption courts.

Results and Discussion

Ratio Legis of Differences between Ad Hoc Judges and Career Judges in Corruption Courts

In Indonesia, the prevention of corruption by law enforcement through the judiciary is conducted by establishing a corruption court through Law No. 46 of 2009 concerning the Corruption Court. The court was established based on the provisions of Article 53 of Law Number 30 of 2002 concerning the Corruption Eradication Commission mandated by the court through its decision no 012-016-019/PUU-IV/2006 dated December 19, 2006, which in its ruling stated that the provisions of Article 53 of Law Number 30 of 2002 concerning the Commission for the Eradication of Crime Corruption contradict the 1945 Constitution and that the Article no longer has binding legal force (Constitutional Court Decision, 2006).

Law No. 30 of 2002 concerning the Corruption Eradication Commission specifically regulates the necessity of establishing a corruption court to hear corruption cases. The provisions of Article 53 paragraphs (1) and (2) of the Law determine that the corruption court is under the general court and, for the first time, was established at the Central Jakarta District Court. Then, in Article 53 paragraph (3) of Law No. 30 of 2002 concerning the Corruption Eradication Commission, the establishment of the corruption court shall be conducted in stages based on the presidential decree.

After the ratification of Law No. 30 of 2002 concerning the Corruption Eradication Commission, through the Decision of the Constitutional Court Number 012-016-019/PUU-IV/2006 dated December 19, 2006, the applicant for judicial review on behalf of Mulyana W Kusuma, et al. and Capt. Tarsicius Walla through their petition requested that the Constitutional Court revoke and nullify the articles relating to the existence and authority of the Corruption Eradication Commission (KPK), especially those related to the authority of the corruption court. In its decision, the Constitutional Court No. 012-016-019 /PUU-IV/2006 states that the provisions of Article 53 of Law No. 30 of 2002 concerning the Corruption Eradication Commission are contrary to the 1945 Constitution and the Article no longer has binding legal force. In its consideration, the Constitutional Court stated that the court for corruption crimes which was established based on Law No. 30 of 2002 gave rise to dualism in the judicial system in dealing with corruption cases (Constitutional Court Decision, 2006).

This dualism occurs because, in corruption cases where the prosecution is conducted by the Corruption Eradication Commission, the trial, examination, and decision are conducted by the corruption court. Meanwhile, criminal cases whose prosecutions are conducted by the Prosecutor's Office have a

trial, examination, and decision conducted in the District Court. By the Constitutional Court, this dualism is contrary to the constitutional principle which guarantees that everyone gets equal treatment before the law. It has also created legal uncertainty and has harmed the constitutional rights of the applicant. Meanwhile, in its deliberations, the Constitutional Court stated its considerations under Law No. 4 of 2004 concerning Judicial Powers that special courts can only be established in one of the general courts with a separate law (Constitutional Court Decision, 2006).

The establishment of the corruption court is particularly important to respond to the decision of the Constitutional Court to establish a corruption court in a separate law, which will eliminate the dualism of the judicial system in handling corruption cases. The independent corruption court will strengthen the juridical and constitutional basis for the existence of a corruption court in line and under the 1945 Constitution of the Republic of Indonesia to provide a solid foundation for the corruption court to have authority to examine, hear, and decide corruption cases.

Sociologically, the corruption court was established due to the public distrust of the general judiciary which examines and decides on corruption cases, low verdicts, non-transparent handling, and low integrity of legal apparatus, which are the main problems faced in tackling corruption in Indonesia. Daniel Kaufman stated that there is a prominent level of corruption in the judiciary in Indonesia, especially related to the bribery practice within the judiciary. The modus operandi is bribery to smooth a case or ease the sentence to be handed down to corruptors; therefore, the judiciary is the institution with the highest level of initiative to ask for bribes (Kaufmann, 1998). This condition is further complicated when the judiciary is also inseparable from the existence of judicial mafia practices that can regulate the severity of sentences for corruptors. Judges have low integrity in deciding corruption cases, resulting in them being prone to bribery and deciding light sentences for corruptors. Judges have knowledge of corruption crimes related to money laundering and other crimes. These affect the quality and verdicts handed down by judges which are not satisfactory for the justice aspect of society (Syarifudin, et al, 2006).

Politically, the law on the establishment of a corruption court is urgent to examine and decide on corruption cases which continue to increase; besides, it is also related to the efficiency and simplicity in the process of dealing with corruption cases and the low productivity of the apparatus in handling corruption cases in Indonesia. The Supreme Court stated that the establishment of a special court for corruption is to manage corruption cases quickly and in an unusual way from that of the general court. This quick mechanism is conducted as a shortcut to answer the shortcomings in conventional courts in the form of a lack of quality and integrity of judges and an irresponsible judicial process (Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, 2004).

Institutionally, the establishment of a corruption court is very possible and has been regulated in the provisions of Article 15 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power which states that special courts can only be established within one of the scopes of general courts, military courts, religious courts, and state administrative courts regulated by law. In its explanation, Article 15 paragraph (1) also states that special courts in this provision, among others, are the children's court, commercial court, human rights court, corruption court in the general court, and tax court in the state administrative court.

Norms Conflicts Related to Differences in Regulations between Ad Hoc Judges and Career Judges at the Corruption Court

The word *ad hoc* in ad hoc judges in corruption court means a temporary judicial body that has expertise and experience in certain fields to examine, hear, and decide a case. It means that ad hoc judges are temporary and only convene if necessary for cases like ad hoc judges in commercial courts and tax judges, ad hoc judges in commercial courts, or ad hoc tax judges to decide on tax and commercial cases

that require special expertise so that the tax and commercial ad hoc judges are not permanent or only temporary according to the case managed.

In contrast to ad hoc judges in corruption courts who have a distinctive character as judges who examine and decide cases of corruption, the corruption court has a distinctive character as judges who examine and decide cases of criminal acts of corruption whose formation is based on Article 6 Preventive Anti-Corruption Body or Bodies as mandated in the 2003 Convention Against Corruption. The distinctive character of ad hoc judges in the corruption court then distinguishes them from ad hoc judges in the commercial and tax courts; therefore, it is necessary to have a harmonization function of laws and regulations to avoid overlapping, different interpretations or differences in the term *ad hoc* used in the law as well as in general perception because the meaning of ad hoc is very decisive for the intent of the law.

The distinctive character of ad hoc judges in the corruption court then leads to a logical fallacy and misleading in interpreting the meaning. It is a form of illogical reasoning with wrong premises caused by drawing invalid conclusions on the premise-forming arguments of the meaning of the word.

Then, *ad hoc* is defined as:

1. In the Great Dictionary of Indonesian Language (KBBI), *ad hoc* is defined as formed/intended/only for one purpose.
2. Meanwhile, Sudarsono in Kamus Hukum (Legal Dictionary), *ad hoc* is implicitly defined as follows: "For that matter/affair, the ad hoc committee is a committee specially appointed for it, specially created for a research need that becomes a problem." (Sudarsono, 2013)
3. Sudikno Mertokusumo defines *ad hoc* on this special occasion (Mertokusumo, 2009).
4. In the Black Law Dictionary, *ad hoc* is defined as: "(In Latin "for this"): Formed a particular purpose; the board created an ad hoc committee to discuss funding for the new arena (Garner, 1990).
5. In Steven H. Gifis' Law Dictionary, *ad hoc* is defined as (Latin) for this or a particular purpose.

From this definition, it can be concluded that the notion of ad hoc is for a specific purpose and does not mean temporary/not permanent as interpreted in the law and public perception. Based on the logical fallacy and misleading meaning of the word, it is not considered the factual truth (correspondence) because the application of the law does not act mechanistically as specified in the laws and regulations but should be realistic under the existing conditions in society, which not only refers to legal justice thinking but must also refer to the reality of social justice. Therefore, in interpreting the differences between career and ad hoc judges in corruption courts, they should avoid logical fallacy and mislead, meaning that, in interpreting ad hoc, judges in corruption courts should base on not only the interpretation of the law but also the reality. Ad hoc judges are not judges on temporary duty but for certain purposes so that their position is not temporary and the same as career judges.

In Article 10 paragraph (4) of Law No. 46 of 2009 concerning the corruption court, it is stated that the appointment of ad hoc judges is the same as the mechanism and procedures for career judges in general. In these provisions, it is stated, "Ad hoc judges at the corruption court, high court, and at the supreme court as referred to in paragraph (1) are appointed and dismissed by the President at the suggestion of the Chief Justice of the Supreme Court." From this provision, it can be interpreted that there is no significant difference in the process of appointment and ratification between ad hoc judges and career judges because the recruitment and appointment mechanism is the same. Thus, ad hoc judges are permanent judges whose position is the same as career judges.

In connection with the difference between ad hoc judges and career judges at the corruption courts, this has implications for the appointment and dismissal of ad hoc judges, particularly regarding the continuation of settlement, examination, adjudication, and decision on corruption cases. In addition, it

will also cause discrimination for ad hoc judges in career, job, and welfare guarantees that are different from those of career judges. The difference between ad hoc judges and career judges in corruption courts is contrary to the principle of fair legal certainty and equal treatment before the law. These provisions have distinguished and criminalized the position of ad hoc judges because no difference regulates between ad hoc and career judges.

The difference in the position of ad hoc judges and career judges in the corruption courts will create career uncertainty for ad hoc judges. Meanwhile, based on the pattern of recruitment and education of judges, it is conducted with a strict and selective process involving the president with presidential decisions for the stipulation and the role of the Supreme Court and the Judicial Commission as their oversight bodies. This recruitment pattern is the same as that of career judges, so the provisions of this article will cause demotivation related to not being given guarantees of independence and equality as a form of state appreciation to ad hoc judges in performing their duties.

The provisions of Article 24 of the 1945 Constitution confirm that the existence of an independent judiciary is an instrument of law enforcement and justice; thus, the difference in legal position between ad hoc judges and career judges in corruption courts will hinder the independence of judges in obtaining proper expectations of their status as judges. Therefore, judges as executors of judicial power can eliminate doubts and uncertainties about the differences between ad hoc judges and career judges in corruption courts. The difference in position between ad hoc judges and career judges in corruption courts creates discrimination, is unfair, and does not provide equal rights for ad hoc judges for handling corruption cases. The law should provide a balanced benefit to the parties involved, including the interests of ad hoc judges for corruption cases, causing a violation of the principle of fair legal certainty and equality before the law to ad hoc judges in corruption courts.

The position of ad hoc judges and career judges in the corruption courts should be equal to avoid differences and unequal standing before the law between ad hoc judges and career judges because they are equal. Both have the authority and competence of judges who examine and decide corruption cases. The violation of the principle of fair legal certainty and equality before the law (equality before the law) makes ad hoc judges in corruption courts feel uncertain and unequal in serving their term of office in the form of:

1. Disruption of the independence of judges in conducting their profession;
2. Career uncertainty, especially the retirement period for ad hoc judges in corruption courts;
3. Early retirement at a productive age;
4. Losing careers because they reach retirement age at a noticeably young age, so there is no career certainty in corruption courts;
5. Differences in earnings and income between ad hoc judges and career judges in corruption courts;
6. Differences in treatment and facilities between ad hoc judges and career judges in corruption courts;
7. Disrupting the continuity of examination of corruption cases because the tenure of ad hoc judges is limited by the period of office.

There is a difference between ad hoc judges and career judges at corruption courts that will cause demotivation related to not being given a guarantee of fair legal certainty and equality before the law in corruption courts in performing their duties.

Conclusion

A corruption court is a court established under the provisions of Article 35 of Law No. 30 of 2002 concerning the Corruption Eradication Commission (KPK) and based on the decision of the

Constitutional Court No. 012-016-019/PUU-IV/2006 dated December 19, 2006. In ratio legis, the corruption court was established based on the sociological aspect starting from the public distrust of the general court which examines and decides on corruption cases, low verdicts, non-transparent handling, and the low integrity of the legal apparatus. Due to the main problem faced in tackling corruption in Indonesia, politically and legally, the establishment of a corruption court is urgent to examine and decide on corruption cases that continue to increase. Besides that, it is also related to efficiency and simplicity in the process of handling corruption cases and the low productivity of the apparatus in handling corruption cases in Indonesia. Institutionally, the establishment of a corruption court is very possible and has been regulated in the provisions of Article 15 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power.

The conflict of norms in the difference between ad hoc judges and career judges in corruption courts is in the meaning of the word *ad hoc*. It is interpreted that ad hoc judges are temporary and only convene if there are cases. However, ad hoc does not mean temporary but is interpreted as being established/intended/one of the purposes only. This conflict has implications related to the appointment and dismissal of ad hoc judges, particularly regarding the continuation of settlement, examination, trial, and decision on corruption cases. In addition, it will also cause discrimination for ad hoc judges in career, job, and welfare guarantees that are different from those of career judges.

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