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Conceptual dualism of the imposition of illegal levies as a corruption offence and a general offence

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Abstract*:* The absence of delineation regarding the imposition of illegal levies under Presidential Regulation No. 87 of 2016 on the Illegal Levy Eradication Task Force has driven law enforcers, especially the Illegal Levy Eradication Task Force (Saber Pungli), to be varied in establishing delineation in the enforcement of illegal levy affairs. The imposition of illegal levies is treated by law enforcers as a corruption offence as well as an extortion offence. The issues raised in this research concern how the offence of imposing illegal levies should be formulated in alignment with criminal law concepts and the reality in society, as well as whether the imposition of illegal levies should be categorised as a corruption offence. The aim of this paper is to review the regulation of the imposition of illegal levies as a corruption offence, as well as the implementation of the law. This research uses a normative research method with statute and conceptual approaches. The legal sources were analysed deductively from the general to the specific. The concept used in this review is the basic concept in criminal law regarding general criminal laws and special criminal laws. Based on the results, this research concluded that the government should confirm the delineation of acts categorised as the imposition of illegal levies, regardless of whether it is part of the corruption offence category or not.
Keywords: Corruption; Extortion; General Crime; Special Crime; Illegal Levy

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Introduction

In learning theories of criminal law, we will come across the idea of 'offence classification', including the dichotomy of offences as general offences and special offences. Among the opinions which speculate on the line between general offences and special offences is that of Indriyanto Seno Adji (as quoted by Supriyadi), who considers special criminal laws outside the Criminal Code in the real sense to be special criminal laws that are intra-penal-rule in nature. Laws that can be categorised as special criminal laws that are extra-penal-rule in nature include the Forestry Law and the Banking Law, among others (Supriyadi, 2015, p. 391).

As posited by Indriyanto Seno Adji, special criminal laws are further divided into special criminal laws in intra-penal-rule nature and special criminal laws in extra-penal-rule nature. Barama defines special offences as offences that are regulated outside the Criminal Code and are within criminal procedure special provisions (Barama, 2015, p. 1).

The national development planning documents in the fields of criminal law and the criminal justice system drafted by the working team of the National Law Development Agency provide a more complex definition. They state that laws belonging to the special criminal law category are those that contain the principles of deviation from general criminal law provisions, including (a) deviation from material criminal law principles, (b) deviation in criminal law norms formulation that tends to be expansive, (c) deviation in criminal law norms expansion that likens evil alliances, preparation, attempts, and assistance to finalised crimes or committing crimes, (d) deviation in sentence formulation, and (e) deviation in the effectiveness of criminal laws (Tim Kerja Badan Pembinaan Hukum Nasional, 2008, p. 111).

Based on the definitions, it is without doubt that offences within the general offence category are not special offences at the same time since the concept of special offences refers to deviation

from the provisions contained in general criminal laws. With regards to implementa-tion, however, the imposition of illegal levies are regulated both as a general offence and as a special offence at the same time.

The term *illegal levy* itself does not belong to any qualification of offences, either as a general offence or as a special offence. The definition of illegal levy is nowhere to be found in the various statutes applicable in Indonesia. The term *pungutan liar*, which translates to *illegal levy* in English, is comprised of two words: *pungutan* (*levy*) and *liar* (*illegal*). *Kamus Besar Bahasa Indonesia* defines *pungutan* as any object collected as a levy or income from imposing a levy, and *liar* as being disorderly, not abiding by a rule, being not officially appointed or recognised by an authority, or being without an official permit from an authority. A *Pungutan liar* can be defined as an activity of imposing a levy that is not in accordance with any official rule (Nugraha & Yusa, 2017).

The government responds to the imposition of illegal levies as a serious social issue, as proven by the Nawacita (None Goals) Program planning, where the government issued a policy through Presidential Regulation No. 87 of 2016 on the Illegal Levy Eradication Task Force (Satgas Saber Pungli) that authorised the Illegal Levy Eradication Task Force to prevent, collect data on, coordinate, plan, and perform illegal levy eradication activities (Permadi et al., 2018),. However, this presidential regulation does not provide sufficient delineation on *which* acts can be categorised as the imposition of illegal levies.

Prior studies offer certain views concerning which acts can be categorised as the imposition of illegal levies, based on which of these acts can be generally categorised as a special offence (corruption) or as a general offence (extortion). Research by Hutur Pandiangan, for instance, states that imposition of illegal levies is mostly committed by officials and can therefore be categorised as corruption, collusion or nepotism (Pandiangan, 2020). Yosua Panjaitan's research, another work that restricts the imposition of illegal levies to an occupational offence, states that the imposition of illegal levies is an act committed by an individual, civil servant or state official asking for payment of a sum of money that is undue or not in accordance with regulations related to such a payment (Panjaitan et al., 2019).

Another view that offers a different way to delineate the imposition of illegal levies is contained in Mulya Hakim Solichin's research. It states that the act of imposing an illegal levy is committed by a a *preman* (thug) through extortion, minor fraudor minor embezzlement on community and region members through deception (i.e. pretending to be an authorised parking officer or a fee collector for vendors in a market, bus station, or any other place). Mulya Hakim Solichin does not delineate the imposition of illegal levies as an occupational offence, but as any act that could be categorised as imposition of illegal levies at large (Solichin et al., 2018).

This diversity of views is not unfounded. In Presidential Regulation No. 87 of 2016 on the Illegal Levy Eradication Task Force, there is no delineation of acts that can be categorised as the imposition of illegal levies. The delineation on the imposition of illegal levies is directly opposed to that on hate speech, contained in Circular Letter of the Police Chief No. SE/6/X/2015. This circular letter asserts that hate speech may take the form of the crimes stipulated in the Criminal Code and other criminal provisions outside the Criminal Code, such as insult, defamation, blasphemy, objectionable acts, provocation, incitement, and hoax spreading, all of which are aimed at or may have an effect on discrimination, violence, loss of life, and/or social conflict. This circular letter was written so that police personnel to have an understanding and knowledge of forms of hate speech (Riyanto, 2015).

The absence of delineation of the imposition of illegal levies under the presidential regulation leads law enforcers, especially the Illegal Levy Eradication Task Force (Saber Pungli), to conceive varied definitions in enforcement related to the illegal levies. The Illegal Levy Eradication Team of Gianyar, for example, arrested two ticket officers at a tourist destination named Tirta Empul in Manukaya Let Village, Gianyar, on the 13th of November, 2021, as the two ticket officers were alleged to have imposed levies not in accordance with Regional Regulation of Gianyar Regency No. 8 of 2010 on the Imposition of Retribution, Creation, and Sports (Wiguna et al., 2020).

Elsewhere, the Illegal Levy Eradication Team of the Departmental Police of Surabaya ran an Arrest Hand Operation (OTT) against five officials of the National Defence Agency (BPN) of Surabaya suspected as having imposed illegal levies on land measurement applicants in Surabaya

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

(Sudiono, 2017). In another publication, police designated illegal parking officers in various locations as persons collecting illegal fees from society members and therefore subject to prosecution (CNN Indonesia, 2021).

Some examples of the aforementioned prosecution indicate that the imposition of illegal levies may fall under both the corruption offence category (by violating the provision under Article 12point e of Corruption Law) and the extortion and *premanisme* crime category (as regulated under the Criminal Code). An act of imposing illegal levies can simultaneously be categorised as a special offence and a general offence depending on its type. This is the case with bribery offence, including embezzlement, which is stipulated as a corruption offence and at the same time as another type of offence depending on the subject. The government is expected to provide strict delineation for acts that can be categorised as imposition of illegal levies, as with the concept of hate speech, which is delineated under a Police Chief circular letter, to avoid divergence in understanding which acts can be categorised as imposition of illegal levies and which cannot.

Based on the background provided above, two issues are to be discussed here: 1) how the crime of imposition of illegal levies should be formulated in alignment with the concept of criminal laws and the reality in society and 2) whether the imposition of illegal levies should be considered as a corruption offence or not. The aim of this research is to review how the imposition of illegal levies should be formulated and its implementation in the context of corruption offences in Indonesia.

Methods

The research method employed here is juridical-normative, by which the author seeks a coherent truth of whether a law has aligned with legal norms and whether a legal norm has aligned with legal principles. This research examines the concept of imposition of illegal levies formulation in law and in society, questioning whether the imposition of illegal levies should be categorised as a corruption offence or not. The legal materials used in this research were primary legal materials, which consisted of the Criminal Code and the Corruption Laws of 1999 and 2001, and secondary legal materials, which took the form of books and journals containing prior research findings.

This research uses the statute approach to study in greater depth the implementation of elements of acts which could be categorised as the imposition of illegal levies, as well as a conceptual approach, as this approach is typically used due to a gap in laws or norms. This research scrutinises a gap in laws, particularly in the delineation of imposition of illegal levies within the legislation in Indonesia (Yudiawan, 2019). The legal materials were obtained from a literature study and analysed deductively from the general to the specific.

Results and Discussion

Imposition of Illegal Levies Formulation in Criminal Law Concept and Society

The absence of delineation of the imposition of illegal levies in the applicable statutes in Indonesia has raised a diversity of views on the concept. As reported by two pieces of news quoted previously; (1) the Arrest Hand Operation carried out by the Illegal Levy Eradication Task Force of the Departmental Police of Surabaya against the National Defense Agency of Surabaya (Sudiono, 2017) and (2) the instruction from the Police Chief to control the activities of illegal parking officers (CNN Indonesia, 2021) are underpinned by different regulations. The former is based on Article 12 e of the Corruption Law, in which five officials of the National Defence Agency of Surabaya were established as suspects (Sudiono, 2017), while the latter is based on the extortion provision under Article 368 of the Criminal Code, although the perpetrators were given a developmental measure rather than being established as suspects (CNN Indonesia, 2021).

The two examples above indicate that the imposition of illegal levies is governed under two different regulations, namely, the Corruption Law and the Criminal Code. Furthermore, the two also fall in two different offence categories, namely, special offences (corruption) and general offences. In criminal law, there is a concern as to whether an offence can be simultaneously categorised as a special offence and a general offence or whether the two classes of offences are mutually exclusive.

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

Eddy O.S. Hiariej differentiates the terms 'general criminal law' and 'special criminal law', with general offences and special offences constituting the classification of offences or crimes. General criminal laws are criminal laws that are addressed and applicable to every individual as a legal subject regardless of certain personal qualities of the legal subject. Simply put, general criminal laws are codified criminal laws (in the Criminal Code), while special criminal laws are criminal law provisions that are materially outside the Criminal Code and formally outside the Criminal Procedure Code (Hiariej, 2014, p. 19). In the same reference, Eddy O.S. Hiariej uses the terms 'general offence' and 'special offence', the difference of which lies in the offence subject. General offences (*delicta communia*) are offences that can be committed by anyone, while special offences (*delicta propria*) can only be committed by individuals with certain qualifications (Hiariej, 2014, p. 105). Eddy O.S. Hiariej's definitions of general criminal law and special criminal law, as well as general offence and special offence clearly differentiate general criminal law from special criminal law, as well as general offence from special offence, based on at least two criteria: the subject and the applicability in codification, both materially and formally.

Based on the offence subject, the designation of the imposition of illegal levies as a corruption offence is based on special subject criteria. According to Article 12 point e of the Corruption Law, "*Civil servants or State administrators who, in the interest of profiting themselves or others, in a manner that violates the law or by abusing their power, force an individual to give them something, make a payment, or accept a payment with a discount or to perform something for their interest*" are sentenced to a life imprisonment or an imprisonment of at least 4 (four) years and at most 20 (twenty) years and to a fine of at least Rp200,000,000 (two hundred million rupiahs) and at most Rp1,000,000,000 (one billion rupiahs).

The subject elements in this offence are civil servants or State administrators. 'Civil servants' here refers to the definition of civil servants under Article 1 paragraph 2 of the Corruption Law of 1999, namely, (a) Civil Servants as referred to in the Employment Law, (b) Civil Servants as referred to in the Criminal Code, (c) Individuals who receive a salary or a wage from the State or local finance, (d) Individuals who receive a salary or a wage from a corporation aided by the State or local finance, or (e) Individuals who receive a salary or a wage from another corporation that uses capital or facilities from the State or society. Meanwhile, 'State administrators' here refers to the definition in the elucidation to Article 5 of the Corruption Law of 2001, that is, State administrators as referred to in Article 2 of Law No. 28 of 1999 on State Administration that is Clean and Free from Corruption, Collusion, and Nepotism.

According to Article 2 of Law No. 28 of 1999, State administrators include (a) State Officials of supreme State agencies, (b) State Officials of high State agencies, (c) Ministers, (d) Governors, (e) Judges, (f) other State Officials in accordance with applicable legislation, and g) other officials who serve strategic functions relevant to State administrators in accordance with applicable legislation (Effendi et al., 2020, p. 69).

Imposition of illegal levies, as an extortion offence as set forth in Article 368 paragraph (1) of the Criminal Code, does not have a specific subject, meaning that any individual has the potential to impose an illegal levy. By subject, of course, there is a line between the imposition of illegal levies as a corruption offence and as a coercion/extortion offence (*dwingen*) (Chazawi, 1995, p. 38) .

By applicability of criminal law, both material and formal, the difference is clear, where imposition of illegal levies as a corruption offence is external to the Criminal Code. Even though the concept behind Article 12 point e originates from Article 423 of the Criminal Code, which designates it as a *knevelarij* offence or an 'act of extortion' (Hamzah, 2015, p. 206), Article 423 of the Criminal Code has been obsolete since the Corruption Law of 2001 came into effect, in which case an extortion crime is directly referred to as a corruption offence. In terms of formal criminal law, the imposition of illegal levies as a corruption offence entails a different legal procedure and is governed outside the Criminal Procedure Code.

By manner in which the act is committed also has an effect. Both a corruption offence and general offence contain an element of coercion, but the former is committed by abusing power/authority, whilst the latter is committed by violence or threat of violence.

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The two forms of action that are categorised as an imposition of illegal levies above are of contrasting natures and characteristics, both in terms of subject and in terms of mode of action. Therefore, it is inappropriate to lump the two forms of action together in the same category of crime. Consistent with such criteria, it is necessary for the government to apply firm delineation to acts that can be categorised as imposition of illegal levies, particularly with regards to criminal law, so that it is no longer categorised as both a special offence and a general offence. Moreover, the government needs to take a concrete step in making sure that the imposition of illegal levies qualifies as an offence, thereby requiring clearer formulation of its forms of action, or whether it is subject to governance alike to hate speech, which is only a sociological term rather than an offence.

There is an overlap in qualification among offences that fall to the imposition of illegal levies category. If the imposition of illegal levies is not categorised within the offence qualification, then it is only categorised within the group of acts. In other words, 'imposition of illegal levies' will no longer be a legal term, but a social term as with hate speech.

When comparing the imposition of illegal levies against hate speech (as referred to in the Police Chief circular letter previously mentioned), we see that there is a difference in characteristics between the two acts. For acts that can be categorised as hate speech, there are regulations that limitedly govern hate speech norms, namely the Criminal Code, Law No. 11 of 2008 on Information and Electronic Transactions as amended by Law No. 19 of 2016, Law No. 40 of 2008 on Racial and Ethnic Discrimination Abolishment, Law No. 7 of 2012 on Social Conflict Handling, and Police Chief Regulation No. 8 of 2013 on the Technical Procedure for Social Conflict Handling (Riyanto, 2015). Although hate speech is governed in more regulations than the imposition of illegal levies, there is no mention of specific perpetrators and no distinction in the existing formal law applicability.

Additionally, society's understanding of the imposition of illegal levies is unlike juridical understanding. For instance, the results of observation, interviews and questionnaire surveys conducted in the author's 2021 research on illegal fee perceptions of the communities at tourist objects in four regencies in Madura revealed that illegal fees were limited only to parking fees at tourist locations, unofficial ticket fees, and imposition of access fees toward tourist attractions, typically committed by community members living around these locations. If it is applied to the elements of the offence, in accordance both with Article 12 point e of the Corruption Law and with Article 368 paragraph (1) of the Criminal Code, then this society's understanding is unqualified because, in terms of both subject and mode of coercion, this imposition of illegal levies are not matched with the elements referred to in both articles.

This lack of clear delineation makes it difficult for the Illegal Levy Eradication Task Force to conduct prosecution. For instance, in the two cases mentioned earlier in this paper, one required prosecution by designating the perpetrators as convicts for allegations of committing a corruption offence, whilst the other establishes that the perpetrators only need a developmental measure as the act was not considered to be corruption.

Imposition of Illegal Levies as a Corruption Offence

Indonesia had established a statute on corruption eradication well before the ratification of the 2003 United Nations Convention against Corruption (UNCAC). Indonesia issued Law No. 3 of 1971 on Corruption Eradication, which was amended by Law No. 31 of 1999 and revised by Law No. 20 of 2001 on Corruption Eradication.

Under the Corruption Laws of 1999 and 2001, 7 (seven) groups of offences are categorised as corruption: (1) Corruption causing a financial loss to the State, (2) Bribery, (3) Occupational embezzlement, (4) Extortion, (5) Dishonest act, (6) Conflict of interest in procurement of goods and services, and (7) Gratification. Meanwhile, the 2003 UNCAC formulates 12 (twelve) acts that are categorised as corruption offences, 5 (five) of which are mandatory offences and 7 (seven) of which are non-mandatory offences.

The twelve acts categorised as corruption offences are: (1) bribery of national public officials, (2) bribery of foreign public officials and officials of public international organisations, (3) embezzlement, misappropriation, or other diversion of property by a public official, (4) laundering of proceeds of crime, (5) obstruction of justice against acts criminalised under the

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

2003 UNCAC, (6) bribery from foreign officials and officials of public international organizations, (7) trade in influence, (8) abuse of functions by public officials, (9) illicit enrichment, (10) bribery in the private sector, (11) embezzlement in the private sector, and (12) concealment of property obtained from crimes criminalized under the 2003 UNCAC (Effendi et al., 2020, p. 127).

The Indonesian Corruption Law is distinct from the 2003 UNCAC. There is an absence of governance for some crimes in Indonesia, and some other acts are already governed as crimes other than corruption. The differences between the two regulations are provided in the Table 1.

Table 1. Differences between the Indonesian Corruption Law and the 2003 UNCAC

No.	Acts under the 2003 UNCAC	Indonesian Statutes		
		Corruption Law	Other Laws	Unregulated
1.	Bribery of national public officials	√		
2.	Bribery of foreign public officials and officials of public international organizations			√
3.	Embezzlement by a public official	√		
4.	Money laundering		√	
5.	Obstruction of justice	√		
6.	Bribery from foreign public officials and officials of public international organizations			√
7.	Trade in influence			√
8.	Abuse of functions	√		
9.	Illicit enrichment	√		
10.	Bribery in the private sector		√	
11.	Embezzlement in the private sector		√	
12.	Concealment		√	

Indonesia is a ratified party to the 2003 UNCAC, as marked by its ratifying the convention through Law No. 7 of 2006 on the Ratification of the United Nations Convention against Corruption of 2003. Nonetheless, after 15 years, some concepts under the 2003 UNCAC are yet to be fully adopted, particularly in relation to acts that are categorised as corruption crimes. Of the 12 (twelve) criminalised acts, 7 (seven) have yet to be regulated as corruption offences in Indonesia: (1) bribery of foreign public officials and officials of public international organisations, (2) money laundering, (3) bribery from foreign public officials and officials of public international organisations, (4) trade in influence, (5) bribery in the private sector, (6) embezzlement in the private sector, and (7) concealment of proceeds from crimes.

The main aims of the 2003 UNCAC were: (1) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively, (2) to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and (3) to promote integrity, accountability and proper management of public affairs and public property (Gunawan & Kristian, 2020). The ratification of the 2003 UNCAC by the Indonesian government marked Indonesia's support for these objectives. However, the fact that the 2003 UNCAC has yet to be implemented in Indonesian regulations has hindered those objectives from being accomplished.

The imposition of illegal levies as a corruption offence in the extortion group has met the elements or criminalisation of acts set forth in the 2003 UNCAC. Article 19 of the 2003 UNCAC reads, "*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity*" (Effendi et al., 2020, p. 134).

The Imposition of illegal levies by civil servants or State administrators is a form of abuse of functions or position performed or failed to be performed to obtain an undue advantage for themselves. In support of the ratified 2003 UNCAC, it is fitting that the act of imposing illegal levies be categorised as a corruption offence. Thus, it requires assertion in the Presidential Regulation on the Illegal Levy Eradication Task Force that imposition of illegal levies *is* a corruption offence

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

and that it must not be construed as other than a corruption offence. This emphasis will prevent multiple interpretations of imposition of illegal levies and thus prevent such offences from being translated as an act of extortion, as referred to in Article 368 paragraph (1) of the Criminal Code.

Such an emphasis is imperative, given that Indonesia is in the middle of a fight against corruption in various forms. The assertion of imposition of illegal levies as a corruption offence strengthens legal enforcement against corruption through the Illegal Levy Eradication Task Force, which is to coordinate with the Corruption Eradication Commission in mitigating corruption offences that take the form of imposition of illegal levies in various regions, given that the Corruption Eradication Commission has yet to have a representative in each region.

Conclusions

The conclusions drawn from the discussion above are as follows: First, the delineation of the imposition of illegal levies from the juridical perspective is unclear due to the dualism in the regulation of the imposition of illegal levies as both a special offence and as a general offence. The government is suggested to establish clear delineation regarding the position of imposition of illegal levies as either a qualified offence or a sociological term alone. Second, it is more appropriate to regulate the imposition of illegal levies as a corruption offence as it is in support of the criminalisation of acts as corruption offences set forth in the 2003 UNCAC, which has been ratified through Law No. 7 of 2006.

In this paper it is suggested that the government should confirm the delineation of imposition of illegal levies as a corruption offence, thus excluding other acts, such as imposition of illegal parking fees, from the same category.

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