

Scope And Standards Of The Double Criminality Principle In Extradition Agreements

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Abstract.

The purpose of this research is to study the consistency and suitability between a law and other laws or between laws and regulations relating to the application of the double criminality principle to corruption. The research was conducted with a normative juridical research type with a statute approach. The legal approach is carried out by examining international conventions, laws and regulations related to the double criminality principle. This approach is necessary for The results of the study are an argument to solve the problems that exist in the formulation of the problem. For this reason, researchers need to find the legal ratio and ontological basis of international laws and conventions. The legislative and ontological ratios will be used as the basis for conceptualizing the implementation of the double criminality principle in the future.

Keywords: *Double criminality principle, extradition agreement, international crime, international law*

I. INTRODUCTION

Indonesia, as emphasized in Article 2 paragraph (1) and paragraph (2) of Law Number 1 of 1979 concerning Extradition, expressly states its willingness to extradite criminals, especially criminals who have fled abroad (fugitives). This is possible in addition to being based on an extradition treaty, also based on good relations, but can only be done if Indonesia's interests so desire. In Article 1 of Law Number 1 of 1979 concerning Extradition it is stated that in this Law what is meant by extradition is the surrender by a country to a country requesting the surrender of a person who is suspected or convicted of committing a crime outside the territory of the surrendering country and in in the territorial jurisdiction of the country requesting the surrender because it is authorized to try and convict it (Angkasari, 2014). Regarding the principles of extradition, Article 2 of Law Number 1 of 1979 concerning Extradition states that the principles of extradition are:

1. Extradition is carried out based on an agreement.
2. In the event that there is no agreement as referred to in paragraph (1), extradition may be carried out on the basis of good relations if the interests of the Republic of Indonesia so desire.

In the history of extradition, the Peace Treaty between King Ramses II of Egypt and Hattusili II of Kheta made in 1270 BC, is recognized by scholars as a form of extradition treaty (Atmasasmita, 2007). The treaty contains substance on extradition or on the surrender of fugitive criminals or fugitives. The agreement contains a provision which states that both parties promise each other to hand over criminals who have fled or are found in the territory of the other party. This kind of agreement, in ancient times was usually in the form of peace agreements in the context of establishing friendly relations between the parties or in the form of peace agreements in order to end wars. This kind of agreement at that time was used as the legal basis for the parties in resolving cases of criminals who fled across national borders.

In practice, countries in carrying out the surrender of fugitive criminals are not solely dependent on the existence of such a treaty. Long before, it was likely that there had been a practice by countries in the surrender of fugitive criminals which was not based on the existence of an agreement, but was only based on good relations between the parties, even though there was no or no evidence to support it. Good friendly relations between the two countries can further facilitate and speed up the process of surrendering fugitive criminals. On the other hand, if the two countries are mutually hostile, it is certain that it will be difficult or even impossible for them to surrender to each other. Each side will allow its territory to be used as a place of escape and seek refuge for criminals from the other country. Good friendly relations between two countries are known in international law as the principle of reciprocity. Therefore, the purpose of this study is to describe the Standard Double Criminality Principle in the Extradition Treaty.

II. METHODS

This type of research is normative juridical with a statute approach (Bachtiar, 2018). The legal approach is carried out by examining international conventions, laws and regulations related to the double criminality principle. This approach is needed to study the consistency and suitability between a law and other laws or between laws and regulations relating to the application of the double criminality principle to corruption.

The results of the study are an argument to solve the problems that exist in the formulation of the problem. For this reason, researchers need to find the legal ratio and ontological basis of international laws and conventions. This legal and ontological ratio will be used as the basis for conceptualizing the implementation of the double criminality principle in the future (Prameswari, 2019). Because the object of research is to find the legal ratio and ontological basis of a statutory regulation, this research is called library research (Gaol, 2014).

III. RESULT AND DISCUSSION

Standard Double Criminality Principle

The scope of the double criminality principle in general is serious crimes (Sari, 2014) (Hardiogo, 2021). So not all crimes can be extradited, but are limited to crimes whose list is attached in the Supplement to the State Gazette of the Republic of Indonesia Number 3130 Attachment to the Law of the Republic of Indonesia Number 1 of 1979 concerning Extradition plus other crimes based on the policy of the requested state and the addition of other types of acts required by law is declared a crime. (Explanation of Article 4 paragraph (1) and paragraph (3) of Law Number 1 of 1979) Not included in the scope of the double criminality principle are:

1. Political crime
2. Military crimes
3. Crimes punishable by the death penalty

This principle is one of the fundamental principles in extradition that the acts committed by the suspect or defendant, both according to the law of the requesting country and the law of the requested country are declared a crime. Strictly speaking, the act committed by the suspect or defendant according to the requesting country and the requested country is a criminal act (Hiariej, 2009).

Based on the understanding of the double criminality principle, the elements of the double criminality principle are (Amanda et al., 2021):

1. *For countries that adhere to the enumerative system*

Elements of the double criminality principle are crimes that are listed on the crime register. Crimes that are outside the list of crimes that can be extradited on the basis of the double criminality principle are not elements of the double criminality principle. This means that crimes outside the list of extraditable crimes are not elements of the double criminality principle.

2. *For countries that adhere to the eliminative system*

Elements of the double criminality principle are all crimes that have the same or similar or similar basic elements as a criminal offense for which extradition is requested. This means that the crime for which extradition is requested on the basis of the double criminality principle does not have to have exact elements, but as long as the crime has elements or elements as a criminal act.

Indonesia based on Law Number 1 of 1979 adheres to the Semi Enumerative System. This system is implied in Article 4 paragraph (2) and paragraph (3) of Law Number 1 of 1979 which states:

- a. Extradition may also be made at the discretion of the requested State for other crimes not listed on the list of crimes.
- b. The enumerative system based on the Supplement to the State Gazette of the Republic of Indonesia Number 3130 Attachment to the Law of the Republic of Indonesia Number 1 of 1979 concerning Extradition may be added to other

types of acts which are declared as crimes by law. The addition of other types of actions is carried out by a Government Regulation.

Based on Article 4, in particular (paragraph 3) of Law Number 1 of 1979, Indonesia adheres to the responsive type of law. Responsive law responds to the development of new crimes as a result of advances in science and sophisticated information technology in today's global era. The development of these new crimes, both national and international, both in the form of organized crime and transnational organized crime, as stated by Muladi, that the criminology factor that supports the development of globalization, international and transnational crime, among others, is due to advances in transportation, communication and informatics technology. modern society, social conflicts in various countries and economic disparities between countries. There are "shared characteristics", interdependence, and a more organized network in the manifestation of crime between countries. Massive migration from developing countries and countries that are experiencing upheaval to developed countries like what is happening in Europe today, or who experience discrimination, violence, cultural, social, political and religious conflicts (the ISIS phenomenon) (Muladi & RS, 2016).

Experience in various countries shows that there are other supporting factors for the development of international and transnational crime, namely the existence of protective groups in addition to criminal groups, namely law enforcement elements such as police officers, prosecutors, judges, prison officers and others. professionals such as computer experts, accountants, notaries and so on (professional fringe violator) (Effendi, 2013) (Harkrisnowo, 2021). What should also be considered are groups of people who enjoy the proceeds of crime such as drug addicts etc.

One of the countries that adheres to the non-enumerative system is the United States of America. In America, to determine the types of crimes that can be used as a basis for requesting surrender, an eliminative system is adopted. In the writings of Julian M. Joshua (Joshua et al., 2008) entitled "*Extradition and Mutual Legal Assistance Threats: Cartel Enforcement's Global Reach*" mentioned: *The new treaty, signed on March 30, 2003, affected two major changes: Dropping the prima facie evidence requirement for extradition from the UK to the United States (but not vice versa). Dropping the "list" system instead making extraditable any offence where the underlying conduct is punishable by the laws of both jurisdictions by at least twelve months in prison.*

The non-enumerative system is widely followed by countries that adhere to the common law legal system, such as the United States and England. The British Common Wealth countries do not always follow the Non-enumerative system. Malaysia and Australia are British Common Wealth countries that adhere to an enumerative system.



Extraditable Offences

Extraditable Offences		
Treaties		Domestic law
<p>Extradition Treaties</p> <ul style="list-style-type: none"> - a list added to the Treaty - offenses punishable under the laws of requesting and requested country (double criminality rule) by imprisonment for a maximum period of at least [x] year(s), or by a more severe penalty. 	<p>Other Treaties</p> <ul style="list-style-type: none"> • Vienna Convention: Drug-related offences • Palermo Convention (+ Protocols): Transnational Organised Crime 	<p>Double Criminality Rule</p>

Fig 1. Extraditable Offences (www.unodc.org, 2022)

The double criminality principle can also be applied to countries that do not have an extradition treaty (Panjaitan et al., 2013). The basis for implementing the double criminality principle is the principle of reciprocity (good diplomatic relations). A concrete example of the application of the principle of reciprocity is the arrest of Mohamad Nazaruddin by Interpol Indonesia. In this case, the Colombian government deported Mohamad Nazaruddin. Deportation is a civil provision imposed on people who are not native or naturalized citizens (foreigners) (Siregar, 2020) (Sianipar, 2021). The foreigner usually does not return to his country of origin. They usually enter the country illegally or without proper passports and visas. Therefore, they were repatriated to their country of origin by the Directorate General of Immigration.

In Law no. 1 of 1979 there are reasons for refusing an extradition request based on one's own nationality, jurisdiction, religion, political belief (not a political crime), nationality, ethnicity or certain population groups.

1. Based on Indonesian citizen

Article 7:

Paragraph (1) The request for extradition of a citizen of the Republic of Indonesia is rejected

Paragraph (2) Deviations from the provisions of paragraph (1) above can be made if the person concerned due to better conditions is tried at the place where the crime was committed.

In the interest of protecting the citizens themselves, it is considered better if the person concerned is tried in his own country. However, it is possible that the person would be better tried in another country (in the requesting country) considering considerations in the interests of the country, law and justice. The implementation of the submission is based on the principle of reciprocity (reciprocity).

2. Regarding jurisdiction

a. Article 8

A request for extradition may be refused if the alleged crime was committed wholly or partly within the territory of the Republic of Indonesia.

b. Article 9

Requests for extradition can be refused if the person requested is being processed in the Republic of Indonesia for the same crime (Darwis, 2014).

Explanation:

What is meant by being processed in this article is starting from the level of preliminary examination (investigation and investigation), prosecution and examination in court.

c. Article 10

The request for extradition is rejected if the decision handed down by the competent Court of the Republic of Indonesia regarding the crime for which extradition is requested has had definite legal force.

Explanation:

This provision is intended to guarantee that a person will not be tried a second time for the same crime (*ne bis in idem*).

d. Article 11

The request for extradition is rejected if the person whose extradition is requested has been tried and released or has served his sentence in another country regarding the crime for which extradition is requested.

Explanation:

What is meant by other countries are third countries.

e. Article 12

A request for extradition is rejected if according to the law of the Republic of Indonesia the right to sue or the right to implement a criminal decision has expired.

f. Article 13

the request for extradition is rejected, if the crime for which extradition is requested is punishable by death according to the law of the requesting country whereas according to the law of the Republic of Indonesia the crime is not punishable by death or the death penalty is not always carried out, unless the requesting country provides a sufficiently convincing guarantee that the death will not be executed.

Explanation:

Although the law in the Republic of Indonesia still recognizes the death penalty in its Criminal Code, its implementation is rarely carried out. Therefore, if the crime is punishable by the death penalty in the requesting country, while in Indonesia it is not, it would be more fair if the person requested was not extradited.

g. Article 15

A request for extradition is rejected if the person whose extradition is requested will be prosecuted, convicted or detained for committing a crime other than

the crime for which he is requested for extradition except with the permission of the President.

Explanation:

This article adheres to the rule of speciality, that the person requested will only be tried for the crime for which extradition is requested, unless otherwise determined by the requested country.

3. *Related to religion, political beliefs (not political crimes), citizenship, ethnicity or certain population groups.*

Article 14

The request for extradition is rejected, if according to the competent authority there is a strong enough suspicion. That the person whose extradition is requested will be prosecuted, sentenced, or subject to other actions for reasons related to his religion, political belief, or nationality, or because he belongs to a certain ethnic group or population group.

Explanation:

This principle guarantees the rights of human freedom to adhere to religion and politics, while also eliminating differences in citizenship, ethnicity and population groups.

4. *Submission to a third country*

Article 16

The request for extradition is rejected if the person whose extradition is requested will be handed over to a third country for other crimes committed before he was requested for extradition.

IV. CONCLUSION

The double criminality principle is generally serious crimes. So not all crimes can be extradited, but are limited to crimes whose list is attached in the Supplement to the State Gazette of the Republic of Indonesia Number 3130 Attachment to the Law of the Republic of Indonesia Number 1 of 1979 concerning Extradition plus other crimes based on the policy of the requested state and the addition of other types of acts required by law is declared a crime. (Explanation of Article 4 paragraph (1) and paragraph (3) of Law Number 1 of 1979).

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