

Restorative Justice in Return of State Loss from Corruption

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Abstract: Returning state financial losses as the basic and main goal of eradicating corruption in Indonesia, which is currently still overshadowed by the paradigm of retributive justice or retaliation. The researcher considers that it is necessary to make a change or revision in the court system in Indonesia, especially in terms of applying penalties for perpetrators of criminal acts of corruption who have made payments for state financial losses as a whole by taking into account the principle of restorative justice. To analyze these problems, a normative juridical research method is used. The results of this study are the construction of restorative justice in corruption, especially the return of state losses, emphasizes that the position of the case must be changed, no longer for the sake of certainty for punishment, but for the sake of the victim's interests and material recovery, the point is how to prevent the perpetrators from imprisonment but remain responsible. answer.

Keywords: Restorative Justice, Corruption, State Loss

I. INTRODUCTION

Corruption, as a financial crime, should not be independently treated from financial interest. Returning the money embezzled to resolve the case can be seen as a strategic move compared to repressive action, such as imprisonment. [1] However, Indonesia's Law of Anti-Corruption currently specifies no forgiveness for corruptors' punishments even if they have returned the state's loss. It is stated in Paragraph 4, Law Number 31, 1999, which has been amended with Law Number 20, 2001, concerning Anti-Corruption. Against that background, legal reformation based on restorative justice in corruption cases should be considered seriously.

II. LITERATURE REVIEW

A primary task of a constitutional state is to protect and ensure the economic standing of the ruling class. Some people call it night watch [2]. In a narrow and formal sense (classic), a constitutional state focuses on preventing disturbance toward peace and public interest, as determined by the law [3]. In a material sense (modern), a constitutional state is similar to a welfare state (*wolvaar staat*), (*wehlfarstaat*), which figures in protecting security in a broad sense [4]. Four legal components, namely rules, principles, processes, and institutions, work together integrally to realize orders and legal guidance in the form of law or statute. These four legal components are complemented with an unwritten law, especially in the jurisprudence mechanism [5]. Various definitions of justice show that attempts to realize justice is

demanding. A behavior perceived as just by a group may not be perceived so by others [6]

III. RESEARCH METHODOLOGY

P The research applied juridical-normative research, a study focusing on examining the implication of norms or principles in positive law [7]. Juridical-normative research discusses doctrines or principles in legal studies. Those principles align with Paragraphs 5 and 6, Law Number 10, 2004, concerning Statute or Law Formation.

Resolving corruption cases that prioritize adjudication burdens the state significantly. The state does not implement simplicity, speed, and low-cost principles as mandated by Law of Judicial Power Number 48, 2009, by proceeding with the method.

IV. RESEARCH RESULTS

Implementing restorative justice in corruption, especially in returning state's loss, should not only be approached within system theory but also formulated comprehensively in terms of reconciliation and restoration. However, before that, resolving corruption cases using restorative justice requires formulating substantive law, the structure of law, and legal culture in a work program specifically dealing with the judicial system of corruption. This work program involves all elements of the criminal justice system to prevent deviation from norms of procedural law, which are general or particular. Therefore, although using the framework of conventional law enforcement terms, it is integral and harmonious with modern criminal law enforcement.

Thought of the legal substantive, culture, and structure reformation in Indonesia is meaningful. This is because national reformation still left a number of issues in legal fields. Reformation, which is supposed to adopt intended change, has not found a constructive direction. For example, in terms of institutions and structures, each institution orients to its own interest and power without considering the synergy and integration with other institutions. Reformation of substantive law, the structure of law, and legal culture in Indonesia are still needed to enrich the Indonesian legal system [8].

The construction of the law of development by Kusumaatmadja [9] states that law is "a tool to reform society" based on the understanding that regularity and

orderliness in development and reformation is a necessary and desired conditions. Another concept contained in the law as a medium for development is that law figures channel society's direction towards things intended by development and reformation."

Law of development can only be done effectively if the bureaucrats have comprehended the functions, roles, and positions of law. The understanding is that law is a regulation that should be obeyed by the public and the law enforcement and bureaucrat. Mainly for the latter, it figures in limiting their actions. In addition, the law should be seen not only from the perspective of the power holder but also from the stakeholders. Putting the elements of bureaucracy and society in a single place is expected to create harmony in the function of law as a medium of development. Therefore, apart from being a social medium, the law should also be recognized as bureaucratic engineering [10].

The construction of law or discovery of law fills the vacuum of law. Paragraph 10, Article 1, Law Number 48, 2009, concerning Judicial Power, says, "the court is not allowed to reject to examine, judge, and adjudicate cases proposed with an excuse that there is no law or the law is unclear. The court must examine and judge the cases." The proposition can also be found in Paragraph 5, Article 1, Law Number 48, 2009, concerning Judicial Power, which says that "judges and constitutional judges are mandated to investigate, follow, and understand legal values and sense of justices living in society [11]."

Legal construction is a way to fill a vacuum in statute using legal principles. Legal construction consists of three methods: *argumentum per analogiam*; legal refinement (*rechtsverfijning*); and, *argumentum a contrario* [12]. In establishing justice, relevant judges should conduct legal discovery. Some terms are related to legal discovery: among many, law enforcement, law implementation, and law formulation or creation. Of the three terms, based on Paragraph 27, Law Number 48, 2009 concerning Judicial Power, justice created by the judges should be substantive so that justice becomes the orientation of the construction of judge's verdicts. In other words, justice is the main goal of the law.

A fundamental element in corruption is the state's financial loss. In Indonesia, loss of state's finance or economy is an element of corruption offense as regulated in Paragraphs 2 and 3, Law Number 31, 1999, which also has been amended with Law Number 20, 2001, concerning Anti-Corruption [13].

Law Number 31, 1999, which has been replaced with Law Number 20, 2001, which is currently in effect, does not provide a definition and regulates clearly and firmly on state's loss. Law Number 1, 2004, concerning State Treasury, Paragraph 1, Article 22, states that "state's or region's loss is a lack of money, securities, and goods, in which it is real, and the number is certain in virtue of violations of laws, whether intentional or not" [14].

The reason inducing the state's loss is a criminal case is that a formal action that violates the law is executed. In addition, there is a real and definite loss in the state finance that can be calculated with the value of money [15]. Anti-corruption aims to recover the state's finance and economy. One of the ways is by returning the state's loss, as written in Paragraph 4 jo. Article 18 (1) Alphabet b, Law Number 31, 1999, which is amended by Law Number 20, 2001 concerning Anti-Corruption. However, there is a contradictory interpretation, "*argumentum a contrario*" in the anti-corruption conception. It can be seen from provisions in Paragraph 4, Law Number 31, 1999 concerning Anti-Corruption, which states that "returning the financial or economic loss of the state does not remove offender's imprisonment as intended by Paragraph 2 and Paragraph 3". The enforcement of this paragraph becomes *argumentum a contrario* from the aim of corruption eradication. It is feared that the corruptors will not have goodwill to return state's loss because, eventually, they are still imprisoned.

Law in Indonesia should reformulate anti-corruption laws so that it does not only orient itself to the offenders but also recover the state's finance. The state's loss in the instrument perspective of criminal law is corruption and requires a different resolution compared to other offenses. If it is seen from the perspective of criminal policies, resolving corruption can be done with or without penal policies. Principally, crime prevention can be done with two strategies, penal and nonpenal policy. The penal policy prioritizes a repressive/enforcement towards crime happening. By contrast, non-penal policy prioritizes the prevention of crimes.

Corruption is an action that "purely harms state's finance" and is committed by government workers and state administrators. Furthermore, the action must involve abuse of authority, facilities, or opportunities attributed to them due to positions or roles with an aim to enrich themselves, other people, or corporations, which can harm the state's finance or economy. Those who satisfy the definition will be indicted with Law Number 31, 1999, which has been amended with Law Number 20, 2001, concerning Anti-Corruption [16].

The researcher can say that after the Court for Corruption Crime verdict, the defendant can file compensation to the state for returning the state's loss facilitated by the state. This recommendation adds to the existing positive law that says:

- a. Compensation is the right of individuals if they are arrested, detained, charged, or judged without a reasonable basis consistent with law or due to errors regarding the person or law implemented as regulated by Law Number 8, 1981, concerning the Criminal Procedure Code (*KUHAP*). If the defendant is punished for the reason that is not based on the law (in *casu* judged innocent on the first level and cassation), the defendant is entitled to file compensation in the form of money as stated in Paragraph 95, Article (1), *KUHAP*.

- b. Rehabilitation is one's right to receive a restoration of right in the standing, dignity, and values given in the level of inquiry, prosecution, or trial because he is arrested, detained, charged, or judged for reasons which are compatible with the law or due to errors involving the person or the law implemented. In that situation, the defendant is claimed innocent with permanent legal force (*in kracht*), Paragraph 97, Article (1), KUHAP.

V. CONCLUSION

The construction of restorative justice in corruption cases, especially in returning state's loss, is established based on previous theories. The construction of the law, which figures in filling in a legal vacuum or legal discovery, asserts that the restorative justice of the case position should be altered. The aim is to prevent offenders from imprisonment but make them accountable. Reconstructing restorative justice towards corruptors in Indonesia and re-establishing or recreating reorganization of resolution by restorative justice should be brought to Court for Corruption Crimes (*Pengadilan Tindak Pidana Korupsi*) and Supreme Court (*Mahkamah Agung*) of Indonesia. It will make the verdicts has legal certainty. In light of that, the verdict to the corruptors responsible for the financial loss of the state put forward in either Court for Corruption Crimes or the Supreme Court will be directed to recover the loss, whether the same or multiplied. The latter can be regulated further through law.

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