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DESIGNING AND CONSTRUCTING THE RETURN OF STATE FINANCIAL IN CORRUPTION CASES: A COMPARATIVE STUDY OF LEGAL SYSTEMS

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Abstract

This study aims to examine and analyze the ratio legis regarding replacement money arrangements for convicted corruption cases from a restorative justice perspective. It is a normative study with conceptual, case, and comparative approaches. The results show that the ratio legis in the regulation of replacement money in lieu of corruption convicts is an effort to recover financial losses suffered by the State due to corruption. An ideal sanction against convicted corruption cases in the context of recovering state losses is more related to the principle of restorative justice, namely focusing on efforts to recover losses suffered by the State by prioritizing sanctions for payment of replacement money for the actions of perpetrators whose qualifications are directly detrimental to state finances. The sanction for payment of replacement money is then balanced with imprisonment or fines according to the capabilities of the act committed. The Plea Bargaining and Deferred Prosecution Agreement in the corruption criminal justice system can be adopted as a means for suspects to obtain reduced sentences (prison and/or fines) if they admit the act.

Keywords: Corruption; Fines; Restorative Justice; State Financial Losses

1. INTRODUCTION

Corruption eradication has become a common concern for all countries. Nowadays, the problem of corruption in Indonesia is categorized as acute. [1] This can be seen from so much news about corruption crimes committed by both central and regional government officials. Corruption is carried out not only collectively, but has been carried out systemically by the perpetrators with the hope of enriching themselves and others. [2] This act of corruption certainly hampers the sustainability of development in Indonesia. Corruption is a threat to the ideals of the state and it requires very serious legal handling regarding this problem. The public's demand to eradicate corruption is a reflection of the problem of law enforcement in our country, because corruption is a form of unlawful act that causes harm to the state and society.

Serious efforts in eradicating corruption, collusion and nepotism, both in terms of general administration and development is factually not followed by concrete and serious steps by the government itself, including law enforcement officials in carrying out law enforcement. The government has carried out various ways and strategies for tackling corruption crimes, both by carrying out repressive and preventive actions. The efforts that have been made by the

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government have also involved all elements of the state, both the executive, legislative and judicial branches. However, corruption is still rampant in our country Indonesia.

To hide (element) state losses, forced efforts are needed (dwang middelen). Actions or forced efforts by law enforcers in order to save state financial can be carried out in stages, namely: [3] First, at the pre-adjudication stage through forceful action or efforts by law enforcers by confiscating property that is in the possession of the suspect. So, it does not have a limitative nature to the existence of the property status. Second, during and after adjudication, by forceful action or effort by law enforcers to realize replacement money, thus, there is no limitative nature of the existence of the status of these assets.

At a practical level, there have been several practices where judges in their decisions impose additional criminal penalties in the form of replacement money. In Decision No. 112/Pid.B/2004/PN.Pwt, it imposes the defendant to pay replacement money of Rp. 312,519,018.00 (three hundred and twelve million five hundred and nineteen eighteen rupiah). [4] However, the main problem is not in the context of imposing criminal sanctions with replacement money due to corruption, but the problem is related to the implementation of the execution. In terms of execution, the prosecutor as an institution is given the authority to execute every judge's decision in criminal law.

In its implementation, the execution of the replacement money for corruption has not shown maximum results so far. Obstructions in the execution of payment of replacement money occur for various reasons, one of which is the lack of regulations regarding payment of replacement money which triggers confusion and inconsistency in its implementation. Calculation of the value of replacement money based on the amount of state losses has several risks; the first risk is the possibility that the amount resulting from corruption is not the same as the state losses it causes. [5]

Recovery for State losses in the context of corruption is considered a restorative effort where the state losses are considered not a reason for imposing corporal punishment. [6] From these provisions it can be seen that not all problems regarding state losses must be imprisoned, because the concept of imprisonment is not necessarily in line with the aim of returning state losses. In addition to balancing human rights demands in the event of a criminal act of corruption due to an administrative procedure error.

As stated above, the concept of restorative justice in the settlement of corruption is expected to restore the essence of regulation of corruption in laws and regulations where the essence intended is to recover the State' losses. Syukri Akub and Sutiawati[7] provide basic examples of restorative justice thinking from several civilizations where the system of sanctions applied is less element of suffering by building greater good in a community that loves one another. Settlement of cases through a restorative justice approach provides an opportunity for perpetrators and victims to restore relations. The restoration of the relationship in question is carried out in accordance with the agreement of the parties. The victim can convey the loss and the perpetrator is given the opportunity to pay through a compensation mechanism.

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2. METHODOLOGY

This research is a normative legal research. It serves to provide juridical arguments that can help if there is a void, ambiguity and conflict over norms. This paper applied the qualitative method and conceptual, historical, as well as comparative approach through a literature review to examine the issue discussed. This paper provides information on the latest trend in research.

3. RESULTS AND DISCUSSION

3.1. Ratio Legis in Replacement Money Arrangement for Corruption Convicts

In the perspective of criminal law, corruption is classified as crimes that are very dangerous, both for the community, as well as for the nation and State. Losses to State finances and the economy as a real result are the basis for justifying criminalization of various forms of deviant (corrupt) behavior in criminal law policies. [8] However, the loss of public trust in the government is precisely the consequence that is much bigger and dangerous than just losses from a purely financial and economic point of view. [9]

The context mentioned above can be an indicator of the dangers of corruption if allowed to develop continuously. The dangerous nature of corruption and its widespread effect on the life of the state and society was also emphasized at the 9th United Nations Congress. [10] The results of the congress held in Cairo were then discussed by the Commission on Crime Prevention and Criminal Justice, in Vienna which produced a resolution on actions against corruptions and emphasized that corruption is a serious problem because it can endanger the stability and security of society, undermined the values of democracy and morality and endanger social, economic and political development (jeopardized social, economic and political development). [11]

Therefore, it can be understood that the nature of the extraordinary crime of corruption is that there is a loss of State finances which has an impact on the loss of a nation's economy. In this context, the victims of State financial losses have an extraordinary impact. In addition, the nature of extraordinary crime from corruption can also be seen from the practices carried out. Most show that corruption takes place systemically and is widespread so that losses are not only experienced by the state in the form of state financial losses but also cause losses to rights.

Many laws and other laws and regulations have been issued to deal with corruption crimes, however, the presence of these various laws and regulations can be assessed as having not provided a deterrent effect for perpetrators of corruption. Data from the Central Statistics Agency shows that Indeks Perilaku Anti Korupsi (IPAK) in 2020 in Indonesia is 3.84 on a scale of 0 to 5. This figure is higher than 2019 of 3.70. Index value getting closer to 5 indicates that society is becoming more anti-corruption, whereas this figure is getting closer to 0 indicating that society is behaving more permissively towards corruption. Indeks Perilaku Anti Korupsi (IPAK) is compiled based on two dimensions, namely perception and experience. In 2020, the value perception index was 3.68 where this figure decreased by 0.12 points compared to the perception index in 2019 (3.80). In contrast, the experience index in 2020 (3.91) increased by 0.26 points compared to the experience index in 2019 (3.65). [12]

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In the context of criminal acts of corruption, the authors assume that the principle of ultimum remidium can still be applied because the effort that wants to be carried out is essentially to recover state losses. As defined, corruption is an act of enriching oneself or another person or a corporation that can harm state finances or the country's economy, so the emphasis in this context is efforts to recover state losses suffered as a result of corrupt behavior, both by individuals and by corporations.

In this paper is focused on additional punishment in the form of replacement money. In this context, the author seeks to reconstruct the regulation of criminal sanctions for corruption as stipulated in Act No. 31 of 1999 in conjunction with Act No. 20 of 2001 concerning Eradication of Corruption Crimes with a premium remedium. This is based on the nature of the regulation of corruption itself which emphasizes efforts to recover state losses. [13] However, this ultimately contradicts the provisions for imposing criminal sanctions on corruptors, both imprisonment and fines. In fact, the imposition of this crime has not had a significant effect on the prevention of corruption in Indonesia; in fact this crime is still very rampant in Indonesia.

The ineffectiveness of imposing criminal sanctions on corruptors has led to many experts contemplating various formulations to eradicate corruption in Indonesia, one of the most extreme of which is an attempt to impoverish corruptors. However, the author believes that this could in fact harm the principles of the Republic of Indonesia as a constitutional state that upholds the due process of law and the protection of human rights. For this reason, the nature of the regulation of acts of corruption must be returned, namely the recovery of state losses. If state losses can be recovered, then of course the country's economy can automatically recover and the socio-economic rights of the people can be fulfilled.

3.2. Comparative Study in Handling Corruption in Several Countries in Recovering State Financial Losses

As a comparison, there are several systems of preventing corruption committed by other countries such as in Hong Kong. In Hong Kong there is an anti-corruption agency called Independent Commission against Corruption (ICAC). The ICAC is chaired by a commissioner who is elected by the State Council of the People's Republic of China based on a recommendation from the Chief Executive is Hong Kong Special Administration Region (HKSAR). ICAC in efforts to eradicate corruption crimes includes 3 (three) approaches, namely law enforcement, prevention, and public education which are regulated and protected based on several regulations, namely the ICAC Ordinance, Organize Serious Crime Ordinance (OSCO), and Prevention of Bribery Ordinance/POBO and the Elections (Corrupt and Illegal Conduct). [14]

In its duties, ICAC through The Corruption Prevention Department takes an approach by building a corruption prevention system by closing gaps for corruption in all systems and procedures through a partnership strategy and a proactive attitude in the realm of the public sector and the private sector. Furthermore, ICAC through The Corruption Prevention Department also provides consultations to the public sector, namely in terms of infrastructure projects, making new regulations, or providing consultations in making large franchise

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contracts. In the public sector, The Corruption Prevention Department has also produced several books, CD-Rooms, and booklets that contain some of the best corruption handling processes to be used as guidelines by agencies in the public sector.

In the private sector, ICAC establishes a body that can provide advice on how to prevent corruption. To be able to carry out this task, the private sector must first ask the institution for advice or direction to prevent corruption in their work environment. Without such requests from the private sector, these institutions cannot provide advice or engage in their work. In its duties, the agency does not charge the private sector for assistance in seeking advice on preventing corruption in their work environment. In addition, secrecy from the private sector is strictly maintained to maintain fair business competition in Hong Kong. The agency can also provide advice on problems faced by the private sector. Also, the agency has a Hotline Service so that the private sector can easily consult on their problems to avoid corruption. In addition, this agency also organizes seminars for private business actors which are held in collaboration with trade associations and professionals in their fields. [15]

In the agency, there is an Advisory Committee on Prevention of Corruption whose membership is appointed by the Chief Executive of ICAC whose duty is to provide advice on places that must be examined and which are priority levels to be examined and then make recommendations regarding considerations for preventing corruption and monitoring the steps that have been taken into account in the recommendation. [16] The system for handling corruption crimes developed in Hong Kong through the ICAC as described above provides an understanding that corruption cases do not always have to be punished with corporal punishment, but must be returned to the nature of the regulation of corruption crimes themselves, namely efforts to save financial or economic losses to the State. Likewise with the construction of sanctions, acts of corruption do not always have to be rewarded with corporal criminal sanctions, but can be considered the application of criminal sanctions for payment of replacement money accompanied by fines as a step or effort to recover financial losses or the country's economy.

Other practices are like in Australia where a defendant does not have to be in the custody of the Corruption Eradication Commission, but is sufficiently house arrest, in the sense that it is to provide an opportunity for the accused to take the principle of act oriented and more than that with the Pre-trials Conference (PTC), the corruption trial process is sufficiently carried out in a short time if the defendant has returned corruption assets based on positive conviction (confession of guilt and awareness of 60% recovery of the accused), then the trial process does not need to continue. Furthermore, the meaning of recovering assets from corruption needs to be linked to an understanding of the purpose of the punishment, namely: the first, the qualification aspect that aims to declare the indictment of the accused has been proven (guilty) or not proven (not guilty) with all legal consequences. Matters included in the legal consequences are the payment of fines, replacement money, social punishment, and others. The second, panalogical aspects that aims at the imposition of light sentences (under 4 years), medium sentences (under 10 years), serious crimes (under 20 years), and very serious sentences (life imprisonment or death penalty). [17]

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Forfeiture asset as described above are the confiscation and taking of an asset through an in rem lawsuit or a lawsuit against assets. The concept of forfeiture asset is based on the taint doctrine when a crime is deemed to taint an asset that is used or is the result of that crime. Thus, forfeiture assets is an act separate from any criminal proceeding, and requires proof that a property was "tainted" by a criminal act. As it is known that in general, a crime must be determined on the balance of probability standards of proof. This eases the burden on the government (authority) to act and this also means that it is possible to obtain a fine if there is sufficient evidence to support a criminal conviction. [18]

Furthermore, it can be seen that the justice system in America has long implemented an act-oriented doctrine. With act-oriented, the punishment system is aimed at the consequences of the actions of the perpetrators of crimes and not towards the perpetrators (man-oriented). As it is known that outside of the act-oriented in the justice system, there are also man-oriented doctrines as implemented in the Peoples' Republic of China. This doctrine can be interpreted as the application of justice, which is more aimed at the personal behavior of the perpetrators. The judicial process in America through act-oriented doctrine has the characteristics of the penal system.

The opposite is applied to the People's Republic of China, which adheres to man-oriented doctrine. The penal system in RRC is as follows: [19]

a. The main principle of punishment is to follow the doctrine of man-oriented. Every corruption case that no longer recognizes an expired institution will tried and sentenced to death if the convict is completely uncooperative, meaning that the judge considers the convict to have no positive conviction for his crime. The above process can be said to have implemented man-oriented doctrine.

b. Application of act-oriented doctrine. In RRC, the criminal system for act-oriented doctrine also applies because every corruption accused is given the opportunity based on a positive conviction to return at least 50% of the proceeds of his corruption so that the sentence for such a defendant is reduced to under 20 years. In this system, the defendant stipulates that every corruption accused at level I is sentenced to 10 years in prison has the right to submit an appeal with two alternative choices of decisions, namely the first decision will be acquitted and also not acquitted, the decision will be doubled from the first judge's decision.

The application of corruption law enforcement in RRC can be used as a perspective for criminalizing corruption in Indonesia. The purpose of the punishment is of course intended to motivate the perpetrators of corruption crimes to apply elements of positive awareness. The element of positive awareness is a form of moral shame. In the future, the Indonesian justice system should be aimed at providing a deterrent effect for perpetrators, not only through legal shame but also moral shame. The purpose of punishment from the point of view of legal philosophy is to create moral shame. [20]

In other concepts that have developed in several countries in the world, there is a concept with a plea bargaining approach that has been implemented in several countries such as the United

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States, United Kingdom, and several other Common Law countries. In fact, several Civil Law countries have adapted this practice into their country' justice system. According to Febby Nelson, in the Common Law legal system, guilty plea confessions to prove guilt have been known for centuries. Along with the times, a new institution was proposed which was created based on the guilty plea, namely Plea Bargaining. Plea bargaining itself is a negotiation process in which the public prosecutor offers the defendant to admit his guilt (guilty plea) with his own convictions and awareness. According to Joshua Dressler, plea bargaining is a process in which a defendant in prosecution agrees to carry out "self-conviction" with some reciprocity from the public prosecutor (for the benefit of the accused). Gary Holten and Lamar argue that "Plea Bargaining of negotiation between the persecutors and accused, or more precisely, between the prosecuting and defense attorneys". [21]

According to Sara J. Berman, plea bargaining can be divided into 3 (three) types, namely charge bargaining, sentence bargaining, and fact bargaining. Charge bargaining is the negotiation of the charges that the defendant will face at trial. Sentence bargaining is an agreement for the defendant to carry out a guilty plea in return for a lighter sentence. Meanwhile, fact bargaining is an agreement for the public prosecutor not to reveal certain facts in front of the trial that can increase the threat of punishment for the defendant (for example a certain minimum sentence period, or the threat of a heavier sentence).

The development of the application of plea bargaining can be seen in the United States. According to Febby Mutiara Nelson, [22] a model of plea bargaining is an integral part of the criminal justice system in the United States. In fact, more than 95% (ninety five percent) of criminal cases in the United States have been resolved involving plea bargaining. Plea bargaining stems from admitting guilty plea to prove guilt (self-conviction) in the Common Law legal tradition. Plea bargaining itself began to appear a lot in the decisions of United States judges in the post-civil war period and the mid-19th century. However, according to Abert Alschuler, there are indications that Plea Bargaining was defined long before the American Civil War.

As a result, it can be explained that the Plea Bargaining model has several sides, some are detrimental and some are beneficial. However, in order to achieve one of its major advantages, namely efficiency in the administration of justice, this model can be accepted in practice, recognized, and even then received approval (endorsement) from the US' Supreme Court as a component or important/essential element of the administration of justice. Proponents of plea bargaining argue that this practice has been a part of the justice system since the system' inception to deal with crimes against society, plea bargaining has accompanied the entire history of the criminal justice system in the United States. This is part of the United States criminal justice system, plea bargaining is not new and has even existed since the existence of criminal justice.

From this legal construction it can be understood that the defendant and the public prosecutor can negotiate to reach a plea agreement. The court can choose between accepting or rejecting type A and C, where if the court rejects one of the two types of agreements, the defendant can withdraw his guilty plea. This is different from type B which is not binding on the court, so if

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the court rejects plea bargaining type B, the defendant does not have the right to withdraw his guilty plea. If the agreement reached is guilty plea or nolo contendere, then the agreement can include clauses A, B and C as regulated in Article 11 (c). In addition to these laws, there are many court decisions in the United States which recognize the existence of plea bargaining and become jurisprudence for subsequent court decisions. However, it turns out that there are several jurisdictions that prohibit plea bargaining in the United States, such as the state of Alaska and the city of Philadelphia, Pennsylvania. In addition, the city of El Paso, Texas also prohibits plea bargaining for cases of serious crimes (felony crimes).

Apart from the United States, the practice of Plea Bargaining has also been implemented in the United Kingdom where until now this model is still considered something new. However, the majority of sentencing decisions in England are based on plea bargaining. Sanders and Young estimate that in Crown Court about 60 percent of the defendants pleaded guilty. In the Magistrate Court, it is estimated that 94 percent of the defendants pleaded guilty or were found guilty in absentia. The concession is a reduced sentence, either in terms of charges or sentences. It is currently estimated that the average sentence reduction received by defendants is around 25-30 percent for plead guilty before trial or less if it is closer to trial. Apart from Plea Bargaining, the United States and the United Kingdom also developed the concept of a Deferred Prosecution Agreement (DPA), namely a concept to resolve existing problems in corporate crime, especially corruption. Deferred Prosecution Agreement is a negotiation conducted by the prosecutor with the defendant or his lawyer where the defendant here is a corporation, in an attempt to divert prosecution from the judicial process or to deal with corporate wrongdoing through administrative or civil recovery procedures. Various forms of agreement are available to public prosecutors and companies in an attempt to divert corporate prosecution from the judicial process or to deal with corporate wrongdoing through administrative or civil remedy procedures. This concept is similar to plea bargaining, in which the public prosecutor negotiates with the defendant or his legal adviser before proceeding with the trial process. Plea bargaining has been developing for a long time in Common Law countries, and plea bargaining is considered efficient in reducing the accumulation of cases. In the United States about 95 percent of cases are resolved through the plea bargaining procedure. However, this mechanism remains a matter of debate in both academia and law enforcement. Learn from the successes achieved by using the plea bargaining mechanism. Hence, the Deferred Prosecution Agreement is also expected to be able to resolve existing problems in the handling of corporate cases to be efficient and the community can receive benefits from the agreed sentence from the corporate case.[23] Deferred Prosecution Agreements can be offered by prosecutors when the company shows a cooperative attitude towards the criminal investigation process, admission the facts and accepts several provisions such as punishment, reparations, fines, and usually preventive measures so that they do not recur.

Based on the description of the experiences of several countries as described above, particularly in the United States and the United Kingdom, it is deemed necessary to reconstruct law enforcement against criminal acts of corruption in Indonesia, especially regarding the principles and construction of sanctions contained in Act No. 31 of 1999 jo Act No. 20 of 2001. By changing the principles of law enforcement against criminal acts of corruption, of course

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the settlement process and sanctions can also be changed. The principle referred to here is the premium remedium principle adhered to by Act No. 31 of 1999 jo Act No. 20 of 2001 where this principle is felt to be not based on efforts to recover state losses, but is oriented towards giving the most severe punishment to perpetrators of corruption. In other words, this principle does not use a restorative justice approach so that its application seems to be only oriented towards corporal punishment of the perpetrators. According to the author, by using a restorative justice approach in dealing with corruption in Indonesia, of course efforts to recover state financial losses can be maximized. Also, by focusing on the payment of compensation and fines, it is hoped that this will change the mindset of the people. As stated above, the Indonesian people have a strange mindset, namely "it is better to be in prison than to be poor". By emphasizing on the imposition of sanctions for replacement money and fines, with such a mindset can result in a reluctance to commit corruption.

4. IMPLICATIONS AND RECOMMENDATIONS

The arrangement of replacement money against corruption convicts is an attempt to recover State's financial losses due to a corruption. However, the payment of replacement money is only in the nature of additional punishment where this matter could have been ruled out by the judge so that efforts to recover state losses due to acts of corruption by the perpetrators cannot be achieved. The ideal sanction for corruption convicts applied in the context of recovering State losses associated with the principle of restorative justice is to focus on efforts to recover State financial losses by prioritizing the imposition of replacement money for the actions of perpetrators whose qualifications are directly detrimental to state finances. The imposition of sanctions for payment of replacement money is then accompanied by imprisonment and/or fines according to the qualifications of the actions committed. Likewise, the concepts of Plea Bargaining and Deferred Prosecution Agreement in the corruption criminal justice system can be adopted as a means for suspects to obtain reduced sentences (prison and/or fines) if they admit their actions. In this context, investigators and public prosecutors may consider the suspect confession in prosecutions. Also with the judge, the suspect confession can be used as material for consideration in making a decision.

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Declaration of Interest

Authors declare there are no competing interests in this research and publication.

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