

Restorative Justice in Criminal Acts of Corruption

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ABSTRACT

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This article intends to elaborate the model of corruption crimes resolved in a system of restorative justice that occurs in the State of Indonesia. This article emphasizes that efforts to eradicate corruption are not merely to provide punishment for those who are proven with the most severe punishment, but so that all countries that are caused by acts of corruption prevention can be returned in a short time. Technically, this study finds that there are 3 (three) conditions that cause the loss of the unlawful nature of a criminal act of corruption, namely: the suspect or defendant is disadvantaged; the state is not disadvantaged; community served. Based on the three conditions illustrate if the criminal act of corruption has returned the entire proceeds of the criminal act of corruption along with all the profits obtained from the results of the criminal act of corruption by the criminal act of corruption then basically the perpetrator is disadvantaged, the country does not suffer financial losses and the public can be served through returning all proceeds of corruption and all the benefits thereof. As a consequence, in order to create a restoring judicial process, this article desires to reduce the socio-economic burden of the state and law enforcement energy in handling cases of corruption.

Keywords: Restorative Justice, Corruption, Judicial Terms

INTRODUCTION

Corruption is included in qualification of criminal acts, it can be seen from the list of criminal threats against perpetrators of corruption under the Law Number 20/2001 concerning on amendments and Law Number 31/1999 concerning on Eradication of Corruption regarding the imprisonment. Didik Endro Purwoleksono briefly explained that corruption is a type of crime (misdrijven) which demand an imprisonment while the criminal offense demand an amercement (financial penalty) (Purwoleksono, 2019).

Normatively, criminal act of corruption has no concept, according to Alatas (1987), criteria of corruption criminal act consist of: a) always involves more than one person; b) Generally involves secrecy, except individuals or those in their environment are not tempted to hide their act; c) it involves an element of obligation and mutual benefit, which is not always include money; d) Corruptors try to cover up their actions by hiding under legal justifications; e) those involved require a firm decisions that could influence the decisions; f) contains fraud in public instances or general public; g) a criminal act of treason; h) any corrupt behavior involves a contradictory dual function of those who commit an act; i) Violating the norms of duty and responsibility in social order. It is based on a deliberate intention to place the public interest under special interest.

In *Black's Law Dictionary* the definition of corruption was explained as below (Garner, 2009): The act of doing something with the intention of giving an advantage that is incompatible with official duties and rights of others; for example in an office or in an institution aimed at obtaining benefits either personally or for others, which is contrary to the rights of others.

Corruption can be described as a common enemy of a country because corruption can harm state finances. State losses because of corruption can hinder national development therefore it is hard to increase people welfare. Based on data from Indonesia Corruption Commission from 2004 to 2018, the observation of corruption indicated 1,135 cases, while investigations reached 887 cases and the cases that have been decided by Inkrachthas 578 cases (Super User, 2018). Corruption criminal act has been considered as serious crime, a serious crime can disturbs people economic and social rights on a large scale, therefore corruption must be handled as “extraordinary crime” and it requires serious, professional and independent steps (Makawimbang & Ilyas, 2014).

Several Efforts to eradicate corruption not only provide penalties for those who are found guilty, but also all in order to return the state losses caused by corruption (Fatah et al., 2017). Inside the Law Number 20/2001, within the deeper examination, the goals that legislators want to achieve is about law enforcement to work optimally and return the state losses (Zumhana, 2016). Law enforcement expected to be able to identify the cases of corruption which considered to be detrimental to state finances therefore it can be settled by the out of court settlement, calculating the comparison of operational funds value for the case

settlement and the value of state financial losses (Humas Kemenko Polhukam RI, 2016). Out of court settlement include as the concept of restorative justice.

The concept of restorative justice is popular alternative in various parts for the concept of illegal acts settlement because it offers comprehensive and effective solutions (Dewi, 2011). Restorative justice exists to solve the failure of purpose regarding the punishment with retribution or judgement (Haley, 2011). Retributive justice approach in criminal act of corruption has not been able to fulfill the goals of legislators, within non-optimal return of state financial losses (Zumhana, 2016). The implementation of retributive justice for corruption will be detrimental to state, because state finances that have been corrupted cannot be fully returned and take a long time on it judicial process, the state needs to spend more money to maintain the corruption cases in prison. This certainly involved more state burden.

Based on the explanation above, the main problem of this research can be explained as bellows:

1. What is the form of restorative justice in corruption?
2. Can restorative justice in corruption be applied in Indonesian law?

RESEARCH METHOD

This research used legal research type to find the truth of coherence, there are legal rules based on legal norms and are there norms in form of orders or prohibitions according to legal principles, whether a person actions are related to the norms (not only according the rule of law) or legal principles (Marzuki, 2016). In legal research, researcher uses primary and secondary legal materials. Primary legal materials are legal materials that have an authoritative nature (having authority) which consists of legislation, official records regarding the making of legislation and judges' decision (Zumhana, 2016). Meanwhile, fundamental secondary legal material can be in form of a Text Book. This is because text book contains the basic principles of law science and classical views of highly qualifies scholar. Furthermore, secondary legal material can be books or legal journals (Zumhana, 2016).

RESULTS & DISCUSSION

Restorative Justice in corruption

Restorative Justice appears as a reaction to the concept of retributive justice which focuses more on retaliation for a criminal act committed by a criminal act. Retaliation is manifested in the form of convictions against the criminal acts perpetrators. According to

Satjipto Rahardjo's statement, a case settlement through the judicial system that results in a court verdict is law enforcement in a slow direction (Flora, 2018). Thus, restorative justice can be seen as better and efficient way of solving a case compared to retributive justice. Luhut MP Pangaribuan stated that on its development, the settlement of criminal case is no longer through the imprisonment because it is a manifestation of revenge and at the same time include as a burden of state, restores the relationship of perpetrators, victims, and society (Pangaribuan, 2009).

Restorative justice emphasize on repairing losses related to criminal acts (Makaro, 2013). Restorative justice model was proposed by abolitionists who had rejected coercive in form of penalty facilities and replaced by reparative law system (Atmasasmita, 1996). In context of criminal sanction system, the values that underlie abolitionist ideas can be the idea to seek alternative sanctions that more feasible and effective than institutions such as prisons (Atmasasmita, 1996).

Restorative justice was carried out through cooperative process that involves every stakeholders (Makaro, 2013). Restorative justice is a process which all the parties involved certain violation to collectively resolve how to deal with the consequence of violation and its implications for the future purposes (Marshall, 1999). Restorative justice can be described as a response to criminal behavior to return the losses suffered by victims of crime in order to support a good condition among the conflicted parties (Minor & Morrison, 1996). M. Taufik divides the basic principles of restorative justice into 3, which consist of: 1) Recovery for those who have suffered losses due to criminal act; 2) Perpetrator has the opportunity to be involved in restoring the situation; 3) the court has a role to maintain public order and society plays a role in preserving a peace (Makaro, 2013). The forms of settlement through restorative consist of: 1) Mediation; 2) Victim-Perpetrator Mediation; 3) Reparation; 4) Family group meeting; 5) Victim-Perpetrator Group; and 6) Victim Vigilance (Putri & Tajudin, 2015).

Based on the explanation above, restorative justice prioritizes the settlement of cases outside court by mediation of all conflicted parties to settle the criminal case. Perpetrators of the crime will recover and responsible for all the losses of crime victims. Therefore, if the loss has been fully recovered by crime perpetrator, then between the perpetrator and the crime victim, there is no conflict or loss experienced by the victim has been fully implemented by perpetrator, there is no need to use criminal law based on the theory of retributive justice. This is in line with the opinion of Nigel Walker who argues that criminal law should not be used

for: a) retaliatory purposes; b) actions that do not cause victims and or losses; c) if there is more effective facilities by a lower penalties to overcome the criminal act; d) if the negative impact of crime is higher than the crime; e) if it does not require strong public support; f) if it is calculated that it will not succeed or will not be implemented (Arief, 2002).

In 2016, constitutional court issued decision number 25/PUU-XIV/2016, which changed the formal offense in article 2 paragraph (1) and article 3 of Law Number 20/2001 concerning on the Eradication of corruption as material offense. C.S.T. Kansil stated that a material offense is an offense which is formulated and focuses on the consequences which was prohibited by the law, while formal offense is an offense whose formulation focuses on an act which is prohibited by law (Kansil, 2007). By changing the formal offense to material offense, it means that the element of detrimental to state finances is no longer understood as an estimate (potential loss), but must be understood that an actual loss has actually occurred (Actual loss) in corruption (Sahbani, 2017). A person can be said have committed a criminal act of corruption and may be subject to criminal sanctions if the person's actions have clearly caused a loss to the state finances or economy.

The main aims of Law Number 20/2001 are to recover state financial losses. Law enforcement officials are expected to be able to identify cases of criminal acts of corruption that are deemed to be detrimental to state finances thus they can be resolved through the form of court settlement, by calculating the comparison on the value of operational funds on handling the cases within the value of state financial losses. *Out of court settlement* is a concept of restorative justice. The application of restorative justice needs to be accommodated in order to evaluate the weaknesses of retributive justice approach as it currently exists and consider as valid. Marwan Effendy (2014) stated that restorative justice can be used in criminal acts of corruption; different from restorative justice in general crimes should involve the involvement of victims, perpetrators and public, related to the problem of corruption which focuses on returning state losses.

Purwoleksono stated that if all the process of corruption are returned by the suspect or defendant, essentially it can be used as a factor that will eliminates the law against criminal law, such as crime of corruption and the suspect or defendant does not required to be convicted (Purwoleksono, 2019). There are 3 (three) elements or conditions that can cause the loss of unlawful nature of corruption, included: 1) the suspect or defendant does not obtain any benefit; 2) the state is not harmed; 3) the public is well served (Purwoleksono, 2019).

Based on this explanation, it can be analyzed that if perpetrator of corruption criminal act along with all the profits obtained from the proceeds of crime of, basically the perpetrator will not be benefited, the state will not suffer financial losses.

If the perpetrator as the subject of the criminal act (corruption) only able to returns part of the benefits from corruption, the perpetrator still have benefit from corruption he has committed and the state is still experiences a disadvantaged and the public could not be well served. Therefore only partial returns of corruption benefit should be returned by perpetrator of criminal act in order to eliminate the unlawful act of perpetrator. The return of all proceed on criminal act of corruption will includes the consequences of: 1) it will not cause any victims and losses, in which case there is no state loss; 2) there are other means that are more effective and with fewer losses in overcoming acts deemed despicable, in this case the state does not need to spend more to process, convict, and feed and drink corruption convicts (Purwoleksono, 2019).

By the application of restorative justice in the criminal act of corruption in the form of returning all the results of corruption by the perpetrators of corruption, it can be said that it is more profitable for the state with the implementation of restorative justice, the state is not burdened financially to process and feed perpetrators of corruption will tend to choose to undergo a substitute punishment in the form of imprisonment rather than paying losses to country. This is of course more detrimental to the state.

In the juvenile justice system in Indonesia, restorative justice that is applied in the form of diversion must be carried out during the investigation, prosecution until the examination stage at the trial. This has been regulated in Law Number 11 of 2012 concerning the Child Criminal Justice System. Meanwhile, in the criminal act of corruption, Purwoleksono argues that the application of restorative justice in the form of returning all the results of corruption can be done when: 1) before an investigation is carried out; 2) at the time of the observation; 3) at the time of the investigation; and 4) during examination before the court (Purwoleksono, 2019). By returning all the results of the criminal act of corruption obtained by the perpetrator can eliminate the element of means rea or malicious intent in the perpetrator, so that if the perpetrator returns all the results of the criminal act of corruption at the investigation level, the investigator can state that the case cannot be upgraded to the investigation stage, whereas at the level of investigation, the investigator can issue a warrant for termination of investigation (SP3). One of the reasons for the issuance of SP3 based on

article 109 of the Criminal Procedure Code is that it is not a criminal act. The return of all proceeds of the criminal act of corruption by the perpetrator results in the loss of the unlawful nature of the perpetrator of the criminal act of corruption and thus it can be said that the case is not a corruption case.

Furthermore, at the trial stage, Purwoleksono argued that the return of all the results of the criminal act of corruption along with all the benefits the defendant received during the examination in court, then this could become a court decision, namely releasing the defendant from all lawsuits or onslag van rechtvervolging (Purwoleksono, 2019). This is in accordance with the provisions of article 191 paragraph (2) of the Criminal Procedure Code, with the return of all the proceeds of the criminal act of corruption by the perpetrator causing a consequence of the loss of the illegitimate nature of the perpetrator of the criminal act of corruption, what the public prosecutor has been accused of is proven, but due to the unlawful nature of the the perpetrator is missing, then the case is not a criminal act of corruption, so the court's decision is in the form of freedom from all lawsuits or onslag van rechtvervolging, not vrij spraak (Purwoleksono, 2019).

Thus, the application of restorative justice in the criminal act of corruption in the form of returning all the results of the criminal act of corruption can be carried out at the stage before the investigation, during the investigation, even during the examination in court.

The application of restorative justice in criminal acts of corruption in Indonesian law

Based on the national work meeting in 2011 which was held by the Supreme Court, it resulted in an important decision which could later become jurisprudence in the Supreme Court decision, which is based on Decision No. 1600 K/ Pid / 2009 regarding the consideration of restorative justice (hereinafter referred to as the case of Decision No. 1600 the year 2009). In principle, jurisprudence can be said to be the birth seed of restorative justice, because according to the Supreme Court one of the purposes of criminal law is to restore the balance that occurs because of a criminal act.

One of the goals of “restoring balance” in criminal acts of corruption is to restore state financial losses for the benefit of the public at large and to anticipate crises in various field of national development (Rusianto, 2015). Basically, restorative justice is recognized by the international community, namely in 2000 which was held by the United Nations, Basic

principles on the use of restorative justice programs in criminal matters concerning a number of basic principles of using the restorative justice approach (ECOSOC, 2000; Gao, 2000).

In chapter 9 of the United Nation Convention on Restorative Justice, efforts have been made to apply in a number of countries in the world, such as in the United Kingdom, Austria, Finland, Germany, the United States, Canada, Australia, South Africa, Gambia, Jamaica and Colombia. According to the former Deputy Chief Criminal Officer of the Supreme Court of the Republic of Indonesia, Artidjo Alkostar, many petty criminal cases can actually be processed on the basis of fast, low cost, and simple trial. For example, people who steal bananas because they are hungry and banana's owners can forgive, then the ethical consequences do not need to be decided in court, but resolved through penal mediation (Alkostar, 2011).

In general, the basic principles of other examples of restorative justice through mediation determine several prerequisites for restorative justice, for example domestic violence or sexual harassment, namely (1) the crime victim must agree, (2) violence must be stopped, (3) the perpetrator of the crime must take responsibility, (4) only the perpetrator of the crime should be blamed not on the victim, (5) the mediation process can only take place with the consent of the victim (Alkostar, 2011).

Restorative justice is currently not specifically regulated in the laws of corruption in Indonesia, but based on the case of Decision No. 1600 of 2009, it is due to the existence of Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power (Hereinafter referred to as the Law on Justice), a judge cannot refuse to examine, hear, and decide a case on the grounds that the law does not exist or is unclear. The reason for the absence of law or the lack of clarity in principle in Article 5 paragraph (1) of the Justice Law is that the judge has a way to find it or in other words makes a legal discovery, so the judge is obliged to continue to examine and judge him. Therefore, in principle, Restorative Justice can reduce the socio-economic burden of the state and the energy of law enforcers in providing justice for society. For this reason, the existence of a restorative justice agency needs to be included in the criminal justice system.

In fact, the criminal act of corruption has been enforced by means of a circular in several law enforcement agencies including, but has not been established by law:

1) Letter of the Chief of Police No. Pol. B / 3022 / XII / 2009 / sdeops regarding the concept of Alternative Dispute Resolution (ADR), in the first point it is written that the handling of

criminal cases that have minor material losses, the resolution can be directed through the concept of ADR which actually has similarities with Restorative Justice which promotes deliberation between parties. which is involved;

2) Circular of the Junior Attorney General for Special Crimes Number: B113 / F / Fd.1 / 05/2010 dated 18 May 2010, one of the points in its content is to instruct all High Prosecutors, which calls for an appeal to the public in cases of suspected corruption. Those with the awareness that they have returned the losses to the State need to be considered not to be followed up on the principle of restorative justice.

In fact, the criminal act of corruption has also been enforced in terms of the implementation of abuse of authority in government administration from Article 17 of the Law of the Republic of Indonesia No. 30 of 2014 concerning Government Administration that the abuse of authority is emphasized in Article 34 of the Government Regulation of the Republic of Indonesia No. 48 of 2016 concerning Procedures for Imposing Administrative Sanctions on Government Officials to Government Officials can be refunded to the state / regional treasury. This means that if from a result of the supervision of the Government Internal Supervisory Apparatus (APIP), even though there is an administrative error that causes losses to state money, a refund of state financial losses is carried out no later than 10 (ten) working days from the date the results of the supervision are decided and published.

CONCLUSION

The form of restorative justice in the criminal act of corruption is in the form of returning all the proceeds of the criminal act of corruption along with all forms of benefits if there are benefits obtained by the perpetrators of corruption. The refund can be made at the stage before the investigation, at the time of the investigation, at the time of the investigation until the stage of examination in court. The application of restorative justice in criminal acts of corruption has a positive impact on the state. The state is not burdened with issuing a state budget to process and maintain perpetrators of corruption who are detained or convicted by feeding and drinking to perpetrators of corruption. In addition, the restorative justice model is a way of solving cases that is more effective and efficient than the retributive justice model to be applied in criminal acts of corruption. Retributive justice tends to take a long time to process perpetrators of corruption and return the state's financial losses and spend more on the state budget.

At this time, the application of the restorative justice model has not been specifically regulated in the laws on corruption in Indonesia, but a circular has been issued in several law enforcement agencies, namely the Kapolri Letter No. Pol. B / 3022 / XII / 2009 / sdeops Concerning the Concept of Alternative Dispute Resolution and the Circular of the Deputy Attorney General for Special Crimes Number B113 / F / Fd.1 / 05/2010 dated 18 May 2010 which regulates the application of restorative justice in criminal acts of more corruption. Put forward deliberation to return all proceeds of corruption. Furthermore, regarding the abuse of power in criminal acts of corruption it has also been regulated in Law Number 30 of 2014 and Government Regulation No. 48 of 2016 which regulates the concept of restorative justice related to abuse of authority in criminal acts of corruption, namely in the form of returning state financial losses to the state.

Restorative justice or the restoring judicial process will be able to reduce the socio-economic burden of the state and the energy of law enforcers in handling corruption cases and can provide more justice for the community. Therefore, the existence of restorative justice institutions needs to be included in the criminal justice system and a special law is formed to apply restorative justice to criminal acts of corruption.

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