RESTORATIVE JUSTICE POLICY IN THE PUNISHMENT OF CORRUPTION CRIMES IN INDONESIA

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ABSTRACT

Indonesia is a rule of law country where one of the basic objectives of eradicating criminal acts of corruption in Indonesia is to restore state losses. However, the retributive justice paradigm which is the legal basis for eradicating criminal acts of corruption and punishing perpetrators of corruption is not relevant to the main goal of the law of eradicating corruption in Indonesia. What is actually important in the spirit of eradicating corruption is that returning state losses is only an additional penalty which can also be replaced by imprisonment. This article is intended to examine the concept of criminal punishment for perpetrators of criminal acts of corruption that is relevant to be implemented in Indonesia in accordance with what is required by law by taking into account developments in the life of the nation and state today. The study focuses on deepening collaboration on the concept of restorative justice to maximize returns to state finances in punishing perpetrators of corruption in Indonesia. By using normative juridical research methods, this study concludes that the concept of restorative justice in punishing perpetrators of criminal acts of corruption can be implemented in the form of strengthening norms for returning state losses from being an additional crime to being a basic crime. To anticipate that the perpetrator will not be able to pay the losses, the concept of forced labor can be applied instead of imprisoning the perpetrator of a criminal act of corruption.

Keywords: Restorative Justice, Punishment, Corruption Crimes

INTRODUCTION

The establishment of the Corruption Eradication Commission (KPK) is a mandate from Article 43 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Law Number 20 of 2001 concerning amendments to Law No. 31 of 1999 concerning the Eradication of Criminal Acts Corruption (KPK), which is independent, has the task and authority to eradicate criminal acts of corruption. The Corruption Eradication Commission has a vision to create an Indonesia free from corruption and a mission to drive change to create an anti-corruption nation.

Eradicating criminal acts of corruption in various countries is principally based on the spirit of saving state assets even though by applying different methods. Therefore, the law on eradicating corruption must be designed in such a way as to facilitate efforts to eradicate corruption comprehensively and systematically so as to achieve this goal. Norms for eradicating corruption must be formed and compiled on strong foundations and are appropriate in representing this goal both from a philosophical perspective and the theories used.

The current norms for eradicating criminal acts of corruption in Indonesia are as stated in Law no. 31/1999 Jo Law no. 20/2001 concerning the Eradication of Corruption Crimes, systematically does not reflect the big goal of eradicating corruption, namely protecting state assets by returning state losses by perpetrators of corruption crimes. Indonesia's corruption eradication law still adheres to the retributive justice paradigm in punishing corruption perpetrators. Therefore, the punishment of perpetrators of corruption is free from any goal other than one goal, namely retaliation. This retributive justice paradigm is certainly not in line with the larger goal of eradicating corruption, which in turn becomes an obstacle to efforts to recover state assets through returning state financial losses in criminal acts of corruption in Indonesia. These obstacles occur both at the procedural level and at the technical level. At the procedural

level, existing legal norms are not able to balance the modus operandi of criminal acts of corruption, for example in cases of criminal acts of corruption where the proceeds of the criminal act are not only enjoyed by the defendant, but are also received or enjoyed by third parties who are not the defendant so that the return state losses are difficult to do. At a technical level, for example regarding criminal acts of corruption committed by corporations, apart from the law providing leeway that corporate administrators can appoint other people to represent them in facing the case, also the main punishment that can be imposed by a judge is only a fine with a maximum additional penalty. one third as regulated in Article 20 paragraphs (6) and (7) of Law no. 31/1999 Jo Law no. 20/2001 concerning Eradication of Corruption Crimes. Thus, efforts to recover state financial losses both procedurally and technically are very difficult to carry out. Furthermore, the principles of retributive justice which prioritize physical punishment of the perpetrator of corruption rather than focusing on recovering from the crime, can be seen in Indonesian corruption eradication norms which state that restitution of state financial losses does not erase the punishment of someone as the perpetrator of a criminal act of corruption.

In the criminal act of gratification there are two parties who both play an active role in realizing the criminal act of gratification perfectly, namely the giver and the recipient of the gratification. The giver of gratification is regulated in the provisions of Article 5 and the recipient is regulated in Article 12B. However, with the provisions of Article 12C, namely when the recipient of the gratification reports the gratification to the Corruption Eradication Commission within 30 days, the legal provisions of Article 12B paragraph (1) do not apply. If this is looked at carefully, it will create injustice for the recipient and giver of gratification. Aristotle stated that justice must be based on law, that is, a person gets rights or shares proportionally considering education, position and ability. Justice in the context of corruption that is demanded is not equality but balance. Likewise if we look at the responsibility for the crime of gratification.

In Article 4 of Law no. 31/1999 Jo Law no. 20/2001 concerning the Eradication of Corruption Crimes, emphasizes that the recovery of losses to state finances or the state economy does not eliminate the punishment of perpetrators of criminal acts as intended in Article 2 and Article 3 of the law. This shows that Indonesian corruption law still views that the mistakes or sins of criminals can only be redeemed by suffering. So, as according to Kant and Hegel, the legal view is directed towards the past (backward looking), not towards the future as is characteristic of the theory of retributive justice. Even if punishment is actually useless, even if it makes the condition of the perpetrator of the crime worse, this paradigm of eradicating corruption still views the crime of corruption as an independent event where there is a mistake that must be accounted for and only by punishing the perpetrator's body the problem of the crime is resolved. The existence of Article 4 of the law on eradicating criminal acts of corruption which is inspired by the retributive justice paradigm certainly shows that the eradication of criminal acts of corruption in Indonesia does not lead to the main focus, namely saving state finances. Moreover, in several cases it has been illustrated that the types of fines contained in the formulation of the articles contained in the law on eradicating criminal acts of corruption, are no longer commensurate with the amount of losses experienced by the State as a result of the criminal act of corruption itself.

On the other hand, the provisions of several articles in the Law which prioritize punishment in the form of imprisonment and fines, are no longer relevant to current developments in international law. In fact, international law has opened up opportunities for each state party to resolve corruption cases through restorative justice in returning assets as an effort to recover state financial losses resulting from criminal acts of corruption. Through the United Nations Convention Against Corruption (UNCAC) which was signed by 133 countries, the UN urges its member countries to respond as soon as possible to the presence of this convention, especially in the context of returning state assets (asset recovery).

The most controversial matter is the formation of the Supervisory Board and the licensing obligations for wiretapping, confiscation and detention. In the legal and constitutional aspects, when the DPR and the Government which are given the authority and authority to form laws and regulations have used their mandate, the implication is that all parties must comply and be deemed to know (fictie).

In fact, instead of depriving perpetrators of criminal acts of corruption of their freedom by imprisoning them, it would be better for the state to focus on recovering state losses caused

by perpetrators of corruption. Apart from that, the state also needs to think about how to ensure that perpetrators of corruption can be employed in work sectors that are their expertise, where the results of that work will be confiscated by the state within a certain time. Strengthening this concept, apart from being able to immediately recover losses resulting from criminal acts, can also realize other criminal objectives, namely providing a deterrent effect and improving the attitude of the perpetrators of these criminal acts.

METHODS

The type of research used in this research is normative legal research methods or library legal research. namely legal research carried out by examining library materials, namely primary and secondary data. These legal materials are arranged systematically to make it easier to draw conclusions from the problems studied. In approaching this problem using the Normative Juridical approach method. This approach is an approach to applicable legislation. The statutory approach is carried out by reviewing all laws and regulations that are related to the content of the law being handled. The normative juridical problem approach is an approach used to approach statutory regulations (statue approach), this approach examines statutory regulations related to the problem being studied. Apart from that, a conceptual approach is also used to look at legal concepts related to existing problems.

RESULTS AND DISCUSSION

1. The Concept of Punishing Corruption Crime Perpetrators from a Restorative Justice Perspective

The Concept of Punishing Corruption Perpetrators from a Restorative Justice Perspective. Failure of the Retributive Paradigm. Efforts to deal with crime using criminal law institutions and physical punishment of criminals are the most classic method, it is even said to be as old as human civilization. In the context of philosophy, crime and punishment are even referred to as the "older philosophy of crime control". Recently, this punishment policy has been widely questioned considering that in the historical context, punishment or criminal sanctions are full of descriptions of treatment that today's standards may be considered cruel and beyond the limits.

Smith and Hogan didn't even dare to call it "a relict of barbarism". Criminal retaliation arises because criminal law itself is built on the basis of indeterminism thinking which basically views humans as having free will to act. Free will is what underlies the birth of criminal acts. Therefore, the interdeterminism view assesses that human free will must be repaid with criminal sanctions. As human life and civilization develops, it turns out that the implementation of criminal sanctions for revoking independence contains more negative aspects than positive aspects. Negative aspects arising from the criminal imposition of revocation of independence include dehumanization, prisonization and stigmatization. Apart from that, another negative aspect is the exhaustion of law enforcers' energy and the State budget to focus on efforts to physically punish criminals rather than focusing on recovering from the consequences of the crimes committed. In fact, in many criminal cases, the losses or negative consequences caused by a crime are more important to repair than taking away the freedom of a criminal.

Juridically, the concept of restorative justice can be applied in Indonesia for several reasons, including:

1. Based on the 2011 national working meeting held by the Supreme Court, it resulted in an important decision which could later become jurisprudence in the Supreme Court's decision, which was based on Decision No.1600 K/Pid/2009 concerning considerations of restorative justice (hereinafter referred to as case Decision

No.1600 the year 2009). In principle, this jurisprudence can be said to be the seed of the birth of restorative justice, because according to the Supreme Court, one of the aims of criminal law is to restore the balance that occurs due to criminal acts. One of the objectives of "Restoring balance" in criminal acts of corruption is to restore state financial losses for the benefit of the general public and anticipate crises in various areas of state development.

2. Restorative justice can be implemented in Indonesia based on the ratification of UNCAC in Law No. 7 of 2006. The ratification of UNCAC by the Indonesian Government is of course based on careful consideration that the contents of the convention are in accordance with the situation and conditions of the country which is currently active. active in eradicating corruption.
3. Restorative justice can be implemented in Indonesia due to the Circular Letter of the Deputy Attorney General for Special Crimes Number: B113/F/Fd.1/05/2010 dated 18 May 2010 and the Letter of the Chief of Police No. Pol. B/3022/XII/2009/sdeops regarding the concept of Alternative Dispute Resolution (ADR). Referring to the provisions regarding the application of the concept of restorative justice in criminal acts of corruption, several cases have been resolved through Jampidsus Circular Letter Number: B-765/F/Fd.1/04/2018 dated 20 April 2018 concerning Technical Instructions for Handling Corruption Cases at the Investigation Stage in several areas The prosecutor's office has implemented restorative justice in dealing with criminal acts of corruption, including the Pringsewu District Prosecutor's Office which in 2018 also implemented this method for 3 (three) cases which in total amounted to + Rp. 500,000,000,- (five hundred million rupiah) which has been deposited into the State treasury. Meanwhile, the form of application of SE Jampidsus Number: B-1113/F/Fd.1/05/2010 is in cases of criminal acts of corruption under Rp. 100 million which was resolved through restorative justice, namely the case of the Penghulu Kampung Empang Pandan who misappropriated the Village Fund Allocation (ADD) amounting to Rp. 15,000,000. The case is in the investigation stage, but the suspect has already returned all state losses. So the prosecutor's office issued an Order to Stop Investigation (SP3) in this case.

In the context of criminal acts of corruption, it seems that the philosophy and theory of punishment which is heavily influenced by the flow of retributive justice is no longer very relevant to the big goal of the law of eradicating corruption in Indonesia, namely the focus on protecting state assets or wealth. The legal interest to be protected is state finances. It was later revealed that a number of corruption convicts who had cost the state a lot of money were actually enjoying the process of their punishment. In fact, their presence in the criminal system actually damages the mental health of law enforcers, which in turn triggers new criminal acts. Corruption convicts instead use the proceeds of their corruption to bribe correctional officers to get luxury facilities while they are serving their sentence. Apart from that, in corruption crimes, the perpetrators are often not individuals but corporations.

In this context, the paradigm of indeterminism and retributive justice in punishing perpetrators of corruption carried out by corporations is clearly irrelevant. In reality, a number of obstacles arise in efforts to protect state finances which are corrupted by corporations. Punishment of corporate perpetrators of corruption, both in terms of substance, structure and legal culture, is no longer relevant using the retributive justice concept approach. Qualitatively, the negative impact of corruption is to reduce revenue from the public sector and increase government spending on the public sector. On another level, corruption also contributes to large fiscal deficits, increasing income in equality, because corruption differentiates the opportunity for individuals in certain positions to gain profits from government activities at costs that are actually borne by society. Viewed from the aspect

of public welfare, corruption also increases the poverty rate because government programs do not reach their targets, corruption also reduces the potential income that the poor may receive. Viewed from this aspect, the punishment of perpetrators of corruption can clearly no longer rely on a retributive approach. Systematic and comprehensive efforts are needed to restore the consequences of criminal acts of corruption.

The failure of retributive theory which is oriented towards retribution and neo-classical theory which is oriented towards equality of criminal sanctions and action sanctions to fulfill the sense of justice in society has triggered a reaction to the emergence of ideas to apply restorative justice in the concept of punishment in general, especially the punishment of perpetrators of criminal acts of corruption. This thinking views the restorative justice approach which emphasizes repairing losses caused or related to criminal acts as a concept that is in accordance with the aim of eradicating corruption in Indonesia, as has also been done in several countries. In several countries this approach has begun to be adopted and is showing encouraging results. The Netherlands, for example, is considered the most successful country in the world in implementing restorative justice.

The proof is that from 2013 to January 2017, the Netherlands has succeeded in closing 24 (twenty four) prisons due to the low number of crimes occurring in that country. Likewise, in corruption cases, the Netherlands also applies restorative justice as a form of resolution in corruption cases. So in 2016, based on the Corruption Perception Index (CIP) or corruption perception index, the Netherlands was in 8th (eighth) position out of 176 countries. Indeed, the criminal law in force in the Netherlands, since 1921, has recognized an institution for resolving criminal cases outside of court proceedings, namely the so-called transaction institution (transactie stelsel), which is not known in the criminal law in force in the Dutch East Indies or Indonesia today. This shows that the restorative justice approach is actually more capable of reducing crime rates, especially in criminal acts of corruption, moreover capable of recovering the consequences of criminal acts where both the state, perpetrators and society jointly think about ways to recover losses resulting from criminal acts committed. Apart from the Netherlands, other developed countries such as the United States and China have also considered implementing effective and efficient methods in handling corruption cases. These effective and efficient methods are to make recovery resulting from criminal acts the primum remedium and the imposition of sanctions for deprivation of liberty of the perpetrators of corruption as the ultimum remedium. For this reason, 133 UN member countries agreed to the United Nations Convention Against Corruption (UNCAC) which essentially wants countries to focus more on legal return (asset recovery) in the formation of laws to eradicate corruption. This means that international law indicates that the focus of punishment is no longer focused on the perpetrator of the crime but on the consequences caused. This is proven by the opening of opportunities in UNAC for every law to resolve corruption cases through restorative justice in legal returns as an effort to recover legal financial losses resulting from criminal acts of corruption.

According to Budi Suharianto, the conjunction "or" is a sign that the choice of using criminal law enforcement policies becomes ultimum remedium when non-criminal sanctions are considered unreliable. Viewed from this point of view, it means that the concept of restorative justice does not completely eliminate criminal sanctions, but rather prioritizes the provision of sanctions that emphasize efforts to recover from the consequences of crime. In the context of criminal acts of corruption, the focus of legal attention should be on how to ensure that the State losses incurred can be returned, which is prioritized by law rather than prioritizing the deprivation of the perpetrator's freedom. In this case, the author believes that there are at least 2 (two) concepts of punishment for perpetrators of criminal acts of corruption that can be applied according to the restorative justice approach, namely first, recovery of state losses in the form of returning state financial losses; secondly, punishment in the form of forced labor for perpetrators of corruption whose proceeds are confiscated for

the state. These two concepts of punishment will be explained further in the next sub-discussion.

1. Implementation of Restorative Justice for Perpetrators of Corruption Crimes

Perpetrators of Corruption Crimes have previously explained that the concept of restorative justice in punishing perpetrators of criminal acts of corruption does not completely eliminate criminal sanctions, but rather prioritizes the provision of sanctions that emphasize efforts to recover from the consequences of the crime. The author proposes 2 (two) modes of implementation of restorative justice in legal punishment for eradicating corruption in Indonesia in the future which will be described below. According to Law no. 31/1999 Jo Law no. 20/2001 concerning the Eradication of Corruption Crimes, corruption is a criminal act that is very detrimental to state finances or the country's economy and hinders national development and also hampers the growth and continuity of national development which demands high efficiency. It is further stated in the consideration section of the law that the criminal act of corruption is said to be a violation of the social and economic rights of society at large, so that the criminal act of corruption is classified as a crime whose eradication must be carried out in an extraordinary manner. Therefore, criminal regulation of compensation money and fines is an effort to restore state financial losses. In fact, all corruption laws in Indonesia regulate the criminal issue of compensation money.

The implementation of restorative justice for perpetrators of criminal acts of corruption is very relevant for perpetrators of criminal acts of corruption, because it can restore state losses and those accused of criminal acts of corruption can return and can return state money so that they no longer immediately receive sanctions in the form of prison.

In Law no. 3/1971, for example, the criminal issue of replacement money has been regulated where the amount of payment of replacement money is as much as possible the same as the money that was corrupted. However, this law has a weakness, namely that it does not clearly determine when the replacement money must be paid, and what the sanctions are if the payment is not made. This law actually weakens the obligation to pay replacement money. In the explanatory part of the law, it is stated that if the payment of compensation cannot be fulfilled, the provisions regarding the payment of fines will apply.

Likewise with Law no. 31/1999 Jo Law no. 20/2001 also regulates the criminal issue of compensation money. Article 18 paragraph (1) letter b states that perpetrators of criminal acts of corruption may be subject to additional punishment in the form of payment of compensation money in an amount equal to the maximum amount of property obtained from the criminal act of corruption. There has been some progress in this law, where the provisions regarding replacement money are more stringent, namely if it is not paid within 1 (one) month, the convict will be immediately executed by being sent to prison. The prison sentence has been determined in the judge's decision, the length of which does not exceed the maximum threat of the principal sentence. However, the concept of restorative justice has not been fully implemented in these regulations. Because Law no. 31/1999 in conjunction with Law no. 20/2001 concerning the Eradication of Corruption Crimes regulates that in cases that are decided, there is a payment time limit of one month, if you do not pay replacement money then the property can be confiscated by the Prosecutor and the confiscated property can be auctioned to cover the replacement money in the amount according to a court verdict that has permanent legal force, and if the convict does not have sufficient assets to pay replacement money, then the convict will be sentenced to imprisonment for a period not exceeding the principal sentence. This norm again shows that the return of state losses is only an additional punishment, not a main crime. Moreover, if the convict cannot recover the state's losses, the solution is to put the convict in prison in addition to having to serve the basic prison sentence.

In the concept of a restorative justice approach, it is necessary to consider making the return of State losses the principal crime. Because if compensation for state losses remains

an additional punishment, there is still an opportunity for the judge to decide on a subsidiary crime or substitute imprisonment if the convict is unable to repay the losses. In the lens of restorative justice, if the convict is unable to recover the losses even though all his assets have been auctioned off, then instead of imprisoning the convict, the State would be better off empowering the perpetrator of corruption in the form of forced labor according to his or her expertise. Because basically the perpetrators of corruption are people who have good skills. The results of this forced labor are confiscated by the State to cover state losses that the convict cannot afford. The development of this concept in the law for eradicating corruption is likely to be able to restore or restore state losses due to corruption. In this case, with this concept of punishment, there are many benefits in terms of the purpose of punishing a criminal. With the obligation to return compensation money that cannot be negotiated, a convict will work under state protection to earn money to cover the losses incurred as a result of his actions.

CONCLUSION

1. The Concept of Punishing Perpetrators of Corruption Crimes in a Restorative Justice Perspective The retributive justice paradigm which is the legal basis for eradicating criminal acts of corruption is not relevant to the main objective of the law of eradicating corruption in Indonesia. The enthusiasm to save state assets must be based on restorative justice thinking which is oriented towards recovering from criminal acts of corruption rather than focusing on imprisoning perpetrators of corruption.
2. The implementation of restorative justice for perpetrators of criminal acts of corruption is very relevant to be applied for perpetrators of criminal acts of corruption, therefore because it can restore state losses and defendants of criminal acts of corruption can return and can return state money so that they no longer immediately receive sanctions in the form of prison, in this case In the context of restorative justice, it is possible that someone will have more difficulty and think about committing a criminal act of corruption.

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