Application Of Restorative Justice In An Effort To Recover State Losses

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ABSTRACT

The law enforcement system and sanctions againts criminal acts of corruption can be carried out with better efforts than just imprisonment for perpetrators of corruption but there are other alternatives that can be applied. The main objective in eradicating corruption is to maximize returns on state financial losses. Formulation of The Problem in this thesis is Why can the alternative of returning state assets that have been corrupted be used as an option to abolish imprisonment? How restoratif justice maximizes returns on state financial losses? This thesis Research Method uses a qualitative method by using a normative juridical research methods. The Discussion in this thesis is the theory of returning state finances resulting from criminal acts of corruption is an action that is not only a countermeasure for criminal acts of corruption but also a prevention of criminal acts. Restoratif justice is implemented in the form of strengthening the norm of returning state financial losses from being an additional punishment to becoming a principal punishment.

Keywords: Restorative Justice, State Finance, Legal benefits, Sentencing

ABSTRAK

Sistem penegakan hukum dan sanksi terhadap tindak pidana korupsi dapat dilakukan upaya yang lebih baik dari pada hanya pidana penjara bagi pelaku korupsi tetapi ada alternatif lain yang dapat diterapkan. Tujuan utama pemberantasan korupsi adalah untuk memaksimalkan pengembalian kerugian keuangan negara. Rumusan Masalah dalam penelitian ini adalah mengapa pengembalian aset negara yang telah dikorupsi dapat dijadikan sebagai alternatif penghapusan pidana penjara? Bagaimana keadilan restoratif memaksimalkan pengembalian kerugian keuangan negara? Metode penelitian ini menggunakan metode kualitatif dengan menggunakan metode penelitian yuridis normatif. Pembahasan dalam penelitian ini yaitu teori pengembalian keuangan negara hasil tindak pidana korupsi merupakan tindakan yang tidak hanya penanggulangan tindak pidana korupsi tetapi juga pencegahan tindak pidana. Keadilan restoratif dilaksanakan dalam bentuk penguatan norma pengembalian kerugian keuangan negara dari pidana tambahan menjadi pidana pokok.

Kata Kunci: Keadilan Restoratif, Keuangan Negara, Tunjangan Hukum, Pemidanaan

A. Introduction

In criminal law enforcement, Restorative Justice contains the meaning, namely: "a rapprochement and redemption of mistakes that the perpetrators of criminal acts (their families) want to do to the victims of these crimes (their families) (peace efforts) outside the court with the intent and purpose that legal problems arising from the occurrence of these criminal acts can be resolved properly by achieving agreement and agreement between the parties.

Justice in the criminal justice system in Indonesia is retributive justice, while what is expected is restorative justice, namely a process in which all parties involved in a particular crime jointly solve the problem of how to deal with the consequences in the future. The settlement of these cases prioritizes recovery for victims, perpetrators, and society. The main principle of Restorative Justice is the participation of victims and perpetrators, the participation of citizens as facilitators in resolving cases, so that there is a guarantee that the child or perpetrator will no longer disturb the harmony that has been created in society.

The current norms for eradicating corruption in Indonesia as contained in Law no. 31/1999 which was amended by Law no. 20/2001 concerning Eradication of Corruption Crimes also in Law No.15/2002 which was amended by Law No.25/2003 concerning Money Laundering Crimes, does not systematically reflect the main goal of eradicating corruption namely protecting state assets by returning state losses by perpetrators acts of corruption. Indonesia's corruption eradication law still adheres to a retributive justice paradigm in criminalizing corruption offenders. Therefore the punishment of corruptors is released from any purpose other than one goal, namely retaliation.[1]

The principles of retributive justice which prioritize the physical punishment of perpetrators of corruption rather than focusing on recovery for the consequences of these crimes, can be seen in the Indonesian corruption eradication norm which states that the return of state financial losses does not eliminate punishment for someone as a perpetrator of a criminal act of corruption. In Article 4 of Law no. 31/1999 which was amended by Law no. 20/2001 concerning the Eradication of Corruption Crimes, emphasized that returning state financial losses or the country's economy does not eliminate the punishment of perpetrators of criminal acts as referred to in Article 2 and Article 3 of the law. This shows that Indonesia's

[1] Teori Retributif Justice melegitimasi pemidanaan sebagai sarana pembalasan atas kejahatan yang telah dilakukan seseorang. Kejahatan dipandang sebagai perbuatan yang amoral dan asusila di dalam masyarakat, oleh karena itu pelaku kejahatan harus dibalas dengan menjatuhkan pidana.Aleksandar Fatic, Punishment and Restorative Crime – Handling. (USA: Avebury Ashagate Publishing Limited, 1995), hlm. 9

criminal law on corruption still views the mistakes or sins of the perpetrators of crimes can only be redeemed by suffering.

So, according to Kant and Hegel, the view of law is directed to the past (backward looking), not to the future as is characteristic of retributive justice theory.[2] Even though punishment is actually useless, even if it makes the situation of the perpetrators of crimes worse, such a paradigm for eradicating corruption still views the crime of corruption as an independent event where there are mistakes that must be accounted for and only by means of physical punishment of the perpetrators the problem of the crime is resolved.

International law has opened up opportunities for every country to settle corruption cases through restorative justice in returning assets as an effort to recover state financial losses due to criminal acts of corruption. Through the United Nations Convention Against Corruption (UNCAC) which was signed by 133 countries, the UN urged its member countries to respond as soon as possible to the presence of this convention, especially in the context of asset recovery.[3]

Instead of depriving the perpetrators of corruption by imprisoning them, it is better for the state to focus on recovering state losses by corruptors. Apart from that, the state also needs to think about how the perpetrators of corruption can be employed in the sectors of work that are their expertise where the results of the work are confiscated by the state within a certain time. Strengthening this concept apart from being able to immediately recover losses due to criminal acts, can also realize other goals of punishment, namely providing a deterrent effect and improving the attitude of the perpetrator.

The restorative justice approach in sentencing perpetrators of corruption is not impossible to apply in Indonesia. Several studies have shown that besides this concept being focused on recovering the consequences of a crime, the principles of restorative justice are actually the main feature of the Indonesian people in resolving legal issues in the midst of their society, which should be explored and implemented into positive laws. Indonesia.[4]

[2] Kant dan Hegel dalam Jan Remmelink, Hukum Pidana, Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KUHP Indonesia, (Jakarta: PT. Gramedia Pustaka Utama, 1993), hlm. 600.

[3] Budi Suharianto, Restorative Justice dalam Pemidanaan Korporasi Pelaku Korupsi demi Optimalisasi Pengembalian Kerugian Keuangan Negara, Jakarta, Kemenkumham, Volume 5, Nomor 3, Desember 2016, hlm. 423

[4] Priyatno, Dwidja. (2019). Pemindanaan untuk Anak dalam Konsep Rancangan KUHP (dalam Kerangka Restorative Justice). Edisi VIII/Volume III. Bandung: Lembaga Advokasi Hak Anak (LAHA).

B. Focus Of Problem

1. Why can the alternative of returning state assets that have been corrupted be used as an option to abolish imprisonment?
2. How restoratif justice maximizes returns on state financial losses?

C. Research Methodology

This research belongs to the type of normative legal research or library law research, because this legal research is carried out by examining library research which consists of primary legal materials and is supported by secondary legal materials. Normative legal research or literature includes:[5] Research on legal principles, legal systematics, vertical and horizontal synchronization, comparative law and legal history.

D. Discussion

1. Return of State Assets as an Alternative to Elimination of Imprisonment in Corruption Crimes

The statutory provisions stipulate that any loss to the state caused by unlawful acts or someone's negligence must be resolved immediately. For state financial losses caused by criminal acts of corruption, the return of state financial losses does not eliminate the punishment of the perpetrator. Settlement of state financial losses due to criminal acts of corruption at the time of disclosing the corruption case itself, starting from the stages of investigation, investigation, examination in court. The costs incurred by the government for investigating corruption cases are quite a drain on the country's own finances.[6]

In fact, for certain cases, the value of state financial losses caused by corruption is less than the state finances spent to finance investigation costs until a verdict is passed, and for cases where the disclosure stage is difficult, an even greater cost will be required. For example, if a case requires expert testimony, if the investigator asks for expert testimony, the costs required will be greater. This is done with the aim that investigators can strengthen the investigation by inviting experts who understand the problem better. And from the suspect's point of view, together with legal counsel, they will present experts

[5] Soerjono Soekanto dan Sri Mamudji, 2001, Penelitian Hukum Normatif, Jakarta: PT. Raja Grafindo Persada, hlm. 14.

[6] Dylan Aprialdo Rachman, Kabareskrim: Anggaran Penyidikan Kasus Korupsi Lebih Besar daripada Kerugian Negara, <https://nasional.kompas.com/read/2018/02/28/15355151/kabareskrim-anggaran-penyidikan-kasus- korupsi-lebih-besar-daripada-kerugian>, Diakses Pada 1 januari 2023 Pukul 17.15 WIB

to counter the investigator's arguments. Investigators finally invited experts to strengthen evidence.[7]

Restorative justice in principle is a philosophy or basic guideline in the peace process outside the judiciary with the aim of the parties involved in a criminal case in this case the perpetrators of crimes and victims of crimes to find the best solution that is approved and agreed upon by the parties. Restorative justice is an approach taken in the context of seeking justice by focusing on victims and perpetrators, as well as the communities involved. does not focus on abstract legal principles or principles or those that punish the perpetrator. The restorative justice approach focuses more on creating balanced justice for perpetrators and victims in a fair and wise manner.

Efforts to deal with crime by using the institutions of criminal law and physical punishment of perpetrators of crimes are the most classic methods and are even said to be as old as human civilization. In the context of philosophy, crime and punishment it is even referred to as the "older philosophy of crime control".[8] Recently, this sentencing policy has been widely questioned considering that in the historical context, sentencing or criminal sanctions are full of descriptions of treatment that by current standards is seen as cruel and excessive. Not even half-hearted Smith and Hogan called it "a relic of barbarism".[9]

Criminal retaliation arises because the criminal law itself is built on the basis of indeterminism which basically views humans as having free will to act. Free will is what underlies the birth of evil acts. Therefore, the view of interdeterminism assesses that human free will must be rewarded with criminal sanctions.[10]

Along with the development of human life and civilization, it turns out that the implementation of criminal sanctions for the revocation of independence contains more negative aspects than positive aspects. The negative aspects arising from the imposition of the crime of revocation of independence include dehumanization, imprisonment and stigmatization.[11] In addition, another negative aspect is that the energy of law enforcers

[7] Hukumonline.com, Mau Tahu Biaya Penanganan Perkara Korupsi? Simak Angka dan Masalahnya, <https://www.hukumonline.com/berita/baca/lt5733f0ea01aea/mau-tahu-biaya-penanganan-perkara-korupsi-simak-angka-dan-masalahnya/>, diakses tanggal 01 Januari 2023

[8] Gene Kassebaum, Delinquency and Social Policy, London: Prentice Hall, Inc, 1974, hal. 93.

[9] Smith and Hogan, Criminal Law, London: Butterworths, 1978, hlm. 6

[10] Sudarto, Hukum Pidana I, Semarang: Yayasan Sudarto, FH UNDIP, 2009, hlm. 146-147

[11] Muladi dan Barda Nawawi Arief, Teori-Teori Dan Kebijakan Pidana¸Bandung: Alumni, 1984, hlm. 77-78

and the state budget is depleted to focus on efforts to physically punish the perpetrators of crimes rather than focusing on recovering the consequences of the crimes committed. In fact, in many criminal cases, losses or negative consequences caused by a crime are more important to repair than depriving the perpetrator of a crime of independence.

In the context of criminal acts of corruption, it seems that the philosophy and theory of punishment which is heavily influenced by the school of retributive justice is very irrelevant to the main goal of law against corruption in Indonesia, which is to focus on protecting state assets or assets. The legal interests to be protected are state finances.[12] Later it was revealed that a number of corruption convicts who had caused a great loss of state funds actually enjoyed their sentencing process. In fact, their presence in the penal system actually damages the mentality of law enforcers which in turn triggers the occurrence of new crimes. Convicted corruption cases even use the proceeds of their corruption to bribe prison officials to get luxury facilities while they are serving their sentence..[13]

In addition, in corruption crimes, the perpetrators are often not individuals but corporations. In this context, the paradigm of indeterminism and retributive justice in the punishment of perpetrators of corruption by corporations is clearly irrelevant. In fact, a number of obstacles arise in efforts to protect state finances that are corrupted by corporations. Criminalization of corporate perpetrators of corruption both from the aspect of substance, structure and legal culture is no longer relevant using the retributive justice concept approach.[14]

Qualitatively, the negative impact of corruption is reducing revenue from the public sector and increasing government spending for the public sector. At another level, corruption also contributes to the value of a large fiscal deficit, increasing income inequality, because corruption differentiates the opportunities for individuals in certain positions to benefit from government activities at the costs that are actually borne by society. In terms of the aspect of public welfare, corruption also increases the poverty rate

[12] Agus Rusianto, Tindak Pidana & Pertanggungjawaban Pidana: Tinjauan Kritis Melalui Konsistensi antara Asas, Teori, dan Penerapannya. Jakarta: Kencana, 2015, hlm. 252.

[13] Membongkar Jual Beli Fasilitas Lapas Sukamiskin. Artikel. https://www.msn.com/id-id/berita/nasional/membongkar-jual-beli- fasilitas-lapas-sukamiskin/ar-BBKXLa5. diakses terakhir pada tanggal 01 Januari 2023

[14] Budi Suharianto, Restorative Justice dalam Pemidanaan Korporasi Pelaku Korupsi demi Optimalisasi Pengembalian Kerugian Keuangan Negara, Jakarta, Kemenkumham, Volume 5, Nomor 3, Desember 2016, hlm. 423

because government programs do not reach the target, corruption also reduces the potential income that the poor may receive. Viewed from this aspect, it is clear that criminalizing perpetrators of corruption can no longer rely on a retributive approach. Systematic and comprehensive efforts are needed to recover the consequences arising from criminal acts of corruption.

UN member states agreed on the United Nations Convention Against Corruption (UNCAC) which basically wants countries to focus more on asset recovery in the formation of anti-corruption laws. This means that international law indicates that the focus of punishment is no longer focused on the perpetrators of crimes but on the consequences they cause. This is evidenced by the opening of opportunities in the UNAC for everyone to settle corruption cases through restorative justice in returning assets as an effort to recover financial losses caused by criminal acts of corruption. This can be seen from article 26 Liability of Legal Person which discloses corporate responsibility not in the form of criminal sanctions but effective and proportionate non-criminal sanctions can be applied. It is stated in article 26 number 4 that each State Party is obliged to ensure that corporations are subject to effective, proportionate and prohibitive criminal or non-criminal sanctions, including financial sanctions. According to Budi Suharianto, the conjunction "or" indicates that the choice of using criminal law enforcement policies becomes ultimum remedium when non-criminal sanctions are considered unreliable.[15]

The concept of restorative justice does not eliminate criminal sanctions, but instead prioritizes the provision of sanctions that emphasize efforts to recover from crime. In the context of criminal acts of corruption, the focus of legal attention should be prioritized on how the state losses incurred can be returned by law rather than prioritizing the deprivation of the perpetrator's independence

2. Maximizing Return on State Loss Assets Based on Restorative Justice in Corruption Crimes

Asset recovery is seen as a preventive measure for corruption because First, it occurs when assets are controlled by the perpetrators so that the perpetrators lose resources to commit other crimes. Second, by attacking directly the criminal motives of the perpetrators of corruption, there is no longer any opportunity to enjoy the results of the

[15] *Ibid*, hlm. 423

crime, or at least it will be minimized. The return of assets removes the purpose which is the motive for the crime. The absence of opportunities to achieve that goal can eliminate the motives that drive people to commit crimes. Third, with the return of these assets a strong message can be given to the wider community that there is no safe place in this world for perpetrators of criminal acts to hide the proceeds of their crimes, while at the same time giving a strong message that no one can enjoy assets resulting from their actions. crime as the "crime doesn't pay" doctrine. These things reduce the desire of society, especially potential perpetrators, to commit crimes.[16]

The idea that returning state financial losses in corruption cases will stop investigations into these cases raises the question of whether this idea will be effective in closing leaks in state finances caused by corruption and reducing corruption cases in the future. so that the state will save its finances to finance the implementation of investigations into corruption cases. To assess the effectiveness of the application of restorative justice in handling criminal acts, it can be seen from the opinion of Gary S. Becker who uses an economic approach to human behavior to commit crimes or crimes.

According to Becker, as explained by Romli Atmasasmita, in essence, it is about human behavior in justifying criminal acts, that is, as long as the marginal utility of economic crime is greater than the marginal cost, the trend of crime or crime will continue and will likely develop where future criminals will realize that a life in crime will give them a better life than a life without crime. To reverse this trend, society must simultaneously increase the marginal cost of criminal behavior while also increasing the marginal utility of non-corporate forms of punishment such as fines or voluntary labor. Becker added that a rational individual would certainly commit a crime if the expected net profit (utility) from committing the crime exceeds the benefit (utility) derived from activities that do not violate rules/laws.

For cases of criminal acts of corruption, a person in committing a criminal act of corruption will take into account the amount of state finances that will be obtained from his evil actions. The costs/efforts incurred by someone to commit corruption are not too large because the perpetrators of corruption are usually carried out by someone within the state financial management environment, the perpetrators usually have the authority or are close to those who have authority in managing state finances so that they can easily commit

[16] Pujiono, Tindak Pidana Korupsi, Universitas Terbuka, Banten, 2021, Hlm. 77

crimes. his actions. Because the perpetrators of corruption are usually someone who is in the state financial management system, the perpetrators already know the internal control system (SPI) of state financial management and can find out the weaknesses of the SPI so that the perpetrators can easily hide their actions so that it is as if no crime has occurred. and the actions of the perpetrators are difficult to uncover. Becker's opinion was then developed by Ogus and Abbot. As explained by Andri Gunawan Wibisana, Ogus and Abbot explain the cost of committing a crime consists of sanctions and the probability of imposing sanctions including the probability of law enforcement officials uncovering related criminal cases.[17]

Completion of state financial losses due to corruption depends on the ability of the perpetrators to pay compensation in order to recover the state losses. In this case, the monetary sanction in the form of payment of compensation will not achieve a deterrent effect for the perpetrator when the assets owned by the perpetrator are not sufficient to pay the sanction/compensation, so the imposition of imprisonment becomes more effective. In addition, other factors such as the difficulty of obtaining evidence regarding the perpetrator's assets, the transfer of the perpetrator's assets to other parties and the existence of objections from third parties over the perpetrator's assets have become obstacles in the settlement of state financial losses due to corruption.

E. Conclution

The retributive justice paradigm which forms the legal basis for eradicating corruption is irrelevant to the main objective of law against corruption in Indonesia. The spirit to save state assets must be based on restorative justice thinking that is oriented towards recovering from criminal acts of corruption rather than focusing on imprisoning corruptors.

Based on the theory by using an economic approach to human behavior to commit crimes or crimes, the paradigm of restorative justice cannot be applied to cases of corruption because if this paradigm is applied then cases of corruption will increase because criminals rationally will commit corruption because of the probability the imposition of witnesses was low and even though the actions of the perpetrators were discovered by law enforcement officials, the sanctions were also low, namely sufficient to recover the resulting state financial

[17] Andri Gunawan Wibisana, Tentang Ekor yang Tak Lagi Beracun: Kritik Konseptual atas Sanksi Administratif dalam Hukum Lingkungan di Indonesia, (Jakarta: Jurnal Hukum Lingkungan Indonesia, Vol. 6, No. 1, 2019), hlm. 66.

losses. Regarding the recovery of state financial losses, settlement depends on the ability of the perpetrator to pay compensation in order to recover the state's losses and other factors such as the availability of evidence showing the existence of the perpetrator's assets and the absence of objections from third parties over the assets owned by the perpetrator.

F. Recommendations

It is important to reform the criminal act of corruption immediately so that the restorative justice paradigm can be immediately introduced into the new legal norms. This is necessary because basically Indonesian criminal law still adheres to a retributive justice paradigm which is full of descriptions of treatment that by current standards is seen as cruel and excessive.

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