

Criminal Law Reform Through The Application Of The Compensation Concept In The Settlement Of Corruption Cases

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Abstract: This research reviews the essence of compensation concept as an additional penalty in the Indonesian criminal system as well as the extent of their impact on the effectiveness of financial indemnification of the state, and aims to provide an overview of the construction of the compensation concept in criminal law reform. The outcomes of the research indicate that there are the difference between perspective and point of view of the demands of the public prosecutor and the judge's decision concerning additional penalty for the compensation. The intention of the law makers to include additional criminal threats that everything is the same, namely in an effort to restore the country's financial losses arising out of the corruption cases. As it turns out in practice, however, it has certain weaknesses, particularly in view of the forming of criminal law which has no sticking to the principle, that adds to other criminal types on the types of crime that have been specified in the Indonesian Criminal Code it is forbidden. Therefore, to realize the main purpose of law enforcement concerning corruption case in order to save as much as possible the financial loss of the state, criminal compensation payments should be made as a "main penalty" not an "additional penalty". Based on such view, the compensation concept appears to be the ideal approach to be applied in the settlement of corruption cases.

Index Terms: Corruption, Compensation, Criminal Law Reform, Law Enforcement

1 INTRODUCTION

Talking about 'corruption' means talking about a behavior which is generally called "greedy" and has a main motive for profit or to enrich themselves or other persons or groups as well as in the implementation of the general form of violation of existing provisions, including abuse of power which causing financial loss to the state. Nowadays, the development mode of corruption over the years increased significantly while the development of laws and regulations to eradicate corruption "running in place" (stagnant), so that law enforcement is always left behind following the development of corruption itself. Eradication of corruption is actually an effort that has been carried out, but reality shows that no matter how efforts to combat corruption, the number of corruption continue to increase. From these facts it appears that the eradication of corruption in many countries, including Indonesia, is something that is a crucial issue and multi-dimensional crime, this means fighting corruption can not be approached only from an approach. It is indicated that the corruption as an extraordinary crime is not only

the problem of violations of the law but also relates to the economy, politics as well as a cultural matter. According to Marwan Efendi, who had led law enforcement corruption as "Deputy Attorney General for Special Crimes" recognizes that although no quantitative data showed a trend increase in the prosecution of corruption cases in Indonesia by police, prosecutors and the Corruption Eradication Commission, but the data is kuantitatif indicates that intensified efforts to eradicate corruption using criminal instruments, on the contrary show that corruption is rampant even like a virus that spreads throughout the life line. Meanwhile, based on the data results of the Indonesian Audit Boards from 2003 to 2012 have reported indications of indication of a criminal element that is found in the inspection to the competent authority, namely the National Police, the Attorney, and the Corruption Eradication Commission (KPK) made up of as many as 159 letters Rp 332 findings. 34353.58 billion. Historically, law enforcement regarding corruption crimes in Indonesia is one of its objectives is reflected in the financial rescue of the provisions of the laws and corruption are never valid in Indonesia. One of the rescue efforts and the return of state financial losses due to corruption is through the means of "additional penalty" to the payment of compensation. Additional penalty in the form of compensation is not really a new kind of criminal because since 1960 criminal of this type have been known in the law concerning corruption although with different names. In the provisions of article 16 points (3) Regulation No. 24 Prp 1960 criminal term for compensation called, "pay compensation an amount equal to the wealth gained from corruption". While in Law No. 31 of 1999 as revised by the Law No. 20 of 2001 compensation stipulated in Article 18 paragraph (1) letter b "Compensation will be as much the same as the amount of property obtained from corruption". The provision on Article 18 paragraph (1) letter b above is a consequence of the impacts by the corruption which may

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harm the country's financial or economic state, so as to restore the loss of that State is necessary juridical means namely in the form of payment of money substitutes. The law gives special emphasis on the amount of the compensation that is as much the same as the property obtained from corruption. The concept of law enforcement under the Indonesian Criminal Code adopts two mechanisms of criminal law process, namely criminal act which is a normal offence and that which is a complaint offence. Complaint offence is a criminal act the report of which can be revoked at any time by the complainant, or in respect of which the state, represented by the Police and the prosecutor, has no authority to take the legal proceedings unless it is reported to the competent authorities. On the other hand, normal offence is a form of criminal act which cannot be revoked by the reporting party or complainant at any time, because the Prosecutor has the discretion to prosecute. In the course of criminal law enforcement process development it has become evident that in fact reports of cases which constitute normal offences are frequently being revoked with the investigation being called off by investigators or public prosecutors, based on the consideration that an amicable settlement has been reached between the victim (reporting party) and the suspect, for humanitarian considerations, or for public interest considerations. Referring to the statute approach, this should be interpreted losses that can be attributed to convict State losses, which amount is real and certainly in number as a result of an unlawful act, either intentionally or neglect committed by the convict. Thus plays an important role for this is the financial loss of state should be based on the findings of the authorized agency or a public accountant appointed by the ordinance/auditing procedures properly. Based on the premise as stated above, objective of this research is to understand the essence of compensation concept as an additional penalty in the Indonesian criminal system by law enforcement agencies (prosecutors and judges) as well as the extent of their impact on the effectiveness of financial indemnification of the state..

2 METHODS

This type of research in this paper is a normative legal research, reviewing the rule of law concept, legal theory, and legal materials relating to the issues to be discussed. The approach used in this study is the statute approach and conceptual approach. In a normative legal research, the source of the data used are include secondary data consisting of primary law materials in the form of laws and regulations, tertiary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as tertiary law materials in the form of language dictionaries and Black's Law Dictionary. Data collection techniques in this research conducted by the library research, then processed and analyzed using qualitative data analysis, are in narrative form and presented descriptively.

3 RESULTS AND DISCUSSION

3.1 The Payment of Compensation Concept as an Additional Penalty

The objectives of the law to included the payment of compensation as an additional penalty in corruption cases, is essentially an attempt to restore the state financial losses caused by the corruption. The most out of indemnification of state financial turmoil the country's economy, it is considered necessary once upon appropriation items of evidence in corruption cases are not limited to those referred to in Article 39 of the Indonesian Criminal Code. So that the additional penalty is an extension set out in the Indonesian Criminal Code. Additional penalty is still considered necessary because although the criminal threat in essence already include criminal fines, but the maximum fine that can be imposed "only" as much as Rp. 1.000.000.000, - (one billion dollars). While the reality in the practices of corruption, many corruption cases that resulted in losses far above Rp.1.000.000.000 country, - (one billion dollars) even lately has evolved as a state loss of trillions of dollars. Additional penalty which purely in article 10 of the Indonesian Criminal Code did not have the form of compensation but limited only repeal certain rights, deprivation of certain goods, and the announcement of the verdict. Essentially, either in law or doctrine, judges are not required to always impose additional penalty. However, specifically for corruption cases that need to be considered. This is because corruption is an act that is contrary to the law which harm or may harm the country's finances. In this case the loss of the country must be restored. According to the Indonesian criminal system, the imposition of additional criminal nature is optional, in the sense that the judge does not always have to impose an additional penalty, which at the time he dropped something for the main criminal defendant. Regarding the decision of whether in addition to impose a principal punishment for a defendant, the judge still feel the need or not to impose an additional penalty, entirely left to the consideration of judges. As it turns out in practice, however, it has certain weaknesses, particularly in view of the forming of criminal law (law makers) which has no sticking to the principle, that adds to other criminal types on the types of crime that have been specified in Article 10 of the Indonesia Criminal Code it is forbidden. For example, what has been specified in Article 18 of the Law No. 31 of 1999 in conjunction with the Law No. 20 of 2001 concerning the Eradication of Corruption, in addition to forming laws have determined criminal extra-criminal as defined in the Criminal Code, was added as an additional penalty as following:

- a. Confiscation of movable or intangible or immovable;
- b. Compensation, which, if not paid, it can be done foreclosure and auction;
- c. The closure of all or part of the company;

- d. Repeal all or part of certain rights or disposition of all or certain advantages.

The existence of two main criminal cumulatively for someone because were charged with criminal offenses certain something new in the development of criminal law in Indonesia which deviate from the "political will" of forming the Criminal Code. According *Memorie van Toelichting* (MVT), the imposition of two kinds of main criminal simultaneously for someone who has done something that certain criminal acts can not be justified, on the grounds that the criminal charge of deprivation of liberty with criminal fines and it has properties very different purposes. Simons has another opinion, the imposition of two kinds of main criminal at a same time for a person who has been found guilty of a particular criminal offense that can dbenarkan, particularly if the criminal act has been carried out with the aim of gaining an advantage, or in the view of Simons' as he stated, "*bij misdrijven uit winst bejag gepleegd kan oplegging van wenselijk zijn*". (The crimes that have been committed with intent to gain advantage, the imposition of a criminal penalty in addition to the imposition of criminal suau form of deprivation of liberty can be justified, even highly expected). Based on the provisions of legal reasoning above, it can be understood that the intention of the law makers to include additional criminal threats that everything is the same, namely in an effort to restore the country's financial losses arising out of the corruption cases. To get the maximum results from the purpose of indemnification of state financial or economic chaos of the country, it is necessary once over appropriation items of evidence in corruption cases are not limited to those referred to in Article 39, so that the additional penalty is an extension set out in the Indonesian Criminal Code. Thus, the success or failure of the state through the law enforcement seeking the return of proceeds of corruption optimal operation of the legal system is a sign of the return of proceeds of corruption effectively recover the various interests in society who are disadvantaged due to corruption..

3.2 The Implementation of the Payment of Compensation in the Settlement of Corruption Cases

The quality of the judge's decision has generally been important. When the decision based on legal considerations in accordance with the facts revealed at the hearing, according to the law and the judge's conviction without being affected from various internal and external interventions that can be accounted for in a professional manner to the public (the truth and justice). Related to the judge's decision of restitution, in practice not all demands of compensation granted by the judge maejlis despite the fact the flow of funds to each defendant. Theoretically, there is a difference between the demands of the public prosecutor with the judge's decision concerning additional penalty for the compensation. The public prosecutor as deputy general interest and state, rests on the basis of the country's financial securing mission as the will of the law.

Therefore, in any corruption cases are handled, be the duty of the prosecutor to prosecute criminal for compensation. Another case for judges, due to additional criminal voluntary. Therefore, the judge will impose additional penalty-free according to the will of the public prosecutor or vice versa. The law does not specify the size or the criteria that left to the judge to assess and decide according to the evidence revealed in the hearing and sense of justice. As a result sometimes there is a difference between the first level court judges to a higher level court, in determining the length of imprisonment to the accused as a substitute for restitution. The dilemma problem if sentenced to substitute a mild form of imprisonment the convict prefer to undergo a criminal rather than pay compensation. And vice versa, if sentenced to prison is quite heavy, even if the amount of remaining money substitutes are not able to be returned is calculated by subtraction substitute imprisonment, the convict would prefer prison to undergo body pairs. For example, a defendant was sentenced to pay compensation of Rp. 1,000,000,000.00 (one billion dollars) with a substitute punishment of imprisonment for 5 (five) years. Had convicted only able to return the money substitutes Rp. 500,000,000.00 (five hundred million rupiah) means the rest of the money substitutes are not paid Rp. 500,000,000.00 (five hundred million), the imprisonment of his successor ($1/2 \times 5 \text{ years} = 2 \text{ years } 6 \text{ months}$). In the practice of the criminal proceedings is not always an additional penalty of compensation is stated in the decision, as *judex facti verdict* in the case of defendant Angelina Sondakh. Thus the state has been anticipated in the Prosecutor General's Letter No. B-28/A/Ft.1/05/2009 dated May 11, 2009 on Guidelines To Make Public Prosecutor in Requisitor. The main problem is a "shame culture" the corrupt have been eliminated because the number of criminals who were imprisoned felt to be common in the absence of a moral burden as well as a deterrent effect. Therefore, to prevent a sharp distinction in determining a sentence of imprisonment replacement, deterrent impact, prevention (preventive), and a positive impact on the return of the country's financial losses, it is necessary to rule which is the benchmark but does not reduce the independence of judges. Whereas the existence of compensation including imprisonment substitute heavy enough can affect the defendant immediately return the money substitutes instead choose to undergo additional imprisonment. If deemed necessary not rule out the possibility of criminal duration is the same as a criminal anyway. As an illustration, the decision of the Supreme Court against Angelina Sondakh. The defendant cases of bribery athlete development Kemenpora and convicted of corruption in the Ministry of National Education to pay compensation, whereas in the court of first instance are not penalized for paying compensation. "*The defendant must pay compensation of Rp. 12.580 billion and US \$ 2.350 million. If not paid, in all this time, to be replaced five years in prison*", said Artidjo Alkostar, Supreme Court's Judge, in a statement on Thursday. This Supreme

Court's decision have a positive effect on a judge's appellate reversal rate with multiple targets in addition to restoring state finances, also create a deterrent for draining wealth defendant (impoverished) and has a preventive aspect for others afraid or are not aware of corruption. Besides the above mentioned, the quality of the judge's decision is also determined by the morals of the judge involved, such as can be seen imbedded in his deliberations and read in his written verdict. The payment of compensation ideally, must be in accordance with the amount of state money that was corrupted so that the defendant can bear the responsibility of other people who also enjoy the fruits of corruption that have not been caught in the law because it is covered or protected by it. Therefore, a progressive law that has the purpose of "welfare and happiness of man" becomes indispensable. As the progressive role of judges in deciding cases not merely as a legal justice rather than the other justice (social justice) and public health by creating a law (*rechtsschepping*). In corruption cases, the perpetrator is usually more than one person so as to allow additional criminal restitution imposed on more than one person. In fact as this is basically there are two loading models that have been applied by judges who decide cases of corruption, namely:

First, Bear Joint Responsibility (or commonly known as "Tanggung-Renteng" in Indonesian). Bear Joint Responsibility, better known in the realm of civil law, is the occurrence of an engagement with a number of subjects that much. In the context of civil law, known there are two forms of joint responsibility that is active and passive. Joint responsibility can be said to be active if the number of indebted parties (creditors) more than one, and vice versa, passive joint liability occurs if the amount owed parties (debtor) is more than one. Referring to the concept of the joint responsibility on civil law above, the joint responsibility in the context of criminal money substitutes can be categorized as passive joint responsibility, where the state in this case serves as a creditor and the defendant as a debtor. This means that if countries through the judges had dropped criminal money substitutes joint responsibility to more than one defendant then each of them has the obligation to fulfill the sentence. According to the civil concept, if one of the accused has repaid the entire amount of compensation then automatically liabilities other defendants fall automatically.

Second, Imposition Proportionately. Imposition of proportionally is the imposition of criminal money substitute judges in a verdict which definitively determine how much load each defendant. Determination of the amount of the compensation is based on the interpretation of the judge on the contribution of each of the accused in corruption cases.

In practice, the two models mentioned above are applied at random depending on the interpretation of the judge. This uniformity is most likely because no clear rules. Based on the nature of each model, proportionately the most minimal indeed have potential problems that will be raised. Thus, according to the Authors, judges tend to

criminalize the payment of compensation only for the proceeds of corruption are acquired and enjoyed by the defendant appropriate information from the defendant in the court alone there without digging further pivotal role played by the accused in corruption. As a result, not all public prosecutor demands compensation granted by the judge in his ruling that the return of the country's financial losses as initial goals included in the laws and almost very little can be realized. compensation. Another case for judges, due to additional criminal voluntary. Therefore, the judge will impose additional penalty-free according to the will of the public prosecutor or vice versa. Therefore, to realize the main purpose of law enforcement concerning corruption case in order to save as much as possible the financial loss of the state, criminal compensation payments should be made as a "main penalty" not an "additional

4 CONCLUSION

The concept behind the formula for compensation under the criminal law of corruption first appeared in the draft of Law No. of 1971 regarding the Eradication of Corruption. The intention of the law makers to include additional criminal threats that everything is the same, namely in an effort to restore the country's financial losses arising out of the corruption cases. To get the maximum results from the purpose of indemnification of state financial or economic chaos of the country, it is necessary once over appropriation items of evidence in corruption cases are not limited to those referred to in Article 39, so that the additional penalty is an extension set out in the Indonesian Criminal Code. There are the difference between perspective and point of view of the demands of the public prosecutor and the judge's decision concerning additional penalty for the compensation. The public prosecutor as deputy general interest and state, rests on the basis of the country's financial securing mission as the will of the law. Therefore, in any corruption cases are handled, be the duty of the prosecutor to prosecute criminal for penalty" as stipulated both in the Indonesian criminal code and the Law No. 31 of 1999 in conjunction with the Law No. 20 of 2001 concerning the Eradication of Corruption. In addition, the formulation of a fair punishment for the defendant is additional compensation which based on the magnitude of the responsibility of the accused in corruption cases that led to financial loss of the state.

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