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Restorative Justice for Corruption Cases the Settlement of Corruption Cases: is it Possible?

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Abstract
The Corruption Law of Indonesia regulate the return of the state's losses suffered by state shall not exclude the criminal acts performed by the perpetrators. In practice, the state's financial loss due to corruption is less than the cost of enforcing the relevant law. Furthermore, a corruption case requires manpower and lengthy process. Thus, the novel idea of settling minor state financial losses in corruption cases by means of returning the losses is considered more effective when applied with certain conditions. The research method of this study is normative judicial. The data used are primary, secondary and tertiary. This study argues that the concept of restorative justice could be applied to the settlement of corruption cases with minor state finance losses with certain conditions. The restorative justice approach to handling cases of corruption emphasises the restoration of the original state of affairs prior to the corruption, the application of restorative justice includes the stoppage of cases in the examination, investigation, and prosecution stages by considering the interest of the state, society, and other legal interests to be protected, the avoidance of negative stigma and retaliation, as well as society's response to such as resolution.
Keywords: Corruption; Investigator; Prosecutor; Restorative Justice; State Losses.

Introduction

The Republic of Indonesia is currently accelerating economic development in various sectors, including public infrastructure, energy and mineral resources, economy, education, socio-culture.[1] In order to achieve the goals contained in the 1945 Constitution of the Republic of Indonesia, the government has implemented this

[1] Mochamad Kevin Romadhona, Bambang Sugeng Ariadi Subagyono and Dwi Agustin, 'Examining Sustainability Dimension in Corporate Social Responsibility of ExxonMobil Cepu: An Overview of Socio-Cultural and Economic Aspects' (2022) 3 Journal of Social Development Studies.[130].

acceleration by delegating its authority, including the management of state finances, to the state bureaucracy. However, in carrying out this process, state administrators, officials, ministries, institutions, in addition to regional governments, have become complicit in criminal acts of corruption hampering development, increasing social inequality, and even endangering the stability and security of society.[2]

Since 1998, as part of a long-standing reform agenda aimed at eliminating corruption, collusion and nepotism have been at the center of attention for law enforcement in Indonesia.[3] Because corruption compromises public welfare, it must be addressed by restoring losses suffered by the public as a result of such criminal conduct.

The Law of the Republic of Indonesia Number 31 of 1999 on The Eradication of Corruption Crimes as amended by The Law of the Republic of Indonesia Number 20 of 2001 (hereinafter referred to as "Corruption Law")[4] provides the legal framework for eradicating corruption focusing on the concept of retributive justice as the philosophical basis for eradicating corruption. On the other hand, the United Nations Convention Against Corruption (UNCAC) which has been ratified by Law of the Republic of Indonesia Number 7 of 2006, generally stipulates that to achieve the efficient and effective prevention and eradication of criminal corruption requires the support of good governance and international cooperation, including the return of assets originating from criminal acts of corruption.[5]

Unlike other subdivisions of criminal law, the Corruption Law calls for the aggravation of criminal penalties for certain offences. For example, Article 12(a), Corruption for Bribery, calls for 4 years imprisonment and a minimum fine without giving signs as regulated. Therefore, the application of the Corruption Law leads to

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[2] Marten Bunga,[*et.,al.*] 'Urgensi Serta Masyarakat Dalam Upaya Pencegahan Dan Pemberantasan Tindak Pidana Korupsi' (2019) 15 Law Reform.[86].

[3] Verelladevanka Adrymarthanino, '6 Agenda Reformasi 1998' (*Kompas.com*, 2022).

[4] Defid Tri Rizky and Mochamad Kevin Romadhona, 'Prinsip Pembuktian Perkara Tindak Pidana Pencucian Yang Berdiri Sendiri (Stand Alone Money Laundering)' (2022) 5 Media Iuris [381].

[5] Sharfudin, 'Pelaksanaan Politik Hukum Pidana Dalam Penegakan Hukum Pidana Di Indonesia' (2009) 27 Jurnal Hukum Pro Justitia.[177].

harsher penalties than would otherwise apply, particularly for crimes committed by more than 2 (two) perpetrators who have different roles.[6]

The return of the state's financial losses, defined here as losses of IDR 50,000,000-IDR 300,000,000 (R. Onggala Siahaan 2014), is more effective than imprisonment of the perpetrator.[7] According to Gustav Radbruch, law enforcement aims to obtain legal justice, legal benefits and legal certainty. This goal is realised by applying the Casuistic Priority Principle of these three basic principles. This is because in reality, legal justice often conflicts with the benefit and certainty of law and vice-versa. However, in order to avoid various conflicts, the application of the priority principle is carried out by applying the priority principle to the case at hand. In one case, perhaps the priority is for benefit, whilst in another case, the priority is for justice.[8]

In recent years, the investigation of corruption cases committed by law enforcement officials has emphasised pursuing the largest number of cases possible rather than assessing the egregiousness or character of each case under review, although the latter aspect of these investigations has nonetheless been taken into consideration.[9] In 2010, the Public Prosecution Office of the Republic of Indonesia (*Kejaksaan Republik Indonesia*) issued a policy statement regarding minor corruption cases. The Circular Letter of the Attorney General of the Republic of Indonesia number B-1113/F/Fd.1/05/2010 emphasises that the prosecutor shall not prosecute minor corruption cases once the state's damages are recovered (restorative justice) from the alleged perpetrators. Since circular letters are internally binding, this provision must be applied by the Public Prosecution Office.[10]

At a working meeting of Commission III of the Indonesian Legislation Committee House of Representatives (*Dewan Perwakilan Rakyat Republik*

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[6] Mudzakkir, *Pengadilan Tindak Pidana Korupsi: Tindak Pidana Biasa Penanganannya Luar Biasa* (Kementrian Hukum dan HAM RI: Perpustakaan STIK-PTIK 2011).

[7] A Muchlis, 'Penegakan Hukum Terhadap Tindak Pidana Korupsi Dengan Kerugian Negara Yang Kecil Dalam Mewujudkan Keadilan' (2017) 16 FIAT JUSTICIA: Jurnal Ilmu Hukum.[337].

[8] A Ali, *Menguak Tabir Hukum: Suatu Kajian Filosofis Dan Sosiologis.* (Gunung Agung 1996).

[9] Defid Tri Rizky and Mochamad Kevin Romadhona, 'Prinsip Pembuktian Perkara Tindak Pidana Pencucian Yang Berdiri Sendiri (Stand Alone Money Laundering)' (2022) 5 Media Iuris.[381].

[10] Salsabila and Wahyudi, 'Peran Kejaksaan Dalam Penyelesaian Perkara Tindak Pidana Korupsi Menggunakan Pendekatan Restorative Justice' (2022) 51 Jurnal Masalah-Masalah Hukum.[61]

Indonesia) on January 27th 2022, the Attorney General of the Republic of Indonesia, ST Burhanuddin, ordered the Public Prosecution Office not to prosecute minor corruption cases in which damages do no exceed IDR 50,000,000.[11] This policy was promulgated during a working meeting of Commission III of the Indonesian Legislation Committee of the House of Representatives at the Parliament Complex, Jakarta. This policy has been carried out as a form of carrying out legal processes quickly, simply, and at a low cost.

Furthermore, the Attorney General has stated that the cost of handling corruption cases, from the examination to the execution level, is often greater than the state's loss due to the corruption.[12] In 2016, the Coordinator at the Junior Attorney General for Special Crimes stated that the costs of handling corruption cases were IDR 25,000,000 for the examination (*penyelidikan*) stage, IDR 50,000,000 for the investigation stage (*penyidikan*), IDR 100,000,000 for the prosecution (*penuntutan*) stage, and IDR 25,000,000 for the execution (*eksekusi*) of the court's decision.[13]

In 2022, the cost of handling corruption cases rose to IDR 29,800,000 for the examination stage, IDR 100,000,000 for the investigation stage, IDR 13,500,000 for the pre-prosecution stage, IDR 139,600,000 for the prosecution, and IDR 6,000,000 for the execution of the court's decision.[14] In reality, the funds available for the handling of corruption cases are insufficient to meet the actual costs required in the field, especially if the prosecutor, in his or her role as an investigator (*penyidik*)/ public prosecutor (*penuntut umum*), requires expert testimony or a large number of witnesses to prove the criminal case.

Moreover, the Attorney General has highlighted cases of misuse of village funds (*dana desa*) where the amount of state losses is not especially large. Provided such corruption is not carried out continuously, the Attorney General

[11] Yulida Medistiara, 'Jaksa Agung Ingin Korupsi Di Bawah Rp 50 Juta Tak Dipidana, Ini Alasannya' (*Detik.Com*, 2022).

[12] Detik.com, 'Jaksa Agung Bicara Biaya Usut Kasus Lebih Besar Daripada Korupsi Kelas Teri' (*Detik.Com*, 2022).

[13] MYS, 'Mau Tahu Biaya Penanganan Perkara Korupsi? Simak Angka Dan Masalahnya' (*Hukumonline.com*, 2016).

[14] Based on the Special Crime Unit of West Sulawesi High Prosecution Office.

has requested that the settlement of corruption cases be handled administratively rather than criminally. The views and policies of the Attorney General's Office of the Republic of Indonesia, which prioritises economic recovery over than punitive measures, contradicts Article 4 of the Corruption Law, which states that the recovery of state financial losses or the state economy shall not exclude punishment for the perpetrators.

In what follows, this study considers a restorative justice approach to the settling of corruption cases. This approach embraces economic recovery, restitution rather than retribution, and a fast, simple, and low-cost legal process to resolve minor corruption cases.

The Application of Restorative Justice to Criminal Cases

In principle, a crime is considered to be an act violating the norms established by society, so that the state, as the party representing the aggrieved community, is given the authority to punish criminal perpetrators based on the applicable law.[15] This view favours a retributive justice approach, under which criminal sanctions are intended to deter potential criminal offenders.

According to Romli Atamasasmita, the justification of the retributive justice approach in punishing the perpetrator can be justified by the following rationales:[16]

a. victims, victims' families, and society at large gain satisfaction (more candidly stated, vengeance) from the retribution imposed by criminal sanctions;
b. the imposition of criminal sanctions acts as a deterrent to potential perpetrators of criminal acts.

The old Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana* or KUHP),[17] considered by scholars to be the original basis of criminal law in

[15] Gregorius Widiartana, 'Paradigma Keadilan Restoratif Dalam Penanggulangan Kejahatan Dengan Menggunakan Hukum Pidana' (2017) 33 Justitia et Pax.[2].

[16] Romli Atmasasmita, *Kapita Selekta Hukum Pidana Dan Kriminologi* (Mandar Maju 1995).[25].

[17] The old Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana* or *Wetboek van Strafrecht*) was the penal code enacted under Law Number 1 of 1946 on Penal Code Regulation. At the time, the Government of Republic of Indonesia has ratified the new Indonesia Criminal Code.

Indonesia, describes criminal sanctions as the "solution" to every criminal act. This perspective is implicit in the various criminal sanctions stipulated in Article 10 of the old Indonesian Criminal Code, including the primary (capital punishment, life imprisonment, imprisonment for a certain time, and fines) and secondary (revocation of certain rights, confiscation of goods certain matters, and the announcement of court decisions) forms of punishment.[18]

Contrary to the logics of the retributive justice approach, the facts demonstrate that imprisonment does not improve the behaviour or character of the perpetrator, and there is no guarantee that he or she will be accepted back in society after serving a sentence. Instead, such punishment leads the perpetrator to interact with other criminal offenders in correctional institutions, often improving his or her ability to commit crimes.[19] This phenomenon is referred to as the criminal cycle, which is of course contrary to the goals of correctional institutions as stated in Article 2(c) of Law Number 22 of 2022 on Corrections, which states that correctional institutions function to improve the quality of criminal offenders so that they can return to society and live as productive, responsible citizens.

Responding to the conundrum described above, Albert Englash introduced the idea of "restorative justice" as an alternative in the settlement of criminal cases. In 1971, Englash presented a set of goals intended to restore the relationship between the parties involved, including victims, perpetrators, and society in relation to criminal acts committed by criminal offenders.[20] According to Muladi, restorative justice is the aspect of the criminal justice system to hear and appease parties harmed by criminal acts and restore their losses by way of mediation, conciliation, dialogue, and restitution. Restorative justice holds that this process reciprocally repairs social damage. It provides an opportunity for the perpetrator to express regret and the

[18] Dede Kania, 'Pidana Penjara Dalam Pembaharuan Hukum Pidana Indonesia' (2014) 3 Yustisia Jurnal Hukum.[55].

[19] Pajar Hatma Indra Jaya, 'Efektifitas Penjara Dalam Menyelesaikan Masalah Sosial' (2012) 9 Hisbah: Jurnal Bimbingan Konseling Dan Dakwah Islam.[2].

[20] Martin D. Schwartz and Suzanne E. Hatty, *Controversies in Critical Criminology* (Routledge 2003).[100-101].

victim to express forgiveness.[21]

Because it involves victims and if necessary, the community, in resolving criminal matters, restorative justice is a fascinating theoretical framework. Restorative justice responds to the harm inflicted on victims and society by criminal acts by compensating them through restitution and, as much as possible, improving relations with perpetrators.[22] In contrast, the retributive justice approach, applied in most criminal cases in Indonesia today, conceives of the victim merely as a witness who plays a supporting rather than a central role in the outcome of the case. A restorative justice approach, which utilises not only a legal, but also a moral, social, economic, religious and culturally sensitive viewpoint in deciding outcomes, clearly provides a stronger basis on which a modern legal system may operate.[23]

The Idea of Restorative Justice in the Settlement of Corruption Cases

The inception of progressive law in Indonesia can be traced to Satjipto Rahardjo's anxiety about the application of the criminal law, which appeared to be worsening on a daily basis.[24] Progressive law has been cultivated as an alternative to the rigidity and stagnation of existing law, critiquing it from another perspective. Because it occupies only a small corner in the world of order, the law (especially the written law) can not solve the existing problems in society. The law must open itself to other disciplines in order to position itself in accordance with its identity.[25] Progressive law is rapidly altering the legal landscape, making fundamental reversals in legal theory and practice and making various breakthroughs. This liberation is based on the principle that law serves the members of society, not vice-versa, and

[21] Muladi, 'Implementasi Pendekatan "Restorative Justice" Dalam Sistem Peradilan Pidana Anak' (2019) 2 Pembaharuan Hukum Pidana.[63].

[22] Hanafi Arief and Ningrum Ambarsari, 'Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia' (2018) 10 Al-Adl : Jurnal Hukum.[173].

[23] Juhari, 'Restorative Justice Dalam Pembaharuan Hukum Pidana Di Indonesia' (2017) 14 Spektrum Hukum.[105].

[24] M Mahfud MD, *Dekonstruksi Dan Gerakan Pemikiran Hukum Progresif* (Tafa Media 2013).

[25] S Rahardjo, *Hukum Dalam Jagat Ketertiban* (UKI Press 2006).

that it does not exist for itself, but to facilitate goals such as human dignity, the ability of individuals and communities to pursue happiness, and public welfare.

There are at least 3 philosophical values contained within the framework of restorative justice. These are: i) the restoration of victims' losses and forgiveness of perpetrators; ii) rebuilding a harmonious relationship between the victim and his community, on the one hand, and the perpetrator, on the other hand, to prevent future grudges from ensuing; iii) the settlement of disputes in a manner that benefit all parties, including victims, communities, and perpetrators.[26]

The goal of settling criminal cases on the basis of restorative justice is to restore the circumstances, to the greatest extent possible, that existed prior to the criminal offence. In order to achieve this, actors in the criminal justice system must dispense with legal formalisms, which in practice betray many contradictions and deadlocks in the search for substantial truth and justice. Legal formalism has given rise to a downward spiral of violations of law and has put us in the hypocritical cage of law enforcement.

The application of restorative justice to criminal cases is essentially an attempt to resolve these cases by prioritizing the restoration of the state of affairs prior to the occurrence of the crime, eliminating, to the greatest extent possible, the harm inflicted by the criminal offence. This approach has been widely practiced in various countries, not only by indigenous peoples, but also in the context of modern criminal justice systems. The following examples describe practices in various countries related to the restorative justice approach in the settlement of criminal cases, including:

1) **The Netherlands**: According to Article 167 *Wetbook van Straffvordering* (Dutch Criminal Code), all prosecutors in the Netherlands must decide to prosecute if the prosecution is considered important based on the results of the investigation. However, the prosecutor may stop the prosecution if it is in the public interest to do so. Unlike Indonesia, where the Attorney General has a monopoly in deciding

[26] M Ali, *Asas-Asas Hukum Pidana Korporasi* (Raja Grafindo Persada 2013).

which cases to prosecute, in the Netherlands, the authority to discriminate between which cases to pursue and which to decline belongs to each prosecutor in the prosecution office. In corruption cases in the Netherlands, restorative justice is utilised as a form of settlement.[27]

2) **France**: Article 41 of the French Criminal Code stipulates that the mediation process may only be carried out at the pre-prosecution stage. In other words, mediation is considered a diversion from the prosecutorial process. However, regardless of the results of the mediation process, the prosecutor may use his or her discretionary rights to construct a decision on reconciliation or to prosecute in the event that no satisfactory agreement is reached. Assistance or recovery of damages could be carried out with the consent of the victim. This could be facilitated by a dialogue with the perpetrator, the perpetrator's parents, and/or the relevant authorities.[28]
3) **Germany**: As stipulated under Article 153(a) of the German Criminal Procedure Code, public prosecutors are authorised to terminate criminal proceedings, particularly for perpetrators of crimes over the age of 21. In certain cases proceedings may also be terminated for perpetrators over 18 years of age. The application of these provisions could be made to cases of a summative nature which do not substantially disturb the public interest. Moreover, in serious cases in which the perpetrator is charged in spite of an agreement for restitution or reconciliation, the judge, with the approval of the public prosecutor, has the discretionary right to dismiss the indictment.
4) **United States of America**: The settlement of criminal cases in the United States often occurs through a process known as "plea bargaining", in which a criminal defendant agrees to plead guilty to a lesser, related charge. In exchange, the prosecutor agrees to drop the more serious charge. Rule 11 of the Federal Rules of

[27] Hammzah A, 'Justice Collaborator Atau Saksi Mahkota' (2013) 6 Pusat Litbang Kejaksaan Agung: Jurnal Bhina Adhiyaksa.[13].

[28] EH Hutauruk, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restortif Suatu Terobosan Hukum* (Sinar Grafika 2014).

Criminal Procedures governs the use of pleas bargains in federal prosecutions,[29] and plea bargains in prosecutions for state offences are regulated by the rules of procedure of each state.

5) **Japan**: The Japanese criminal justice model is known as a dual track system or a dual track model, in which the restorative process and the traditional process function concurrently when the parties determine the discourse on the course of the process of a particular case. When an agreement to enter into a restorative process cannot be reached by the consent of all interested parties, the case will be referred to the criminal justice system, which utilises a traditional model.

The abovementioned application of restorative justice in handling criminal cases demonstrates the principle of settling cases with the aim of restoring conditions or damages arising from criminal acts, which has long been ingrained, or has become a tradition, in society. In 2021, based on the Corruption Perception Index (CIP) or corruption perception index, the Netherlands ranks 8th out of 180 countries.[30] This statistic demonstrates that the restorative justice approach is capable of reducing crime rates, especially those involving corruption, and repair the harm inflicted by criminal offences. Apart from the Netherlands, other developed countries, such as the United States and China, have also considered implementing effective and efficient methods of dealing with instances of corruption. These effective and efficient methods include recovery as a result of a crime becoming *primum remedium* and imposing sanctions on deprivation of independence for corruptors as an *ultimum remedium*. In cases of corruption, victims, including those who have suffered as a result of a corrupt state budget, are represented by the prosecutor, or if possible, the victim is represented by an agency using the budget.[31]

The Public Prosecution Service of the Republic of Indonesia has implemented restorative justice as a basis for stopping prosecution under Public

[29] R Atmasasmita, *Sistem Peradilan Pidana Kontemporer* (Kencana 2011).

[30] Transparency International, 'Corruption Perceptions Index' (*Transparency International*, 2022).

[31] Y. Piadi and R. Sitepu, 'Implementasi Restoratif Justice Dalam Pemidanaan Pelaku Tindak Pidana Korupsi' (2019) 1 Jurnal Recheten: Riset Hukum dan Hak Asasi Manusia.[1-8].

Prosecution Service Number 15 of 2020 on Stopping the Prosecution Based on Restorative Justice. However, a number of requirements must be fulfilled under Article 5(1) of this regulation: the suspect is committing a crime for the first time; the criminal act or acts in question are punishable only by fines or imprisonment of not more than five years; and the crime is committed with the value of the evidence or the value of the loss incurred as a result of the crime of not more than IDR 2,500,000. Subsequently, the following requirements must be met: the perpetrator has made restitution sufficient to restore circumstances to their original state prior to the offence; there has been a reconciliation between the victim and the suspect, and the community has responded positively. In practice, the Public Prosecution Service Number 15 of 2020 cannot be applied to the handling of criminal acts of corruption.

In general, criminal cases and cases of corruption involve a range of damages and victims. Losses in cases of corruption could take the form of losses to state finances or the country's economy, whilst the victims in question are the Indonesian people, who suffer as a result of the corruption, and the Indonesian economy. Therefore, the Corruption Law has a blind spirit to torment perpetrators. It should be noted that the legal politics of eradicating corruption contained in the Corruption Law includes the following aspects:[32]

a. a philosophical basis, maintaining and defending the ideals of social justice and national welfare within the State of Indonesia as a legal state as referred to in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia;
b. a law enforcement basis, maintaining and protecting the rights of everyone to recognition, guarantee, protection and legal certainty that is just and equal before the law as referred to in Article 28 (d) (1) of the 1945 Constitution of the Republic of Indonesia;
c. an operational basis, namely maintaining the criminal law as a basis for order and security, as well as to deter perpetrators of corruption.

[32] Nandang Albian, 'Politik Hukum Pemberantasan Korupsi: Lex Specialis Systematic Versus Lex Specialis Derogat Lege Generali' (2020) 5 Jurnal Ahwal al-Syakhsiyyah (JAS).[66].

As of today, the implementation of the Corruption Law has shifted to a paradigm that applies the framework of restorative justice, emphasising recovery of the state's losses rather than punitive consequences. Under this framework, the criminal justice system has fulfilled the value of legal certainty. A criminal justice system that applies a retributive justice approach cannot successfully provide sufficient restitution to compensate the state for its losses. The settlement of cases of corruption related to state financial losses through the criminal justice system does not necessarily facilitate justice, requires high costs, and takes a long time to proceed. The concept of restorative justice, using an administrative process, is a new approach to solving corruption crimes involving state finances that avoids these pitfalls.[33]

Progressive law is a conceptual framework which offers solutions to overcome legal downturns, facilitate faster changes, fundamental reversals, liberation, breakthroughs and so on. The methodology of progressive law are carried out by emphasizing "law for humans and not vice-versa for humans for law", "ruling substantially, not artificially", and "lawing holistically".[34]

Furthermore, such progressive legal methods are alternatives as well as solutions to facilitate just law enforcement in society. In relation to the application of sanctions in the handling of minor corruption, the law must be responsive in providing justice for the perpetrators and happiness for the people who should enjoy development from the state budget.

Progressive law relies on creativity in the context of law enforcement. Creativity overcomes lagging and legal imbalances, makes breakthroughs and breaks rules. At this level, investigators or public prosecutors depend on the legal norms that are already available. Breakthroughs can only be made if the legislature writes statutes that are consistent with the principles of progressive law.[35]

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[33] S. Lasmadi and E. Sudarti, 'Restorative Justice as an Alternative for the Settlement of Corruption Crimes That Adverse State Finances in the Perspective of the Purpose of Conviction' (2018) 9 Jurnal IUS Kajian Hukum dan Keadilan.[296].

[34] M Al Arif, 'Penegakan Hukum Dalam Perspektif Hukum Progresif' (2019) 2 Jurnal Hukum: Undang.[169-192].

[35] Rizal F, *Sanksi Reparatif Pada Pemidanaan Korporasi Dalam Tindak Pidana Korupsi* (Litera 2021).

The criminalisation of minor corruption is counter-productive to the goal of restoring equity and justice. For example, if a civil servant or individual is involved in a case of corruption that involves an amount greater than IDR 100,000,000), a criminal sentence of more than four years is imposed. In addition, the civil servant involved is typically fired and blacklisted, in which case it is certain that he or she will be unable to resume his or her occupation after serving the sentence. The framework of restorative justice allows a perpetrator to take responsibility for mistakes, pay restitution, and return to their occupation, allowing him or her to provide for their family rather than live with the stigmatisation of being a criminal offender.

The restorative justice approach for eradicating corruption could be realised expanding the range of crimes that can be handled through a restorative, administrative process. In cases in which perpetrators are not able to repay losses, social work may be used instead of imprisonment. The Indonesian Criminal Code, which was ratified on 6 December 2022, introduces social work punishment as a model for criminal implementation as an alternative to imprisonment as referred to in Article 65 (1) (e) of the Indonesian Criminal Code.[36]

Efforts to reform the law to eradicate corruption should be immediately implemented so that the restorative justice approach can be used as the basis of new legal norms. In sharp contrast to Article 4 of the Corruption Law, there should be conditional pardon for an incident in which a party who feels responsible for state losses voluntarily returns them. The scope of new legal norms must start from the stage of investigation and prosecution. Article 4 of the Corruption Law states that the return of state financial losses or the country's economy shall not exclude the punishment of the perpetrators. This provision applies after a crime has been committed. A crime can be categorised as a criminal act if the process is already in the investigation stage (*penyidikan*).

The definition of investigation, according to Article 1 (2) of the Criminal Procedure Code, is a series of investigative actions according to the methods

[36] Please note that the new Criminal Code will be enforced in 2024 according to Article 632 of the Indonesian Criminal Code.

stipulated in the law to seek and collect evidence to determine whether a crime has occurred and to find the suspect. The definition of examination, according to Article 1 (5) of the Criminal Procedure Code is a series of investigative actions to seek and find an event suspected of being a crime in order to determine whether or not an investigation can be carried out according to the method stipulated in this law. Hence, whilst the process of examination is ongoing, it cannot be said that there has been a crime. Therefore, the party is not responsible for returning the state's losses resulting from criminal offences, and the matter is not yet within the scope to which Article 4 of the Corruption Law refers.

Under these circumstances, the examination process is still considered to be a search process, whether the incident has been categorised as a crime or not. It can only proceed to the investigation stage after the initial evidence has been obtained. This process implies that if the proceeds of corruption are repaid during the examination stage, then the offence does not violate the provisions contained in Article 4 of the Corruption Law. Although the proper reports have been submitted to the authorities during the examination stage or a complaint has been filed, if the process does not continue to investigation stage, it is clear that a crime has not been committed as defined in Article 2 (1) of the Criminal Procedure Code. Under this provision, an act is referred to as a crime only after it has entered the investigation stage, where it will be explained more clearly.

The Public Prosecution Office, as one of the law enforcements agencies authorised by law to eradicate criminal acts of corruption, is able to issue a statement independently terminating the investigation and issue an Order to Stop Investigation (*Surat Perintah Penghentian Penyidikan* or SP3) at the investigation stage of the prosecution and a Decision Letter on Termination of Prosecution (*Surat Ketetapan Penghentian Penuntutan* or SKPP) at the prosecution stage. The authority of the Public Prosecution Service to issue SP3 and/or SKPP would ensure legal certainty with respect to the disposition of cases in which perpetrators have repaid funds received through corruption. The Public Prosecution Service could also issue a follow-up circular explaining how minor cases of corruption

cases should be handled in order to avoid the unnecessary public expense of prosecuting them.[37]

An economic approach to human behaviour holds that if the potential costs of corruption are too low, potential perpetrators will be encouraged to offend. Therefore, as opposed to minor instances of corruption, the paradigm of restorative justice should not be applied to more serious ones, which must be handled through the criminal process. Otherwise, because the sanctions are insufficient, it is certain that cases of corruption will increase.[38]

The restorative justice approach must be understood as a policy aimed at avoiding retaliation and emphasizing reconciliation between the parties. The settlement of cases using the restorative justice approach should be reserved for perpetrators who are truly regret their actions and are aware of the consequences. Furthermore, the application of the restorative justice approach must not be based on the internal regulations of the Public Prosecution Office but, rather, should be further regulated under a Law (*Undang-Undang*) to ensure uniformity in application by all agencies of law enforcement.[39]

Consistent with the policy outlined above, additional sanctions, imposed by regional governments or agencies, may be needed to increase the deterrent effect on the parties involved. If this cannot be done during the examination phase, then other legal procedures gleaned from more developed countries, such as plea-bargaining and deferred prosecution agreements may be considered as strategies to augment the criminal justice system of Indonesia.[40]

The United States of America, as one of the countries that has implemented plea bargaining in 95% of criminal cases, uses a system of plea-bargaining system

[37] Salsabila and Wahyudi (n 10).[69].

[38] M. Sulantoro, 'Penerapan Prinsip Keadilan Restoratif Pada Tindak Pidana Korupsi Dalam Rangka Penyelamatan Keuangan Negara' (1AD) 2 Dharmasisya.[26].

[39] A Habib, 'Penerapan Restorative Justice Dalam Perkara Tindak Pidana Korupsi Sebagai Upaya Pengembalian Kerugian Negara' (2020) 1 Corruptio.[9].

[40] Bambang Sugeng Ariadi Subagyono, Zahry Vandawati Chumaida and Mochamad Kevin Romadhona, 'Enforcement of Consumer Rights Through Dispute Settlement Resolution Agency to Improve the Consumer Satisfaction Index In Indonesia' (2022) 37 Yuridika [673].

that entails negotiation between the public prosecutor and the defendant or his attorney with the aim of speeding up the process of settling criminal cases so that the process runs effectively and efficiently. These negotiations include the voluntary confession by the defendant of a less serious criminal act in order to avoid the most serious charges. The prevalence of this practice has allowed jurisdictions in the United States to manage high volumes of criminal cases and avert the high costs and long durations often associated with criminal cases. In the Draft Indonesian Criminal Procedure Code (*Rancangan Kitab Undang-Undang Hukum Acara Pidana* or RKUHAP), Article 199 contains the concept of plea bargaining, but what distinguishes it from this practice in the United States is that, under the proposed law, there is no negotiation between the public prosecutor and the accused. Instead, the public prosecutor can delegate a case to court with a brief examination program.

Also in the United States, deferred prosecution agreements (DPA) are sometimes used by the United States Department of Justice. A DPA is an informal agreement between a defendant, his or her lawyer, and the public prosecutor, which sets certain conditions for non-prosecution that must be met by the defendant. These may include admission of guilt, payment of restitution or other damages, etc. Assuming these requirements are met, the public prosecutor will postpone the prosecution of the defendant. If all the requirements continue to be met over an agreed upon duration of time, then the prosecution of the defendant will be officially closed.[41]

In Indonesia, the termination of cases based on a restorative justice approach may be set forth under the Attorney General's Regulations, the Indonesian Police Chief Regulations, or the Supreme Court Regulations.

It is important for the court to apply the principle of restoration, essentially the welfare of society, as the objective of the law. Retributive measures, such as imprisonment, must not be considered as the final objective. When a safe social

[41] Ardia Ferdian, 'Konsep Deferred Prosecution Agreement (DPA) Dalam Pertanggung-Jawaban Pidana Korporasi Sebagai Bentuk Alternatif Penyelesaian Sengketa' (2021) 4 Arena Hukum.[527].

order has been achieved, the legal objectives have been met. If one applies the Casuistic Priority Scale put forward by Achmad Ali, then the legal objectives to be achieved in criminal corruption cases are public benefit, followed secondly by justice and legal certainty.[42]

The effectiveness of the restorative justice approach, enforced by the Public Prosecution Office against the perpetrators of corruption, might be seen from two perspectives: that of deterrence and that of expediency. Because restorative justice minimises the cost of criminal offences to perpetrators, it is conceded that this framework may undermine deterrence. However, if viewed from the perspective of expediency, restorative justice effectively minimises the costs and time expended on criminal cases of corruption. Furthermore, the practice of restorative justice provides the principle of benefit.[43] Based on these considerations, the effectiveness of the restorative justice approach appears certain, and it is possible that the *ultimum remedium* principle can be upheld because not all criminal cases, including cases of corruptions, must be resolved in court.

The Public Prosecution Office's discretionary authority in handling corruption crimes based on a restorative justice approach is an appropriate means to optimise law enforcement by minimizing the cost of bringing and trying cases for minor acts of corruption. The prosecutor's authority in enforcing discretionary law is considered a concrete step to resolving criminal acts of corruption by compelling the perpetrators of criminal acts to voluntarily repay the stolen or misappropriated funds.[44]

It is necessary to revise the Draft of the Indonesian Criminal Procedure Code and Corruption Law to state that when the state's losses are returned during the examination stage for corruption, perpetrators regret their actions, and society

[42] Ali (n 8).

[43] M Budiman, 'Implementasi Prinsip Restorative Justice Dalam Penghentian Penuntutan Perkara Korupsi Oleh Kejaksaan Republik Indonesia' (2022) 7 Syntax Literate: Jurnal Ilmiah Indonesia.[1050].

[44] R Iskandar, 'Kewenangan Kejaksaan Dalam Penyelesaian Tindak Pidana Korupsi Berdasarkan Pendekatan Asas Restoratif' (2012) 3 Jurnal Sosial dan Sains: Matriks.[29].

responds positively, then the examination of the case may be stopped by the Public Prosecution Office. In addition, it is also necessary to revise the Draft of the Indonesian Criminal Procedure Code to accommodate both the material and immaterial losses of victims. Furthermore, the judge must order the confiscation of the perpetrator's assets in order to ensure the fulfilment of compensation for victims due to criminal acts.

The Draft of the Indonesian Criminal Procedure Code is intended to realise restorative justice in Indonesia through compensation for victims of criminal acts as contained in Article 133 of the Draft. Thus, the application of restorative justice can be carried out in corruption cases through a compensation mechanism.[45]

Based on the above analysis, a restorative justice approach could be applied to the handling of corruption cases at the examination, investigation and prosecution stages, with the following provisions:

1. Termination of corruption cases shall be performed under the following considerations:
    a. the interests of the victim (state and society) and other protected legal interests,
    b. avoidance of negative stigma,
    c. avoidance of retaliation, and
    d. community response and harmony.
2. Termination of corruption cases based on restorative justice shall be carried out by considering:
    a. the background of the occurrence and the competence of a crime,
    b. losses or consequences arising from criminal acts,
    c. costs and benefits of handling cases,
    d. sufficient restitution has been made, and
    e. an apology has been offered by the suspect and accepted by the victim.
3. The corruption cases may be legally closed and prosecution stopped if the following conditions have been fulfilled:
    a. the perpetrator was a first time offender in a corruption case;

[45] P Gultom, 'Analisis Sosisologi Hukum Terhadap Kemungkinan Dapat Diterapkannya Restorative Justice Dalam Perkara Tindak Pidana Korupsi Di Indonesia' (2022) 3 Jurnal Hukum dan Kemasyarakatan Al-Hikmah.[164].

b. the value of the evidence or the value of the losses incurred valued do not exceed IDR 300,000,000
c. restitution has been sufficiently carried out by the related party/suspect by means of:
    1) returning goods obtained through corruption;
    2) repaying state losses; and
    3) repairing other damages caused by the corruption.
d. society responds positively to the agreement; and
e. in certain circumstances, the restoration could be carried out between the perpetrator and the institutions or agencies involved as representatives of the state.

Victims of corruption are the state and society. However, for purposes of the case termination process, the community can be represented by the agency that has been aggrieved by the corruption.

Conclusion

The restorative justice approach to handling cases of corruption emphasises the restoration of the original state of affairs prior to the corruption. This prerogative is in keeping with the rule of "follow the asset and follow the money". In corruption cases, the application of restorative justice includes the stoppage of cases in the examination, investigation, and prosecution stages by considering the interest of the state, society, and other legal interests to be protected, the avoidance of negative stigma and retaliation, as well as society's response to such as resolution. To accomplish this, the Public Prosecution Service may issue Circular Letter of Attorney General Number B-1113/ F/ Fd.1/ 05/ 2010 to stop the examination of minor corruption cases once the perpetrator has returned the state losses. The termination of corruption cases based on the restorative justice approach at the examination, investigation and prosecution stages must be set forth in the Public Prosecution Service Regulation in accordance with regulations in other relevant agencies, such as the Police and the Supreme Court, to ensure that there is consistency between coordinate agencies of law enforcement and justice.

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