THE URGENCY AND THE CONCEPT OF AUTHORITY OF JUDGE TO SET SOMEONE AS SUSPECT OF CORRUPTION IN INDONESIA

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ABSTRACT

One of the causes of the lack of success in eradicating corruption in Indonesia is the unfair behavior of investigators in taking action and establishing the perpetrators of corruption. Therefore,it needs control and balance to cover the probability of mistakes of investigators. The purpose of this study was to identify the possibility of granting authority to a judge to establish a person as a suspect of a criminal act of corruption. Research method was done through sociological juridical method, with primary and secondary data source. Primary data were obtained by conducting interviews with respondents namely judges and investigators with purposive sampling method. The data obtained were analyzed by using qualitative descriptive method. The result of the research is organ that is considered to be most aware of whether or not the practice of favoritism in determining the suspect is the judge during the examination process of the defendant and the witness in court. So that the judge also needs to be authorized to assign someone as a suspect of corruption by two tracks: the authority of the judge to determine the suspect of corruption based on the result of the examination in court which is based on the statement or the acknowledgment of the defendant and the witnesses and other evidence leading to the involvement of certain parties, and the judge based on the request of the community accompanied by sufficient evidences which is then examined through a special way.

Keywords: Urgency, Authority, Judge, Suspect, Corruption

A. INTRODUCTION

One of the problems of the Indonesian nation today is the high level of corruption that has far-reaching impacts not only on the law but also on economic growth, social conditions and political stability. Corruption crimes from year to year are increasing, both from the quantity (number of cases and the amount of financial losses of the state) as well as in terms of quality increasingly systematic and structured with increasingly sophisticated modus operandi. Data Transparency International Indonesia (TII) said Indonesia's Corruption Perceptions Index (CPI) in 2016 rose one point by 37 from the highest number of 100, but globally Indonesia's position still ranks at 90th[1]. Within 6 months from 1 January to 30 June 2017, Indonesia Corruption Watch (ICW) recorded 226 cases of corruption. The case with the number of the 587 suspects had cost the state Rp 1.83 trillion and the bribe Rp 118.1 billion.[2]

One of the factors of the lack of success in eradicating corruption in Indonesia is the behavior of investigators who seem "favoritism" in taking action and establishing the perpetrators of corruption. This can be seen in the examination process at the trial which shows that the defendant and witnesses examined in court have openly appointed and acknowledged the parties involved in the case being examined, but the appointed party involved is not designated as a suspect although witnesses and defendants have expressed it since examined at the investigation level.

The above situation has caused a public dissatisfaction reaction which sees that there is injustice in the handling of corruption acts, so this has indirectly hampered the efforts of complete corruption eradication or eradication.

The judge who is adjudicating corruption cases must have evidence in the form of a hearing on the involvement of other parties mentioned by witnesses and defendants and to know the extent of involvement and accountability that should be imposed on those unlawful parties. The judge may order that the parties alleged to be involved are designated as suspects and detained and

[1] http://www.bbc.com/indonesia/indonesia-38734494, downloaded at , 8 March 2018.
[2] https://news.detik.com/berita/d-3621894/icw-dalam-6-bulan-226-kasus-korupsi-rugikan-negara-rp-183-t, downloaded at 8 March 2018.

investigated. However, the provision giving such authority is not regulated in the criminal procedural law of corruption. The authority of the investigator's monopoly in determining the suspect becomes the loophole for the misuse of his discretion. Due to the lack of controlling authority over the performance of law enforcement officials by judges and the public, it will make efforts to eradicate corruption crime to be slow and incomplete. The criminal act of corruption as an "extraordinary" crime should be dealt with in an extraordinary way. Although the authority to determine a person as a suspect is the authority of the "Investigator", but specifically for corruption it is necessary to have the authority of a judge to establish a suspect of corruption and the importance of the breadth of public access to control the eradication efforts. In other words, the community should be given the opportunity to participate in combating corruption, for example by applying for a suspect to the Court. So that the reform of criminal law in the handling of corruption must be done comprehensively[3], it is necessary to do with delegation of policy-making authority in all stages of handling a case independently.[4]

Based on the above description, what can be discussed in this paper is how urgency and concept of giving authority to judges in determining someone as a suspect of corruption in Indonesia.

B. RESEARCH METHOD

The type of this research is socio-legal research by using primary and secondary data source, primary data were obtained by interview the judge, and investigator. The method of determining the sample used in this research was purposive sampling method. The secondary data were obtained by conducting literature studies on primary legal materials in the form of legislation and secondary legal materials in the form of books, journals, and scientific articles. The results were then analyzed by using qualitative descriptive analysis method.

C. RESEARCH RESULT

Jeremy Bentham in Melden says that law enforcement is central to the existence of rights,[5] therefore law enforcement as a concrete form of the application of law greatly affects the real feeling of law, legal satisfaction, legal benefits, and legal justice individually and socially.

Given the crucial existence of justice in the rule of law and the judiciary, the judge as a personification of law and justice must be able to uphold truth and justice. Indeed, the justice that should be given by judges is not only commutative justice but also includes distributive justice in order that fairness and equality before the law can be realized.

Justice that must be given is not only related to the balance between the judge's verdict and the actions committed by the defendant, but justice must also be upheld against the existence of other perpetrators who have not yet been tried. This is where the commutative justice of Aristotle calls for equality, in the sense that every innocent person should be punished without discrimination. Therefore, every perpetrator of corruption must be prosecuted and punished by legal instrument based on the written law and the unwritten law.[6]

n Aristotle's commutative justice quoted by Hans Kelsen, equality is not based on geometric, but based on arithmetic proportions, it is not the equivalence of two ratios, it is the equivalence of two things, especially two disadvantages or two advantages[7]. The same equality can apply in the relationship between crime and punishment. To perform services to others without accepting the appropriate measure of remuneration, it is equally unfair to commit a crime without receiving appropriate penalties.[8]

The principle of equality before the law requires that the same case be treated equally. Hart said this principle is a prima facie for humans[9]. However, there is one interesting explanation related to the exceptions to the equality before the law principle. In reality, there have never been identical or exact cases. Therefore, in the law known jargon *summunius, summa injuria*. That is, demanding the law carried out in the extreme will actually present the deepest wound. Another latin adage from Horatius

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[3]Elwi Daniel, *Fungsionalisasi Hukum Pidana Dalam Penanggulangan Tindak Pidana (StudiTentangUrgensi Pembaharuan Hukum Pidana TerhadapTindak Pidana Korupsi)*, Disertasi, Universitas Indonesia, Jakarta, 2001.

[4]Yudi Kristiana, *Rekonstruksi Birokrasi Kejaksaan Dengan Pendekatan Hukum Progresif (Studi Penyelidikan dan Penuntutan Tindak Pidana Korupsi),*Disertasi, Universitas Diponegoro, 2008.

[5]A.I. Melden, Ed, 1970, ***Human Right,*** Wadsworth, Calif, Page 30.

[6] Sri EndahWahyuningsih, The 2nd Proceeding Indonesia Clean Corruption in 2020, jurnal.unissula.ac.id/index.php/the2ndproceeding/article/viewFile/1082/818, page. 150.

[7]Hans Kelsen, 2014, ***Dasar-Dasar Hukum Normatif,*** Nusa Media, Jakarta, Page 150.

[8]*Ibid,* Page 151.

[9]H.L.A. Hart, 1961, ***The Concept of Law,*** Oxford University Press, Oxford, Page 158.

teaches, "nil agit exemplum litem quo lite resolvit", (a dispute solved by another dispute example, never succeeded in resolving the dispute).[10]

Linking the two concepts of justice with the state of law (*rechtstaat*) that recognizes and protects human rights, then everyone has the right to be treated equally before the law. Equality before the law must be interpreted dynamically and not statically, meaning that if there is equality before the law, it must be balanced also with equal treatment (equal treatment).

According to Ahmad Kamil and Fauzan, the principle of equality before the law is very important, especially in the life of a plural society. The main objectives are: 1) To eliminate the treatment of categorical discrimination and normative discrimination in law enforcement; 2) Thus there is no difference in legal treatment based on differences in sex, ethnicity, education and socioeconomic status. Nor should there be any difference in the application of laws that are treated and applied on the basis of differences in sex, religion, ethnicity, education, and socioeconomic status. All are the same before the law. 3) Further equality principle before the law coincides directly with the demands of guarantees of enforcement: a) Equal protection on the law, ie giving equal protection before the law; b) Equal justice under the law, ie giving equal treatment according to law.[11]

To complete equality before the law containing *nil agit exemplum litem quo lite resolvit*, one more justice is required that the judge should not neglect in terms of distributive justice. The principle of distributive justice according to Aristotle is proportional equality[12]. Aristotle in Hans Kelsen says that justice in distribution must be based on certain types of punishment, although that does not mean they are all the same type of law.[13]

Commutative justice is equality before the law, which means merely legality, right by law. While the definition of distributive justice is nothing but a mathematical formula of a well-known principle of *suumcuique*, each person bears his own or each person bears only his own right.[14]

In essence, it is fair to put something in its place and give it its due, based on a principle that everyone is equal before the law. Thus, the most basic demand of justice is to give treatment and give equal opportunity (equality and fairness) to every person.[15]

Referring to commutative justice which requires every perpetrator of crime including corruption crime to be punished according to its role or deeds, has been formulated in Indonesian criminal law texts namely *delneming* institution which serves to expand the criminal offenders involved in a criminal act, both in the capacity of the perpetrators themselves (*plegen*), enjoin do (*doenplegen*), participate to do (*medeplegen*), persuade to do (*uitlokken*), or just act as a maid perpetrator (*medeplichtigheid*).

This (inclusion body) delneming institution in addition is functioning to expand the people who must be responsible for their involvement also serves as a differentiator of the perpetrators accountability in accordance with the capacity and role of each actor. At this level also distributive justice plays a role so that simultaneously with commutative justice can be realized. In this sense commutative justice is exercised to each party involved, while distributive justice determines the form and quality of the perpetrator's accountability in accordance with the quality of the roles and actions he performs.

Although institutionally in the criminal law (KUHP) has set up delneming institutions to reach out to parties involved in a crime as an appropriate tool and strategy, but if the strategy is not accompanied by accurate tactics and formulations in the criminal law Formal (Criminal Procedure Code or Corruption Court Law), then it cannot be used optimally. For example, the authority to appoint corruption suspects remains the authority of investigator monopolies. As a result, the other party cannot participate to determine who should take responsibility for the criminal acts, even though the invisible person will know the involvement of others in a criminal act, because it all depends on the desire of the investigator to want or not to assign someone as a suspect, despite the fact that there has been strong evidence of the beginning of the judge's legal optics as well as the eyes of the common people and the mass media. Thus, it would be futile for delneming agencies to be regulated in material criminal law to appeal to other co-perpetrators, indicating that commutative justice and distributive justice would be difficult if material criminal laws are not supported by formal criminal law.

[10]B.J. Marwoto & H. Witdarmono, 2004, ***Proverbia Latina,*** Kompas, Jakarta, Page 139.
[11] Ahmad Kamil dan Fauzan, 2004, ***Kaidah-Kaidah Hukum Yurisprudensi,*** Kencana, Jakarta, Page 21
[12]Hans Kelsen, ***Dasar-Dasar…,*** *Op.Cit.,* Page 148.
[13]*Ibid,* Page 149.
[14]*Ibid,* Page 150.
[15]Agus Santoso, 2014, ***Hukum, Moral, & Keadilan: Sebuah Kajian Filsafat,*** Kencana, Jakarta, Page 101.

Although in a case of corruption, it is believed by a judge that to adjudicate his case, the perpetrator still involved in the case has not been appointed as a suspect by the investigator, and the judge also realizes that if the other party is not brought to trial, then what he does is a powerlessness in upholding truth and justice, caused by the constraints of legislation as a source of formal law and a source of authority that limits its authority and public participation. This is where the certainty of law and justice is in conflict.

Legal certainty is a formal requirement that must be met by all parties, including law enforcement officers as regulated by law[16]. Sri EndahWahyuningsih said that a humanistic approach to the use of criminal sanctions not only implies that the punishment imposed on the offender must be in accordance with civilized human values but must also raise awareness of the offender of human values and values social interaction[17]. For example, who has the right to appoint a suspect under Article 1 point 2 of the Criminal Procedure Code is merely an investigator, then no other party may do it. Although in the trial process the judge feels there is an irregularity in the determination of the suspect by the investigator, where the other parties who participate in the criminal act are not included as a suspect, but the judge may only adjudicate the parties that have been designated as suspects only, According to the provisions of the contrary the judge does not have the authority to assign a person as a suspect.[18]

Conversely, the certainty of justice is a material requirement (the real fact). If the formal conditions have been fulfilled, it becomes the duty of the judge to seek, explore, and find the law based on living values in society, to be further formulated in the judgment of the verdict (motivering verdict[19]). In a phrase it is said that certainty is not the same as justice, but without certainty, it is hard to find justice, on the other hand justice in uncertainty will be very subjective, because it depends entirely on who determines or controls certainty.[20]

The fundamental philosophy of fundamental problems in the limitation of corruption in Indonesia is the absence of the principle of equality and justice in the substance of law that ultimately weakens the legal and legal structure of law in law enforcement, especially in the field of eradication of corruption.

Based on the results of interviews with several informants, it was found that in order to achieve the objective of effectively eradicating corruption both commutatively and distributive. Judges should be given the authority to designate a person as a suspect of corruption, followed by other authorities supporting the authority of the judge in determining a person to be a suspect in a criminal act of corruption, such as the authority to instruct the Investigator to carry out the Investigation, Arrest and Detention of the designated suspect, the authority to prevent and detain suspects, which principally the judge shall be authorized to instruct the Investigator perform any action which can be carried out by the Investigator as set forth by KUHAP. In addition to these authorities, the public should also be given access to participate in combating corruption, not only as a whistle blower but as a Petitioner applying to a judge to establish a person as a suspect of corruption accompanied by sufficient evidence through a separate path. In relation to such authority, the judge shall be authorized to order any person or parties concerned to submit evidence of a letter or document relating to a suspected corruption offense against the Respondent to prove the truth of the evidence filed by the Petitioner.

During this time the Reporter's difficulties in filing a report on alleged corruption to the investigator is due to not having the original documents to be used as evidence in the case reported, so that it is often used as an excuse for the Investigator not to process the case reported arguing the evidence does not support.

Several informants also suggested that if a judge is authorized to designate a suspect in a criminal act of corruption was based on a request made by the public. The judge is authorized to order the relevant parties who own or keep original documents related to the case reported to submit or at least showing the original documents to the court or judge, in order to be considered by the judge in making the decision whether the document could be used as evidence in the reported case. In comparison to the authority to request original documents to the parties concerned, some have been given by law to judges, particularly in prosecution of cases within the State Administrative Court.

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[16]Binsar M. Gultom, 2012, ***Pandangan Kritis Seorang Hakim dalam Penegakan Hukum di Indonesia,*** Gramedia Pustaka Utama, Jakarta, Page 13

[17] Sri Endah Wahyuningsih, 2013, ***Prinsip-prinsip Individualisasi Pidana Dalam Hukum Pidana Islam; dan Prospek Kontribusinya Bagi Pembaharuan Hukum Pidana Indonesia,*** Badan Penerbit Universitas Diponegoro, Semarang, Page81.

[18]*Ibid.*

[19] *Ibid.*

[20]Djulia Herjanara, ***Refleksivitas Asas Manfaat (Zwechmaasingkeit) (Interpretasi Hakim Menuju Keadilan dan Kepastian Hukum Dalam Penyelesaian Sengketa),*** dalam Majalah **Varia Peradilan** Tahun KeXXVI No. 299 Oktober 2010, Page 80.

Given the criminal act of corruption is an extra ordinary crime, then efforts to eradicate it also required extraordinary actions. Therefore, it is appropriate if the judge in examining the case of the petition for the determination of suspects of corruption is given the authority to do things that shall be conducted by a judge of the State Administrative Court.

In addition to judges being authorized to designate a person as a suspect, the judge shall also be authorized to order that the investigator undertake certain acts which fall within the competence of the investigator as governed by applicable criminal procedural law. Moreover the Judge shall be authorized to determine which investigator (Police investigator, prosecutor investigator or KPK investigator) will be instructed to investigate the case of the suspect set by the judge.

The granting of authority to a judge in determining a person or corporation as a suspect in a criminal act of corruption is not to interfere with the action of the investigator or to authorize the judge to conduct an investigation, but rather to provide certainty about whether a person or a corporation is eligible to be designated as a suspect. It remains to give the judge an impartial or impartial position to the investigator and/or to the prosecutor or to the suspect.

The granting of authority to the judge in determining this suspect is not a new institution, it does not lead the investigation at all, but it is more identical with the pretrial whose authority is expanded and independent[21]. So far, investigation action is the monopoly of the Investigator as a preliminary step before entering the investigation level, so the Investigator has the absolute authority to determine whether a case can be upgraded to the investigation level for investigation. This means that a person or a new corporation can be designated as a corruption suspect if according to the Examiner the existing evidence meets the minimum standard of proof, on the contrary if according to the Examining Examiner there is not yet qualified, it is the absolute authority of the Investigator also not to conduct an investigation. And against this, there is no control institution that can assess the objective or not the actions made by the Investigator in determining the suspect. The authority of the control in relation to the action of investigation which has been regulated by KUHAP through the Pretrial Institution is only the authority on the validity of the "suspension of investigation" conducted by the Investigator, meaning that the action of the new Investigator may be corrected and tested for objectivity if he has assigned a person or a corporation as a suspect, either corrected by the Prosecutor or by an interested third party (victim), while the investigation action before establishing the suspect as in the form of an investigation or collection of materials and information (Pulbaket) there is no authority of outside control, so it opens great opportunities for abuse of authority such as selective logging or favoritism in setting a suspect.

Basically, Police Investigators and KPK (Corruption Eradication Commission) Investigators are established and authorized to carry out investigations into cases of corruption as investigating judges is to offset the over dominant prosecutor as master of procedure or *dominuslitis*. The intention is to capture big cases and attract the attention of the public who will be prosecuted to the court[22]. Nevertheless, there is no institution for the control of pre-investigation action against investigations, so there are still many cases of favoritism as described above.

At the International level, the control of the investigation is carried out by the Pre-Trial Chamber authorized to issue a permit or authorize the International Prosecutor to proceed with the investigation itself (*propiomotu*), to determine whether a case may be accepted or not accepted for follow-up to the hearing, and participate in determining the results of the International Prosecutor's Investigation. The function of the Pre-Session Assembly is a filter that determines whether the principles of due process and fairness have been made by the International Prosecutor in obtaining strong evidence to follow up the case to the Court's proceedings. The power of the Pre-Session Assembly includes issuing arrest warrants and detention and forcing the presence of suspects into trials and preventing and ensuring that there will be no attempt to impede the judicial process[23]. Although the judge is authorized to designate a suspect, the judge does not preside over an investigation, as a Dutch rechrist in the Netherlands or a judge d'instruction in France[24], but is similar to a pretrial whose authority is expanded and independently established.

After the judge issued a stipulation regarding the receipt of the petitioner's petition to appoint a person as a suspect of corruption, the judge appointed and instructed the investigator to immediately conduct an investigation accompanied by guidance and submission of evidence. Furthermore, the leader of the appointed investigating institution shall instruct the investigator to carry out the judge's determination. If the head of the appointed investigating institution does not order its investigator to conduct an investigation, or for the investigator instructed by the head of the institution not to conduct an investigation, the head of the relevant institution and / or investigator may be declared to have "thwarted" the investigation as regulated in Law Number 31 Year 1999 on the Eradication of Corruption.

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[21]Tim Penyusun KUHAP, 2012, ***Naskah Akademik Rancangan Undang-Undang tentang Hukum Acara Pidana,*** Jakarta, Page 20.

[22]Academic TextPage 20-21.

[23] Romli Atmasasmita, 2011, ***Sistem Peradilan Pidana Kontemporer,*** Kencana, Jakarta, Hal 146-147.

[24]Academic TextPage 20.

The duty and responsibility to implement the judge's determination is a responsibility that is directly attached to each person, especially those who hold the position of head of the institution and/or investigator. If the investigator does not carry out the determination of the judge, there is still an authorized supervisory authority or superior to order the relevant investigator to determine the judge to take place. And in the case that the superior of the investigator or the head of the investigating institution does not carry out the obligation, it can be interpreted that the superior of the investigator or the institution's head has indirectly been involved in the attempt to prevent, obstruct, obstruct or thwart the investigation, prosecution and examination in court.

In addition, investigators and prosecutors are prohibited from taking "suspension of investigations" or "suspension of prosecution" measures against cases of criminal corruption suspected by the judge, inasmuch as investigative requirements such as sufficient evidence have been carefully examined by the judge and thoroughly, both at the stage of the examination of a defendant in court and in the process of examining the public's request regarding the determination of a person as a suspect of corruption. In addition, at the time of submission of evidence from the court to the investigator is also accompanied by guidance, as well as instructions on clauses that may be suspected. Therefore, there is no reason for investigators or prosecutors to stop the investigation or prosecution of suspects of corruption.

The idea mentioned above was born from the reality of law enforcement in order to eradicate corruption that has been done conventionally proved to experience various obstacles. Therefore, extraordinary law enforcement methods are required through the renewal of criminal procedure law, which ensures that the implementation is conducted in a participatory, open, optimal, intensive, effective, professional and sustainable manner.

D. CONCLUSION

The judge needs to be given the authority to assign suspects to corruption through two tracks: the authority of judges to appoint corruption suspects based on the results of the examination in court. It is based on the statements and acknowledgment of the accused and the witnesses and other evidence that lead to the involvement of certain parties, and judges based on a request from the public accompanied by sufficient evidence which is then examined through a special channel. The concept of authority of the Judge shall be accompanied by other authorities in the form of the authority to instruct the Investigator to conduct investigation, arrest and detention of a prescribed suspect, the authority to order the investigator to prevent and detain (banning) the suspect, and the authority to instruct the Investigator to perform any action that can be carried out by the Investigator as set forth by the Criminal Procedure Code. Thus, anyone involved in corruption can be held accountable without favoritism so as to achieve commutative justice. While distributive justice is the responsibility of the judge which will be reflected in the decision.

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