

The Importance of Progressive Interpretation for Judge in Handling Corruption Cases in Indonesia

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Abstract—The objective of this research is to analyze method of legal interpretation which is conducted by judge in handling corruption cases. Data were collected by interviewing judge and analysing judge verdict on corruption cases. Research result showed that common methods of legal interpretation are wide and narrow interpretations. Wide legal interpretation is interpretation which considers norms and moral turpitude based on unwritten legal sources. Narrow legal interpretation views corruption merely based on written legal sources. The application of both legal interpretations brings implication. If judge employs narrow legal interpretation, judge tends to pass non guilty verdict. Meanwhile, if judge applies wide legal interpretation, judge is likely to pass guilty verdict. This research recommends the importance of progressive interpretation for corruption case. Progressive interpretation is legal interpretation on written regulation and legal facts which does not only to read them literally but also to place them in certain context.

Index Terms—Progressive legal interpretation, corruption.

I. INTRODUCTION

Commonly, the scholars define corruption as abuse of power for personal interests [1]. Robert Klitgaard formulated general definition of corruption in formula $C=M+D-A$. This formula explains that corruption (C) is a function of monopoly (M), which is added with discretion (D), and minus accountability (A). Therefore, corruption may happen if there is a monopoly of power in the midst of uncertainty of regulation and discretion along with the lack of accountability mechanism or irresponsibility towards public/society [2]. Corruption might happen in the sector of public, private or even in *non profit* sectors, if someone monopolize the power upon goods or service in receiving or acquiring something without accountability [3].

In Indonesia, corruption is defined specifically as an unfair action which is committed by government official in managing fund that is supposed to be utilized for public interest. It is also a form of abuse of authority that belongs to certain government position which eventually can bear damage for public service since the fund is corrupted for fulfilling personal interest of government official [4].

William J. Chambliss stated that many people who are getting involved in corruption are called *cabal* or corruption network. He views that corruption is an integral part in any bureaucracy which meets with interests of certain business actors; legal enforcers and politicians that is difficult to be destroyed. Corruption network involves certain people who

belong to the center of government power, such as executive leader, members of political party, judicial officers and business actors. Corruption belongs to the internal system. As the result, it is difficult to wipe corruption out from the system because the judicial officers usually appear in the middle of dilematic position. Corruption is not a crime which occurs outside the system. Therefore, corruption network becomes a thick wall which is internally impenetrable due to the collusion that occurs among business actors, politicians and legal enforcers. Corruption network is also impenetrable externally since the legal enforcers may provide low ranked criminal which is ready to be sacrificed in order to protect the real corruption actor which remains at the core of such network [5].

Paul Heywood emphasizes corruption definition on the public space and the actor. If the doer of corruption is public official, the corruption is named political corruption. Political corruption is: "...corrupt activities which take place either wholly within the public sphere or at interface between the public and private spare –such as when politicians or functionaries use their privileged aces to resources (in whatever form) illegitimately to benefit themselves or others...". Political corruption scope is limited by the actor category: politician. Politician refers to public official, such as bureaucracy leader, judicial officer leader and police commander. As the consequence, corruption which occurs within business sector or financial corruption such as financial report manipulation and financial auditing manipulation do not belong to political corruption, unless such financial corruption involves public officials [6].

Modus of corruption cases which occur in Indonesia are presented on the following Table I.

There are still many corruption modus besides what have been explained previously on the Table I. However, the occurrence of corruption is close related to the space, time, possible condition and the willingness which is aimed to be achieved by corruption doer. There is also corruption that uses religion as 'vessel' to commit corruption and it is related with money politics. For example: a certain person who acts as briber grants prize money (*bisarah*), builds religious sites or builds educational place (*jariyah*) for religious leader in order to achieve his/her political interests. It usually happens prior to general election or pre-presidential election. As the consequence, the religious leader has to help to do political campaign for the bribery actor in order to gain more mass sympathy and ultimately to obtain more vote for one of candidates in general election. By issuing political campaign against female presidency or declaring political vow to do *social corruption* (corruption ala Robin Hood) in which the corrupted money will be used to build religious sites, boarding school and madrasa-which is privately owned by

the religious leader or owned by his affiliations, the bribery actor that acts on behalf of a certain general election candidate hopes to win people vote during general election [8].

TABLE I: TYPES OF PROJECT AND CORRUPTION MODUS

| No | Types of Project | Modus |
|-----|--|---|
| 1. | Equipment Procurement | <ul style="list-style-type: none"> The value of goods and service is marked up which exceeded market price. Having collusion with contractor during bidding process |
| 2. | Removal of inventory/state assets | <ul style="list-style-type: none"> Taking office inventory for personal purpose |
| 3. | Carer promotion and pension management | <ul style="list-style-type: none"> Collecting additional illicit cost which is not regulated by official provision |
| 4. | Social aid and subsidy | <ul style="list-style-type: none"> Reducing social aid fund which is usually conducted by all of public officers within public service system |
| 5. | Fictional Subsidy | <ul style="list-style-type: none"> Creating a fictional request letter which as if there is aid from government for another party. |
| 6. | Corruption on project fund | <ul style="list-style-type: none"> Taking government project fund illicitly without following official regulation. Reducing project fund illicitly. |
| 7. | Fictional physical project | <ul style="list-style-type: none"> Allocated fund which is written in official report is actually fictional |
| 8. | Manipulation on selling result and retribution | <ul style="list-style-type: none"> The real amount of selling result and tax are not reported. Stipulating tax revenue target under the real received income |
| 9. | Manipulation on physical project | <ul style="list-style-type: none"> Marking-up on project value. Imposing and collecting illicit payment towards the contractor |
| 10. | Fictional Salary or honorarium list | <ul style="list-style-type: none"> Creating fictional job |
| 11. | Manipulation on physical renovation data | <ul style="list-style-type: none"> Reducing the maintenance fund Mark-up on physical renovation fund data |
| 12. | Reduction on aid fund | <ul style="list-style-type: none"> Direct/indirect reduction on aid fund which is committed by public official illicitly |
| 13. | Fictional human resources project | <ul style="list-style-type: none"> No project/ no report (fake project report) |
| 14. | Extortion license | <ul style="list-style-type: none"> Imposing and Collecting illicit cost towards society Marking up license cost |
| 15. | Extortion on management of residential and immigration | <ul style="list-style-type: none"> Collecting illicit cost towards society Marking up license cost |

Source: The Habibie Center [7]

Some people argue that corruption which occurs in Indonesia is equal to incurable pandemic disease [9]. Meanwhile, some believe that corruption is part of culture which is embeded in entire aspect of life in Indonesia. Corruption has already transformed into mentality of most Indonesians [10]. It is due to high tendency of corruption occurrence in any level of social life which starting from corruption on the making of birth certificate, marriage certificate, ID`Card, building license and government procurement projects and, futhermore, corruption even occurs in judicial environment as signaled with the existence of judicial mafia (*judicial corruption*) [11].

II. THE TYPOLOGY OF JUDGE LEGAL INTERPRETATION IN HANDLING CORRUPTION CASES

According to research on judge legal interpretation in handling corruption cases in Indonesian courts, there is classification that can describe on how Indonesian judges interpret elements of corruption. The classification is wide legal interpretation and narrow legal interpretation. Wide legal interpretation is a legal intepretation that views corruption form material perspective that consideration on norms and *moral turpidute* which come from unwritten legal sources. Meanwhile, narrow legal interpretation is a legal intepretation that views corruption merely based on written legal sources but, at the same time, ignoring unwritten legal sources.

The application of both legal interpretation brings implication. If judge only employs narrow legal interpretation, the judge tends to pass a non guilty verdict. On the other hand, if judge applies wide legal interpretation on the corruption case, there will be high tendency to pass a guilty verdict. Regarding the guilty verdict, penal sanction that is passed by judge may fall into several categories, such as extremely light sanction, light sanction, moderate sanction, heavy sanction and extremely heavy sanction. However, the judge is likely to pass penal sanction which falls into light sanction category. The relation between the characteristic of judge interpretation on corruption and penal sanction on verdict is described in Table II.

In Table II, there is relation between characteristic of judge interpretation on corruption and the sanction as written in verdict. If the judge uses narrow legal interpretation on corruption case, the result is more likely non guilty verdict in which the defendant is free from charges and sanctions. Even if the defendant is considered guilty and sanctioned, the judge is likely to impose extremely light sanction. Meanwhile, if the judge chooses to apply wide legal interpretation, the result usually leads to guilty verdict. Regarding the sanction of guilty verdict, the penal sanction may fall into several categories such as light sanction, moderate sanction and heavy sanction.

TABLE II: RELATION BETWEEN CHARACTERISTIC OF JUDGE INTERPRETATION ON CORRUPTION AND VERDICT IMPLICATION

| Typology and characteristics of judge legal interpretation on corruption | Verdict implication |
|--|--|
| <p>Wide legal interpretation:</p> <p>Indicators of tort:</p> <ul style="list-style-type: none"> Violation against written regulations Violation against norms, justice principles and etc <p>Indicators of abuse of power:</p> <ul style="list-style-type: none"> Violation against written regulations Violation against good governance principles | <ul style="list-style-type: none"> Guilty verdict, with various range of penal sanctions: light, moderate and heavy sanctions which depends on judge consideration upon assessing incriminating factors and demulcent factors |
| <p>Narrow legal interpretation:</p> <p>Indicators of tort:</p> <ul style="list-style-type: none"> Violation against written regulations Abuse of power practice Violation against written regulations | <ul style="list-style-type: none"> Guilty verdict, with extremely light sanction which depends on judge consideration Non guilty verdict which means free from charges and sanctions |

The characteristic of legal interpretation on corruption depends on types of corruption, such as tort and abuse of power which are committed by legislative officials and executive officials in local government environment. Narrow interpretation on corruption is conducted based on tort category and abuse of power practice which is merely interpreted as violation against written regulations. Meanwhile, wide legal interpretation on corruption is conducted based on criteria of tort and abuse of power practice that contradicts with and violates both written and unwritten regulations. Unwritten regulation for tort element is in the form of violations against norms and values that injure justice principle on society. Meanwhile, unwritten regulation for the element of abuse of power practice is in the form of violation against good governance principles.

Based on this research, it shows that the panel of judge fallacy in proving corruption elements as presented on the indictment during the trial session is caused by judge tendency to apply narrow legal interpretation on corruption. If the judge uses wide legal interpretation on corruption, the corruption elements as indicted by prosecutors will be successful to be proved during trial session. The application of both legal interpretation brings implication. If judge only employs narrow legal interpretation, the judge tends to pass a non guilty verdict which means letting free defendant from any charges and sanction. Even if the judge imposes guilty verdict to the defendant, the sanction will be extremely light one. On the other hand, if judge applies wide legal interpretation on the corruption case, there will be high tendency to pass a guilty verdict. Regarding the sanction in guilty verdict, the penal sanction may fall into several categories such as light sanction, moderate sanction and heavy sanction. It depends on judge consideration as basis in creating a decision.

Theoretically, in legal science, there are some types of legal interpretation. Some of legal interpretation methods even complement each other. Each method has their characteristic. Therefore, there is no obligation to use one specific method when deals with a certain real case. As the result, there are many legal interpretation methods which are possible to be employed by judge, especially in creating a verdict. The judge independently has right to choose method of legal interpretation which is considered proper to be applied in certain case [12]. In other words, judge is free from obligation to obey a certain fixed method of legal interpretation in creating verdict by ignoring other legal interpretation methods.

However, this research also points out that there is close relation between the characteristic of legal interpretation and judge verdict. The assessment upon the quality of judge verdict can be evaluated from the way of judge interpret the elements of certain article in law. It should be conducted by applying the legal interpretation on the case and applying contextual consideration on the case. According to Burgh and Winkelman, history has shown that there was attempt to force the application of a certain method of legal interpretation. However, the result was contradictory and against expectation which lead to ambiguous guidance. It was due to the difficulty to grasp the real motives of judge in making a certain decision since there was only explicit

argument as written in the verdict [13].

III. THE IMPORTANCE OF PROGRESSIVE LEGAL INTERPRETATION FOR JUDGE

Based on result of the research as explained previously, it is important to have discussion on progressive law as basis to do reconstruction on legal interpretation method which is employed by judge when dealing with certain case. Progressive law requires holistic interpretation upon legal issue settlement in order to achieve substantive justice which is more than formal and procedural justice achievement. Interpretation is an activity to give meaning on text of regulation and legal facts which does not merely refer to reading the literal meaning of text in regulation and legal facts. This is called as progressive law which means placing the legal text/facts in a certain context and later gets contextualized.

Progressive legal interpretation views formulation of a regulation on the position as initial piece. Meanwhile, the main objective which should be reached out is justice as the essential ultimate piece. As the result, the initial formulation of written regulation should not be viewed as something that final and absolute one. The regulation admonishes anyone that the society needs justice and justice is formulated in the form of words that have legal implication. Justice is merely a little piece of objective of law since there are some missing pieces that should be compiled together, they are: *justice, utility, doelmatigheid, billijkheid*. In other words, any time people read law or regulation, they are also obliged to find out essential meaning behind the said regulation [14].

Progressive legal interpretation views legal process as a process of liberation from any irrelevant concept or doctrine which is not appropriate anymore to be applied in responding the current issues of people's life nowadays. Progressive legal interpretation is stemmed from "law for people" paradigm. It is completely contradictory with *analytical jurisprudence* which believes in "people for law" paradigm. Human is a symbol of dynamics of life fact. The main assignment of law is to guide people and to serve people. Therefore, the balance between "static and dynamics" among regulations is needed along with open opportunity.

From the perspective of progressive law, law and court cannot be perceived as engine or robot. It should be perceived as an institution that creatively guiding and serving people. Such assignment can be performed if law is granted with liberty to implement interpretation. Interpreting is form of implementation upon assignment to guide and serve people.

Progressive law is relevant with various schools of thoughts, such as: historical (Savigny), realist (America, Europe), sociology (Pound, Ehrlich, Black), responsive (Nonet dan Selznick). Those schools of thoughts basically accept the fact that legal interpretation acts as connector between rigid and static regulation or laws and the dynamic present and future which requires law to be adaptable. The reliable desired law will appear if the law is able to do its main assignment as guidance and servant of society. Therefore, the law cannot rely on past. Instead, it should move forward to the present and future. It is the main essence

of progressive law and the progressive legal interpretation.

From theoretical perspective, there are some types of legal interpretation, in which one and another complement each other. Each method has their respective characteristic and there is no obligation to use a certain fixed method of legal interpretation which should be applied on certain real case. The judge has independent rights to choose one of legal interpretation method which is considered appropriate to be applied on the said case. In other words, judge is free from obligation to obey certain fixed method of legal interpretation in creating verdict by ignoring other legal interpretation methods [15].

However, practically, there is evidence that shows close relation between characteristic of legal interpretation and judge verdict. The assesment on quality of judge verdict is related to the ability of judge in interpreting formulation of article in certain regulation, the said case along with the social context which is dynamic and continuously developed.

Since the characteristic of judge legal interpretation determines the quality of verdict, therefore, according to Arief Sidarta, all methods of legal interpretation should be mustered hermeneutically. In order to determine the meaning of law as written on laws and regulations, it should be conducted based on positive law rule which requires grammatical interpretation within frame of historical context in relation with its main objective that determines the content of the said regulation (theological). Besides, it also should be conducted within contextual relation among other related regulations (systematical) and contextually refers to sociological and economical factors by referring to cultural and fundamental human rights values for the future. It is called as hermeneutical approach.

Moreover, in order to manifest the main legal objective, such as to create progressive law that serves people for achieving social justice and social welfare, all methods of legal interpretation is needed (wide interpretation). Besides, in order to develop legal science, law has to involve the study on sociology of law, history of law and philosophy of law.

ACKNOWLEDGMENT

The author would like to express gratitude to Director of Research and Social Service Institute of Universities Islam Indonesia Yogyakarta and Directorate General of Higher Education of Ministerial of Education and Culture of Republic of Indonesia which had granted excellence research fund for higher education that supported the creation of the research and this article.

REFERENCES

- [1] R. Ackerman and R. Susan, *Korupsi Pemerintahan, Sebab, Akibat dan Reformasi*, Jakarta: Pustaka Sinar Harapan, pp. 127, 2006.
- [2] R. Klitgaard, R. M. Abora, and H. L. Paris, *Penuntun Pemberantasan Korupsi dalam Pemerintah Daerah*, Jakarta: Yayasan Obor Indonesia, pp. 29, 2002.
- [3] P. Bernasson, "Role for International Organizations in The Fight Against Corruption," in *Responding to Corruption: Social Defense*,

Corruption, and The Protection of Public Administration and The Independence of Justice, pp. 367, 2000.

- [4] S. Wignjosoebroto, "Korupsi: Sebuah Tinjauan dari Perspektif Sosial Budaya," presented at Law School Doctorate Program of Diponegoro University, June 23, 2007.
- [5] W. J. Chambliss, *Corruption, Bureaucracy and Power, Sociological Reading in The Conflict Perspective*, pp. 358-359, 1973.
- [6] P. Heywood, "Political Corruption: Problem and Perspectives," *Journal of Political Studies*, vol. 45, 1977.
- [7] Rustamadji, "Habis Otonomi, Terbitlah Korupsi," *Journal of Democracy*, vol. 2, pp. 37-38, 2005.
- [8] A. K. Umam, *Kiai dan Budaya Korupsi di Indonesia*, Semarang: Rasail, pp. 99-107, 2006.
- [9] M. Y. Firdaus, "Pandemik Korupsi dan Mentalitas Birokrasi," *Opini Radar Jogja*, January 27, 2007.
- [10] R. T. Sugiarto, "Mengebor Sumur Tanpa Dasar," *Journal of Democracy*, vol. 2, pp. 6-8, 2005.
- [11] I. G. M. Nurdjana, *Korupsi dalam Praktik: Bisnis Pemberdayaan Penegakan Hukum, Program Aksi dan Strategi Penanggulangan Masalah Korupsi*, Jakarta: Gramedia Pustaka Utama, pp. 1, 2005.
- [12] J. M. V. Bemmelen, *Hukum Pidana 1 Hukum Pidana Materil Bagian Umum*, Jakarta: Binacipta, pp. 63-72, 1984.
- [13] Shidarta, *Karakteristik Penalaran Hukum dalam Konteks Keindonesiaan*, Bandung: CV. Utama, pp. 44, 2006.
- [14] S. Rahardjo, "Penafsiran Hukum Progresif," presented on the Class Discussion at the Law School Doctorate Program, Diponegoro University Semarang, October 23, 2007.
- [15] A. Sidharta, "Hukum Progresif dari Sisi Filosofis: Persepsi Epistemologis, Hermeneutis, dan Metafisika," presented at the National Seminar of Prospek Hukum Progresif di Indonesia, Faculty of Law Diponegoro University, April 28, 2009.



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