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The Dilemma of Restitution Penalty: Understanding Nemo Bis Punitur Pro Eodem Delicto or Bifurcating Criminal Responsibility

Rizkisyah Karoen Nasution[1]

Abstract

Special punishment (strafsoort) is lex speciali which can only be imposed in corruption cases, namely restitution. The focal point of this paper is not about the application or effectiveness of the imposition of such punishment, but this paper focuses on the theoretical aspects of punishment that are directly related to efforts to find the basis and justification for the imposition of a punishment against a convict. Restitution punishment was originally created in 1958, which was then improved in 1971, and finally refined in 1999 with a variety of arrangements that are very extensive and deviate from the existing punishment in the codification book. When referring to the enactment of restitution punishment since 1999, it has been more than 25 years since this punishment has been applied in a positivistic sense, but it seems that this punishment is still not ideally implemented with various theoretical and practical problems so that this punishment cannot be utilized properly. Several lessons can certainly be extracted from the development of this punishment that has occurred three times, and it will certainly be touched upon in this paper to provide an overview of the true nature of restitution punishment. However, the focus of this paper still refers to what is currently in effect through Law No. 31/1999, especially Article 18. Because in the theoretical realm, there are considerable problems, but not realized by many parties regarding how this punishment has been imposed disproportionately and actually away from the ideal theory of punishment. This paper is an attempt to embody the fundamental problems of restitution punishment that still cannot be fully understood by academics and law enforcers in Indonesia, and is expected to provide additional references to understand the ideal form of restitution punishment.

Keywords: Proportionality, substitute imprisonment, double punishment, bifurcation.

Introduction

As a country with a rigid legal system, Indonesia certainly has criminal law politics that can be considered strict and has a long stage in the process of creating a legislation. However, from the point of view of the politics of criminal law, even though a regulation has met the requirements and passed the pedigree test regarding the validity of its content, it can still be re-examined in terms of its consequences for the values at stake in it (Nonet & Selznick, 2013). In the context of criminal law, of course, the above opinion will have a strong relevance when faced with punishments that are lex specialis in nature and in the form of deviations from what has become common as in the codification book. Criminalization and punishment itself is basically an attack on human rights that is allowed, this is because of the

[1] Magister of law, University of Indonesia, Email: r.karoen@gmail.com Email: https://orcid.org/0009-0005-7231-9445

noble goals of the law The purpose of criminal law is to achieve the goals through the imposition of sanctions on those who violate the rules, and it is the sanctions that make criminal law a special law when compared to other branches of legal disciplines (Hamzah & Rahayu, 1983). With the friction with human rights, it certainly requires criminal law to be understood as perfectly as possible and applied with the highest level of caution.

A suffering in the form of punishment that will be given to a convict is certainly not necessarily arbitrary without an adequate basis and reason with the degree of criminal offense committed by a person, which is why there are various theories of punishment that ultimately give rise to doctrines and teachings about the appropriateness of punishment or proportionality of punishment, or what is known in developed countries as just desert theory (Johnston, 2013). The appropriateness of a punishment has been considered for a long time, even since the era of Beccaria, which he made the opening sentence in the conclusion of his work which is still influential today. He closed his work by emphasizing that the proportionality of punishment is an obligation that must be carried out, and that proportionality must depend on each crime that occurs and cannot be generalized or sought to be similar to other crimes even if they look similar (Beccaria, 1872).

It is easy to agree that the legitimacy needed for a punishment to be acceptable, even though it is clearly a form of attack on human rights, is the teaching of proportionality that can make punishment not be seen as mere suffering (Sudarto, 1981). Even in the modern criminal era, it is still agreed that the proportionality of punishment is the main milestone that justifies the imposition of a punishment and makes it an action that has the purpose of not just suffering (von Hirsch & Ashworth, 2005).

The theory of appropriateness or proportionality was born at a time when punishment and punishment were still general in nature, because these theories were developed in the past when the variety of crimes was not as complicated and complex as it is today. As a result, it is logical that for complicated and complex crimes such as corruption, the proportionality of punishment must be more concentrated and guaranteed so as not to make the punishment process a punishment that is carried away by emotions and becomes irrational. Because of the special and complex nature of the crime, of course the punishment provided will also be complex and therefore will require more attention and consideration in its imposition, in order to make it proportional. Speaking of complex crimes and punishments, of course corruption and restitution are the best specimens to be tested for proportionality both theoretically and practically.

Research Methods

This paper is prepared in the form of doctrinal research, which is specifically intended to be able to provide clarity based on systematic exploration of a law (Yaqin, 2007). Although examples of court decisions will be given as this paper discusses a punishment, this paper still focuses on the study of positive law from various aspects such as theoretical, philosophical, historical, and relevant developing doctrines, but does not discuss its implementation (Purwati, 2020). However, to provide more benefits for this paper, there will be a little mention of its legal application which is intended as an effort of fact finding - problem solution

(Soekanto, 2010), because restitution has a complex application and meaning. To obtain the meaning or essence, this paper will be assisted by the research method of legal philosophy that can seek the greatest probability of achieving legal justice in the form of antinomic value balance. (Purbacaraka, 2011).

Utilization of the doctrinal research form will certainly use materials in the form of literature, the majority of which are related books, as well as laws and regulations as primary legal materials. in principle using qualitative methods, which are analytical procedures by developing concepts, thoughts, and understanding of existing patterns and carrying out a logical deduction process (Ashshofa, 1996).

Result and Discussion

Essence, Form, and Nature of Money Substitution Penalty

In fact, this punishment was not born in 1999, but in 1958 through the Regulation of the Army Staff Central War Ruler Number 13 of 1958 concerning Investigation, Prosecution, and Examination of Corruption and Property Ownership (Atmasasmita, 2007). At the beginning of the birth of restitution punishment, the punishment was more of a command without coercion, because there was no coercive element like the current restitution punishment. The condition at that time made restitution punishment as a punishment that was not mandatory because there was no consequence for those who ignored the court decision in fulfilling the restitution punishment, so there was an empty nuance in the imposition of restitution punishment in that era (Nugroho, 1997). In fact, even a small amount of fine is still paired with imprisonment as a consequence if it is not fulfilled.

To change this condition, restitution punishment experienced an experimental development in 1971 through Law No. 3 of 1971 on the Eradication of Corruption, where the void felt in the previous era was tried to be eliminated, or at least minimized by providing consequences if the restitution punishment was not fulfilled by a convict. However, as it has been mentioned that the development of restitution punishment is experimental, it can be seen from the presence of confinement punishment that is paired as a subsidiary if the restitution punishment is not fulfilled, but it is common knowledge that the period of confinement punishment is inadequate with the amount of restitution punishment in general. Although it is experimental, at least the restitution punishment in that era already has an imperative element in the form of psychological pressure (psychologiche dwang) in the form of imprisonment, although not too strong in its imperative nuance (Mahmud, 2018).

The experimentation on restitution punishment can easily be considered as a futile effort, because the maximum amount of imprisonment is not commensurate with the amount of restitution punishment in general. Looking at the opinion of the maestro of money crime law, Bentham himself has predicted that even though money crime is a favorite for several developing countries, it cannot have much benefit if it is not paired with an equivalent level of corporal punishment, so that money crime can be a serious and imperative punishment (Bentham, 2016). The experience of Bentham was also evident in the minds of Indonesian criminal law experts, namely Muladi and Arief, who firmly voiced that without an adequate coercive device with a large amount of money in corruption cases, there would be no point in the implementation of restitution in the 1971 era (Muladi & Arief, 2010).

Ironically, in 1988, the imprisonment punishment which became the coercive element of the restitution punishment was rejected by the Supreme Court of the Republic of Indonesia by issuing Circular Letter No. 4 of 1988 on the Execution of Restitution Payment Punishment. More ironically, this rejection was also simultaneously carried out by the Attorney General's Office of the Republic of Indonesia through Circular Letter of the Attorney General No. 8 of 1988 on the Implementation of Additional Penalty for Payment of Restitution.From both institutions, the rejection of the enforceability of confinement as a means of coercion (subsidiary) of restitution if not paid. Instead, the two institutions agreed to conduct rechtvinding by creating a special forced effort for the fulfillment of restitution in the form of confiscation of personal property owned by the convict. Thus, in 1988, the mechanism of confiscation of personal property owned by convicts was born, which could be carried out based on a court decision, and the property to be confiscated did not have to be the result of a crime or related to a crime. At this point, the restitution punishment began to be ignored as a complete and ideal money punishment, because the restitution punishment was imposed with no intention to be fulfilled by the convict, but was only imposed so that the special forfeiture instrument could be activated (Arifin, Utari & Subondo, 2017).

By studying the results of experimentation that occurred with restitution punishment in the 1971 era, improvements and developments were made to the provision through Law No. 31 of 1999 concerning Eradication of Corruption. Where in the past, the imprisonment punishment that was tried to be a coercive tool failed and was rejected, this time it is the imprisonment punishment that is presented as the latest coercive tool for this type of punishment. This kind of legal breakthrough has never happened before in Indonesia, but some formulators of this law felt the urgency to do so (Hamzah, 2007). It should be remembered that restitution is in the criminal regulations outside the codification which itself has a special nature, so that a special law (including the punishment therein) is certainly allowed to be created deviantly, which is not even uncommon to tear a common custom (Arief, 2016).

In the context of legal systematics, as part of Law No. 31/1999, of course restitution is a speciali punishment, which is a regulation that is allowed to have different provisions and deviate from the Criminal Code and Criminal Procedure Code (Hiariej, 2016). The deviation is carried out with full consideration, because there are specific things that become the purpose of the creation of restitution punishment, namely efforts to recover state losses due to corruption through criminal instruments. That is why the formulators present imprisonment as a means of coercion for those who do not fulfill court decisions related to restitution. The presence of imprisonment as a subsidiary of money penalty is expected to make restitution as a complete and effective money penalty. Based on Article 18 paragraph (3) of Law No. 31 Year 1999, the imprisonment as a subsidiary to the restitution punishment has a maximum limit of 20 years, which is the highest limit of imprisonment that can be applied in Indonesia.

Imprisonment as a subsidiary of restitution is now often referred to as substitute imprisonment. The naming is done to distinguish it from imprisonment in the context of main punishment. As an intermezzo, although it has a limitation of

20 years, this substitute imprisonment still belongs to the family of additional punishment, which is generally known as a punishment with a fairly weak predicate and is considered as a secondary punishment, also not a few people understand that additional punishment is only an additional suffering from the main punishment imposed (Hamzah, 2010). However, restitution punishment is actually not an additional punishment in general, because it was born with a special purpose and was not created to add suffering to a convict, nor is it facultative in its imposition.

In contrast to the 1971 era, where restitution was not supported by the Supreme Court and the Attorney General's Office, this time the two institutions accept and strengthen the presence of restitution and recognize the enforceability of restitution as an ideal coercive tool. In 2014, the Supreme Court issued Supreme Court Regulation No. 5 Year 2014, which states that in the event of state losses arising from corruption crimes, restitution must be imposed. The same thing was also welcomed by the Attorney General's Office through Attorney General Guidelines No. 1 of 2019, where the obligation to prosecute restitution is absolute if a corruption crime causes state losses. The support from both institutions is an extraordinary support for restitution, because as an additional punishment, it is no longer facultative but imperative in its imposition.

From this brief description, it can be seen that the journey and development of restitution punishment is quite complicated and full of debates, but at least the essence of this punishment can be concluded as a special additional punishment. Restitution is an additional punishment that is created specifically not to punish, but an effort to restore state losses through criminal instruments. The effort is also very serious, so that a punishment that is money and classified as an additional punishment, currently becomes very, very imperative in its implementation. Whether it is with the presence of a mechanism for confiscation of personal property, to a subsidiary in the form of substitute imprisonment with a maximum of 20 years as a means of forcing the convict to fulfill the court's decision in terms of paying restitution.

Proportionality in Restitution Penalty

As a law that is loaded with human rights, criminal law (especially punishment) must be justified so that it is not considered arbitrary and can create justice through court decisions. In the theoretical context, this certainly relies on the teachings of proportionality which requires consideration in imposing punishment, which has long been known as the postulate of 'an eye for an eye' where the punishment must be proportional and equal to the act and it is forbidden to have a punishment that is more severe than the crime.

Proportionality in punishment is not only about the appropriateness of the severity or leniency of a punishment, but also about the accuracy in choosing the type of punishment (strafsoorts) that is adjusted to the type of crime, and the personal circumstances of the perpetrator (Ashworth, 2005). However, as this paper only discusses one type of punishment, namely restitution, the focus of the proportionality doctrine that will be touched upon is proportionality related to the severity or leniency of a punishment based on guidelines and indicators in the imposition of punishment. The best way to justify the imposition of a punishment is by presenting guidelines containing indicators that will be responsible for why

the high and low punishment is imposed (Johnston, 2013). This guideline and benchmark has also actually been initiated by Beccaria with the term individualization of punishment, which is described as a way to prevent the power from being arbitrary in giving punishment or so that a case is not generalized just because it has one or two similarities. In short, the doctrine of proportionality does require the presence of a guideline for punishment and this is considered good for the legitimacy of criminal law, because based on the principle of legality, a punishment can also be justified if the causes and reasons that affect its imposition are based on a clear and written benchmark as the lex scripta postulate (Zulfa, 2011).

Back to talking about restitution, where it has been explained previously that this punishment is a special punishment created by Indonesia which aims not to provide suffering or punishment, but aims to force the convict to return the state losses that have been incurred (Noviyanti, 2014). The struggle to restore state losses via criminal instruments can be considered very serious, because currently restitution in the perspective of positive law can be matched with a substitute imprisonment with a maximum of 20 years as a coercive element. A coercive tool that is so heavy and can be considered equivalent to imprisonment in terms of basic punishment, of course, must be considered for its utilization, because the coercive tool really has unusual strength and can be said to be extraordinary. With no intention to underestimate the existing punishment in the codification book, however, the teaching of proportionality must be given more attention in the imposition of restitution punishment because of the extraordinary coercion. If a systematic interpretation is conducted based on Supreme Court Regulation No. 5 of 2014 and Attorney General Guideline No. 1 of 2019 which requires the imposition of restitution in the event of state losses, it is very clear that there is only one indicator or single factor that can affect the severity or lightness of the imposition of restitution as a coercive tool, that factor is the amount of state losses proven to be enjoyed by a convict.

Currently, the proportionality and balance between the imposition of restitution and substitute imprisonment is based on the Attorney General Guidelines No. 1 of 2019 concerning Criminal Charges for Corruption Cases. The guidelines contain factors and conditions that affect the prosecutor's demands in each corruption case. Both for the main punishment in the form of imprisonment and fines, as well as for substitute imprisonment which is antinomic to restitution. However, there is an irregularity in the indictment guidelines, where the factor of state losses or the amount of money enjoyed by a perpetrator of the crime is actually used as a factor that affects the severity and leniency of the main punishment. With a fairly complicated formulation, the state loss factor has eliminated subjective factors such as: the level of complexity of the modus operandi; the capacity of the perpetrator; the means and facilities used; and the authority that was misused. These subjective factors are erased by the money factor, which should be the sole factor influencing the imposition of restitution, which is a coercive tool and the key to the success of restitution.

According to the grammatical interpretation, the imposition of restitution is definitely done because of the state loss caused by a convict, so it should be illogical if the amount of state loss becomes a factor that affects the amount or duration of

the main punishment as regulated in this guideline. If the state loss factor has been used as a factor that affects the imposition of the main punishment, then what can be used as a proper factor or indicator to affect the imposition of substitute imprisonment. Whereas the substitute imprisonment is an imperative aspect for the substitute money penalty that serves to increase the possibility of the return of state losses, which arguably can be said to be more important than just punishment. This condition provides a kind of theoretical paradox of punishment, where proportionality cannot be measured clearly because the factors that influence the two types of imprisonment are not clearly separated.

The substitute imprisonment itself has an absurd arrangement in the Attorney General Guideline No. 1 Year 2019, where there is only 1 sentence that becomes the reference in its imposition. The clause that affects the imposition of substitute imprisonment as stipulated in the Attorney General Guideline No. 1 of 2019 as stipulated in Chapter 2 Point VI is as follows: 'the charge of imprisonment as a substitute for the additional punishment of paying restitution for a person defendant is at least ½ (half) of the charge of imprisonment and at most does not exceed the maximum threat of imprisonment for the article that is proven'.

This arrangement raises many theoretical questions, both from the aspect of the purpose of punishment or the doctrine of proportionality. This is because the coercive tool of restitution punishment, although it is a special punishment and speciali in nature, is not given clear indicators or influencing factors. It should be remembered that restitution punishment is not born as a form of punishment or additional suffering, but a means of coercion in the form of a threat to the convict to fulfill restitution. However, this coercive instrument does not have clear indicators or factors in an effort to increase the success of restitution punishment. The condition when the coercive instrument that determines the success of the fulfillment of monetary punishment is actually not dependent on the amount of money that is the purpose of punishment, is a misguided thinking that makes the proportionality of restitution punishment impossible to achieve. Without requiring empirical research, this condition can certainly be predicted to disrupt the effectiveness of the success of restitution punishment.

As a concrete example that is currently happening, namely the corruption case with the convict Harvey Moeis, where the prosecutor demanded a compensation of IDR 210 billion and a substitute imprisonment of 6 years. The prosecutor has certainly formulated the charges based on the Attorney General's Guideline No. 1 of 2019, albeit at the minimum level, where the basic imprisonment is 12 years so that ½ of this amount is 6 years. However, it is certainly easy to question whether a convicted person is willing to pay 210 billion rupiah with a means of coercion in the form of 6 years of imprisonment, especially since there is already a 12-year prison sentence as the main punishment that must be served. Such questions certainly cannot be answered easily, but what needs to be considered is how the teaching of proportionality can justify the prosecutor's demands regarding the imposition of substitute imprisonment if the state loss factor actually affects the main punishment.

When discussing the theoretical problems that exist in restitution punishment and its substitute imprisonment, it seems that the current guidelines cannot justify

restitution punishment as a non-retributive punishment. Because without a precise and clear factor on the things that influence it, of course proportionality cannot be achieved and in the end the imposition of such monetary punishment cannot be justified. If the factor of the amount of state loss becomes the determinant of the severity and lightness of the main punishment (imprisonment and fine), then it gives the impression that the main punishment is actually imposed as a form of responsibility for state losses caused by a convicted person for the corruption crime committed. Meanwhile, there is a special punishment, namely restitution, which is presented because of the state losses caused by a convicted person, which is even given a coercive tool with a degree of seriousness equal to the main punishment which is also imprisonment.

Based on the current criminalization guidelines and strategies, the criminalization of corruption cases that cause state losses has experienced the phenomenon of double punishment. This is evident by looking at the real conditions where a corruption convict who was sentenced to restitution along with substitute imprisonment due to the state losses he caused, was sentenced to the main punishment which was somehow based on and influenced by the same factors as the imposition of restitution. So that for every convicted corruption offender who causes state losses, it will undoubtedly always be punished twice with the same reasons for punishment and influencing aspects, namely the state loss factor.

Thus, every court decision for corruption cases that cause state losses is conceptually ne bis in idem, or more precisely the postulate of nemo bis punitur pro eodem delicto. This is because a convict has been sentenced twice (with similar degrees of suffering) for exactly the same cause or reason (Mochtar & Hiariej, 2021), namely state losses. Whereas the restitution punishment along with the restitution imprisonment is concretely born as the state's effort to return the state's loss, but it turns out that the factors that underlie and influence the length of the main punishment are also the factors that become the reason why the restitution punishment is created, thus the phenomenon of double punishment occurs.

Of course it is not easy to find out why this theoretical problem occurs, and why the state loss factor actually affects the imposition of the main punishment. However, in the case of the presence of restitution, which was specifically created to be a punishment for the presence of state losses, the state loss factor should no longer affect the imposition of the main punishment in the same case. Because if so, then the imposition of punishment in corruption cases will not be justified by the teachings of proportionality. Therefore, the imposition of punishment in corruption cases will be difficult to justify, and it is also not based on or in accordance with the theory of punishment and the discipline of criminal law in general. Perhaps this theoretical problem is what causes many corruption convicts to prefer to serve substitute imprisonment, compared to fulfilling restitution.

Consequences of the Presence of Restitution Penalty

After going through various experiments and developments since 1958, it is not wrong to say that restitution punishment in the era of Law No. 31 Year 1999 has gained its validity as a special additional punishment. By providing imperative elements to be imposed, as well as multiple fulfillment mechanisms, namely confiscation of personal property and substitute imprisonment with a maximum of

20 years. Indonesia's seriousness in the effort to hold accountable for state losses appears to be in an extraordinary degree of seriousness, because a punishment classified as an additional punishment has been strengthened in such a way as to blur the boundaries between the main and additional punishment. The formulation of restitution punishment has succeeded in presenting a coercive tool with a maximum limit in the form of 20 years of substitute imprisonment, which was done with the aim that the substitute imprisonment could not be used by convicts as a way to 'avoid' the return of state losses as in the 1971 era (Loqman, 1991). Unfortunately, talking about the utilization of coercive power becomes difficult when examining its relationship with the teaching of proportionality, which is still far from ideal and unclear. It is reminded that as a punishment that has a fairly extreme degree of deviation from the lex generalis, restitution must be utilized with great care. Because what is currently happening, the imposition of restitution does not reflect the utilization of criminal instruments as intended by the formulators, and instead becomes an additional punishment in general (which only adds suffering). With the presence of such heavy substitute imprisonment as a means of coercion, the reason for the imposition of the punishment must be carefully formulated and of course absolutely no longer should the reason for the imposition affect other punishments even though it is the main punishment.

In the application of Law No. 31 Year 1999, if at the time of determining the severity of the main punishment, the factor of state loss has been used, it will certainly be wrong to impose additional punishment that was created specifically because of the state loss. Because later on for the exact same factors and reasons (i.e. state losses), a convict will be sentenced to two types of punishment with the same degree of suffering. Currently, in corruption cases, there are main and additional punishments, each of which has the potential for 20 years of imprisonment, so it would be despotic in practice and wrong in theory if criminal law allows two punishments to be imposed for the same reason..

To be able to utilize this special punishment in order to produce outputs in the form of justice, the proportionality doctrine must be put forward by presenting clear and clear sentencing guidelines. There are two main factors to create proportionality of punishment based on ideal sentencing guidelines, first is a philosophical factor in the form of clarity in the use of principles, legal sources, along with the drafting arguments that must be based on the appropriate legal interpretation flow (in this case is the restrictive flow), second is a technical factor in the form of clarity in the formation process in accordance with the principle of legality and the reality of needs (Johnston, 2013). As mentioned earlier, proportional teaching must be considered with a much higher level of concentration on lex specialis punishment, so that the preparation of guidelines and factors that influence their imposition must be based on the purpose of punishment which is reflected in the notion of legal harmonization. The form of legal harmonization in criminal legislation is the realization of harmony regarding the principles and theories of punishment, both between different regulatory hierarchies, as well as between articles in the same legislation (Sulistyawan, 2019), such as Law No. 31 of 1999.

Even though a sentencing guideline is considered accountable and good enough to be implemented, it will be difficult to justify if the formulation of the

guideline is not philosophically based on the will of the legislator as the creator of a regulation (in this case punishment). As the Attorney General's Guideline No. 1 of 2019 can be considered to require a reformulation process, harmonization via legal interpretation in achieving proportionality of punishment can be assisted by Kelsen's legal hierarchy teaching, because the sentencing guidelines are implementing regulations of a law and are literally the implementation of a binding legal norm (Asshiddiqie, 2021). This needs to be done so that the preparation of sentencing guidelines related to restitution can be in line with the orders of the law, and its application is also in accordance with the legislative aspects.

The formulation process of sentencing guidelines is certainly easier than non-criminal guidelines because of the limitation of lex stricta, so that the legal content that will be embedded in the guidelines must be sourced from the law and the law itself without being allowed to interpret outside the restrictive flow (Hiariej, 2009). This is also greatly influenced by the nature of criminal law, where the presence of suffering as one of its outputs certainly requires the absolute principle of legality theoretically and in practice. This kind of thing becomes very sensitive when formulating sentencing guidelines that have basic imprisonment and substitute imprisonment with similar degrees of suffering. Considering that Law No. 31 Year 1999 has been drafted in the concept of overpenalization (Muladi, 1999), then the imposition of two types of severe imprisonment for the same reason becomes really dilemmatic to be allowed to occur. This mindset is expressed solely because restitution punishment has a coercive element in the form of imprisonment with a degree of seriousness that is equal to the main punishment, so that the factor or reason for punishment of restitution punishment must be ensured that it is no longer found in other types of punishment, either explicitly or implicitly.

The reason why the theoretical matters above are important to be disclosed, is to support a hypothesis that restitution (although an additional punishment) is a stand-alone punishment in terms of the philosophy of its imposition, namely as a speciali punishment that is tasked with forcing the recovery of state losses. Thus, the object of criminal liability requested by restitution is the 'result' of the crime of corruption. This restitutive philosophy must be separated from the philosophy of punishment in the main punishment in Law No. 31 Year 1999 as a whole, which is dominated by retributive nuances. From the perspective of the theory of punishment, it certainly cannot be justified if the philosophy of imposing two types of severe imprisonment is not clearly and clearly separated.

The hypothesis above can also be supported by systematically interpreting Articles 2, 3 and 4 of Law No. 31 Year 1999. While Article 2 and Article 3 provide room for substitute imprisonment to be imposed for 20 years, Article 4 states the impossibility of imprisonment even though the state losses have been fully returned. This clearly states that in Law No. 31 Year 1999, there has been a bifurcation in the philosophy of punishment, where the philosophy of the imposition of basic punishment is retributive which aims to punish, while the philosophy of the imposition of restitution is restitutive which aims to restore.

Article 4 of Law No. 31 of 1999 clearly shows what is the philosophy of punishment adopted by the main punishment in Law No. 31 of 1999. This provision guarantees the presence of a punishment that is purely aimed at punishment to be

imposed on corruption convicts, regardless of the presence or absence of the consequences of corruption in the form of state losses. Article 4 indicates that the imposition of the main punishment through Law No. 31/1999 is a form of criminal responsibility of a perpetrator of corruption for the 'act' committed. As for the aspect of state losses, a separate punishment has been created. So that the imposition of restitution is a form of criminal responsibility of a perpetrator of corruption for the 'consequences' caused. Thus, it becomes clear that the two types of punishment are evidence of the separation of criminal responsibility requested by the state in the event of a corruption crime that causes state losses.

The phenomenon of bifurcation (branching) of criminal responsibility requested by the state is certainly not easy to understand, but in fact, in the event that the criminal act of corruption causes state losses, the perpetrator will be held liable for two responsibilities at once, namely for his actions (through the principal punishment) and for the consequences caused (through restitution). Of course, the above opinion can be considered as an anomaly or erroneous legal logic, because for a long time for offenses related to property, a punishment has been accustomed to being imposed because of the actions of an offender, and not for the consequences caused (Sinaga, 2023). Likewise, in the case of losses resulting from the offenses of embezzlement and fraud, where a conviction does not explicitly have an instrument for the recovery of these losses, even though the Criminal Procedure Code opens up the incorporation of compensation claims (Suhendro, 2023). It seems that the current culture of punishment is still focused on imposing punishment for the actions of a criminal, and has not focused on restitutive aspects.

The non-restitutive punishment strategy described above is what the drafters of Law No. 31/1999 wanted to prevent. Although the corruption offense itself has an aggravated principal punishment, it seems that restitutive efforts via punishment require their own portion, because the development of anti-corruption laws has shown the need to present a punishment instrument that can truly provide coercion for the recovery of state losses. Even though it is classified as an additional punishment, the presence of restitution punishment as the latest compelling element, has required the philosophy of restitution punishment to be completely separated from the philosophy of other punishments (strafsoorts).

This is crucial, because the effectiveness of restitution punishment will certainly increase if the bifurcation (branching) of criminal responsibility between restitution and main punishment can be clearly separated and make restitution as an independent punishment that is not bound or limited by the main punishment as mandated by Article 8 paragraph (3) of Supreme Court Regulation No. 5 Year 2014. Because in the legal positivistic perspective, the imprisonment that can be imposed on convicts of corruption cases that cause state losses, can be imposed with a total of 40 years of imprisonment, consisting of 20 years of basic imprisonment, and 20 years of substitute imprisonment if the substitute money penalty is not fulfilled.

If the 'burden' carried by restitution punishment has been comprehensively understood, then the next step is to ensure that restitution punishment can be independent and not bound by Article 12 paragraph (4) of the Criminal Code, and also to ensure its proportionality so that it is not imposed as a mere additional suffering like additional punishment in its general sense. In addition to restitution is

a punishment that has a special purpose and is not retributive in nature, but basically, punishment will not have any justification value if it is solely imposed to add more suffering (Harkrisnowo, 2003).

Conclusion

Restitution punishment is the result of more than 65 years of development, which has gone through many challenges and experiments. This punishment is not born from retributive aspects, but purely utilitarian based on restitution. Although classified as additional punishment, this punishment was not created to provide additional suffering. The sole purpose of restitution punishment is to restore state losses. However, the coercive tool of money penalty in the form of substitute imprisonment which has a maximum potential of 20 years seems difficult to be accepted, even though it has been given clarity through Supreme Court Regulation No. 5 Year 2014. Regarding the proportionality between restitution and substitute imprisonment, the biggest reason is because the state loss factor, which should only apply to substitute imprisonment, turns out to be a factor that also affects the main punishment in Attorney General Guideline No. 1 Year 2019. In this case, the main punishment and restitution punishment have the same influencing factors, thus creating a condition where a convict is twice punished for the same reason, or known as nemo bis punitur pro eodem delicto. To avoid this from being prolonged, restitution must be released from its inherent limitations. Even though it is an additional punishment, it is special and has a much more important purpose than the main punishment in the case of corruption crime. Then the restitution must be released from the influence of the main punishment and equalized, because based on the interpretation in the restrictive flow, in Law No. 31 Year 1999 there has been a bifurcation (branching) of criminal responsibility. In addition to holding criminal responsibility for the 'act' of corruption through the imposition of the principal punishment, Law No. 31/1999 also holds criminal responsibility for the 'consequences' of corruption. Both forms of accountability demanded by Law No. 31/1999, have a similar prison sentence, namely 20 years. This indicates that restitution must be equalized with the principal punishment and should no longer be constrained by general provisions, if you do not want to maintain the prolonged occurrence of nemo bis punitur pro eodem delicto.

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