The Principles of Law to Resolve Disharmony of Regulations in the Calculation of Financial Loss to the State

Ronald Hasudungan Sianturi, Rizkan Zulyadi, Rahmayanti
Department of Law, Faculty of Law, Prima Indonesia University, Medan, North Sumatera 20113, Indonesia;

*Corresponding Author: hasudungan_r@yahoo.com

Abstract

Upholding the rule of law remains a serious challenge in Indonesia, that law enforcement should be carried out based on the principle of legality, included in the calculation of financial loss to the state in law enforcement against corruption. Certainty calculation of losses to the state is difficult to be achieved because of disharmony some regulations in the definition, the process and subjectivity in determining the method of calculation of losses to the state. Conflicts of some regulations makes law enforcement became ineffective, inefficient and inconsistent. This research aims to investigate the principles of law in the calculation of financial loss to the state to overcome conflicting regulations. This research is juridical normative. The data used are related regulations and court verdicts. This research use statute approach and conceptual approach. This research found that disharmony of regulations in the calculation of financial loss to the state can be solved with lex superiori derogat legi inferiori and lex specialis derogat legi generali.

Key words: Disharmony of regulations, financial loss to the state, calculation, corruption.

Introduction

Corruption is an extraordinary crime because it inhibits the destination country to prosper citizens (Prasetyo, 2012). Corruption resulted in losses to the state so that the state loses the ability of the economy to prosper citizens (Agbiboa, 2012). As a state law, criminal law enforcement in Indonesia has the primary objective to restore the economic capacity of the country in its people prosper by prioritizing the return losses to the state through criminal restitution (Setiabudhi & Artha, 2014). Corruption compensation should be determined based on the principle of legality, which must be in accordance with the amount of state financial loss calculated by competent authorities, the appropriate procedure legislation with due regard to the substance of the right (Hadjon, Djatmiati, Addink & Berge, 2011).

In practice, the calculation of losses to the state are controversial because of disharmony stakeholder perspective on calculation of financial loss to the state such as: (i) the scope of the state finances; (ii) that institution calculating the financial losses of State authority; (iii) the existence of the state financial losses in post indemnification of state financial; (iv) the financial loss calculation method different countries. Disharmony of regulations concerning the calculation of financial loss resulting state of legal uncertainty in the eradication of corruption that need to be harmonized with the principles of law in Indonesia. Harmony legislation is one of the requirements of the legal system in the eradication of corruption effectively, efficiently and consistently.

Research Method

Procedure

This research type is juridical normative by using secondary data consist of (i) the primary legal materials in the form of legislation (ii) secondary legal materials from previous studies and books. The data analysis approach to legislation and approach to the concept.

Results and Discussion

Disharmony of Regulations in the Calculation of Financial Loss to the State

Disharmony of regulations in the calculation of financial loss to the state consists of (i) the scope of state finances; (ii) that institution calculating the financial losses of State authority; (iii) the existence
of the state financial losses in post indemnification of state financial; (iv) the financial loss calculation method different countries as follows:

**The Scope of State Finances**

The scope of state finances became controversial because of the difference in status of state assets set aside. Law No. 17 of 2003 on *Keuangan Negara* stated that state assets set aside a part of state finances, while Law No. 40 of 2007 on *Perseroan Terbatas* stated that the status of state assets have been separated to the limited liability company is not a part of state finances, but belonged to a limited liability company as a legal entity. Some cases become controversial because of the difference in perspective on the status of state financial losses, among credit lending from PT. Bank Mandiri to PT Cipta Graha Nusantara case (2005), the bioremediation Chevron case (2012), the credit lending from BNI 46 to PT Bahari Dwi Kencana Lestari case (2013).

**Institutions that Authorities Calculate the Loss of State Finances**

Indonesian regulations do not declare explicitly the institution having authority to calculate the loss of state finances. The court verdicts by using the calculation of financial loss to the state by the agency that has the authority of financial control, among others Controlling System of Government Internal (BPKP, Inspectorate General, Inspectorate Provincial Inspectorate District / City), the Supreme Audit Agency (BPK) and Law Enforcement (Police, The Prosecutor and Corruption Eradication Commission). Problems agencies that have authority in the calculation of financial loss to the state if there are differences in the calculation of financial loss to the state by each of these institutions.

**The Existence of State Financial Losses after the Return of the Country’s Financial Losses**

The existence of the state financial losses in the country’s financial losses after the return of a controversy because of a conflict between the two laws. Law No. 15 of 2006 on Supreme Audit Agency which states that compensation losses to the state removing elements while Law No. 31 of 1999 on Corruption Eradication stated that the payment of compensation does not remove corruption.

**The Different Method of Calculating the Financial Losses to the State**

The calculation of losses to the state can be done through five methods of calculating losses to the state, namely: (1) Total loss with some adjustments, (2) The difference between the contract price with the cost of purchase or cost of production, (3) Difference between the contract price with the price or value of a specific benchmark, (4) Acceptance that the rights of the country but not remitted to the state treasury, (5) expenses that are not in accordance with the budget, used for personal interests or certain parties (Tuanakotta, 2009). Selection of an impact on the calculation method of the difference in losses to the state, but until now there is no provision regulating the parameters / requirements for using a particular method so heavily influenced by the element of subjectivity from officers who calculate financial losses of the state.

**The Principles of Law in Indonesia**

The principle of regulation stipulated in Law No. 12 Year 2011 on the Establishment of legislation that is *lex superiori derogat legi inferiori*, the principle of *lex specialis* and *lex posterior derogat legi principle priori*. The principle of *lex superiori derogat legi inferiori* reflected in Law No. 12 of 2011 on the Establishment of legislation that declared unenforceable rules and regulations in accordance hierarchy consists of (1) Indonesia Constitution, (2) the MPR (3) law / government decree (4) government regulations (5) presidential decree (6) provincial regulation and (7) district Regulation. The principle of *lex specialis derogat legi generali* states that are specific regulations overriding the rules of a general regulations. This principle is reflected in Article 63 Point 2 of the Code of Law Criminal Law which states "If a deed entered in a rule of criminal common, regulated in the rules of criminal special, then just the special ones that are applied." This principle can only be used if both rules are in the same position on legislation hierarchy. The principle of *lex posterior derogat legi priori* states that the new regulations put aside the old rules equivalent. The principle of *lex posterior derogat legi priori* can be seen from the legislation, which generally states that are still applicable legislation is not contrary to the old regulation (Sian, 2015).

If there are differences methods in calculation of loss to the state carried out by the authority by legislation, then the determination of the competent institutions calculate the financial loss to the state should be based on the principles of the legislation, namely the principle of *lex superiori derogat legi inferiori*, principle of *lex specialis derogat legi generali* and principle of *lex posterior derogat legi priori*. 

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The principle of lex superiori derogat legi inferiori, lex specialis derogat legi generali and lex posterior derogat legi priori in the calculation of financial loss to the state are:

The Scope of the Country's Financial Losses

Legal principle in determining the scope of state loss is lex superiori derogat legi inferiori which are limited liability finance financial legal entities as stipulated in Law No. 40 of 2007 on Perseroan Terbatas throughout the financial wealth is not included in the separated state as stipulated in Law No. 17 of 2003 on Keuangan Negara.

Institutions that Authorities Calculate the Loss of State Finances

The legal basis of the authority of institutions to calculate the financial loss to the state is (a) Government Internal Control Systems (BPKP, Inspectorate General, Provincial Inspectorate, Inspectorate District / City) based on Government Regulation No. 60 of 2008 on Sistem Pengendali Intern Pemerintah; (b) Supreme Audit Agency (BPK) based on Law No. 15 of 2006 on Badan Pemeriksa Keuangan; (c) The Law Enforcement based on Law No. 2 of 2012 on Kepolisian Negara Republik Indonesia, The Attorney based on Law No. 16 of 2004 on Kejaksaan Republik Indonesia and The Corruption Eradication Commission based on Law No. 30 of 2002 on Komisi Pemerantasa Tindak Pidana Korupsi. Legal principle in determining the authority calculating the financial losses the state is lex specialis derogat legi inferiori hereinafter through lex specialis derogat legi generali. The calculation of losses to the state carried out by the Commission which has specialized in combating corruption. Prosecutors and police can do all the calculations are not executed by the authority of the Commission. The Supreme Audit Agency can perform calculations in connection with the state financial losses that are administrative violations, while the BPKP, Inspectorate General, Provincial Inspectorate, Inspectorate District/Municipal authorities can perform all calculations are not executed by the Supreme Audit Agency.

The Existence of the State Financial Losses after the Compensation Payment

Legal principle in determining the existence of state loss in post indemnification of state finances is lex specialis derogat legi generali. The payment of state financial losses originated from corruption case specific provisions of an administrative violation. Indemnification of the State finances caused no corruption does not remove a criminal offense as stipulated in Law No. 31 of 1999 on Pemberantasan Tindak Pidana Korupsi. Returns the state financial losses caused by administrative violation resulted in the abolishment of the State financial losses as stipulated in Law No. 15 of 2006 on Audit Board of the Republic of Indonesia.

The Method of Calculating the Financial Losses of Different Countries

Legal principle in determining the method of calculation of financial loss to the state is a lex specialis derogat legi generali. Losses to the state of expenditure on procurement of goods / services can be accomplished by (1) total loss with some adjustments, (2) The difference between the contract price with the cost of purchase or cost of production, (3) The difference between the contract price the price or value of a specific benchmark by taking into account the value of benefits from the procurement of goods / services. Losses to the state from spending apart from the procurement of goods / services using the expenditure method that does not comply with the budget. Financial losses from reception using the method acceptance to the Government but not remitted to the state treasury.

Conclusions

The principles of law to resolve disharmony of regulations in the calculation of financial loss to the state consists of lex superiori derogat legi inferiori hereinafter and lex specialis derogat legi generali; the principles of law in determining the scope of state loss is lex specialis derogat legi generali; the principles of law in determining the authority calculating the financial losses the state is lex superiori derogat legi inferiori hereinafter through lex specialis derogat legi generali; the principles of law in determining the existence of state loss in post indemnification of state finances is lex specialis derogat legi generali; the principles of law in determining the method of calculation of financial loss to the state is a lex specialis derogat legi generali.

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