

Compensation as Legal Protection for the Suspect, Defendant and Convict in the Criminal Case

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Abstract : Declaration of principles justice for the victim of crime and misused of power on point B of the misused power number 19 stated that the states must be consider to put under the national law, norms that have forbidden to misused it. Spesifically, the restoration must cover the restitution and/or compensation, together with the help and support on materiil, medical, psicology and social but in the case of implementation is often the legal officers conduct the wrongact in order to enforced the law, like to arrest and detention the suspect witouht a proper procedure that mentioned under the Penal Code of procedural law, The wrongful act under the law implementation so the suspect is free, have found the error in persona so need to have a right for compensation. Furthermore, it is need to analysis about the right of compensation for the suspect, defendant and convicted. The purposed of this study is to know the essence of compensation for the suspect, defendant and convicted under the criminal case. Type of this study is normative research with legal approach, philosophy approach, case approach and concept approach. The result of this research have shown one basical things that included in the penal code of procedural law which is the consideration of human rights for suspect and defendant as a guarantee for the protection of honor and dignity. The rights of the suspect or defendant are the constitutional right that given since they were born or given by the law. The right is given by the law related of its status as a suspect or defendant, one of the principle which under the penal code procedural law is the principle of the right for compensation for the suspect, defendant and convicted under the criminal court system as mentioned under point d of the general explanation of penal code of procedural criminal law which stated that to whom that to be arrested, to be accused or being prosecuted without any reason according to the law or due to any mistakes must get the compensationor rehabilitation since in the level of investigation. Therefore, it should be if the examination of pre court of the compensation demanding is going, the investigator should not in a rush to bestow main case to the court, it shall wait until all the investigation process have finishes due the short time that judge only have a week to finish the examination and decide the application.

Index Term : Compensation, Legal Protection, Suspect, Defendant, Convicted.

I. INTRODUCTION

The Constutution of the Republik of Indonesia Year 1945 on the third amendment Year 2001 which is on article 1 point (3) asserted that Indonesia is a legal state (*rechtstaat*), and not based on power (*machtsstaat*). It means that each citizen must act as the existing law. *Rechststaat* concept have posited the human rights as one of the identity. There are two big tradition of legal opinion of the state in the world, which is the state of law under European Continental tradition and State law under Anglo Saxon which is called *Rule of Law*.

Along together with those above, one of the scholar that often as referenced whne tall about state law (*Rechtsstaat*) under European Continental tradition is *Friedrich Julius Stahl*. on his view, *Rechtsstaat* is the restoration from the opinion from *Immanuel Kant*. According to him, there are four elements that must be have and became the characteristic of the state law, they are human rights (*grondrechten*); separation of power (*scheiding van machten*); The government based on the law (*wetmatigheid van het bestuur*); and administration court (*administratieve rechtspraak*).

Those statement is along well with Hans Kelsen statement as mentioned by M. Hatta, that one of indication to be called state of law, like human rights (H. A. Mashyhur Effendi, 1994). For Indonesian Nation, the definition of human right protection is can be seen under the constitutional law of 1945 (Fourth amendment year 2002) on the article 28 A to article 28 J. While the article 28 D point (1) set that everyone have the right for recognition, guarantee, protection and justice legal certainty also equal treatment before the law. The protection of human right is described by the law under the constitutional 1945. One of the rules of law that have described human rights is law number Nomor 8 Tahun 1981 on Book of procedural criminal law.

Declaration for principles of justice for the victim of crime and misused power on point B of the misused of power number 19 that mentioned “states must consider to involve it under national law of norms that forbid the misused of power” Spesifically, the restoration must be cover the restitution and/or the compensation, also supported on materiel, medical, psikology and social demand. Although in fact, is often the legal officer under conduct their duty have done the wrongful act as mentioned

under the law, like the investigator conduct the forceful measures like arrested and accused which is not along with the procedure that mentioned under the criminal law procedural or due to the error in Persona which is not that person who conduct the crime and get punishment.

Case of example that well known to the error in persona is Sengkon and Karta cased that happened in. Court of Bekasi and high Court of Bandung have stipulated the Sengkon bin Yakin with punishment of 12 years of jail and Karta or known as Karung known as Encep bin Salam with the punishment of 7 years of jail due to assumed that proved to rob and kill Sulaiman bin Nasir and his wife Siti Haya binti Abu. While in other case, have proven that the robber and killer the couples of Sulaiman are Gunel, Siih and warsita (Adami Chazawi, 2010). Another case is the case of the death of Marsinah, where nine of defendants was on jail for 5 months to 2 years, before proved unguilty by the supreme court and Mohammad Arif Budi who defendat as hold-up of taxi driver that was in jail for 166 days before released by the judge of the court in North Jakarta (Leden Marpaung, 1997).

In the court of North Jakarta, Pre court application that applied by Hermin which advocated to O.C Kaligis. The applicant is brother from suspect Sudarto (almarhum) that have arrested on 25 April 1985 by the police officers from Resort of Police North Jakarta with the reason that have involved in the stealing case with torture in the village of Mauk Tangerang on 24 April 1985. Under the arrested, the legal officers has not shown the letter of duty and didn't give the letter of arrest to Sudarto and sent the copy to his family. The applicant has applied in order the judge of pre court decide that the arrested was no legal and compensated the lost around Rp. 3.000.000,- (3 millions rupiah). Moreover, the judge decision stipulated that application was rejected with the reason that suspected was caught under hand (O.C. Kaligis, 1997).

According to those above, the issue of this research is the legal officer often to have the wrongful act in order to conduct the law, like to arrest and to accused of the suspect that not among with the criminal procedural law, error in persona, so need to get compensation for its lost.

II. RESEARCH METHOD

Type and Reasearch Approach

The type of this research is normative research by using the legal approach, philoshophy approach, cases approach and conceptual approach.

Type of Material Law

Type of of materiel law in this research is primary and secondary material law.

Data Analisis

The primary and secondary material that have analysis by used the qualitative analysis with Statute Approach method, analysis the legal material that direct collected in order to get the description of the material substance that will discuss in this study.

III. RESULT

The Essential Of Compensation For Tthe Suspect, Defendant and Convicted in The Case of Criminal Law

The suspect, defendant and the convicted is the person who assumed to conduct the criminal act and have prosecuted, examined and judged in the court. A person who have broken the law, person who disturbing the public order and caused damaged to other people. By conduct the act against the law, he/she have caused the damage to other people than become a victim from his/her act.

Human rights is a gift from the almighty God to human since he was born. Since the God created the human being on this earth, God had given the human with human rights. Human rights in general means the right that adhere to human being characteristic, while without it, a human being can't alive. Human right is given directly from the God. So there is no any power beyond of it. Human rights is not given by the other human being, the government or constitution. Its only the honority and enforce the right, so human being is able to live with their honor and dignity.

Human rights is a given from God as the consequence of the existing of human being as created from the God. These rights is natural. In the Al-Qur'an, one of the clause that mentioned about human rights is not only willing the human being or any nation to make a relationship, but asserted the human being to be free as well and have same position as mentioned in the Al-Qur'an Surat Al-Hujurat point 13. According to the meaning of Surat Al-Hujurat point 13 is so the human being is connected eachother and help eachother. There is impossible the good relationship if the equal right and freedom is not preserved. How do we

have a relation with other if there is pressure on an equal position under this relationship. So it necessary to have equal position first then have good relation between human being, the respect other people rights.

Article 1 point (1) The Law Number 39 Year 1999 of human rights have defined the right as a right that adhere on the essential and existing of human being as the creatures of God and it's a gift that must be respect, put in upheld and to be protected by the State, law and government and everyone for the respect and protect of the honor and dignity as human being. As the state of law, Indonesia is respect the law and rule of law, means that the satte in conduct anything should be based on law and able to responsible. Culture of law that have developed in the whole of society in order to create the willingness and meet legal compliance in the law supreme framework and in the case of law enforced.

The definition of the human rights protection under the Constitution of the Republic of Indonesia the fourth amendment found in chapter XA article 28A to article 28J, the implemented to the law under the constitution, one of them is Law Number 8 Year 1981 of criminal procedural law.

The provision of article 1 point (1) penal code arranged that an action can not be conviction, except based on the law of criminal act that have existed before. Those definition included the unsure that criminal law must be source on the law, this is called legality principle due the authority under conduct its duty binded by the law, so prevent from arbitrariness. It means there is a ceritanty law for the justice seeker. Second unsure is the provision of criminal law under the law may not retroactive, this principle is to protect the people from the arbitrariness of the authority trough the legislative institution that have repressive characteristic so take a rectroactive law is against the law and violation the human rights.

On the general description on criminal procedural law point 2 mentioned that the state of the Republik of Indonesia is the state of law based on Pancasila and Constitution 1945, respect human rights and guarantee the whole citizen in order to get equal position under the law and the government and obliged to respect the law and government without any exception. Further more still on point 2 the general description that the development in legal aspect of criminal law have purposed that people are able to will their right and obligation so increased the attitude of law enforcement along with the fungtion and authority of each in order to get the public order and for the legal enforcement in Republik Indonesia as a state law that along well with Pancasila and Constitution 1945.

Criminal Law Procedural is created to replace the criminal law procedural under HIR (*Het Herziene Inlands Reglemen*) or Reglemen of Indonesia that made it up again, the making process is purpose to make the process of criminal court based on the due process of law, where is the rights of the suspect, defendants and convicted are protected as part of the civil right and its part of human rights.

The function of criminal law procedural is to restrict the state power in order to protect all the people who involved in the criminal procedural court, so it expected the guarantee of the protect for the suspect and defendant from legal officers abused. One of the basically idea that included under the procedural criminal law is posited the human rights for the suspects and defendants. The rights of the suspects and defendant is the constitutional rights that have given since they were born either given by the law.

The guarantee and protect to Human rights under the criminal procedural law that have the important meaning, due to most of the process from criminal law procedural to lead to the restrict of human rights like arrest, accused, detained and punishment.

Morevar the protected means is along with the criminal procedural law purposed which is in the implementation level need balance between the interest of justice seeker as individual with the public interest/ state interest or others interest with some of the investigation. Therefore, under the criminal procedural law, the case of investigating must be conduct by understanding human being that obliged to be protected their honor and dignity. Although the purpose of law enforcement is to keep and protect the people interest, the law enforcement is not allowed to sacrifice the right and dignity of the suspect and defendant. In contrary, the protection of honor and dignity of the suspect and defendant can not sacrifice the people interest. The legal officer is must able to posited the balance principle that mentioned under the criminal procedural law so not to sacrifice both of the interest.

One of the principle that mentioned in the criminal procedural law is the compensation principle for the suspect, defendant and the convicted on their criminal court process as found in point D the general explanation of criminal procedural law that stated to everyone who get arressed, accused, prosecuted or judged without any reason refer to the law or due to the error in persona must be get compensation or rehabilitation since in the investigating level and the legal officers that alleged negligence on purpose or because of their negligence broke the law should sentenced or get administration punishment.

The principle of compensation for the suspect, defendant or convicted first time arranged under article 9 Law Number 14 Year 1970 (Now is Law Number. 48 Year 2009 of judicial power which is stated :

- (1) Everyone who is arrested, accused, prosecuted or being judged without the law or because of the negligence of law, have the right to apply for compensation and rehabilitation;
- (2) The officer whom alleged negligence on purposed as mentione on point (1) would be punishment as mentioned on provision of the existing law;
- (3) The provision concerning the procedural of compensation, rehabilitation and the imposition of the compesantion is governed by the law.

The principle of compensation for the suspect and defendant that have arrested or accused which is not found under ICCPR, Article 9 point (5) : Anyone who has been the victim the victim of unlawful arrest or detention shall have an enforceable right to compensation. Further more on the article 14 point (6) ICCPR stated if the person stipulated punishment with legally binding decision, and if then decided contrary or get pardoned according to new fact or just found the evidence that there is a wrongful act on enforced the justice. So the person who is suffered from that punishment must be get compensation according to the existing law.

Before the law of judicial power has existed, in Indonesia has no regulation about the compensation, except through the civil procedural based on the *onrechtmatige daad* on article 1365 or the abuse of law by the authority (*onrechtmatige overheidsdaad*).

The principle of compensation is then implemented to the article 68 of criminal law procedural that mentioned the suspect or defendant have the right for compensation and rehabilitation as mentioned under article 95. Beside of those two article, article 77 point b of criminal procedural law is given the right for compensation for the suspect and defendant that the case is stop on the investigating level or in the level of prosecution.

When it concerned, to the article 68, the rights of compensation is only restrict to the suspect and defendant, but on article 95 point (1) on criminal procedural law, the rights of compensation is extended, is not only for the suspect and defendant but also for the convicted.

Compensation is the right of everyone to get fulfillment for the demand like compensation in financial due to the arrested, accused, prosecuted or being judged without any reason based on law or because of the negligence of the person or regulation that mentioned under this law (article 1 point 22 KUHAP). What is mentioned on article 1 number 22 same purposed with article 95 point (1). The differentiate between those two definition is on the additional unsure for the reason of compensation, while article 95 point (1) is due to the wrongful act without refer to the existing law.

To get the right of compensation for the suspect, defendant, must be conduct the evaluation first whether in the process of the investigating is there is a mistake or error while use the authority to conduct the legal enforcement. Criminal procedural law have given the authority to the new institution under the first court to evaluate it, which it called the precourt institution. The compensation is through the pre court process is the way to rehabilitate the right of the suspect and defendant with financial compensation.

IV. DISCUSSION

Human Rights Protection and Protection Right of The Suspect, Defendant and Convicted.

Human nature created by God as the individual who have sense and freedom of willingness, this number of value in order the human being is not allowed to used as a tool or being forced to conduct against their conscience. (Hyronimus Rheti, 2011). The right of everyone to be recognized for all people, all level, institution, government and belief. Those right have not dependent to the law protection and able to protect by anyone and whenever. (Anton Sujata, 2000). According to H. A. Mansyur Effendy (1994), human rights is the basic right/ absolute right for human being, given by god since born and till death. While in the implementation conduct with the obligation and responsibility. In some of the existing law, person who has no born yet is given certain of right as well as after the death.

Along with those above, Arief Budiman stated that human rights is the right of human nature, when she/he born directly have the human right as human being, in this case human rights is standing out from the law, so it must be separate between the right of the citizen and human rights (O.C. Kaligis, 2006).

Basically, human rights signed by two characteristic. First is the balance between the rights and obligation, second is the individual interest and the people interest. So the protection of human rights is cover the two unsure, which are the personal right and the people rights. The balance between humanity aspect and the society aspect is contain the meaning of rights between the individual rights in one side and the social rights in other side. In other words, the law is must be manifested and also protected the human rights both for individual and social right. It is means that human rights is not only the characteristic and identity of law but also the substance and soul from the law itself. Law in substantive way is not given the guarantee of protection the human rights (H. Soeharto, 2007).

The question is often come up, is the mentioned of rights is necessary must be together with obligation, so become the human right and obligation. This view is started from the understanding, that the right and obligation is simetris. It is truth, but need to remember the simetris does not exist under the same individu. For example, if A have the rights of X, then B has the right that related to X, or if A has an obligation Y, then B has the right that related to Y. This definition under human rights is stick to the human being and only own by the individu, while the obligation is part of the simetris one that found on the state due the state has the authority to protect the rights of individu. So if willing to use the right and obligation, so the understandable is there is a right for individu and the obligation for the government to protect the individu to all the violation possibility, included the violation from the government officers. (Mardjono Reksodipuro, 1994).

Moh. Kusnadi and Bintang Saragih (1983) have opinion that the characteristic of the rule of law that based on the state law, like:

1. The recognition and protection of human rights that have equality under the politic, law, social, culture and education aspect;
2. The neutral and freedom court, not involved by any power or anything;
3. The legality of law in the whole menaing and shaped.

On the national Conference III of Persahi in 1966 provide that the principle of state law Pancasila must involved the principle as following:

1. The recognition and protection of human rights that have equality under the politic, law, social, culture and education aspect.;
2. The neutral and freedom court, not involved by any power or anything;
3. The guarantee of certainty law in all matter (Miriam Budiarto, 1988).

The human rights enforcement in state of law according to Pancasila as mentioned by Marzuki Darusman, like :

1. The understable of human right and Pancasila, there is no conceptual contrary about the essential of human dignity and the value of individu that must be protect;
2. The requirement that the implementation of the government must be based on the constitutional system that recognized, protect and guarantee the rights of the citizens;
3. The asserted that the essential distinguish between the idea of state law with the definition of the state law according to Pancasila (H. Soeharto, 2007).

Kelsen (1995) in his positivism view based the efforts of forcibly use (*dwang middelen*) as a legality that given by the law or positive law. The effort forcibly use (*dwang middelen*) to the crime is a paradox. The sanction given as the characteristic of special law that given to the damaged in order to reach the real purposed that must be get from the treath of revocation life, freedom or someone property. In other words, enforcement is used to prevent the forcibly in the society.

Criminal procedural law according to the philosophy of the nation because underneath is arranged by the protection of principle of the dignity of human being that already mentioned under the Law Number 14 Year 1970 of the main provision of judicial power. There are ten principles that asserted under the number 3 of general explanation of criminal procedural law. The ten of those principles, divided into 7 general principles and 3 special principles by Mardjono Reksodiputro (Mardjono Reksodiputro, 1994) :

1. General Principles :
 - a. The equal treatment before the law without any discrimination;
 - b. Presumption of innocence;
 - c. The Rights of compensation;
 - d. The Right to have legal aid;
 - e. The right of fair trial for the defendant on the court;
 - f. Fast and easy court with low cost;
 - g. The court is open for public;
2. Special Principles :
 - a. Violation of individual rights (arrest, accused, investigate, prosecuted) must be conduct according to the existing law and by written commanded.
 - b. The right of the defendant to be told of their conjecture and charged;
 - c. The obligation of the court to conduct the monitoring of the execution of

The right of compensation for the suspect, defendant and convicted is the effort of protectection of the human right for them. As mentioned by Martiman Prodjohamidjojo (1982) the compensation principle is the guarantee of rights for the suspect, defendant, and convicted due to against the law or wrongful act or the action without refre to the existing law about error in persona or the abused of law and implicated the damaged to them. Further more Martiman Prodjohamidjojo (1982) stated on article 95 basically have given the protection of rights to individual rights and or his/her property from the wrongful act that against the law of misused the power (*onrechtmatige overheidsdaad, misbruik van bevoegheidsorgaan, misbruik van macht; detournement de pouvoir*).

Along with that, Andi Sofyan (2013) stated that claim for compensation is conduct by the suspect or its heirs is the effort of protection of human rights and human dignity when the suspect and defendant get the unlawful act. This is also mentioned by Ansorie Sabuan, dkk (1990), the provision of compensate under the criminal procedural law is a guarantee for human rights protection of the suspect, defendant and convicted that have arrested and accused without consider the existing law.

As same as what Djoko Prakoso (1988) Stated that it is the right to get compensation as the consequence of the release of the personal rights for those people mentioned above without considering the law. Also M. Yahya harahap (1993) said that the

claim of compensation for those people mentioned above or their heirs is the created of protection human rights and dignity of human being from unlawful act.

Pre Court institution has existed from inspiration of the rights on *habeas corpus* under court system *Anglo Saxon*, that guarantee the fundamental human right, specially right for freedom. *Habeas corpus act* is given the right to ap person trough the witten command letter of the court that claim the officer to conduct the arrest and accused of himself. This is guarantee that the restriction of person freedom is already fulfill the law provision. (Loebby Loqman, 1987). The function of pre court is the created of monitoring to the human rights protection, and the monitoring is conduct by the judges.

The pre court institution is became of central point and give new spirit, specially to the guarantee of rights for the suspect, due to the transparance and public accountability characteristic which is the requirement of the legal enforcement. (O.C. Kaligis, 2006). The control of the forcibly use that conduct trough the pre court is purposed to enforcer the law and to protect the rights of suspect/defendant on the investigation and prosecution level. In order to conduct the investigation, the investigator is not allowed to conduct the forcibly act, like arrest and/or accused. Neither the prosecutor, may conduct the forcibly act for the interest of arrested. Basicly the forcibly act that conducted by the investigator and prosecutor is violation the human rights, morevar the criminal procedural law is permit it with the certain requirement that provided by the criminal procedural law.

Due to its character that human rights violation, so the law maker assumed to have a correction or monitor to the implementation. The monitoring is conduct by the suspect, defendand and investigator, prosecutor and other third party that have interest on it. The existing of pre court as the control of tool, so may be prevent the forcibly use on the investigation level. The restriction of this forceful measure is more prtect the rights of the suspect and defendant.

From article 1number 10, article 77 and article 95 point (2) of criminal procedural law can be mentioned that one of the authority of precourt is to investigate and decide the claim of compensation both the compensation of criminal case is not go to the court due to the discontinuance prosecuted or the compensation for the suspect, defendant or convicted due to arrested, accused, prosecuted, judged or stipulated other action without considering the existed law or because of the wrongful act. Come with question, how if the case is already go to the court or event have been punished while the defendant or convicted felt to have lost of those process? Article 95 point (3) Criminal procedural law have arranged that claim for compensation of the case that have brought to the court, so the application of the comeensation is need to investigate and decide by the judge who prosecuted the case. And the investigation will be followed by the criminal procedural law as mentioned on article 95 point (4) Criminal procedural law/ KUHAP.

V. CONCLUSION AND SUGGESTION

One of the basic point that concluded under the criminal pceural law is posited the human rights of suspect and defendand as a guarantee to the human right protection. The rights of the suspect and defendand is the constitutional rights that given since they were born or given by the law. The rights is given by the law is related to his status as a suspect or defendand, one of the principle that included under the criminal procedural law is the compensation principles as mentioned on article d general explanation of criminal procedural law that everyone who arrest, accuse, prosecutes without considering the existing law or due to wrongful act, so the legal officer who negligence would be punishment or administration sanction. The the investigator should be work carefully on the investigation process and not rush to bring the case into the court, while judge only have one week to finish the investigation and decide that application.

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