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Plea Bargaining in Corruption Cases: A Solution for the Recovery of Financial Losses by Indonesia?

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ABSTRACT

This paper discusses the possibility for Indonesia of the plea-bargaining model as a solution for the recovery of financial losses to the state in corruption cases. Plea bargaining has become a common procedure in common law countries, where the majority of cases are resolved through the mechanism of plea bargaining. This paper uses a conceptual, historical, and comparative approach through literature review to examine how Indonesia as a civil law country could apply plea bargaining in its criminal justice system, particularly in cases of corruption involving financial losses to the state. This paper concludes that corruption prevention efforts focusing on state losses require new approaches to be more effective; this would be in line with both the UNCAC as well as the applicable elements of the legal system in Indonesia. The mechanism of plea bargaining, an agreement reached between the prosecutor and the accused persons in which the accused person acknowledges his or her guilt and willingly returns the gains of their corruption, is, on the other hand, still in line with one of the clauses in the UNCAC, and also has similarities with the existing provisions of the Indonesian Criminal Code through the *Afdoening Buiten Proces* as well as in the Law on Economic Offences.

Keywords: Corruption, discretion, plea bargaining, state financial losses

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INTRODUCTION

Corruption eradication has become a common concern for all countries, especially for the signatory states of the 2003 United Nations Convention Against Corruption (UNCAC), including Indonesia. The preamble to this convention expresses concern about the serious threat posed by corruption to the stability and security

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of the society, including its tendency to undermine the core ethical and legal values of democratic institutions and to disrupt sustainable development and law enforcement.

The UNCAC is particularly concerned with cases of corruption involving large quantities of assets that form an important part of the country's resources and can threaten the country's political stability and sustainable development. The convention also emphasizes that corruption is an international phenomenon affecting the society and the economy of the entire world.

Efforts to combat corruption (as well as other crimes) are carried out primarily through the criminal justice system (CJS). The criminal justice system is closely related to the legal system in a country. The criminal justice system is a sub-system of the national legal system as a whole that is adopted by a country (Hiariej, 2005).

Pertaining to the enforcement of anti-corruption laws, Article 36 of the UNCAC states that state parties shall, in accordance with the fundamental principles of their legal system, ensure the existence of bodies or specialized agencies to combat corruption through law enforcement. Interestingly, the convention underlines that each state party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offense established in accordance with the convention.

The provision listed above, forms a model for the prevention of crime: namely, plea bargaining. In the limited number of cases where the accused person is willing to cooperate with law enforcement in the investigation or prosecution of corruption, the possibility is raised of reducing the sentence of the accused person who provides such cooperation. This paper discusses the role of plea bargaining in the prosecution of corruption cases. Can this model provide a solution for recovering financial losses suffered by the state in corruption cases in Indonesia?

METHODS

This paper applied the qualitative method and conceptual, historical, as well as comparative approach through a literature review to examine the issue discussed. The data collection technique applied used available data, such as available public documents and official records (Singleton et al., 1988). The data collection method applied in this research was a document study aimed at seeking legal materials, namely primary legal documents which include laws and regulations (Soekanto, 2010).

In addition to studying documents through primary and secondary legal materials, comparative research materials also examined as part of the process of aligning and cross-checking based on various secondary data obtained, which could be done by conducting interviews (Denzin & Lincoln, 1994). Interviews conducted to obtain accurate information concerning

the application of plea bargaining in the criminal justice system and on whether or not the concept of plea bargaining could be potentially applied in Indonesia.

The data obtained was analyzed by processing data obtained through the literature review supported by interviews, in order to answer the question "can this model provide a solution to financial losses by the state in corruption cases in Indonesia?" In the first part, plea bargaining in common law countries was discussed, followed by comparison with similar models in civil law countries. The application of plea bargaining in corruption in several countries was discussed further. After that, the research result was used to discuss the issue of corruption in Indonesia and the weaknesses in recovering state losses by using the conventional model. Furthermore, the results of the literature review and interviews were used to discuss the possibility of applying plea bargaining in the Indonesian justice system, particularly in corruption cases with a focus on the recovery of state losses. A critical view of applying plea bargaining in general as well as in corruption cases and relevant theories were also used in the discussion on the main issue in this paper.

RESULT AND DISCUSSION

Plea Bargaining: Only in Common Law Countries?

Plea bargaining has not been practiced widely in Indonesia, but it has been discussed, developed, and practiced in other countries, including those that adhere to the common law as well as those that adhere to the civil law system. In the Common Law legal tradition, confession of a guilty plea to prove an offense has been known for centuries (Alschuler, 1979). However, it was only in the 19th century that there was evidence of plea bargaining being a normal practice in Great Britain and the United States (Mather, 1979). At present, plea bargaining has become a major procedure in common law countries, where the majority of cases are resolved through the mechanism of plea bargaining (Langbein, 1979; see also Dubber, 1997; Dusek, 2010; Fisher, 2003; Flynn & Kate, 2011; Mnookin, 2005; Rauxloh, 2012; Thaman, 2010; Tuner, 2009). In the Brady v. United States (1970), the court concluded that plea bargaining was: "inherent in the criminal law and its administration"(Alschuler, 1979). The American criminal justice system is a system of pleas (Crespo, 2019).

Plea bargaining is an exchange of concessions offered by law enforcement for the accused person's guilty plea. These concessions may be explicit or implicit and may be related to the reduction in the sentences handed down by the court or recommended by the public prosecutor, an alteration of the crime charged, or other conditions (Alschuler, 1979).

Plea bargaining is a negotiation process in which the public prosecutor offers the accused persons to admit their mistake (guilty plea) with their own conviction and awareness. According to Joshua Dressler, plea bargaining is a process in which the accused person in the prosecution agrees to conduct "self-conviction" with some

reciprocity from the public prosecutor (for the benefit of the accused person) (Dressler, 1997).

Through the mechanism of plea bargaining, the parties can mutually agree on certain things and they have the incentive and authority to bargain (Mnookin, 2005). The negotiations between the public prosecutor and the accused persons (or more accurately with the accused person's lawyer) may be of three types: (1) horizontal plea bargaining, regarding the number of indictments faced by the accused person; (2) vertical plea bargaining, regarding the severity of the indictment, indictment for serious crimes or quantity of crimes; and (3) sentence bargaining about the severity of the threat of punishment. In the case of some serious charges the three types of plea bargaining can be negotiated together.

One of the advantages achieved by plea bargaining is to reduce the burden of state-borne cases, especially to the prosecutors. Plea bargaining may also be justified by the weak position of the prosecutor who, if the case is forwarded to trial, can be defeated; this would induce the prosecutor to suggest a plea bargain. When dealing with victims of crimes who do not wish the case to be resumed, or other similar factors, plea bargaining may provide the best possible resolution to the case (Holten & Lamar, 1991).

The philosophy that underlies plea bargaining, among other things, is the view that trials are "zero-sum games" whereby both sides (the prosecutor as well as the accused persons) are bound to lose, none of the parties benefits. Therefore, negotiation or plea bargaining offers at least some advantages to both sides. This argument is also related to each side being aware of their weak position thus facing potential defeat if they proceeded to trial, hence an offer for plea bargaining is made or accepted. Sometimes, it may also be related to a victim who does not wish to continue the case and opts for settlement through plea bargaining, along with other factors (Holten & Lamar,1991).

Apart from the advantages of the above described guilty plea system, certain disadvantages of the same have also been experienced in its implementation in countries that have adopted it. This issue is discussed by Smith (1987) in his piece "The Plea Bargaining Controversy". Some critics argue that a system of negotiated justice undermines the deterrent effect of punishment and can be used by influential perpetrators to evade legal sanctions. Others maintain that perpetrators with prior criminal records, and hence more firsthand experience with the justice system, are able to negotiate more favorable sentences. Additional attacks on plea bargaining focus on the alleged coerciveness of the process (Alschuler, 1979; Fine, 1987; Kishan, 2018; Schulhofer, 1992; Smith, 1987). The policy debate over plea bargaining has focused, in large part, on one question: do plea bargains help accused persons or hurt them. Proponents of plea bargaining argue that plea bargains are good for the accused persons. The other side, as mentioned above, explores the coercive features of the plea bargaining process (Gill & Shahar, 2009).

The application of this common law procedure in the CJS of civil-law countries is of some interest, though naturally each system will apply the mechanism according to its own peculiarities. The adoption of judiciary practices from other legal traditions, such as Civil Law countries adopting criminal legal procedure concepts and practices from Common Law countries and vice versa, is neither new nor recent. The history of the development of criminal justice in Civil Law countries clearly indicates the existence of convergence (Thaman, 2008). The authors use the German model as an instance of the civil law process which has been using plea bargaining.

Plea bargaining has been practiced in several countries that adopt the Civil Law tradition, including Germany. In the old tradition of Civil Law countries, a guilty plea (admitting to one's guilt) was indeed admitted as evidence; however, it could not be used for the judiciary process. However, in the course of their development Civil Law countries such as Germany have accepted plea bargaining. As a Civil Law process, Germany's criminal judicial system is aimed at seeking material truth. The court must be able to uncover the truth, beyond the facts previously submitted by the parties (the public prosecutor and the accused person's attorney) (Rauxloh, 2010). In 1987, the German Federal Constitutional Court decided in a case that in order for an informal settlement to be acceptable, the following requirements must be met: involvement of all related parties; pronouncement of the entire negotiation process and particular details in the main trial session; the absence of *ultra vires* commitments; and the result of negotiation must be lawful and justified; although such agreement is non-binding, there may be no deviation from the agreement for no cause; and related to the principle of material truth, the tribunal must examine whether the accused person's confession is authentic.

On May 28, 2009 the German Federal Parliament ratified the Bill for the Regulation of Agreements in the Criminal Procedure, formalizing agreements reached in a criminal court. The German Law on Criminal Proceedings (*Strafprozessordnung*, StPO) was supplemented with a new article, namely Article 257c, allowing agreements in the criminal court without violating the principles of the existing German law on criminal proceedings providing for the same (Rauxloh, 2010). The said article provides for agreements made among the court, the public prosecutor and the accused person's attorney-in-fact. The agreement becomes valid once the court announces the substance which is allowed in an agreement, and it is subsequently agreed to by the prosecutor's office and the accused person's attorney-in-fact. The provisions of the above mentioned new article are aimed at ensuring that there is material justice. A verdict can only be passed after the charges are thoroughly examined and there is sufficient reason to believe that the confession to wrongdoing is true. The said provision also excludes "charge bargaining" known under the Common Law system. (Rauxloh, 2010).

The above description of agreements under German criminal proceedings (the German model of plea bargaining) is rather interesting as on the one hand there is the on-going practice of informal negotiation for agreement between the parties prior to holding hearings, while on the other hand as a Civil Law process it upholds material truth in its law on criminal proceedings, thereby creating convergence. It is submitted that such practice would be more suitable if plea bargaining were to be applied in Indonesia, due to similarity in principle namely the criminal justice system seeking material justice; thus despite an agreement having been reached between the accused person and prosecutor, seeking the material truth remains the main guiding principle in the criminal court. The above overview of plea bargaining in Civil Law countries, particularly in Germany, provides useful insight in the context of introducing the possibility of adopting plea bargaining in Indonesia, especially in view of formal agreement in plea bargaining.

The official format of the agreement is extremely important because as mentioned above in the discussion on plea bargaining in Germany, as Civil Law process where the criminal procedure law is seeking material truth, it needs to be emphasized in order to convince the adjudicating judge that the bargaining process conducted prior to the hearing was not a result of coercion or due to the accused person telling a lie, wishing to achieve another goal by making such confession (for instance, confessing to a deed which was in fact committed by another person, whereby such other person has promised to provide various generous compensation to the accused person admitting to wrongdoing). In other words, the official format provides legal certainty. The official report on the agreement between the accused person and the public prosecutor along with the supporting files must be submitted in a complete form to the judge. The judge will then make a decision in his/ her verdict based on such an official report.

Having discussed the implementation of plea bargaining in Civil Law countries, particularly in Germany, we shall follow up with the main issue of this article whether the plea bargaining model can be chosen as an alternative solution to handle corruption cases and the problem of state financial losses in Indonesia.

Corruption Issues in Indonesia and State Financial Losses

In Law No. 31 of 1999 and Law No. 20 of 2001 ("Anti Corruption Law"), there are more than 30 types of corruption that are regulated in 13 articles which can be grouped into seven categories of corruption: The first category of corruption offenses is corruption "detrimental to state finances". The second category is bribery. The third category is embezzlement in the office. Embezzlement in this context is a form of corruption committed by someone who holds a position as a public servant who deliberately embezzled money or securities. The fourth category is corruption in the form of blackmail in office. The fifth category offense is cheating/ fraud. There are about

six criminal acts included in this fraudulent group namely contractor committing fraud, the project supervisor allows fraudulent acts. The last category is corruption in the form of a conflict of interest in procurement (Komisi Pemberantasan Korupsi, 2006).

The criminal act of corruption, which causes enormous losses to the state, is perceived to hamper national development. Each year the number of corruption cases—as well as state losses caused by corruption—increases. The large number of cases results in an increase in the backlog of criminal cases which must be resolved by the CJS. The length of the corruption case investigation process itself creates additional law enforcement issues in the area of corruption in Indonesia. The financial losses suffered by the state are also enormous, while recovery efforts have not been able to recoup the state's financial losses caused by the criminal act of corruption.

Related to State Financial Losses, the concept of state finance will first be discussed. The term state finance is included in the Constitution of the Republic of Indonesia, but the term still raises different interpretations, because in reality state finance is not only absolute state money, there are also regional finances and other legal entity finances that originate from state assets separated in State-Owned Enterprises and Regional-Owned Enterprises are also still categorized as state finance (Indrawati, 2014). State finance is all activities or activities that are closely related to money conducted by the state for the public interest at any place and for any purpose (Atmadja, 2005).

According to the General Elucidation on Law No. 31 of 1999, state finances are all state assets in any form, either separated or not separated, including all portions of state assets and all rights and obligations arising from being: A. under the control, management and accountability of state officials, both at the central and regional levels; B. in the possession, management, and responsibility of State-Owned Enterprises / Regional-Owned Enterprises, foundations, legal entities, and companies that include state capital, or companies that include third-party capital based on agreements with the State.

Law No. 31 of 1999 and Law No. 20 of 2001 uses the term "state financial losses", rather than "state losses" as can be seen in the considerations considering item A of Law Number 31 of 1999 and Article 2 paragraph (1) and Article 3 of the said Law. The same terminology namely "state financial losses" is also found in Article 4, Article 32 paragraph (2), and Article 33. Meanwhile, in contrast to the above, another term namely "state losses" [without the word financial] is used in Article 1 item 15 of Law Number 15 of 2006 concerning the Audit Board ("BPK Law").

The question would be, do "state financial loss" and "state loss" have identical meanings or is there a difference between them? In what context is corruption present? In practice, these two terms are used in the same sense. State financial losses relating to expenditures are state expenditures incurred in excess of those allowed, or state expenditures which should not have been incurred, and / or state expenditures carried

out faster than allowed. State financial losses related to expenditure transactions can occur due to the following: (1) Fictitious activities, namely when activities included in the budget (*APBN, APBD, BUMN* Budget) are not implemented, but are reported as if they had already been carried out; (2) Expenditures made based on legislation that is no longer valid; and (3) Expenditures which are official, but are accelerated; for example in the case of payments to suppliers or contractors before the agreed work is achieved (Tuanakotta, 2014).

The restitution of state financial losses is the most important goal of criminal prosecution. A review of the database of corruption compiled by the UGM Research Team Laboratory of Economic Sciences shows the value of state losses due to corruption in Indonesia during the period 2001–2015 amounting to IDR203.9 trillion. During the same period, however, the total financial penalty was only IDR21.26 trillion (10.42%); it means that IDR182.64 trillion (89.58%) of Indonesia's losses due to corruption were not returned. Nor does this financial reckoning account for the social costs of corruption. The data above shows the prevention and eradication of corruption in Indonesia through the imposition of criminal sanctions according to the current Criminal Justice System; imposing a prison sentence is not directly proportional to the return of state assets that are lost due to corruption (Pradiptyo et al., 2015).

Data provided by the UGM Laboratory Research Team shows also that the financial penalties paid by corporate convicts tended to be suboptimal; again, total state losses from 2001–2015 amounted to IDR203.9 trillion, while the corporate financial punishment assessed was only IDR5.5 trillion and penalties assessed by the court was IDR21.3 trillion (Pradiptyo et al., 2015). This data emphasizes the great disparity between state losses caused by corruption and the restitution paid; as a result, one can conclude that there is a need for some other mechanism to maximize the restitution received by the state in compensation for state financial losses due to the crime of corruption (Toegarisman, 2016).

The Need for a New Paradigm

To date, criminal acts are processed and adjudicated under Indonesian law by applying the regular procedure, namely through trial and verdict. Corruption cases are investigated by the police, the prosecutor or anti-corruption commission (*KPK*) and are adjudicated at the anti-corruption court. The basis for investigation, prosecution and administering justice can be found in the procedural law provided for in the Criminal Procedure Code (KUHAP) and partially in Law No.31 Year 1999 and Law No. 20 Year 2001 concerning the Criminal Act of Corruption, as well as Law No. 46 Year 2009 concerning the Anti-Corruption Court.

Handling corruption cases, as well as other criminal cases, takes a long time ranging from investigations to judges' judgment in the first level court, the process to the judgment at the appeal level, to the cassation and review judgment. The mechanism for checking corruption goes

through many stages, it also requires a long period of time. The amount of time for handling such cases can be viewed as a weakness in resolving criminal acts of corruption. As with other criminal acts in our process according to the Criminal Procedure Code, as in most other Civil Law countries, even though prior to entering the trial process the suspect acknowledges his/her guilt of committing corruption and returns state losses by way of repayment or returning the bribe received, the case is not completed faster because it still continues to be processed through trial, verification, and verdict. The time required is relatively the same as if the suspect did not admit his/her mistake and did not return the state's loss or the result of the bribe received.

To overcome those weaknesses and problems, the Indonesian justice system needs a new paradigm to handle corruption cases with the purpose to resolve state financial losses, sort of plea bargaining as practices in several countries, including Civil Law countries such as Germany and the Netherland.

With regard to the above discussion, the interesting issue that arises is whether, plea bargaining can be implemented to handle corruption cases. Are there any actual examples in which such a model has been applied in corruption cases? Indeed, the answer is yes, this model has been implemented by countries encountering the problem of corruption as Indonesia. Plea bargaining has been applied in corruption cases, such as in Nigeria and Pakistan. The legal basis used in applying plea bargaining in Nigeria was Section 14 (2) of the Economic and Financial Crime Commission (EFCC) Act stating that the EFCC can combine criminal acts committed under the criminal law provided for in this law by entering into an agreement to pay an appropriate amount of money, in excess of the amount the person would have to pay if declared liable in a verdict. Plea bargaining is also used in corruption cases in Pakistan, where it is known under the National Accountability Ordinance 1999. The purpose of applying plea bargaining in Pakistan is to offer the opportunity to the accused person in a corruption case to return all property obtained in an unlawful manner in exchange for freedom, however, by taking away such person's political rights (Khan, 2016).

The above-mentioned discussion has proven that it is quite possible for a country that has corruption and state financial losses (such as Indonesia) to use plea bargaining as a new approach in the criminal justice system. Coming back to the situation in Indonesia, plea bargaining is also in line with the new development in the philosophy of punishment in Indonesia where the concept of criminal punishment has been gradually perceived as a system contravening the concept of rehabilitation (medical model), social reintegration as well restoration. The new approach is intended to ensure the perpetrators realize their wrongdoings and not repeat their crimes (Nelson, 2017).

The Plea Bargaining Mechanism is a mechanism for resolving criminal cases committed at the stage of the prosecution, between the prosecutor and the accused

person or his/her legal counsel. Both of these mechanisms are highly dependent on the Prosecutor's ability to negotiate with the accused person or his/her legal counsel. The prosecution is an important step in the settlement of a criminal case because it connects the investigation and examination process in court. In other words, the prosecutor has the power to decide whether or not to sue for almost any criminal offense (Surachman & Hamzah, 1996).

In addition to the prosecutor's authority not to prosecute, the prosecutor is also permitted to settle an out-of-process dispute in what is known as the *Afdoening Buiten Proces*, which is regulated in Article 82 of the Indonesian Criminal Procedure Code. Remmelink said that, before the trial proceedings, the prosecutor may determine one or more requirements (especially those mentioned in the payment of a certain amount of money) to prevent or terminate the continuation of prosecution because of a crime (Remmelink, 2003).

The opportunity provided in Article 37 paragraph 2 UNCAC providing that reduction of punishment is possible in corruption cases when the perpetrator significantly cooperates in resolving the ongoing corruption case. The said provisions of Article 37 paragraph 2 of UNCAC are related to the reduction of punishment (a lot closer to justice collaborator and plea bargaining).

There are a number of major corruption cases in Indonesia, which have been very long to adjudicate, until many years to go to court and decided by the judge. The verdicts for these cases are mainly prison sentences and fines, as well as payment of compensation in the amount of value obtained from the accused person's actions. For example, Anas Urbaningrum in Hambalang case in which the investigation began in 2011 was only decided by the Corruption Court at the Central Jakarta District in 2014 with a sentence of 8 years in prison and a fine of 300 million rupiah, and over 57 billion in compensation (Case No. 55 /Pid.Sus/TPK/2014/PN.JKT.PST). This decision was strengthened by the Supreme Court at the 2015 cassation level with a sentence of 14 years imprisonment and a fine of 5 billion rupiahs and replacement money equal to the decision of level 1 (Case No. 1261 K / Pid.Sus / 2015).

The other big case is a procurement project of e-identification cards (E-KTP) that seems to involve several political parties. One the accused person stated that some political parties also took bribes from E-KTP project, which was estimated to cost the country approximately 2.3 trillion rupiah (US $172 million) from the total project amount of 5.9 trillion rupiah (US $ 443 million) (Mulyati & Santoso, 2019).

If such cases are resolved by applying the plea bargaining model, the adjudication of the case will not take a long time and the recovery process is easier, and recovery of state financial losses could be more significant. The reason is that the accused persons in plea bargaining should be more cooperative, either in recognizing his guilty and disclosing information about his assets. It is submitted that the process of plea

bargaining in corruption cases in Indonesia can begin since the Pre-adjudication process, namely in the prosecution phase, similar to the U.S. and Nigeria. The plea bargaining can be initiated by the public prosecutor; under the Indonesian criminal justice system it can be done by the prosecutor at the Public Prosecutor's Office of the Republic of Indonesia or the prosecutor at *KPK* who has the function as a prosecutor in corruption cases in Indonesia. With regard to the above corruption cases, the following steps could be taken: (1) Formal plea bargaining to produce an agreement spelled out in an official report prepared by the prosecutor under the Attorney General Office or prosecutor of the Anti-Corruption Commission (KPK); (2) The official format of the agreement must be submitted in complete form to the judge; (3) The judge will then make a decision in his / her verdict based on such an official report. Therefore, the verification process did not last long because the accused persons have already acknowledged his actions, willing to return the state losses which had all been agreed in the plea bargaining agreement.

The legal substance related to plea bargaining and thus requiring change or adjustment is at least the *KUHAP, KUHP,* the Anti Corruption Law, the Anti-Money Laundering Law, the Law on the Police, the Law on The Public Prosecutor's Office, the Law on General Judicature, the Law on the Anti-Corruption Commission, and implementation thereof. The said laws contain provisions allowing for or ensuring the implementation of the plea bargaining model thus increasingly paving the way toward strengthening the basis for the implementation of both above-mentioned models.

One of the instances of such legal substance is related to the application of Article 4 of Law No. 31 Year 1999 *jo.* Law No. 20 Year 2001 (Law on the Anti-Corruption Court) stating that: "Returning state financial losses or losses to the national economy does not eliminate criminal charges against the perpetrator of the criminal act as intended in Article 2 and Article 3". The applicability of the said Article 4 can potentially hamper the implementation of plea bargaining (as well as of other models such as *transactie* or deferred prosecution agreement). This particular provision needs to be revised to make it in line with the new model as proposed.

Besides, there is a need to strengthen the capacity of law enforcement agencies in order to enable them to enhance efficiency in the implementation of the plea bargaining procedure and strengthen their code of conduct, bearing in mind that this new model is highly dependent on the discretion of law enforcers, particularly prosecutors at the Public Prosecutor's Office of the Republic of Indonesia and the Anti-corruption Commission (*KPK*), where the discretion exercised in plea bargaining calls for moral/ ethical and legal accountability.

Critique of Plea Bargaining in Corruption Cases

The application of plea bargaining in corruption cases also raises certain criticism. Such has been the case with the process

of applying plea bargaining in corruption cases in Nigeria. The application of plea bargaining in Nigeria, particularly in corruption criminal cases, has been creating controversy. On the one hand, it is considered to be useful in reducing case backlog in courts, fulfilling the principle of speedy and low-cost justice, reducing the number of the prison population and preventing recidivism, it can ensure the recovery of state money and support the national economy (Adeleke, 2012; Imosemi & Ogundare, 2017; Mudasiru, 2015; Obida, 2019).

On the other hand, plea bargaining has been met with resistance as there are hidden motives in its application, fraud, it can be used as justification for committing a crime, and it is prone to be misused as the accused person in corruption criminal cases tend to be affluent and powerful people. Thus far, many people think that the EFCC, which was established for the eradication of criminal acts of corruption in Nigeria, has failed in its work for lacking the ability to produce the deterrent effect, due to handing down light sentences to perpetrators through plea bargaining practices, lack of funds, and political intervention (Adeleke, 2012; Imosemi & Ogundare, 2017; Mudasiru, 2015; Obida, 2019).

In the Indonesian context, the idea of applying plea bargaining in corruption cases is also criticized, as conveyed by former justice Artijo Alkostar (Interview, July 2, 2018), who stated that plea bargaining in Indonesia will create a new type of corruption. In addition, it is not easy to adopt a model from Common Law countries for the Indonesian criminal justice system, where the accused person's guilty plea is not automatically used to decide a case. Besides, it is considered to violate the principle of non-self incrimination and not in harmony with the objective of criminal law to seek material truth.

CONCLUSIONS

Based on the foregoing it can be concluded that Indonesia is now increasingly accepting external legal concepts into its judicial system. Plea bargaining, an important concept that has been widely applied in the criminal justice system in other countries, has not yet been implemented in Indonesia. In regard to corruption cases, to date Indonesia has prosecuted these by imposing penalties (imprisonment and fines) for individuals within corporations and pecuniary penalties for corporations. Such penalties are imposed based on the criminal procedure law, which does not recognize the bargaining approach of the common law. In order to implement plea bargaining in the Indonesian criminal justice system, it is important to improve the discretionary role of public prosecutors. As in many other jurisdictions, prosecutors in Indonesia have the authority to revoke an indictment or to stop legal proceedings with or without conditions.

In order to implement plea bargaining in the Indonesian criminal justice system, it is important to improve the discretionary role of public prosecutors. As in many other jurisdictions, prosecutors in Indonesia have

the authority to revoke an indictment or to stop legal proceedings with or without conditions. There are two types of authority that the public prosecutor can exercise without being demanded by others, namely termination of prosecution for technical reasons and termination of prosecution by discretion. The authority to not prosecute by discretion is also known as the principle of opportunism. In addition to the prosecutor's authority not to prosecute, he or she is also permitted to settle an out-of-process dispute or also known as *Afdoening Buiten Process*, which is provided for in Article 74 Sr/Article 82 of the Criminal Code. However, this provision is only relevant for minor cases entailing fines as punishment.

For criminal prosecution, discretion involves the choice of the article for sentencing, the choice of types of crime, and the choice of how severe the punishment should be. In the context of a new plea bargaining model which would allow prosecutors to bargain with accused persons, this discretionary authority becomes very important. It is relevant for Indonesia, in the context of the prevention of corruption, because plea bargaining will assist in the recovery of the state's losses due to corruption since as a result of the agreement the perpetrator acknowledges guilt and is willing to return what he/she has gained through corruption, while the prosecutor demonstrates the willingness to file a lighter charge, provide a lighter punishment, not prosecute the perpetrator at all, or charge others who committed crimes along with the perpetrator. This model requires a trustworthy prosecutor and external supervision. Plea bargaining could be an alternative solution in the handling of corruption, especially in the recovery of the state's losses, but it will only be possible after additional study of its juridical, philosophical, and sociological aspects.

Article 4 of Law No. 31 Year 1999 *jo.* Law No. 20 Year 2001 (UU PTPK) states that: "Returning state financial losses or national economy losses shall not eliminate the criminal punishment of the perpetrator of criminal act as intended in Article 2 and Article 3". The application of the said Article 4 can hamper the implementation of plea bargaining (as well as other models such as *transactie* or deferred prosecution agreement). Therefore, the wording of Article 4 of the said Law needs to be amended or deleted, so that it will not hamper the implementation of a new model such as plea bargaining.

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