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# **THE 5 th INTERNATIONAL AND CALL PAPER**

## **Legal Reconstruction in Indonesia Based on Human Rights**

**Imam As Syafei Building**

**Faculty of Law, Sultan Agung Islamic University**

**Jalan Raya Kaligawe, KM.4 Semarang, Indonesia**

**UNISSULA PRESS**

# The 5<sup>th</sup> PROCEEDING

## *“Legal Reconstruction in Indonesia Based on Human Right”*

**IMAM AS SYAFEI BUILDING**

Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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*“Legal Reconstruction in Indonesia Based on Human Right”*

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## PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

## PROCEEDINGS

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# The Village Fund As Indonesian Social Welfare Program: The Gap Between Regulatory And Practice (A Study On Penal Perspective)

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## Abstract:

*The State through Law No. 6 /2014 on Villages allocates a National Budget (APBN) for villages. Substantial financial support for villagers is expected to be able to support the development. Unfortunately, the Village Fund Program has become a root of corruption cases which has caused many villagers to live in poverty. The method used in this research is the normative juridical which focusing on secondary data in the form of primary, secondary and tertiary legal material to obtain a comprehensive, factual and accurate legal analysis on the village fund program in Indonesia while also provide a legal perspective of Anti-Corruption Law. The result of this study is village funds as part of APBN is State Finance. Therefore the abuse of authority by the chief or apparatus of villages management can be categorized as an act of corruption. However, the stipulation of “the abuse of authority” in Article 3 of the Anti Corruption Law should only be related to bribery. Because the authority of public officials on policymaking is not within the scope of criminal law, this is intended to prevent a criminalization. Therefore, criminal acts of corruption in village funds should be using Article 2 for the legal basis.*

**Keywords:**Village Fund; Social Welfare; Corruption; Indonesia.

## INTRODUCTION

The development of social and public welfare is one of the national objectives as mandated in the 1945 Constitution of the Republic of Indonesia (hereafter will refer as the 1945 Constitution). Pancasila as state fundamental norms stipulates the doctrine of social justice. In the fifth principle, which is “social justice for all people of Indonesia” and the Preamble of the 1945 Constitution also gives the state an obligation to:

- a. protect all the people of Indonesia;
- b. the independence and the lands;
- c. to improve public welfare;

- d. to educate the life of the people and to participate in the establishment of a world order based on freedom, perpetual peace, and social justice.

Also, economic growth and human development index are the indicators to determine successful social welfare of a country and play an essential role as a benchmark of future policies. One of the first steps towards economic growth is to manifest social welfare for the undeveloped region. Therefore the enactment of Law No.6/2014 is aiming for the prosperity of villages. Based on Law No. 6/2014 on Villages (hereafter will refer as Village Law) regulating several forms of village income which divided as follows:

1. Original Income;
2. APBN (State/National Budget);

3. Regency/City PDRD;
4. Village Funds;
5. Financial Supports from the Provincial/Regency/City Budget;
6. Third-party donations and contributions;
7. Other legitimate income.

Based on seven points above, Village Funds has a very strategic position as village income. Therefore the State through Law No. 6 /2014 on Villages allocates a National Budget for villages or what is often called a Village Fund Programme. The objectives of this program, as stated in Article 7 paragraph (3) of Law Number 6 /2014 on Villages are:

- a. Manifesting the effectiveness of Village Government;
- b. Accelerating the improvement of village welfare;
- c. Accelerating the development of public services quality;
- d. Improving the quality of village governance; and
- e. Increasing village competitiveness.

The allocation of village funds continues to increase from 2015 until today with the total allowance for village funds in 2018, reaching Rp. 187 trillion.<sup>611</sup> Great financial support for villages is expected to be able to advance the communities. However, in reality, the Village Fund Programme has become a root of corruption cases which has caused many villagers could not fulfill the basic needs of human beings and live in poverty. As an impact, they

experience difficulties and limited ability to access various sources of essential social services and cannot enjoy a decent life.

Therefore we addressed this issue as the object of research to examine the reality between law in the book concerning village fund program and the corruption cases that occurs as law in action based on the perspective of the penal law.

## LITERATURE REVIEW

According to Kranenburg the State must actively strive for prosperity and fairness for the whole community in equal and balance way, not only for the welfare of specific people but all the society. The concept of state obligations in providing welfare for its people is a state of the law in the material sense (material social-service state)<sup>612</sup>, which is often known as the type of modern state of law. In this concept of the rule of law, the objective of the state is to bring prosperity to all the people.<sup>613</sup>

For the sake of the people, the State developed five pillars. i.e., Democracy; Rule of Law; Human Rights; Social Justice; and Anti Discrimination. That is why the State through local autonomy delegates not only the authority but also the obligation to provide social justice for welfare within the scope of the region. Therefore, the management of the Village Fund carried out by the chief of the village in the form of local autonomy that applies to the smallest government point, such as the village sector. It aims to improve the effectiveness and efficiency of government as well as an extension of the 1945 Constitution which dividing government affairs into state institutions and put the local affairs within their autonomy.<sup>614</sup>

<sup>611</sup> Kompas, "Jokowi: Anggaran Dana Desa di 2019 Naik Jadi Rp 73 Triliun", accessible on <https://ekonomi.kompas.com/read/2018/09/25/165659526/jokowi-anggaran-dana-desa-di-2019-naik-jadi-rp-73-triliun>. On 19 November 2018.

<sup>612</sup> SF Marbun. 2002. *Dimensi-dimensi Pemikiran Hukum Administrasi Negara*, Yogyakarta: UII Press, P. 13.

<sup>613</sup> Ellydar Chaidir. 2007. *Negara Hukum, Demokrasi dan Konstalasi Ketatanegaraan Indonesia*, Yogyakarta: Kreasi Total Media, P. 30-31.

<sup>614</sup> Yuli Asmara Triputra. 2016. "Harmonisasi Peraturan daerah Terhadap Peraturan Perundang-undangan Dalam Bingkai Negara Kesatuan Republik Indonesia," *Jurnal Lex Librum*, Vol. III, No. 1, December 2016, P. 417 - 428

However, the existence of authority based on local autonomy is inseparable from the obligation of supervision and inter-institutional balancing. Because authority is the core of every legal action from every level of government, with the legitimate basis of authority, any legal actions carried out by each level of government can be categorized as legal actions. If authority is absent, then any legal actions carried out by each level of government can be categorized as actions that are contrary to the law and can also be a violation of the general principles of good governance.<sup>615</sup>

## RESEARCH METHODS

The method used in this research is the normative juridical which focusing on secondary data in the form of primary, secondary and tertiary legal material.<sup>616</sup> The research specifications used descriptive analytic to describes the provisions, norms and legal principles applicable to obtain a comprehensive, systematic, and accurate description of the village fund program in Indonesia after the enactment of Law No. 6 /2014 on Villages while also provide a legal perspective of Anti-Corruption Law. The analysis is done by the qualitatively, meanings it was conducted without using numbers, statistics, and mathematics. Furthermore, the authors conducted a literature study by reading, quoting, and analyzing. Qualitative data analysis is performed thoroughly. The data obtained will be analyzed using legal interpretation and legal construction.

Furthermore, legal interpretation will have resulted in legal findings (*recht-vinding*) while statutory construction carried out to find the answer for the issues. In correlation with this method, legal arguments will be produced as a solution

through logical and systematic reasoning.

## ANALYSIS AND DISCUSSION

### *The Village Fund Programme to Increase Public Welfare for Undeveloped Villages*

From the sociological perspective, the definition of a village is a form of community unit or community of residents who live in a close and friendly environment. While their lifestyle is relatively homogeneous and depends on nature, has a pure nature with strong social ties and customs. Anthropologists describe the village as a collection of people or communities with a particular environment or geographical background that has a pattern of habits, customs, and culture in their lives, the existence of life's existence and aesthetic values that encourage differences in character and cultural characteristics between one village and other villages. Furthermore, from a historical perspective, the village was an embryo for the formation of political and governmental societies in Indonesia, long before this modern state was formed, villagers and indigenous people has become a social institution which plays a vital role. While from the economic perspective, the portrays of the village as a community has a unique view as a capital production and a barn of raw material and human resources. Then, from the juridical and political perspective, the village is often seen as the lowest governing institution in Indonesia. Furthermore, it also can be considered as a legal unit that has an identity, a different entity and has regional boundaries that are authorized to regulate and manage the interests of the local community, based on origin and custom which are recognized and respected in the Indonesian government system.<sup>617</sup>

Following the idea and empir-

615 Fatkhul Muin. 2014. "Otonomi Daerah Dalam Perspektif Pembagian Urusan Pemerintah-Pemerintah Daerah dan Keuangan Daerah," *Fiat Justisia Vol.8 No.1, January-Maret 2014, P. 72-73.*

616 Mukti Fajar ND and Yulianto Ahmad. 2010. *Dualisme Penelitian Hukum, Cetakan 1, PT. Raja Grafindo Persada, Yogyakarta, P. 28.*

617 Siti Khoiriah. 2017. "Analisis Sistem Pengelolaan Dana Desa Berdasarkan Regulasi Keuangan Desa" *Jurnal Masalah-Masalah Hukum, Jilid 46, No.1 January 2017, P. 20-29.*



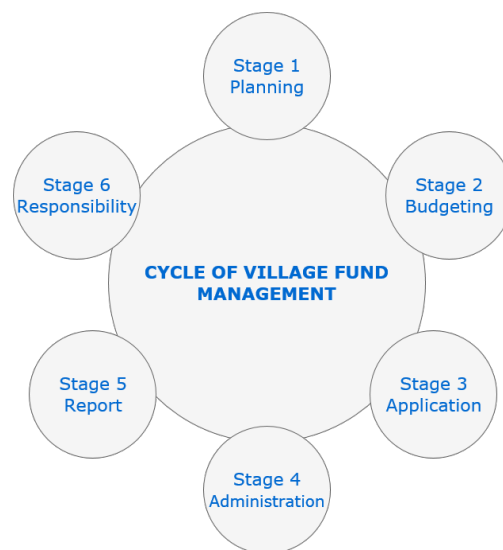
ical context in Indonesia, there are at least three types of village forms:<sup>618</sup>

1. Customary Village (self-governing community) is a form of the original and oldest village in Indonesia.
2. Administrative Village (local state government) is a village as a unit of administrative territory which is positioned as an extension of the state and only carries out administrative tasks given by the state.
3. Autonomous Villages or formerly referred to as Desapraja (local self-government), is a village based on local autonomous of Indonesia.

Village autonomy contains three values: First, village rights to own, manage or obtain economic-political resources; Second, the authority to regulate or make decisions on the matters of public goods and the interests of the local community; and finally, the responsibility of the village to take care of the public interests through public services.<sup>619</sup>

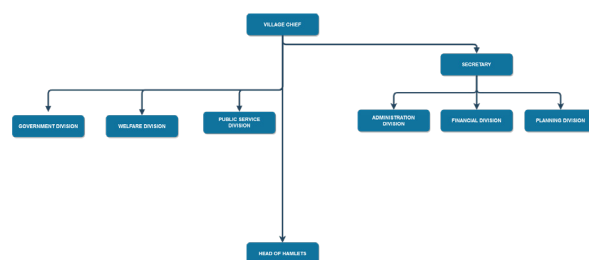
Village funds as local finance are actually can be categorized as State Finance.<sup>620</sup> The village as the smallest government unit in Indonesian has its financial system integrated into the village's original income and is part of APBN (State Budget). Thus the management should be in line with the principles of good governance.

Figure 1. The Management of Village Fund



(Source: Law No.6 Year 2014 and Government Regulation No.43 Year 2014)

Figure 2. The Structure of Village Ruling



(Source: Permendagri No. 84 /2015)

Village fund is managed based on the principles of good governance. The management of village fund as stipulated in Permendagri Number 113 /2014 must be transparent, accountable, participatory and carried out in an orderly and discipline. Village fund in Law Number 6 /2014 on Villages pointed the chief of the village as the authority of village fund management. In exercising his power, the chief of village authorizes part of his power to the village apparatus. Furthermore according to

<sup>618</sup> Directorate of Village Government and Directorate General of Community and Village Empowerment Ministry of Home Affairs. 2007. Legislative Draft of Village Law Bill, Jakarta.

<sup>619</sup> *Ibid.*

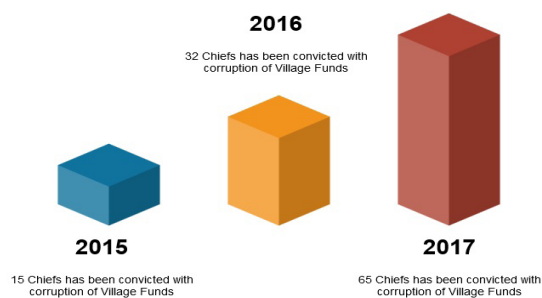
<sup>620</sup> More explanation see Jimly Asshiddiqie. 2008. *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi*, Jakarta: PT Bhuna Ilmu Populer.

Article 93 paragraph (1) of Government Regulation Number 43 /2014 on The Implementation of Law Number 6 /2014 on Villages the management of fund includes Planning, Implementation, Administration, Report and Accountability/Responsibility.

### *The Arising Cases of Corruption in Village Funds*

Unfortunately, Based on several studies and data on the amount of corruption in village funds during the program from 2015. Many corruption cases arising in Village fund program and the major actors for this crime were chief of villages. While the chief of Village is the dominant actor caught in the cases with a total of 112 chiefs convicted for corruption. This figure is increasing each year, with 15 chiefs were arrested and convicted in 2015. Then in 2016, 32 chiefs were arrested and convicted in 2016, and 65 chiefs in 2017. Beside the chief of Village, other 32 village apparatus and three families of village chief were also convicted.

**Figure 3. Corruption by Chief of Village in the Last 3 Years**

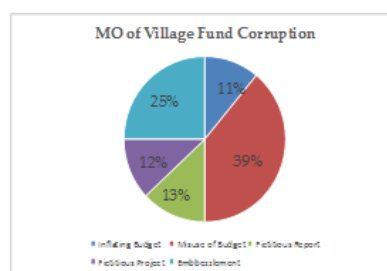


(Source: Indonesia Corruption Watch, 2018)

Then from the aspect of State Finance, corruption in the village funds contributed to significant losses. In 2015 the loss reached Rp. 9.12 billion. Then in 2016, the loss slightly decreased into Rp. 8.33 billion. However, in 2017, the loss remarkably jumped to Rp. 30.11 billion. Therefore the total losses caused by corruption in the village sector reached Rp. 47.56 billion in 3 years, it is equivalent to the allocation of funds for 77 villages while various modus

was carried out by perpetrators in the village, including the practice of the budget misuse (51 cases), embezzlement (32 cases), fictitious reports (17 cases), fictitious projects (15 cases), and inflation of budget (14 cases).

**Figure 4. Type of Corruption in Village Funds in the Last 3 Years**



(Source: Indonesian Corruption Watch, 2018)

Thus based on the data above, it can be concluded that there is a gap between the law and the implementation. The criminal sanction in the field of village fund is a necessity because to distinguishes between Criminal Law, and other legal fields are that criminal sanctions are the provision of the deliberate threat of suffering and imposition of suffering even though there are no victims of crime.

In the development of criminal law, the sanctions in some instances have shifted from *ultimum remedium* (last remedy) to *premium remedium* (first remedy). Provisions regarding the criminal sanctions as a premium remedium can be seen in the corruption of village funds which are subject under the Anti Corruption. From a sociological perspective, this is because the actions stipulated in this is an extraordinary crime affecting the whole community. Thus, in this case, there is no longer a consideration to use other sanctions, because it is necessary to use criminal sanctions on the perpetrators of these crimes.

### ***The Corruption of Village Fund in the Perspective of Penal Law in Indonesia***

The Chief of Village and their devices as state administrator has an authority embedded in the system and, then with that authority state administrators can make policies, decisions, stipulations, and others as the representation of the State in an operating condition. However, behind all that is attached norms and principles, to put functions according to the path outlined in the law that becomes the basis for administrative action.<sup>621</sup> That authority could be abused by the regional head for self-enrichment, Mahfud MD, in his paper that cites Acton's adage: "power tends to corrupt, absolute power corrupts absolutely." Furthermore, Mahfud argued:

*"Based on Lord Acton's argument, implies that anyone who holds power will be encouraged to commit corruption or fraud if there are no severe restrictions on power through the constitution. Even good people who hold power will be pushed for corruption. Because, although the person is personally righteous, the power environment will continue to encourage him to corrupt"*<sup>622</sup>

The corruption of village funds is within the scope of extraordinary crime with the characteristics of the White-collar crime which is a separate class from normal crimes.<sup>623</sup> The perpetrators of this crime include officials, politicians, financial institutions, companies, and organizations.<sup>624</sup>

621 Ifrani, Anang Shophan Tornado, and M.Yasir Said. 2018. "The Abuse of Authority in Awarding Permits of Forest Conversion in Indonesia," Paper presented in ICLPS 2018 Yokohama, Japan on <sup>ninth</sup> - 10<sup>th</sup> Oct 2018. Page.2.

622 Mahfud MD. (without year). *Sukarno, Suharto & Dalil Acton, Paper Media Online, Gagasan Hukum, Article, Legal Opinion.*

623 J. Dorminey, A.S Fleming, M.J Kranacher, R.A Riley. 2012. The Evolution of Fraud Theory. *Issues in Accounting Education, No. 27 (2), 2012, P. 557. <http://doi.org/10.2308/iaec-50131>*

624 D. J.Cooper, T.Dacin, and D.A Palmer. 2013. *Fraud in Accounting, Organizations, and Society: Extending the Boundaries of Research, Journal Accounting, Organizations and Society, No. 38, 2013, P. 440. <http://doi.org/10.1016/j.aos.2013.11.001>*

625 Thomas D. Lancaster. 2017. *Measuring Regional Authority: A Postfunctionalist Theory of Governance, Volume I*, by Liesbet Hooghe, Gary Marks, Arjan H. Schakel, Sara Niedzwiecki, Sandra Chapman Osterkatz, and Sarah Shair-Rosenfield, *Publius: The Journal of Federalism*, Volume 47, Issue 2, 1 April 2017, page. 4, <https://doi.org/10.1093/publius/pjx022>

626 Indriyanto Seno Adji. 2010. "Tindak Pidana Korupsi-UNCAC 2003: Beberapa Catatan Perubahan Dalam Perspektif (Paper), Presented at Pelatihan Hakim Angkatan IX, Pustdiklat Teknis Peradilan Badan Litbang Diklat Kumdil MA-RI, Megamendung 25 April -12 May 2010, Bogor, P.5.

Furthermore, it is undeniable that authority such as power, control, influence, interests, and representation are core to politics and governance. Unfortunately, corruption is also one of them. Even when precisely defined, efforts to measure empirically such essential concepts are inevitably challenged.<sup>625</sup>

Although Law No.6 /2014 on Village does not contain the provision of penal sanction, however, based on the principle of *lex specialist systematic* and the provision of article 14 of Law No. 31 /1999 on the Eradication of Corruption stated: "every person who violates the provisions of the legislation which expressly states that the violation of the provisions of the law as prevailing corruption regulations stipulated in this law." Therefore the Anti-corruption law can also be used to prosecute other crimes related to state finance and the national economies such as forest crime, tax crime, the crime of capital markets, and other related crimes.

Furthermore, Law No. 31 /1999 on the Eradication of Corruption (Anti Corruption Law) contains two provisions of regarding State Finance, the first is in Article 2 concerning against the law and the second is Article 3 related to abuse of authority. However, the "abuse of authority" in Article 3 of the Anti Corruption Law is not on policymaking. However, the relations between authority and bribery.<sup>626</sup> While the authority of public officials on policy is not the scope of criminal law, this is intended to prevent a criminalization.

Also, the limitation of corruption scope is based on the ratification of the *United Nation Convention Against Corruption (UNCAC 2003)*. In which the provisions dominated by criminal acts in the form of bribery, as well as the *2008 Anti Corruption Bill* which abolished the term “abuse of authority” and makes the provision relating to bribery, instead of in the context of authority. Therefore, criminal acts of corruption in village funds should be using Article 2 for the legal basis applied.

Article 2 Paragraph (1) of Law No. 31 /1999 on the Eradication of Corruption explicitly states:

*“Any person unlawfully enriching himself and/or other persons or a corporation in such a way as to be detrimental to the finances of the state or the economy of the state shall be liable to life in prison, or a prison term of not less than 4 (four) years and not exceeding 20 (twenty) years and a fine of not less than Rp 200,000,000 (two hundred million rupiah) and not exceeding Rp 1,000,000,000 (one billion rupiah).”*

Based on this provision the elements included include 1) unlawful; 2) enrichment of self, others, or a corporation; and 3) can be detrimental to state finances. However, it is also essential to understand the interpretation of the phrase “*in such a way as to be detrimental to the state finances*” causes this offense not interpreted as a formal or material offense. Because in the formal offenses, punishment is applicable if the act has satisfied its element while the consequences of the act must accompany the material offense of the punishment. Because, in criminal law, the action (*actus reus*) considered as a crime if it is satisfied the elements of the offense. The basis for consideration of why the element of state finances loss is not have included as an offense based on UNCAC 2003. Therefore, if the alleged acts of corruption in village funds have met the elements of unlawful and self-enrichment. Then it should be satisfied as a criminal act of corruption.

## CONCLUSION

Based on the perspective of the penal law, village funds as part of APBN (State Budget) is State Finance. Therefore the abuse of authority by the chief or apparatus of villages management can be categorized as an act of corruption. Furthermore, Law No. 31 /1999 on the Eradication of Corruption (Anti Corruption Law) contains two provisions of regarding the State Finance, which is Article 2 (unlawful) and Article 3 (abuse of authority).

However, the stipulation of “abuse of authority” in Article 3 of the Anti Corruption Law is not mean on policymaking. However, related to authority and bribery. Because the authority of public officials on policymaking is not within the scope of criminal law, this is intended to prevent a criminalization. Therefore, criminal acts of corruption in village funds should be using Article 2 for the legal basis applied.

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