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The Principle of Justice in the Sentencing of Corruption Offenders

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Abstract
Justice or just is actually an abstract feeling, but it is perceived as a real and visible matter by individuals or group. There is neither perfect justice nor pure nor sure, except the justice made by God the Almighty as the ruler of the universe.
This journal focuses on corruption which is a latent danger that needs special attention in its handling. Indonesia is a state law with Pancasila as its fundamental ideology giving full mandate to law enforcement officials to enforce the truth and justice.
To handle corruption cases, extraordinary measures are needed along with justice principle based on the Pancasila prioritizing the principle of equality before the law. There is not an exception on who the offender is and how the sentence is imposed.
The reason of why the writers write the journal of which tittle is "The Principle of Justice in the Sentencing of Corruption Offenders" is that the we would like to establish an unbeatable theory that the sentencing on the corruption offender is not merely about the maximum sentence that can be applied proportionally, but also an effort to create proportional justice for all parties without hurting the heart of the public and this is aimed at avoiding extreme disparity in the application of laws in the judges' verdicts on cases with similar legal violations.
***Keywords**: Justice Principle, Sentencing, Consideration*

1. Introduction

Justice is generally interpreted as a just conduct or a just treatment. On the other hand, being just means being impartial and to take the side of the right party. According to philosophical study, justice requires two elements, *first*: it does not bring disadvantage on an individual and *second*: proper treatment to individuals according to their respective rights. If the two principles can be fulfilled, justice can be realized.[5]
Corruption as a crime etymologically originates from Latin words: *"corruptio"* or *"corruptus"*. The word is later adopted into some European language's, such as English and French: "corruption"and Dutch : *"korruptie"*. Indonesian adopts the word and it becomes *"korupsi"*. [6]
As the previous paragraph explains, corruption etymologically originates from the Latin: *corruptio* or *corruptus* meaning destructive, dishonest and can be bribed. Corruption also means crime, cunning, immoral and evil. It also refers to misconducts, such as money embezzlement, bribery and so on. On the other hand, according to the Grand Dictionary of Indonesian (Large Dictionary Indonesian), corruption means ugly, foul, damaged, like using goods (money) trusted to her/ him, easy to be bribed for misusing the power, misconducts or embezzlement (state's money or company's money) for personal purpose or the interest of other individual.[7]
Philosophically, corruption is motivated by two aspects. *First,* intrinsic motivation that is the drive for satisfaction created by corruption. In this case, the offender feels satisfied and comfortable when the corruption is successfully committed. In the next stage, corruption becomes a lifestyle, habit and acceptable tradition. *Second*, extrinsic motivation, which is the stimulating element of corruption, comes from outside the offender himself/ herself and it does not attach to the offender. Some motivations of this category are economical motivation, ambition for achieving certain position in the career of an individual, obsession for improving the quality of life or improving one's career by using a shortcut.[8] In order to realize the just, prosperous and wealthy community based on the Pancasila five principles and the 1945 Constitution, the corruption eradication has not achieved the optimum level. Therefore, the eradication of corruption needs to be professionally, intensively and

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[5] Arsyad Sanusi, *Substantive Justice and Enforcement Problems*, Article in Varia Justice, Law No. Magazine. 288 June 2009. p. 35
[6] Andi Hamzah, *Glare-Glare Spread outside the Criminal Code with Comments*, Pradnya Paramita, Jakarta, 1982, p. 11.
[7] Alfitra, *Law of Evidence in Criminal Proceedings, Civil and Corruption in Indonesia*, Asa Achieve Success, Depok, 2011, p 146.
[8] *Ibid,* p. 146-147.

continually improved because it undermines the state's treasury and economy as well as disturbing the national development.[1]

Corruption has caused damages in various aspects of life of the community, nation and state. Therefore, it needs to be treated extraordinarily. Besides, to prevent and eradicate corruption continuously, it is necessary to involve various resources covering human resources and other resources, such as the improvement of institutional capacity and the improvement of law enforcement. In this way, the consciousness and anti-corruption behavior of the community can be improved.[2]

From normative perspective, corruption caused by three factors: 1) corruption by greed; 2) corruption by need; 3) corruption by chance.

There are some legal expert's theories on justice and why a crime offender must be punished. The differences of the point of views influence the perspectives of justice. Whether or not a punishment can create justice depends on the differences on the point of views. If the offender is punished severely, the victim may regard it as a just decision. On the other hand the defendant may regard that the punishment is too severe and consequently, the decision is categorized as an unjust one. Justice is a sensitive matter and only God can be just. However, the writer will quote some theories of justice. There are three principles that should be regarded by law enforcement officials in their works: justice, usefulness and legal certainty. This is in line with Gustav Radbruch's theory. Unfortunately, it is difficult to implement all the three principles in equal proportion in law enforcement practice. Sometimes, legal certainty must be put aside in order to prioritize justice.[3]

According to the principle *ius curia novit*, judges are regards as officials with good legal knowledge. Therefore, judges are not allowed to refuse to conduct a trial on corruption case based on the reason that there are not any laws stipulating it or the laws are not clear. Judges must examine the case and conduct the trial. If there are not any laws regulating a case or it is not clear, judges are allowed to use law-creation instrument (rechtsschepping).[4]

Referring to the background explained above, there are juridical problems to research in this dissertation:

How is the justice principle in the sentencing of corruption offenders?

What is the goal of sentencing imposed upon corruption offenders?

What kind of legal consideration applied by judges in the sentencing of corruption offenders?

2. Research Method

The research conducted for this dissertation is a legal-normative type. Therefore, it focuses on the laws regulating the decision of judges. This research type is also aimed at understanding the existing laws and regulations applied by law enforcement officials to deal with corruption case.

Regarding normative research, there are some approaches:

First, statute approach. A normative research requires stature approach because the objects of the research are laws which become the focus and the central theme of the research.

Second, conceptual approach. Regarding this approach, the researcher applies an approach towards the concept of the criminal law.

Third, comparative approach. This approach is one way used in the normative research to compare a legal institution of a legal system from a somewhat similar legal institution of different legal system. From this comparison, elements of similarity and differences can be extrapolated.

Fourth, case approach. This approach is applied in normative research in order to study the implementation of norms or legal principle in the legal practice. This especially focuses on case that has been decided by the court as shown in the jurisprudence of cases focused in the research.[5]

This journal uses two legal materials as the research materials:

First, primary legal material or basic legal material. This legal material is directly obtained from the first sources: laws and other regulations related to the research.

Second, the secondary legal material. This covers official documents, results of researches in form of reports, diary and so on.[6]

As the realization of the justice principle, there are corruption cases tried by the court of appeal. They include

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[1] Consideration point (a) of the Law Number 30, Year 2002 on Corruption Eradication Commission

[2] First Paragraph I General, Explanation on the Law No. 46 Year 2009 on Corruption.

[3] Ricca Anggraeni, "*Legal Positivism pengusungan Mindset in Corruption Case*," Journal of Judicial, Vol-IV/No-03/December/2011, p 307.

[4] Rekso Basuki Wibowo, *The Faceless Justice Law Reform*, Law No. Varia Justice Magazine. 313 December 2011, p 14.

[5] Johnny Ibrahim, 2008, *Loc. Cit*

[6] Soerjono Soekanto, 1981, *Op. Cit*, p. 11-12.

court decision of which verdict is lower than the minimum sentence stipulated for the case, sentence with preconditions, decision on clemency, acquittal from any charges, unacceptable court decision, sentence which is heavier than criminal prosecution and life imprisonment.
The analysis on the legal material is conducted in descriptive way meaning the material is presented descriptively and analyzed according to the quality and the reliability. Afterwards, the conclusion as the answers of the research's problems is made.

3. Result and Discussion

3.1. The Tort Conception According to the Criminal Law

According to Simons, "*strafbaarfeit"* is a conduct which is punishable, against the law and related to the guilt committed by a responsible individual.[1] On the other hand, Van Hamel states that "*strafbaarfeit* is a conduct of an individual formulated in the law, containing the characteristic of law violation (against the law), punishable and committed with a tort.[2] Both still regard tort from the perspective of criminal law. A conduct related to the tort or committed with the element of tort is a phrase signifying that a conduct is a crime if its related stipulation also formulates tort. In addition to that, Schaffmeister says that "crime is human's conduct included in the coverage of delicate formulation, containing element of conduct against the law and it can be condemned".[3] In this case, although the term: "tort" is not applied, condemnation signifies the existence of tort.
Tort is the determining element because it should not be a part of crime definition. According to Moeljatno, crime definition does not cover whether an offender is punished or not. It means, the definition of crime does not cover the punishment of the offender. [4]
Crime is a forbidden conduct and anyone committing it can be punished.[5] According to Marshall, "*a crime is any act or omission prohibited by law for the protection of the public and punishable by the state in a judicial proceeding in its own name*".[6] A crime is a conduct or an omission forbidden by the law in order to protect the community and anyone who commits it can be punished according to the existing legal procedure. The element of guilt taken away from these definitions and a crime is, essentially, a conduct only. A conduct in this regard covers an action and incidence caused by an action or a conduct and its consequence.[7] A conduct also consists of doing something (commission) and not doing something (omission). Therefore, a crime covers conducts of doing something, not doing something and causing the forbidden consequences according to the law.
The article (1) of the Indonesian Criminal Code has an intention that the determination of a crime should refer to the law (the principle of legality). According to the criminal law, the status of the characteristic of legal violation is very specific. There is usually an agreement among the legal experts concerning the characteristic of legal violation related to the crime. Each crime has an absolute characteristic of a tort. Roeslan Saleh says that punishing a conduct which does not have an absolute characteristic of a tort is meaningless.[8]
On the other side, according to Andi Zainal Abidin, "one essential element of a delicate is whether or not the characteristic of tort is clearly mentioned in an article of the criminal law because it does not make sense if someone is punished because of committing a conduct allowed by the law" .[9]
Common law system is characterized by a heterogenic situation. The principle of material tort is also recognized in the common law system, especially, Britain and Australia. The two countries recognize the term *unlawfully*[10] as the reason of the punishment abolition outside the law. However, the material tort is not recognized in the United States. [11]

3.2. Culpability

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[1] S.R. Sianturi, *Principles of Criminal Law and Its Application in Indonesia*, Alumni AHAEM-PTHAEM, Jakarta, 1986, p 205
[2] *Ibid*
[3] Scaffmeister D., N. Keijzer and E.PH. Sutorius, *Criminal Law*, Liberty, Yogyakarta, 1995, p. 27
[4] Moeljatno, *Criminal Actions and Accountability in Criminal Justice*, Literacy Development, Jakarta, 1987, p. 11
[5] *Ibid*, Ruslan also lsee Saleh, *Criminal Acts and Criminal Liability; Two Basics in Criminal Law*, Aksara Baru, Jakarta, 1983, p 14
[6] Andi Hamzah, *Principles of Criminal Law*, Rineka Cipta, Jakarta, 1994, p. 89
[7] Moeljatno, *Principles of Criminal Law*, Literacy Development, Jakarta, 1987, p 155
[8] Ruslan Saleh, *Unlawful Nature of Criminal Actions*, Aksara Baru, Jakarta, 1987, p. 1
[9] Andi Zainal Abidin, *Criminal Law I, Sinar Grafika*, Jakarta, 1995, p. 42
[10] Indriyanto Seno Adji, *Corruption and Criminal Law: Lawyers & Legal Consultants Office Prof. Oemar Seno Adji & Partners*, Jakarta, 2002, p. 94
[11] E. lunar Sapardjaja, *Material Law Doctrine Against the Indonesian Criminal Law: Case Studies on the Application and Development in Jurisprudence*, Alumni, Bandung, 2002, p. 185

The culpability can be a result of an intentional conduct or an unintentional one. "The intention must touch three elements of crime: 1) forbidden conduct; 2) the result of the conduct as the principle reason of the prohibition; and 3) the conduct is against the law ".[1]

It is commonly taught that intentional conduct (*opzet*) consists of varieties: 1) Intentional conduct as the purpose to achieve something (*opzet als oogmerk*); 2) Intentional conduct which does not have a purpose, but it is accompanied by knowledge that something will surely happen (*opzet bij zekerheidsbewustzijn* or anticipated deliberation); and 3) intentional conduct similar to the second sub but accompanied by knowledge of possibility (not certainty) that something will probably happen (*opzet bij mogelijkheids-bewustzijn* or intentional conduct accompanied by knowledge of the possibility).[2]

The intention as the purpose (oogmerk) causes that the offender can be held responsible and it is easily understood by the public. If a crime is characterized by this intention, it is undeniable that the offender is punishable. To make things clear, the intention functioning as a purpose signifies that the offender really expects to achieve the primary result which is the main reason of the punishment (*constitutief gevold*).

An intentional conduct can happen if the offender uses his or her mind improperly. In this case, his or her mind is occupied by the will and knowledge directed towards a crime. Intention and deliberate thought are interconnected concepts. The intention is directed towards the crime as a conduct against the law. Besides matching with the formulation of the law forbidding it, it is also against the legal consciousness of the community. Conducts which do not fully break the law can lead the perpetrator to punishment in the prison. There are also crimes related to crimes committed by other individuals. "In short, attempts to commit crime and involvement in crimes are punishable. The reason of it is that the conducts are against the law and legal consciousness of the community."[3]

Both *civil law system* and *common law system* generally formulate crimes negatively. Therefore, according to the Indonesian Criminal Law, as commonly found in countries with civil law system, the law even formulates situation in which the perpetrators cannot be held responsible.[4] A further consequence of it is that the law formulates situations in which offenders cannot be held responsible (*strafuitsluitingsgronden*) and this is partly recognized as the reason for the abolition of the guilt. On the other hand, this phenomenon is accepted as the reason for general defense or general excuse of liability.

Criminal liability exists in any conduct against the law, except that there are reasons for abolishing the punishment, such as excuse. In other words, criminal liability is imposed when the offender does not have reason to defend his or her conduct. In the practice of the law of criminal procedure, a liability can be imposed on the offender when there is no 'defense' in the conduct. These concepts create balance among the rights to accuse and prosecute of the general prosecutor and the rights to denial and defense of the accused. The general prosecutor has the rights to accuse and prosecute an individual committing crime. Therefore, the General Prosecutor has an obligation to prove the object of accusation and prosecution. In other words, the General Prosecutor has an obligation to support his or her prosecution based on the formulation in the criminal code. On the other hand, the defendant can defend his or her position based on the reasons of punishment abolition. To avoid punishment, the defendant must be able to prove that his or her crime is supported by the reason that can abolish the punishment.[5]

When someone is held responsible for a crime, a chance to defend the reason of the conduct must also be given. If a legal system does not provide such an opportunity, there is not a due process of law. This in turn will challenge the justice principles. The law will fail to contribute valuable matters to social life, if the creator of the delicate is not given the chance to clarify why he or she does not avoid crime.[6]

The culpability conception is related to the mechanism that can determine the punishment of the offender. It therefore influences the judge. The judge must consider all aspects regardless its negative or positive formulation. Besides, the judge must consider several aspects although the general prosecutor does not prove it. On the other hand, when the accused put forward the defense based on the reasons that can abolish the crime, the judge has an obligation to go deeper into the problem."[7] In this case, the judge has an obligation to look deeper into the defendant's reasons related to the abolition of the guilt. Although the defendant does not defend his or her conduct based on the reasons that can abolish the guilt, it should be noted such reasons did not accompany

[1] Wirjono Prodjodikoro, *Principles of Criminal Law in Indonesia*, Refika Aditama, Bandung, 2003, p. 66.
[2] *Ibid*.
[3] Chairul Huda, *Criminal from Nothing to Nothing without Errors toward Criminal Liability without Error*, Kencana, Jakarta, 2006, p 104.
[4] Andi Zainal Abidin, 1995, *Op. Cit*, p. 260.
[5] Chairul Huda, 2006, *Op. Cit*, p. 62.
[6] *Ibid*, p. 63
[7] *Ibid*., p. 65

the defendant when he or she committed crime. A judge still has an obligation to note that the defendant does not have reasons that can abolish the guilt although the defense is not based on such reasons. This will make a basic change in the process of case examination in the court.[1]

The decision on a crime case can be separated from the public morality, but the result may go against the expectation. All crimes are unaccepted conducts in the eye of the law. If the law cannot accept the conduct, it is morally unacceptable. Law is a phenomenon resulted from the development of civilization and it can only be understood from this aspect. Therefore, the stipulation of a conduct as a crime is the reflection of public 'refusal' against the conduct. Crimes are unacceptable conducts in the community and they are consequently condemned. It is the state's wisdom who gives juridical form for the condemnation[2]

Sometimes, the state takes an initiative to forbid a conduct with a hope that the community will 'refuse' the conduct too. The moral norm influences the state determining a crime. In other words, the moral factor is not obligatory, but its influences are undeniable. The stability of legal system is influenced by moral values. Consequently, the stipulation of a crime conduct must take note on the moral system. Although this is not obligatory, the public morality must really be considered when the state formulates crime. A further consequence of it is that the community is expected to develop juridical condemnation against a crime in line with the moral values of the community.[3]

The culpability is the responsibility of an individual for the crime that he or she commits. To make it clear, the responsibility required from an individual is the crime that he or she commits. Therefore, the culpability is caused by the crime committed by someone. Culpability is essentially a mechanism built by the criminal code to react against the 'refusal agreement' on certain conducts".[4]

3.3. Criminal Justice System

The culpability is the responsibility of an individual for the crime that he or she commits. To make it clear, the responsibility required from an individual is the crime that he or she commits. Therefore, the culpability is caused by the crime committed by someone. Culpability is essentially a mechanism built by the criminal code to react against the 'refusal agreement' on certain conducts. [5] Therefore, the goals of the criminal justice system are:

Protecting the community from the crime;

Solving the crime case to satisfy the community because the justice is enforced and the guilty is sentenced; and

Make attempts to prevent crimes committed by repeat offenders.

The word system in the criminal justice system signifies that the work of this institution is full of careful consideration related to synchronization, coordination and cooperation as described above. As a parable, the subsystems of criminal justice system are similar to the cars. All have important functions and roles to generate the car. A classical problem which often disturbs the work of the criminal justice system is that each subsystem is independent and has its own vision, mission and goal. Each subsystem has authority to determine and make decision according to respective condition (discretionary power). A change in a subsystems will influence the work of the system as the whole. The fragmentation among the system will undeniably influence the achievement of the criminal justice system as the whole. Therefore, the understanding on the good pattern of cooperation is necessary in order to achieve the goal of criminal justice system.[6]

3.4. The Judge's Decision on Punishment

Meticulousness is necessary for judges for examining a case in the court and deciding the punishment. Besides, a judge must be able to learn psychic and social condition of the offender in order to choose and decide the right punishment for the offender. In this way, a judge can predict how the punishment will change the behavior of the offender after the end of the period of imprisonment. [7]

Related to the quality of the punishment, judges must note the objective and subjective condition of the crime as

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[1] *Ibid.*
[2] *Ibid*, p. 67.
[3] *Ibid*, p. 68
[4] *Ibid.*
[5] Mardjono Reksodiputro, *Indonesian Criminal Justice System (The Role of Law Enforcement Against Crime) in Human Rights in Criminal Justice System*, Institute of Criminology, University of Indonesia, Jakarta, 1994, p. 84-85
[6] Eva Achjani Zulfa, *Paradigm Shift Punishment*, Supreme Lubuk Publisher, Bandung, 2011, p. 21
[7] J. Djohansyah, *Legal Justice, Social Justice, and Moral Justice in Practice*, Comparison of Materials in the Panel Discussion with the Supreme Court, in Capita Selecta of Corruption 2007, Jakarta, 2000 p.128

well as the quality of the conduct and the offender.[1]
According to the Code of Criminal Procedure, the judge's decision covers stipulations as basics of punishment or stipulations of laws and regulations as legal basis of the judge's decision accompanied by favorable and unfavorable condition that can support the position of the defendant. Related to this stipulation, there are two aspects to discuss:[2]
The quotation of the articles and laws used as the basics of the decision.
Favorable and unfavorable condition that can help the defendant.

3.5. Definition of Corruption

Generally, corruption is a conduct against written and unwritten legal-norms causing the damage of the agreed orders covering legal order, political order, administrative order, sociocultural order and this deprives the rights of the public.
Shed Husein Alatas explained the characteristic of corruption in his book: "Sociology of Corruption" as quoted by Evi Hartanti as follows:
Corruption often involves more than one individual. This is different from theft or fraud. Actually, there is no such a corrupt official, except for the one committing embezzlement. For example, the financial report on official tour of duty or hotel receipts. However, there is usually a silent agreement among the officials practicing the frauds to facilitate the crimes. One method of operation is carried out by increasing the frequency of the tour of duties. Such cases are practiced by the political elites and create public polemic.
Corruption is usually committed secretly, but when it prevails and deeply roots in the community, the individual holding power and those inside the inner circle dare showing their corruption conducts. However, the motive of corruption is kept as a secret.
Corruption involves reciprocal elements of obligation and advantages. The obligations and advantages are not always in forms of money.
The offenders of corruption usually cover their conducts using legal justification.
Offenders of corruption expect clear decision and they have ability to influence the decision.
Each corruption has element of fraud, usually committed by public institution or community.
Each corruption is equal to the betrayal of trust.[3]
According to the historian *Onghokham* as quoted by Ikhwan Fahrojih and friends from the Malang Corruption Watch (MCW), corruption starts when someone separate private finance and public finance meaning that corruption becomes popular when modern political system came into practice. [4]
The traditional political system does not recognize the separation of state money and the king's. The principle of the separation of the state's money and private money starts in the beginning of the 19th century after the French, British and American revolutions. Since then, the abuse of power for personal purpose, especially in financial matters was regarded as corruption. However the separation concept of the state money and private's is not monopolized by the history of western countries. According to the Islamic history, such a separation concept was also practiced in the era of the Prophet Muhammad SAW and his close friends. In the era of the Khalifa Umar bin Khattab, there was a separation between the money of the ummah and private money. Khalifa Umar did not even want to use the money of ummah except for the portion of his rights as the Khalifa. There is an interesting and inspiring story concerning this leader. When he was visited by a private guest, he switched off the lamp paid by the state because the arrival of the guest was not related to the interest of the ummah.[5]
Regarding corruption, the article 2 of the law Number 31 Year 1999 on the Eradication of Corruption (later written as the Corruption Law) stipulates that:
"Anyone enriches oneself and another or corporation illegally and consequently harm the state's finance or the state's economy is punishable for life imprisonment or minimum four-year imprisonment and maximum twenty-year imprisonment and minimum fine Rp 200,000,000,- (two hundred millions) and maximum Rp. 1.000,000,000,- (one billion rupiah)" .[6]
In addition to that, the article 3 stipulates that:

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[1] *Ibid*
[2] M. Yahya Harahap, *Change and Implementation Issues Criminal Procedure Code*, Second Edition, Sinar Grafika, Jakarta, 2005, p. 362-364.
[3] Evi Hartanti, *Corruption*,Sinar Grafika, Jakarta, 2005, p. 10.
[4] Fahrojih Brotherhood, et al, *Understanding and Fighting Corruption*, Yappika and Malang Corruption Watch (MCW), Jakarta, 2005, p. 7.
[5] *Ibid*., hp. 8
[6] Article 2 of the Law Number 31 Year 1999 on the Corruption Eradication

"Anyone misuses the power, the chance, the facility given to him or her as parts of the official position or official job in order to enrich himself or herself or someone else or a corporation and this can harm the state's treasury or state's economy, is punishable for life imprisonment or minimum imprisonment for a year and maximum twenty years and or minimum fine Rp. 50,000,000,- (fifty millions rupiah) and maximum Rp. 1.000,000,000,- (one billion rupiah)".[1]

Referring to the stipulation, elements of corruption are :
A conduct against the law
Enriching oneself, someone else or corporation
Harm the state's treasury or state's economy
Misuse the power, chance or facility trusted to him or her as part of official job or official position.[2]

3.6. The Punishment in the Corruption

The reason why the Law Number 31 Year 1999 on Corruption is amended can be found in the part b of the considerations of the Law Number 20 Year 2001:

a. To safeguard legal certainty;
b. To avoid the variety of legal interpretation;
c. To protect the social and economy rights of the community;

Fair treatment in the war against corruption.[3]

By amending the Law Number 31 Year 1999 into the Law Number 20 year 2001 followed by the Law Number 30 Year 2002, it is hoped that the Law Number 31 Year 1999 can fulfill and anticipate the development of legal demand of the community. This, in turn, is hoped to be able to prevent and eliminate effectively all forms corruption that can harm especially the state's treasury and state's economy as well as the community in general. Also, the president has promulgated Presidential Instruction Number 5 Year 2004 on the Acceleration of the Corruption Elimination to realize the goal to prevent and eliminate corruption.

According to the Law Number 31 Year 1999, the varieties of the punishment that can be imposed by judges on offenders of corruption are as follows:[4]

3.6.1. Death Penalty

An amendment made by the Law Number 2001 on the Law Number 31 Year 1999 is the explanation of the the Article 2 point (2) saying that "certain condition" in the Article 2 the point (2) is a condition that can be employed as unfavorable reasons for the offenders of corruption when : [5]

a. The crime is committed against financial resources for:
b. The prevention of dangerous situation
c. Natural disaster
d. The prevention of widespread social unrest's impact
e. The prevention of economy and monetary crisis
f. Prevention of corruption

Referring to the "dangerous situation", it is explained by the Article 2 point (2) of the Law Number 23 "Prp" Year 1960 on Dangerous Situation. It is not clear when national disaster, widespread social unrest, economy and monetary crisis as explained by the article 2 point (2) above happen. It is because there is no law regulating when such situations can be declared.

"Certain situation" as elaborated in the explanation of the Article 2 point (2) above is aggravation of the punishment which can only be imposed on corruptors as stipulated by the Article 2 point (1) above. Since it is an aggravation, it is not necessary to prove that the offender understand "certain situations" above when he or she commits corruption.[6]

The aggravation of the punishment in form of the death penalty can be imposed on the perpetrator of corruption as stipulated by the Article 2 point (1) above when the crime is committed in "certain situation" as stipulated in the Article 2 point (2). Due to the application of the word "can" in the Article 2 point (2) of, the death penalty for corruptors is facultative. It means, although the corruption is committed in certain situation as stipulated in

[1] Article 3 of the Law Number 31 Year 1999 on the Corruption Eradication
[2] Ikhwan Fahrojih, 2005, *Op. Cit.,* p. 10.
[3] Point b of the Consideration of the Law Number 20 Year 2001 on the Amendment of the of the Law Number 31 Year 1999 on the Corruption Eradication
[4] *Ibid*, p. 12
[5] The explanation on the Article 2 92) of the the Law Number 20 Year 2001 on the Amendment of the of the Law Number 31 Year 1999 on the Corruption Eradication
[6] Evi Hartanti, 2005, *Op. Cit.*, p. 13

Article 2 point (2), the offender can be punished by other types of punishment instead of the death penalty.[1]

3.6.2. Imprisonment

Article 2 point (1) and Article 3 of the Law Number 31 year 1999 on the Elimination of Corruption

Article 5, 6, 7, 8, 9, 10, 11, 12, 21, 22, 23 and 24 of the Law Number 20 Year 2001 on the Amendment of the Law Number 31 Year 1999 on the Elimination of Corruption

3.6.3. Additional Punishment

Additional Punishment consists of:[2]

Deprivation of visible mobile-property or invisible or immobile property supported or gained from corruption including the company belongs to the convict where corruption is committed as well as the substitutes of those properties.

Repayment of the loss in the same amount as the wealth obtained from the corruption.

The closing of all or part of the company for maximum a year.

The deprivation of all or parts of certain rights or the elimination of all or parts of certain profits given by the government to the convict.

If the convict does not repay for the loss in maximum one month after the final court's decision, his or her property can be confiscated and put into auction by the judge in order to repay for the loss.

In case of a situation in which the convict does not have enough wealth or property to pay for the loss, it is substituted by imprisonment which must be decided by the court according to the Corruption Law.

3.7. Justice Principle in the Court's Decision for Corruptor

Judges have obligation to examine and try a case according to the jurisdiction based on the existing law. The law must be cited in the court's decision. After the defendant is legally and convincingly proved guilty, the judge can decide whether the defendant should be punished by imprisonment or fine payment. A judge is bound by the law which normatively stipulates minimum punishment covering imprisonment or fine payment. However, there are usually judges who pass the minimum sentence because of justice and conscience considerations. A judge can make the decision in forms of:

Punishment if the defendant proven guilty;

Discharge if the accusation is not proven or proven but it is not a crime (not in the jurisdiction of criminal law), but a conduct within the jurisdiction of the civil law;

Discharge from any legal prosecution if the defendant cannot be responsible for his or her conduct (because of mental illness) or forced defense.

According to the Instruction of the Chief of the Indonesian Supreme Court Number KMA/015/INST/VI/1998 June 1, 1998, a good and quality decision is executable one. To make executable decision, there are some criteria:

a. Ethos or Integrity
b. Pathos or decision consisting of
c. Juridical element as the first and principal element;
d. Philosophical element containing mainly truth and justice;
e. Sociological element which means the decision must consider the values existing and growing in the community;
f. Logos or making sense.

The judge as the one who implements the law decides a case, in the name of the law, based on existing laws, authentic data and reliable witnesses. Concerning with the decision that acquits the defendant from the legal charge is based on the Article 191 point (1) of the Code of Criminal Procedure saying that: "If the court thinks that the court examination shows that the guilt of the accused is not legally and convincingly proven, the defendant is acquitted from any legal charges.[3]

In reality, the public still think that law enforcement is unjust because there is a difference of treatment between one offender and the other, such as in a corruption case.

In all trials of criminal case, the Court (the judge) must adopt *due process model* and the principle of *equality before the law*.

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[1] *Ibid*, p. 13

[2] Evi Hartanti, 2005, *Op. Cit.*, p. 16

[3] Department of Justice, *Guidelines for Implementation of the Criminal Procedure Code*, the Foundation Pengayoman, Jakarta, 1981, p. 86

3.8. The Goal of Punishment in the Sentencing of Corruptor

The existing Indonesian law has never formulated the goal of punishment. Furthermore, the discourse of such a goal has still been in the theoretical realm so far. However, the Draft of the Indonesian Criminal Law has put the goal of the punishment in the first book called the General Stipulation, or to be exact in the Chapter II called Punishment, Crime and Action.

According to Wirjono Prodjodikoro, the goals of the punishment are: [1]

To deter individuals in order to tell them not to commit crime (general prevention) or to tell certain individuals who committed crime previously in order to prevent them to commit crime again (special prevention).

To educate or rehabilitate individuals who previously committed crime in order to counsel them to be well-behaved and useful citizens.

The goals of the punishment itself are hoped to facilitate protection, rehabilitation and resosialization of the community as well as the fulfillment of the *adat* values. It is also directed towards the psychological aspect, especially the elimination of the guilty feeling of the perpetrator. Although punishment is a burden, it is not directed to cause suffering and humiliate human dignity.

According to P.A.F. Lamintang[2] there are three principles concerning the expected goals of the punishment:

a. To rehabilitate the mental of the offender,
b. To make individual wary of committing crime, and
c. To make certain criminals incapable of committing other crimes, such as criminals who cannot be rehabilitated in any other ways.

This frame of thought gives birth to some theories concerning the goals of punishment. In general, there are three major theories of punishment:

a. Absolute theory or revenge theory (*Vergeldings Theorien*)
b. Relative theory or goal (*Doel Theorien*)
c. Joint theories/ modern (*Vereningings Theorien*)

3.9. The Basics of Judge's Consideration for the Punishment of Corruption Offender

To make decision on the punishment, judges take juridical consideration more into account than non-juridical consideration.

In addition to material and immaterial loss, corruption also results to high-cost economy because it creates inefficiency and wastes economical resources. Bribery and illegal taxes burden the component of production cost. A corrupt government will burden the private sector with extraordinary problems to deal. Jeremy Pope's survey shows that companies in Ukraine spend 28% in average of the working hours to deal merely with government in 1994. It becomes 37% in 1996. If there is no real action of the government to eliminate corruption, the government's effort to invite foreign investor to invest their capital in Indonesia through some international visits spending billions of Rupiahs will be useless.[3]

A research conducted by Professor Shang-Jin-Wei of Kennedy School of Government of Harvard University as quoted by Jeremy Pope shows that the increase of one level of corruption causes the decrease of 16% of total foreign investment. It is because the worse corruption in a country receiving foreign investment, the increase of the foreign company's marginal tax will be.[4]

In addition to those consequences, Alatas (1987) states that there are six bad influences of corruption : (1) The birth of various forms of injustice; (2) Inefficiency; (3) Stimulating other crimes; (4) Weakening the spirit of bureaucracy official and those who become victims; (5) Reducing the state's ability in performing public service; (6) Increasing the cost of service.[5]

4. Conclusion and Recommendations

As the researchers explain, analyze and discuss the results of the research above, we conclude answers of the research problems and make some suggestions.

4.1. Conclusion

The justice principle in the sentencing of corruption offenders must be applied proportionally. This signifies that the judge must really pay attention to the justice principle governing not only the act, but also the loss suffered

[1] Wirjono Prodjodikoro, *Principles of Criminal Law in Indonesia*, Refika Aditama, Bandung, 2003, p. 16
[2] P.A.F. Lamintang, Penitensier Indonesian Law, Armoco, Bandung, 1984, p. 23
[3] Jeremy Pope, *Combating Corruption Strategy Elements of the National Integrity System*, Transparency International Cooperation between Indonesia and Indonesian Torch Foundation, Jakarta, 2003, p. 53
[4] *Ibid*, p. 55
[5] Alatas, *Corruption Nature*, Causes and Functions. LP3ES, Jakarta, 1987, p. 19

by the state. Also, the decision of the Judge specializing for corruption cases must accommodate the justice principle of the Pancasila.

The goals of the sentencing for the corruption offenders are retribution as well as prevention.

The basics of consideration used by the judge in sentencing the corruption offenders are juridical and non-juridical ones.

4.2. Recommendations

To establish proportional justice principle, the judge must regard the principle of equality before the law for all offenders and deciding the case fairly as well as proportionally.

The sentencing for corruption offenders must be in proportion and equal with the act and the loss suffered by the state.

The judge's considerations must not stimulate doubtfulness and public disbelief towards the Court, especially concerning with the offenders of corruption.

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