The 2nd Proceeding
"Indonesia Clean of Corruption in 2020"

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

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CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED

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ABSTRACT

Corruption is one of society's disorientation and is in the same state as other types of crimes such as theft, which has existed since the human are living as society. The problem is that the corruption is increasing in line with prosperity and technological advancement. In fact, when a nation is advancing in its development, it encourages people to have more need so that they will engage in corruption. Based on these descriptions, in the preparation of this paper the authors will describe, how corruption criminal sanctions with values of justice? In this study, the author applies qualitative research methods, constructive approach, and also applies primary data and secondary data. The techniques of observation and in-depth interviews with key informants are applied for collecting primary data. Last, data analysis technique is applied to the primary data.

Corruption prevention policies do not give deterrent effect to the corruptor. The investigation and prosecution policy in cases of corruption, supposedly having orientation for reimbursing the state and also aiming deterrent effect by providing severe criminal sanctions. No arrest for suspect of corruption (although the state has been paying losses) is reducing the deterrent effect or even not all.

For the sake of justice, the judge should see Article 5 of Law No. 48 of 2009, it is clear that the reconstruction of criminal responsibility and accountability of the administration are related to the values of justice, the values of divinity and legal values that live in the community (the living law) so we need to develop justice characterized by Indonesia, which is “justice of Pancasila”, which implies “justice of deity,” “fairness humane (humanistic)”, “justice that is democratic, nationalist, and social justice”. This means, justice upheld is not just formal justice, but substantial justice.

Keywords: corruption, criminal sanctions, the value of justice

A. BACKGROUND

Technology provides a major influence for the change in lifestyle of the people, the more rapid development of technology, the more developed a lifestyle of people in the country marked by sophisticated crime. Crimes appearing must be subject to a fair law. Issues of justice according to Islamic law, can not be separated from the philosophy of Islamic laws and theories regarding the purpose of Islamic law, which in principle is how to realize the “benefit” to all mankind, which includes “expediency” in this life and in the hereafter.
Corruption is one of society's disorientation and is in the same state as other types of crimes such as theft, which has existed since the human are living as society. The problem is that the corruption is increasing in line with prosperity and technological advancement. In fact, when a nation is advancing in its development, it encourages people to have more need so that they will engage in corruption.3

The uncontrolled increase of corruption will be catastrophic for not only to the national economic life but also the life of the nation in general. The widespread and systematic Corruption is also a violation of the rights of the local economy, and therefore, all the corruption can no longer be classified as an ordinary crime but has become an extraordinary crime. Thus, the eradication process demands extraordinary ways.4

B. Problem Statement

What is corruption criminal sanctions which based on the values of justice?

1 Barda Nawawi Arief, Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana, Bandung, Citra Aditya Bakti, 2005. Hal.8
C. Research Method

The type of research is qualitative research. According to Kirk and Miller, it is a certain tradition of qualitative research in social science that is fundamentally dependent on the observations in humans both in the region and in their terminologies. The qualitative research is expected to locate the hidden meaning in the text as well as the fact in real society related to corruption criminal sanctions which based on the values of justice.

Constructive approach is applied in the research to collect empirical data material in the practice of criminal sanctions methodology applied towards corruption based on the values of justice.

Justice is actually a relative concept. On the other hand, justice is the result of interaction between expectations and realities, the formulation can serve as guidelines in the lives of individuals or groups. From the etymological aspect of language, the word “fair” is derived from the Arabic “Adala” which implies middle. From this meaning, the word "Adala" then synonymous with the lowering wasith to the word wasith, which means the arbitrator or a person standing in the middle which implies a fair attitude.

From this meaning, the word fair is synonymous with meaningful inshaf (conscious), because the fair is a person who can stand in the middle without a priori partiality, in which such a person is a person who is always aware of the problems facing it in the overall context, so the attitude or decision taken with regard to the issue becomes right.

Sense of justice can also be found in the implementation of the rule of law through the judge's decision.

For further in defining and achieving justice, Natural Law Theory retains the crown of justice as law since Socrates to Francois Geny. It gives priority to “the search

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7 Ibid.
for justice”9. There are a variety of theories on justice and a fair society. These theories related to the rights and freedoms, the opportunities of power, income and prosperity.

The efforts to "impoverishment" of the true corruption convicts for criminal sanctions such as confiscation or seizure of assets acquired convicted of acts of corruption engage. “Impoverishment” is a popular term used to refer to the seizure and confiscation of wealth. The Code of Penal (Wetboek van Strafrecht -KUHP-) in Book I Chapter II, Article 10 requires that the deprivation of certain goods is a type of criminal penalties or additional. Penal Code regulate in more detail in Article 39 paragraph (1) that “goods belonging to convicted derived from the crime or who intentionally used to commit a crime, can be deprived”.

Penal sanctions have been imposed, in the context of criminal law, focused on the legal interest or folk. The nature of criminal law as public law does not depend on the will of the individual, which in concreto harmed, but submitted to the government as a representative of the public interest.10

In order to protect the public interest, what has been done by the state is an act which actually violates fundamental to the personal interests of the parties concerned, such as arrest, detention, to impose criminal sanctions to perpetrators.

The sanctions is in form of “impoverishment” including an attempt of restorative justice where the offender must return to the original condition before he committed the crime of corruption.

It is interesting that there is an improvement in law related to the decision of the Court of Corruption (Corruption Court) who hear the case of Gayus Tambunan. In the decision, the panel of judges impose criminal sanctions additional to confiscate property owned by Gayus Tambunan in addition to imposing sanctions of imprisonment and fines.11 This ruling is a legal breakthrough and could be used as a precedent for subsequent corruption cases in an effort to “impoverish” the corruptor.

10 Wirjono Prodjodikoro, Asas-asas Hukum Pidana di Indonesia, (Bandung: Eresco, 1969)
11 Putusan Pengadilan Tindak Pidana Korupsi yang dijatuhkan pada hari Kamis 1 Maret 2012 oleh Majelis Hakim Pengadilan Tipikor yang dipimpin Suhartoyo dan beranggotakan Ugo, Pangeran Napitupulu, Sudjatmiko, dan Anwar dengan hukuman enam tahun penjara dan denda Rp 1 miliar subsider empat bulan serta menyita harta Gayus senilai Rp 74 miliar di berbagai rekening dan deposito, serta aset berupa mobil Honda Jazz; Ford Everest; rumah di Gading Park View, Kelapa Gading, Jakarta Utara; dan 31 batang emas masing-masing 100 gram.
Existence formulation of Law No. 20/2001 on the Amendment of Act No. 31/1999 concerning the Eradication of Corruption Act, Chapter II, Article 2, paragraph (2), related to death penalty for corruption in specific circumstances. Therefore, it must be placed as the positive law reality and become a part of Indonesia.

This statement explains that researchers better to put together with the moral law and not in separate things as Austin stated. Positive law is not a separate part to the ideal law, because, to see the nature of the positive law it must return to the values, empirical facts and legal ideals that built up in it. The idea of the law must not be contrary to the idea of justice, and therefore actual conflict that exists between the law and justice should be interpreted as a consequence of the interpretation which is not perfect against each idea.\(^\text{12}\)

Therefore, it is derived from the general principles of the natural law through a process of inference, as “one should not kill” may be derived from the principle of “no one should do evil against one another”. Some others are derived from by establishment.

Specialization of the rights under natural law it relies upon positive law, or in other words, the positive law is a means to apply the general principles of the natural law on the arrangement of real-life people in society.\(^\text{13}\)

From the above philosophical reasoning, the researchers will analyze the reality of death penalty for corruption in Indonesia based on the level of specificity as characteristic of positive law. The formulation of the Act No. 20/2001 on the Amendment of Act No. 31/1999 concerning the Eradication of Corruption Act, Chapter II, Article 2, paragraph (2), related to death penalty for corruption in certain circumstances, on aspects of the grounding values, law and justice sanction law

Discussion

Sanction of Corruption which Based On Value of Justice

Corruption is like an illness in someone’s body, which should be prevented for not harming the other part of the body itself. The harmed part of the body should be amputated


\(^{13}\) Op. cit., 22.
so that the viruses will not affect the others. From this illustration, the corruption should be treated so.14

Corruption will be the obstacle for the development of democracy, hinder the implementation of agencies in performing their duty and can not use resources optimally. Corruption fosters behavior in concealing everything and encourage oppression. At the end, corruption preclude the weakest citizens to have share in the development and have higher quality of life.15

The increasing of corruption has been spread from all level of people to the members of the legislature and the judiciary. This has implications brought huge losses to the state finance.

Corruption has become the culture in society. It increases the number of corruption case. We still have confidence, that corruption in Indonesia is the result of a systemic cause that occurs in Indonesia

Corruption is the result of failure of systemic management of our country, where the limitations and lack of accessory facilities and infrastructure that supports both the bureaucratic system involving physical, technological and human resources.

For example, the lack of shipbuilding in Tanjung Priok so the ship takes long enough to be able to do the unloading, while the vessel operating costs are quite high, the length of time it takes to make the permitting is caused by the bureaucratic system which is quite complicated, even though there has been one-stop service. The superstructure system of government is less precise and firm, so it results vulnerable crimes of corruption.16

In the end, from these conditions, it will gradually lead to crimes of corruption among government administrators and bureaucrats, and if this condition is not immediately resolved and equipped, provide a deterrent effect and prosecute the perpetrators of corruption instead, it will lead to new corruption that carried out the crime of corruption. If this happens, it will be more difficult for the implementation of eradication of corruption, and the conditions that would make corruption more intricate and more complicated.

16 Zulki Zulkifli Noor, Deklarator Indonesia Seharusnya.
The nature of criminal law as public law does not depend on the will of the individual, which in concreto harmed, but submitted to the government as a representative of the public interest.\(^{17}\)

Another result, the handling of corruption cases lose their deterrent effect. First, rich criminals will easily restore the proceeds of corruption and continuing business activities as if nothing had legal issues.

Second, the calculation of loss-prone countries still make a difference. In any corruption case, handling the process of calculating the losses amount of the country is still causing differences of interpretation either by the Prosecutor, state audit agency (BPK), the financial supervision and development (BPKP), as well as the courts.

Third, the delivery of assets belonging to criminals is prone to be manipulated. So far, the fines policy is still unclear whether the state should be in cash or assets or both. Issues will arise if the indemnification of the country is carried out in the form of assets. It is not possible for asset to be given by a suspect which is bulging asset or assets whose value has increased (markup).\(^{18}\)

In principle, severe sanctions are given only when the enforcement mechanism of the lighter has not been deemed useful or not suitable. Criminal law sanctions should be fair and proportionate to the reality, performed by the offender. The sanction is the form of “impoverishment”, including an attempt of restorative justice where the offender must return to the original condition before he committed the crime of corruption.

The reconstruction of the criminal sanctions under the Act is absolutely necessary, such as in the Law of the Republic of Indonesia Number 31 of 1999 on Corruption Eradication jo Law of the Republic of Indonesia Number 20 of 2001 concerning amendments to the Law of the Republic of Indonesia No. 31 of 1999. Thus, it should balance in the special criminal sanctions as stipulated in the Act, in particular, the balance and values of justice in the confiscation of the assets of the perpetrator of the offenses of corruption committed.


\(^{18}\) Indonesia Corruption Watch, diakses 3 April 2014.
Conclusion

Corruption prevention policies do not give deterrent effect to the corruptor. The investigation and prosecution policy in cases of corruption, supposedly having orientation for reimbursing the state and also aiming deterrent effect by providing severe criminal sanctions. For the sake of justice, the judge should see Article 5 of Law No. 48 of 2009, it is clear that the reconstruction of criminal responsibility and accountability of the administration are related to the values of justice, the values of divinity and legal values that live in the community (the living law) so we need to develop justice characterized by Indonesia, which is “justice of Pancasila”, which implies “justice of deity,” “fairness humane (humanistic)”, “justice that is democratic, nationalist, and social justice”. This means, justice upheld is not just formal justice, but substantial justice.

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