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Applying the Straftoemetingsleiddraad in a Corruption Case in Indonesia

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Abstract

Criminal Disparity in a corruption case is unacceptable in philosophical reasoning, sociologically, or even from the perspective of legal objectives, which in theory and factual facts lead to judicial caprise and the presumption of judicial corruption in the verdict, where it will adversely affect the fair justice of the convicted or for the Indonesian people as victims of corruption. Criminal Law gives alternative in order to give pressure the criminal disparity through straftoemetingsleiddraad or guidance of sentencing of the judges in prosecuting without violating the principle of freedom of judges, either through the Indonesian Supreme Court Regulations for now as ius constitutum, or through the legislation process of the Anti-Corruption Act for the future as ius constituendium.

Keywords: *Disparity; Straftoemetingsleiddraad; Justice*

Introduction

Prof. Satjipto Rahardjo (2006: 136) argues that "corruption is a parasite sucking a tree will cause the tree to die and when the tree dies the corruptors will also die because there is nothing left to suck", this statement is already enough to give a picture of what corruption is in this country, so that it is appropriate that the Law of the Republic of Indonesia Number 20 Year 2001 on the Amendment to Law of the Republic of Indonesia Number 31 of 1999 on the Eradication of Corruption Crimes (LNRI.2001 No.134) abbreviated as Corruption Law, give a threat of dead sentence, life imprisonment and imprisonment of a minimum probation and a maximum of 20 years and other penalties, and the indefinite sentence referred in the Corruption Act makes criminal disparity, even though the articles violated are the same or the total amount of the state financial court losses is relatively the same, but criminal sanctions imposed by the Court vary without satisfactory reasons for the present, as in these two cases where the Supreme Court of Indonesia by its Judgment No. 472/K / Pid.Sus / 2012 dated 3 May 2012 stated that the Regent of Langkat Syamsul Arifin (2000-2007) was proven to have violated Article 3 of the Anti- Corruption Law, and was sentenced to six years imprisonment, but on the other side of the Supreme Court trial through Judgment No. 1589 / K / Pid.Sus / 2013 imposed 9 years imprisonment to former Banyuwangi Regent Ratna Ani Lestari (2000- 2005), for violating Article 3 of the Anti-Corruption Act which resulted in state financial losses of up to Rp 19,106,000,000.- (Nineteen billion one hundred

and six million Rupiah) these two judgements have raised a query "why is Syamsul Arifin detrimental to state finances more than Ratna Ani Lestari is sentenced lower? and vice versa why is Ratna Ani Lestari which had harmed state finances in smaller number is imposed with higher prison sentence? even though both of them have violated the same Article 3 of the Anti-Corruption Act, at the time they committed their criminal act both were in the course of occupation as regents, but the fact is the Court had sentenced them differently, according to Prof. Muladi and Prof. Barda Nawawi (2010: 52) a situation like this is called criminal disparity, a different punishment for a same crime or toward a crime which dangers can be compared without a clear justification and Prof. Harkristuti Harkrisnowa argues that disparity happened in many issues such as between cases, having the same serious level (Ali & Heryani, 2012: 152), such thing will lead to the presumption of the public that there has been a "judicial corruption" as argued by Prof. Mahfud M.D, that:

> " . . whatever judgment is desired can be built up by its acceptable logic. If nothing extraordinary happens, a judicial corruption transaction can easily pass because in making decisions and choosing perspectives, judges can take refuge under the principle of "freedom of judges" to judge in the name of confident as a judge." (Syamsudin, 2012: 208-209).

Other than that according to Prof. Muladi and Prof. Barda Nawawi (2005: 8) disparity will create:

> "Convicted underestimates the law, whereas respect to the law is one of the targets of punishment. A serious matter will be seen from here, since this will form an indicator and a manifestation of failure in the system to reach a fair justification in a rule of law and at the same time will weaken public trust in the criminal justice system."

Now or even in the future the national criminal law needs to seek for a pattern or system of punishment that can reduce punishment disparity in cases of corruption that happened so far, creating low public confidence in the judiciary in Indonesia, then in respond to this criminal law problem a problem formulation was made to answer this legal problem, with the question what is the significance and nature of the application of *straftoemetingsleiddraad* in corruption cases? Can this *straftoemetingsleiddraad* system be applied in corruption cases in Indonesia on the basis of the national criminal law? what is the ideal concept of the *straftoemetingsleiddraad* system applied in corruption cases in Indonesia according to the national criminal law in the future ?, Base on this three formulas this research is made and given the title "The Application of *Straftoemetingsleiddraad* in Corruption Criminal Case in Indonesia".

Discussion

This discussion will be carried out through a legal argument built on factual facts not from an empty space with *ius in causa positum* principle deriving from the concepts and theories of the criminal jurists, as the term of the writer that "in research we should lean on the shoulders of a giant", but still refers to the positive law as a characteristic of normative research, then to enrich the insight of this legal argumentation, the writer uses the Rotterdam school of thought, that "the law is not rigidly fixed (*gefixeerde essenties*) but empty spaces (*lege plekken*), open (*open ruimen*) and is not a determined domain (*gedetemineerde plaatsen*) (Rahardjo, 2016: 87).

The Significance and Nature of the Application of Straftoemetingsleiddraad in Criminal Corruption Cases

The differences in the severity of imprisonment sanction imposed by the Court against a convicted individual in a conventional criminal offenses (general criminal offenses), both are subject to the same article is a logic, because the judge needs to examine the various aspects of a conventional criminal act, both starting from the cause and effect of *actus reus*, and *mens rea* of the accused, until in a decision the Judge's consideration is found which are things that incriminate and alleviate the accused, which is as a basis for the judge to impose criminal sanctions on the accused, then according to Article 14a *Memori van van Toelichting* (WvS, 1927) that:

> "In determining the level of punishment, for each incident the judge must observe the actions and the accused. What rights are being offended by the criminal act, what are the damages caused? What was his previous track record? Is the mistake blamed to him the first step to a misguided path or is it a repetition of an evil character that already appeared before? The limit between the maximum and the minimum must be fixed in the broadest way, so that even all the questions above are answered with the defendant's risk. the ordinary maximum punishment should have been adequate." (Djunaedi, p. 7)

This scheme of punishment is called the definite sentence which is influenced by the neo-classical indeterminism, that is, the flow of law which thinks that punishment can only be imposed for the benefit of the accused as well as protecting the interests of the community, then the consequence of this punishment is the disparity punishment occurred in corruption cases. If disparity occurred in the conventional criminal case as provided in The Republic of Indonesia Law No. 8 year 1981 in the Book of Criminal Law (LNRI Year 1958 No. 127) abbreviated KHUP, it is still acceptable because the accused has definitely *mens rea* or different social background, but in corruption act punishment disparity is unacceptable because its social background or the intelligence capacity of accused to self-ability is relatively the same one and another, and the *mens rea* of the accused is greed, not for the necessities of life but to enrich themselves with certain parties, thus the criminal acts of corruption in various literatures are included in the white collar crime typology or "white collar crime", i.e crimes committed by respectable people and having public power, capitalizing the country's wealth to their interests, such as bribery to pass a policy of laws and regulations expected by the oligarchs, as well as mark up costs and / or embezzle state assets and others. In many various literatures white collar crime is an evil act done by persons having high position and authority in the government sector or private sector, which according to the American criminologist Edwin Hardin Sutherland in his book titled White Collar Crime in 1949 is defined as (Fuady, 2004:1):

> "Crimes *committed* by person of respectability and high social status in the course of their occupation" (Setyono, 2009: 30) and or "a white collar crime were a crime committed by a person of respectability and social status in the course of his occupation".

Then the development of white collar knowledge is more extensively described by Edelherz (1970:3) by stating that:

> "White collar crime as illegal act or series of illegal acts committed by non-physical means and by the concealment or guile, to obtain money or property, to avoid the loss of money and property, or obtain business or personal advantage".

Or a series of illegal act committed by non-physical means to obtain private profits and the white collar crime not only narrowly understood that it is committed by the company officials in the private sector, but broadly than that including people from government and politicians, the most important actor

can be identified are "honorable" person, as confirmed by Vijay K Shunglu that corruption is a white collar corruption and the fact is true that the actor of the corruption criminal act is committed by the students and economically established individual, so that the factor they committed corruption is none other than the factor of greed as argued above. Facing this the judge no longer need to consider the actor's *mens rea* in giving punishment, because the *mens rea* of a corruptor is greed.

Punishment disparity in Indonesia in a corruption case that creates dissatisfaction in society as well as the accused himself, making the application of guidance of sentencing in the Anti-Corruption Act aimed to press the occurrence of:

- *Judicial corruption*

For the purpose in minimizing the judge's own desire which might be happened as described by Prof. Mahfud M.D., that:

> "Actually, in examining and making a decision, a judge can punish or release the defendant, it does not depend on the law, but on" the desire / taste of the judge. If the judge wishes to punish the defendant, he can then use certain perspectives and find his argument. Meanwhile, if the judge decides to free the defendant, then he will choose another perspective, argument, and other laws. . . whatever decision is desired can be built up by its acceptable logic. If nothing extraordinary happens, a judicial corruption transaction can easily pass because in making a decision and choosing perspective, the judge can take refuge under the principle of "freedom of the judge" to give a verdict in the name of confident as a judge " (Syamsudin, 2012:208-209).

- *Judicial Caprice*

The interpretation of disparity in the convicted victim is not in a court because the punishment received is different than of other convict even though the case is same (the same offense), as explained by Professor Muladi and Professor Barda Nawawi (2005:8) that:

> "The convict who after comparing punishment then feel as a victim of judicial caprice will become a convict who does not respect the law, though one of the targets of punishment is creating high respect to the law. This will create a serious problem, because it will become an indicator and manifestation failure in a system to achieve equality in the rule of law and at the same time will weaken the public trust in the criminal justice system. Something that not expectable to happen if the disparity is not resolved, namely the emergence of demoralization and anti-rehabilitation attitudes among the more severely punished convict than the others in a comparably cases."

Significance is the initial clue to again seek whether nature is ontological, where it is the thing that wants to be realized by the meaning, due to the occurrence of criminal disparity in corruption cases in Indonesia, so that the application of *straftoemetingsleiddraad* is a means to realize justice through the law, where in legal knowledge justice is a legal objective as Aristotle said that the law can only be established when related to justice (Darmodiharjo dan Shidarta, 2006: 156), and according to Gustav Radbruch in Einfurhung indie *Rechtswissenschaf*t that one of the objectives of the law is justice and the occurrence of punishment disparity according to Professor Muladi and Professor Barda Nawawi (2005: 54) is " an indicator and manifestation of failure in the system to reach equality in justice in the Indonesian Law Government," attributable to the raising of judicial corruption and judicial caprice that

attack the injustice values, then the ontology of application to the application of *straftoemetingsleiddraad* in corruption cases in Indonesia is to provide legal justice for the whole people in Indonesia as provided in Article 17 paragraph (1) of the 1945 Constitution as the ground norm or as the legal source and the successful achievement of the nation ideals, a social justice for all Indonesian people as referred to the 5th precept of Pancasila as the philosophy of *grondslag* or *staatfundamentalnorm* or mentioned also as the source of all national law sources.

The Application of Straftoemetingsleiddraad in a Criminal Corruption Case in Indonesia According to the Criminal Law

The scheme of punishment in the national criminal law or even in the Anti-Corruption Act does not recognized the *strafoemetingsleiddraad* system being influenced by the freedom of the judges principle as provided in Article 24 paragraph (1) of 1945 Constitution that "Judicial power is an independent power", so that the Anti-Corruption Act still uses the indefinite sentence punishment pattern as illustrated for example in Article 2 paragraph (1) with life imprisonment sanctions or for a minimum of 4 (four) years and a maximum of 20 (twenty) years, where this situation proves the occurrence of judicial corruption. The criminal legal experts in Indonesia are aware of this situation, therefore they include the guidance of sentencing in Paragraph 2 titled "*Pedoman Pemidanaan*" in the Draft Law of the 2017 Criminal Code (RUU KUHP), where such punishment is hoped to be the benchmark of the judges to later impose the same criminal sanction as punishment in the similar criminal case in the previous corruption case. The disadvantages of the guidance of sentencing in Article 56 paragraph in the Draft Law of the Criminal Code (KUHP) is in fact depends on the judge's subjectivity, and the guidance as referred to in paragraph (1) has been implemented by the judges in sentencing a corruption criminal case.

Punishment disparity has to end according to the Indonesian Supreme Court itself through its authority, as its responsibility being a judicial institution that oversees judges throughout Indonesia other than the judges at the Constitutional Court of the Republic of Indonesia, on the basis of the Anti-Corruption Act said:

"That corruption act has been committed extensively during this time, not only detrimental to the state finances, but is also an offence to the social and economic rights of the community at large, until criminal act of corruption need to be classified as a crime that its eradication must be carried out extraordinarily ,. . "

On such basis guidance of sentencing could be implemented by giving sentence on criminal corruption cases through the Indonesian Supreme Court (Perma) regulation.

How Is the Ideal System Concept of Straftoemetingsleiddraad Applied in Criminal Corruption Cases in Indonesia in the Coming Period?

Pressuring the occurrence of judicial corruption and judicial caprice is a form of justice in criminal law, so ideally the national criminal law should include the *straftoemetingsleiddraad* in the Anti-Corruption Act with measurable guidelines, by consistently based on the concept as well as theories that already exist in court law, as a legal basis for implementing the system later. The assertiveness of the concept of *strafteoemetingsleiddraad* in criminal corruption cases in Indonesia is required, taking into account that the modus of criminal corruption act in Indonesia always find the cutting-edge forms, and its scope reaches to the judiciary level in Indonesia, and in fact there are dozens of judges at the Corruption Court, who are also apprehended as accused corruptors. Considering the legal understanding in Indonesia tending to adhere to the concept of Plato's justice, that says "that justice can only exist in the laws and regulations made by experts who specifically think about it" (Rato, 2010:63), and confirmed by Hans

Kelsen (2010: 48) with his legalism principle that regards fairness only reveals the value of relative compatibility with a norm, so "fair" is just another word for "true", as said by the American Chief Justice Oliver Wendell Holmes, "The supreme court is not a court of justice, it is a court of law ". The concept of justice is also in line with the Constitutional Court Decision No. 003 / PUU-IV / 2006, dated July 24, 2006 states that the Elucidation of Article 2 paragraph (1) of the Anti- Corruption Law along the phrases that in essence reads:

"What is meant against the law in this article covers a tort in formal or in material form, even if the wrong doing is not regulated in a legislation, but doing such actions is considered despicable because it is not in accordance with the taste or norms of social life in the society, such actions can be charged as against the 1945 Constitution and not having binding legal force".

Agreeing with the principle "*nullum delictum, nulla poena sine praevia lege poenali*", the *straftoemetingsleiddraad* should ideally be formulated in the Anti-Corruption Act not through Perma as in the *trias politika* principle, not by the judiciary (Supreme Court of Indonesia).
The application of *straftoemetingsleiddraad* in a criminal corruption case based on legislation theory having:

- *Philosophical Base*

The occurrence of punishment disparity Prof. Muladi and Prof. Barda Nawawi (2005: 54) said, that punishment is an indicator and manifestation of the failure of a system to achieve equality in the Indonesian rule of law, then if equality in justice is not achieved, it is an injustice, and the injustice referred to in this case is the occurrence different criminal punishment in the same case (same offence), while the aim of Pancasila as the philosophy of Indonesian *Grondslag* is "a social justice for all Indonesian people", as also provided in the 1945 Constitution as a *groundnorm*.

- *Sociological Base*

In order that all regulations that will be issued are useful for the needs of the community in the life of the nation and state, and as an effort to eradicate corruption in Indonesia, punishment disparity has been an issue since the past, and has been discussed for a long time in the Symposium of the Indonesian Association of Judges (IKAHI) in 1975 principally that:

> "To eliminate the feelings of dissatisfaction to the verdicts of criminal judges whose punishments are strikingly different for the same legal offences, it is necessary to make efforts so that there is an appropriate and harmonious punishment"(Sudirdja, 1984: 3).

With regard to punishment disparity Professor Harkristuti Harkrisnowo (2003:28) argues:

> "With the real punishment disparity, it is not a surprise if the public questions whether the judge / court has truly carried out their duties to uphold law and justice? When viewed from the sociological perspective, the condition of punishment disparity is perceived by the public as the evidence of the absence of justice (societal justice). Unfortunately, juridically formal, this condition cannot be considered to have violating the law. However, people often forget that basically the element of "justice" must be attached to the verdict given by the judge ".

Punishment disparity in corruption cases occurred so far, could not be explained in logical ratio to the community why such thing happened.

- *Juridical Base*

Arguments on the need of criminal guidelines in the Anti-Corruption Act are indispensable, as submitted in the philosophical and sociological foundations above, then it needs a juridical basis as a legal basis to complete it, and the juridical basis to include *straftoemetingsleiddraad* or guidelines of sentencing in the future Anti-Corruption Act, for reasons as:

- *Corruption as Extra Ordinary Crime*

The Indonesian Law No. 19 Year 2019 on the Second Amendment on Law Number 30 Year 2002 on the Corruption Eradication Commission abbreviated as UU KPK by confirming that:

> "An extensive and systematic corruption act is also an offence to the social and economical rights of the people, because of these all a criminal corruption act can no longer be classified as an ordinary crime but already as an extraordinary crime. When studied from the result side or the negative impact that have seriously ruined the life structure of the Indonesian people since the New Order government to present time, is is self-explanatory that corruption is a deprivation of economic rights and social rights of the Indonesian people".

This opinion was supported by Chief Justice Artidjo Alkostar and others. Academically base referred to in legislation theory above designates guidance of sentencing in criminal corruption act, become the necessity of national criminal law to be applied in the Anti-Corruption Act in the coming time, as an efforts of the government to crease social justice for the whole people of Indonesia, and this application may be applied as instructed by the Anti-Corruption Act itself, that "corruption act is categorized as a crime with extraordinary eradication", therefor even *straftoemetingsleiddraad* or guidance of sentencing is not known in the scheme of punishment in our national legal system, but since corruption is an extra ordinary crime according to the Corruption Eradication Commission than according to the Anti-Corruption Act its eradication should be carried out in an extra ordinary action way, including the application of *straftoemetingsleiddraad* in a criminal corruption case, not through Perma or through regulation especially made for that.

Punishment disparity will cause judicial caprice which resulted in the demoralization of the convicted and anti-rehabilitation attitudes, whereas for the community such punishment will lead the minds of the people over there that there have been judicial corruption in the punishment verdict, and both forms are forms of injustice, then the application of *straftoemetingsleiddraad* in the Anti-Corruption Act becomes the need of a national criminal law in order to provide social justice for all Indonesian people " as referred to in the 5th Precept of Pancasila as the phlosophy *Grondslag* state philosophy of Indonesian *Gronslag* is" and referred to in Article 27 paragraph (1) of the 1945 Constitution as a groundnorm, both its application through the Perma for the present or in the Anti-Corruption Act for the foreseeable future, it is still possible according to national criminal law, because corruption is an extraordinary crime according to the KPK Law, and its action is carried out in an extra ordinary action according to the Anti-Corruption Law.

Finally, In order that the application of *straftoemetingsleiddraad* in corruption cases be measurable, *justitia vindicativa* theory must be determined as an objective of justice by using a precedent

system as the basis for imposing penalties in cases of corruption, especially for the same article, and must observe the Article 18 paragraph (1) letter b of The Anti- Corruption Act as the aim in eradicating criminal corruption act.

Conclusion

Punishment is the tool of criminal law to bring order to the members of society from inadequate acts in a certain measure, where the provisions have been formulated as an offense by the legislators and promulgated, this system has a European continental style characterized by legalistic characteristics as in Hans Kelsen's theory as the characteristic of the current Indonesian legal system.

Ideally the criminal provisions must be fair when applied to all parties including to the people of Indonesia, the problems faced by the Anti-Corruption Act is that the application of punishment by the courts are different to obscure the meaning of justice itself, as happened repeatedly, in two or more cases of the same criminal corruption act, the application of the criminal article is given different criminal sanctions, this disparity causes public dissatisfaction to lead to presumption of judicial corruption in handling cases the criminal corruption, dissatisfaction is also felt by the convicted self and felt as a victim of judicial caprice, these two issues is significance in weaken the trust of the Indonesian people towards the national criminal law system and lead the Indonesian people to become apathetic to respect the law as one of the targets in sentencing, facing the disparity issues in the criminal prosecution of corruption, that leads the Indonesian people to become ignorant until they do not respect the law as one of the targets of sentencing needs the application of *straftoemetingsleiddraad* also known as guidance of sentencing or in the Indonesian language referred to as the guidelines of sentencing, the purpose of its philosophy is to reduce the inequality of justice in the application of punishment in criminal corruption acts.

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