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Minimum Criminal Sanction of Corruption Perpetrators: Legal Philosophy Approach

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ABSTRACT

The minimum criminal sanction provision is clearly recognized in the Act No. 20 of 2001 concerning amendment the Act No. 31 of 1999 on Eradication of Corruption. This research uses the normative method. The results of the study indicates that the provisions of the minimum criminal sanction are clearly stated in the Act No. 20 of 2001. Therefore, the judge may impose a minimum sentence as part of the judge's responsibility in implementing the law. However, imposing minimum criminal sanction is clearly ineffective in overcoming corruption because it does not cause a deterrent effect and is not in line with the sense of justice that grows in society who wants the perpetrators of corruption be given a maximum criminal sanction.

Keywords
Minimum Criminal Sanction, Criminal Actions, Corruption Actor

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Introduction

Corruption is the common enemy of humanity. [1] The increasing quantity of corruption can be recognized on the increasing number of perpetrators and the amount of the money that involved in corruption; it does not include criminal act of corruption that occur but still not revealed (hidden crime). It is the reason why corruption is described as the iceberg model in the middle of ocean.

In this context, the number of corruptions in law enforcement process is very small compared to the perpetrators of corruption that are not revealed or cannot be known, or prosecuted. In addition to the effort to eradicate corruption, it always sounds cynical that the eradication of corruption is carried out selectively or in other word, it can be said that the law enforcement on corruption issues is still weak. This can be seen from several fact that show some sentences who release the corruption perpetrators or giving a minimum criminal sanction that does not clearly fulfil the sense of community justice and does not providing a legal certainty for the community.

Beside the increasing quantity of corruption, the increasing quality (in a negative term) can be seen from the ways and forms of the corruption that continue to develop and also followed by the courage of the culprit that constantly looking for new ways to do corruption. Therefore, with the increasing quantity and quality of corruption, this corruption is not seen as an ordinary crime, but it is classified as extraordinary crime. [2]

With the Law No. 31 of 1999 Jo. Law No. 20 of 2001 concerning on Corruption Eradication that include the new paradigm on corruption eradication, in such on forming Corruption Eradication Commission, the community involvement in tackling the corruption, reverse onus, corruption as a formal offence, corporation as a subject of corruption, and the state right to file a civil suit. In describing the form of corruption today, Soedjono Dirdjosiswono argues that the forms of corruptions are in such a way that it cannot longer be classified as White-Collar Crime, but more into a form such as an organized crime. [3] if it compared with the old form of corruption, J.A Sahetapy describe it into "… 20 years ago, if people were corrupt, then the person would not act collectively, but by seeing the circumstances and conditions, he would always operate as a lonely ranger. [4]

Corruption as one act showed by certain group of people and seen as an abnormal symptom can damage the life of the nation and state. In societies where the corruption occurs, it stimulates a counter-action from the community itself, namely social reactions/demonstration to require this social problem to be tackled. The social reaction in a form of mass movement by various type of society urges that the act of corruption to be firmly tackled as echoed in many countries. The social reaction that happened in this country has an important meaning to show there are people who are anti-corruption (social will) and this also has an important meaning for the establishment of a law on corruption. [5, 6, 7]

The eradication of corruption is not an easy case and can be solved immediately because the government administration system is drab of transparency and prioritized confidentially and secrecy. It is also diluting the public accountability and prioritizing vertical accountability that based on primordialism that used a system of recruitment, transfer and promotion based on a good co-existence on ethic similarities, political background, or political remuneration. This situation then more complicated and almost the law enforcer from upstream to downstream get involved into the corruption where this corruption act supposed to be the enemy of the law enforcer itself. In this context, it is more complicated with the presence of the evidence or an example where there has been a struggle for power in the investigation between police and the prosecutor office which has developed since the Criminal Procedure code in 1981. This struggle for power in the investigation is much more sharped since the existence of the Law No. 31 of 1999 that has been amendment with the Law No. 20 of 2001 concerning on Corruption Eradication.

In theory, the strategy to eradicate corruption in Indonesia used 4 approaches, called legal approach, moral and faith approach, educational approach, and social-cultural approach. The legal approach plays a very strategic role in eradicating corruption. However, the conventional law approach today is inadequate in facing modus operandi of corruption which is systematic and wide-spread and constitute as an extra-ordinary crime. A new legal approach is needed that place the interest of nation and the state or economy and social rights for people above the interest of the rights of individual suspects or defendants, including a philosophical approach in particular that questions the minimum sentence for corruptor, which still often found in court decision. Therefore, this study is focused to identify and analyze the minimum criminal sanction for a corruptor that which assessed still not effective and does not make any deterrent effect for the perpetrator in the future.

Problems

This study attempts to identify and analyze minimum remedy to the actor of corruption in legal philosophy approach.

Research Method

The type of the research is normative legal research by using legal materials such as some law and cases to answer the basic reasons why judge decide minimum remedy to the corruption perpetrators. The data then analyzed qualitatively.

Discussion

The imposition of sanctions under the minimum threat against the perpetrators of corruption is not carried out to relieve the perpetrators or prevent the perpetrators from being caught by the law or imprisonment, but the imposition of sanction under the minimum sanction is based on various consideration, including those that are incriminating and those that relieve the perpetrators.

The verdict of a judge should have legal certainty, because the judge decides a case not arbitrarily, especially in deciding the time limit for the criminal sanction. Ideally, the verdict of judge on the case of corruption, made a balance decision between the severity of the crime and the severity of the threatening offense so that justice is created, certainty and legal benefits are created, certain and useful, and the judge decision on the application of the minimum criminal sanction in case of corruption can made a verdict that is balanced between the severity of the crime and the severity of the threatening offense, so the verdict that issued by the judge can achieve justice.

A judge is required to give a decision even though it is not based on the criminal law code, but seeing from the considerations from various aspects. As it is stated that crime is not merely for retaliating or rewarding on people who have commit a crime, but has a certain useful purpose. Retaliation itself has no value, but only as a means of protecting the interest of society. the basis of criminal justification can be seen from the purpose that is to reduce the number of crimes. The crime is imposed not because someone has committed a crime, but to make people to not committing a crime or utilitarian theory.

Interpretation by judges about the minimum sanction in the laws is applied on the decision that is a result of the output of the authority to judging every handled case. The verdict is based from the indictment and the fact that is revealed in the judgement then connected to the clear application of legal basis, including the severity of criminal penalties, as it is according to the principle of criminal law that is legality principle which it is according to the Article 1 Paragraph 1 of Criminal Law Code where it is stated that the criminal law should based on law, it mean that the conviction should based on the law. The application of the severity of the sentence imposed is of course for a judge should according to the motive and consequences of the offender action, especially in the application of the type of imprisonment. Certain laws and regulation have normatively regulated certain articles relating to the punishment under the minimum threat.

Application of the sanction under the minimum thread on corruption, in Indonesia criminal law recognize the legality principle as it is stated on the Article 1 Paragraph 1 of the Criminal Code that is No act shall be punished unless by virtue of a prior statutory penal provision *(nulla poena sine lege)*. If after the committed crime there is an amendment on the law and regulation, then the lightest rule will be used for the defendant as it is mentioned on the Article 1 Paragraph 2 of the Criminal Code. It can be understood if after the crime act there is an amendment on the laws and regulation, then for the defendant the lightest or the minimal criminal sanction could be used. This crime regulation is applied to all people that commit a crime including corruption.

Legality principle that is mentioned in the Article 1 Paragraph 1 and 2 of the Criminal Code means every criminal sanction must be according to the law. A judge imposed a sentence according to the law. Relating to the imposing a sentence below the minimum limit of the provisions of a law by the judge, as well as the imposition of punishment under the minimum limit of the provisions of a law by the judge, the minimum threat from the minimum threat from the provisions of the law on the corruption eradication by judges is in accordance with the conviction of evidence in court so it is giving a legal certainty (justice in imposing criminal sanctions).

Relating to the minimum crime outside the Criminal Code regarding on corruption, it is regulated on the Law no. 20 of 2001 concerning of Corruption Eradication as follow: Article 2 of the Law No. 20 of 2001, stated that "Anyone who illegally commits an act to enrich oneself or another person or a corporation, thereby creating losses to the state finance or state economy, is sentenced to life imprisonment or minimum imprisonment of 4 (four) years and to a maximum of 20 (twenty) years, and fined to a minimum of Rp. 200,000,000,- (two hundred million Rupiahs) and to a maximum of Rp1,000,000,000,- (one billion Rupiahs)."

Article 2 of the Law No. 20 of 2001 can be understood based on the element of the article, namely: first, action against the law is an act that violates the provisions of the laws and regulation. Second, an act of to enrich oneself that is an act that can harming the economy or state finance. Third, corporation act that is a criminal act that done

together by several people that can harming the state finance.

For the defendant that fulfill three of those elements can be sentenced to life imprisonment or minimum imprisonment of 4 years and to maximum 20 years and fine to a minimum of Rp. 200,000,000, - (two hundred million Rupiahs) and to a maximum of Rp.1,000,000,000, - (one billion Rupiahs). The relationship with the use of the term of minimum criminal and maximum on this Article is using the term of the longest and the shortest, but the meaning is the same with minimal and maximal. As it is stated on the Article 3 of Laws No. 20 of 2001 concerning on the Corruption Eradication that stated "Anyone with the aim of enriching oneself or another person or a corporation, abuses the authority, opportunity or facilities given to him related to his post or position, which creates losses to the state finance or state economy, is sentenced to life imprisonment or minimum sentence of 1 (one) year and maximum sentence of 20 (twenty) years or the minimum fine of Rp, 50,000,000.(fifty million Rupiahs) and maximum fine of Rp, 1,000,000,000 one billion Rupiahs)."

It is need to be understood that on the Article 3 of the Law No. 20 of 2001 for the defendant can be sentenced to life imprisonment, or minimum sentence of 1 (one) year minimum and maximum 20 (twenty) years and/or minimum fine of Rp. 50,000,000, - (fifty million Rupiahs) and maximum fine Rp. 1,000,000,000, - (one billion Rupiahs), if it fulfilled the elements on the Article 3 of the Law No. 20 of 2001 namely: (1) the element to enriching oneself or another person, (2) a corporate act, (3) abuses the authority, and (4) abuse the facility that given. Four of those elements can be done because of the post or position that can create losses to the state finance can be sentenced and fined according to the Article 3 of the Law No. 20 of 2001 concerning on Corruption Eradication. The minimum crime outside the Criminal Code is also regulated in Article 5 of the Law No. 20 of 2001 that stated "Anyone committing the criminal act as referred to in Article 209 of the Criminal Code is sentenced to a minimum of 1 (one) year and maximum of 5 (five) years, or fined to a minimum of Rp. 50,000,000,- (fifty million Rupiahs) or to a maximum of Rp. 250,000,000,- (two hundred fifty thousand Rupiahs)."

The defendant can be sentence for a imprisonment for shortest 1 (one) year and the longest 5 (five) years and/or fined minimum Rp, 50,000,000, - (fifty million Rupiahs) and maximum of Rp. 250,000,000, - (two hundred fifty thousand Rupiahs). If it is fulfilled the element of bribery as it is stated on the Article 209 for Criminal Code which is: first, make a promise on something to an official. Second, give something to the official.

The use of maximum and minimum term on the criminal act outside the criminal code, especially on the laws of corruption eradication is not stated (not used) only uses the longest and shortest term in serving a criminal sanction by the perpetrator of a corruption, even though the judge interprets the same meaning between the minimum and maximum crime also longest and shortest that is minimal and maximal of crimes and fines in case of corruption.

The minimum criminal system is an exception, which for certain offenses that are deemed very detrimental, dangerous or disturbing the public and offenses that are qualified by the consequences *(erfolsqualifiziertedelikte)* as a quantitative measure that can be used as a benchmark that offenses punishable by imprisonment above 7 (seven) years can be given a special minimum thread, because the offences are classified as very serious.

The crime system on the corruption, has established the treats for shortest and longest, both for the imprisonment and fined. The law No. 20 of 2001 concerning on Corruption Eradication is not using a system that applied the maximum and minimum treats as in the Criminal Code. Maximum for the longest imprisonment that was threatened by the Law No. 20 of 2001 concerning of Corruption Eradication is far more then maximum on the Criminal Code (15 Years), that is 20 years. The Criminal Code is justifies adding imprisonment to the maximum limit of 15 (fifteen) years that is 20 (twenty) years, in terms of repetition or concurrency (because it can be added by one third) or certain criminal act as an alternative to death penalty (example, Article 104, 340, 365 Paragraph 4 of the Criminal Code). A special law is made just for a certain criminal act, especially corruption, which is regulated outside the criminal code.

Regarding the special law, it is recognized that there is a criminal thread for the longest and the shortest, but in this research the author used the terms minimum and maximum. The minimum threat standardization varies and does not have a pattern depending on the type of the crime so that there is no rules and guidelines for its implementation or application that will be used to implementing it.

Corruption is a part of a special crime in criminal law beside having a special specification that is different with the general crime, such as irregularities in procedural law and if it viewed from regulated material. A direct of indirect corruption is intended to minimize the leakage and irregularities in the country's finance and economy.

The eradication of corruption in order to increase the usability and efficiency of the eradication of corruption act, the government has made KPK (Corruption Eradication Commission) that have duties such as to coordinate with other authorized agencies in carrying out activities to eradicate corruption including the BPK (Audit Board of the Republic of Indonesia), BPKP (Financial and Development Supervisory Agency), KPKPN (State Officials Wealth Supervision Commission), inspectorate in departments or non-departmental government agencies (Article 6 Letter s Jo. The Explanation of Article 6 of Law No. 30 Of 2002)

Other legal consideration, including the ability of the perpetrators to return the corruption/state loss including fine that is charged according to the applicable lawsuit without any legal discrimination. It means, anyone who violates the law should given sanction according to the severity of the criminal act. According to the authors, a judge, apart from having legal responsibility, also have a moral responsibility and hereafter responsibility in taking a decision on the court. Decision that are not in accordance with applicable legal regulations can pose a risk for the decision maker itself. Therefore, the decision that is taken must be truly believed to be deterring so that the perpetrators of corruption did not commit act that can harm various parties, including himself. If a judge can be considering the problem in order to achieve legal objective that are justice, useful, and legal certainty, in considering and application of the criminal sanction under

the minim threat on the corruption cases, decide the corruption based on the prevailing laws and regulations.

The application of minimum sanction on the corruption case, if it is referred to the laws and regulation, still consider both objective and subjective side. From the objective side, it is described that the philosophical basis of corruption is to prevent state loses, in addition, to see how much losses from the corruption. From the subjective point of view, the judge assessed the defendant actions by looking at the level of his ilt against the abuse of the authority as it is stated on the Article 3 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001. Furthermore, from the level of error then presented on how much was corrupted by each defendant, after that, the number of each defendant was convicted was applied.

Principally, the application of the minimum sanction according to Join, still refer to the special minimum standard, even though there are several judges that imposing under the minimum standard. The basic term of the provisions and additional terms must be separated, so on the Article 2 of Corruption law is just only on the people who have position as a state official. Article 3 just for the regular government employee (PNS), because it doesn't have position, even though a corruption is happened in a small number, but if it continuously done, it can damage the state with a big number.

Joni view, that the minimum standard threat on Article 3, should have the same with the threat on the Article 3. According to the respondent, the special minimum standard threat on the Article 3 should be higher or minimal the same with Article 2. [8] According to V. Banar, stated that on deciding criminal sanction below the minimum, a sentence of 2 (two) years prison is given with the case number: 150/pid.B/2007/PN Bantul on behalf of Kusrianto in the case of corruption in housing projects after the earthquake in Bantul Regency t is worth Rp. 120,000,000, - on a juridical basis of Article 2 of Corruption aw No. 31 of 1999 Jo. No. 20 of 2001. Those decision is based on the consideration of a sense of justice and the loss value that is corrupted worth Rp. 9,000,000, -. The purpose in giving the verdict is to giving a deterrence effect and not too far from disparities in decision.[8]

Then, it was argued that it is permissible to make a decision or verdict given in that case by taking a decision below a special minimum, according to V. Banar stated that it is permissible to imposing a sanction below the minimum standard by looking at several factors and condition of the defendant, such as psychological, humanity, and the value of the losses as well as things that ease the defendant. [8] V. Banar recommend that there is no need to use minimal threats and that the penalty for losses should be reduced. In addition to needing to be reviewed regarding to the minimum and maximum on the discussion of legislation, some of these crimes minimum sanction should be eliminated, so that the widest possible interpretation of the law can be given to the judge. [8]

Some judge disagreed with the provision regarding the permissible of making decision below the special minimum standards. This is stated in the view of the judges that still refer to the standard regulation below the minimum (law), event though the judge decision has been given the widest possible authority, as it is stated on the law on Judicial Power. According to him, the aim of implementing the minimum standard sanction is to provide guidelines for judges to assess and considering the limit of sentence that is imposed, so that on the basis of the guidelines, it can help the judge's to deciding the case of corruption with a fair decision and meet the legal certainty. In this context, the imposition of a minimum sanction for the perpetrators of corruption does not actually reflect the optimization of criminal efforts in tackling corruption. [9]

Conclusion

Philosophically, the imposition of minimum sanction on the corruptors by judge actually injures the sense of the justice seeker. Therefore, in deciding a corruption case the judge should giving the heaviest punishment so that people are reluctant and event dare not to commit a corruption.

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