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# Non- Litigation Paradigm and the Principle of Criminal Proportionality in Corruption Cases with Mild Error Levels

Alexander F. Tungga[1], Hartiwiningsih[2], Rudepel Petrus Leo[3]

***Abstract***

*The general objective of this research is to be able to realize justice for perpetrators of corruption with a mild degree of guilt. The formulation of this research problem is: Why is there a need for a non-litigation approach and proportional principles in corruption cases with a mild degree of guilt? This research is a normative legal research that uses literature studies with a statutory approach and a case approach. The results of this study show that almost all crimes are processed by litigation, namely through the criminal justice system, including corruption with a mild degree of error. For example, an official is negligent when signing a contract. This official did not take or embezzle state money as stipulated in the Corruption Eradication Law in Indonesia. However, the case is still prosecuted until the perpetrator is sentenced to prison. This is an injustice for the perpetrator and contradicts the Theory of Justice. According to the author, it is fairer if such cases are resolved non-litigatively and apply the principle of proportionality which states that the severity of the punishment imposed must be balanced with the severity of the guilt and the weight of the crime committed. Sanctions should not exceed the guilt of the defendant. This principle is an important principle in the Theory of Punishment.*

***Keywords:*** *Proportional Principle, Nonlitigation, Level of Error, State Losses, Responsive Law.*

## Introduction

The number of corruption crimes in Indonesia is high. In the Southeast Asian region (ASEAN), Indonesia once occupied the number one position in terms of the high number of corruption crimes. Corruption in Indonesia has penetrated everywhere, almost all government departments or agencies and existing SOEs. There are almost no government departments or agencies and SOEs that are not involved in corruption, including those who logically cannot be involved in corruption, such as the Ministry of Religion, the Ministry of Education and Culture, the National Police of the Republic of Indonesia, even the Chairman of the Constitutional Court of the Republic of Indonesia, has been proven to have committed a large amount of corruption.

In reality, various criminal cases that occur in society with varying degrees of severity, including corruption, are all processed through the Criminal Justice System (CJS). Furthermore, many cases with minor types of crimes are also processed through the SPP. This is because law enforcement officials are still bound or 'fixated' on the provisions of the legislation. Such law enforcement officers are known as 'law trumpet' officers. This kind of law enforcement is no longer suitable with the progress of the development of society and the advancement of theory and practice in the field of law which is being intensively discussed and taught in law lectures in Indonesia in recent decades. The branch or 'school of legal thought' referred to is "Progressive Law" which was initiated by one of Indonesia's legal scholars, Satjipto Rahardjo, a Professor of Legal Sociology at Diponegoro University, Semarang.

[1] University of Sebelas Maret, Solo, Indonesia, Ema: lexylawyer889@gmail.com
[2] University of Sebelas Maret, Solo, Indonesia, Email: hartiwiningsih@gmail.com.
[3] Nusa Cendana University, Kupang, Indonesia, Email: rudepel.leo@gmail.com

One type of crime with a minor or very minor loss, but which is still being prosecuted in court, is corruption. This type of crime is said to be minor or very minor because this corruption crime does occur because of a very trivial mistake, namely an official is accused of being involved in a corruption crime just because he signed a contract or agreement. In such cases, the official charged with corruption did not take (steal, embezzle, corrupt) state money at all. This is clearly known by the police investigators, by the prosecutors, and even by the team of judges hearing the case in court. These law enforcement officials clearly knew and said that the suspect or defendant did not actually take (steal, embezzle) state money, but they still processed this case. The law enforcement officials continued to process this case until the defendant was convicted and served time in a correctional institution because he was proven to have violated Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption. Article 2 of the UUPTPK regulates a clause that states, "enriching oneself, others, or corporations ...." and Article 3 states, "benefiting oneself, others, or corporations " The perpetrator or official is still prosecuted and imprisoned even though he did not become rich or did not become or benefit because he really did not take (steal, embezzle) state money.

Demanding criminal responsibility from a person or official whose offense is minor or very minor, to a prison sentence, let alone a heavy sentence, is, according to researchers, an injustice. People who are prosecuted and sentenced to prison, especially if the sentence is severe, will suffer a lot of losses, namely losses in various aspects. On the other hand, because all types of crimes, from minor crimes to serious crimes, are processed through the SPP, three new problems arise that are classified as serious. These serious problems are: First, there will be a backlog of cases at the Supreme Court. Second, there will be overcrowding or overcapacity of detainees and prisoners. Third, the amount of expenditure by the state becomes much greater to fund the various needs of life of detainees and prisoners. In such cases, the state and society experience double losses or multiple losses. First, the state and society suffer losses due to the occurrence of crime (corruption). Second, the process of handling each crime case requires a lot of time, energy and money, as well as in the settlement of corruption cases. Third, it is added to the expenditure to fund the needs of detainees and prisoners. In fact, the purpose of criminal prosecution for corruption offenders is to save state money. In the case of imprisoning perpetrators of corruption with criminal or very light types, it is not the state's money that is saved, instead more state money is spent to finance the corruption case.

In the author's opinion, this huge state expenditure can be reduced, among others, by imposing other types of punishment (other than imprisonment, for example administrative punishment) on perpetrators of corruption with mild or very mild punishment as stated earlier. Referring to the description of the background of the problem, the author formulates the main problem as follows: Why is it necessary to implement the non-litigation paradigm and proportional principle in corruption cases with minor types of errors?

**Methodology**

This paper is prepared using the inductive thinking method, which discusses or solves problems on the basis of theoretical studies. Theories (as well as concepts, principles, and scientific assumptions) from experts or scholars are collected and used as an analytical knife in the discussion of this paper.

**Results and Discussions**

The explanation of the reasons for the need for the non-litigation paradigm and the proportional principle in corruption cases with minor errors will refer, among others, to the thoughts of several experts. Implementation of the Non-Litigation Paradigm and the Principle of Proportionality as a Means of Realizing Justice Advantages, Drivers and Benefits of Non-Litigation Dispute Resolution These three aspects will be explained to emphasize the advantages of nonlitigation problem solving (conflicts, other legal cases) and the disadvantages of nonlitigation.

**Advantages of Non-Litigation Dispute Resolution**

Adi Sulistiyono argues that in the business community there are two general approaches that are often

used to resolve disputes. First, the litigation paradigm. This approach is an approach to obtaining justice through the adversary system and using coercion in managing disputes and producing a win-lose solution decision for the parties to the dispute. Second, using the non- litigation paradigm. This paradigm in achieving justice prioritizes the 'consensus' approach and seeks to bring together the interests of the parties to the dispute and aims to obtain a win-win solution. The use of one of these paradigms is determined by the concept of dispute resolution objectives embedded in the minds of the community, the complexity and sharpness of social status contained in the community (Chambliss, W, J & Seidman, R, B, 2017; Leo, R, P & Bunga, G, A, 2025), and the culture or values of the community.

Of the two paradigms, the litigation paradigm, which relies on the judiciary as its institution, has been widely used in line with the rapid infiltration of modern law in every corner of the world. In the constellation of modern legal systems, the existence of judicial institutions, among others, carries the task of resolving disputes to uphold the rule of law. The existence of courts is intended as a facilitative means to uphold the authority of law by providing access to justice for parties involved in disputes. However, in its development, dispute resolution using the litigation paradigm is plagued by excessive formality, inefficiency and effectiveness, impartial judge behavior, and judge decisions that often disappoint justice seekers. The culmination of this disappointment has caused the public to disrespect the judiciary, resulting in a crisis of authority and trust in the judiciary. At such a level, the law creates a kind of post-justice reality, namely a world in which courts and justice live in the form of simulacra, in the form of masks of justice, in the mechanism of justice as if (as if). Justice flourishes in its simulation, which features concrete images as signifier (court, defendant, prosecutor, judge, concrete witness) showing factual social actions, but all of them are present in its simulation (Piliang, Y, A, 2004).

**Factors that Encourage Non-Litigation Dispute Resolution**

Amriani (2004) argues that from the existing literature, two main reasons can be stated why people in developed countries such as the United States, Europe, Australia, Japan, Korea, Hong Kong and China, prefer out-of-court dispute resolution as an alternative, namely: (1) the demands of the business world, (2) criticism of judicial institutions that are less responsive to the needs of public justice.

**Business Demands**

In the era of economic globalization, effective ways of dispute resolution are needed in accordance with the demands of the interests, because one of the most prominent characteristics of business or the economy in the era of globalization is its fast-moving nature, both in transactions and in the movement of goods and capital flows. This also affects the various rules in the business sector which are also rapidly changing. Due to court delays, high court fees, and mental stress during the litigation process, scholars are looking for alternatives to the courts. This alternative to litigation is now known as ADR (Alternative Dispute Resolution). Business disputes require simple, fast, and low-cost dispute resolution. Therefore, dispute resolution through the judicial process, which is long-winded, expensive and time-consuming, is not suitable for resolving business disputes.

**Criticism Directed at the Judiciary**

There has been a lot of criticism of judicial institutions in various countries. The process of resolving disputes through litigation is considered ineffective and inefficient. From the existing literature on dispute resolution through courts in several countries, the most common criticisms are: dispute resolution through litigation is very slow, court fees are expensive, court decisions do not solve problems, the ability of judges is generalized, and various expressions that reduce the image of the court.

**Slow Dispute Resolution**

Dispute resolution through litigation is generally a waste of time. This results in the examination process being very formalistic and technical. In addition, the increasing number of cases that enter the court will increase the burden on the court to resolve the case (overload). As J. David Reitzel (1990) describes, "There is a long wait for litigants to get trials".

**Expensive Court Fees**

The parties consider that the costs incurred in resolving a case are very expensive, especially in relation to the length of the dispute settlement. The longer it takes to settle a case, the more costs will be incurred. People litigating in court must mobilize all their resources, time and thoughts (litigation paralyzes people). As an illustration of the high cost of litigation, the data presented by Tony Mc. Adams (1992), Tony described that in 1985 the total income of 750,000 lawyers in the United States amounted to $64.5 billion. Based on this data, criticism arises that the law has become big business for Americans. In fact, the high cost of litigation is directly linked to the economic problems of the United States. It is said that "That litigation costs may actually be doing damage to the nation's economy" (Mc.Adams, T,1992). That the high cost of litigation is considered a very damaging factor to the national economy.

**(3) Court Decision Does Not Solve the Problem**

Often court decisions cannot resolve problems and do not satisfy the parties. This is because in a decision there are parties who feel they have won and lost (win-lose), where the feeling of winning and losing will not provide peace to either party, but will foster seeds of resentment, hostility and hatred.

**(4) Generalist Ability of Judges**

The end of the 20th century and the beginning of the 21st century is the era of science and technology (IPTEK). In this era, there is a common opinion that Judges are only generalists. On the other hand, the development of science and technology has brought a variety of complex problems, so that ways of resolving disputes based on professional expertise are needed. As generalists, Judges may only have superficial knowledge. Therefore, it is difficult to expect a proper and objective resolution of complex disputes from Judges. For example, a dispute over the construction of a building. Do Judges have sufficient knowledge and ability to understand the problem fundamentally and objectively. It may be more appropriate if the dispute is handed over to a construction professional. As most Judges do not have a thorough understanding of complex issues, especially those arising from high-technology issues, the Court's decisions often deviate from the subject matter.

**(5) Unresponsive Judiciary**

Courts are often considered unresponsive in resolving cases. This is because the courts are considered to be less responsive to defending and protecting the interests and needs of the litigants and the general public (community) and the courts are often considered unfair.

**(6) Various Expressions Regarding the Image of the Court**

Aside from criticisms directed at the process of resolving disputes through litigation, there are also various expressions that undermine the popularity of the judiciary. Some expressions are derived from proverbs, while others are formulated from impressions gathered from the reality of daily practice. Below are some expressions that contain cynicism towards the reality of judicial practice. Abraham Lincoln in 1850 said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -in fees, expense, and waste of time" (Mc.Adams, T,1992). [The point is to avoid litigating in court. Try to compromise with your neighbors. Point out to them how the nominal winner is often a real loser-in fees, expenses, and waste of time." [The point is to avoid litigating in court.]

One Chinese proverb states, "A lawsuit breeds ten years of hatred" (Mc.Adams, T,1992). Litigating in court will breed hatred for decades. Thus, it will destroy family and brotherly relationships. Another Chinese proverb states, "Going to the law is losing a cow for the sake of a cat" (Mc.Adams, T,1992). A person who litigates will lose an ox, just to gain a cat. Thus, considering the various expressions above. Jack Etthridge said, "Litigation paralyzes people. It makes them enemies. It pets them not only against one another but against the other's employed combatant" (Mc.Adams, T,1992). [Litigating paralyzes people, because it makes the parties enemies, not only the parties, but involves all parties concerned].

From these expressions, it is clear how bad the image of dispute resolution through the courts is. In addition to these foreign expressions, there are also some anecdotes about the practice of law in Indonesia. For example: KUH Perdata is "twisted" into Kasih Uang Habis Perkara, Hukum Dagang is "twisted" into Dagang Hukum, Hakim is "twisted" into Contact Me If You Want to Win, and so on.

**Advantages of Non-Litigation Dispute Resolution**

In general, the advantages that often arise in the use of ADR (Alternative Dispute Resolution) as dispute resolution are (Moore, C, W, 1995): The voluntary nature of the process: The parties believe that ADR provides a potential avenue for resolving the problem better than doing so through existing procedures, such as litigation and other procedures involving third-party decision-makers. In general, no one is forced to use ADR procedures.

Speedy procedures: Because ADR procedures are less formal, parties are able to negotiate the terms of their use. This prevents delays and speeds up the resolution process. Non-judicial decisions: The authority to make decisions is retained by the parties involved, rather than delegated to a third-party decision-maker. This means that the parties have more control over the dispute and can foresee the outcome of the dispute. Control by managers who know best about the needs of the organization: ADR procedures place decisions in the hands of people who are well positioned to interpret the long-term and short-term goals of the organizations involved and the positive and negative impacts of any particular problem-solving option. Third-party decision- makers often enlist the help of a Judge, jury or arbitrator to make a binding decision on an issue over which they have no expertise.

Confidential procedures: ADR procedures can provide as much assurance of confidentiality to each party involved as is often found in problem-solving conferences. Disputants can participate in ADR procedures, explore potential dispute resolution options, and still protect their rights to present their best case in court at a later date without fear that data disclosed in these procedures will be used against them. Greater flexibility in designing the terms of the settlement: ADR procedures provide an opportunity for the key decision-makers of each party to work out settlements that better reconcile their interests, rather than pursuing third-party settlements. ADR allows the parties to avoid the pitfalls of deciding who is right and who is wrong, and to decide the decision-makers are key to the development of workable solutions acceptable to all parties. ADR procedures may also provide greater flexibility for the parameters of the issue under discussion and the scope of possible solutions. ADR procedures allow participants to "enlarge the pie" and develop more comprehensive remedies to address the underlying causes of the dispute. It avoids the constraints of judicial procedures that are strictly limited to making court decisions based on a narrow point of law, such as whether or not proper procedures were followed.

Time saving: With significant delays in waiting for a confirmed trial date, ADR procedures offer more opportunities to resolve disputes without having to spend years in litigation. In many instances, time is money and delays in resolving issues are costly, dispute resolution developed through the use of ADR procedures may be the best alternative for timely resolution of issues. Cost-effective: ADR procedures are usually not as expensive as litigation. Costs are determined by the utility and amount of time spent, and neutral third parties on average charge a fee to compensate for their time rather than paying lawyers. Protection and maintenance of employment relationships: ADR dispute resolution methods that result in negotiated agreements that take into account the needs of the parties involved are much more capable of maintaining current and future employment relationships than win-lose procedures such as litigation. High likelihood of implementing the agreement: Parties who have reached an agreement are generally more likely to follow and fulfill the terms of the agreement when an agreement has been determined by a third-party decision-maker. This factor helps participants in ADR procedures avoid costly re-litigation. Better agreements than mere compromises or results from lose/lose settlements: Dispute resolution negotiated through interest-based negotiation is generally more satisfactory to all parties who compromise their decisions where the parties share the gains and losses. Interest-based negotiation allows parties to find ways to enlarge the pie, rotate satisfaction between disputants, or seek a hundred-percent settlement that creates "gains for all and losses for none." Decisions that last over time: Dispute resolution by ADR

procedures tends to last over time, and if at a later date the dispute becomes problematic, the parties involved seem willing to utilize cooperative forms of problem solving to resolve differences of interest rather than adversarial approaches.

**The Need for Implementation of the Non-Litigation Paradigm and the Principle of Proportionality**

Referring to the existing literature, it can be said that there are actually quite a number of criminal offenses that are then transferred from litigation to non-litigation. One of them is a criminal offense involving a child as the perpetrator. The settlement of juvenile criminal offenses from litigation to nonlitigation is known as the diversion approach. According to Dahlan Sinaga (2017), etymologically, the word "diversion" has the same meaning as the English word "divert," which means: "the act of changing the direction that someone or something is following, or what something is used for" (Wehmeier, S, 2007). [That is, an act of changing the direction that something is following or changing the purpose of something, or changing what something is used for]. The lexical understanding of the word "diversion", while informing the meaning of the word "diversion" as it is commonly understood, does not fully explain the nature of diversion according to the law.

**Types of Crimes by Corruption Offenders Considered Mild or Very Mild**

The type of crime will refer to the criteria put forward by experts as well as in the laws and regulations, especially those stipulated in Supreme Court Regulation Number 1 of 2020 concerning Sentencing Guidelines. The PERMA, which consists of 21 articles, outlines more detailed guidelines, starting from the stage of determining state financial losses, then knowing the guilt, impact, and benefits obtained by the defendant, to the range of sentencing. As described above, the judge must also elaborate on the facts revealed in the trial regarding the stages referred to in Article 5 paragraph (1). The severity of the perpetrator's guilt is clearly regulated in the Supreme Court Regulation. This will be discussed in Chapter IV of this paper. Judging from the types of crimes that officials in corruption cases are accused of committing due to minor or very minor misconduct as stated earlier, it is clear that these types of crimes are much lighter when compared to the types of crimes committed by children and resolved using the diversion approach. Crimes committed by children are equivalent to those committed by adults. Thus, the types of crimes in these crimes between child offenders and adult offenders are equivalent or the same. In contrast, compared to corruption crimes involving officials who did not take (steal, embezzle) state money at all, but only due to administrative negligence, it is clear that the types of crimes committed by these officials are much lighter when compared to the types of crimes committed by children and resolved using the diversion approach. A comparison of the types of crimes between child offenders and perpetrators of corruption due to administrative negligence is illustrated in Table 1.

| No. | Child Offender Crimes | Corruption due to administrative negligence |
|---|---|---|
| 1.<br>2.<br>3. | Serious crimes<br>Medium crime<br>Misdemeanor | Very minor error |

Table 1. Comparison of Crime Types between Child Perpetrators and Corruption Perpetrators due to Administrative Negligence Only

Table 1 clearly shows that the types of crimes committed by children are higher or more severe than the types of corruption crimes committed by adults, which are classified as minor or very minor, as stated earlier. The crimes committed by children include serious crimes, moderate crimes, and minor crimes, while the perpetrators of corruption only commit minor crimes, for example for signing an agreement (agreement, contract).

**Implementation of the Non-Litigation Paradigm and the Principle of Proportionality Better Fulfills**

Referring to the teaching in the Dignified Justice Theory put forward by Teguh Prasetyo (2010) that the law can only be found in a jurisdiction that manifests the soul of the nation (volksgeist), the procedures and procedures for implementing the non-litigation paradigm and proportional principles as part of the Pancasila Legal System can be known by studying the arrangements regarding case settlement procedures according to the applicable regulations in the Pancasila Legal System, as stated below.This is the same as saying that the implementation of the non-litigation paradigm and proportional principle as part of the Pancasila Legal System in general, must prioritize the dignified justice approach. According to the Dignified Justice Theory, this has become the volksgeist of the Indonesian nation because it manifests itself in the applicable laws and regulations in the Pancasila Legal System. With the inclusion of the word "shall" in the formulation of the rule as stated above, it can be said a-contrario that in the settlement of corruption crimes as minor or very minor crimes and other criminal cases, it is also possible to implement the non-litigation paradigm and proportional principles that have become the volksgeist of Indonesia in the Pancasila Legal System. In this case, dignified justice must be used in the settlement of corruption crimes as minor or very minor crimes and other criminal cases.

**The Nonlitigation Paradigm and the Principle of Proportionality are Supported or in Accordance with the Theories of Justice**

Injustice, which is the main theme of this research, will be discussed by basing it on theories of justice that have developed so far. These theories of justice are put forward to serve as the main reference for the discussion of the first main problem in this paper. Marwan Effendy (2014) collects several theories of justice from various schools, ranging from the school of natural law theory to the school of development, progressive and integrative legal theory, all of which emphasize that the law must be based on justice. In fact, since the initiation of Natural Law Theory in the era of Socrates to Francois Geny, justice has been emphasized as the crown of law (the search for justice) (Huijbers, T, 1995). Because of the importance of justice as the cornerstone of law, various legal experts provide their views on rights and freedoms, opportunities for power, income and prosperity for the achievement of justice in society which is the basis of theoretical thinking about justice. Among these theories are Plato's theory of justice in his book Republic, Aristotle's theory of justice in his book Nicomachean Ethics, John Rawls' theory of social justice in his book A Theory of Justice, and Hans Kelsen's theory of law and justice in his book General of Law and State Plato in his paper entitled Georgias which was later recorded in a book entitled Republic provides a doctrine of justice based on goodness. In realizing justice, retribution is needed in every evil behavior, however, the retribution is carried out to realize goodness (Kelsen, H, 2001). Aristotle view of justice can be found in his works Nichomachean Ethics, Politics, and Rhetoric. In essence, this view of justice as a granting of equal rights, but not equality. Aristotle distinguishes equal rights according to proportional rights. Equal rights are seen as a unit or the same container. It can be understood that everyone or every citizen before the law is equal. Proportional equality gives each person what he is entitled to according to his abilities and achievements (Apeldoorn, L, J, V, 2009).

Roscoe Pound (1978) sees justice in the concrete results it usually brings to society. He saw that the results obtained should be in the form of satisfying as many human needs as possible with the least sacrifice. Some concepts of justice put forward by the American philosopher at the end of the 20th century, John Rawls, such as A Theory of Justice, Political Liberalism, and The Law of People, which gave considerable influence to the discourse on the values of justice (Faiz, P, M, 2009). John Rawls, who is seen as the "Liberal Egalitarian of Social Justice" perspective, argues that justice is the primary virtue of social institutions. However, benevolence for the whole society cannot override or challenge the sense of justice of everyone who has obtained a sense of justice, especially the weak justice seekers (Faiz, P, M, 2009) Hans Kelsen (2007) in his book General Theory of Law and State, argues that law as a social order can be declared fair if it can regulate human actions sufficiently, so that they can find happiness in it. One aspect of Hans Kelsen's concept of justice is the concept of justice and legality. "Justice" means legality. A general rule is "just" if it is actually applied, while a general rule is "unjust" if it is applied to one case and not to another similar case (Kelsen, H, 2007).

Based on the philosophy and legal theory mentioned above, legal reform is a necessity with the development of society. With the development of society, the law must also develop following the development of society so that the law can answer the interests and needs of the community, so that justice, legal certainty and legal benefits can be achieved for the community. The development of criminal law at this time has been deemed necessary for legal reforms. The future criminal law that needs to be studied is about the Draft Law on the Criminal Code (KUHP), the Draft Law on Corruption , and other actual issues surrounding criminal law today. Regulations and law enforcement in Indonesia are currently still seen as prioritizing retributive justice, namely justice that prioritizes retaliation by applying criminal sanctions to the perpetrators, so that often Retributive Justice Theory is seen as not paying attention to the rights of the perpetrators. This theory of retributive justice is also very close to the theory of the purpose of punishment which focuses more on procedural justice, not substantive justice.

One of the main ideas of Cessare Beccaria, a pioneer of the Classical School in criminal law, regarding the enforcement of law and justice is that punishment must be in accordance with the crime. According to Satochid Kartanegara and the opinions of prominent jurists in criminal law, there are three theories of the purpose of punishment or punishment in criminal law (Kartanegara, S, 2010). One of the schools is the Absolute Theory or Vergeldings Theorieen (Vergelden or Retaliation). According to Hegel, one of the adherents of this theory, criminal acts must be eliminated by punishment as a retribution that is balanced with the severity of the acts committed.

The Nonlitigation Paradigm and the Principle of Proportionality are Supported or Compatible with the Perspective of theories of Punishment. A specific explanation of justice in the punishment or punishment of the perpetrators of corruption that is very light, which is the object of this writing, will refer to the theories and opinions of criminal law experts.

**Justice According to Absolute Theory or Retaliation Theory (Vergeldings Theorien)**

According to Leo Polak, punishment must fulfill three conditions, one of which is: Of course, the severity of the punishment must be balanced with the severity of the offense. This is necessary so that criminals are not punished unfairly. Neger Walker gives three definitions of retribution, one of which is (Sahetapy, J, E, 1982): quantitative retribution, which is a restriction on forms of punishment that have other purposes than retaliation, so that these forms of punishment do not exceed a level of cruelty that is considered appropriate for the crime committed. Meanwhile, Karl O. Christiansen identifies five main characteristics of absolute theory, one of which is: The punishment must be adjusted to the offender's guilt.

In relation to the question of how far the punishment should be given to the criminal, the absolute theory explains as follows: The punishment is intended to show a comparison between what is called the gratuity of the offense and the punishment imposed. This absolute type is called proportionality (Atmasasmitha, R, 1995). Van Bemmelen supports the absolute type of proportionality, saying that for today's punishment, the fulfillment of the desire for retaliation remains an important thing in the application of criminal law to avoid "vigilantism." However, the suffering caused by the punishment is still important. It's just that the suffering caused by a sanction (punishment) must be limited within the narrowest limits. The severity of the sanction must also not exceed the guilt of the defendant, even on the grounds of general prevention (Maladai & Arier, B, N, 1992).

In its development, the absolute theory was modified with the emergence of the modern absolute theory that uses the concept of "just desert" based on Kant's philosophy. According to this concept, a person who commits a crime has gained an unfair advantage over other members of society. Punishment nullifies that advantage especially if the court orders confiscation, restitution or compensation, and at the same time, punishment reaffirms the values of the society by expressing the moral disapproval or retrial of the offender. The modern concept of absolute just punishment emphasizes that people should be punished only for committing a crime for which the state has provided a punishment. They deserve punishment. This approach is based on two theories, namely deterrence and retribution.By quoting the words of Groritius or Hugo de Groot, Eddy O. S. Hiariej (2016) explains the purpose of punishment according to the Combined Theory as follows. Puniendis nemo est ultrameritum, intra meriti vero modum magis aut

minus peceate puniuntur pro utilitate. Thus Groritius or Hugo de Groot stated that suffering is indeed something that should be borne by the perpetrator of the crime, but within the limits of what the perpetrator deserves, social expediency will determine the severity of the suffering that should be imposed. This stems from an adage that reads: natura ipsa dictat, ut qui malum fecit, malum ferat, which means that nature teaches that whoever commits a crime will suffer. However, not only suffering as a retribution but also the order of society. Furthermore, Hiariej also suggests the purpose of punishment according to the Educational Theory (Hiariej, E, O, S, 2016). Basically, educational theory states that punishment aims to educate the public about which actions are good and which actions are bad. Seneca, referring to the Greek philosopher Plato, stated that nemo prudens punit, quia pecatum, sed ne peccetur. This means that a wise man does not punish for committing a sin, but rather so that no more sins occur. A wrongdoer must be punished accordingly to teach others not to commit the same act.

**Justice According to the Relative or Goal Theory (Doel Theorien)**

The second theory of criminal purpose is the relative theory. This theory seeks the basis of criminal law in organizing the order of society and its consequences, namely the goal of preventing crime. This form of punishment is different: frightening, repairing, or destroying. Then, general and specific conventions are distinguished. General prevention requires that people in general do not commit offenses. In the Aufklarung era of the 18th century, this harsh punishment was massively opposed, especially by Beccaria in his book Dei Delitti e delle Pene (1764). The objection to von Feurbach's theory is that the punishment is abstract, making it difficult to determine the severity of the punishment in advance. It may not be balanced between the severity of the punishment threatened and the severity of the offense concretely committed.

**Justice according to the Theory of Association (Verenigings Theorien)**

The Joint Theory emerged as an effort to complement the shortcomings or weaknesses of the two previous theories of the purpose of punishment. The combined theory of retaliation and deterrence, there are also varying opinions. Some emphasize retaliation, while others want the elements of retaliation and deterrence to be balanced. The first, which emphasizes retaliation, was adopted by Pompe, Van Bemmelen, and Grotius, among others. Grotius developed a composite theory that emphasized absolute justice manifested in retribution, but which was useful for society. The basis of every punishment is suffering, the severity of which is in accordance with the severity of the act committed by the convicted person. However, the extent to which the severity of the punishment and the severity of the acts committed by the convict can be measured is determined by what is useful for society. The theory proposed by Grotius was continued by Rossi and later Zevenbergen, who said that the meaning of every punishment is retaliation, but the purpose of every punishment is to protect the legal system. Punishment restores respect for the law and government. The second joint theory is the one that focuses on the defense of community order. According to this theory, the punishment should not be more severe than the loss or danger it causes and the benefit should also not be greater than it should be. Thus, it can be said that what is stated in the Draft Criminal Code is an elaboration of joint theory in a broad sense. It encompasses the efforts of prevention, correction, peace in society, and releasing the guilt of the convict (similar to expiation).

**Justice in Legal Certainty and Proportionality in Perma Number 1 0f 2020**

Before discussing justice in legal certainty and proportionality in Perma Number 1 of 2020, the following will first touch on the meaning of fairness in a decision and action based on objective norms. Referring to Santoso's opinion, Syarifuddin (2020) argues that justice is a relative concept, where everyone is not the same in understanding and feeling justice. What is fair to one is not necessarily fair to another. When someone asserts that he is doing justice, it must be relevant to the public order in which a scale of justice is recognized. The scale of justice varies greatly from place to place. Each scale is defined and fully determined by society according to the public order of that society (Santoso, M, A, 2014).

**Principles of Legal Certainty and Proportionality in Judges' Decisions**

The judicial system has two major objectives, namely to protect society and uphold the law (Efendi, T,

2013). Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which is the basis for the authority of judges in adjudicating disputes, emphasizes that the Court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the law is absent or unclear, but is obliged to examine and hear it. Philosophically, theoretically, and dogmatically, the formulation of this Article provides authority for judges to be able to actively uphold law and justice through the judicial process, including the resolution of criminal cases under the authority granted by law to judges.

The disparity of decisions in cases with similar legal issues greatly disturbs the sense of justice to be realized in criminal law enforcement. This is what PERMA Number 1 of 2020 aims to eliminate through the application of the principles of certainty and proportionality as important elements in realizing the value of justice. In this case, the first consideration of PERMA Number 1 of 2020 emphasizes that every criminal sentence must be carried out by paying attention to the certainty and proportionality of punishment to realize justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

Regarding the principle of legal certainty, Gustav Radbruch mentioned this principle as one of the objectives of law, in addition to the principles of justice and expediency. The principle of legal certainty is one of the principles that is closely related to the guarantee of the rights that a person has before the law. Legal certainty is a form of normative juridical conformity, both in terms of statutory provisions and in terms of judges' decisions. Thus, the principle of legal certainty is the implementation or implementation of a consistent, orderly and clear legal life system that is free from subjective influences or circumstances. Therefore, legal certainty is a form of legal achievement which is part of an effort to realize justice itself. From this definition, it can be concluded that the principle of legal certainty is absolutely important in terms of achieving something ideal and guaranteeing the interests of the parties, the rights of the parties in accordance with the applicable normative juridical provisions, and precisely realized to the community (Wardiono, K, et al, 2020). The certainty to be achieved through this PERMA certainly does not mean the uniformity of criminal values, but rather the process through a model of sentencing guidelines with a consistent approach. PERMA Number 1 Year 2020 emphasizes that this sentencing guideline aims to realize the uniformity or consistency of the stages that must be used by judges in determining the punishment imposed. With such consistency, it is hoped that there will not be a deep disparity between cases with similar legal issues, so that the values of legal certainty will be more clearly realized. As for the principle of proportionality, the term proportional or proportionality itself simply means in accordance with the proportion (part), comparable, balanced or balanced. The word balance means a balanced state (equal weight, comparable, equal) (Hernoko, 2011). Proportionality in a legal context has various meanings. In the perspective of constitutional law, for example, the principle of proportionality is related to restrictions on state power, which requires that the use of state power must be proportional to the interests to be limited by that power (Ristroph, A, 2005).

In the context of criminal law, the concept of proportionality can be traced historically, from Hammurabi's lex talionis to Gilbert and Sullivan. At that time, the concept of proportionality meant that the punishment must fit the crime. In Magna Carta, proportionality is reflected in the phrase, "... free man shall not be amerced (penalized) for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it" (Inger, R, G, 2010) Furthermore, quoting Mahrus Ali (2018), the idea of criminal proportionality then stems from the thought of classical scholar Cesare Beccaria about the need for comparability between punishment and crime in the famous phrase, "... let the punishment fit the crime ...." In imposing punishment - which is the culmination of the judge's conscience and creative struggle to uphold law and justice -, the judge is required to be able to fully consider the existing legal facts to then consider the guilt or innocence of the defendant, and finally determine the severity of the punishment according to the existing provisions and a sense of justice and expediency.

A criminal punishment if associated with the concept of human rights is a form of state intervention on the rights and freedoms of citizens, in this context the Covenant on Civil and Political Rights in Article 12 paragraph (3) allows state intervention on the rights and freedoms of citizens as long as the action is carried out on the basic principle of proportionality of human rights. In this case, the principle of proportionality is used as an approach to conduct legal intervention accompanied by legitimate

considerations. This intervention can be interpreted as a process of making decisions that contain legal breakthroughs (rule breaking). In making rule breaking, law makers must know several provisions that must be considered in applying the principle of proportionality. Rule breaking in the principle of proportionality is used to maintain a proper ratio between two legal views. The legal intervention carried out must take into account aspects of rationality. An action that is considered proportional must contain reasonable treatment. Conversely, actions considered disproportionate contain treatment that is 'irrationality', the equivalent words that have the same meaning as irrationality are illegality and procedural impropriety (Tobroni, F, 2018). In PERMA Number 1 of 2020, proportionality is defined as a comparison between the level of guilt of the perpetrator and the severity or amount of punishment imposed. This interpretation at first glance seems in line with the well-known philosophical meaning of justice: justice consists in treating equals equally and unequals unequally, in proportion to their inequality [Meaning: Justice is the act of treating 'equals equally' and 'unequals unequally' in proportion to their inequality] (Wacks, R, 2012). The effort to find the meaning of the principle of proportionality is not an easy process, and there are times when it overlaps with the understanding of the principle of balance. This is natural considering that proportionality and balance are two principles whose existence cannot be separated. However, there is still a common thread that can be drawn from the two principles, because basically between proportionality and balance are different, but look similar. This principle was previously often found in the civil sphere, especially in the theme of contracts and agreements, where the essence of the principle of proportionality in this context is a manifestation of the doctrine of justice that corrects the dominance of the principle of freedom which in some cases creates injustice.

This principle has long been recognized in the dispute resolution process. In terms of the distribution of the burden of proof, for example, Yahya Harahap emphasized that the application of the principle of proportionality is very relevant, because in the science of law it has never been found and obtained logical proof results, as certain and logical proof in exact sciences, therefore, the evidentiary process as one of the processes that judges go through when convening, the application of the principle of proportionality is very helpful for judges in providing justification for the decision to be made, in this case the principle of proportionality emphasizes the fair distribution of the burden of proof for the parties (Harahap, M, Y, 2006).

Measures of proportionality are usually based on the values of equality, freedom, proportional distribution, and of course cannot be separated from the principles of accuracy, feasibility, and propriety. The principle of proportionality is not concerned with mathematical balance or equality of results, but rather emphasizes on proper and appropriate proportions, and this principle applies both in criminal law in the form of determining the portion of punishment in cases with the same legal issues, or in the civil realm in the form of division of rights and obligations between the parties. The integration of legal principles, including the principles of proportionality and balance, is an analytical knife to dissect the existence of a decision on the case being heard.

In this guideline for sentencing cases of Corruption, the importance of proportionality is emphasized as one of the instruments of justice, and was never intended at all to shackle the independence of judges in imposing punishment on perpetrators of Corruption. The drafters of PERMA realize that when the judge conducts the examination process of the accused in court, in accordance with the 1945 Constitution and existing laws and regulations, the judge may not be intervened by anyone, but when he/she wants to impose a sentence on the accused who has been proven guilty as a result of extracting facts at trial. However, judges should not simply impose punishment without paying attention to the specific requirements as guidelines for imposing punishment as stipulated in PERMA Number 1 of 2020, so that disparities (differences in severity) in judicial decisions can be eliminated. PERMA Number 1 of 2020 which regulates sentencing guidance - once again - does not interfere with the independence of judges, because in this PERMA it is possible for judges to depart from the guidance if there are special considerations, so that the panel has full authority to impose the severity (strafmaat) of the defendant's sentence. However, it is hoped that the issuance of PERMA Number l of 2020 can reduce the occurrence of spectacular disparities in the severity of sentences / convictions of defendants in cases with similar legal

issues. PERMA Number 1 of 2020 can be considered as a significant modification and renewal in Indonesian criminal law. The presence of this PERMA emphasizes a leap of thinking in an effort to overcome obstacles in handling criminal cases. The ultimate goal to be achieved is the realization of procedural justice and substantive justice at the same time. This leap of thinking was born after a long dialectical process and a review of various legal norms and doctrines that have developed. The dialectic that occurs is likened to a heuristic process that combines various legal and non-legal aspects in norming, so that legislative products are produced that can answer current legal needs. This is what the author calls legal heurestics, which is a perspective on law that prioritizes creativity and art, because law is the art of legal problem solving.

In connection with that, although this Sentencing Guideline temporarily only applies to Corruption Crime cases, especially in Articles 2 and 3 of the Corruption Crime Law, in the future, the Supreme Court is certainly expected to continue to study various guidelines for sentencing in general. In addition, with the enactment of PERMA No. 1 of 2020, judges should begin to introspect, so that in the imposition of any punishment it is not arbitrary to carry out disparity in punishment, but still pay attention to the sense of legal justice of all parties, both victims and defendants. The application of these sentencing guidelines will create uniformity in sentencing between cases that have been decided and subsequent cases with similar legal issues, meaning that subsequent decisions will not be much different from the previous ones. The question may arise: does this pattern mean that Indonesia has directly or indirectly adopted a mixed system of civil law and common law? Given that the legal system adopted in Indonesia is civil law, but with the enactment of PERMA Number 1 of 2020 - coupled with the fact that the practice so far where Supreme Court Decisions in Indonesia have been used by judges as references in their decisions - is this an indication that Indonesia has also adopted the common law system Implicitly, it seems so. However, the author considers that this PERMA is a form of fusion between the two legal systems. The parameters that form the matrix in this PERMA are indeed extracted from the analysis of various existing decisions, so that it seems to function as a precedent in the common law system, however, the matrix is promulgated in the form of written law that will become a reference for judges, in which case the style of the civil law system remains apparent. Through the civil law system, judges are freer to conduct legal processes to extract material facts (what actually happened), in order to realize legal certainty and justice. However, when imposing a sentence, judges are required to be guided by the matrix as regulated in PERMA Number 1 of 2020, so it is hoped that there will be no spectacular disparity in sentences.

Justice is the final outcome of the decision made by the judge. In the formulation of Article 2 of PERMA Number 1 of 2020, it has been emphasized that judges in sentencing criminal cases of Article 2 and Article 3 of the Corruption Eradication Law are based on the principles of judge independence, professionalism, transparency, accountability, proportionality, justice, usefulness, and legal certainty. The existence of regulations (PERMA) in addition to providing legal certainty to create proportionality of punishment, no less important is to provide a sense of justice for those caught in corruption cases, so that there is no gap, jealousy, and of course a sense of injustice when the verdict has been handed down by the judge.

With the elimination of disparity in punishment in corruption cases, it is hoped that the values of justice will increasingly manifest themselves in judges' decisions. In this context, it is also necessary for judges to appreciate the principle of proportionality between the interests of society, the interests of the state, the interests of the perpetrators of criminal acts and the interests of the victims of these criminal acts. The disparity in the severity of punishment in corruption cases - and crimes in general - which have similar legal issues is considered a condition that violates the sense of justice.

**Conclusion**

Referring to the descriptions in the previous chapter, the author can draw the following conclusions. The reasons or reasons for the need to implement the non-litigation paradigm and proportional principles in corruption cases classified as minor or very minor are seen as more in accordance with the sense of justice of the community as well as in the theories of punishment objectives adopted by many countries in the world. Judging from the level of guilt of corruption crimes alleged against officials in corruption cases

classified as minor as stated earlier, it is clear that these types of crimes are much lighter when compared to the types of crimes committed by children and resolved using the diversion approach. The crimes committed by children are equivalent to those committed by adults. Thus, the types of crimes between child offenders and adult offenders are equivalent or the same. In contrast, compared to corruption crimes involving officials who did not take (steal, embezzle) state money at all, but only due to administrative negligence, it is clear that the type of guilt in the crimes committed by these officials is much lighter when compared to the types of crimes committed by children and resolved by the diversion approach.

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