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Policy Formulation for Indonesia's Criminal Action of Corruption as Ius Constituendum: Learning from China

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Abstract

This study is to provide a comprehensive description of the existing regulations governing the elimination of corruption in Indonesia, as stipulated in Law Number 31 of 1999, which has been modified by Law Number 20 of 2001, often known as the Corruption Law. The future eradication of corruption, as outlined in the IUSC constitution. This normative legal research study considers both statutory and philosophical approaches. The study's findings indicate that the formulation policy in the article aims to establish the punishment by considering the magnitude of state financial losses as a metric. Articles 2 and 3 are more suited to be classified as formal offenses. Perpetrators who repatriate public funds do not require imprisonment but a fine equivalent to 2-3 times the extent of their misconduct. Converting state financial losses into a debt owed by an individual or entity to the state is necessary. The disbursement of replacement funds was intended to offset the profits obtained through corruption, and the defendant's inability to substantiate the contrary was presented as compelling proof. The policy aims to streamline and enhance capital punishment by incorporating it into every item on corruption and considering the level of corruption as a determining factor in its implementation. The criminal penalty of a fine is determined by multiplying the corrupted amount by a factor of 2-3 and then adding the profits obtained to the state's law enforcement expenses. The prison sentence is a secondary punishment if the perpetrator lacks the financial means to cover the fine.

1. Introduction

The policy of formulating criminal law, especially the problem of corruption, is one of the interesting problems to be analyzed with an economic approach. It is important for legal experts to better understand the economic analysis approach to law in this era of globalization, because law is a dynamic process or as Satjipto Rahardjo said "law in the making", meaning that law is not a status quo, not just maintaining conditions that have

been established. exist, but also continue to be in the process of searching and inventing answers regarding the efficiency and effectiveness of the operation of a law, especially in overcoming the problem of corruption, to achieve the classic goals of law, namely certainty, justice and expediency. Another consideration, why it is important to understand and apply an economic analysis approach to law in formulating policies to address the problem of corruption in Indonesia is that the corruption eradication movement, both by the Attorney General's Office and the KPK with Law no. 31 of 1999 as amended by Law no. 20 of 2001, many corruptors have been arrested and imprisoned, but another important objective of this law has proven not to have succeeded in recovering significant state financial losses.[1]

In this case, the author describes the data in the 2009-2014 period of state financial losses that were saved by the KPK which have been processed from the KPK Annual Report for the same period, 2009-2014, as follows:

Tabel I
Saved State Financial Losses 2009-2014

Years	PNBP deposited to the State/Regional Treasury (in Rupiah)
2009	75.081.048.628,00
2010	192.430.877.162,00
2011	102.008.175.766,00
2012	121.655.680.319,00
2013	122.047.032.251,00
2014	115.222.335.116,00
Total	728.445.149.242,00

Source: KPK, 2020

Although the report has shown the estimated number of state financial losses that can be saved, the report on the total number of state financial losses during this period has not been fully recorded. It should be noted that during the 6-year period, in which the total value of state financial losses saved by the KPK was nominally IDR 728.45 billion (seven hundred twenty eight point forty five billion rupiah), whereas when compared

[1] Shubhan Noor Hidayat, Lego Karjoko, and Sapto Hermawan, 'Discourse on Legal Expression in Arrangements of Corruption Eradication in Indonesia', *JOURNAL of INDONESIAN LEGAL STUDIES*, 5.2 (2020), 391–418 <https://doi.org/10.15294/jils.v5i2.40670>.

with the amount of the realized APBN allocation by the KPK is much larger, namely Rp 3.02 trillion (three komo zero two trillion rupiah). It can be seen in the table on the Budget Ceiling and Actual Expenditure of the KPK, for the 2009-2014 period as follows:

Tabel II
Budget and Realization of Expenditures for KPK 2009-2014

Years	Budget (Rp)	Realization	Percentage
2009	461.735.338.000	229.260.890.513	50%
2010	508.507.348.000	268.002.903.040	53%
2011	576.589.258.000	297.122.350.109	52%
2012	606.668.934.000	335.574.887.523	55%
2013	703.876.286.000	465.831.958.792	66%
2014	624.180.262.000	558,765.628.563	90%
Total		3.019.822.079.000	

Source: KPK, 2020

For the record, APBN funds allocated in 2014 for all ministries and institutions related to efforts to eradicate corruption through prevention and prosecution aspects reached a total of Rp 53.46 trillion with the following details: BPK (Rp 2.59 trillion), BPKP (Rp 1, 26 trillion), KPK (Rp 0.56 trillion), POLRI (Rp 43.3 trillion), the Attorney General's Office (Rp 3.57 trillion), and the Supreme Court (2.18 trillion). The total cost does not include the calculation of the budget allocated for the performance of K/L apparatus which in their duties and functions support efforts to eradicate corruption, such as the Government Goods/Services Procurement Policy Institute, OMBUDSMAN RI, Center for Financial Analysis and Transaction Reports (PPATK), Judicial Commission (PPATK). KY), Witness and Victim Protection Agency (LPSK), and others. Referring to the data that the author has described previously, it is estimated that the cost of law enforcement in overcoming the problem of corruption has created a potential for large state financial losses, so that it is counter-productive to the purpose of the establishment of the Corruption Crime Eradication Law which, if you look at the results that have been obtained. obtained is not in accordance with all the sacrifices that have been issued.[2] Thus, from an economic analysis approach to law, it is evident that the judicial process of corruption cases based on repressive laws is inefficient, both from the social, economic, political and legal aspects as well as state finances. In addition, it also proves that repressive laws have failed to

[2] Elly Sudarti and Sahuri Lasmadi, 'Harmonisasi Sistem Pemidanaan Dan Tujuan Pemidanaan Pada Tindak Pidana Korupsi Suap', *Pandecta*, 16.1 (2021), 173–85.

fulfill the ideals of certainty, justice and legal benefits for all Indonesian people.[3]

With the failure to fulfill the legal objectives, it is now necessary to change the orientation and foundation in law enforcement for corruption. From a repressive legal orientation that prioritizes deterrence to responsive laws and restorative laws.[4] Responsive law aims to make law enforcement seriously consider what is really needed by the Indonesian people, and restorative law is law that can accommodate the restoration of social relations between perpetrators and victims (individuals or the state).[5] Responsive law uses a "cost and benefit ratio" approach, by applying the principles of an economic analysis approach to law, namely maximization, balance and efficiency. While restorative law uses a "mediation" approach with the principle of balancing the interests of victims and perpetrators.[6] By applying the principles of economic analysis to the law in the formulation policy as ius constituendum, it is an effort to enforce the law of corruption that does not only focus on deterring the perpetrators, but also pays attention to the costs and benefits of spending the minimum possible cost to obtain the maximum possible results. so as to cover the loss of state finances. Thus the author will describe the concept of these things in order to expand the repertoire of eradicating corruption in the future.

2. Research Method

This study employs a normative juridical research methodology, which involves utilizing legal sources such as laws, regulations, court decisions, legal theories, and scholarly opinions. The research primarily relies on secondary data, commonly referred to as a literature review.[7] Despite the absence of explicit legislation regulating AI in Indonesia, the author employs a conceptual methodology to construct concepts based on existing legal statutes.[8] These laws and regulations include the Corruption Act, the State Finance Act, and the State Treasury Act. The author also tries to compare corruption eradication policies in Indonesia and corruption

[3] Muhammad Arif Setiawan and Mahrus Ali, 'When Double Intention Ignored: A Study of Corruption Judicial Decisions', *Jurnal Hukum Ius Quia Iustum*, 28.3 (2021), 459–80 <https://doi.org/10.20885/iustum.vol28.iss3.art1>.

[4] Nurisyal Muhamad and Norhaninah A. Gani, 'A Decade of Corruption Studies in Malaysia', *Journal of Financial Crime*, 27.2 (2020), 423 – 436 <https://doi.org/10.1108/JFC-07-2019-0099>.

[5] Susan ROSE-ACKERMAN, 'Corruption and the Criminal Law Legalization and Criminalization', *Forum on Crime and Society*, 2.1 (2002), 20.

[6] Mabroor Mahmood, 'Corruption in Civil Administration: Causes and Cures', *Humanomics*, 21.3 (2005), 62 – 84 <https://doi.org/10.1108/eb018905>.

[7] Rian Saputra, M Zaid, and Devi Triasari, 'Executability of the Constitutional Court ' s Formal Testing Decision : Indonesia ' s Omnibus Law Review', *Journal of Law, Environmental and Justice*, 1.3 (2023), 244–58 <https://doi.org/10.62264/jlej.v1i3.18>.

[8] Muhammad Khalif, FX Hastowo Broto Laksito, and Andriamalala Laurent, 'Role and Position of Indonesian Medical Disciplinary Honour Council : Fair Medical Dispute Resolution', *Journal of Law, Environmental and Justice*, 1.3 (2023), 185–201 <https://doi.org/10.62264/jlej.v1i3.15>.

eradication policies in China.[9]

3. Results and Discussion

Formulation Policy in Article Formulation

There are several provisions that are seen as strategic articles in Law no. 31/1999 as amended by Law no. 20/2001 on the Eradication of Corruption Crimes, but from the economic analysis approach to the law, there are still some weaknesses and not in line with economic principles (maximization, balance and efficiency) as the authors have analyzed and described in sub A, in Among them are Article 2 and Article 3, Article 4 and Article 18, Article 5 and Article 12 letters a and b, Article 12B and Article 37. So to perfect the formulation of articles on criminal acts of corruption that still have weaknesses and legal loopholes, the author expect an update of the formulation of the articles as follows:

Determining the Amount of State Financial Losses.

The provisions of the formulation of Articles 2 and 3 as the authors have explained in sub A of this chapter, although different from the legal subjects, have the same goal, namely the return of state financial losses. From the point of view of economic analysis, the formulation of the two articles is abstract because it does not determine the exact and measurable amount of state financial losses, so that even the smallest amount of state financial losses can be prosecuted as a criminal act of corruption. This formulation pattern is inefficient and has the potential to harm the state. Improvements that can be offered to further refine the formulation of Articles 2 and 3 with an economic analysis approach to law are to determine the total value of state financial losses, because the total value of state financial losses is evidence of the seriousness of a criminal act of corruption and should be used as a parameter to determine penalties. So that in the future the punishments imposed on the perpetrators of criminal acts of corruption with one another with the same quality/seriousness of crime will receive the same or not much different punishments. This pattern of rules is in accordance with the principle of equilibrium in economic analysis.[10]

As a comparison, the criminal acts of corruption in the Chinese criminal law, namely the Criminal Law of the People's Republic of China, classifies them into two types of corruption which are regulated in Chapter VIII concerning Crimes Of Embezzlement And Bribery. the amount of money that was corrupted as a parameter in formulating the severity of criminal sanctions to be imposed. As in the formulation of the following articles.[11]

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[9] Agung Basuki and others, 'Establishing Ecological Justice in the Governance of Land Inventory , Ownership , and Utilisation in Indonesia', *Journal of Law, Environmental and Justice*, 18.2 (2023), 137–54 <https://doi.org/10.62264/jlej.v1i2.12>.

[10] Kuo Zhou and others, 'The Power of Anti-Corruption in Environmental Innovation: Evidence from a Quasi-Natural Experiment in China', *Technological Forecasting and Social Change*, 182 (2022), 121831 <https://doi.org/https://doi.org/10.1016/j.techfore.2022.121831>.

[11] Chenghao Huang and others, 'The Real Effects of Corruption on M&A Flows: Evidence from China's Anti-Corruption Campaign', *Journal of Banking & Finance*, 150 (2023), 106815 <https://doi.org/https://doi.org/10.1016/j.jbankfin.2023.106815>.

Article 382: *"Any State functionary who, by taking advantage of his office, appropriates, steals, swindles public money or property or by other means illegally take it into his own possession shall be guilty of embezzlement. Any person authorized by State organs, State-owned companies, enterprises, institutions or people's organizations to administer and manage State-owned property who, by taking advantage of his office, appropriates, steals, swindles the said property or by other means illegally take it into his own possession shall be regarded as being guilty of embezzlement. Whoever conspires with the person mentioned in the preceding two paragraphs to engage in embezzlement shall be regarded as joint offenders in the crime and punished as such".*

Article 383: *Persons who commit the crime of embezzlement shall be punished respectively in the light of the seriousness of the circumstances and in accordance with the following provisions:*

1) *An individual who embezzles not less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property; if the circumstances are especially serious, he shall be sentenced to death and also to confiscation of property.*

2) *An individual who embezzles not less than 50,000 yuan but less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than five years and may also be sentenced to confiscation of property; if the circumstances are especially serious, he shall be sentenced to life imprisonment and confiscation of property.*

3) *An individual who embezzles not less than 5,000 yuan but less than 50,000 yuan shall be sentenced to fixed-term imprisonment of not less than one year but not more than seven years; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than seven years but not more than 10 years. If an individual who embezzles not less than 5,000 yuan and less than 10,000 yuan, shows true repentance after committing the crime, and gives up the embezzled money of his own accord, he may be given a mitigated punishment, or he may be exempted from criminal punishment but shall be subjected to administrative sanctions by his work unit or by the competent authorities at a higher level.*

4) *An individual who embezzles less than 5,000 yuan, if the circumstances are relatively serious, shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention; if the circumstances are relatively minor, he shall be given administrative sanctions at the discretion of his work unit or of the competent authorities at a higher level.*

Article 385: *"Any State functionary who, by taking advantage of his position, extorts money or property from another person, or illegally accepts another person's money or property in return for securing benefits for the person shall be guilty of acceptance of bribes. Any State functionary who, in economic activities, violates State regulations by accepting rebates or service charges of various descriptions and taking them into his own possession shall be regarded as guilty of acceptance of bribes and punished for it".*

Article 386: *Whoever has committed the crime of acceptance of bribes shall, on the basis of the amount of money or property accepted and the seriousness of the circumstances, be punished in accordance with the provisions of Article 383 of this Law. Whoever extorts bribes from another person shall be given a heavier punishment.*

The formulation of Article 382 of the Chinese Criminal Code is a provision of the rules regarding embezzlement, stating: First, any person who by taking advantage of his position, possessing, stealing, defrauding money or public property or in any other way illegally inserts it into his own property is deemed guilty of embezzlement. Second, any person authorized by state institutions, state-owned enterprises, corporations, institutions to manage public administration and manage state-owned property, by illegally bringing it into his own possession is considered guilty of embezzlement. Anyone who conspires/allies with the person mentioned in both of the above provisions is involved in embezzlement will be considered a co-principal in the crime and punished.[12]

The formulation of Article 383 is a provision of sanctions rules for people who commit embezzlement in Article 382, and will be punished according to the level of seriousness of the crime, with the following provisions:[13]

1) A person who embezzles no less than 100,000 Yuan will be sentenced to a minimum of 10 years in prison or life imprisonment and may also be sentenced to confiscation of property, if the situation is very serious, he shall be sentenced to death and also to confiscate his property.

2) A person who embezzles a minimum of 50,000 Yuan (Rp 109.5 million) and less than 100,000 Yuan will be sentenced to a minimum of 5 years in prison and may also be sentenced to confiscation of property, if the situation is very serious, it will be sentenced to life imprisonment as well as confiscation his property.

3) A person who embezzles a minimum of 5,000 Yuan (Rp 10,950,000) and less than 50,000 Yuan will be sentenced to a minimum of 1 year and a maximum of 7 years, if the situation is serious, it will be sentenced to a minimum of 7 years and a maximum of 10 years. If a person who embezzles a minimum of 5,000 Yuan and less than 50,000 Yuan repents and returns the embezzled money of his own free will, his sentence will be reduced or perhaps freed from the criminal penalty but must be subject to administrative sanctions by a higher competent authority.

4) A person who embezzles less than 5,000 Yuan, if the situation is serious is sentenced to a maximum imprisonment of 2 years, if the situation is normal will be subject to administrative sanctions at the discretion of the institution having the competent authority

[12] Kai D Bussmann, Anja Niemeczek, and Marcel Vockrodt, 'Company Culture and Prevention of Corruption in Germany, China and Russia', *European Journal of Criminology*, 15.3 (2018), 255 – 277 <https://doi.org/10.1177/1477370817731058>.

[13] Noore Alam Siddiquee, 'Combating Corruption and Managing Integrity in Malaysia: A Critical Overview of Recent Strategies and Initiatives', *Public Organization Review*, 10.2 (2010), 153–71 <https://doi.org/10.1007/s11115-009-0102-y>.

at a higher level. Anyone who repeatedly embezzles and does not get punished will be punished on the basis of the cumulative amount of money that has been embezzled.

The formulation of Article 385 is a provision of the rules regarding bribery, which states: First, any state official who by taking advantage of his position, extorts money or property of others, or illegally accepts other people's money or property in exchange for obtaining benefits for that person will be considered guilty of accepting bribes. Second, every state official who in economic activity violates state regulations by accepting discounted prices or service fees from the first various descriptions and including them in his own property must be considered guilty of accepting bribes and punished accordingly. The formulation of Article 386 is a provision of sanctions rules for people who accept bribes in Article 385, where for state officials who accept bribes will be punished based on the amount of money and property received and look at the seriousness of the situation in accordance with Article 383.[14]

Taking a quick look at the formulation of the articles of criminal acts of corruption in China, whether embezzlement or bribery, makes the amount of money or property embezzled and the amount of money or property received as parameters in determining criminal sanctions against corrupt perpetrators. Thus, it is clear how the appropriate sanctions are imposed, not only based on the subjective interpretation of the judges reflected in their decisions so far, giving an illustration to the public that stealing state money of hundreds of millions to billions of rupiah by stealing motorbikes on the side of the road whose value is much smaller but the punishment dropped is not much different. Therefore, it is necessary to formulate a fairer policy so that people still believe that the judicial process is the best place to seek justice.[15]

Article 2 and Article 3 are more appropriate to be formal offenses.

The existence of real state financial losses in Articles 2 and 3 is a condition that corruption actors can be prosecuted as a consequence of the abolition of the word "can". The consequences arising from making material offenses are that it will slow down and make it difficult for the KPK and other law enforcers to handle corruption cases. The most appropriate formulation pattern for Article 2 and Article 3 is to continue to serve as a formal offense so as to facilitate law enforcement in arresting perpetrators and recovering state financial losses. According to the author, why do Articles 2 and 3 have to remain and are more appropriate to be formal offenses, because corruption is not only detrimental to state finances in a real and quantifiable way (material) but also causes losses that cannot be calculated (immaterial) because it involves rights. the wider community who also feel the negative impact of the act of corruption, thus corruption is not only about actual loss but also potential loss which must also be taken into account as in the formulation of the article before removing the word "can". If the reason for deleting the word "can" is because it is feared that law enforcement will arbitrarily make someone a suspect, then according to the author it is another matter, namely

[14] Michael Levi and Fangmin Ruan, 'Corruption Legislation and Socio-Economic Change in the People's Republic of China', *Journal of Financial Crime*, 4.2 (1996), 116 – 128 <https://doi.org/10.1108/eb025766>.

[15] Rajeev K Goel and James W Saunoris, 'Corrupt Thy Neighbor? New Evidence of Corruption Contagion from Bordering Nations', *Journal of Policy Modeling*, 44.3 (2022), 635–52 <https://doi.org/https://doi.org/10.1016/j.jpolmod.2022.05.004>.

a violation of the SOP that must be dealt with firmly if it is proven to have violated and is regulated in a different place, but not preventing it by eliminating the word "can" which will actually make it difficult for law enforcement to eradicate corruption and restore state financial losses.[16]

Amend the provisions of the formulation of Article 4.

One of the obstacles to not achieving the objectives of the law on corruption in restoring significant state financial losses is the formulation of Article 4 which does not abolish prosecution for perpetrators who have returned the amount of state money they have corrupted. This means that whether the perpetrator returns the money from corruption or does not return the money from the corruption, in the end the perpetrators of corruption will still be prosecuted for committing corruption. The logical question is whether it is possible for the perpetrator to return the money from corruption but on the other hand he is still sentenced. Provisions like this from the point of view of economic analysis are inefficient and unbalanced, so they need to be reviewed. A realistic solution is to provide pardons in the sense that they do not imprison the perpetrators but are replaced with a conditional sentence of 2 years for the perpetrators who return the money from the corruption and by implementing provisions requiring the perpetrators to pay a fine of 2 or even up to 3 times the amount of state financial losses. With provisions like this, according to the author, it is more effective and efficient because the state does not have to pay for the sanctions imposed and the perpetrators receive a fairer punishment. In imposing multiple fines, there are elements of deterrence, and legal certainty is maintained, justice is felt and benefits are obtained.[17]

Turning State Financial Losses As Debt.

State financial losses in Articles 2 and 3 have so far been interpreted as "real losses" and must be returned in real terms (cash) within a certain period of time, needing to be converted into a debt of a person or a corporation to the state. Changes in the meaning or meaning of state financial losses into debt to the state can be returned in the form of shares by the corporation concerned so that it can apply a penalty in the form of transfer of ownership of the corporation's shares to the state either in part or in whole according to the amount of state financial losses, as a result of the corruption crime committed.[18]

Extending the Reach Article 18 letter b.

The provisions of the rules for returning state financial losses in the form of additional criminal sanctions in Article 18 paragraph (1) letter b state that the payment of replacement

[16] Yunsen Chen and others, 'Corruption Culture and Accounting Quality', *Journal of Accounting and Public Policy*, 39.2 (2020), 106698 <https://doi.org/https://doi.org/10.1016/j.jaccpubpol.2019.106698>.

[17] Ting Gong, Shiru Wang, and Hui Li, 'Sentencing Disparities in Corruption Cases in China', *Journal of Contemporary China*, 28.116 (2019), 245 – 259 <https://doi.org/10.1080/10670564.2018.1511395>.

[18] Jinting Deng, 'The National Supervision Commission: A New Anti-Corruption Model in China', *International Journal of Law, Crime and Justice*, 52 (2018), 58–73 <https://doi.org/https://doi.org/10.1016/j.ijlcj.2017.09.005>.

money in the maximum amount is the same as the assets obtained from criminal acts of corruption. From an economic point of view, the provisions of Article 18 do not meet the maximization principle, because this provision only allows the payment of replacement money in the maximum amount equal to the assets obtained from corruption. This means that the court may not impose a replacement payment that is greater than the proceeds of the corrupted money. If you look at the many existing cases, it is clear that corruption cases can be revealed either by the Prosecutor's Office or the KPK after so many years. It can be illustrated that if the perpetrators of corruption amounted to 1 billion, and the money of 1 billion was used as investment capital for years, it is certain that the perpetrators of corruption had already benefited a lot. If after 3 years later the perpetrator is arrested, the perpetrator must return the state loss of 1 billion, while the profit from the capital of 1 billion remains the property of the perpetrator.[19] From the illustration of the case above, the provisions of Article 18 paragraph (1) letter b benefit the perpetrators of corruption so that it needs to be reviewed. The solution that can be offered with an economic analysis approach is to expand the scope of the article, the payment of replacement money is not only limited to the amount of the proceeds of corruption but to the number of benefits derived from the proceeds of corruption. In principle, the money used as business capital is not his right, so it is forbidden for him to use it and enjoy the results of the money, so it should be returned to the rightful.

Making the Defendant's Failure in the Reverse Evidence System a Strong Evidence.

As one of the supporting elements in efforts to restore state financial losses to the maximum, it is related to the reverse burden of proof system for assets obtained from the proceeds of corruption. However, so far the reverse evidence has only served as a reinforcement for other evidence as stipulated in Article 37 and Article 37A. These two provisions aim to confiscate the defendant's assets originating from the criminal act of corruption so that the defendant is not entitled to control and own the assets related to the crime, except for the assets legally obtained by the defendant. The provisions of Article 37A paragraph (2) still have legal loopholes, from the point of view of maximizing the provisions regarding the failure of the defendant to prove that legal assets are only used as things to strengthen other evidence that the defendant has committed corruption. The defendant's failure should be used as strong evidence for the court to order the confiscation of assets that the defendant cannot prove as a result of legitimate income.[20]

Policy on Formulation of Criminal Sanctions.

One important aspect of law enforcement efforts is the importance of prevention. Prevention efforts through prison sanctions that are often applied so far in overcoming the problem of corruption have in fact not been successful. By using an economic analysis of law

[19] Ling Li, 'Performing Bribery in China: Guanxipractice, Corruption with a Human Face', *Journal of Contemporary China*, 20.68 (2011), 1 – 20 <https://doi.org/10.1080/10670564.2011.520841>.

[20] Haitao Wu and others, 'Does Environmental Pollution Promote China's Crime Rate? A New Perspective through Government Official Corruption', *Structural Change and Economic Dynamics*, 57 (2021), 292–307 <https://doi.org/https://doi.org/10.1016/j.strueco.2021.04.006>.

approach in the context of preventing corruption which is an economic crime, it offers solutions in the form of criminal sanctions with an economic character so that law enforcement on corruption crimes becomes more optimal, balanced and efficient without neglecting the classic objectives of the law itself. namely certainty, justice and expediency.[21]

Before determining the form of criminal sanction that will be used so that later in its application it is targeted and efficient so that it is able to overcome the problem of corruption, namely by considering the motives of the perpetrators. A person or a corporation that commits a criminal act is usually based on two motives, namely corruption by need, people commit corruption because they are forced to fulfill their needs, their families and relatives. The economic crush is one of the reasons why someone is corrupt. The second motive is corruption by greed, people do corruption because they are greedy. Materially, the perpetrator is a respected person both in terms of position and in terms of finance, but because of his greedy nature he causes corruption.[22]

In the context of economic analysis of law, the two motives need to be distinguished so that the use of the principles of economic analysis of law is right on target. Economic principles against the law will only be suitable to be applied to perpetrators of corruption by greed, because in fact there are many corruption cases that appear to the public that are detrimental to state finances, from billions to trillions of rupiahs due to greed. Meanwhile, the application of the principle of economic analysis to the law on the perpetrators of corruption by need is irrelevant because from the beginning the perpetrators of this motive were not economically able to meet the needs of his life, his family and colleagues, thus forcing him to commit corruption.[23] Corruption is a criminal act with an economic character and the perpetrators who commit corruption are driven by economic motives, so it is appropriate that the perpetrators are also sentenced to economic character so that the goals of certainty, justice and benefit in law are achieved. Through the principles of economic analysis of the law, the author tries to offer a form of criminal sanction that prioritizes aspects of optimization, balance and efficiency, as follows:

Streamlining and Intensifying the Death Penalty

Since the promulgation of the provisions regarding corruption in Indonesia, there has never been a criminal act of corruption sentenced to death based on a court decision. Regardless of the amount of state losses due to corruption, which even reaches trillions, no perpetrator has ever been sentenced to death.[24] Why is that, because the death penalty is only for perpetrators of corruption who violate Article 2 on the condition that the perpetrator

[21] Daniel Márquez, 'Mexican Administrative Law Against Corruption: Scope and Future', *Mexican Law Review*, 8.1 (2015), 75–100 <https://doi.org/10.1016/j.mexlaw.2015.12.004>.

[22] Hongming Cheng and L Ling, 'White Collar Crime and the Criminal Justice System: Government Response to Bank Fraud and Corruption in China', *Journal of Financial Crime*, 16.2 (2009), 166 – 179 <https://doi.org/10.1108/13590790910951849>.

[23] Chen and others.

[24] Salsabila Salsabila and Slamet Tri Wahyudi, 'Peran Kejaksaan Dalam Penyelesaian Perkara Tindak Pidana Korupsi Menggunakan Pendekatan Restorative Justice', *Masalah-Masalah Hukum*, 51.1 (2022), 61–70 <https://doi.org/10.14710/mmh.51.1.2022.61-70>.

commits corruption in certain circumstances where it is difficult to fulfill the elements of certain circumstances. So that it can not impose the death penalty against perpetrators of corruption who do not commit corruption in certain circumstances that the author has described previously.[25]

When compared with the provisions of the Criminal Law of the People's Republic of China (Book of the Criminal Law of the People's Republic of China) which intensifies the imposition of the death penalty on perpetrators of criminal acts of corruption, where the imposition of the death penalty is not based on the types of corruption as in Indonesia, but the imposition of the death penalty is based on the amount of money that was corrupted. As in the provisions of Article 383 paragraph (1) for people who embezzle state money a minimum of 100,000 Yuan which if in rupiah is equivalent to Rp. 219,000,000 (two hundred and nineteen million rupiah) the threat of a minimum sentence of 10 years in prison and a maximum of life, and can also subject to additional penalties such as confiscation of property (property), and if the situation is very serious then the perpetrator will be sentenced to death.[26]

By embezzling Rp. 219,000,000 (two hundred and nineteen million rupiah) in China, the perpetrator can be sentenced to death. The number of state losses is still in the hundreds but the threat is the death penalty, much different from the legal provisions in Indonesia, where there are many corruption cases that cost the state finances up to trillions but none of the perpetrators is sentenced to death. By streamlining and intensifying the imposition of the death penalty for corruptors in China, making China one of the countries that most often imposes the death penalty, however, this turned out to have a positive impact both in terms of law enforcement and in terms of economic growth because it has succeeded in overcoming the problem of corruption. has long been rooted since imperial times. China's success in overcoming the problem of corruption needs to be an example for the good of this nation in the future, so the imposition of the death penalty for criminal acts of corruption should be made effective and intensified because its existence is in accordance with the principles of rationality and efficiency in economic analysis of the law. The death penalty provisions which are only contained in Article 2 must also be contained in other corruption criminal articles and the parameter of its application is the large amount of money that is corrupted, no longer dependent on certain conditions which are very difficult to fulfill.

Penal Formulation.

The basic assumption of prevention theory in economic analysis of law is that humans are always rational. There are two concepts of humans as rational beings put forward by Kenneth G, namely Shaping the individual's opportunities and Shaping the individual's preferences. The first concept is that a person rationally chooses the available opportunities to realize the greatest satisfaction based on the available choices. While the second concept is that a person will act rationally as long as the choices he has are complete, and he will choose the

[25] Zimeng Pan, 'Culture-Specific Conceptualisations Relating to Corruption in China English', *Lingua*, 245 (2020), 102948 <https://doi.org/https://doi.org/10.1016/j.lingua.2020.102948>.

[26] Satria Unggul Wicaksana Prakasa, 'Garuda Indonesia-Rolls Royce Corruption, Transnational Crime, and Eradication Measures', *Lentera Hukum*, 6.3 (2019), 413–30 <https://doi.org/10.19184/ejlh.v6i3.14112>.

opportunity in which there is the greatest advantage based on the choices he has.[27]

Referring to the principle of rationality in the economic analysis of the law which describes that rational actors always calculate the costs and benefits that will be obtained when committing a criminal act of corruption. If the benefits or profits are greater than the costs or losses, they will commit a criminal act of corruption and vice versa. Because humans are rational creatures, as a prevention effort is when someone commits a criminal act of corruption, the criminal sanctions imposed must exceed the seriousness of the corruption crime, in other words the losses/costs to be borne by the potential perpetrators must be greater than the benefits obtained by commit a criminal act. In order to adjust the criminal penalty provisions in Law No. 31/1999 as amended by Law No. 20/2001 on the Eradication of Corruption Crimes with the principles of economic analysis of the law, it is necessary to change the formulation and form of the threat of fines in all provisions of the articles in the corruption law. In the economic analysis of the law that imprisonment is not the main choice because of the high social cost of imprisonment (requires very high social costs) so it is not efficient. So the main choice is fines.[28]

By applying the principles of economic analysis to the law in Law No. 31/1999 as amended by Law No. 20/2001 on the Eradication of Criminal Acts of Corruption in which the provision of imprisonment which has been the main choice so far must be changed to a fine. According to Mahrus Ali, the formulation of the threat of cumulative criminal sanctions between imprisonment and fines, or alternative cumulative between imprisonment and or fines should be changed. These changes can be in the form of formulating a single threat of criminal sanctions, namely placing a fine as the only criminal sanction that is threatened to the perpetrator, or also the formulation of the threat of cumulative criminal sanctions between fines and the death penalty.[29]

Considering that the perpetrators of corruption in Indonesia are not all rich and have abundant property assets, and based on the motives of the perpetrators of corruption by need and by greed, then to maintain certainty, justice and expediency as the ideals of the law, according to the author, the criminal sanction of fines becomes the main criminal sanctions in the sense of prioritizing fines rather than imprisonment, criminal fines as an alternative criminal to replace imprisonment for both perpetrators of corruption with the motive of by need and also by greed, with a note if the perpetrator has assets or property that can be used to pay the crime the fine imposed in the court's decision, the perpetrator does not need to be imprisoned, it is enough to just impose a fine against him, but if the perpetrator is unable to pay the fine which is not for reasons of not wanting to pay but because he cannot afford it because there are no more assets or property owned by the perpetrators of corruption then

[27] Peng Zhang, 'Anti-Corruption Campaign, Political Connections, and Court Bias: Evidence from Chinese Corporate Lawsuits', *Journal of Public Economics*, 222 (2023), 104861 <https://doi.org/https://doi.org/10.1016/j.jpubeco.2023.104861>.

[28] Seno Wibowo and Ratna Nurhaya, 'Perbedaan Pandangan Ajaran Sifat Melawan Hukum Materiil Tindak Pidana Korupsi', *Padjadjaran Jurnal Ilmu Hukum*, 2.2 (2015), 351–69.

[29] Nicken Sarwo Rini, 'Penyalahgunaan Kewenangan Administrasi Dalam Undang Undang Tindak Pidana Korupsi', *Jurnal Penelitian Hukum De Jure*, 18.2 (2018), 257 <https://doi.org/10.30641/dejure.2018.v18.257-274>.

as a crime na subsidiary is a prison sentence.[30]

Regarding the provision of substitute criminal sanctions currently in force, a maximum imprisonment of 6 months and if there is a weighting it will increase to a maximum of 8 months, this provision must also be changed if the criminal sanction of a fine becomes the main crime and imprisonment as a subsidiary. The changes must be considered more wisely so that the principle of proportionality in law enforcement is achieved. With the provision of fines as the main criminal sanctions in overcoming the problem of corruption, the next step is to design the formulation of the threat of criminal sanctions from the point of economic analysis of the law, no longer explicitly formulated the nominal amount of the fine for each article, but simply formulated by multiplying at least 2 times and a maximum of 3 times the nominal amount of the fine that must be paid by the perpetrator, adjusted to the amount he was corrupted, then added the profits derived from corruption money if there is a profit and added to the cost of law enforcement incurred by the state.

The optimal imposition of criminal sanctions in the economic analysis of the law must be within reasonable limits and can still be tolerated, so as not to cause what is called excessive law (overenforcement). The imposition of excessive criminal sanctions when the total number of criminal sanctions imposed on perpetrators of criminal acts exceeds the optimal number of prevention efforts. For example, when a person commits corruption of Rp. 500,000,000.00 and is sentenced to a fine of Rp. 2,000,000,000.00, the penalty imposed is included in the excessive category. Unlike when the sentence imposed is IDR 1,000,000,000 or a maximum of IDR 1,500,000,000.00, this kind of punishment imposes 2-3 times the proceeds of corruption, which is a legal consequence that must be borne if someone commits a criminal act of corruption.

4. Conclusion

The policy formulation in the article involves determining the penalty based on the value of state financial losses as a parameter. Articles 2 and 3 are more suited to be classified as formal offenses. Perpetrators who repatriate public funds do not require imprisonment but a fine equivalent to 2-3 times the extent of their misconduct. Converting state financial losses into a debt owed by an individual or entity to the state is necessary. The disbursement of replacement funds was intended to offset the profits obtained through corruption, and the defendant's inability to substantiate the contrary was presented as compelling proof. The policy aims to streamline and enhance capital punishment by incorporating it into every item on corruption and considering the level of corruption as a determining factor in its implementation. The criminal penalty of a fine is determined by multiplying the corrupted amount by a factor of 2-3 and then adding the profits obtained to the state's law enforcement expenses. The prison sentence is a secondary punishment if the perpetrator lacks the financial means to cover the fine.

[30] Giorgio Locatelli and others, 'Corruption in Public Projects and Megaprojects: There Is an Elephant in the Room!', *International Journal of Project Management*, 35.3 (2017), 252–68 <https://doi.org/https://doi.org/10.1016/j.ijproman.2016.09.010>.

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