

RETRIBUTIVE JUSTICE THEORY AND THE APPLICATION OF THE PRINCIPLE OF SENTENCING PROPORTIONALITY IN INDONESIA

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ABSTRACT

This study discusses the application of the principle of proportionality in criminal sentencing. It argues that there is a significant sentencing disparity within the Indonesian criminal justice system, which contributes to the deterioration of both the law enforcement and the judiciary. Within the Indonesian justice system, many verdicts related to corruption cases are reached that are deemed disproportionate by either party to a case in particular and the public in general. Ordinary people who commit petty, non-violent crimes get heavy punishments while political elites, government officials, business tycoons and other high profile criminals who commit serious felonies receive a slap on the wrist. Such a justice system is often referred to as a two-tiered justice system. This is an empirical research that seeks to address the question as to what extent the principle of proportionality can help judges reach a rather proportionate and just verdict in criminal cases. This study reveals that judges pronounce different verdicts for identical criminal cases. They seem to ignore the principle of proportionality to only focus on the principle of legality, legal certainty and personal gains.

Keywords: Retributive Justice Theory, Principle Of Proportionality, Sentencing, Two-Tiered Justice System And Indonesian Justice System.

INTRODUCTION

Punishment is the culmination of the repressive procedure. It is a reflection of what the criminal justice system is and what it privileges. The sentence must therefore reflect the idea that justice has been done. However, a sentence that is too light or too heavy does not achieve these goals. On the one hand, the impression that the gravity of the crime has not been properly considered can fuel a feeling of resentment; on the other hand, excessive severity can give rise to a feeling of revenge in the person judged guilty or in the group from which it comes. The present study does not discuss whether a criminal should be punished, but rather how they should be punished. As argued at the outset of this paper, many of the verdicts pronounced by judges in criminal cases such as corruption very often disappoint not only in either party to a dispute but the community as a whole.¹ The rulings of many cases often display disparities that lead one to believe that there is a two-tiered justice in Indonesia. The disparity is even greater when it comes

to deciding cases involving either people with political or economic power or those without any power whatsoever. Judges tend to be lenient in sentencing the former while they are harsh on the latter. This has led to a sense of disappointment of the community in courts, and could significantly contribute to the degradation of the authority of the law enforcement and the judiciary in Indonesia. As argued at the outset of this paper, corruption cases whereby judges do not base their conviction and legal inclination on the principle of proportionality in reaching verdicts have driven sharp criticisms from legal practitioners, NGOs and academics in Indonesia. A good example of such a situation is the controversial pre-trial ruling (Rowley, 2017) of the case of the then National Police chief nominee General Budi Gunawan against the Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* (KPK) by Judge Sarpin Rizaldi on 16 February 2015, which sparked controversy. In fact, Gen. Gunawan was named suspect for allegedly accepting bribes while he was still the head of Police Headquarters Career Planning Bureau from 2003 to 2006.² According to Chairman Samad, KPK's Chairman, Gen Gunawan violated Article 12 (A/B); Article 5 (2); and Article 11 or 12, (B), of Law No.31/1999 juncto Law No.20/2001 on corruption eradication juncto Article 55 (1) of Criminal Code: General Gunawan challenged the allegation by filing a pre-trial motion in a Jakarta court. The motion was approved by a panel of judges which ruled that KPK's investigation of the suspect was unlawful that it needed to stop (Rowley, 2017). Needless to say that the anti-corruption community led by pro-KPK NGOs was very disappointed with the judgment. This case shows how financial or political power negatively influences the law and the manifestation of justice. Another equivocal court ruling is that of the case of Minah, a 70 year old woman who was sentenced to one-month and fifteen days in jail by the judge of Central Java District Court of Purwokerto on November 19, 2009 for stealing three cocoa beans worth Rp. 6,000 (about \$50 Cents). The fact that the case attracted condemnation and protests from legal scholars and practitioners, anti-corruption NGOs and human rights activists did not sway the judges in reaching such a rather ridiculous verdict. Similarly, there is the theft of seven logs of teak tree allegedly committed by a 63 year old woman named *Nenek* (grandmother) Asyani who was sentenced to one year and three months imprisonment with probation and a fine of Rp 500,000,000 (about \$37,000 US) by the Situbondo District Court on April 23, 2015. Regardless of the probation, a fine of Rp. 500 millions for the theft of seven logs of tree by an elderly citizen is not only a disproportionate verdict but has also no legal logic. These cases show that the working of the law in Indonesia is still based on the text rather than the context. Much like many civil law countries, the Indonesian law enforcement is entirely based on the written provisions with less attention given to the sociological dimension (Murdoko, 2016). We believe that the outcome of a case is highly dependent on the difference in the quality of a judge's conviction. In other words, whether or not a verdict is just, fair and proportional has a lot to do with what the judge believes in. It is not surprising to see different rulings for two similar cases. In the eyes of the community, the existence of such differences in the verdicts is a form of injustice.

RESEARCH METHOD

This research deals with the law applied by judges in imposing criminal sanction on the defendant. To address the research question, legal value approach, empirical approach and conceptual approach are used in this study. The legal value approach is used in the attempt to solve problems related to the value of justice, which has not yet been able to be achieved by

judges so far. Empirical approach is used to investigate legal issues raised by unpopular verdicts through observations and interviews in the field. The research population consists of the disputants, judges, NGOs, legal practitioners and scholars. The conceptual approach, on the other hand, is used to examine the principle of proportionality contained in the theory of retributive justice, which is proposed as one of the solutions to achieving justice (Mudhofir, 1996). The data presented in this study is empirical qualitative data related to the legal problems resulting from the judges' failure to meet citizens' needs for justice and fairness. In an attempt to address the issues of the research, interviews along with questionnaire was run with the disputants, legal scholars and practitioners, judges and investigators who were predetermined by the researcher as informants who gave their consent to participate in open and free dialogues or discussions on the issues related to the research topic. Primary data involved in this study consist interviews with predetermined informants such as judges, academics, investigators and disputants. Interviews were conducted freely in forms of limited discussions with informants so as to obtain more accurate answers. Secondary data, on the other hand, is related to retributive justice theory considered as the oldest theory of punishment (Lewis, 1987). Secondary data is gathered from legal and philosophical books, research articles and magazines.

RESULTS AND DISCUSSION

The Scope of Punishment Under the Indonesian Criminal Law

The weight of the punishment imposed by judges very often depends on the defenant's behavior, which they see not only as the mitigating or aggravating element but as a normative complement to justify their conviction when reaching a verdict. The general principle in sentencing is that a judge must not impose sanctions beyond those prescribes by the law. In a civil law country such a Indonesia, this means that judge shall not make law, as the theory of "*freie rechtslehre*" in Anglo-Saxon. Article 20 of "*Algemene Bepalingen Wetgeving Van Voor Indonesie*" stated that "*a judge must decide on the case based on the Law.*" Such principle also implies that judge should not apply the law excessively to prevent unjust and harsh punishments. However, in carrying out their duty, judges are allowed to make broad interpretation of the law when it is not clear, or in the event of a legal vacuum, which is no excuse for rejecting a case in a court of law in Indonesia.³ Deciding a case, judges must consider the values and sense of justice that exist within the community so that their decisions can be accepted sincerely by the parties (Waluyo, 2004). In a civil law system, the judge's role is to establish the facts on the case filed by the prosecutor and to apply the provisions of the applicable code. Although the judge determine charges, investigates the matter, and decides on the case, he or she must work within a framework established by a comprehensive codified set of laws. What this really means is that a civil law judge is only obliged to examine the facts and decide the case brought before him by the prosecutor.

The Lack of Proportionality in Sentencing in Indonesia

Punishment is to prevent the culprit from further harm to society and to divert his fellow citizens from attempting similar crime. "*Among the penalties and the manner of inflicting them, it is necessary to choose the one which, proportionate, must make the most effective and lasting*

impression on the minds of men and the least cruel on the criminal".⁴ The seriousness of the crime and the personal situation of the convicted relate to the principles of proportionality and individualisation.⁵ Alec Walen argues that there are two basic senses of proportionality: cardinal and ordinal. Cardinal proportionality sets absolute measures for punishment that is proportional to a given crime; ordinal proportionality requires only that more serious crimes should be punished more severely (Walen, 2016). There are three principles within the criminal punishment process that should be considered by the judge in pronouncing the verdict against the defendant, namely the principle of "legal certainty," the principle of "justice" and the principle of utility. Of the three principles to be considered, the principle of legal certainty seems to be the focus point of judges in deciding over a criminal case. Authors of petty crimes often receive fierce punishment while those that put the entire nation at risk get away with lenient sentences.⁶ One of the best cases to refer to in this regard is the National Identification Electronic Cards corruption case known as *Kasus Korupsi Proyek E-KTP* whereby Irman and Sugiharto, two former high-rank officials at the Ministry of Home Affairs misused nearly Rp. 6 trillion earmarked for the issuance of national identification cards. Despite the tremendous loss suffered by the state⁷ in particular and the Indonesians in general, the judges of the Jakarta Corruption Court only imposed a 7-year prison sentence and a fine of Rp. 500 million (\$37,000 US) along with a 6 month imprisonment subsidy to the defendants.⁸ This case along with the cases discussed earlier shows a significant lack of proportionality in sentencing. In reaching their verdicts, the judges seem not to have taken into consideration the ages of the defendants, the stolen objects and the consequences of the offence. By no means do we suggest that judges must be lenient on certain crimes but harsh on others. But instead we argue that the a sentence must not exceed the boundaries specified by the applicable law and must be commensurate with the offense. When a 70 year old lady is sentenced to one and half months in jail for stealing three cocoa beans worth less than a dollar or when a year and three months jail time along with a fine of \$37,000,00 US is given to a 63 year old for stealing only a few logs of teak tree while those who endanger significantly the lives of the Indonesian people by ruining the country's economy get away with mild punishments and fines, there is a two-tiered justice system (Ainsworth, 1994), namely a justice system whereby ordinary people who commit petty, nonviolent crimes go to prisons while political elites, government officials, and other criminals who commit serious felonies receive full-scale immunity.⁹

The American Example

The United States Supreme Court proposed the Proportionality Doctrine in two cases during the 1980s, namely "*Enmund vs. Florida*" (1982) and "*Solem vs. Helm*" (1983) to clarify this key principle of proportionality within the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Enmund vs. Florida case

Enmund vs. Florida was a 5-4 decision in which the US Supreme Court applied its capital proportionality principle, to set aside the death penalty for the driver of a getaway car, in a robbery-murder of an elderly Florida couple. While Earl Enmund sat outside in the getaway car, his accomplices Sampson and Jeanette Armstrong rang the doorbell of Thomas and Eunice

Kersey, who lived at a farmhouse in Florida. When Thomas Kersey answered, Sampson Armstrong held him at gunpoint while Jeanette took his money. Eunice came out with a gun and shot Jeanette, wounding her. Sampson shot back and killed both of the Kerseys. The Armstrongs took all the Kerseys' money and then went back to the getaway car Enmund was driving. Enmund and the Armstrongs were indicted for first-degree murder and robbery. Enmund was sentenced to death. But on appeal, the Supreme Court rejected Enmund's contention that his death sentence was inappropriate because he did not kill or intend to kill the Kerseys.¹⁰

Solem vs. helm case

The same court nullified on November 1983 a prison sentence because the judges believed that its length was disproportionate to the offense and, therefore, a violation of the Eighth Amendment's ban on "*cruel and unusual punishment*." By a 5-4 majority, the Court struck down South Dakota's "*habitual offender*" law, which authorized judges to sentence felony offenders with three prior felony convictions to life in prison without possibility of parole. The decision nullified the life sentence of Jerry Helm, who, on the basis of six prior felony convictions for property crimes and drunk driving, had been sentenced to life imprisonment when convicted of passing a phony \$100 check. Writing for the majority, Justice Lewis F Powell, Jr., declared that "*Helm's sentence was unconstitutional because 'a criminal sentence must be proportionate to the crime'*".¹¹

The fundamental principle behind proportionality is that the punishment should fit the crime. In 1983, the U.S. Supreme Court ruled that courts must do three things to decide whether a sentence is proportional to a specific crime:¹²

- Compare the nature and gravity of the offense and the harshness of the penalty.
- Compare the sentences imposed on other criminals in the same jurisdiction; i.e., whether more serious crimes are subject to the same penalty or to less serious penalties.
- Compare the sentences imposed for commission of the same crime in other jurisdictions.

The Indonesian Supreme Court has adopted similar position in its verdict. 662K/Pid/1992 (State vs. Abdullah bib Tatoto et al), and the verdict no. 1168 K/Pid/2000 (State vs. Margono Kusuma Widagdo and Sri Endah Soekardi). In these two decisions, the Supreme Court overturned the State court decisions for excessive prison sentences without consideration and enough detailed reasons. In both verdicts, the Supreme Court sees a disparity of punishment. Proportionality requires that the level of punishment be related to the severity of the offending behavior. Severity can be determined by the amount of harm, unfair advantage or the moral imbalance the crime caused (Cavadino, 1997). Immanuel Kant (1998) argues that, "*judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime*" (Martin, 2005). The idea of proportionality in sentencing is often associated with *distributive justice* theory.

Retributive Justice Theory

Retributive justice theory is understood as a form of justice committed to the following three principles: (1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; (2) that it is intrinsically

morally good good without reference to any other goods that might arise if some legitimate punisher gives them the punishment they deserve; (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers (Walen, 2016). The “*just deserts*” theory of sentencing advocates that punishment should be proportionate to the gravity of the crime committed. Proponents of the just deserts philosophy emphasize the importance of due process, determinate sentences, and the removal of judicial discretion in sentencing practice. Andrew von Hirsch (1976) argues that “*a just desert is a retributivist theory of punishment*”. Unlike theories that are primarily concerned with preventing future offenses, such as deterrence, rehabilitation, and incapacitation, retributivist theories are only concerned with punishing crimes that have already been committed. The concept of “*just deserts*” seeks to preserve human dignity through punishment. It asserts that a person is a rational individual with the free will to make a moral choice whether or not to engage in conduct known to be prohibited. Retribution under a just deserts principle treats a defendant as a dignified human being by responding to his or her conduct in a way that respects his or her choice to engage in wrongful behavior (Hirsch, 1976). Under this definition of retribution, crime is a conduct that disturbs the “*right*” relationships within the community: relationships between offender and victim, offender and community and victim and community. A criminal “*deserves*” to be punished because he or she has violated the “*moral order*,” and proportionality is the rope used to measure the type of punishment he or she deserves. Because the goal of retributive justice is to restore the relationships that have been broken, a defendant must be punished only to the extent necessary to restore the relationships. In other words, the level of punishment must be proportional to the seriousness of the crime (Nozick, 1981).

Factors Considered by Judges in Determining Sentences

Many factors are taken into consideration by judges when determining criminal sanctions. Generally, these factors include mitigating and aggravating circumstances.

Mitigating circumstances include factors such as the defendant’s mental health, their first offense, remorsefulness, their willingness to take responsibility for their actions, proof of rehabilitation and other life circumstances. While aggravating circumstances include prior criminal history, the seriousness of the crime and the extent of any victims’ injuries. These generally accepted judicial principles are set forth in the Indonesia Criminal Code or *Kitab Undang-Undang Hukum Pidana* (KUHP) through its article 197 that “*says that the facts and circumstances presented during trial are the basics to determine whether or not a defendant is guilty.*” It is important to emphasize that these guidelines must give the judges ample latitude so that, within the framework of their sovereign discretion, they can take into consideration all the circumstances of a case. However, in imposing sanctions on the defendant, judges seem to only consider the mitigating and aggravating factors and pay less attention to what the law actually says.¹³ The principle of legality supposes that a verdict must be in accordance with the law and the law alone so as to avoid the tyranny of the judges. The rule of law is preferable to that of any individual as Aristotle warns.¹⁴ Aristotle argues that he who bids the law rule may be deemed to bid God and reason alone rule because the law is reason unaffected by desire. By principle of proportionality, the superior judge’s intention must not be inconsistent/at odd with the decision of a lower judge. He must only make sure that previous court verdicts contain no errors. Although there is no single perfect sentence for a particular crime as each offence and offender

may have particular characteristics that could affect the severity of the sentence, the judge must order a sentence that is proportionate considering the gravity of the offence and the particular circumstances of the offender.

CONCLUSION

The final stage of the criminal trial is sentencing, which forms the essence of the repressive procedure. The cases discussed in this paper show that the nature and duration of the sentence are influenced not only by the objectives and functions assigned to it but also and, to a large degree, by the inclination of the judges. Sentencing is an extremely sensitive process in which the interests of the community and offender must be weighed. For the community, the sentence is directed toward the elimination of the criminal, denounce his behavior and dissuade potential criminals to preserve peace and security. As for the convicted person, he must be entitled to a sentence that is fair, pronounced according to the rules and principles of a fair procedure, not out of whim. The fear of punishment and the existence of effective mechanisms of repression protect men from each other and contribute to the maintenance of justice and peace (Hart, 1968). The retribution must be in the sense of punishment that adequately reflects the moral culpability of the offender rather than the vengeance. A proportionate sentence must take into consideration the crime as committed, that is, the circumstances surrounding it and the characteristics of the offender. Although disparity is inherent in any criminal justice system, effort must be done to minimize it so as to prevent feelings of injustice leading to discrediting the Indonesian criminal justice system. However, it is important to note that preventing disparities between court sentences does not mean promoting the arithmetic uniformity that would be reflected in the duration of the sentence, but rather aspiring to uniformity in the judicial approach. Judges need to carefully balance consistency and proportionality with a flexibility that allows for unique circumstances and the impact of structural inequalities on offending behavior and criminalization.

ENDNOTE

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3. Law No. 48/2009 on the Judicial Power.
4. *Traité des délits et des peines*, op. cit., note 69.
5. Rule 145 (1) on the Rules of Procedure and Evidence of the ICC.
6. Edwan, Interview, Lampung, August 7, 2015.
7. The panel of judges ruled that both individuals had enriched themselves, others or corporations causing Rp 2.3 trillion (US \$195 million) in state losses.
8. Tempo.CO, *E-KTP Trial*: <https://en.tempo.co/read/news/2017/07/20/055893051/E-KTP-Trial-Judge-Sentences-Defendants-7-and-5-Years-in-Prison>.
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10. *Enmund vs. Florida*, 458 So.2d 782 (US 1982).
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14. Aristotle, *Politics*. Book III, p.77.

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