

## RECONSTRUCTION OF CORRUPTION CRIMINAL IN INDONESIA

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### ABSTRACT

*Criminal corruption in Indonesia is formulated in Law Number 31 Year 1991 on the Eradication of Corruption juncto juncto Law Number 20 Year 2001 which reflects the nature of retaliation (retibutive theory). In abstracto the nature of retaliation is reflected in the formulation of capital punishment, the absence of "criminal counting methods," and in concreto a criminal disparity occurs. The situation is not in accordance with Pancasila as the source of all sources of law, which is the foundation of the development of corruption criminal law in Indonesia, and the 1945 Constitution of the Republic of Indonesia which recognizes the value of divinity, humanity, equality and justice before the law and opposes discriminatory treatment. The gap causes unlawful criminal sanction, so criminal corruption in Indonesia's law needs to be reconstructed. The problem is how to reconstruct criminal law in corruption in Indonesia. Based on the type of normative legal research, with secondary data source of Supreme Court Appeal Court of 2012-2016 amounted to 25 (twenty five) verdicts which have legal force remained as sample, using random sampling technique, and descriptive approach and qualitative analysis, , that in fact abstracto, Pancasila values are not used as legal principles in determining criminal purposes, lack of criminal guidance and the absence of "criminal counting methods", open to criminal disparity, discrimination and criminal injustice. In concreto, from 25 (twenty five) samples of corruption cases can be known various criminal correlation, that is firstly most of the demands of the Public Prosecutor and Court Judgments (District Court, High Court and Supreme Court) impose minimum prosecution or imprisonment. Secondly, Correction of Criminal Penalty with Corrupt Replacement Money on Claims and Judgments The court proves that the prosecution and decision of the criminal court of a fine is greater than the financial compensation money of the State. Thirdly, correlation of Criminal Penalty with Criminal Custody of Corruption on General Prosecutor's Inquiry, Decision of District Court, Court of Appeal Decision, and Supreme Court Decision proves there is disparity duration of imprisonment. In this regard, it is necessary to reconstruct criminal corruption in Indonesia, firstly, to make Pancasila values as Indonesian criminal law principles, to formulate just criminal objectives, the need for guidance on punishment, and the use of mathematic sentence method in calculating fair . In conclusion, that the reconstruction of criminal justice through the way in abstracto using the ideological values of the nation as the principle of law, change of criminal stelsel, namely the abolition of capital punishment and place of fine as additional criminal, and in concreto through "mathematic sentence" as a method of criminal counting.*

Keywords: Reconstruction, Criminal

### PREFACE

The development of law is a process of reconstructing and or harmonizing the law toward the goal of a law-legal, peaceful and equitable legal order. In Indonesia, legal development is based on *Pancasila* as the source of all sources of law, as formulated in Article 2 of Law Number 12 Year 2011 on the Establishment of Laws and Regulations. The values of God, humanity, unity, democracy and social justice, essentially in those values contain justice value as the basic value of the formation of law that is religious justice, human justice, regional justice, justice in the process of social, nation and state, and justice for mutual benefit. In general, the development of law is also based on human rights, as formulated in the Declaration of Human Rights.

*Pancasila* as the source of all sources of law implies that the basic values of *Pancasila* as legal principles, which are still based on the principles of criminal law formulated in the Criminal Code. The development of national law formulated in Law Number 17 of 2007 on Long Term National development Year 2005-2025 the field of law, stating, that in order to eliminate, handle and resolve corruption by way of legal material development. The values of *Pancasila* underpin the development of legal material and should be the values of *Pancasila* as the principles of criminal law.

But in fact, in the development of national law, especially the development of criminal law, there has been corruption criminal injustice in Indonesia, both in abstracto in the formulation of criminal threat and in concreto in the application of criminal which is a social phenomenon in the field of criminal law in Indonesia. The criminal corruption in Indonesia is quite severe and reflects the "retaliation", away from justice. The nature of "retaliation" is formulated in the threat of capital punishment and the absence of a fair criminal counting method, the application of two main types of criminal sanctions, namely imprisonment and fines which affect the severity of the crime which is not proportional to the economic loss of the act, greater than the value of the state financial loss. The nature of "retaliation" is not in accordance with his opinion Cesare Beccaria (1738-1794) in his book *Dei Deliti e Delle Pene* states the harshness of punishment will be contrary to justice and social conspiracy.<sup>1</sup>

Even punishment guidelines, in consideration of criminal application, there is no formulation in the law of criminal law, so the considerations used by law enforcement officers are subjective. Empirically, the criminal law applied to the defendant cannot be

<sup>1</sup> Cesare Beccaria, *Dei Deliti e Delle Pene*, translated by Wahmuji (Yogyakarta: Genta Publishing, 2011), page 8

used as a therapeutic and therapeutic shock factor due to the inherent abstracto and in concreto weaknesses, so there is still high corruption and gratification in Indonesia. Proven on the basis of the Annual Report of the Supreme Court of the Republic of Indonesia in 2012-2015, in special crimes show that the 2012 corruption amounts to 879, in 2013 the corruption totaled 821, in 2014 corruption amounted to 689, in 2015 corruption totaled 811. Even in the annual report of the Corruption Eradication Commission shows the high gratification and corruption in Indonesia, as shown in the table below.

Table 1  
Report of Gratification and Corruption Investigation  
Indonesia's Corruption Eradication Commission  
Year 2012-2016

No	Year	Amount				Information
		Gratification Report	Corruption	Suspect/Defendant	Gratification Value (more than) /Rp*	
1	2012	1.158	283	50	27.996.101.671	* not including the value of foreign money and goods
2	2013	1.391	70	59	33.622.378.153	
3	2014	2.224	58	54	29.224.188.171	
4	2015	1.573	281	63	33.829.397.013	
5	2016	1.948	422	99	19.846.195.306	
AMOUNT		8.294	1.114	325	144.518.260.314	

Data source: Indonesia's Corruption Eradication Commission Annual Report Year 2012-2016

Therefore, it is necessary to conduct corruption reconstruction as an effort to renew the criminal law *in abstracto*, which is expected in the future will affect the application of criminal justice *in concreto*, so as to prevent, minimize and or tackle corruption.

### Problems

The problem of criminal corruption can be seen from the aspects of material criminal law (covering the subject of criminal acts, criminal and criminal acts), formal criminal law aspects, and legal aspects of criminal implementation. In the discussion of this paper limits the problem of criminal law of the criminal side, with consideration in abstracto and in concreto in the corruption of unlawful crimes. The discussion of this paper seeks to find a just criminal form in abstracto, and is expected to be implemented in concreto, so the problem in this paper takes the topic of corruption criminal reconstruction in Indonesia.

### Research Methods

The type of research used is normative legal research, which specifically looks at Law Number 31 Year 1999 juncto Law Number 20 Year 2001 regarding Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption. The approach taken by describing criminal problems in abstracto in corruption laws, and is expected to affect in concreto the application of fair criminal law. Sources of data used in this paper are secondary data, in the form of corruption laws and Supreme Court Cassation Decision of 2012-2016 amounted to 25 (twenty five) decisions that have permanent legal force. There is also data collection conducted by literature study on corruption laws and Supreme Court decisions of the Republic of Indonesia. The sample in this research is the decision of Mahkamah Agung Republic of Indonesia with 25 (twenty five) decisions, with sampling technique using random sampling technique. Sampling of 25 (twenty five) decisions is not representative, but can be used to describe the occurrence of unequal criminal and criminal disparities. The analysis conducted in this research is qualitative. This research will briefly describe criminal problems in abstracto and in concreto, which will further illustrate the existence of criminal theories, and the most recent concept of the Pancasila paradigm with its solution to justice.

The limitation of the research area in Indonesia, but in general the results of this study can be considered in a fair trial of criminal justice, such as divinity, humanity, unity and justice, and the use of criminal counting method of "mathematic sentence" with indicators adjusted to each country.

### Discussion

#### a. Corruption: *In Abstracto*

Hans Kelsen says that law is an order of human actions, and "order" is a system of rules. Law is a set of rules that contain a kind of unity that is understood through a system. A particular social order that has a legal character is a legal order.<sup>2</sup> Compliance with the legal order will be realized if the formulation of legal subjects, legal acts, and criminal *in abstracto* in accordance with the character of Indonesian law, namely the legal character of *Pancasila*. Hans Kelsen says that law is an order of human actions, and "order" is a system of rules. Law is a set of rules that contain a kind of unity that is understood through a system. A particular social order that has a legal character is a legal order. Compliance with the legal order will be realized if the formulation of legal subjects, legal acts, and criminal in abstracto in accordance with the character of Indonesian law, namely the legal character of *Pancasila*.

<sup>2</sup> Hans Kelsen, *General Theory of Law and State* (New York: Russel and Russel, 1971), translated by Raisul Muttaqien, *Teori Umum Tentang Hukum dan Negara* (Bandung: Nusa Media, 2011), page 3-6

Indonesian Criminal Law is still based on the character of colonial law, namely philosophical *Wetboek van Strafrecht voor Nederlandsch-Indie* (S.1915 No.732) which is general (*lex generalis*) with retributive theory, and becomes the basic construction of special Indonesian Penal Code (*lex specialis*), which is sometimes more "cruel" and distorted than the general Criminal Law of Indonesia (*lex generalis*). In *casu*, Law of the Republic of Indonesia Number 20 Year 2001 concerning Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption, which contains criminal philosophical value as "retaliation," because the law formulates and implements capital punishment and 2 (two) principal penalties, namely imprisonment and fines, sometimes applying additional criminal sanctions in the form of state financial returns and/or the revocation of the rights of the convicted persons (such as the revocation of political rights), there is even an attempt to make poor convicts a "retaliation" paradigm in law enforcement. R. Soesilo in the explanation of the Criminal Code says that for a crime or offense one can only be subjected to one principal punishment, Cumulative more than one principal punishment is not permitted.<sup>3</sup> Andrew and Dorit Halpin say the criminal law may be an instrument of oppression.<sup>4</sup> Furthermore it is said, ... critically considering how to enlist the criminal law as a positive resource; critically rejecting oppressive uses to which the criminal law has been put; and being critically open to a flexible use of methods to alter the structure of society in a manner that reduces oppression.<sup>5</sup>

The paradigm of "retaliation" in abstracto becomes the dark side of Indonesian criminal law enforcement that contradicts the values of Pancasila, especially the formulation of a financially limiting criminal penalty with a minimum-maximal formula, which often exceeds the state's financial losses. Guidelines for calculating the amount of fines do not exist, so the calculation of criminal penalty is subjective by referring to the formulation of penalty threat of fine, using minimum-maximum. In *casu*, the case of the Case Number 1714 K/PID.SUS/2014, the defendant CH violated Article 2 paragraph (1) with the state losses enjoyed by the defendant amounting to Rp 61,740,000, - The court ruling imprisonment for 2 (two) years and fine amounting to Rp 200,000,000, - and paid a substitute of Rp 61,740,000, - The Cassation Decision reflects the penalty of "retaliation", and it is not fair.

Criminal corruption includes principal punishment, which consists of capital punishment, imprisonment, fine and additional criminal sanction. The punishment system uses a maximum-maximum and there is no criminal counting method yet. Even very concerned in Law Number 31 of 1999 about the Eradication of Corruption, Article 2 paragraph (2) states "in the case of criminal acts of corruption done under certain circumstances, capital punishment can be imposed." The formulation of the threat of capital punishment is contrary to the source of all sources of law, namely Pancasila. The first principle of Pancasila, Belief in the one and only God, means that in the development of criminal law, it should be based on the divine value, one of which is the problem of death is a matter of God, not a human problem, let alone the problem of corruption is a matter of property, so prison and penalty are quite representative in punishment justice. Gargi Roy<sup>6</sup> said that our decisions are often manipulated by social and political power. As a result it is not uncommon to find that someone has been given capital punishment only to attain certain individualistic or political gain and that has nothing to do with justice. Furthermore Gargi Roy<sup>7</sup> said that the Report has already been shown that the uneducated poorer sections of the population are given more punishment capital than the educated well to do people. The rich manage to escape. This can not be supported from the moral point of view. From time immemorial legal judgment has been forced to bow down to political, economic or religious power.

If Gargi Roy's opinion is true, and if it happens in Indonesia, then the act is a criminal and human rights penalization. It is therefore necessary to reconstruct the criminal theory.

#### **b. Criminal Corruption: In Concretto**

Of the 25 (twenty five) sample cases of corruption cases most of the demands of the Public Prosecutor and Court Judgments (District Court, High Court and Supreme Court) apply minimum prosecution or imprisonment. This can be seen from the correlation of criminal acts with imprisonment which is threatened, namely:

1. Criminal acts according to Article 2 paragraph (1) of Law Number 31 Year 1999, the threat of life imprisonment or imprisonment of a minimum 4 (four) years and maximum of 20 (twenty) years, but the demand of the Public Prosecutor and Judgment of the Court between 4 years to 10, there is only 1 (one) prison sentence imposed 10 (ten) years, then the imprisonment is prosecuted and the court decision is in the minimum category (low), even eleven cases of corruption are imposed imprisonment approaching the formulation of a minimum of 4 (four) years;
2. Criminal acts of corruption under Article 3 of Law Number 31 Year 1999, the threat of life imprisonment or imprisonment of a maximum of 1 (one) year and maximum of 20 (twenty) years, but the prosecution of the Public Prosecutor and the Court Decision between 1 year to 2 years 6 months, there is only 1 (one) imprisonment imposed 4 (four) years, the imprisonment is prosecuted and the court decision is minimum (low) category, even approaching the formulation of the threat at least 1 (one) year 9 (nine) out of 10 (ten) cases of corruption;

<sup>3</sup> R Soesilo, *Kitab Undang-undang Hukum Pidana* (Bogor: Politeia, 1981), page 30

<sup>4</sup> Andrew Halpin, *Definition in the Criminal Law* (North America: Hart Publishing, 2004), page 55

<sup>5</sup> *Ibidem*, page 56

<sup>6</sup> Gargi Roy, *Is Capital Punishment Acceptable?*, *International Journal of Humanities and Social Science*, Vol.4 No.2, Center for Promoting Ideas, USA, Januari 2014, page 96

<sup>7</sup> *Ibidem*.

3. The criminal act of corruption according to Article 11 of Law Number 20 Year 2001, the threat of imprisonment is a minimum of 1 (one) year and maximum 5 (five) years, but the Public Prosecutor's and the Court's Decision between 1 year to 1 year 6 month, the required imprisonment and court decisions are included in the minimum (low) category, even approaching the formulation of a minimum threat of 1 (one) year;
4. Criminal acts under Article 12 of Law Number 20 Year 2001, the threat of life imprisonment or imprisonment of a maximum of 1 (one) year and a maximum of 20 (twenty) years, but the demand of the Public Prosecutor and Judgment between 1 years up to 2 years 6 months, there is only 1 (one) imprisonment imposed 4 (four) years, then the imprisonment is prosecuted and the court decision is minimum (low) category, even approaching the formulation of the threat at least 1 (one) year of 9 (nine) out of 10 (ten) cases of corruption;

**Table 2**  
**Correlation of Criminal Penalties and Replacement Money**  
**Corruption in Court Claims and Judgments**  
**Year 2012-2016**

N = 25

No	Comparison of Criminal Penalties with Replacement Money	Court Claims and Judgments				Amount
		Demands	state courts	high courts	supreme court	
1	Low	8	7	8	5	28
2	High	17	14	13	19	63
3	No Final Criminal Decision	-	4	4	1	9
	Amount	25	25	25	25	100

Data Source: Processed Cassation Decision Class of 2012-2016

Based on Table 2 data on Correlation of Criminal Penalties and Cash Replacement Money on Corruption In Court Claims and Judgments proves that the prosecution and decision of the criminal court is greater than the financial compensation of the State or the state economy. However, such results can not be used in the overall conclusion that the criminal act of fines being applied is greater than the replacement money in the case of corruption. What can be considered in the correlation of criminal fines with the replacement money is still there penidization that is not fair.

Criminal penalty that is not paid, it will be imposed the penalty of imprisonment by using a subjective measure on the judge, there is no guideline to determine the duration of imprisonment. Based on the results of random criminal corruption random sampling, taken in the corruption crime directory, shows the disparity in imprisonment of the penitentiary, as the tables below.

**Table 3**  
**Correlation of Criminal Fines and Criminal Penalties**  
**Corruption at the Public Prosecutor's Charges**  
**Year 2012-2016**

N = 25

No	Penalty of Fine (IDR/million)	Demands							Amount
		Penalty of confinement (month)							
		1	2	3	4	5	6	12	
1	50		2	6		2	1		11
2	100								
3	150								
4	200			4		1	4	1	10
5	250								
6	300					1			1
7	350						1		1
8	400								
5	500						3		3
	Jumlah	-	2	10	-	4	8	1	25

Data Source: Processed Cassation Decision Class of 2012-2016

Based on the data of Table 3 on Correlation of Criminal Penalty and Criminal Criminal Crime of Corruption at the Public Prosecutor Demonstration, there is evidence of disparity in duration of imprisonment and also proves that there is no guidance or formula for the duration of imprisonment in Prosecution:

1. The defendant shall be subject to a fine of Rp 50,000,000 (fifty million rupiahs), shall be subject to imprisonment of 2 (two) months, 3 (three) months, 5 (five) months and 6 (six) months;
2. The defendant shall be subject to a fine of Rp 200,000,000 (two hundred million rupiah), shall be subject to imprisonment of 3 (three) months, 5 (five) months, 6 (six) months and 12 (twelve) months;

3. Defendants charged with a fine of Rp 300,000,000 (three hundred million rupiahs) shall be subject to imprisonment of 5 (five) months;
4. The defendant who is sentenced to a fine of Rp 350,000,000 (three hundred and fifty million rupiah), may be sentenced to 6 (six) months imprisonment;
5. The defendant, sentenced to a fine of Rp 500,000,000 (five hundred million rupiah), shall be subject to imprisonment of 5 (five) months;

At the Prosecution level, the imposition of a fine of Rp 50,000,000 (fifty million) is no different from a fine of Rp 200,000,000 (two hundred million rupiah) to Rp 500,000,000 (five hundred million rupiah), each of which may be subject to imprisonment 2 (two) months, 3 (three) months, 5 (five) months and 6 (six) months, as well as other criminal penalties.

**Table 4**  
**Correlation of Criminal Fines and Criminal Penalties**  
**Crime of Corruption in the District Court Decision**  
**Year 2012-2016**

N = 25

No	Penalty of Fine (IDR/million)	Decision of the District Court							Amount
		Penalty of confinement (month)							
		Not Decision	1	2	3	4	5	6	
1	4				1				1
2	50		3	5	1	1	1		11
3	100								-
4	150				1				1
5	200			1	4	2		1	8
6	250				1				1
7	300								-
8	350								-
9	400								-
10	500								-
11	No Decision	2							2
	Amount	2	3	6	8	3	1	1	25

Data Source: Processed Cassation Decision Class of 2012-2016

Based on the data of Table 4 on Correlation of Criminal Penalties and Criminal Criminal Criminal Acts of Corruption The District Court Decision proves there is a disparity in duration of imprisonment and also proves no guidance or formula for the duration of imprisonment in District Court Decisions, namely:

1. A convicted person sentenced to a fine of Rp 4,000,000 (four million rupiah), shall be sentenced to 3 (three) months imprisonment;
2. A convicted person sentenced to a fine of Rp 50,000,000 (fifty million rupiahs) may be sentenced to imprisonment of 1 (one) month, 2 (two) months, 3 (three) months, 4 (four) months and 5 (five) months;
3. A convicted person sentenced to a fine of Rp 150,000,000 (one hundred and fifty million rupiah), shall be sentenced to 3 (three) months imprisonment;
4. The convicted person shall be subject to a fine of Rp 200,000,000 (two hundred million rupiah), shall be subject to imprisonment of 2 (two), 3 (three) months, 4 (four) months and 6 (six) months;
5. The convicted person who is sentenced to a fine of Rp 250,000,000 (two hundred and fifty million rupiah), is sentenced to 3 (three) months imprisonment;

At the State Court level for Corruption, the penalty of Rp 4,000,000 (four million) fine is no different from a fine of Rp 50,000,000 (fifty million rupiah), Rp 150,000,000 (one hundred and fifty million), Rp 200,000 (Two hundred million rupiahs) and Rp 250,000,000 (two hundred and fifty million) each of which may be 3 (three) months, as well as other fine penalties.

**Table 5**  
**Correlation of Criminal Fines and Criminal Penalties**  
**Corruption in the High Court Judgment**  
**Year 2012-2016**

N = 25

No	Penalty of Fine (IDR/million)	Decision of High Court						Amount
		Penalty of confinement (month)						
		1	2	3	4	5	6	
1	4			1				1
2	50	5	2	2	1			10

3	100						1	1
4	150							-
5	200			4	2		1	7
6	250			1				1
7	300							-
8	350					1		1
9	400							-
10	500							-
11	No Decision							4
	Amount	5	2	8	3	1	2	25

Data Source: Processed Cassation Decision Class of 2012-2016

Based on the data of Table 5 on Correlation of Criminal Penalties and Criminal Criminal Criminal Acts of Corruption The High Court Decision proves there is a disparity in duration of imprisonment and also proves there is no guidance or formula for the duration of imprisonment in the High Court Decision:

1. A convicted person sentenced to a fine of Rp 4,000,000 (four million rupiah), shall be sentenced to 3 (three) months imprisonment;
2. A convicted person sentenced to a fine of Rp 50,000,000 (fifty million rupiahs) may be sentenced to imprisonment of 1 (one) month, 2 (two) months, 3 (three) months, 4 (four) months;
3. A convicted person sentenced to a fine of Rp 100,000,000 (one hundred million rupiah), shall be sentenced to 6 (six) months imprisonment;
4. The convicted person who is sentenced to a fine of Rp 200,000,000 (two hundred million rupiah), may be sentenced to imprisonment of 3 (three) months, 4 (four) months and 6 (six) months;
5. The convicted person who is sentenced to a fine of Rp 250,000,000 (two hundred and fifty million rupiah), is sentenced to 3 (three) months imprisonment;
6. The convicted person who is sentenced to a fine of Rp 350,000,000 (three hundred fifty million rupiah), is sentenced to 5 (five) months imprisonment;

At the Court of Appeal level, a fine of Rp 4,000,000 (four million) fine is no different than a fine of Rp 50,000,000 (Two hundred and fifty million) each of which can be 3 (three) months, as well as other fine penalties.

**Table 6**  
**Correlation of Criminal Fines and Criminal Penalties**  
**Corruption at the Supreme Court Ruling**  
**Year 2012-2016**  
**N = 25**

No	Penalty of Fine (IDR/million)	Decision of Supreme Court								Amount
		Penalty of confinement (month)								
		No Disicion	1	2	3	4	5	6	12	
1	50		3	1	3			1		8
2	100							2		2
3	150					2				2
4	200				2	1		7		10
5	250									
6	300									
7	350									
8	500									
9	2.500.000								1	1
10	No Decision	2								2
	Amount	2	3	1	5	3		10		25

Data Source: Processed Cassation Decision Class of 2012-2016

Based on data from Table 6 on Correction of Penal Penalty and Penalty of Criminal Criminal Crime At the Supreme Court Decision proves there is a disparity in duration of imprisonment and also proves no guidance or formula of the duration of imprisonment in the Supreme Court Decision:

1. A convicted person sentenced to a fine of Rp 50,000,000 (fifty million rupiahs) may be sentenced to imprisonment of 1 (one) month, 2 (two) months, 3 (three) months and 6 (six) months;
2. A convicted person sentenced to a fine of Rp 100,000,000 (one hundred million rupiah), shall be sentenced to 6 (six) months imprisonment;
3. A convicted person who is sentenced to a fine of Rp 150,000,000 (one hundred and fifty million rupiah), may be sentenced to 4 (four) months imprisonment;
4. The convicted person shall be subject to a fine of Rp 200,000,000 (two hundred million rupiah), shall be sentenced to 3 (three) months, 4 (four) months, 6 (six) months imprisonment;

5. The convicted person who is sentenced to a fine of Rp 2,500,000,000 (two and a half billion rupiah), is sentenced to 12 (twelve) months imprisonment;

At the Supreme Court (Cassation / PK) level, a fine of Rp 50,000,000 (fifty million rupiahs) is not different from a fine of Rp 100,000,000 (one hundred million rupiah) and Rp 200,000,000 (two hundred million rupiahs) each of which can be sentenced to 6 (six) months. While a fine of Rp 2,500,000,000 (two and a half billion rupiah) is imposed with a 12 (twelve) month imprisonment, which is not comparable with a fine of Rp 200,000,000 (two hundred million) imprisoned for 6 (six) months and a criminal other fine.

Based on the correlation of criminal penalty with imprisonment on each internal of judicial institution, namely Public Prosecutor, Judge of Corruption Court, Supreme Court Judge and Supreme Court Justices of the Supreme Court above proves no guidelines or size formula determines duration of imprisonment, even a disparity of criminal confinement, especially if juxtaposed between judicial institutions. The amount of criminal penalty is determined based on minimum and maximum threat formulation in the legislation, while the duration of imprisonment is determined based on the maximum limit of the formulation of the threat of imprisonment which cannot be more than 1 (one) year 4 (four) months as Article 18 of the Law Criminal law.

### c. Construction of Criminal Theory

L.H.C.Hulsman, as quoted by Barda Nawawi Arief states that the sentencing system is a law that relates to criminal sanctions and punishment.<sup>8</sup> Criminal as a criminal punishment is a criminal political tool which can contain retaliation or oppression or sorrow, but on the other hand criminal can give benefit to society, even to restore social balance damaged by crime. Cassia Spohn quotes HLA Hart as saying that there are five necessary elements of punishment:<sup>9</sup>

- It must involve pain or other consequences normally considered unpleasant
- It must be for an offense against legal rules
- It must be of the actual or supposed offender for his or her offense
- It must be intentionally administered by human beings other than the offender
- It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

In general, there are several criminal purposes in the construction of criminal theories that develop in the knowledge of criminal law, those are:

#### 1. The criminal aims in retaliation

Retaliation is a criminal justification applied to the offender regardless of the special circumstances of the offender, but based on the evil deeds committed. Muladi and Barda Nawawi Arief with his absolute theory say, that criminal is an absolute consequence that must exist as a retaliation to the person committing the crime.<sup>10</sup>

Douglas N Husak mengatakan severity of punishment can be made proportionate to the seriousness of the crime only if degrees of seriousness can be distinguished.<sup>11</sup>

Von Hirsch mengatakan, desert theory, it is clear that most forms of retributivism have taken victims into account indirectly, and only to a limited extent. Modern desert theory, of course, stresses the importance of proportionality between the seriousness of the offence and the severity of the punishment.<sup>12</sup>

The Corrupt Practices Investigation Bureau (CPIB) Singapore states to successfully combat corruption, in addition to adapting strict and effective enforcement, we need tough punishments meted out on convicted offenders to serve as a deterrent to the "like-minded". Punishment can be severe and depends on the impact and severity of the act. In fact, many private sector cases have resulted in jail sentences comparable to those applied for public sector corruption.<sup>13</sup>

Cassia Spohn proposed the theory of criminal justification, it is: Retributive justifications (A Theory of Desert),<sup>14</sup> that, The retributivist's answer to the question "why punish?" is straightforward. We punish the man who violates the law because he has done something wrong. Justice demands that he be punished. The retributive justification of punishment focuses on what the offender "deserves" as a result of his criminal behavior.

<sup>8</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana : Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana, 2008), page 115

<sup>9</sup> Cassia Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (California: SAGE Publications, Inc, 2009), page 4

<sup>10</sup> Muladi dan Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana* (Bandung: Alumni, 1984), page 10

<sup>11</sup> Cassia Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (California: SAGE Publications, Inc, 2009), page 189

<sup>12</sup> *Ibid.*, page 105

<sup>13</sup> *The Corrupt Practices Investigation Bureau (CPIB) Singapore, Strategies for Cusiness, Government, and Civil Society to Fight Corruption in Asia and The Pasific, Proceedings of the 6<sup>th</sup> Regional Anti Corruption Conference for Asia and the Pacific*, Held in Singapore, 26-28 November 2008, page174

<sup>14</sup> Cassia Spohn, *Op.cit.*, pages 6-14

## 2. Criminal aims to provide benefits

Criminal aims to provide the benefit of the community and perpetrators, so that the community is protected and the perpetrator is regained in society by complying with the prevailing norms. The purpose of such benefits has not resolved the conflict in the community and the victims. Martin Wasik in his writing "Crime Seriousness and the Offender-Victim Relationship in Sentencing mengatakan Utilitarian theories of punishment place reliance upon the requirement of general social protection, but they rarely address the situation of individual victims. this is understandable. although utilitarian goals have their ultimate force in their claim to achieve net community benefit through punishment, their immediate purpose is either to motivate a change in the offender's"<sup>15</sup>

Muladi and Barda Nawawi Arief with their relative theories say that criminal is used to provide the protection of society, and criminal is not merely to take vengeance to the person who has committed a crime, but has certain utilitarian objectives.<sup>16</sup>

Cassia Spohn proposed the theory of criminal justification, it is:<sup>17</sup> Utilitarian justifications, In contrast to desert theory, a backward-looking approach, the utilitarian justifications for punishment: deterrence, incapacitation, and rehabilitation. Although all utilitarian justifications of punishment are based on the general principle that the purpose of punishment is to prevent or reduce crime, each there answer the question "why punish?" somewhat differently. We explore these differences in the sections that follow:

### a. Deterrence

The purpose of punishment is to prevent those who are punished from committing additional crimes in the future (specific deterrence) or to deter others from committing similar crimes (general deterrence)

### b. Incapacitation (isolation, neutralization, predictive restraint)

The purpose of punishment is to isolate high-risk offenders in order to limit their opportunities for committing crimes in the future.

### c. Rehabilitation (treatment)

The purpose of punishment is to reform the offender and thus to reduce his propensity to commit crimes in the future.

## 3. The criminal aims to restore social balance

Crime inflicts damage to norms and values or disturbs the balance of society, so to restore that balance is necessary criminal as justification. The restoration of social equilibrium as the main objective in criminal application, in contrast to the utilitarian theory (benefit) that is oriented towards the protection of society and perpetrators of crime. Muladi and Barda Nawawi Arief quoted Pellegrino Rossi (1787-1884) who considered "retribution as a principle of criminal and criminal severity should not extend beyond a just retaliation. Criminal has various influences, among others, the repair of a damaged in society and general prevention. "Furthermore Stanley E Grupp, said that" the reaction of providing sufficient suffering for criminals is a very desirable thing to maintain order, and is a collective statement of society that is natural against crime. In addition, it is very important to defend criminal law and create community unity against crime and criminals.<sup>18</sup>

Cassia Spohn quotes Leena Kurki in his book *Restorative and Community Justice in United State*, that on the other hand Restoration as justifications of punishment , the purposes of punishment is to repair the harm to the victim and the community, to heal the victim and the community, and to restore harmony between victims and offenders.<sup>19</sup>

## 4. Criminal aims to realize justice

In criminal theory that developed at this time, has not been found, that the criminal purpose is to realize justice in abstracto in the formulation of criminal threats and in concreto in the decision of criminal punishment (punishment). In the context of criminal corruption in Indonesia, the formulation of threats and the application of capital punishment to perpetrators of crimes, is it fair? and so does the formulation of threats and the application of fines which exceed the value of the state financial loss, is it fair? Is there a fair trial, Cassia Spohn's opinion of how much criminal sanction imposed on a criminal, "How much punishment is justified?" Each theoretical perspective discussed thus far would answer this question differently.<sup>20</sup>

### a. Retribution

The amount of punishment imposed on the offender should equal the amount of harm done by the offender. The punishment should be proportionate to the seriousness of the crime and the culpability of the offender

### b. Deterrence

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<sup>15</sup> Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory* (New York: Clarendon Press-Oxford, 1998), page 104

<sup>16</sup> Muladi dan Barda Nawawi Arief, *Op.Cit.*, page 50

<sup>17</sup> Cassia Spohn, *Op.Cit.*, pages 6-14

<sup>18</sup> Muladi dan Barda Nawawi Arief, *Op.Cit.*, page 50

<sup>19</sup> Cassia Spohn, *Op.Cit.*, page 7

<sup>20</sup> *Ibidem*, page 17-18



The punishment should be sufficient to outweigh the benefits of the crime. The amount of punishment should be enough (and no more) to dissuade the offender from reoffending and to discourage potential criminals.

c. Incapacitation

The amount of punishment should be proportionate to the risk posed by the offender. Dangerous, high risk offenders should be punished more severely than nonviolent, low-risk offenders.

d. Rehabilitation

If rehabilitation is the justification for punishment, the nature and duration of punishment will depend on what is needed to reform the offender. In other words, the offender's punishment will be an individualized treatment program designed to change the forces that caused his or her criminality. The offender will be punished (treated) until "cured".

The above-mentioned Cassia Sphon's opinion is still abstract, and has not reflected a fair trial. Simply put, Cassia Sphon explains, that in the criminal retribution aspect in accordance with crime, the criminal deterrence aspect is heavier to prevent the perpetrator not to repeat again, from the aspect of criminal incapacitation in proportion to the risks posed, and aspects of criminal rehabilitation in the form of program actions to change the evil behavior of the offender.

John Rawls says the main idea of the theory of justice is justice as fairness, namely (1) the principles of giving basic rights and obligations and determining the sharing of social benefits, (2) the position of equality of origin with respect to natural conditions in traditional social contract theory, (3) the first principle of a conception of justice that regulates further criticism and institutional reform, then after choosing the conception of justice, they choose the constitution and law enforcement law, all of which are in accordance with the agreed principle of justice, (4) view the various parties in the initial situation as rational and equally neutral, determines which principles of justice will be chosen in the original position.<sup>21</sup> Based on John Rawl's opinion it can be taken the key words, that rights and obligations, equality, agreement, rational and neutral is a component of justice. However, the ideology of a nation also has an influence in formulating justice *in abstracto* in a legislation.

Pancasila as the ideology of the Indonesian nation, which explicitly in Article 2 of Law Number 12 Year 2011 on the Establishment of Laws and Regulations is declared as the source of all sources of law. Therefore, the theory of criminal retaliation and expediency used in Indonesian criminal legislation must be harmonized or reconstructed on the basis of Pancasila.

**d. Construction of Criminal Theory: Pancasila Paradigm**

In Black's Law Dictionary (1999) reconstruction is the act or process of rebuilding, re-creating, or reorganizing something. Reconstruction means building, organizing or redesigning. The reconstruction of crime is related to the problem of "law reform" and "law development" in the development of criminal law.<sup>22</sup> The renewal is part of the social reconstruction of the field of law in social dynamics, which empirically factors outside the law become a significant influence on the purpose of reconstruction of punishment, namely the realization of justice *in abstracto* and *in concreto*.

This paradigm of reconstruction of the criminal theory uses the paradigm of *Pancasila*, which focuses on the substantive aspects of law, namely the formulation of criminal threats in corruption laws, which are examined and formulated using the values of *Pancasila*, in order to create a just criminal threat formula *in abstracto* and *in concreto*. The *Pancasila* paradigm is expected to be the main alternative paradigm, which has the cultural characteristics of the Indonesian nation. Sudjito in his writing "Building a National Legal System Based on Pancasila Ideology" states:

Law and state law, should be designed in such a way in accordance with the cosmology of their respective nation. Of course, *rechtstaat*, good and in keeping with European cosmology, however, is hard to accept, enforce or enforce in Indonesia. Vice versa. Accordingly, the Indonesian state of law is not likely to be designed to follow *rechtstaat*, but it needs to be designed as a typical Indonesian legal state, called the Pancasila Law State.<sup>23</sup>

Then Sudjito in his article entitled "Law as a *Pancasila* Cultural Facility," states:

Whereas in the context of a state of law, if the Indonesian people want *Pancasila* to be a realiteit, that of becoming a nation, an independent nationaliteit, wishing to live as a free, humane world member, to live on the basis of deliberation, to live a perfect life with *sociale rechtvaardigheid*, wishing to live prosperously and safely, with a wide and perfect Godhead, the struggle for *Pancasila* culture must be done seriously, systematically, massively and continuously, among others by using the law as the ingredients.<sup>24</sup>

<sup>21</sup> John Rawls, *A Theory of Justice, Teori Keadilan*, translated by Uzair Fauzan, Heru Prasetyo (Yogyakarta: Pustaka Pelajar, 2006), page 12-16

<sup>22</sup> Barda Nawawi Arief, *RUU KUHP Baru Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia* (Semarang: Badan Penerbit Universitas Diponegoro, 2009), page 1

<sup>23</sup> Pusat Studi Pancasila UGM dan Universitas Pattimura Ambon, *Penguatan, Sinkronisasi, harmonisasi, Integrasi Pelembagaan dan Pembudayaan Pancasila dalam Rangka Memperkokoh kedaulatan Bangsa*, Prosiding Kongres Pancasila VI (Yogyakarta: PSP UGM, 2014), page 37

<sup>24</sup> PSP UGM, *Strategi Pembudayaan Nilai-Nilai Pancasila Dalam Menguatkan Semangat Ke-Indonesiaan*, Prosiding Kongres Pancasila V (Yogyakarta: PSP Press, 2013), page 113-114

Values in the *Pancasila* principles that today are the guidance of the life of society, nation and state include the values of divinity, humanity, unity, democracy and social justice with the ultimate goal of achieving justice. The opinion of A Hamid S Attamimi, as quoted by Satya Arinanto in his article "State of Law In *Pancasila* Perspective" states:

Whereas by stipulating *Pancasila* as the ideals of law and also the fundamental norm of the state, the Indonesian legal system, whether in its formation, implementation, or enforcement, cannot escape *Pancasila* values as constitutive and regulative legal ideals; and from the provisions of *Pancasila* as the highest norm that determines the legitimacy of a legal norm in the Legal System of the Republic of Indonesia.<sup>25</sup>

The values of *Pancasila* as the legal ideals in the formation of the law are covered in the following principles:

### 1. The Principle of Godhead

Implementation of state governance, execution of government, judiciary, divine base and its implementation.<sup>26</sup> Sudjito in his writings "Building a National Legal System Based on *Pancasila* Ideology" states, the principle of law based on the ideology of *Pancasila*, namely the relationship of the Indonesian state with God is eternal. As long as there is a direct relationship between citizens, state organizers, lands/territories, indigenous peoples, countries/ international institutions with God.<sup>27</sup>

Justice is a basic human value, because human beings are born in a just state, even human beings in their lives should be fair in attitude and behavior, including in formulating criminal threats, as revealed in the holy book of the Qur'an:

- a. Surah Annisa verse 58  
Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things.
- b. Surah Al Maidah verse 8  
Allah has promised to those who believe and work righteousness, that for them is forgiveness and a mighty reward.
- c. Surah An Nahl verse 90  
Indeed Allah decrees the commands of justice and kindness, and of giving to relatives, and forbids from the shameful and evil and rebellion; He advises you so that you may pay heed.
- d. Surah Ar Rahman verse 7-9  
And the heaven He raised and imposed the balance. That you not transgress within the balance. And establish weight in justice and do not make deficient the balance.

In casu, is capital punishment is it fair to apply to the perpetrators of corruption who commit crimes against property in the form of state financial losses, and whether fair criminal penalties are formulated and applied beyond the financial losses of the state? Of course, based on the above Godhead principle, capital punishment and criminal penalty is unfair and violates the values of the divine. The Divine Principle embodies justice equal to God's creatures without exception, so the criminal theory of "retributive" and "utilitarian" theory is different from the principle of "Deity".

### 2. The principle of humanity

Sudjito in his writings "Building a National Legal System Based on *Pancasila* Ideology" states, that the relationship of the Indonesian nation with other creatures is subjective. Its meaning is that naturally every citizen is involved in competition, but the social value as the oldest value is placed in a position of honor and higher than the value of the individual, within the framework of communal-religious relations, with respect for the value of personal freedom.<sup>28</sup>

Human beings as God's creatures, their dignity and dignity in the life of society, nation and state shall be respected, as Article 5 of the Declaration of Human Rights states that "no one shall be mistreated or treated cruelly, with no remembrance of humanity or humiliating treatment or punishment."

In casu corruption, the formulation of the threat of capital punishment and criminal penalties exceeding the financial losses of the state, there is even an attempt to impoverish the corruptors in opposition to the principle of humanity.

### 3. The principle of unity

The law serves the interests of a single and sovereign Indonesia that protects the entire bloodshed of Indonesia. Indonesia from Sabang to Merauke, each of which has different customs and cultures. The law must protect all the diverse Indonesian people as a whole.<sup>29</sup> Sudjito in his writings "Building a National Legal System Based on *Pancasila* Ideology" states that the

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<sup>25</sup> UGM dan Mahkamah Konstitusi, Kongres Pancasila, Pancasila Dalam berbagai Perspektif, proceeding (Yogyakarta: Sekretariat Jendral dan Kepaniteraan MK, 2009), page 211

<sup>26</sup> *Ibidem*, page 224

<sup>27</sup> Pusat Studi Pancasila UGM dan Universitas Pattimura Ambon, *Op.Cit.*, page 35

<sup>28</sup> *Ibidem*, page 35-36

<sup>29</sup> UGM dan Mahkamah Konstitusi, *Op.Cit.*, page 226

Indonesian nation has vowed to remain united in the unity of NKRI, therefore nationalism should not be sacrificed for the sake of and in international relations.<sup>30</sup>

Article 7 of the Declaration of Human Rights states "all persons are equal before the law and without any discrimination shall be entitled to equal protection of the law. Everyone is entitled to the same protection from any other discrimination violating this declaration and from any incitement to such discrimination."

#### 4. The principle of democracy

The discussion of the law between the government and the People's Legislative Assembly formulated as a joint discussion and mutual agreement between the DPR and the President is an implementation of the principle of deliberation in Indonesian constitutional law.<sup>31</sup> Sudjito in his writings "Building a National Legal System Based on *Pancasila* Ideology" states that the people have the highest authority in determining national law which is considered the best for their nation, meaning that the people are the subject of law and should never be objected. Every human being as a citizen is engaged in the making, execution and enforcement of the law, and is respected for its human rights, as a person, a social being, an environmental being, a calf and a caliphate.<sup>32</sup>

In court "everyone is entitled in equality to be fully heard in public and in a fair manner by an independent and impartial tribunal, in the determination of his rights and duties and in any criminal prosecution against him", as defined in Article 10 of the Declaration of Human Rights.

#### 5. Principle of Social Justice

Public interests and social interests to some extent can be a limitation on the dignity of man in the elements of the Western legal state.<sup>33</sup> Sudjito in his article "Building a National Legal System Based on *Pancasila* Ideology" states that social justice includes the understanding that every Indonesian citizen has the right and opportunity of proportionality to participate, receive treatment and get a share of the benefits in the life of the state and society based on the pleasure and power Allah SWT.<sup>34</sup>

Article 11 Paragraph (1) of the Declaration of Human Rights states that "everyone charged with a criminal offense is presumed innocent until proved guilty under the law in an open trial and in such proceedings shall be given all necessary guarantees for his defense. "Subsequently Article 11 Paragraph (2) of the Declaration of Human Rights states that" no one shall be liable to a criminal offense for an act or omission which is not a criminal offense under national or international law when such conduct is committed. Nor is it permissible to impose more severe punishment than the punishment that should have been imposed when a criminal offense was committed. "

In the context of criminal theory, the penal theory of "retaliation" (retributive theory), the criminal theory of "benefit" (utilitarian theory) and the "social balance" criminal theory (the Combined theory) are different from the "*Pancasila*" criminal theory which bases on divine principles , humanity, unity, democracy and social justice toward justice. Franz Magnis Suseno said that the principle of justice expresses the obligation to give equal treatment to all others who are in the same situation and to respect the rights of all parties concerned.<sup>35</sup> Criminal justice as part of substantive law of course formulation of criminal threat in corruption crime law base on *Pancasila* values which is reflected in 5 (five) principle of *Pancasila* above, as principle of development of national criminal law which is cultured Indonesia.

Justice becomes a criminal goal, which contains the value of divinity, humanity, equality, democracy and social welfare. In bringing about such justice, in addition to referring to the values of *Pancasila*, also based on the method of criminal counting, namely by using the concept of "matemathic sentence", which is a criminal counting in concreto by basing on reasoning / logic, with indicators state financial loss value, bank interest at that time, period of enjoying state money, provincial minimum wage is highest, as the formula:

imprisonment = state financial loss value : provincial minimum wage is highest  
penalty fine = value of state financial loss x bank interest at that time x period of enjoying state money  
imprisonment of substitute for unpaid state losses:  
= value of state financial loss : provincial minimum wage is highest  
criminal penalty substitute penalty is not payable:  
= penalty of fine : provincial minimum wage is highest

In the theory of goodness conveyed by Agus Wahyudi in his writings "Building the *Pancasila* State with the Theory of Goodness and the Theory of Truth" states that the theory of goodness is a theory of public morals or morals in which contains a collection

<sup>30</sup> Pusat Studi Pancasila UGM dan Universitas Pattimura Ambon, *Op.Cit.*, page 36

<sup>31</sup> UGM dan Mahkamah Konstitusi, *Op.Cit.*, page 225

<sup>32</sup> Pusat Studi Pancasila UGM dan Universitas Pattimura Ambon, *Op.Cit.*, page 36

<sup>33</sup> UGM dan Mahkamah Konstitusi, *Op.Cit.*, page 225

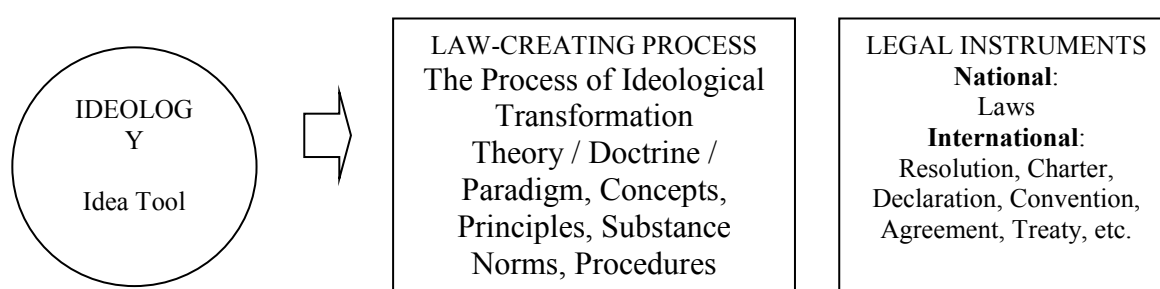
<sup>34</sup> Pusat Studi Pancasila UGM dan Universitas Pattimura Ambon, *Op.Cit.*, page 36

<sup>35</sup> Franz Magnis Suseno, *Etika Dasar, Masalah-masalah Pokok Filsafat Moral* (Yogyakarta: Kanisius, 1989), page 138

of teachings about "properties or properties", especially teaching the traits or traits (like what) universally make things better than others.<sup>36</sup> The most basic virtues of *Pancasila* contain at least three meanings: first, there are equality and equal freedom criteria. This means that the culprit realizes that he is a member of a free and equal citizen, and considers others as free and equal. Secondly, there is a criterion of respect, meaning it makes sense in cooperation and not because of pressure from anyone, but based on freedom and equality. Thirdly, there is a common good criterion, meaning that the subject matter discussed in the proposed cooperation is about common good or fundamental political justice, which concerns two things, namely the constitutional essentials and the issue of basic justice.<sup>37</sup> Further explained by Agus Wahyudi, that the theory of truth is a theory that teaches about what causes a right choice and what causes other choices wrong.<sup>38</sup>

The paradigm of *Pancasila*, as the main alternative paradigm in the construction of good and correct criminal theory, is a paradigm based on living values in the life of society, nation and state, be it divinity, humanity, unity, democracy and justice. The values of *Pancasila* must be the principles of Indonesian law, because they contain the value of goodness and truth. Ketut Rinjin states that the position of *Pancasila* as the fundamental principle of the fundamental state has implications as the source of all sources of law, attached to the survival of the state of the Proclamation of 17 August 1945, and is imperative.<sup>39</sup> As also formulated in Article 2 of Law Number 12 Year 2011 on the Establishment of Laws and Regulations, thus the justice that must be realized is *Pancasilais* justice.

The correlation and position of *Pancasila* as Ideology, the process of law and law formation can be described as follows.<sup>40</sup>



The construction illustrates (1) the position of ideology as the source of ideas, the basic selection of theory / doctrine / paradigm, the source of the concept, the substance of the principle, the idea device in ideology is input. (2) the position of law-creating process as the place for the process of ideological transformation. In the process, ideology as a tool of ideas is transformed into concepts, principles, substance norms, and procedure formats. (3) the position of legal instruments as a result of the ideological transformation process.

The *Pancasila* paradigm of criminal theory differs fundamentally from retributive, utilitarian and combined paradigms. Characteristics of *Pancasila* gives perfection of justice as the ultimate goal, that is justice for the perpetrator, victim and society and state, so that punishment will give birth to the balance of value in society. Although realized, the formation and implementation of crime in the current legislation does not reflect the characteristics of *Pancasila*. In this regard, it is appropriate that the development of national law is oriented towards the reconstruction of existing legislation and the construction of new legislation, especially in casu in relation to criminal and criminal prosecution.

Criminal reconstruction of corruption laws based on *Pancasila*, including:

- a. God's values, humanity, unity, democracy and justice in *Pancasila* become legal principles in giving consideration in formulating and or executing criminal corruption;
- b. the principal punishment is a criminal act applied independently or singly to an act. Criminal penalty in the legislation of corruption is the principal penalty, in the application of criminal penalty is always based on the guilty of perpetrators who are prisoners imprisonment, which means criminal fines follow imprisonment. Thus a fine should not be a principal penalty. If a fine is applied to a corporate agent, then it is driven by a corporate boarder who was found guilty beforehand and sentenced to imprisonment. The reconstruction of criminal stalls is necessary by placing criminal penalties in additional criminal cases. So that in corruption can only be applied 1 (one) principal criminal;
- c. The death penalty is a criminal act contrary to the divine value in *Pancasila*, and contrary to human rights, because human beings have the right to life and death is the absolute affair of God Almighty. Corruption is a crime directly related to property, and no matter how much property is corrupted does not directly affect the death of a person or group of people. In

<sup>36</sup> UGM dan Mahkamah Konstitusi, *Op.Cit*, page 107-108

<sup>37</sup> *Ibidem*, page 119-120

<sup>38</sup> *Ibidem*, page 114

<sup>39</sup> Agus Saras Sri Widodo dkk.Ed. *Konsistensi Nilai-nilai Pancasila Dalam UUD 1945 dan Iplementasinya* (Yogyakarta: PSP Press, 2010), page 73

<sup>40</sup> *Ibid.*, page 276-277

connection therewith, the application of capital punishment in corruption legislation is contrary to Pancasila and human rights;

- d. the necessity of formulating a criminal guideline, as the general limits of punishment, while specific limits through criminal counting methods;
- e. the application of criminal corruption is based on the subjectivity of law enforcers in minimum and maximal criminal signs, resulting in criminal disparity and criminal injustice. In order to eliminate criminal disparity and criminal injustice, and in order to realize Pancasila's criminal justice, a criminal counting method of "mathematic sentence," is a calculation method based on logical reasoning or logic. The method of "mathematic sentence" will abolish the value of law enforcement subjectivity in determining the criminal, and will manifest a humanitarian, equal, democratic crime with a definite and just punishment measure;

## Conclusion

In the current development of punishment still using retributive, utilitarian or combined paradigm, which has not been able to produce justice, the paradigm is still oriented to the perpetrator and society, and not yet reflect justice. In abstracto and in concreto criminal still contain retaliation. God's values, humanity, unity, democracy (musyawarah) and social justice have not been reflected in criminal formation and implementation.

The paradigm of Pancasila, as an alternative paradigm in the development of criminal theory, and most importantly in the development of Indonesian national law, sees the crime should be based on the value of divinity, humanity, unity, democracy and social justice in achieving a just criminal goal, because the paradigm of Pancasila as a tool of construction in building on just ideas, principles, principles, concepts and criminal theories. It is fitting that Pancasila values should be used as legal principles in the development of national criminal law and law enforcement.

In relation there to, the criminal reconstruction is based on the values of Pancasila in Law Number 31 Year 1999 in conjunction with Law Number 20 Year 2001 regarding Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption. it is necessary to do so both in in abstracto and in concreto, namely the need to make Pancasila values as a legal principle in criminal and criminal punishment, change of criminal stelsel by abolishing capital punishment and placing criminal penalty as additional criminal, the need for punishment guidance as general limitation of punishment, and the need for a special criminal act of criminal penalization "mathematic sentence" The paradigm of Pancasila, as an alternative paradigm in the development of criminal theory, and most importantly in the development of Indonesian national law, to see criminal and punishment should be based on the value of divinity, humanity, unity, democracy and social justice in achieving a just criminal goal, because the paradigm of Pancasila as a tool constructs in building the ideas, principles, principles, concepts and theoretical criminal theory. The value of Pancasila should be made as legal principles in the development of national criminal law and law enforcement.

In this regard, it is appropriate to consider criminal reconstruction in Law Number 31 Year 1999 in conjunction with Law Number 20 Year 2001 regarding Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption, based on the principles of Pancasila law.

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