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Best practice in aggravating and mitigating factors: Assessment of court decisions on corruption

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Abstract: Many court decisions on corruption have contained aggravating and mitigating factors that have left the public wondering. This research aims to find out the standard of best practice in aggravating and mitigating factors on corruption cases and measure the fulfillment of those standards in various court decisions. This normative research utilises the statute, case, and conceptual approaches as well as the qualitative analysis method. The research concluded that, (1) circumstances outside the elements of the crime, (2) circumstances that reflect the seriousness or dangerousness of the crime and the defendant, (3) the motive to commit such crime including internal or external reasons (Correspondence Inference Theory), (4) circumstances related to or surrounding the offence, and (5) circumstances related to the personal condition or reputation of the defendant in the community are the standards of best practice in aggravating and mitigating factors; and, that none of the court decisions examined in this research have cumulatively fulfilled those standards.
Keywords: Aggravating and Mitigating Factors; Sense of Justice; Society; Corruption; State Organizers

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Introduction

The Indonesia Corruption Watch (hereinafter "**ICW**") recorded that throughout 2018, the main actors of corruption were state representatives, amounting to 375 people. This phenomenon continued during the first semester of 2020, with the highest number of those committing the act of corruption being state representatives, amounting to 114 people or 30.7% (Alamsyah, 2020). In the first semester of 2021, primary actors of corruption continued to be state representatives, amounting to 162 people (Annur, 2021). Although the seriousness of crimes of corruption is evident, as cited by Media Indonesia, ICW stated that the majority of punishments for corruption tended to be too light. When reading the data from throughout 2020, the average punishment imposed was only 3 years and 1 month (Mustain, 2022). Corruption is still a serious matter in Indonesia, especially when corruptors continue to be punished lightly.

It is undeniable that one of the factors causing corruptors to receive light punishments is due to aggravating and mitigating factors. Article 5(1) of Law Number 48/2009 regarding Judicial Power (hereinafter "**Law 48/2009**") obliges judges to explore, adhere to, and comprehend the legal values and the sense of justice that lives in society. Despite this, many corruption cases are accompanied by unique aggravating and mitigating factors that cause the public to question how judges could have come to such a consideration – (especially with regards to mitigating factors). This raises two problems being examined in this research: (1) What are the standards when determining the best practice in aggravating and mitigating factors on cases of corruption? And (2) have the aggravating and mitigating factors within these decisions fulfilled those standards?

Methods

This research falls under the type of normative research that utilises the method of literature research to obtain data from existing laws and regulations, court decisions, treaties, and other legal documents, as well as doctrines (Fuady, 2018). This means that the type of data utilised in this research stems from secondary data consisting of primary, secondary, and tertiary sources of

law, which respectively refer to national and international legal instruments, academic writings and reports, and dictionaries. This research does not limit the scope of decisions to a particular level of trials and thus depends on the proceeding of each case. The research does, however, limit the scope of corruption cases to those that occurred in Indonesia, particularly ones committed by high-ranking officials. The court decisions to be analysed in this research are taken from the cases of Angelina Sondakh, Anas Urbaningrum, Pinangki Malasari, Nurhadi, Edhy Prabowo, and Juliari Batubara. The decisions were selected based on the similar characteristics of these cases, namely the actors, the patterns, and the controversy of the case – (triggering the sense of justice in society) – as well as the timeframe in which these cases occurred, namely within the last 10 years. In total, there are 15 court decisions analysed in this research, stemming from six different corruption cases.

The qualitative analysis method will be applied in this research thus focusing on the relationship between theories and practices of the issue or problem being discussed in the research (Soekanto & Mamudji, 2009). Several approaches will be utilised in this research to help identify answers relevant to the issue being discussed (Marzuki, 2007). These approaches are the statute approach, the case approach, and the conceptual approach. The first approach studies existing laws and regulations relating to the legal issue (Marzuki, 2007) which in this case pertains to aggravating and mitigating factors, court decisions, and corruption. The second approach studies the implementation of legal norms within the legal practice that is identified through the analysis of legal reasonings within the facts of the case in question (Diantha, 2016). The final approach examines doctrines, theories, perspectives, and other forms of legal experts' opinion (Marzuki, 2007) related to the determination of aggravating and mitigating factors, such as the Correspondence Inference Theory by Jones and Davis, as well as views of legal scholars with regards to the supposedly correct usage of circumstances as aggravating and mitigating factors.

Results and Discussion

Understanding the Crimes of Corruption

Corruption derives from the Latin word "*corruptio*", which means depravity or damage and is often used to refer to foul condition or conduct (Silalahi, 2018). It can also be defined as a change of actions, morals, or manners from good to bad (Ka'bah, 2007). Corruption, according to Syed Hussein Alatas, (as quoted by Syamsul Anwar in his journal), essentially means stealing through deception in a situation where trust is betrayed (Anwar, 2008). Klitgaard (2000) views corruption as these three conducts: first, collecting money for an ought service, second, using power to fulfil an illegitimate purpose, and third, neglecting or forgetting a supposed duty (Anwar, 2008). However, the definition adhered to by the World Bank is more classic and comprehensively elaborated as it defines corruption as "the abuse of public office for private gain".

In the international legal framework, the United Nations established a convention to combat crimes of corruption. It is known as the United Nations Convention Against Corruption which entered into force effectively on the 14th of December 2005 with 140 signatories. The convention recognises 11 types of criminalisation written from Article 15 until Article 25. These are: bribery (subjected to national public officials and foreign public officials as well as officials of public international organisations), embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, bribery in private sectors, embezzlement of property in the private sector, laundering of proceeds of crime, concealment, and obstruction of justice.

In Indonesia, crimes of corruption are divided into 30 types, categorised into the following classifications: (1) Financial State Loss, (2) Bribery, (3) Embezzlement by virtue of Office Position/Function, (4) Extortion, (5) Fraudulence, (6) Conflict of Interest in Procurement, and (7) Gratification (Ardisasmita, 2006). Other than those, Law Number 31/1999 regarding the Eradication on the Crimes of Corruption as amended by Law Number 20/2001 regarding the Amendment to Law Number 31/1999 regarding the Eradication on the Crimes of Corruption, recognises obstruction of justice relating to criminalising perpetrators that commit a violation in the investigation and prosecution process (Arief, 2018).

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The Standards on Determining Best Practice in Aggravating and Mitigating Factors

Previous studies have tended to focus on discussions surrounding the identification of aggravating and mitigating factors and the impacts of such factors. This article, however, tries to fill the gap in knowledge by identifying the standards of determining what constitutes aggravating and mitigating factors and further analysing the application of these standards within the court decisions on corruption, thus drawing a correlation between theories and practice.

According to the Cambridge Dictionary, "aggravate" means to make a bad situation worse. "Aggravating" in the context of law means making a crime worse. Whereas the word "mitigate" is defined by the Cambridge Dictionary as to make something less harmful, unpleasant, or bad; "mitigating" in the context of law is to cause a crime to be judged less seriously or to make the punishment less severe (Cambridge University Press, 2021). Based on the processes within the criminal justice system, aggravating and mitigating factors can be divided into three types: primary, secondary, and tertiary. The focus of this article will be on the secondary aggravating and mitigating factors, which refer to additional considerations manifested through non-juridical reasonings which are not taken from the written law (Suarda, 2011).

Aggravating and mitigating considerations must be included in a decision as obligated by Article 197(1) letter f of the Criminal Procedural Code. Article 8(2) of Law 48/2009 also obliges judges to consider the good and bad behaviour of the defendant when determining the severity of the criminal punishment. The purpose of this is to achieve fairness for the defendant so that there is a balance of punishment imposition. Given the fact that if it is possible to impose heavier punishment by the basis of consideration towards bad acts, then it should also be possible to impose lighter punishment on the basis of considering good acts.

With regards to court decisions, aggravating and mitigating factors correlate with each other. Suarda explains that they come in 'one package' during the formulation of a decision (Suarda, 2011). Mitigating factors can cause a defendant to be punished more lightly than the criminal charges contained in the articles that are being accused of them (Suarda, 2011). This means, inversely, aggravating factors may cause a defendant to be punished heavier. Hence, aggravating and mitigating factors are a form of moral accountability for judges when determining criminal punishments in order to reflect a sense of justice not only for the perpetrator but also the society (Suarda, 2011).

Artidjo Alkostar explains that when determining aggravating and mitigating circumstances, the judges must consider aspects that are related to the defendant's conduct with regard to the crime being committed (Kick Andy, 2014). This idea can be correlated with the Correspondence Inference Theory by Jones and Davis as cited by Jonaedi Efendi in his book. This theory stipulates that a defendant committing an offence due to internal reasons will be punished more severely than one committing an offence due to external reasons. Therefore, the theory justifies the analysis of external factors which caused the defendant to commit the crime as mitigating circumstances and justifies the analysis of internal factors which caused the defendant to commit the crime as aggravating circumstances (Efendi, 2018).

Additionally, legal scholars like Yahya Harahap and Jonaedi Efendi argue that when determining such factors, the real-life circumstances of the defendant should be considered. Yahya Harahap opined courthouses should be required to start a comprehensive method of data collection regarding the defendant's background and day-to-day behaviour amidst the society the defendant lives within. This data will then be further analysed to find any correlations between those conditions, the legal facts, and the evidence obtained through the trial examinations (Harahap, 2013). Jonaedi Efendi states that the personal conditions of the defendant must be taken into account by judges and such information may be obtained from testimonies of people within the community, psychiatrists, and any others who have knowledge of the defendant. This is in order to produce punishments that are proportionate and fair (Efendi, 2018).

Based on the explanations above, it is apparent that such determining factors can be classified into the following characteristics: (1) the type of circumstances that refer to anything influencing the criminal offence or influenced by the criminal offense potentially in the form of a motive of the crime, occurrences during the crime, or the impact caused by the crime, (2) the formulations

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of such factors are found outside the elements of the crime, however, still correlate with the crime itself, (3) considerations of the degree of seriousness of the criminal offence or the dangerousness of the defendant that will affect the severity of the punishment imposed (Hananta, 2018). This means that when determining the aggravating and mitigating factors, the characteristics and theories explained previously could serve as standards as to whether the circumstances incorporated in a decision are indeed reflective of the best practice of aggravating and mitigating factors.

The Fulfillment of Best Practice in Aggravating and Mitigating Factors on Various Court Decisions

In Angelina Sondakh's case, both the aggravating and mitigating factors from all four decisions (the first-degree court decision, the appellate decision, the cassation decision, and the judicial review) are seen to consider situations outside the elements of the crime. Also, the aggravating factors reflect the seriousness and dangerousness of the crime and the defendant, seen in the fact that the judges considered her act might trigger another budget arrangement within the House of Representatives, as well as the fact that the judges considered her capacity as a member of Commission X and Budgeting Board of the House of Representatives. The utilisation of the Correspondence Inference Theory is also reflected through the fact that the judges considered her an active perpetrator within the crime. This justifies the severe punishment she received because active perpetration shows that there was an internal motive to commit such a crime.

Remaining with Angelina's case, it can be seen several times that the judges used sociological aspects within the mitigating factors, namely her age (which was still relatively young), family responsibility of being a single parent, and her accomplishments in representing Indonesia and being an ambassador relating to several social fields. Another mitigating factor included the dangerousness of the defendant. The fact that she was never convicted before implied a low degree of dangerousness, which helped in mitigating her crime. The judges also considered the fact that she did not receive as much money as calculated, meaning that they considered circumstances surrounding the offence. There were neither aggravating nor mitigating circumstances related to her background or personal condition in the community (day-to-day behaviour) meaning that this standard was not fulfilled in the decisions.

A similar pattern of considerations is also apparent in Anas Urbaningrum's case, in which both the aggravating and mitigating factors were formulated outside the elements of the crime. The factors were also reflecting the degree of seriousness or dangerousness of the crime and the defendant. This is seen through the fact that the judges considered his position as a member of the House of Representatives, as well as taking into account that he had never been convicted before. One of the mitigating factors also derived from a sociological aspect (which considers the good acts of the defendant), namely that he was the recipient of *Bintang Jasa Utama*, an award given by the President for someone who has done meritorious conduct on a particular field that is useful for the state. There were no further considerations as to whether there was an active perpetration, resulting in no considerations of whether this crime was committed due to internal or external factors. This means that the Correspondence Inference Theory was not utilised. Nevertheless, the judges considered the circumstances surrounding the offence by taking into account the role of Anas as a non-implementor of the projects, making this one of his mitigating factors.

In the case of Pinangki Malasari, it is apparent that both the aggravating and mitigating factors of her case were taken from outside the elements of the crime itself. The aggravating factors were relevant to the commission of the offence because the judges considered circumstances that occurred adjacent to the crime. This is seen through factors such as Pinangki helping a convict evade his execution, her being used to 'handle' cases related to the Supreme Court and the Attorney General (evident in Decision Number 38/Pid.Sus-TPK/2020/PN Jkt.Pst through one of her conversations with Anita Kolopaking about the Clemency arrangement of Annas Maamun, the former Governor of Riau), her refusing to disclose the identity of 'King Maker' and her enjoyment of the results of the crime. However, the judges did not consider circumstances related to her internal or external motive, meaning the theory of Correspondence Inference was once again left out by the judges.

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It is apparent that there were several sociological aspects within mitigating factors of this case, such as family responsibility, the hope of fixing her attitude because she sincerely accepted her dismissal from the Indonesian Attorney General, and her gender. What is unique in Pinangki's mitigating factors was the consideration of the *dominus litis* principle and her as a woman. These two factors, although obtained from outside the elements of the crime, are neither relevant to the crime itself nor do they reflect an internal motive or external motive for committing such an offense. The definition of *dominus litis* is "Lord of the lawsuit" (Fellmeth & Horwitz, 2021) which in the context of criminal law, translates to the Lord of prosecution. This means in the criminal justice system, *dominus litis* serves as a principle that empowers prosecutors to be the sole owner of the right to prosecute, which is an absolute monopoly in nature (Manthovani, 2019). In Pinangki's case, this principle relates to the decision in which judges are deciding beyond what is demanded in the *requisitoir*, meaning that in the context of punishment, the judges are considering imposing a more severe punishment than what was demanded by the prosecutor. Such a thing is still debatable in the criminal justice system, however, as opined by M. Asri Irwan (one of the Prosecutors on duty at KPK), judges are allowed to decide beyond what is demanded so long as it is in conformity with the laws and regulations and, most importantly, so long as it is in the public's interest or for the sense of justice in society (Irwan, 2020). It thus affirms that although in the case of Pinangki the prosecutor only demanded four years imprisonment, it was legitimate for the judges to impose a sentence more severe than that; just like what the first-degree court did in their initial sentence of 10 years imprisonment. However, the High Court is of the perception that *dominus litis* is playing its role in the prosecution. Consequently, the demand of the prosecutor for four years imprisonment is seen as appropriate and represents the sense of justice in society.

A consideration based on gender is, to some extent, not in conformity with the spirit of gender equality, let alone equality before the law. Although restorative justice is not applicable for crimes of corruption (because, referring to the Appendix of Decision Letter of the Directorate General of Courts of General Jurisdiction Number 1691/DJU/SK/PS.00/12/2020 regarding Guidelines on the Implementation of Restorative Justice in the Courts of General Jurisdiction, corruption is nowhere to be found) it is nonetheless justifiable to apply restorative justice toward a woman in conflict with the law. This is in accordance with Supreme Court Regulation Number 3/2017 regarding Guidelines for Adjudicating Cases of Women in Conflict of Law (hereinafter "**PERMA 3/2017**"). However, the implementation of restorative justice, especially that pertaining to corruption cases, generally does not use gender-based mitigating factors. Article 6 letter c of PERMA 3/2017 also obliges judges to explore legal values, local wisdom, and a sense of justice in society to ensure gender equality, equal protection, and non-discrimination. A consideration that is gender-based will not reflect nor achieve what has been mandated by the aforementioned article because neither gender equality nor the sense of justice in society is established. One example of implementing restorative justice in corruption cases is sentencing the defendant to replace the misappropriated money as the main punishment. When perpetrators are unable to pay, the punishment can be replaced with work accordingly to their expertise (Sitepu & Piadi, 2019), instead of imprisonment. This is similar to what is already implemented in the Indonesian legal system, namely, the assimilation activities that allow convicts to do work based on their expertise. It is also similar to social work which is one of the main punishments formulated under the Bill of the Criminal Code (RKUHP).

In the case of Nurhadi, both the aggravating and mitigating factors were formulated outside the elements of the crime. Like the previous cases, the mitigating factors were related to sociological aspects and reflected the degree of seriousness and dangerousness of the crime and the defendant. This is seen in factors such as the defendant bearing family responsibility, the defendant's instrumental role in the development and advancement of the Supreme Court, and the fact that he was never previously convicted. There was no need for the judges to consider factors related to active or passive perpetration due to it being part of the elements of the crime within the article Nurhadi is accused of.

In the case of Edhy Prabowo and Juliari Batubara, it is also apparent that the aggravating and mitigating factors were taken from outside the elements of the crime. In Edhy's case, the factors also reflect the degree of seriousness and dangerousness of the crime and the defendant. This can

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be seen by the judge's consideration that his wealth has been confiscated, which shows that there was an effort to diminish the seriousness of the crime. The dangerousness of the defendant was considered through the fact that he had never been convicted before. The judges also considered circumstances that occurred adjacent to the offense, namely the fact that Edhy was already enjoying the result of the corruption. Similar to Nurhadi's case, both Edhy Prabowo and Juliari Batubara were also accused of articles containing elements of the crime relevant to active perpetration hence no need for judges to consider such circumstances as aggravating or mitigating factors.

In both cases, the judges did not consider that the crime was committed in a pandemic, a circumstance which could constitute an aggravating factor. For instance, in the Criminal Code of Romania and the Philippines, Article 77 letter g of the Romanian Criminal Code recognises "the offence by a person who profited from the occasion of a disaster, the state of siege, or state of emergency" as an aggravating factor, whereas Article 14(7) of the Revised Penal Code of the Philippines recognises one of the aggravating circumstances as "…the crime be committed on the occasion of a conflagration, shipwreck, earthquake, epidemic or other calamity or misfortune." (Hananta, 2018). It thus affirms that committing a crime amidst a pandemic can be seen as an aggravating factor. In Juliari's case, the judges instead took a situation that was irrelevant as a mitigating factor, namely public insult. As argued by many legal scholars, it is a matter of fact and logical consequence that a corruptor being bullied by the public does not mean such a phenomenon should be used to mitigate a crime.

Table 1. Summary regarding the Fulfillment of Best Practice in Aggravating and Mitigating Factors on Various Court Decisions on Corruption

Case	The Factors	Obtained Outside the Elements of the Crime	Seriousness & Dangerousness of the Crime and Defendant	Correspondence Inference Theory	Circumstances Surrounding the Offense	Personal Condition / Reputation
Angelina S.	Aggravating Mitigating	✓	✓	✓	Partially considered	×
Anas U.	Aggravating Mitigating	✓	✓	×	Partially Considered	×
Pinangki M.	Aggravating Mitigating	✓	×	×	✓ Partially considered	×
Nurhadi	Aggravating Mitigating	✓	× ✓		×	×
Edhy P.	Aggravating Mitigating	✓	✓	Contained in the Accused Article	Partially considered ✓	×
Juliari B.	Aggravating Mitigating	✓	× ✓		×	×

Lastly, sociological aspects tend to reflect the implementation of Article 8(2) of Law 48/2009, namely the consideration of the good and bad acts of the defendant. Although these are not necessarily circumstances related to the crime, objectively speaking judges are not completely unjustified in considering such circumstances because, imposing severe punishment on the basis of bad acts but refusing to lighten punishments on the grounds of good acts will create an imbalance in criminal sentencing (Hessick, 2008). Furthermore, four out of six cases considered the politeness of the defendant as one of the mitigating factors. The Author opined that this type of mitigating factor is unnecessary within the considerations of the judges because it neither correlates with the commission of the offence nor reflects the motive of the defendant to commit the offence, hence it does not relate to the Correspondence Inference Theory. It is an obligation for everyone to be polite during a trial examination (Hananta, 2018). Additionally, there are no circumstances related to the defendant's personal condition or day-to-day behaviour in the community within those decisions. This means that none of these cases fulfilled the standard of

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determining factors based on real-life circumstances or the reputation of the defendant. The summary of the assessment regarding the fulfillment of those standards is displayed in Table 1.

Conclusion

The first conclusion is that the standards which determine the best practice of aggravating and mitigating factors are (1) circumstances outside the elements of the crime, (2) circumstances that reflect the seriousness or dangerousness of the crime and the defendant, (3) the motive to commit such crime including internal or external reasons (Correspondence Inference Theory), (4) circumstances related to or surrounding the offence, and (5) circumstances related to the personal condition or reputation of the defendant in the community (day-to-day behaviour). The second conclusion is that none of the court decisions cumulatively fulfill those standards as most of the incorporated aggravating and mitigating factors are still shallow and irrelevant, which jeopardises the sense of justice in society.

It is important for judges to be critical in determining appropriate aggravating and mitigating factors because this may affect the consequentiality of decisions which either safeguard or jeopardise the sense of justice in society. Public trust in the judiciary and the legal system is required to build a better legal system and legal culture in society (Sutiyoso, 2010). Hence, by creating decisions that are impactful toward corruptors, judges will be deemed to have considered the rights of the people, reflecting the sense of justice in society, and eventually gaining public trust.

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